IN RE SEMINOLE ELECTRIC COOPERATIVE, INC.

PSD Appeal No. 08-09

ORDER DENYING REVIEW

Decided September 22, 2009

Syllabus

Sierra Club petitioned the Environmental Appeals Board ("EAB" or "Board") to review the Florida Department of Environmental Protection ("FDEP") decision to issue a prevention of significant deterioration ("PSD") permit, under Clean Air Act section 165, 42 U.S.C. § 7475, to Seminole Electric Cooperative, Inc., ("Seminole"). The permit (hereinafter "Seminole permit") authorizes Seminole to construct a 750-megawatt pulverized coal-fired supercritical steam generating unit, an electric power plant ("EPP"), at the existing Seminole Generating Station seven miles north of Palatka, Florida. At the time of final permit issuance on September 5, 2008, FDEP administered a PSD program for EPPs that was approved by the U.S. Environmental Protection Agency ("EPA" or "Agency"). Thus, FDEP issued the Seminole permit under state authority. However, when the draft permit was noticed for public comment on September 8, 2006, FDEP administered the PSD permit program for EPPs as a delegate of EPA Region 4 ("Region") and was thus subject to federal law and regulation.

At least as of the time the draft Seminole permit was noticed for comment, Florida permit review procedures required a particular step to preserve the right to state judicial review of the final permit: timely filing with FDEP of a petition for an administrative hearing on the draft permit. Federal PSD procedures, which were applicable during the draft phase of the Seminole permit rather than the Florida procedures, do not include this filing requirement to preserve judicial review of the final permit. Sierra Club appeared to comply with the applicable federal requirements to preserve judicial review. However, when Sierra Club filed a petition for an administrative hearing with FDEP in October 2006, FDEP denied it as untimely for review in the state forum.

In its petition to the Board for review of the Seminole permit, Sierra Club alleges FDEP failures to adequately respond to comments and flaws in the best available control technology and maximum achievable control technology analyses. FDEP responded by seeking summary disposition on the ground that the Board lacks jurisdiction to review the Seminole permit. FDEP argues that it issued the Seminole permit under an EPA-approved state PSD program rather than under delegation from EPA. Despite acknowledging that 40 C.F.R. part 124 does not ordinarily apply to permits issued by states operating approved PSD programs, Sierra Club counters FDEP's challenge by asserting that a "savings clause" exists in the Agency's approval of the Florida PSD program and extends jurisdiction to the Board to review the Seminole permit. The alleged savings clause, 40 C.F.R. § 52.530(d)(2), incorporates federal permitting procedures, including federal permit review procedures, into the Florida State Implementation Plan ("SIP") for "[p]ermits issued by EPA prior to approval of the Florida PSD rule." Specifically, Sierra Club argues that the

lack of a definition for "draft permit" in the EPP PSD program approval that is separate from the definition of "permit" indicates that the Agency intended that "draft permits" be included with "permits" when construing section 52.530(d)(2). Additionally, Sierra Club argues that "unjust results" could arise should the Board deny review because FDEP and Seminole also seek to bar judicial review of the Seminole permit in Florida court.

EPA's approval of Florida's EPP PSD program does not explicitly state whether the Board or the Florida tribunal is the appropriate forum for review of the Seminole permit. FDEP and Seminole asserted in the Florida court action that Sierra Club's untimely petition for a State administrative hearing waives the right to state judicial review of the Seminole permit. Accordingly, the Board considers whether it is the appropriate forum for administrative review under these circumstances where a petitioner appears to have abided by all applicable federal program requirements during the draft permit phase, the final permit is issued by a federally-approved state program, and there are attempts to bar state judicial review of the final permit with the claim that the petitioner failed to follow a purely state law procedure that was not required by the then-applicable federal program during the draft permit phase.

Held: The Board denies review of the Seminole permit.

