Hopping Green & Sams

Attorneys and Counselors

November 3, 2008

Via Overnight Delivery

Ms. Erika Durr, Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1341 G Street N.W., Sixth Floor
Washington, DC 20005

Re: Seminole Electric Cooperative, Inc.
PSD Permit Number PSD-FL-375
PSD Appeal Number 08-09

Dear Ms. Durr:

Enclosed for filing is one original of the Motion for Leave to Intervene & Response to Sierra Club's Motion to Hold Proceedings in Abeyance for the above-referenced case. If you have questions or need additional information, please do not hesitate to contact me.

Sincerely,

David W. Childs

Enclosure

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

In the matter of:

PSD Appeal No. 08-09

In Re Seminole Electric Cooperative, Inc.
_____/

MOTION FOR LEAVE TO INTERVENE & RESPONSE TO SIERRA CLUB'S MOTION TO HOLD PROCEEDINGS IN ABEYANCE

In accordance with Environmental Appeals Board Practice Manual III.D.4, Seminole Electric Cooperative, Inc. (Seminole), hereby moves for leave to intervene in PSD Appeal No. 08-09, initiated by the Petition for Review by the Sierra Club pursuant to 40 C.F.R. § 124.19, Seminole also files response to Sierra Club's Motion to Hold Proceedings in Abeyance, filed on October 24, 2008 and served on Seminole. The Petition for Review involves the decision by the Florida Department of Environmental Protection (DEP) to issue a PSD Permit to Seminole for a proposed third electric generating unit (Unit 3) at Seminole's existing electric power generating plant in Putnam County, Florida.

Seminole has a tangible interest in the subject matter of Appeal 08-09 as the permittee and a real party in interest. In addition, Seminole's Response to Sierra Club's Motion to Hold Proceedings in Abeyance will materially assist the Environmental Appeals Board (Board) by providing argument and evidence directly relevant to the Petition including consideration of whether the Board has jurisdiction and whether Sierra Club's Motion to Hold Proceedings in Abeyance should be granted or denied. Seminole's intervention will not delay resolution of the appeal or consideration of Sierra

Club's Motion to Hold Proceedings in Abeyance; rather, Seminole's intervention should expedite resolution of this appeal.

Notice of Seminole's Motion for Leave to Intervene and Response to Sierra Club's Motion to Hold Proceedings in Abeyance is being served on all parties identified in the accompanying Certificate of Service.

If the Board grants Seminole's Motion for Leave to Intervene, parties may serve all correspondence in this matter upon Seminole's undersigned counsel, James Alves.

RESPONSE TO SIERRA CLUB'S MOTION TO HOLD PROCEEDINGS IN ABEYANCE

Sierra Club's "Factual and Procedural Background" omits material facts essential to resolving this matter, notably including Sierra Club and Seminole's full settlement of all issues related to the PSD permit (including Sierra Club's agreement not to challenge the final PSD permit in any forum) and DEP's ongoing actions to incorporate the terms of the Sierra Club-Seminole settlement into a revised final PSD permit. In light of this and other omissions, a brief recitation of the factual and procedural history of this case is necessary. This response then explains that the Board lacks jurisdiction over this matter because the final PSD permit was issued under Florida's "approved" PSD program, and because Sierra Club and Seminole's joint Settlement Agreement resolved all issues associated with the PSD permit; no justiciable controversy exists. Finally, this response argues against granting Sierra Club's motion and thereby delaying resolution of this settled matter.

FACTUAL & PROCEDURAL BACKGROUND

On August 24, 2006, DEP issued a draft PSD permit for Seminole's Unit 3. In accordance with Florida administrative law, Seminole published DEP's Notice of Intent to issue the PSD permit in the Palatka Daily News on September 8, 2006. This public notice stated that interested persons would have the opportunity to file comments regarding the draft permit within 30 days (by October 9, 2006) and that substantially affected persons opposing permit issuance could file a petition for an administrative hearing within 14 days of the notice (by September 22, 2006). Mirroring the language of Rule 62-110.106(12), of the Florida Administrative Code, the public notice stated, "[t]he failure of any person to file a petition within the appropriate time period shall constitute a waiver of that person's right to request an administrative determination (hearing) under Sections 120.569 and 120.57 of the Florida Statutes, or to intervene in this proceeding and participate as a party to it." (Emphasis added). [See attached public notice, Exhibit A]. These state notice and procedural requirements for issuing PSD permits are the same ones that EPA approved on June 27, 2008. See, EPA, Approval & Promulgation of Implementation Plans Florida; Prevention of Significant Deterioration, 73 Fed. Reg. 36,435 (June 27, 2008).

