Exhibit 2
EPA Region 4's Brief Regarding Reviewability of Permit

STATE OF FLORIDA
FIRST DISTRICT COURT OF APPEAL

SIERRA CLUB, INC.,

Appellant,

vs.

Case No. 1D-08-4881
DEP Permit No.1070025-005-AC

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

Appellees.

AN APPEAL OF A PERMIT ISSUED BY THE DEPARTMENT

ANSWER BRIEF OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION

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PRELIMINARY STATEMENT

For purposes of this brief, the Department of Environmental Protection shall be referred to as "DEP" or the "Department"; appellant Sierra Club, Inc., shall be referred to as "Sierra Club"; appellee Seminole Electric Cooperative, Inc., shall be referred to as "Seminole"; and the air construction permit 1070025-005-AC shall be referred to as "the Seminole permit."

A number of acronyms are commonly used in air construction permitting. The Seminole permit was issued pursuant to DEP rules implementing a permit process commonly referred to as prevention of significant deterioration of ambient air quality, which shall be referred to as "PSD". The PSD permit process requires a particular project analysis and case-by-case imposition of air emissions limitations for pollutants with established ambient air quality standards and for certain other pollutants, which shall be referred to as "PSD pollutants". The DEP also issues air construction permits that require other types of analyses and limitations for other types of pollutants, including limiting hazardous air pollutants, which shall be referred to as "HAP." A construction permit containing maximum achievable control technology, which shall be referred to as "MACT", is also a case-by-case imposition of air emissions limitation, but for HAP rather than for PSD pollutants;

a MACT is required when a proposed project's HAP emissions may reach certain thresholds.

STATEMENT OF THE CASE AND FACTS

This is an appeal from a final permit issued by the Florida DEP. This is not an appeal from an agency decision after an administrative hearing. Neither is it an appeal from a denial of an administrative hearing. This is an appeal from a final air construction permit issued by the DEP for which no administrative hearing was timely requested and for which no such hearing was held.

A brief outline of Florida's regulatory framework covering pre-construction air permits is necessary to help explain Seminole's application and permit issuance. The Seminole permit was issued by DEP pursuant to Florida DEP's own permitting statutes and rules but it also was issued as part of Florida's approved State Implementation Plan (SIP) under the Clean Air Act, 42 U.S.C., sections 7401 et seq. Section 110 of the Clean Air Act requires each state and territory of the United States to prepare a SIP to attain and maintain ambient air quality standards. Each state's SIP must comply with the minimum requirements established by the U.S. Environmental Protection Agency (EPA) at 40 C.F.R. Part 51. Each approved state SIP is promulgated by EPA rulemaking and is published at 40 C.F.R. Part 52. Florida's approved SIP is published at 40 C.F.R. Part 52, Subpart K, sections 52.520-52.530.

As part of each approved SIP, sections 160-165 of the Clean Air Act, 42 U.S.C. sections 7470-7475, require that each state implement special permitting for large sources of air pollutants locating in areas in which ambient air quality standards are attained. The special permitting is called prevention of significant deterioration (PSD) permitting. For some states whose SIP cannot be approved for PSD permitting and for other states whose SIP is partially approved for PSD permitting, EPA has, within the state's SIP, delegated authority to process PSD permits using federal permitting rule 40 C.F. R. section 52.21 in accordance with 40 C.F.R. section 52.21(a)(1). For states whose SIP has been approved for PSD, PSD permits are issued independently and solely under state authority. Any delegation of federal authority is reflected in each state's approved SIP. See 40 C.F.R. § 52.21(a)(1). Florida's PSD permitting is approved as part of the Florida SIP at 40 C.F.R. section 52.530.

PSD permitting regulates pollutants for which ambient air quality values have been established (criteria pollutants) and certain other pollutants designated as being covered by the program (designated pollutants). See 40 C.F.R. § 51.166. The program does not apply to "hazardous air pollutants." See 42 U.S.C. § 7412(b)(6). Florida also administers a separate special permitting process for larger so urces of hazardous air pollutants, the MACT program. Florida's case-by-

case MACT program is not part of the approved SIP. It is separately approved by EPA pursuant to 40 C.F.R. Part 63.

The Department received Seminole's permit application in March 2006. (R. Vol. 3, pp. 412-600). The permit was processed by DEP separately from, but in association with, an application for Siting certification under the Florida Power Plant Siting Act, sections 403.501-403.5185, Florida Statutes. (R. Vol. 2, 3, pp. 201-411). DEP issued a Notice of Intent to Issue the Seminole permit August 24, 2006. (R. Vol. 9, pp. 1510-56). Seminole published the notice in the Palatka Daily News on September 8, 2008. (R. Vol. 9, pp. 1557-58). The published notice reflected that a petition was required to be filed within 14 days of notice or publication to avoid a waiver of any right to an administrative hearing. On October 16, 2006, Sierra Club filed a petition for administrative hearing concerning the Seminole permit. (R. Vol . 10, pp. 1875-91). On October 31, 2006, DEP dismissed the petition as untimely filed, granting Sierra Club leave to amend but stating the order was final unless an amended petition was filed as provided. (R. Vol. 10, pp.1892-1912). Sierra Club did not file an amended petition and Sierra Club did not appeal the final order.

