IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

SIERRA CLUB, INC.

Appellant,

vs.

Case No: 1D-08-4881
Final Permit No. PSD-FL-375
Project No. 1070025-005-AC

STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, and SEMINOLE ELECTRIC COOPERATIVE, INC.,

Appellees.

_____/

MOTION TO DISMISS FOR LACK OF JURISDICTION

Appellee, Seminole Electric Cooperative, Inc. (Seminole), by and through undersigned counsel and pursuant to Rule 9.300(a), Fla. R. App. P., hereby respectfully moves to dismiss this appeal for lack of subject matter jurisdiction on grounds that the Appellant, Sierra Club, Inc. (Sierra Club), failed to secure party status in the agency action below and therefore lacks standing.

PROCEDURAL BACKGROUND

1. On August 24, 2006, the Florida Department of Environmental Protection (DEP) issued a draft air quality construction permit, called a Prevention of Significant Deterioration (PSD) permit, associated with a proposed third electric generating unit (Unit 3) at Seminole's existing electric power generating plant in

Putnam County. A PSD permit is one of a handful of separate approvals that Seminole must receive prior to constructing a new electric generating unit. The Florida Power Plant Siting Act also requires that a new electric generating unit be certified through a separate administrative proceeding. See §§ 403.501–.518, Fla.Stat. (2008)

2. Seminole published DEP's Notice of Intent to issue the PSD permit in the Palatka Daily News on September 8, 2006. This public notice stated that interested persons would have the opportunity to file comments regarding the draft permit within 30 days (by October 9, 2006) and that substantially affected persons opposing permit issuance could file a petition for an administrative hearing within 14 days of the notice (by September 22, 2006). Mirroring the language of Rule 62-110.106(12), of the Florida Administrative Code, the public notice stated, "[t]he failure of any person to file a petition within the appropriate time period shall constitute a waiver of that person's right to request an administrative determination (hearing) under Sections 120.569 and 120.57, F.S., or to intervene in this proceeding and participate as a party to it." (Emphasis added). [See attached public notice, Exhibit A].

3. On October 9, 2006, the Appellant, Sierra Club submitted timely comments regarding the draft PSD permit. On October 16, 2006, Sierra Club filed

an untimely "Motion of Enlargement of Time and Petition for Administrative Hearing" (petition).

4. On October 31, 2006, DEP issued an order dismissing Sierra Club's petition for an administrative hearing on grounds that it was "untimely filed." [See attached Order Dismissing Petition with Leave to Amend, Exhibit B]. DEP's Order stated that Sierra Club failed to demonstrate "any basis for excusable neglect" in untimely filing the petition; that Sierra Club had "105 members in Putnam County" and "520 members in St. John County;" that the Palatka Daily News, which published the public notice of the PSD permit, was circulated in these counties; and that Sierra Club received actual notice of DEP's intent to issue the permit on September 5, 2006 (in addition to the newspaper notice). In short, Sierra Club's failure to timely submit a petition challenging the PSD permit constituted a waiver of its rights under Florida law.

5. DEP's October 31, 2006 order essentially left Sierra Club with two options: either amend its petition to demonstrate why it "should be considered timely," or within thirty days "seek judicial review" of the order by "the filing of a notice of appeal...with the appropriate district court of appeal." Sierra Club did not avail itself of either of these options; Sierra Club did not file an amended petition or appeal DEP's Order Dismissing Petition with Leave to Amend.

6. Although Sierra Club failed to timely file a petition (or amended petition) under Chapter 120, Florida Statutes, in opposition to Seminole's Unit 3 PSD permit, during that time (August – November, 2006) Sierra Club was a party in the distinctly separate Unit 3 certification proceeding under the Florida Power Plant Siting Act. See §§ 403.501–.518, Fla. Stat. (Pursuant to Section 403.509(4), Florida Statutes, DEP exercises separate authority to issue PSD permits, which are issued in conjunction with federal requirements.) Moreover, because Sierra Club timely submitted comments on the draft PSD permit, at that point the potential existed that if DEP issued the final PSD permit while EPA still considered Florida a "delegated" PSD permitting program, Sierra Club could challenge the final PSD permit before the Federal Environmental Appeals Board. See 40 C.F.R. § 124.19(a) (limiting standing to challenge a final PSD permit issued under a delegated state PSD permitting program before the Environmental Appeals Board to "any person who filed comments on [the] draft permit or participated in the public hearing").[1]

[1] Later, EPA published notice that effective July 28, 2008, Florida's PSD program henceforth would be "approved" instead of "delegated." See EPA, Approval & Promulgation of Implementation Plans Florida: Prevention of Significant Deterioration, 73 Fed. Reg. 36,435 (June 27, 2008). This distinction means that instead of implementing the PSD regulations on EPA's behalf, DEP would administer the program as an "approved" state. An artifact of this distinction is that federal administrative appeals to the Environmental Appeals Board are no longer available.