On October 9, 2006, the Appellant, Sierra Club submitted timely comments regarding the draft PSD permit, and on October 16, 2006, Sierra Club filed an untimely "Motion of Enlargement of Time and Petition for Administrative Hearing" (petition). DEP responded to the untimely petition on October 31, 2006, issuing an order that dismissed Sierra Club's petition for an administrative hearing on grounds that it was "untimely filed." [See attached Order Dismissing Petition with Leave to Amend, Exhibit

B]. DEP's order stated that Sierra Club failed to demonstrate "any basis for excusable neglect" in untimely filing the petition; that Sierra Club had "105 members in Putnam County" and "520 members in St. John County;" that the Palatka Daily News, which published the public notice of the PSD permit, was circulated in these counties; and that Sierra Club received actual notice of DEP's intent to issue the permit on September 5, 2006 (in addition to the newspaper notice). [Exhibit B, page 2]. In short, Sierra Club's failure to timely submit a petition challenging the PSD permit constituted a waiver of its rights under Florida law.

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

Although Sierra Club failed to timely file a petition (or amended petition) under Chapter 120, Florida Statutes, in opposition to Seminole's Unit 3 PSD permit, during that time (August – November, 2006) Sierra Club was a party in the distinctly separate Unit 3 certification proceeding under the Florida Electrical Power Plant Siting Act (PPSA). See §§ 403.501–.518, Fla. Stat. Seminole and Sierra Club subsequently entered into two Settlement Agreements that resolved Sierra Club's substantive air quality-related concerns and all potential legal claims related to both the certification of Unit 3 under the Florida Electric Power Plant Siting Act and the issuance of Unit 3's final PSD permit. [See attached January 7, 2007 and March 9, 2007 Settlement Agreements between the

Sierra Club and Seminole, Exhibits C & D, respectively]. (Section 403.509(4), of the PPSA confirms that DEP exercises separate authority to issue PSD permits in conjunction with federal requirements.) In the March 9, 2007 Settlement Agreement, Seminole agreed to ask DEP to incorporate numerous air emission reduction commitments into the final PSD permit, and Sierra Club agreed "not to contest FDEP's issuance of the final PSD permit in any administrative or judicial forum," so long as "the final PSD permit is issued in accordance with the terms and conditions of this Agreement." [Exhibit D, page 1, paragraph G].

On September 5, 2008, DEP issued the PSD permit for Seminole's Unit 3.[1] DEP issued the PSD permit without incorporating the changes that Seminole and Sierra Club had agreed to, yet committed to revise the permit to incorporate the Settlement Agreement conditions. [See attached DEP Final Determination, Exhibit E].

Soon after issuing the Unit 3 PSD permit, DEP characterized one of Seminole's written requests to incorporate the agreed-upon emission reductions as a request to modify the just-issued PSD permit. Consistent with its commitment in the Final Determination, DEP's official response to Seminole states that the Department "has opened a permit revision project to include the Settlement Agreement." [Exhibit F, page 1].

---

[1] The issuance of the PSD permit was delayed due to an appeal proceeding related to DEP's certification of Unit 3 under the Power Plant Siting Act. See Seminole Elec. Coop., Inc. v. Department of Envtl. Protection, 985 So. 2d 615 (Fla. 5th DCA 2008) (remanding with instructions that DEP enter a final order approving certification). This recent judicial decision briefly described both Seminole-Sierra Club Settlement Agreements and noted the distinction between Power Plant Siting Act and PSD permit proceedings. Id. at 619, fn.1. DEP's final order approving the certification of Unit 3 issued on August 18, 2008. In re: Seminole Elec. Coop. Seminole Generating Station Unit 3 Power Plant Siting Application No. PA 78-10A2., Fla. Admin. Order No. 06-0929 (Dept. of Envtl. Prot. Aug. 18, 2008).

ARGUMENT

I. The Board Lacks Jurisdiction Over a Permit Issued by a State with an Approved PSD Permitting Program

The Board lacks jurisdiction in this matter because the Florida DEP issued the final PSD permit pursuant to an "approved," not "delegated," PSD permitting program. A particular state has an "approved" PSD program if EPA has determined that its State Implementation Plan (SIP) meets the substantive and procedural PSD permitting requirements set forth in 40 C.F.R. Part 51. 40 C.F.R. § 124.41. For approved programs, the state issues the PSD permit in accordance with state regulations. If a program is delegated, however, the state implements federal PSD regulations, and the permits are essentially treated as if they were issued by EPA for the purposes of administrative and judicial review. See EPA, Permit Programs, Consolidated 45 Fed. Reg. 33,290, 33,413 (May 19, 1980) ("A permit issued by a delegated state is still an 'EPA-issued permit'; a permit issued by a transferee State is a 'state-issued permit.'").