Neither the language Sierra Club identifies as a savings clause nor Sierra Club's argument that Board review is essential due to FDEP's and Seminole's attempts to bar state judicial review of the final permit alters the clear statement in 40 C.F.R. § 124.1(e) that the federal PSD permit review procedures found at part 124 do not apply to PSD permits issued by EPA-approved state permitting authorities. The PSD permit-specific provisions of section 124.41 and the general permit provisions of section 124.2(a) each define "permit" and "draft permit" separately as separate regulatory categories. A PSD permit is an "issued" permit, whereas the part 124 regulations consistently characterize draft permits as "prepared." Moreover, the use of the word "permit" in the codification of the Florida EPP PSD program approval, 40 C.F.R. § 52.530, does not confer the Board jurisdiction to review the Seminole permit. "[P]ermit" in section 52.530(d)(2) does not include "draft permits," and the section does not "save" for review under federal procedures a permit that was prepared in draft under a delegated PSD program and issued in final by an approved PSD program.

The Board's decision is made without consideration of FDEP's and Seminole's attempts to bar judicial review of the final permit in Florida court. However, we note the Region's clear admonition that "when a party such as Sierra Club has preserved an opportunity for [judicial review of a PSD permit decision] 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." According to the Region, "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."

Before Environmental Appeals Judges Edward E. Reich, Charles J. Sheehan, and Anna L. Wolgast.

Opinion of the Board by Judge Sheehan:

This case arises under unusual procedural circumstances and presents a question pertaining to the respective jurisdictions of federal and state authorities

in administering the prevention of significant deterioration ("PSD") permitting program.

On September 5, 2008, the Florida Department of Environmental Protection ("FDEP") issued a PSD permit to Seminole Electric Cooperative, Inc. ("Seminole") for the construction of a 750-megawatt pulverized coal-fired supercritical steam generating unit, an electric power plant ("EPP"), at the existing Seminole Generating Station seven miles north of Palatka, Florida ("Seminole permit"). At the time of the final permit issuance, FDEP administered a PSD program for EPPs that was approved by the U.S. Environmental Protection Agency ("EPA" or "Agency"), and thus issued the permit under state authority. However, during the pendency of the permit proposal and public comment period, Florida implemented a delegated PSD program (rather than an approved program) for EPPs, subject to federal law and regulation, because, at that time, EPA had not yet approved Florida's EPP PSD program. Sierra Club now petitions the Environmental Appeals Board ("Board") to review and remand the Seminole permit. FDEP seeks summary disposition on the ground that the Board lacks jurisdiction to review a permit issued under state authority, although FDEP also seeks, in a parallel state court action, to bar Sierra Club from obtaining review of the Seminole permit due to Sierra Club's alleged failure to abide by a longstanding state procedure not part of the federal PSD program.

Accordingly, the issue is the Board's authority to review a state-issued permit under these novel facts. Because our taking jurisdiction would be at variance with a central element of an approved state program – exclusive state jurisdiction over appeals of its final PSD permitting decisions – and because we find no basis in the Clean Air Act ("CAA") to support such a variance, we decline to review Sierra Club's petition.

I. *BACKGROUND*

A. *Statutory and Regulatory Framework*

In 1977, Congress established the PSD program to regulate air pollution in areas of the country designated as in "attainment" or as "unclassifiable" with respect to federal air quality standards called "national ambient air quality standards" ("NAAQS").[1] *See* CAA §§ 160-169, 42 U.S.C. §§ 7470-7479 (establishing PSD program). Congress charged EPA with developing NAAQS for air pollutants

[1] In geographical areas deemed to be in "attainment" for a particular pollutant, the ambient air quality meets the NAAQS for that pollutant. CAA § 107(d)(1)(A)(ii), 42 U.S.C. § 7407(d)(1)(A)(ii). In areas designated "unclassifiable," air quality cannot be classified on the basis of available information as meeting or not meeting the NAAQS. CAA § 107(d)(1)(A)(iii), 42 U.S.C. § 7407(d)(1)(A)(iii).

whose presence in the atmosphere above certain concentration levels could "reasonably be anticipated to endanger public health and welfare." CAA § 108(a)(1)(A), 42 U.S.C. § 7408(a)(1)(A); *see* CAA § 109, 42 U.S.C. § 7409. NAAQS are "maximum concentration 'ceilings' measured in terms of the total concentration of a pollutant in the atmosphere." Office of Air Quality Planning & Standards, U.S. EPA, *New Source Review Workshop Manual* C.3 (draft Oct. 1990) ("NSR Manual").[2] To date, EPA has promulgated NAAQS for six air pollutants: sulfur oxides, particulate matter, nitrogen dioxide, carbon monoxide, ozone, and lead. 40 C.F.R. §§ 50.4-.12.

