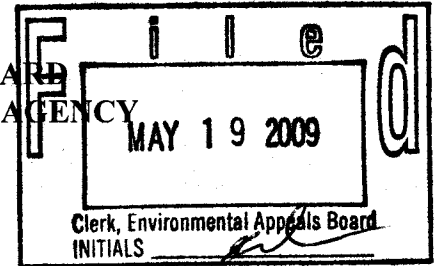


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC



_____)
In re:) PSD Appeal No. 08-09
)
Seminole Electric Cooperative, Inc.)
)
Permit No. PSD-FL-375)
_____)

ORDER REQUESTING EPA REGION 4 TO FILE BRIEF

By this Order, the Environmental Appeals Board ("Board") requests that U.S. Environmental Protection Agency's ("EPA" or "Agency") Region 4 ("Region") file a brief addressing issues related to the above-captioned matter. These issues arise in the context of a Clean Air Act ("CAA") prevention of significant deterioration ("PSD") permit decision, Permit No. PSD-FL-375, issued by the Florida Department of Environmental Protection ("FDEP") on September 5, 2008. The Board believes that the Region's views on this matter may assist the Board's resolution in this case.

On October 6, 2008, Sierra Club petitioned the Board under 40 C.F.R. § 124.19 to review a permit FDEP issued to Seminole Electric Cooperative, Inc. ("Seminole") for the construction of a 750-megawatt pulverized coal-fired supercritical steam generating unit at the existing Seminole Generating Station seven miles north of Palatka, Florida. In a request for summary disposition of the petition, FDEP asserted that the Board lacks jurisdiction in this matter because FDEP issued the permit pursuant to its authority to implement the PSD program for electric power plants ("EPPs"), which is derived from the federally-approved Florida state implementation plan ("SIP"). According to FDEP, because the final permit was issued under an approved state program, as opposed to authority delegated by the federal government, the Board lacks

jurisdiction to review the permit.¹ 40 C.F.R. § 124.1(e) (“Part 124 does not apply to PSD permits issued by an approved State.”); *In re Carlton, Inc.*, 9 E.A.D. 690, 693 (EAB 2001) (“[Approved State-issued] permits are regarded as creatures of state law that can be challenged only under the state system of review.”).

I. Background

In this case, the state permitting authority, FDEP, prepared the draft Seminole permit pursuant to a delegated PSD program and requested public comment on it. Under the federal system of PSD permit review, any person who filed comments on a draft PSD permit during the comment period or participated in the draft permit’s public hearing may, within thirty days of the final PSD permit decision, petition the Board to review any condition of the permit. 40 C.F.R. § 124.19(a).

As discussed below, FDEP subsequently issued the final permit pursuant to an approved PSD program incorporated into the Florida SIP. The Florida permit regulations governing filing of appeals provide:

- (a) A petition [for an administrative hearing on any actual or proposed FDEP action] must be filed (received) in the office of General Counsel of [FDEP] within the following number of days after receipt of notice of agency action * * *: []

¹ Sierra Club subsequently requested that the Board hold these proceedings in abeyance pending resolution of a concurrently-filed State court challenge, *Sierra Club v. Fla. Dep’t of Env’tl. Prot.*, No. 1D-08-4881 (Fla. Dist. Ct. App. filed Oct. 3, 2008). In the state court case, Seminole, a co-defendant in the state court action, moved to dismiss, arguing that the court lacked subject matter jurisdiction due to Sierra Club’s failure to secure “party status” under Florida law. Seminole’s Motion to Dismiss for Lack of Jurisdiction, *Sierra Club v. Fla. Dep’t of Env’tl. Prot.*, No. 1D-08-4881 (Fla. Dist. Ct. App. filed Oct. 3, 2008). Seminole alleged that Sierra Club, having failed to timely file with FDEP a petition for administrative hearing, “was not a party to the [Seminole Unit 3 PSD permit proceedings]” before FDEP. *Id.* at 8 (citing *Norkunas v. State Bldg. Comm’n*, 982 So. 2d 1227, 1228 (Fla. Dist. Ct. 2008)). The Florida court received Sierra Club’s reply brief to FDEP’s answer brief on April 27, 2009, and has not yet issued a determination on the motion to dismiss.