The Board's authority to review permits issued by EPA lies in Part 124 of EPA's regulations (see, 40 C.F.R. § 124.19), and EPA regulations clearly state that "Part 124 does not apply to PSD permits issued by an approved State." 40 C.F.R. § 124.1 (emphasis added); see also Chipperfield v. Missouri Air Conservation Comm'n, 229 S.W.3d 226, 242 (Mo. S.D. 2007) (noting that pursuant to 40 C.F.R. § 124.19 and 42 U.S.C. § 7401, "the [Board] has no authority to review any decision of [Missouri environmental agencies] applying Missouri statutes or regulations under Missouri's approved PSD program under its SIP."); In re Michigan CAFO Gen. Permit, 2003 WL 1787940, NPDES Appeal No. 02-11, (EAB March 18, 2003) ("It therefore follows that

because the permit at issue is a state permit issued by [a state agency], which administers a federally approved state NPDES program, the Board lacks jurisdiction to review the permit decision . . . . Although the permit program is federally approved, the permit at issue here is nonetheless a state permit issued under state law."). Contrary to Sierra Club's assertion that a jurisdictional grey area exists, EPA regulations make clear that Board jurisdiction only applies to a "PSD final permit" issued pursuant to Part 124. 40 C.F.R. § 124.19(a); see also 40 C.F.R. § 124.2 (defining the term "permit" to "not include . . . any permit which has not yet been the subject of final agency action, such as a 'draft permit' or a 'proposed permit.'").

This regulatory distinction between final and preliminary permits for the purposes of Board jurisdiction reflects the longstanding EPA position that the rules applicable to a permit are those in place when the final permit is issued. See In the Matter of: Homestake Mining Company, 2 E.A.D. 195 fn.8 (EAB 1986) ("The standards and guidelines for the preparation of NPDES permits must be fixed at some point in time so permit terms can become final and pollution abatement can proceed[, and] . . . the proper point in time for fixing applicable NPDES standards and guidelines is when the Regional Administrator initially issues a final permit.") In re: Phelps Dodge Corp., Verde Valley Ranch Dev. 10 E.A.D. 460, 478 fn.10 (EAB 2002) ("[T]he Region's obligation, as the permit issuer, is to apply the CWA statute and implementing regulations in effect at the time the final permit decision is made. . . ."). In sum, pursuant to the plain language of EPA regulations and in accordance with principles regarding regulatory applicability, the Board lacks jurisdiction because Florida's PSD program unambiguously was "approved" at the time DEP issued the PSD permit applicable to Seminole Unit 3.

Sierra Club, in its Motion to Hold Proceedings in Abeyance, attempts to insert a caveat into this bright-lined jurisdictional rule. Sierra Club admits that it is "not aware of any Board opinion" that directly supports its argument that the Board somehow retains jurisdiction to review DEP's issuance of the final PSD permit for Unit 3. [Motion, page 11]. Lacking applicable case law, Sierra Club attempts to correlate the procedural posture of this case to four other Board cases: In re Russell City Energy Ctr., PSD Appeal No. 08-01 (EAB, July 29, 2008); In re Rockgen Energy Ctr, 8 E.A.D. 536 (EAB 1999); In re Amerada Hess Corp. Port Reading Refinery, Facility 12 EA.D.1 (EAB 2005); and In re West Suburban Recycling & Energy Ctr. L.P., 6 E.A.D. 692 (EAB 1996). In each of these cited cases, however, the Board was considering a final permit issued by a state with problems in the state's delegated permitting program, and none of the cited cases remotely stand for the proposition that the Board has jurisdiction to review a final PSD permit issued by a state with an approved program. Cf. In the Matter of Alcoa-Warrick Power Plant, PSD Appeal No. 02-14, n.2, (EAB Mar. 5, 2003) ("Permits issued under the state program are considered creatures of state law, not federal law, and are thus reviewable under the state system of review rather than by this Board.")

In contrast to Sierra Club's cited cases, EPA has approved Florida's SIP, and in so doing explicitly determined that Florida's public notice and participation procedures are "adequate and effective." 73 Fed. Reg. at 36,347. To the extent that Sierra Club is now attempting to argue that Florida's administrative procedures somehow provide inadequate administrative remedies or that EPA should not have approved the state's PSD permitting program, its arguments are misplaced. These state procedures have not changed since Sierra Club inexcusably failed to properly avail itself of them in October 2006. If Sierra

Club disagreed with EPA's determination that state procedures for public notice and participation comply with federal regulations, then it could have brought such claims to EPA's attention; however, Sierra Club failed to even submit any comments on EPA's April 4, 2008 notice of proposed rule approving of Florida's PSD program. See 73 Fed. Reg. at 36436 ("No comments were received on EPA's proposed action.").

