BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

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

EPA REGION 4's BRIEF REGARDING REVIEWABILITY OF PERMIT

On May 19, 2009, the Environmental Appeals Board ("EAB" or "Board") issued an Order requesting EPA Region 4, in consultation with the Office of General Counsel, to file a brief in the above-captioned matter responding to a series of questions regarding the reviewability of a permit that was prepared in draft form under a Prevention of Significant Deterioration ("PSD") program that was delegated and issued in final form after the approval of the PSD program into the Florida State Implementation Plan ("SIP"). The underlying case involves an appeal of a PSD permit issued by the Florida Department of Environmental Protection ("FDEP") under the Clean Air Act ("CAA") to Seminole Electric Cooperative ("Seminole") for the construction of a new coal-fired, 750-megawatt unit at Seminole's Palatka, Florida facility.

As discussed more fully below, Region 4's position is that the EAB does not have the jurisdiction to consider this appeal of the PSD permit issued to Seminole because FDEP did not issue the permit in final form on the basis of delegated federal authority. However, Sierra Club's timely submission of public comments in accordance with the then-applicable implementation plan preserved its rights under federal law to obtain judicial review of FDEP's action. If Florida law does not permit judicial review of the permit under the circumstances present in this case, or

FDEP does not take corrective action to enable review in a Florida judicial forum, Seminole will not have a valid PSD permit under federal law because the CAA requires that Sierra Club have an opportunity for judicial review under the circumstances in this case.

I. BACKGROUND

A. Federal and State Laws Apply to Permitting Air Pollution Sources in Florida

The crux of the dispute before the Board over the reviewability of the Seminole permit is the interaction of the state and federal law applicable to the permitting of air pollution sources in the State of Florida. The applicable federal law derives from the provisions of the CAA and the Code of Federal Regulations ("CFR") discussed below and in prior opinions of the EAB. The governing state law is found in the relevant sections of the Florida Statutes and Florida Administrative Code. Seminole must construct and operate Unit 3 at the Palatka facility in compliance with both federal and state laws.

Under section 165 of the CAA, a major source of air pollutants may not be constructed without a PSD permit. 42 U.S.C. § 7475(a). This requirement of federal law can be satisfied by obtaining a preconstruction permit under a PSD program that is administered within a state in one of the following three ways:

> First, the program can be run by EPA pursuant to a Federal Implementation Plan ("FIP"). Second, EPA can delegate its authority to operate the PSD program to a state, in which case the state issues PSD permits as federal permits on behalf of EPA. Third, EPA can approve a state PSD program if it meets the applicable requirements of federal law, in which case the program is incorporated into the state's "State Implementation Plan" ("SIP"). In this last instance, the state would conduct PSD permitting under its own authority.

In re Milford Power Plant, 8 E.A.D. 670, 673 (EAB 1999) (internal citation omitted).

Under the third form of PSD program administration discussed above, the state program must meet the requirements of 40 CFR § 51.166 of EPA's regulations to be approved by the

Agency. When EPA approves a state PSD program, it determines that compliance with the state law by the state permitting authority will be sufficient to ensure compliance with the PSD permitting requirements of the CAA. Upon SIP-approval, the state regulations that are approved as the SIP have the force and effect of federal law and are federally-enforceable. 42 U.S.C. §§ 7410; 7413; *see also Nat'l Mining Ass'n v. EPA*, 59 F.3d 1351, 1363-1634 (D.C. Cir. 1995); *Union Electric Co. v. EPA*, 515 F.2d 206, 211 (8th Cir. 1975) *aff'd* 427 U.S. 256 (1976). Thus, in the case of SIP-approved PSD programs, the federal law and state law governing issuance of construction permits for large air pollution sources are essentially the same. *See In re Milford Power Plant*, 8 E.A.D. at 673 (state conducts PSD permitting "under its own authority").

However, if EPA determines that compliance with state law is insufficient to meet the PSD permitting requirements of the CAA, EPA may withhold approval of a state PSD permitting program. 40 CFR § 52.21(a)(1). In these cases, either EPA (under the first form of program administration described above) or the state (through the second form of administration) must apply the federal regulations found at 40 CFR § 52.21 and Part 124 to ensure compliance with federal law. In these circumstances, the federal law applicable to PSD permitting can operate in parallel with the state law governing construction permits because both forms of law are independently applicable. Under the second form of program administration, if EPA delegates the responsibility to implement federal law to a state permitting authority, the state has a responsibility to ensure compliance with both federal law and state law, but these laws are not necessarily one and the same. *See In re West Suburban Recycling and Energy Center*, L.P., 6 E.A.D. 692, 707 (EAB 1996). In these circumstances, a construction permit issued under state law is not necessarily a PSD permit meeting all the requirements of federal law. *Id.* at 710.

B. Historical Summary of Florida's PSD Program[1]

The administration of the PSD program for electric power plants in Florida has followed an unusual path. There have been several changes over time between the three forms of administration described above, including the most recent change during the pendency of the process for issuing the Seminole permit.

Electric power plants subject to the Florida Power Plant Siting Act ("PPSA") (a state law found at Florida Statutes Section 403.501 *et. seq.*) have historically been permitted by FDEP (through a federal delegation of authority from EPA) under the federal PSD program rather than the Florida SIP-approved PSD permitting program. The Florida PSD program was initially approved by EPA into the Florida SIP on December 22, 1983 (48 *Fed. Reg.* 52,713). The approval transferred to FDEP the legal authority to process and issue PSD permits to sources in Florida that are required to obtain PSD permits.