Petitions concerning Department action or proposed actions on applications for permits under chapter 403 [of the Florida Statutes, the Florida Air and Water Pollution Control Act] * * *: fourteen days[.]

* * *

(b) Failure to file a petition within the applicable time period after receiving notice of an agency action shall constitute waiver of any right to request an administrative proceeding under [the Florida Administrative Procedure Act,] chapter 120 of the Florida Statutes.

Fla. Admin. Code Ann. r. 62-110.106(3)(a)(1), (b). Sierra Club points out that in the state court action, *see* footnote 1, Seminole argues that failure to participate in an administrative proceeding as a “party” is a bar to state court permit review. Sierra Club’s Motion to Hold Proceedings Abeyance at 9 (Oct. 24, 2008) (“Sierra Club’s Motion for Abeyance”).

From October 1993 to July 2008, FDEP issued federal EPP PSD permits under delegated federal authority. Approval and Promulgation of Florida PSD Plan, 73 Fed. Reg. 36,435, 36,437 (June 27, 2008) (withdrawing 1993 delegation). In September 2006, FDEP prepared the draft Seminole permit and made it available for public comment. Sierra Club timely commented on the draft permit but admits that it did not file within the fourteen-day deadline in which to petition FDEP for an administrative hearing.²

² Sierra Club petitioned FDEP for an administrative hearing approximately five weeks after the notice of the intent to issue the permit was published and simultaneously sought an enlargement of time in which to file the petition. Order Dismissing Petition with Leave to Amend at 1-2, *Sierra Club v. Seminole Elec. Coop., Inc.*, OGC Case No. 06-2157 (FDEP Oct. 31, 2006). In its order, FDEP found that Sierra Club did not show any basis for “excusable neglect” to support the request for enlargement and denied that request. *Id.* at 2. FDEP also determined that Sierra Club “failed to timely file a petition for administrative proceeding” and thus waived its right to request an administrative proceeding under the Florida Administrative Procedure Act, which FDEP stated “constitute[d] a waiver of Sierra Club’s right to request an administrative proceeding under Chapter 120 [of the Florida Statutes].” *Id.* at 1-2. The FDEP order did not address the fact that, as of the deadline for filing a request for an administrative hearing under Florida law, Florida was a delegated, not an approved, state for EPP PSD purposes, and federal regulations governing issue preservation applied.

On June 27, 2008, while the FDEP's permitting decision was still pending, EPA approved the Florida PSD program for electric power plants, effective July 28, 2008. Approval and Promulgation of Florida PSD Plan, 73 Fed. Reg. 36,435 (June 27, 2008). Neither the proposed nor final rule making pertaining to the approval of the Florida EPP PSD program specifically addressed the treatment of permits that had been published in draft form at the time of program approval. FDEP, now authorized to issue EPP PSD permits pursuant to an approved program, issued the Seminole permit on September 5, 2008.

II. The Parties' Arguments

Sierra Club argues that it "fully preserved its rights to challenge the final [Seminole] permit under then-controlling federal law." Sierra Club's Motion for Abeyance at 7-8. Sierra Club asserts that application of Fla. Admin. Code Ann. r. 62-110.106(3)(a)(1) constitutes "retroactive" application of the rule and "vitiate[s] the terms of the federal delegation then applicable and frustrate[s]" the public participation mandates of the CAA and Part 124. *Id.* at 10. Sierra Club further argues that EPA's approval of the Florida EPP PSD program, codified at 40 C.F.R. § 52.530, reserved federal jurisdiction over permits whose draft versions were completed prior to EPP PSD program approval because the regulation "draws no distinctions between draft and final permits."³ *Id.* at 12-13. According to Sierra Club, the Seminole permit is a "[p]ermit[] issued by EPA prior to the approval of the Florida [EPP] PSD rule" that remains subject to most of 40 C.F.R. § 52.21 and, consequently, the federal permit review procedures in 40 C.F.R. pt. 124. 40 C.F.R. § 52.530(d)(2); Sierra Club's Motion for Abeyance at 13. Finally, Sierra Club argues that the delegation-to-approval structure of the CAA and federal rules does