Sierra Club also argues that 40 C.F.R. § 52.530(d)(2), which states that Board retains jurisdiction over "[p]ermits issued by EPA prior to approval of the Florida PSD rule," supplies a "textual basis" for Board jurisdiction in this appeal, because this regulation draws "no distinction between draft and final permits." [Motion, page 13]. This argument simply ignores that in defining the term "permit," Part 124 states that the term "does not include . . . any permit which has not yet been the subject of final agency action, such as a 'draft permit' or a 'proposed permit.'" 40 C.F.R. § 124.2. In other words, 40 C.F.R. § 52.530(d)(2) only refers to the issuance of final permits and supplies no textual basis whatsoever for Board jurisdiction over Seminole's PSD permit. This appeal should thus be dismissed on grounds that the Board lacks subject matter jurisdiction over the PSD permit issued by an approved state.

II. The Board Lacks Jurisdiction Over this Matter Because No Justiciable Controversy Exists

Sierra Club bases its motion in large part on equitable concerns, arguing that the "particular circumstances" of this case could allow Seminole's PSD permit to "escape review," unless the Board or the First District Court of Appeal in Florida accepts jurisdiction. For all of its concerns regarding potential inequities created by the procedural posture of this case, however, Sierra Club's motion fails to mention the March

9, 2007 Settlement Agreement between Sierra Club and Seminole that resolves all matters related to the issuance of the PSD permit for Unit 3.

In this Settlement Agreement, Seminole committed to significant emission reductions and environmentally beneficial project upgrades, and in exchange Sierra Club agreed not to contest the final PSD permit in "any judicial or administrative forum." [Exhibit D, page 1, paragraph G]. As DEP noted in its attached Final Determination regarding the PSD permit, the Settlement Agreement "resolves all timely-received comments submitted by the applicant and the Sierra Club related to the draft PSD permit." [Exhibit E, page 1]. DEP responded to the Settlement Agreement by issuing the final PSD permit as initially noticed and then opening a permit file to incorporate the terms of the Settlement Agreement. Accordingly, with all potential claims fully settled and DEP's implementation of the Settlement Agreement underway, no justiciable controversy exists regarding Unit 3's PSD permit, and this appeal should be dismissed. See Shelby v. Superformance Int'l., Inc., 435 F.3d 42, 45 (1st Cir. 2006) ("It is . . . clear beyond hope of contradiction that a global settlement moots an action between the settling parties arising out of the same subject matter.")

Sierra Club seems to be attempting to utilize DEP's approach to implementing the Settlement Agreement (i.e. first issuing a final PSD permit without the Settlement Agreement conditions and then amending the PSD permit to incorporate the agreed-upon conditions) as providing Sierra Club an excuse to wriggle out of its agreement with Seminole and oppose all aspects of the PSD permit. Such a myopic interpretation of the Settlement Agreement, however, ignores that the Sierra Club-Seminole Settlement Agreement contemplated that DEP would issue a "final PSD permit in accordance with

the term and conditions identified in this Agreement" [Exhibit D, page 3, paragraph 11] and did not preclude accomplishing this via permit revision. The essential facts are two-fold: (1) Sierra Club and Seminole mutually expected DEP to incorporate the reductions into the permit, and (2) that is exactly what DEP is doing. Sierra Club cannot simply assume, implicitly or otherwise, that the Settlement Agreement is void

It is noteworthy that DEP's approach to implementing the Settlement Agreement (i.e., to incorporate the agreed-upon air emission reductions in the PSD permit via permit revision) creates no risk that Seminole could avoid complying with the agreed-on air emissions reductions. Amongst other things, the Settlement Agreement precludes this possibility by confirming that Seminole "agrees to be bound by these [i.e. the Settlement Agreement's] limits and conditions." [Exhibit D, page 3, paragraph 11]. This language, included as a safeguard for the Sierra Club, means that the air emissions reductions are independently enforceable under the Settlement Agreement. Moreover, DEP's approach in implementing the Settlement Agreement conditions in no way voids the agreement. See Thomas v. Fusilier, 966 So.2d 1001, 1003 (Fla. 5th DCA 2007) ("Unless there is a determination that 'time was of the essence,' a brief delay by one party in the performance of a contract covenant does not discharge the other party's contractual obligations."). It is not as if Seminole could begin constructing Unit 3 or operating it in a manner contrary to its commitments in the Settlement Agreement; rather, Seminole is working with DEP to incorporate the Settlement Agreement into its final PSD permit.