One category of sources not covered by EPA's 1983 approval of Florida's PSD program was electric power plants. This was because, at the time, a separate Florida law known as the Florida PPSA, required permits for electric power plants to be issued solely by the Power Plant Site Certification Board under the PPSA, rather than by FDEP under Florida's PSD regulations. Such a conflict between the PPSA and Florida's PSD program created impediments to implementation and enforcement of the State's PSD program by FDEP for such power plants and precluded EPA's SIP-approval of Florida's PSD program as to these sources. As a result, for electric power plants subject to the PPSA, FDEP has been operating under either a partial or full delegation of authority to implement the federal PSD program since 1983, while various attempts

[1] A complete and detailed history of the Florida PSD program is provided in the recent rulemakings approving Florida's PSD program into the SIP. 73 *Fed. Reg.* 18,466,18,471 (April 4, 2008)(Proposal); 73 *Fed. Reg.* 36,435, 36,437 (June 27, 2008) (Final rule). This section of the brief provides a summary for purposes of responding to the Board's questions.

to amend the PPSA to correct the conflict were made. On November 5, 1985, EPA delegated partial authority to FDEP to conduct the technical and administrative portion of the federal PSD program for power plants subject to the Florida PPSA (with EPA retaining final permitting authority). Letter from Jack E. Ravan, EPA Region 4, to Victoria J. Tschinkel, Florida Department of Environmental Regulation (November 5, 1985) [Exhibit 1 (attached)].

In 1993, the Florida Legislature amended the PPSA to address concerns over the inappropriate influence of the Florida Power Plant Siting Board's certification decisions on the PSD permitting process. In light of this 1993 amendment to the PPSA, FDEP requested that EPA grant it full federal delegation of PSD permitting authority for sources subject to both the federal PSD regulations and the PPSA. Because the 1993 PPSA amendment made clear that FDEP is the final permitting authority for PSD and new source review permits and can act in a manner different from the PPSA Siting Board if Florida's PSD or new source review regulations require such a different action, EPA granted full federal delegation to FDEP on October 26, 1993. Letter from Patrick Tobin, EPA Region 4, to Virginia Wetherell, Florida Department of Environmental Protection (October 26, 1993) [Exhibit 1 to Sierra Club's Motion to Hold Proceedings in Abeyance (EAB Docket Item # 16)].

In the October 26, 1993 letter, EPA explained that, "[w]e have determined that the procedures for new source review by the State of Florida provide an adequate and effective procedure for the implementation of the PSD program ... we hereby delegate our authority for all portions of the Federal PSD program, as described in 40 C.F.R. § 52.21, to the State of Florida for sources subject to review under the PPSA located or to be located in the State of Florida and subject to review under the federal regulations for PSD." The October 26, 1993 letter further identified the requirements of the full delegation, including compliance with 40

CFR § 52.21 as well as public participation requirements found at 40 CFR §§ 124.3-124.14; 124.15-124.19. Page 3.

The statutory amendment to the PPSA made by the Florida Legislature in 1993 formed the basis of the State's 2006 request for EPA approval to apply Florida's SIP-approved PSD program for other sources, rather than the federal PSD program, to sources subject to the PPSA.

C. Current Status of Florida's PSD Program

On February 3, 2006, FDEP submitted SIP revisions to EPA modifying Florida's PSD rules and explaining why the State's PSD permitting program should be SIP-approved for all sources, including electric power plants.[2] After an initial attempt to issue a direct final rule in 2007, on April 4, 2008, EPA initiated a rulemaking process proposing approval and conditional approval[3] of the February 3, 2006 SIP revisions. In that proposal, EPA explained that electric power plants would become subject to the State's SIP-approved program. 73 *Fed. Reg.* 18,466 (April 4, 2008). EPA took final action approving Florida's PSD program revisions into the SIP on June 27, 2008. 73 *Fed. Reg.* 36,435. In that final action, EPA explained the following:

> EPA is now approving Florida's February 3, 2006, request that EPA grant Florida SIP-approval to implement the State's PSD program for electric power plants subject to the PPSA. EPA is approving this specific request under section 110 because there is no longer a conflict between the State's PSD regulations and the PPSA and because FDEP now has adequate and effective procedures for full implementation of the State's PSD program for electric power plants.

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[2] The letters referenced in this Brief, as well as other documents including Florida's SIP revision, are available in the Docket for EPA's most recent rulemaking action approving revisions to Florida's PSD program into the SIP. On www.regulations.gov, see Docket No. EPA-R04-OAR-2006-0130.

[3] The conditional approval regarded certain aspects of the revision responding to EPA's 2002 New Source Review Reform Rules. Florida has since provided EPA with a SIP submission revising its PSD program consistent with the elements that were subject to the conditional approval. EPA is processing that SIP revision.

Id. at 36,437/2. In addition, EPA explained that "EPA's October 26, 1993, federal delegation of PSD authority to FDEP will be withdrawn effective July 28, 2008." *Id.* at 36,437/3.

D. Procedural History of the Seminole Permit

On September 8, 2006, FDEP issued a "Public Notice of Intent to Issue Air Permit" regarding the issuance of a PSD permit (No. PSD-FL-375) for the construction of the new Unit 3 at the Seminole Generating Station in Palatka, Florida. Exhibit 2 to Sierra Club's Motion to Hold Proceedings in Abeyance (EAB Docket Item # 17). In that public notice, FDEP cites to its authority under Florida statutes and rules to issue the permit. Although this public notice was issued when Florida held delegated federal authority to implement the PSD program for electric power plants, this public notice does not cite to 40 CFR § 52.21 or Part 124, or make any mention at all of Florida's status as delegated for PSD purposes. With respect to public participation, the public notice explains the following:

> **Comments:** The Permitting Authority will accept written comments concerning the Draft Permit for a period of thirty (30) days from the date of publication of the Public Notice. ...
>
> **Petitions:** A person whose substantial interests are affected by the proposed permitting decision may petition for an administrative hearing in accordance with Sections 120.569 and 120.57, F.S. ... Petitions ... must be filed within fourteen (14) days of publication of this Public Notice or receipt of written notice, whichever occurs first. ... The 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.[4]

Consistent with the October 26, 1993 letter (EAB Docket Item # 16) providing the delegation of authority, at the time of this public notice, FDEP was required to comply with 40 CFR § 52.21 and 40 CFR Part 124 in issuing PSD permits to power plants. *See In re: Russell City Energy*

[4] Under Florida's Administrator Procedures Act (APA), an administrative hearing is an evidentiary (fact-finding) process that develops the record supporting a final action by FDEP.