The Seminole PSD permit was initially processed pursuant to the statutory timing requirements set forth in section 403.509, Florida Statutes (2005), which required that DEP issue the PSD permit within 30 days of the issuance of the Siting

Board certification. Absent the timing provision of section 403.509, Florida Statutes, all air preconstruction permits, including PSD permits, are subject to the permit timing specifications of section 403.0876(2), Florida Statutes (2006), requiring issuance within 90 days of DEP's receipt of a complete application. During the summer of 2006, the provisions of section 403.509, Florida Statutes, changed to eliminate the link between the timing of the issuance of the PSD permit and the Siting Board certification. DEP relied upon the 2005 statute as authority to exceed the 90-day issuance clock. Litigation delayed the issuance of the Siting certification. A Siting certification denial order was entered by the Secretary of DEP on behalf of the Siting Broad on August 20, 2007. See Seminole Electric Cooperative, Inc. v. Dep't of Envtl Prot., 985 So. 2d 615, 621 (Fla. 5th DCA 2008). The Siting denial order was appealed and the appellate decision was issued in June 2008 and released in August. Id. at 615. The certification was then issued in August 2008 and Seminole's PSD permit was issued on September 8, 2008. (R. Vol. 13, pp. 2284-2292.23)

Sierra Club has filed a separate action before the EPA's Environmental Appeals Board (EAB) to contest whether Florida's SIP contained an approved or a delegated PSD program when the Seminole permit was being processed and issued and whether DEP complied with appropriate standards for establishing PSD limits.

Initial Brief, pp. 9-10) DEP is a party to that action also.[1] That action is still pending.

SUMMARY OF THE ARGUMENT

This is not an appeal of an agency decision after hearing, nor is it an appeal of an agency order denying party status. This is an appeal of a final agency order by an entity who never became a party to any process resulting in the final agency action appealed from. Sierra Club was provided a clear point of entry to participate in an administrative proceeding but failed to file a timely petition. Sierra Club was then granted leave to amend its late-filed petition to show why it should be considered timely but, again, it failed to file an amended petition. Sierra Club chose not to appeal that dismissal. Sierra Club abandoned its attempt to become a party; therefore, under section 120.68, Florida Statues, this Court lacks jurisdiction to review the final agency action where such appeal has been brought by a non-party who has waived its right to petition for hearing below.

Furthermore, Sierra Club cannot support a state court appellate right based upon federal administrative rules. Rather, to establish standing in the state administrative process, Sierra Club was required to take action to become a party below (by filing a timely petition for hearing in the state administrative proceedings, amending its petition, or seeking to appeal from the decision

[1] Sierra Club's action before the EAB is only available if Seminole's permit was issued pursuant to a "delegated" program, which DEP contests.

addressing its late-filed petition). Here, the record reflects that Sierra Club failed to avail itself of these available opportunities. For that reason, it cannot invoke this Court's jurisdiction to review the permit for the first time through this appeal, which should, accordingly, be dismissed.

Further, there was no change of any statute or rule, state or federal, depriving Sierra Club of a right to claim party status for purposes of appeal. The provisions of applicable statutes and rules have remained substantially the same throughout the permit process.

Moreover, even if Seminole had perfected its standing to challenge this permit, there is still no basis for reversal of the agency action. DEP processed the Seminole permit pursuant to DEP rules, which provide that technology review must include evaluation of multiple factors and technological judgment. The record shows that DEP properly assessed both the pollutants and the appropriate technology and imposed the appropriate emissions limits for the Seminole permit. DEP identified each pollutant subject to control requirements and correctly did not include carbon dioxide because carbon dioxide is not yet listed as a pollutant subject to best available control technology analysis under DEP rules; furthermore, DEP currently has no other rules limiting stationary source emissions of carbon dioxide. DEP correctly established limits for each pollutant subject to the best available control technology requirements of DEP rules, based upon engineering

data and experience as provided by rule, and correctly considered all information provided. In any event, the appropriateness of an individual emissions limit is a factual issue that could have been determined through fact-finding in administrative hearing, had Sierra Club not waived its right to a hearing.

While Sierra Club is correct that the DEP permit did not include Maximum Available Control Technology (MACT) for control of hazardous air pollutants (HAP), including mercury, the record shows that the factual circumstances surrounding the permit action were unusual; first, the permit was processed under a now-defunct statutory provision and, furthermore, because the Siting certification was delayed by litigation. While the separately-processed Siting certification was being appealed in state court, a federal court decision raised the issue of the necessity for a case-by-case MACT permit. DEP stated in conjunction with issuance of the Seminole permit that a separate MACT permit would be required. DEP's decision to split the permits was acceptable. MACT permits and PSD permits involve separate and distinct pollutants, rule authorities, and requirements. A subsequent permit action addressing MACT will provide Sierra Club with the opportunity to request a hearing on that permit. Remand on this issue is both unnecessary and unwarranted.

ARGUMENT

I. SIERRA CLUB HAS NO STANDING TO BRING THIS APPEAL

A. Standard of Review

Whether a party has standing to bring an action is a question of law that is to be reviewed de novo. See Mid-Chattahoochee River Users v. Dep't of Envtl. Prot., 948 So. 2d 794, 796 (Fla. 1st DCA 2006) (citing Hospice of Palm Beach County, Inc. v. State Agency for Health Care Admin., 876 So. 2d 4, 7 (Fla. 1st DCA 2004)).

B. Sierra Club Failed To Become A Party To The Permit Action

For this Court to exercise its jurisdiction pursuant to section 120.68, Florida Statutes, Sierra Club must establish that it is a "party" to the proceeding. However, Sierra Club waived party status by not filing a timely petition, by not amending its petition when given the opportunity, and finally, by not appealing the dismissal of its petition. As explained above, the "Public Notice of Intent to Issue" for the Seminole permit was published in the Palatka Daily News September 6, 2006.[2] (R. Vol. 9, pp.1557-8). The notice contained detailed information concerning the requirements to become a party to the permit action, including the 14 day timeline

[2] In addition, the record shows that on September 5, 2006, even before the notice was published, Sierra Club was informed that the Intent to Issue Air Permit had been issued to Seminole. (R. Vol. 10, p.1893).

within which to file a petition. (R. Vol. 9, pp.1555-56). The published notice also clearly reflected,

> [b]ecause the administrative hearing process is designed to formulate final agency action, the filing of a petition means that the Permitting Authority's final action may be different from the position taken in this Written Notice of Intent to Issue Air Permit. Persons whose substantial interests will be affected by such final decision ....have the right to petition to become a party to the proceeding." (emphasis added).