Because Seminole and Sierra Club fully settled this case, no justiciable controversy exists, and this appeal should be dismissed.

III. Sierra Club's Motion To Hold Proceedings In Abeyance, If Granted, Would Inequitably Delay The Unit 3 Project

Sierra Club reasons "that considerations of judicial efficiency in these unusual procedural circumstances, coupled with the Clean Air Act's mandate to protect public participation, warrant a stay of proceedings for the duration of the Sierra Club's Florida state court appeal." [Motion, pages 13-14]. Sierra Club's state court appeal could take a year or more to resolve, because Florida courts sometimes delay ruling on jurisdictional issues until after the merits of the case are presented and considered. See, e.g. Legal Envtl. Assistance Found., Inc., v. Clark, 668 So.2d 982 (Fla. 1996) (considering the standing of an environmental advocacy group). A stay in this Board matter would potentially result in affording Sierra Club five bites at the apple: (1) Sierra Club had notice of the opportunity to challenge the draft PSD permit in a state administrative hearing, but it inexcusably failed to timely do so; (2) in its denial of Sierra Club's untimely petition for administrative hearing, DEP gave Sierra Club the opportunity to provide an excuse for its late-filed petition or appeal DEP's denial and Sierra Club declined; (3) Sierra Club then entered into negotiations with Seminole that culminated in the March 2007 settlement agreement, in which Seminole committed to various emission reductions, and Sierra Club committed not to challenge the final PSD permit; (4) despite having agreed not to contest the final PSD permit, Sierra Club filed an appeal in state court, which may hear continued evaluation of the merits of the case (i.e., initial brief, response brief, answer brief, and oral argument) along with the state law jurisdictional issue; (5) at the close of the state appellate proceedings, Sierra Club requests the opportunity to challenge the final PSD permit before the Board, reasoning that "[o]nly if

the Florida court declines to consider the merits of [the] Seminole permit would the Board's involvement likely to [sic] be necessary to resolve this matter." [Motion, page 13] (emphasis added).

If Sierra Club was truly interested in equitably and efficiently resolving this matter, it would join Seminole and DEP in implementing the Settlement Agreement instead of seeking to tie up the Unit 3 project in serial litigation. Affording the Sierra Club an unjustified opportunity to participate sequentially in two appeals (and asking for one to be placed in abeyance while it argues the other) could result in unwarranted delay in the issuance of the PSD permit to such a degree that the passage of time would be prejudicial to the Unit 3 project. Sierra Club, having settled the PSD issues with Seminole and having sat on its potential rights under state law, should not be allowed to "run out the clock" on the Unit 3 project.

WHEREFORE, Seminole respectfully requests that the Board deny Sierra Club's Motion to Hold Proceeding in Abeyance and instead dismiss this appeal, because the Board lacks jurisdiction and no justiciable controversy exists in this fully settled matter.

Respectfully submitted this 3rd day of November, 2008.

James S. Alves, Florida Bar No. 443750
David W. Childs, Florida Bar No. 013354
Hopping Green & Sams
Post Office Box 6526
Tallahassee, FL 32314
(850) 222-7500
(850) 224-8551 (facsimile)
jalves@hgslaw.com
dchilds@hgslaw.com

Attorneys for Seminole Electric Cooperative, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Leave to Intervene and Response to Sierra Club's Motion to Hold Proceedings in Abeyance, has bee furnished via U.S. Mail this 3rd day of November, 2008, to:

Joanne Spalding, Esq.
Kristen Henry, Esq.
Counsel for Sierra Club
85 Second Street
San Francisco, CA 94105-3441

David G. Guest, Esq.
Counsel for Sierra Club
P. O. Box 1329
Tallahassee, FL 32302

Brian L. Doster
Air and Radiation Law Office
Office of General Counsel
Environmental Protection Agency
1200 Pennsylvania Ave. N.W.
Washington, DC 20460

Patricia E. Comer, Esq.
Department of Environmental Protection
3900 Commonwealth Blvd., MS 35
Tallahassee, FL 32399-3000

Trina Vielhauer
Department of Environmental Protection
Bureau of Air Regulation
2600 Blair Stone Road, MS #5505
Tallahassee, FL 32399-3400

Vera Kornylak
Mary J. Wilkes
U.S. EPA, Region 4
61 Forsyth St., S.W.
Atlanta, GA 30303-8960

James R. Frauen, Project Director
Seminole Electric Cooperative, Inc.
1613 North Dale Mabry Highway
Tampa, FL 33614

Attorney