Center, PSD Appeal No. 08-01 (EAB, June 29, 2008) (delegated state agency must insure strict compliance with federal PSD requirements for public notice). These federal rules, and in particular the public participation requirements of these rules, were also incorporated by reference into Florida law. *See* Florida Administrative Code (FAC) 62-212.400(11) (2006) ("No permit shall issue until the applicant and Department have complied with all applicable notice and participation provisions of 40 C.F.R. 52.21(q), adopted by reference at Rule 62-204.800, and Rules 62-210.350 and 62-110.106, F.A.C.").[5] The federal rules applicable at the time of the public notice did not require that a party request a hearing within 14 days of the public notice to preserve review. To obtain administrative review under this federal law, one only had to submit comments during the comment period. 40 C.F.R. § 124.19(a)

On October 9, 2006, during the public comment period, Sierra Club filed timely public comments on the draft PSD permit. The comment period closed on October 9, 2006. Although Sierra Club submitted public comments within the public comment period, it did not request an administrative hearing under Chapter 120 of the Florida Statutes (the Florida APA) within 14 days, as explained in the public notice. FDEP issued the final Seminole PSD permit on September 5, 2008. This was a few months after EPA took final action to approve Florida's SIP-approved PSD program for permitting of electric power plants.

On October 6, 2008, Sierra Club filed a petition for review with the EAB alleging that the EAB should review the matter because the draft permit was issued under a federal delegation, while acknowledging that the final permit was issued under the SIP-approved program. Sierra Club also appealed the permit in Florida state court (consistent with the customary method for challenging PSD permits issued pursuant to SIP-approved programs). Sierra Club explained that

[5] Florida has since removed the reference to 52.21(q) from this rule. 35 Fla. Admin Weekly 3224-25 (June 20, 2008).

it was seeking EAB review due to concern that its request for state court review would be dismissed because it did not request an administrative hearing within 14 days of the public notice, thus potentially resulting in Sierra Club being barred from challenging the final permit in any forum.

FDEP and Seminole are presently arguing that neither the EAB nor the Florida courts have the authority to consider Sierra Club's request for administrative and judicial review of the state's PSD permitting decision. Florida's administrative procedures only allow "parties" to challenge final permits. FDEP and Seminole filed briefs before the Florida court arguing that "party" status may only be obtained by petitioning for an administrative hearing of the permit within 14 days after the draft permit public notice is published. *Sierra Club v. State of Florida*, Case No. 1D-08-4881, "Answer Brief of Florida Department of Environmental Protection" at 9-18 (April 1, 2009) (Fla. 1st Dist. Ct. Appeal) [Exhibit 2 (attached)]; *Sierra Club v. State of Florida*, Case No. 1D-08-4881, "Consolidated Answer Brief of Appellee Seminole Electric Cooperative, Inc." at 16-24 (March 30, 2009) (Fla. 1st Dist. Ct. Appeal) [Exhibit 3 (attached)]. However, Sierra Club is arguing that it preserved its opportunity for judicial review under Florida law because the Florida Statutes incorporated 40 CFR § 52.21 and the Part 124 procedures by reference at the time of the public notice on the Seminole permit. *Sierra Club v. State of Florida*, Case No. 1D-08-4881, "Consolidated Reply Brief of Appellant Sierra Club" at 4-8 (April 27, 2009) (Fla. 1st Dist. Ct. Appeal) [Exhibit 4 (attached)]. Region 4 expresses no opinion here as to how the Florida courts should resolve this dispute over the reviewability of the permit under Florida law, which remains pending at this time.[6] The focus of this brief is on the

[6] On June 25, 2009, the Florida court dismissed an appeal by an additional party (the Southern Alliance for Clean Energy) that failed to submit timely public comments on the draft PSD permit or to request an administrative hearing under Florida's Administrative procedures. *Southern*

EAB's questions and the requirements for review under the federal law established in the CAA and the implementation plan applicable to the Seminole permit application at each stage of review.

E. EAB Order of May 19, 2009

In its Order of May 19, 2009, the Board requested that EPA Region 4 file a brief addressing three questions that arise from the parties' arguments regarding the reviewability of this PSD permit, which was noticed in draft form under a delegation of federal authority and issued in final form under a SIP-approved PSD program. In the analysis that follows, Region 4 addresses the following questions of the Board:

> 1. Does the regulation granting final approval of the Florida DEP 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 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 CFR § 52.530(d)(2), which retains the federal regulatory requirements of 40 CFR § 52.21 for "permits issued by EPA"? Specifically, does this language apply or not apply to the Seminole Permit?

Alliance for Clean Energy v. State of Florida, Case No. 1D08-4900, Order of the Court [granting motion to dismiss] (Fla. 1st Dist. Ct. Appeal, June 25, 2009).

II. ANALYSIS AND RESPONSES TO BOARD'S QUESTIONS

A. Region 4's SIP Approval Rulemaking and Record Do Not Address the Availability of Permit Review in these Circumstances and Region 4 Has Not Identified Any Guidance that Directly Addresses this Issue (Question 1)

Region 4 did not address the procedural circumstances presented in this case in any of its rulemakings to approve the Florida's PSD program into the SIP. Region 4 has not located any regulatory history or record documents from these rulemaking actions that address the availability of, or appropriate forum for, permit review in a situation where a PSD permit is public-noticed under a federal delegation of authority but finalized after approval of the state's PSD program. Furthermore, Region 4 has not located any example where another EPA Region or headquarters office[7] addressed a similar situation or otherwise issued a policy or interpretive statement addressing a situation where a party seeking review of a PSD permit followed the federal rules in effect at the time of the public notice but not the state rules. Likewise, Region 4 has not identified any provision of federal law or EPA guidance that directly addresses the jurisdictional issue presented in this matter. Furthermore, the Florida Statutes and Florida Administrative Code provisions approved into the Florida SIP by Region 4 do not address this situation. However, as discussed in more detail below, Region 4 has located some EPA statements on a related issue that may assist the Board in evaluating the appropriate forum for reviewability of the Seminole permit.