(R. Vol. 9, p. 1558). The record also shows that Sierra Club failed act upon that information.

Rather, the record reflects that, although Sierra Club filed extensive documents as "comments" on October 9, 2008, the 31st day after publication of the notice,[3] (R. Vol. 9-10, pp. 1572-1868) Sierra Club then waited an additional 7 days before filing a Motion for Extension of Time and Petition for Administrative Hearing. (R. Vol. 10, pp.1875-1891). The explanation for delay given in Sierra Club's petition was that Sierra Club did not have time to evaluate the draft permit because it was busy working on a separate action; that its members did not read the published notice; and that the timing provisions of section 403.815, Florida Statutes, are unreasonable.[4] (R. Vol. 10, pp. 1881-3).

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[3] October 8, 2006, the 30th day, was a Sunday.

[4] Thus, the reasons given for Sierra Club's failure to timely file a petition in the first instance were, on their face, legally insufficient to raise any "equitable tolling" issue. See § 120.679(c), Fla. Stat. ("This paragraph does not eliminate the availability of equitable tolling as a defense to the untimely filing of a petition.");

DEP's governing statute, section 403.815, Florida Statutes, the implementing rule at Florida Administrative Code Rule 62-110.106, and the DEP notice itself all specify that a petition must be filed within 14 days of notice or publication to avoid a waiver of rights to an administrative proceeding. Because the petition was filed on the 38th day, DEP dismissed the petition as untimely and granted Sierra Club leave to amend the petition. (R. Vol. 10, pp. 1892-1912). That order reflected that it would become final if Sierra Club did not submit an amended petition within fifteen days, and also provided Sierra Club with appellate rights. As explained above, Sierra Club failed to either file an amended petition or appeal the dismissal. In so doing, Sierra Club forfeited its right to seek to become a party to an administrative proceeding. Cf. Klein v Dep't of Educ., 908 So. 2d 1097 (Fla. 1st DCA 2005) (finding that a person who has been granted a point of entry to challenge an administrative action but has failed to take action required to avail himself of the opportunity has waived his right to request a hearing).

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see also Jancyn Mfg. Corp. v. State, Dep't. of Health, 742 So. 2d 473, 476 (Fla. 1st DCA 1999) ("Because the record reveals that the failure to seek yet another extension or to file for a chapter 120 proceeding was the result of appellant's own inattention, and not the result of a mistake or agency misrepresentation, we affirm."); Whiting v. Florida Dep't of Law Enforcement, 849 So. 2d 1149, 1151 (Fla. 5th DCA 2003) (affirming dismissal of an untimely petition for an administrative hearing under section 120.569(2)(c), Florida Statutes, where "Whiting has claimed only his mistaken belief as to when the time period ended, and that PERC's fax was not available to him at the time he wanted to fax his notice").

In addition to waiving its right to participate as a party below, Sierra Club has failed to demonstrate that it meets the statutory definition of a "party," as is required to invoke this Court's appellate review. Section 120.68, Florida Statutes, provides that "[a] party who is adversely affected by a final agency action is entitled to judicial review." See § 120.68(1), Fla.Stat. (2008). There are four requirements that must be met for this Court to exercise its jurisdiction to review final agency action: (1) the action is final; (2) the agency is subject to provisions of the act; (3) the person seeking review was a party to the action; and, (4) the party was adversely affected by the action. Legal Envtl. Assistance Fund., Inc. v. Clark, 668 So. 2d 982, 986 (Fla. 1996); Norkunas v. Fla. Bldg. Comm., et al, 982 So. 2d 1227, 1228 (Fla. 1st DCA 2008).

While the Seminole permit is final and DEP is an agency subject to the provisions of the Florida Administrative Procedures Act, Sierra Club has not shown that it meets the other two criteria necessary to invoke this Court's jurisdiction. Sierra Club does not meet the statutory definition of a party as set forth in section 120.52(13), Florida Statutes; moreover, because it is not a party, it cannot be a party adversely affected by the permit. The term "party" is defined at section 120.52(13), Florida Statutes:

> (a) Specifically named persons whose substantial interests are being determined in the proceeding.

> (b) Any other person who, as a matter of constitutional right, provision of statute, or provision of agency regulation, 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.
>
> (c) Any other person, including an agency staff member, allowed by the agency to intervene or participate in the proceeding as a party. An agency may by rule authorize limited forms of participation in agency proceedings for persons who are not eligible to become parties.

See § 120.52(13), Fla. Stat. (2008). Sierra Club does not fit within any of these categories of designated "parties."

First, Sierra Club is clearly not a "specifically named person" within the meaning of subsection (a). Nor has DEP allowed Sierra Club "to intervene or participate as a party" within the meaning of subsection (c) since the record shows that DEP specifically dismissed Sierra Club's petition to become a party. (R. Vol. 10, pp. 1892-1912). While DEP does "authorize limited forms of participation" by providing persons who may not be eligible to become a party an ability to provide public comment, see rule 62-210.350, Fla. Admin. Code., DEP's published Notice of Intent to Issue clearly stated that it did not confer party status to public commenters, inviting interested persons to request a formal process and make an appearance as a party.

Having failed to meet sections 120.52(13)(a) or (c), Florida Statutes, Sierra Club would need to establish that it comes within the purview of section

120.52(13)(b), Florida Statutes, involving those who are entitled to participate in the proceeding or those whose substantial interests will be affected by the proposed agency action and who make an appearance as a party. See § 120.52(13)(b), Fla. Stat. (2008). As detailed above, Sierra Club did not become a party to this action below when given the opportunity. Therefore, by failing to pursue the appropriate process, Sierra Club abandoned any claim to becoming a "party" and invoking this Court's jurisdiction for the purposes of appellate review.