7. Seminole and Sierra Club subsequently entered into two Settlement Agreements that resolved Sierra Club's substantive air quality-related concerns and all potential legal claims related to both the certification of Unit 3 under the Florida Electric Power Plant Siting Act and the issuance of Unit 3's final PSD permit. [See attached January 7, 2007 and March 9, 2007 Settlement Agreements between the Sierra Club and Seminole, Exhibits C & D, respectively]. In the March 9, 2007 Settlement Agreement, Seminole agreed to ask DEP to incorporate numerous air emission reduction commitments into the final PSD permit, and Sierra Club agreed "not to contest FDEP's issuance of the final PSD permit in any administrative or judicial forum," so long as "the final PSD permit is issued in accordance with the terms and conditions of this Agreement." This Settlement Agreement acknowledged that the Sierra Club was a "party" in the Power Plant Siting Act process (page 1, paragraph C), but made no representation as to whether it was a party in the PSD proceeding.

8. On September 5, 2008, DEP issued the PSD permit for Seminole's Unit 3.[2] Citing the fact that the Settlement Agreements arose "outside" of the PSD

[2] The issuance of the PSD permit was delayed due to an appeal proceeding related to DEP's certification of Unit 3 under the Power Plant Siting Act. See, Seminole Elec. Coop., Inc. v. Department of Envtl. Protection, 985 So. 2d 615 (Fla. 5th DCA 2008) (remanding with instructions that DEP enter a final order approving of certification). This recent judicial decision briefly described both Seminole-Sierra Club Settlement Agreements and noted the distinction between Power Plant Siting Act and PSD permit proceedings. Id. at 619, n.1. DEP's final order approving the

permit proceeding, DEP issued the PSD permit without incorporating the changes that Seminole and the Sierra Club had agreed to, while committing to revise the permit to incorporate the changes in a subsequent proceeding. [See attached DEP Final Determination, Exhibit E]. Soon after issuing the Unit 3 PSD permit, DEP characterized one of Seminole's written requests to incorporate the agreed-upon emission reductions as a request to modify the just-issued PSD permit. Consistent with its commitment in the Final Determination, DEP's official response to Seminole states that the Department "has opened a permit revision project to include the settlement agreement." [See attached September 19, 2008 letter from DEP to Seminole, Exhibit F].

9. On October 3, 2008, nearly two years after DEP initially dismissed Sierra Club's petition challenging the draft PSD permit as untimely, Sierra Club filed an appeal in the First District Court of Appeal opposing the Unit 3 PSD permit.

ARGUMENT

10. "It is a fundamental principle of appellate law that appeal jurisdiction is only available to parties," and "the Administrative Procedure Act only provides for review of agency action by parties." Orange County, Fla. v. Game & Fresh

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certification of Unit 3 issued on August 18, 2008. Seminole Elec. Coop., Inc. v Department of Envtl. Protection, Fla. Admin. Order No. 06-0929 (Dept. of Envtl. Prot. Aug. 18, 2008).

Water Fish Comm'n, 397 So. 2d 411, 413 (Fla. 5th DCA 1981). In accordance with this "fundamental principle," this Court lacks subject matter jurisdiction over this matter, because Sierra Club was not a party to the Unit 3 PSD permit administrative proceeding, and therefore lacks standing to appeal.

11. Sierra Club brought this appeal pursuant to Section 120.68(1), Florida Statutes.[3] This section authorizes judicial review of administrative action by "[a] party who is adversely affected by final agency action." § 120.68(1), F.S. (2008) (emphasis added).

12. Pursuant to Section 120.68(1), Florida Statutes, "in order to have standing to seek such review, a person must show: (1) the action is final; (2) the agency is subject to the provisions of the Act; (3) he was a party to the action which he seeks to appeal; and (4) he was adversely affected by the action."