B. The Board Does Not Have Jurisdiction to Review FDEP's Action (Question 2; see also Section "D" below)

The EAB does not have the jurisdiction to consider this appeal of the PSD permit issued to Seminole because FDEP did not issue the permit under delegated federal authority. Although

[7] In accordance with the Board's order, Region 4 consulted with OGC. In addition, Region 4 has consulted with the Office of Air and Radiation and other Regional Offices.

the federal regulations at 40 CFR § 52.21 and Part 124 were also applicable at the time of the public notice and the draft Seminole permit, Florida issued the final permit on the basis of state regulations that were fully-approved into the Florida SIP for this type of source. For purposes of determining the jurisdiction of the Board to hear this appeal, the rules in effect at the time of final permit issuance are applicable.

Region 4 withdrew its delegation of federal authority to FDEP on July 28, 2008. Thus, at the time of permit issuance, FDEP did not have any delegated federal authority to issue a PSD permit to Seminole under 40 CFR § 52.21. Florida did not purport to take any final action on this permit on the basis of delegated federal authority and had no such authority after July 28, 2008. Although the 2006 public notice may have served to meet the requirements of section 52.21 in effect at that time, Florida has not expressed any intent to take final action on this permit under 40 CFR § 52.21. FDEP has stated in this appeal that it intended to issue a PSD permit as an approved state.

According to its own terms, "Part 124 does not apply to PSD permits issued by an approved State." 40 CFR § 124.1(e). An "approved state" is defined in federal regulations as a state that administers an "approved program." 40 CFR § 124.41. An "approved program" is defined as a SIP providing for the issuance of PSD permits which has been approved by EPA in accordance with the CAA and its implementing regulations. *Id*; *see also Milford Power Plant,* 8 E.A.D. at 673. The EAB has recognized this jurisdictional limit in prior decisions (including one cited in its May 19, 2009, Order directing Region 4 to submit this brief) as well as the EAB Practice Manual (June 2004). *See, e.g., Milford Power Plant* 8 E.A.D. at 673; *In re Carlton, Inc. North Shore Power Plant*, 9 E.A.D. 690 (EAB 2001) (dismissing a petition for review of a state issued minor PSD permit); EAB Practice Manual at 27 (Section III.B.).

The EAB Practice Manual further explains the EAB's jurisdiction provided by Part 124 as follows:

> Section 124.19(a) creates a direct appeal to the EAB from *federally-issued* RCRA, UIC, PSD and NPDES permit decisions. The EAB generally does not have authority to review state-issued permits; such permits are reviewable only under the laws of the state that issued the permit." *In re Great Lakes Chem. Corp.*, 5 E.A.D. 395, 396 (EAB 1994) (parenthetical omitted)(emphasis in original)(footnote omitted).

EAB Practice Manual at 27 (Section III.B.). Since Florida did not have delegated federal authority to issue PSD permits under 40 CFR § 52.21 after Region 4 rescinded that delegation, the Seminole permit was not "federally-issued." Because the federal rules do not contemplate that the EAB would review PSD permits issued by states under a SIP-approved program, federal laws do not provide the EAB with authority to remedy the permit.

Thus, Region 4 agrees in part with Seminole's argument that the rules applicable to a permit are those in effect when the final permit is issued. Seminole's Motion for Leave to Intervene and Response to Sierra Club's Motion to Hold Proceedings in Abeyance at 7 (EAB Docket Item #25); *see also Ziffrin, Inc. v. United States, 318 U.S. 73 (1942)*; *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 614 (EAB 2006) (clarifying that the holding in *Ziffrin* pertains to a change in law between the time of a permit application and an initial permit decision). Florida's final action to issue the permit to Seminole was an action based on the Florida Statutes and Florida Administrative Code and not also an action under 40 CFR § 52.21 of EPA's regulations. However, as discussed in more detail below, Region 4 does not agree that waiver of a right to judicial review under the CAA can be established on the basis of Florida statutes and regulations that were not incorporated into federal law at the time of the alleged waiver. The waiver of a claim should be governed by the law in effect at the time of the alleged waiver. *See Garfinkle v. Dooley*, 672 F.2d 1340, 1347 (11th Cir. 1982) (recognizing that a right

waived must exist at the time it is waived). As discussed further below, under the particular circumstances of this case, the Seminole permit must be judicially reviewable by Sierra Club as a matter of federal law because Sierra Club did not waive administrative or judicial review under federal law. Nonetheless, since FDEP issued the final PSD permit to Seminole after Florida's PSD program was fully-approved into the SIP for this type of source, Sierra Club's October 6, 2008 Petition for Review is not properly filed before the EAB under the clear terms of Part 124 and the EAB's precedents. These principles are not altered by the Part 52 regulation cited by Sierra Club.

C. The "Savings Clause" Language Does Not Apply to the Seminole Permit (Question 3)

The so-called "savings clause" found in 40 CFR § 52.530(d) does not apply to the Seminole permit because this permit was not issued by EPA or an EPA delegate. This paragraph of the regulation states the following:

> The requirements of sections 160 through 165 of the Clean Air Act are not met since the Florida plan, as submitted, does not apply to certain sources. Therefore, the provisions of § 52.21 except paragraph (a)(1) are hereby incorporated by reference and made a part of the Florida plan for: (1) Sources proposing to locate on Indian reservations in Florida; and (2) Permits issued by EPA prior to approval of the Florida PSD rule.