C. Neither Federal Procedural Rules Nor State Administrative Requirements Have Changed To Prejudice Sierra Club

Perhaps in recognition that it has no legitimate claim to invoke this Court's jurisdiction pursuant to section 120.68, Florida Statutes, Sierra Club, as a non-party, argues instead that it should have standing because it was somehow deprived of a right to review the agency's action in this instance. Sierra Club alleges that the administrative review process changed during the pendency of the Department's processing of Seminole's permit, claiming that it assumed review of the permit in Florida was optional and in addition to the opportunity for review that could occur at the federal level. However, the only avenue available to Sierra Club to appeal to state court was through Florida's administrative process. Whether Sierra Club believed that review under chapter 120, Florida's Administrative Procedures Act, was optional, applicable procedures to obtain such in-state review are clearly not optional and have not changed since the Department's decision to

issue Seminole's permit. Sierra Club's allegations of forbearance do not excuse their failure to avail themselves of a still-viable alternative in Florida's Division of Administrative Hearings (DOAH).

Sierra Club argues that DEP operated as a "delegated" state and that it was going forth under the assumption that it could petition for review before the EAB;[5] however, the record does not support Sierra Club's premise that Florida is a "delegated" program, nor did DEP ever purport to process the permit pursuant to any federal rule. DEP's public notice states clearly that DEP was processing the permit according to and under authority of Florida statutes and DEP's own permit processing rules. (R. Vol. 9, pp. 1555-6). Moreover, the record shows that EPA provided extensive comment to DEP concerning the Seminole permit on October 5, 2006. (R. Vol. 9, pp. 1567-1571). Nothing in EPA's comments references delegation or the application of federal rules.

Furthermore, the federal rules themselves do not support Sierra Club's argument that DEP was processing the permit under delegated authority.[6] The

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[5] Review before the EAB is discretionary. Regardless of the status of Florida's PSD permit program as "delegated" or "approved," the EAB has discretion to deny any petition. There simply is no appeal as of right to the EAB on an EPA permit decision. In re Miners Advocacy Council, 4 E.A.D. 40, 42 (EAB, May 29, 1992). However, Sierra Club would have the option of appealing the EAB's decision to deny review to the federal courts.

[6] The federal "PSD rule", 40 C.F.R. section 52.21, states at paragraph(a)(1) that:

Department acted as an approved program when issuing Seminole's permit, and provided a clear path to review of the agency's decision through the state process. Having failed to avail itself of that option, Sierra Club cannot now seek to challenge the agency's decision in an appellate court.

The gravamen of Sierra Club's argument is that it failed to petition for an administrative hearing based on its misunderstanding of DEP's program resulting

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> The provisions of this section are applicable to any State implementation plan which has been disapproved with respect to prevention of significant deterioration of air quality in any portion of any State where the existing air quality is better than the national ambient air quality standards. Specific disapprovals are listed where applicable, in subparts B through DDD of this part. (emphasis added).

Since 1983, 40 C.F.R. subpart K, section 52.530 has provided:

> (d) 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 section 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
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> (2) Permits issued by EPA prior to approval of the Florida PSD rule.

In addition, when EPA wishes to approve or disapprove a state permitting rule, it must comply with the federal rulemaking process. El Comite Para Bienestar De Earliment v. Warmerdam, 539 F. 3d 1062 (USCA 9th Cir 2008). EPA cannot avoid proper rulemaking process in making such determinations. Envt'l Integrity Project v EPA, 425 F.3d 992 (USCA DC Cir 2005). Had EPA disapproved any or all of DEP's PSD permit program, that disapproval would have been reflected in the federal rule.

in an erroneous strategic decision. Sierra Club's allegations of misunderstanding and forbearance do not excuse its failure to timely take advantage of the clear opportunity to petition for a state administrative hearing, confirmed by the record in this case. Moreover, the procedures to obtain review in Florida are plainly mandatory and have not changed since DEP processed Seminole's application.

Section 403.815, Florida Statutes, provides, "[t]he failure to request a hearing within 14 days after publication of notice of proposed agency action constitutes a waiver of any right to a hearing on the application under sections 120.569 and 120.57." See § 403.815, Fla. Stat. (2008). DEP's implementing rule, Florida Administrative Code Rule 62-110.106, and the public notice published September 8, 2006, state precisely the same. (R. Vol. 9, p. 1555-6). Neither the statute nor the rule has changed since 2006, when the application for the Seminole permit was submitted. (R. Vol. 3, pp.412-600).

Further, the definition of "party" at section 120.52(13), Florida Statutes, has remained the same, although it was renumbered from subsection (12) during the period between 2006 to 2008. The provisions of sections 120.569 and 120.57, Florida Statutes, have remained essentially the same since 2006. The provisions of section 120.68, Florida Statutes, have not changed since 2003, and section 403.815, Florida Statutes, has remained the same since 1996. The DEP rule governing petitions, Florida Administrative Code Rule 62-110.106, has had the

same provisions since 1998. While Sierra Club states that the forum for appellate review changed during Seminole's permitting process, what has actually changed is Sierra Club's understanding that the appropriate vehicle for challenging the agency-issued permit in this case was a petition for hearing under Florida's Administrative Procedures Act. Because establishing standing to challenge the permit through filing a timely and sufficient petition is not and never has been "optional," Sierra Club's purported direct appeal from the permit issued should be dismissed for lack of standing.