³ Sierra Club furthers its textual argument in its response to the permittee's motion to intervene, contending that the PSD-specific definition of "Permit" or "PSD Permit" in 40 C.F.R. § 124.41 does not explicitly exclude draft permits as found in the general definition of "Permit" in 40 C.F.R. § 124.2(a). Thus, Sierra Club argues, the PSD-specific definition of "Permit" "may be easily read to include [draft permits], particularly when read in tandem with [40 C.F.R. § 52.530(d)(2).]" Sierra Club Reply in Support of its Motion to Hold Proceedings in Abeyance at 4.

not allow such unintended consequences as shielding a permit from review. Sierra Club's Motion for Abeyance at 11-12.

FDEP asserts that at the time it issued the Seminole permit, FDEP was fully approved to issue PSD permits to electric power plants "pursuant to its own state rules and procedures[,] and because of this, "the [Seminole] permit was not issued by EPA or under EPA-delegated authority." FDEP Brief in Support of Its Request to Deny and Motion for Summary Disposition at 2 (Oct. 22, 2008). FDEP argues that the Board cannot review the Seminole permit because the applicability of Part 124, which governs the Board's authority to review PSD permits, does not extend to "PSD permits issued by an approved State." *Id.* FDEP also refutes Sierra Club's retroactivity argument by stating that "Sierra Club does not allege that any change to FDEP's state administrative procedures occurred during the processing of the permit so the failure of Sierra Club to fully participate in the state administrative appeal process was not due to any retroactive application of Florida administrative appeals procedures." *Id.* at 3.

III. Request for Briefing

After preliminary review of the parties' arguments and the novel facts of this case, the Board believes that briefing from the Region would be helpful and hereby requests the Region to address the following matters:

(1) In the Region's view, does the regulation granting final approval of the Florida EPP PSD program, its regulatory history or applicable guidance address the availability of, or appropriate forum for, permit review in an instance, such as this, where a petitioner complied with the federal but not state rules at a time when the federal rules applied?

(a) Are there any record documents or applicable guidance that address which procedural rules apply when a draft permit goes through public comment under a federally delegated PSD program and is issued in final after the state PSD program is federally approved?

(2) If this fact pattern is not squarely addressed in the PSD plan approval regulation, its history, applicable guidance, or record documents, what is the Region's position on the availability of permit review in this instance?

(3) What is the Region's interpretation of the so-called "savings clause" of 40 C.F.R. § 52.530(d)(2), which retains the federal regulatory requirements of 40 C.F.R. § 52.21 for "permits issued by EPA"? Specifically, does this language apply or not apply to the Seminole permit?

The Region shall consult with the Agency's Office of General Counsel in preparing its brief. The brief must be filed on or before Tuesday, June 16, 2009.⁴

So ordered.

Dated: May 19, 2009

ENVIRONMENTAL APPEALS BOARD

By: Charles J. Sheehan
Charles J. Sheehan
Environmental Appeals Judge

⁴ Documents are "filed" with the Board on the day they are *received*.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Requesting EPA Region 4 to File Brief in *Seminole Electric Cooperative, Inc.*, PSD Appeal No. 08-09, were sent to the following persons in the manner indicated:

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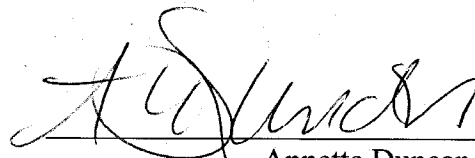
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Annette Duncan
Secretary