Id. Since the Seminole facility is not located on Indian Country, the first part of the second sentence of this provision is clearly not applicable. Furthermore, the second part of this sentence was never intended to cover permits issued by a state permitting authority, and the language in this clause is not reasonably interpreted to apply to a draft permit under Part 124 of EPA's regulations.

The second part of the final sentence in section 52.530(d) addresses the transition from an EPA-administered PSD permit program to a state-administered program (via either delegation or

SIP-approval). On May 9, 1985, EPA addressed this issue in a Memorandum entitled *Improved New Source Review/Prevention of Significant Deterioration (NSR/PSD) Program Transfer,* from Darryl D. Tyler, Director, Control Programs Development Division to Director, Air Division, Regions I-X on page 6 at item number 7. This memorandum explained as follows:

> Jurisdiction of Existing PSD Permits. When EPA approves a PSD SIP, it is necessary to determine jurisdiction over any existing PSD permits previously issued by EPA. If the State wishes to have responsibility for these permits and will commit to reissue these permits under the State program, EPA should announce the transfer of authority in the Federal Register. If the State wishes to have responsibility for these permits and either will not or cannot commit to reissue these permits, EPA can still transfer control by retaining 40 CFR 52.21 in the SIP and delegating authority to the State (i.e. using a memorandum of understanding as in a program delegation). In this case, the supplementary information in the final rulemaking Federal Register notice should announce the delegation of priority for the existing permits. If a State declines the opportunity to take responsibility for EPA-issued permits, EPA will again retain 40 CFR 52.21 authority for these permits. In either of these last two cases, the CFR language contained in the final Federal Register promulgation package should contain provisions which retain EPA's authority and exclude the State's authority for these existing permits.

Id. This matter is discussed briefly in EPA's 1981 final rulemaking on Florida's PSD program wherein EPA enacted the relevant language above in 52.530(d). In that rulemaking, Region 4 stated the following:

> Florida's PSD program does not apply to sources locating on Indian lands or to permits previously issued by EPA. EPA will retain jurisdiction to issue PSD permits for sources locating on Indian lands and to enforce its previously issued permits.

48 *Fed. Reg.* at 52,714/1. Thus, this regulatory history makes clear that 40 CFR § 52.530(d)(2) was intended to apply to permits that were issued *by EPA* prior to either Florida's SIP-approval (in 1981) or subsequent delegation of authorities.

As described in the Board's May 19, 2009 Order, Sierra Club argues that the term "permit" in 40 CFR § 52.530(d)(2) can be read to include *draft* permits and that this somehow

suggests that the Seminole permit is a permit that was "issued" by EPA (or a delegate of EPA) prior to approval of the Florida PSD program into the SIP. Board's May 19, 2009 Order at 4. Since Part 52 contains no definition of the term "permit" that is controlling, some parties have looked to provisions in Part 124 that are incorporated into Part 52 in section 52.21(q).

Sierra Club's reading of the phrase "permits issued" in section 52.530 conflicts with the terms of the regulations in Part 124 that define the Board's jurisdiction to hear appeals of PSD permits. As Seminole points out, section 124.2 of EPA's regulations specifically excludes a "draft permit" or "proposed permit" from the definition of the term "permit" used in Part 124. 40 CFR § 124.2. However, section 124.41 provides a replacement definition for the term "permit" in the context of the PSD program which covers "a permit issued under 40 CFR § 52.21 or by an approved state." Although this specific definition applicable to PSD permits makes no distinction between draft or federal permits, other provisions of Part 124 that are applicable to PSD permits do reflect this distinction. The terms of section 124.19 indicate that an appeal to the Board is available only to consider "a PSD final permit decision" by any party that filed comments on the "draft permit." 40 C.F.R. § 124.19(a). Section 124.15(a) establishes that a "final permit decision" is issued after the public comment period on a draft permit. Furthermore, the latter section uses various forms of the verb "issue" to describe the action of approving the final permit, whereas the term "issue" is not used to describe the action of preparing a draft permit in section 124.6. In the latter regulation, the term "issue" is used to describe only a "notice of intent to deny" or a tentative decision to issue a permit rather than a final decision to issue a permit. 40 C.F.R. § 124.6(b),(c).

If accepted, Sierra Club's reading of the term "permits issued" would not necessarily be limited to this particular situation and would lead to the absurd result of making draft PSD

permits subject to an appeal before the EAB. If the Board were to construe the term "permits" to include draft permits prepared under section 52.21, then this would result in the Board having to entertain appeals of draft permits prior to the completion of the public comment period or the preparation of a response to comments document. Such a practice would make these steps in the permitting process superfluous and leave the Board without a meaningful record on which to conduct its review of the action of a Regional Administrator or her delegate. *See, e.g., In Re Northern Michigan University, Ripley Heating Plant*, PSD Appeal No. 08-02, slip op. at 47 (EAB, Feb. 18, 2009) (explaining importance of complete permit record for judicial review); *In re Prairie State Generation Station*, 12 E.A.D. 176, 179-180 (EAB 2005) (addressing importance of response to comments as key part of permitting record).

Thus, for the reasons discussed above, Region 4's position is that 40 C.F.R. § 52.530(d) does not apply to the Seminole matter. Sierra Club's suggested interpretation of that provision is not consistent with EPA's intent in promulgating that rule.

D. Although the EAB Lacks Authority to Review the Action of FDEP at Issue Here, the CAA Nevertheless Requires that Sierra Club Receive an Opportunity for Judicial Review Under the Circumstances of this Case (Question 2).

As a matter of federal law, a PSD permit must be subject to judicial review by a person who submitted timely public comments under the applicable CAA implementation plan in effect at the time of the public notice. While this principle does not compel the EAB to accept jurisdiction over this appeal in contravention of its precedent and the most appropriate reading of the applicable federal regulations, it informs the current status of the Seminole PSD permit. Further, this requirement of federal law does not necessarily change the Florida law applicable to the actions of FDEP.