II. DEP PROPERLY PROCESSED THE SEMINOLE PERMIT UNDER THE APPLICABLE RULES AND IMPOSED APPROPRIATE EMISSION LIMITS

A. Standard of Review

Even if Sierra Club were able to demonstrate that this Court has jurisdiction to review the permit, they have demonstrated no basis for reversal of the agency action. The standard of review of an agency decision on issues of law is set out in section 120.68(7)(d), Florida Statutes, providing that an appellate court may set aside a final administrative order if the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action. However, the courts have held that an agency decision interpreting a statute within its substantive jurisdiction should not be reversed unless it is clearly erroneous. Brown v. Comm'n on Ethics, 969 So. 2d 553, 557 (Fla. 1st DCA 2007)("[I]f the

agency has interpreted a statute within its jurisdiction.... the interpretation may have been based on a history that is best known by the agency or special expertise the agency has in applying the statute.") When an agency has exercised its discretion on a matter within its substantive jurisdiction, the court shall not substitute its judgment for that of the agency unless the agency has exceeded the scope of its authority. See also Fla. Hosp. (Adventist Health) v. Florida AHCA, 823 So. 2d 844, 847-8 (Fla. 1st DCA 2002). Since the statutes and rules governing the permit at issue are within DEP's substantive jurisdiction, the "clearly erroneous" standard applies. Id. at 847.

Furthermore, it should be emphasized that any such arguments pertaining to whether Seminole's permit contains the appropriate pollutant limits are procedurally barred as being raised for the first time on appeal. See Rudloe v. Dep't of Envtl. Reg., 517 S0. 2d 1987 (Fla 1st DCA 1987), Rosenzweig v. Dep't of Transp., 979 So. 2d 1050, 1056 (Fla. 1st DCA 2008); Fla. Ass'n of Nurse Anesthetists v. Dept of Prof'l Reg., 500 So. 2d 324 (Fla 1st DCA 1986) rev. den., 509 So. 2d 1117 (Fla 1987). Because Sierra Club waived its rights by failing to file a timely petition and then, after being given opportunity to appeal that order, abandoned the process, Sierra Club cannot now contest the facts on appeal.

B. DEP Properly Used Florida Administrative Code Rule 62-212.400 To Evaluate The Seminole Permit

The Seminole permit was issued pursuant to Florida Administrative Code Rule Chapters 62-4, 62-204, 62-210, 62-212, 62-296 and 62-297. (R. Vol. 13, pp. 2284-2292.23). DEP issues permits pursuant to its own statutory authority at section 403.087, Florida Statutes, but the DEP PSD permit rules are also approved by EPA as part of the Florida SIP. DEP's PSD process[7] is contained at Florida Administrative Code Rule 62-212.400, which includes requirements for modeling and monitoring as well as for evaluating and limiting emissions from proposed projects, such as that of the Seminole permit.[8] The evaluation and emissions limiting process is contained in paragraph (10) of Rule 62-212.400, which limits the application of the process to those pollutants identified as "PSD pollutants".[9]

DEP rules define "best available control technology" (BACT) at Florida Administrative Code Rule 62-210.200, which provides, in pertinent part, that BACT is :

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[7] PSD is a process for evaluating and limiting emissions.

[8] The specific approval for DEP to issue federal PSD permits is 40 C.F.R. section 52.530.

[9] Florida Administrative Code Rule 62-212.400(10), provides as follows:

> (b) The owner or operator of a new major stationary source shall apply best available control technology for each PSD pollutant that the source would have the potential to emit in significant amounts.
> (c) The owner or operator of a major modification shall apply best available control technology for each PSD pollutant which would result in a significant net emissions increase at the source. (This requirement applies to each proposed emissions unit at which a net emissions increase in the pollutant would occur as a result of a physical change or change in the method of operation in the unit.)

(a) An emission limitation, including a visible emissions standard, based on the maximum degree of reduction of each pollutant emitted which the Department, on a case by case basis, determines is achievable through application of production processes and available methods, systems and techniques (including fuel cleaning or treatment or innovative fuel combustion techniques) for control of each such pollutant, taking into account:

1. Energy, environmental and economic impacts, and other costs;
2. All scientific, engineering, and technical material and other information available to the Department; and
3. The emission limiting standards or BACT determinations of Florida and any other state.

(b) If the Department determines that technological or economic limitations on the application of measurement methodology to a particular part of an emissions unit or facility would make the imposition of an emission standard infeasible, a design, equipment, work practice, operational standard or combination thereof, may be prescribed instead to satisfy the requirement for the application of BACT. Such standard shall, to the degree possible, set forth the emissions reductions achievable by implementation of such design, equipment, work practice or operation.

See Fla. Admin. Code R. 62-210.200. The rule establishes what elements DEP must use to evaluate the limitations and technologies to apply to a specific permitting situation. The rule is part of DEP's approved SIP and was therefore appropriately used to process the Seminole permit.

C. DEP Properly Applied Its Governing Rule Requirements To Determine Appropriate Emissions Limits in Seminole's Permit

DEP's application of its evaluation and limitation process is reflected in the Technical Evaluation and Proposed Permit. (R. Vol. 9, pp. 1515-54). The Technical Evaluation shows that DEP used a "top-down" type of process for

determining BACT (R. Vol. 9, p.1526). The Technical Evalaution also shows that DEP examined each PSD pollutant likely to be emitted at significant rates. [Vol 9, pp. 1519, 1524.) DEP determined that some PSD pollutants, including sulfur dioxide, nitrogen oxides, sulfuric acid mist, mercury, and lead, were not likely to be emitted at significant rates but that carbon monoxide, volatile organic compounds, particulate matter and particulate of ten microns (PM/PM_{10}), and hydrogen flourides were likely to be emitted at significant rates. (R. Vol 9., p. 1524)

Regarding BACT for PM/PM_{10}, the record shows that DEP analyzed data provided by the permit applicant. (R. Vol. 9, pp1519-20, 1525.) The record also shows that DEP consulted the permit requirements established from other states and evaluated several potentially available technologies. (R. Vol. 9, p. 1525). DEP rejected the applicant's proposed limit, stating it "does not include a technology-forcing component" and required a "more aggressive limit." (R. Vol. 9, p. 1525).. The record clearly shows that DEP considered precisely the factors included in the DEP rule definition of BACT. In addition, the record shows that DEP required that "condensibles be captured and reported" (R. Vol. 9, p.1525), and in response to an EPA recommendation for a "placeholder" if "testing has demonstrated that condensables can be measured accurately", DEP agreed that the issue could be deferred. (R. Vol. 13, pp. 2285-6). Had the Seminole permit been subject to an

administrative hearing, the permitting record would clearly provide competent and substantial evidence that DEP properly addressed BACT for PM/PM_{10}.