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[3] In its Notice of Appeal, Sierra Club also states that this appeal is brought in part under "40 C.F.R. § 124.10(b)(1), 40 C.F.R. § 124.13, and 40 C.F.R. § 124.19(a)." These federal regulations concern federal procedures for submitting public comments on certain draft federal or federally delegated permits and procedures for federal appeals to the Environmental Appeals Board. The referenced federal regulations do not purport to grant, nor could they grant, any entities standing to appeal actions before the First District Court of Appeal of Florida or any other state appellate court. Further, the Florida Administrative Procedure Act and applicable DEP rules do not reference these federal regulations as providing any basis for appellate review. See §§ 120.68, 120.54(6), Fla. Stat. (2008); Fla. Admin. Code Ann. r. 62-110.106, 62-210.350(2) (2008). In short, the cited federal regulations do not provide Sierra Club any basis to seek review of this matter before the First District Court of Appeal of Florida.

Daniels v. Florida Parole & Probation Comm'n, 401 So. 2d 1351, 1353 (Fla. 1st DCA 1981) (emphasis added).

13. Under part three of this four-part test, if an "appellant was not a party to the proceedings below, he is without standing to institute an appeal." Norkunas v. State Bldg. Comm'n, 982 So. 2d 1227, 1228 (Fla. 1st DCA 2008). If the appellant lacks standing, then the appellate court lacks subject matter jurisdiction to consider the appeal. See Rogers & Ford Constr. Corp. v. Carlandia Corp., 626 So. 2d 1350, 1352 (Fla. 1993) ("The determination of standing to sue concerns a court's exercise of jurisdiction to hear and decide the cause pled by a particular party."); University Psychiatric Ctr., Inc. v. Department of Health & Rehabilitative Servs., 597 So. 2d 400, 401 (Fla. 1st DCA 1992) ("[T]he petitioners lack standing to maintain this action, and the action must be dismissed for lack of subject matter jurisdiction.").

14. Applying these principles to the circumstances at hand, this appeal should be dismissed because Sierra Club was not a party to the Seminole Unit 3 PSD permit proceeding. Sierra Club failed to exercise its rights to become a party; its petition was untimely. DEP provided Sierra Club an opportunity to justify its neglect in late-filing the petition, and of course Sierra Club could have appealed DEP's Order. But Sierra Club declined. To the extent Sierra Club wishes to contest DEP's decision that the petition was untimely, its appeal is two years too

late. Having failed to secure status as a party below, Sierra Club cannot now appeal the issuance of the Unit 3 PSD permit.

15. Sierra Club may argue that its filing of timely comments regarding the Unit 3 PSD permit affords it "party" status under Florida's Administrative Procedure Act. However, Florida law requires more. See St. Joe Paper Co. v. Department of Cmty. Affairs, 657 So. 2d 27, 28-29 (Fla. 1st DCA 1995) (the mere submission of comments does not confer standing in an administrative proceeding under the Florida Administrative Procedure Act). The term "party" is defined in pertinent parts as "[s]pecifically named persons whose substantial interests are being determined in the proceeding" or "[a]ny other person who...is entitled to participate in whole or in part in the proceeding, or whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party." § 120.52(13)(a)-(b), Fla. Stat. (emphasis added). Simply put, Sierra Club failed to "make an appearance as a party." Timely filing a petition for hearing was a prerequisite to obtaining party status in this case; failure to do so constituted waiver. See, Fla. Admin. Code Ann. r. 62-110.106(3)(b) (2008) ("Failure to file a petition within the applicable time period after receiving notice of agency action shall constitute waiver of any right to request an administrative proceeding under Chapter 120, Florida Statutes."); Fla. Admin Code Ann. r. 62-110.106(12), (2008) (requiring the public notice of agency action to state that "[t]he failure of any

person to file a petition within the appropriate time period shall constitute a waiver of that person's right to . . . intervene in this proceeding and participate as a party to it"). DEP's denial of Sierra Club's untimely petition had the effect of denying Sierra Club's status as a party. Cf. Postal Colony Co. v. Askew, 348 So. 2d 338, 339 (Fla. 1st DCA 1977) ("Petitioners have standing to seek judicial review of this agency action. ...[T]he Administration Commission recognized petitioners as parties entitled to participate in the proceedings.").