The CAA requires that Sierra Club have an opportunity for judicial review under the circumstances in this case. Region 4's action to approve Florida's PSD program did not authorize FDEP to deny a party the opportunity to obtain judicial review of a PSD permit under the circumstances present here. If Florida law does not allow for judicial review of the permit under the circumstances present in this case, or FDEP does not take corrective action to enable review in a Florida judicial forum, Seminole will not have a valid PSD permit under federal law.

1. The CAA requires an opportunity for judicial review of a PSD permit by a party that participated in the public comment process under the applicable implementation plan.

Consistent with prior statements of EPA, Region 4 interprets the provisions of the CAA described below to require an opportunity for judicial review of a decision to grant or deny a PSD permit. 61 *Fed. Reg.* 1880, 1882 (Jan. 24, 1996) (proposed disapproval of Virginia's PSD program due to standing requirements that limited judicial review). The Agency has previously observed that the opportunity for public review and comment provided in the statute and regulations is seriously compromised where an affected member of the public is unable to obtain judicial review of an alleged failure of the permitting authority to abide by PSD permitting rules. 61 *Fed. Reg.* at 1882. Thus, when a party such as Sierra Club has preserved an opportunity for such review under the applicable program in effect at the time of the public notice of a draft PSD permit, that review should not be denied as a result of a subsequent change to the SIP and the program under which the PSD permit is being administered.

Public participation is an important requirement of the PSD permitting program. *See Russell City*, PSD Appeal No. 08-01, slip. op. at 22-25. One of the statutory goals of the PSD program is to "assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision

and after adequate procedural opportunities for informed public participation in the decisionmaking process." 42 U.S.C. § 7470(5). In addition, before a PSD permit may be issued, the permitting authority must provide "a public hearing" and "opportunity for interested persons ... to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations." 42 U.S.C. § 7475(a)(2). EPA has implemented this requirement in regulations at 40 CFR §§ 51.166(q) and 52.21(q), and Part 124.

In addition, the provisions of the CAA establish a right to judicial review of PSD permitting decisions and compliance with PSD permitting obligations. In section 307(b)(1), Congress provided the opportunity for judicial review of any final action of the Administrator under the Clean Air Act. 42 U.S.C. § 7607(b)(1). EPA has previously interpreted this provision to provide an opportunity for judicial review of PSD permitting decisions when EPA is the permitting authority. 61 *Fed. Reg.* at 1882. In addition, section 304(a)(3) establishes a right for citizens to bring suit to enforce a violation of a PSD permit or the failure of a major source to obtain such a permit. 42 U.S.C. § 7604(a)(3).

Under the federal PSD permitting program, these rights are recognized in the Part 124 regulations. Under Part 124, a party must first exhaust its administrative remedies in an appeal to the EAB before it may obtain judicial review. In accordance with the CAA and its implementing regulations, EPA has previously observed that "any member of the public who has participated in the public comment process and meets the threshold standing requirements of Article III of the U.S. Constitution may petition for administrative review of the permit within 30 days of issuance and ultimately seek judicial review of the administrative disposition of the permit." 61 *Fed. Reg.* at 1882.

The requirements for public participation and judicial review are not diminished when a state issues a PSD permit under a SIP-approved program or as a delegate of EPA. In reviewing the Virginia PSD program, EPA observed that there is no indication that citizens' rights to judicial review would be diminished upon EPA approval of a state's PSD program. 61 *Fed. Reg.* at 1882. In addition, EPA cited legislative history suggesting that the Congress intended that such a right to review be available through the state administrative and judicial process. *Id.* (citing Subcommittee of the on Environmental Pollution of the Senate Committee on Environment and Public Works, 95th Congress, 1st Session. A Section-by-Section Analysis of S. 252 and S. 253, Clean Air Act Amendments, 36, reprinted in 5 Legislative History of the Clean Air Act 3892 (1977)).

Based on these provisions of the CAA and legislative history, EPA expressed the view that Congress intended for state judicial review of PSD permit decisions to be available for members of the public who can satisfy threshold standing requirements under Article III of the Constitution. 61 *Fed. Reg.* at 1882. EPA proposed to disapprove the Virginia PSD program because Virginia law "does not enable any member of the public who participated in the public comment process on a PSD permit and who meets the threshold standing requirements of Article III of the Constitution to obtain judicial review of the permit in the Commonwealth's court system." *Id.* Virginia later corrected the deficiencies in the standing requirements under state law, and EPA approved the program without any additional discussion of the judicial review requirements. 63 *Fed. Reg.* 13,795 (Mar. 23, 1998).

EPA has continued to adhere to the interpretation expressed in the proposed disapproval of the Virginia PSD program. In its final action on the Virginia PSD program approval, EPA did not indicate that public comments had persuaded the Agency to change its view that a

meaningful public participation process includes an opportunity for judicial review. *Id.* More recently, in approving the South Dakota PSD program, EPA cited the Virginia rulemaking[8] and stated the following: "[w]e interpret the statute and regulations to require at minimum an opportunity for state judicial review of PSD permits." 72 *Fed. Reg.* 72,617, 72,619 (Dec. 21, 2007). Since South Dakota law provides an opportunity for administrative and judicial review of PSD permitting decisions, EPA determined that the South Dakota PSD program satisfied this requirement. *Id.*

In the case of the Seminole permit, if FDEP obtains the relief it is seeking and both the EAB and Florida courts decline to review Sierra Club's appeals under the facts of this case, there will be no opportunity for review of this permit by a "member of the public who participated in the public comment process on a PSD permit." 61 *Fed. Reg.* at 1882. As discussed in more detailed below, Sierra Club participated in the public comment process for the Seminole permit by submitting timely public comments in accordance with the public participation procedures set forth in the CAA and Part 124, which were applicable in 2006. Denying Sierra Club an opportunity to obtain judicial review of FDEP's final permitting decision under these circumstances would be inconsistent with EPA's interpretation of the CAA.