Regarding the control of carbon monoxide, the record shows DEP considered a number of technologies, including thermal oxidation, catalytic oxidation, and proper boiler design and operation. (R. Vol. 9, pp. 1520, 1525-6). DEP stated that it was "unwilling to reject thermal oxidation on the basis of being infeasible" because it had been used in a different context, but DEP recognized "that practical considerations exist when establishing BACT for a proven technology in an unproven configuration." (R. Vol. 9, p. 1526). DEP discussed, in its analysis, the variability of limits recently imposed in permits from other states but recognized that the compliance determination is significant when determining a limit. (R. Vol. 9, p.1527). The limit of 0.13 lb/MMBtu must be demonstrated based upon a three hour "initial stack test" rather than a rolling average. (R. Vol. 9, p. 1527). Again, had the Seminole permit been subject to an administrative hearing, the permitting record would clearly provide competent and substantial evidence that DEP properly addressed BACT for carbon monoxide.

For control of volatile organic compounds (VOC), DEP reiterated that VOC and CO are both resultant from combustion practices. (R. Vol. 9, pp. 1520-1, 1527). DEP determined that the applicant-proposed BACT "does not appear to be adequately stringent" and that "wet pollution control systems" "are well suited for

removing large percentages of HAP's [hazardous air pollutants] and VOC's." (R. Vol. 9, p.1528). DEP established a limit of 0.0034 lb/MMBtu "demonstrated via an initial stack test". (R. Vol 9. P.1528). Had the Seminole permit been subject to an adminstrative hearing, the record would clearly provide competent and substantial evidence that DEP properly addressed BACT for VOC.

For control of hydrogen flourides (HF), DEP's technological analysis and evaluation concluded that the combination of wet and dry emissions control systems in place for other pollutants would assure "97 percent removal." (R. Vol. 9, p. 1528). DEP also evaluated the ranges of limits imposed in other, recently-issued permits[10] and established the limit based upon the 97 percent expected removal. (R. Vol. 9, p. 1528). The emissions limit must be demonstrated by testing rather than as a rolling average. (R. Vol. 9, p. 1528). Had the Seminole permit been subject to an administrative hearing the permitting record would clearly provide competent and substantial evidence that DEP properly addressed BACT for HF.

The record also shows that DEP evaluated the possible impacts of excess emissions resulting from startup and shut-down operations. DEP determined that emissions related to fuel contaminants, SO_2 and PM, could be minimized; DEP established the practices that would be required to minimize emissions. (R. Vol. 9,

[10] The permit dates, most from 2004 and 2005, indicate that, given the timeframe required to install electric power units, many of the units have not yet begun or have only recently begun operations.

p. 1529). Regarding use of best operational practices during start-up and shutdown, the definition of BACT allows use of operational practices, saying:

> [i]f the Department determines that technological or economic limitations on the application of measurement methodology to a particular part of an emissions unit or facility would make the imposition of an emission standard infeasible, a design, equipment, work practice, operational standard or combination thereof, may be prescribed instead to satisfy the requirement for the application of BACT.

Fla. Admin. Code R. 62-210.200(4)(b). Again, as with the other permitting concerns raised above, had the Seminole permit been subject to an administrative hearing, the record would provide competent and substantial evidence supporting the final permit's BACT for start-up and shut-down operations.

The record shows that in evaluating the Seminole permit, DEP complied with its governing rules to evaluate control technology and emissions limits for those PSD pollutants likely to be emitted at significant rates. DEP established those limits as permit limits. (R. Vol. 12, 13 pp. 2243-58, 2291-2). Morevover, the record shows that DEP explained its analysis for the technology and limit chosen for each pollutant. (R. Vol. 9, pp. 1514-1536). The record also shows that DEP evaluated the permit using a top-down process even though such a process is not required. See Ak. Dep't of Envt'l. Conservation v. EPA, 540 U.S. 461, 476 fn 7 (2004). The record also shows that, contrary to the situation of Alaska Department of Environmental Conservation, in which EPA had objected to the Alaskan

process, the EPA made no objections to the BACT requirements of the Seminole permit. Nor did EPA exercise any oversight role to negate the state BACT process, although it clearly has that authority. Id. at 490 ("Congress, however, vested EPA with explicit and sweeping authority to enforce CAA 'requirements' relating to construction and modification of sources under the PSD program, including BACT. We don't see why Congress ...would then preclude the Agency from verifying substantive compliance with BACT provisions.") (R. Vol. 9, pp. 1567-71). The only comment EPA made concerning appropriateness of emissions limits was in regards to nitrogen oxides, and even then, EPA admitted that the pollutant was not subject to BACT. (R. Vol. 9, p. 1571). The record contains ample information that would be competent and substantial evidence at hearing that DEP made a reasoned engineering judgment in establishing emissions limits.

DEP has considerable experience in this area. DEP has been issuing PSD permits for nearly 30 years. The agency's experience and technical expertise should be afforded deference in a technical area such as the appropriate numerical permit limits at issue here. The record clearly shows that DEP complied with its governing rules to apply BACT to all the PSD pollutants that were expected to have significant rate increases.

D. Pursuant to the Applicable Rules, DEP Was Not Required to Regulate Carbon Dioxide in Seminole's PSD Permit

Next, Sierra Club argues that, given recent case law defining carbon dioxide (CO_2) as a pollutant, DEP is required to regulate CO_2 through PSD permitting. Sierra Club cites Massachusetts v. EPA, 549 U.S. 497 (2007), which found that carbon dioxide (CO_2) meets the statutory definition of "pollutant" in the Clean Air Act, 42 U.S.C. section 7401 et seq. That decision concerned motor vehicle emissions, and instructed EPA to either explain why it is not necessary to regulate CO_2 under the Act or take steps to regulate it. Id. at 533-35. However, nothing in the decision affects DEP's current approved SIP or permit processing rules. When EPA determines how it would like the states to address CO_2, DEP will evaluate and possibly change its rules. In the future, CO_2 may become subject to PSD regulation under DEP rules. But those rules were not automatically changed by the Supreme Court decision.