16. Sierra Club may also attempt to rely on the attached Settlement Agreements as evidence of its party status. The Settlement Agreements, however, never once refer to Sierra Club as a party to the state PSD permit proceeding and for good reason: Seminole and Sierra Club entered into those agreements knowing full well that DEP had denied Sierra Club's petition to challenge the PSD permit and further that Sierra Club had elected not to make an effort to justify missing its deadline or appeal DEP's denial. The existence of the two Settlement Agreements must be understood in the full context of Sierra Club's potential rights under all state and federal forums at the time the two agreements were executed. Sierra Club was an opposing party to a separate Power Plant Siting Act certification proceeding when the first Settlement Agreement was executed, and because Sierra Club filed timely comments regarding the draft PSD permit, there was a potential that if DEP issued the final Unit 3 PSD permit while Florida was considered a

delegated PSD permitting program, Sierra Club could contest the final PSD permit before the Federal Environmental Appeals Board. See 40 C.F.R. § 124.19(a). (See footnote 1 on page 4.)

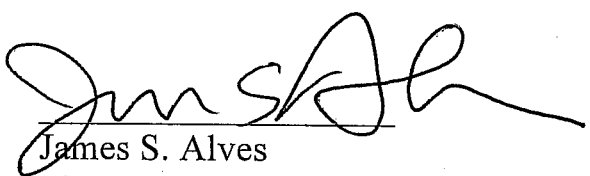
17. Regardless of the reasons for the Settlement Agreements, however, any argument that the Settlement Agreements could somehow confer standing on Sierra Club for purposes of this appeal is necessarily without merit. The Settlement Agreements were entered into between only Sierra Club and Seminole. The Settlement Agreements did not and could not replace statutory requirements for obtaining party status in Seminole's Unit 3 PSD permit proceeding, nor could the agreements confer subject matter jurisdiction on this Court. Rinella v. Abifaraj, 908 So. 2d 1126, 1129 (Fla. 1st DCA 2005) ("Subject matter jurisdiction, which arises only as a matter of law, cannot be created by waiver, acquiescence or agreement of the parties, by error or inadvertence of the parties or their counsel, or by the exercise of the power of the court.") (quoting Seven Hills, Inc. v. Bentley, 848 So. 2d 345, 350 (Fla. 1st DCA 2003)).

18. Having failed to exercise its rights in a timely manner and therefore never gained party status, Sierra Club cannot now circumvent the explicit requirement that it be a party in section 120.68(1), Florida Statutes, -- the very statute upon which it claims this court has jurisdiction -- and appeal the final PSD permit. Daniels v. Florida Parole & Probation Comm'n, 401 So. 2d at 1353 (Fla.

1st DCA 1981); Norkunas v. State Bldg. Comm'n, 982 So. 2d at 1228 (Fla. 1st DCA 2008). Because Sierra Club lacks standing, the First District Court of Appeal lacks subject matter jurisdiction over this matter. Rogers & Ford Constr. Corp. v. Carlandia, 626 So. 2d at 1352 (Fla. 1993). This appeal should be dismissed.

WHEREFORE, Appellee Seminole respectfully requests that this Court dismiss the Sierra Club's appeal with prejudice.

Respectfully submitted this 21st day of October, 2008.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been provided by U.S. Mail this 21st day of October, 2008 to the following:

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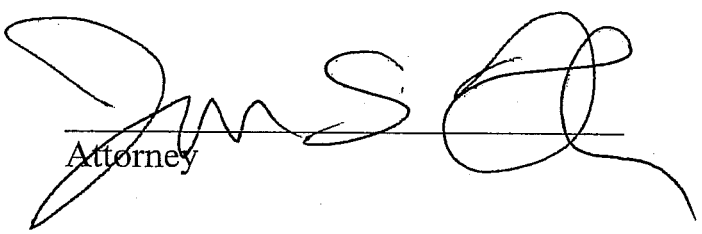

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APPENDIX TO MOTION TO DISMISS FOR LACK OF JURISDICTION

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March 9, 2007 Settlement Agreement ..... Exhibit D

DEP Final Determination ..... Exhibit E

September 19 Letter from DEP to Seminole ..... Exhibit F