2. When approving Florida's PSD program, Region 4 did not intend to authorize FDEP to deny judicial review to a party that preserved its opportunity for such review under federal law.

No action by Region 4 reflected the intent to approve (or had the actual effect of approving) procedures that would deny judicial review to a party that participated in the public comment process on a PSD permit consistent with the procedures applicable under federal law at

[8] The Agency's 1996 proposal was also cited by the Supreme Court in a dissent joined by four justices. *See Alaska Dept. of Envt'l Conservation v. EPA*, 540 US 461, 506-508 (2004) (dissenting opinion).

the time of public notice of that permit. As discussed earlier, Region 4's rulemakings approving the Florida PSD program did not address permits that were finalized after the SIP-approval but public-noticed under a delegated federal PSD program. While Region 4's approval of the FDEP's 2006 PSD program SIP submission was appropriate, the Region could not have approved a SIP submission that authorized denying judicial review of a permit decision to a party that participated in the public comment process applicable under the implementation plan in effect at the time of the public notice. The CAA requirement to provide an opportunity for judicial review of a PSD permit would be frustrated if Sierra Club is denied its opportunity to obtain judicial review of Florida's action solely because the applicable implementation plan changed after Sierra Club preserved its right to review under the federal rules in effect at the time of the public notice.

As a general matter, Region 4 properly approved Florida's PSD program because Florida law provides an opportunity for an administrative hearing and judicial review of a PSD permitting decision by FDEP under its SIP-approved program. *See, e.g.,* FAC 62-212 (Florida's PSD program, implemented through authority provided by Florida Statutes Chapter 403); Florida Statutes § 403.90 (provides for judicial review of any permit issued under the authority of this Chapter). In the typical case, Florida issues both the public notice and final permit decision on a PSD permit in accordance with the then EPA-approved SIP (consistent with other state SIP-approved PSD programs). These permits issued in both draft and final form by Florida pursuant to its SIP-approved program are reviewable in the Florida state court system and a failure to exhaust administrative remedies under state law would waive judicial review for purposes of both state and federal law. However, in the unique case of the Seminole permit, as described below, Sierra Club cannot be said to have waived a right to review under federal law.

3. The public notice for the Seminole PSD permit was flawed and insufficient to establish waiver of Sierra Club's right to judicial review under federal law.

Florida's public notice for this permit focused on the procedural requirements of state law and did not explain its status as "delegated" or cite to the applicable federal regulations at 40 CFR § 52.21 or Part 124. In FDEP's Brief in Support of It's Request to Deny Review and Motion for Summary Disposition filed with the EAB (EAB Docket Item #13), "FDEP admits that at the time the draft permit was issued the Florida PSD program was considered delegated by EPA." Page 3. However, FDEP is arguing in State court that it did not "ever purport to process the permit pursuant to any federal rule." Exhibit 2 at 15. If the latter is in fact the case, then no permitting authority would have issued a public notice for the Seminole permit satisfying the requirements of federal law (since neither Florida nor Region 4 would have done so).

However, the FDEP public notice did provide notice of the opportunity to comment on the permit within 30 days, and that standing alone was arguably consistent with procedures applicable under Part 124. Since FDEP did not state clearly at the time that it was only applying state law and not also acting under its delegated federal authority, Sierra Club reasonably assumed that Florida's public notice was intended to satisfy the procedures required under both state and federal law. Sierra Club was aware of Florida's PSD program being a delegated program, and thus conformed its participation in the public process to the requirements set forth in 40 CFR § 52.21 and Part 124. *See* Petition for Review at 3-8 (EAB Docket Item # 1). Although FDEP had submitted a request for EPA approval to apply Florida's PSD program to PPSA sources in February 2006, Region 4 did not provide notice of proposed action on the request until 2007.

Even if Florida's public notice for this permit met minimum requirements under the federal law in effect at the time, with respect to the waiver of administrative and judicial review, the public notice stated only that the failure to file a petition for an administrative hearing in accordance with Chapter 120 of the Florida Statutes would constitute waiver of the right to an administrative hearing under sections 120.569 and 120.57 or to participate as a party to the permit proceeding under state law. There was no notification to the public that FDEP had requested a change in the PSD program status for PPSA sources or that a failure to request a public hearing under the state procedures would also result in a waiver of a right to review under the then-applicable federal law. Under the applicable implementation plan in effect at the time of the public notice, such a waiver cannot be the result of Sierra Club's decision not to invoke the state procedures.

Although FDEP was required as a matter of state law to follow the public participation procedures under the Florida APA, compliance with state law throughout the processing of the Seminole permit did not ensure compliance with federal law. The state procedures were not incorporated into the CAA implementation plan applicable to the Seminole permit at the time of public notice. Region 4's delegation of the authority to implement the PSD program did not make the Florida state law the plan applicable to the Seminole permit application in 2006 at the time FDEP issued its public notice. Florida's public participation procedures were not made a part of the implementation plan applicable to this permit until Region 4 fully-approved Florida's PSD program into the SIP on June 27, 2008 and rescinded the delegation agreement.

FDEP and Seminole dispute Sierra Club's argument regarding the retroactive application of state law on the basis that the Florida administrative procedures have not changed between the time of public notice and final action, but this is not the issue. Sierra Club's argument rests on

federal law, while FDEP and Seminole respond only with an argument based on state law. Even if unchanged throughout the permitting process, the Florida administrative procedures would have to be retroactively incorporated into the CAA implementation plan applicable at the time of the public notice for this permit to establish that Sierra Club waived its opportunity for judicial review under federal law.