DEP defines "PSD pollutant" as "[a]ny pollutant listed as having a significant emission rate." See Fla. Admin. Code R. 62-210.200(254). The pollutants with significant emission rates are listed at Florida Administrative Code Rule 62-210.200(280). That list does not include CO_2. Because CO_2 is not listed as having a significant emission rate, CO_2 is not defined as a "PSD pollutant" by DEP rule.[11] Florida Administrative Code Rule 62-212.400(10), provides that a

[11] Nothing in Florida Administrative Code Rule chapters 62-4, 62-204, 62-210, 62-212, 62-296 and 62-297, or any other air pollution stationary source rule, currently regulates CO_2.

BACT analysis must be done for "each PSD pollutant that the source would have the potential to emit in significant amounts." Since CO_2 is not listed as having any significant emission rate, it is not a PSD pollutant and it is not subject to the requirement of a BACT analysis. Because DEP processed the Seminole permit pursuant to its own rules,[12] and because those rules do not list CO_2 as a PSD pollutant, DEP was not required to perform a BACT analysis for CO_2.

E. Pursuant to DEP rules, MACT Permits May be Separately Issued from PSD Permits

Sierra Club asserts that a MACT permit must be issued with a PSD permit, and since the two were issued separately in this instance, Seminole's PSD permit is invalid. While DEP does not agree that DEP rules require a MACT permit to be combined with a PSD permit, DEP agrees that the evaluation of whether a MACT

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[12] Nor does the adoption of 40 C.F.R. section 52.21 into Florida Administrative Code Rule 62-204.800, require DEP to implement any and all provisions of the federal rule in lieu of its own specific rules. Florida Administrative Code Rule 62-204.800, is a repository for adoptions of federal rules, but the introductory paragraph particularly limits the applicability of the adopted federal rules, stating:

> All federal regulations cited throughout the air pollution rules of the Department are adopted and incorporated by reference in this rule. The purpose and effect of each such federal regulation is determined by the context in which it is cited. Procedural and substantive requirements of the incorporated regulations are binding as a matter of state law only where the context so provides.

Fla. Admin. Code R. 62-204.800 (effective 1-1-2005) (emphasis added). DEP's rules nowhere use the definitions given in 40 C.F.R. section 52.21(b)(50)(iv) to identify pollutants regulated pursuant to PSD permitting.

permit is necessary must be accomplished prior to construction of the Seminole project. The timing of the permit application helps explain DEP's decision to bifurcate these permits.

As explained above, the DEP PSD permit was initially processed subject to the Florida statutory timing requirements at section 403.509, Florida Statutes (2005), which required DEP to issue the PSD permit within 30 days of the issuance of the Siting Board certification. Absent the timing provision of section 403.509, Florida Statutes, all air preconstruction permits, including PSD permits, were subject to the permit timing specifications of section 403.0876(2), Florida Statutes (2006), requiring issuance within 90 days of DEP's receipt of a complete application. During the summer of 2006, the provisions of section 403.509, Florida Statutes, changed, eliminating the link between the timing of the PSD permit and the Siting Board certification. However, DEP was not ready to issue or deny Seminole's application when the statute changed.[13]

To prevent any question of a default permit, DEP relied upon the existing statute in effect when the application became complete, issuing the PSD permit within 30 days after the Siting certification approval order. While the Siting certification appeal was proceeding, a federal court decision, New Jersey v. EPA, 517 F.3d 574 (DC Cir. 2008), raised the issue that a MACT permit may be

[13] The Intent to Issue the Seminole permit was issued August 24, 2006. (R. Vol. 9, pp. 1510-1556].

required for Seminole. It appeared in the summer of 2008 that the Seminole PSD permit would have to be issued before a case-by-case MACT permit could be processed, so DEP completed the PSD permit process. DEP noted in the Final Determination that a separate permit application would be required, addressing case-by-case MACT as a result of the recent federal decision. (R. Vol. 13, pp. 2284).[14]

Regardless of the timing circumstances at issue here, DEP disagrees that the MACT evaluation must be included as part of the PSD permit issued to Seminole. The processes are completely different and are governed by separate rules. The requirement for a case-by-case MACT permit is a distinct permitting requirement from the requirement for a PSD permit under both federal law and state rules.[15] While DEP can properly issue the MACT permit in conjunction with the PSD permit, the two permits must always be evaluated separately. MACT permits involve a separate set of pollutants and a distinct set of evaluation criteria from those governed by the PSD process. The case-by-case MACT cannot be processed as a PSD permit under Florida Administrative Code Rule 62-212.400. Furthermore, the pollutants subject to case-by-case MACT are, with the exception

[14] The application submitted December 22, 2008, also addresses this issue.
[15] The DEP rule governing case-by-case MACT permits is Florida Administrative Code Rule 62-212.300(3)(b). The federal regulations governing case-by-case MACT permits are found at 40 C.F.R. sections 63.40-63.56.

of mercury, not listed as PSD pollutants.[16] Rather, they are identified as "Hazardous Air Pollutants." See Fla. Admin. Code R. 62-210.200. DEP uses federal substantive requirements and DEP procedures in issuing MACT permits, and the federal substantive requirements for MACT permits are much different from PSD permitting requirements.[17]

Thus, DEP agrees that it has the power to perform the two separate processes, for PSD and for case-by-case MACT, simultaneously and to include the resulting requirements as separate parts of a single pre-construction permit; typically, DEP would do so. DEP would likely have done so in the instant case permit had the circumstances not been exceptional. However, given the timing of Seminole's application, there is nothing in the rules preventing DEP from issuing a PSD permit separately from a MACT permit.[18] Because of the various statutory timing provisions and litigation circumstances, and because the PSD permitting and the MACT permitting are separate processes, DEP reasonably decided to process the PSD permit separately from the MACT permit. Sierra Club has established no basis for reversal of the agency's permitting decision on this issue.