FDEP's present position in the EAB and state courts amounts to the contention that Sierra Club's waiver of its rights under state law means that Sierra Club also waived its right to review under federal law. However, Sierra Club plainly did not do the latter under the federal rules in effect at the time of the public notice.[9] The concept of waiver is defined as "the intentional relinquishment of a known right." *Garfinkle v. Dooley*, 672 F.2d 1340, 1347 (11th Cir. 1982). A waiver requires "(1) the existence at the time of the waiver [of] a right, privilege, advantage, or benefit which may be waived; (2) the actual or constructive knowledge thereof; and (3) an intention to relinquish such right, privilege, advantage, or benefit." *Id.* Sierra Club had no notice that the law would change -- let alone, as FDEP and Seminole argue, change with retroactive effect -- before final action on the permit. Public commenters had no basis to expect that Florida would assert that no review of the permit would be available in any forum if they submitted public comments but elected not to request a hearing under the Florida APA

[9] Although Sierra Club subsequently entered into a settlement agreement with Seminole under which Sierra Club agreed not to appeal the permit if certain conditions were met, this agreement was negotiated after Sierra Club preserved its right to judicial review under federal law by submitting timely comments. Sierra Club contends that agreement was nullified by FDEP's failure to issue a permit in accordance with the agreement. Seminole now contends this appeal is moot because FDEP has proposed to amend the permit to conform to the terms of the agreement. Motion to Dismiss Sierra Club Appeal as Moot (EAB Docket Item # 34). Region 4 does not take a position here as to the effect of the agreement and proposed permit revision. Since the questions in the Board's May 19, 2009 Order would not necessarily be reached if the settlement agreement precludes review or makes this case moot, Region 4 has assumed only for purposes of this discussion that the settlement agreement is not operative.

procedures. To even argue there was a waiver as a matter of federal law, Florida would have at least needed to provide Sierra Club with notice that its decision not to invoke administrative remedies under state law would also have the effect of waiving its right to administrative and judicial review under federal law. However, even such a notice may not have been sufficient to establish waiver because it would not by itself change the nature of the federal law in effect at the time of the public notice.

4. If FDEP continues to maintain that it never processed the Seminole permit pursuant to any federal rule or the Florida court denies review under the circumstances presented, Seminole will not have a valid PSD permit meeting the requirements of the Federal CAA.

To the extent no permitting authority issued a public notice for this permit in accordance with federal regulations or Sierra Club is not able to obtain review of the permit in any forum on the basis of its timely submission of comments after such a notice, the construction permit that FDEP issued to Seminole cannot be considered a valid PSD permit meeting the requirements of the CAA. In 2006, FDEP was required under a delegation from Region 4 to issue a public notice for the Seminole PSD permit in accordance with federal regulations. To the extent FDEP issued a public notice for this permit that satisfied the requirements of the federal law in effect at the time, the CAA requires judicial review of this permit under the circumstances. Region 4 did not authorize Florida to deny review in this situation. If review is completely denied, Seminole's permit will not fulfill the requirements of federal law.

The Florida First District Court of Appeal has not yet addressed the implications under Florida law of the fact that 40 CFR § 52.21(q) and other provisions were incorporated by reference into Florida law at the time of the public notice for the permit. Thus, there remains a possibility that the Florida courts will determine that the permit is reviewable in state court on the grounds that the procedures Sierra Club followed were applicable under state law. Region 4

does not offer an opinion here as to the requirements of state law or whether the Florida courts should grant Sierra Club the relief it requests as a matter of state law. However, if Florida law compels a result under these facts that is not consistent with federal law under the CAA, then the action of the FDEP in issuing the Seminole PSD permit cannot be considered to be action in accordance with the CAA.

If there was no public notice satisfying the requirements of federal regulations or such notice was provided and Florida law precludes review of the FDEP's action under the circumstances presented here, additional action will be needed to ensure that Seminole's construction is authorized under federal law. Since Florida is currently a SIP-approved state with respect to power plant permits, and EPA Region 4 did not retain any authority to issue permits for this type of source under the federal regulations, FDEP may need to provide a new public notice that enables Sierra Club and any other party that preserved a right to judicial review under federal law with a right to perfect its right to judicial review in the Florida courts.[10] If additional developments make clear that Seminole does not have a permit meeting the requirements of the CAA, EPA has the authority, among other things, to issue an order to stop construction at the source, pursuant to sections 113(a)(5) and/or 167 of the CAA, 42 U.S.C. §§ 7413(a)(5), 7477.

[10] On June 12, FDEP issued a new public notice for "a minor revision of the original air construction permit for Unit 3." This notice states that "PSD preconstruction review is not triggered" and that "the Department did not conduct a new review for Best Available Control Technology (BACT) nor make any changes to the prior BACT determinations." Exhibit 1 to Seminole's Motion to Dismiss Sierra Club Appeal as Moot (EAB Docket Item #34.3). This type of notice (issued after the FDEP PSD program was fully approved by EPA) could correct such a problem if it provides the opportunity for a party such as Sierra Club to perfect its right of review under the state law that is now a part of the approved implementation plan applicable to this type of source.

III. CONCLUSION

As is described above, there do not appear to be any directly applicable regulations, guidance or other documents discussing the jurisdictional issues in this unique situation of the Seminole permit. The law does, however, support Region 4's position that review by the EAB is not appropriate in this circumstance. In addition, prior EPA interpretations support the view that, unless Florida confirms that it has issued a public notice for this permit under federal law and also ensures that judicial review of FDEP's permitting decision (and any administrative remedy that must be exhausted to obtain that review) is available to Sierra Club, the permit issued to Seminole will not be a valid PSD permit as a matter of federal law.

July 16, 2009. Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of "EPA Region 4's Brief Regarding Reviewability of Permit" were served on the following persons by First Class U.S. Mail and electronic mail. Since the following parties already served copies of Exhibits 2-4 to this brief upon each other as parties in another matter, to avoid excess duplication, these Exhibits were served only by electronic mail and not by U.S. Mail:

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