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[16] Mercury is listed as a PSD pollutant in Florida Administrative Code Rule 62-210.200, but is not subject to PSD under federal rules.

[17] The Clean Air Act itself, at 42 U.S.C. section 7412(b) recognizes the difference between the permitting processesstating, in the section requiring MACT that: "The provisions of part C of this subchapter (prevention of significant deterioration) shall not apply to pollutants listed under this section."

[18] DEP put Seminole on notice that it cannot begin construction until the question of the case-by-case MACT permit is resolved. (R. Vol. 13, p. 2284].

F. DEP Properly Applied Its Governing Rule Requirements To Consider All Public Input

DEP's rule govening public notice for preconstruction permits is Florida Administrative Code Rule 62-210.350, which requires at paragraph (2)(f) that DEP "consider" timely received public comments in making its permitting decision. DEP did so and reflected its consideration in its Final Determination. (R. Vol. 13, pp.2284-90).

Contrary to Sierra Club's position, there is no reason that this court should follow any federal procedural decisions concerning public comment and the processing of permits. The Seminole permit was processed pursuant to DEP permit processing rules at Florida Administrative Code Rules 62-210.300 and 62-212.400. Public notice was provided pursuant to Florida Administrative Code Rules 62-110.106 and 62-210.350. The public notice presented ample opportunity for an affected person to become a party. (R. Vol. 9, pp. 1557-8). The notice also provided an opportunity to comment, although the notice made clear that the primary avenue for determination of the terms and conditions of the permit was the administrative process. (R. Vol. 9, p 1558). Florida's Administrative Procedures Act, at sections 120.569 and 120.57, Florida Statutes, provides the opportunity for a complete de novo process.

As reflected in the record, DEP was well aware of Sierra Club's comments and of a "settlement agreement" made between Seminole and Sierra Club in 2007,

after both had submitted comments to DEP. (R. Vol. 12, pp.2165-9).[19] Because the agreement purported to resolve "all timely received comments submitted by the applicant and Sierra Club related to the draft permit," the agreement, which also claimed to "settle all remaining issues related to the PSD permit for Unit 3," was specifically addressed in DEP's final determination as a revision to Sierra Club's and Seminole's previously-submitted comments. (R. Vol. 12, p 2165; Vol. 13, p. 2284) The record also shows, however, that DEP independently considered the comments of both Seminole and Sierra Club. The DEP copy of the Sierra Club-Seminole agreement is annotated with calculations and statements such as "different in comments" and "more restrictive than comments". (R. Vol. 12 pp. 2166-7). DEP agreed in its final permit determination to consider incorporating the agreement into Seminole's permit after proper application. (R. Vol. 13 p. 2284). DEP also separately agreed to process the agreement issues with the case-by-case MACT permit by letter of September 19, 2008. (R. Vol. 13, p.2293). [20]

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[19] The agreement was titled a "settlement agreement," although no litigation was pending concerning the permit. DEP was not a party to the agreement.

[20] Although it is necessarily not part of the record on appeal, Seminole Electric Cooperative, Inc., made application on December 22, 2008, for a permit to address both the "settlement agreement" and case-by-case MACT. DEP has assigned project number 1070025-011-AC to that application. It can be accessed by web at http:// www.dep.state.fl.us/air and by linking to the permitting and air permit search links. When DEP is ready to issue its proposed agency action on this application, the process will require a public notice pursuant to Florida Administrative Code Rules 62-110.106 and 62-210.350, with opportunity for public hearing. Application review process is currently ongoing.

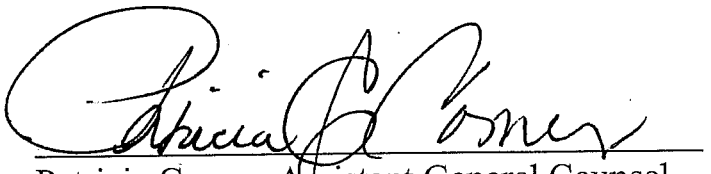
DEP emphasizes, however, that it was never party to the agreement and had no obligation to change the PSD permit based upon the terms of the agreement. DEP's rule requires the agency to consider all information timely received but does not oblige the agency to change its determination in response. The record shows that DEP received multiple comments and that DEP considered them all but determined that no change was warranted to the proposed agency action. (R. Vol. 13, pp. 2284-90). Had the Seminole permit been subject to an administrative hearing, the permitting record would clearly provide competent and substantial evidence that DEP considered the Sierra Club comments.

Despite the circumstance that no administrative hearing was held to consider the terms and conditions of the Seminole permit, the record shows ample materials that would constitute, in an administrative hearing, competent and substantial evidence to support the DEP permit determinations and a conclusion that DEP properly followed its own procedures and applied the proper rules in issuing Seminole's permit.

III. CONCLUSION

For the foregoing reasons, DEP respectfully requests that this court dismiss the appeal of Sierra Club or, if this court determines that Sierra Club has standing to bring this appeal, DEP requests that this court affirm the decision of DEP to issue the Seminole permit.

Respectfully submitted this 1st day of April, 2009.



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CERTIFCATE OF SERVICE

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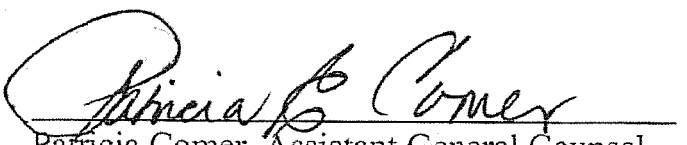

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