Under the CAA, those who wish to construct "major emitting facilities"[3] in "attainment" or "unclassifiable" areas must obtain preconstruction approval, in the form of PSD permits, to build such facilities. CAA § 165, 42 U.S.C. § 7475. Applicants for PSD permits must demonstrate, through analyses of the air quality impacts associated with the construction and operation of proposed new sources, that emissions from their facilities will not cause or contribute to a violation of any applicable NAAQS or PSD "increment."[4] CAA § 165(a)(3), 42 U.S.C. § 7475(a)(3); 40 C.F.R. § 52.21(k)-(m); *see* NSR Manual ch. C. In addition, applicants for PSD permits must meet emissions limitations reflecting the "best available control technology," or "BACT," to minimize pollutant emissions by the new source in amounts greater than applicable "significant" levels established by the PSD regulations. CAA § 165(a)(4), 42 U.S.C. § 7475(a)(4); 40 C.F.R. § 52.21(j)(2). Finally, Congress intended "to assure that any decision to permit increased air pollution in any area to which [the PSD program] applies is made only after careful consideration of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process." CAA § 160(5), 42 U.S.C. § 7470(5).

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[2] The NSR Manual has been used as a guidance document in conjunction with new source review workshops and training and as a guide for state and federal permitting officials with respect to PSD requirements and policy. Although it is not a binding Agency regulation, the Board has looked to the NSR Manual as a statement of the Agency's thinking on certain PSD issues. *E.g.*, *In re RockGen Energy Ctr.*, 8 E.A.D. 536, 542 n.10 (EAB 1999); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 129 n.13 (EAB 1999).

[3] A "major emitting facility" is a stationary source in any of certain listed stationary source categories that, in new or modified form, emits or has the "potential to emit" 100 tons per year ("tpy") or more of any air pollutant, or any other new or modified stationary source that has the potential to emit 250 tpy or more of any air pollutant. *See* CAA § 169(1), (2)(C), 42 U.S.C. § 7479(1), (2)(C).

[4] PSD increments represent the "maximum allowable *increase* in concentration" that may occur above a baseline ambient air concentration for a pollutant. NSR Manual at C.3; *see* 40 C.F.R. § 52.21(c) (increments for six regulated air pollutants).

B. *Relevant History of PSD Program for Electric Power Plants in Florida*[5]

Although EPA Region 4 ("Region") approved Florida's PSD regulations into the State Implementation Plan ("SIP") in 1983,[6] 48 Fed. Reg. 52,713 (Nov. 22, 1983), the Region later found that a separate law, the Florida Electrical Power Plant Siting Act ("PPSA"), Florida Statutes §§ 403.501-.518, conflicted with the Florida SIP and impeded FDEP's ability "to implement[] and enforce[] * * * the [s]tate's PSD program * * * for [electric] power plants." PSD Requirements for Power Plants Subject to the PPSA, 72 Fed. Reg. 29,273, 29,274 (May 25, 2007). Accordingly, while the conflict existed and for most of the Florida PSD program's history, FDEP and its predecessor[7] operated the federal PSD program for EPPs under either a full or partial delegation of permitting authority from the Region.[8]

The Florida Legislature made "various attempts to amend the PPSA to correct the conflict," 72 Fed. Reg. at 29,274, including a 1993 amendment. 1993 Fla. Sess. Law Serv. ch. 93-94, § 10 (amending PPSA). In light of this amendment, FDEP sought full federal delegation of the EPP PSD program, which the Region

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[5] A complete and detailed history of the Florida PSD program for EPPs is provided in the rulemakings approving the EPP PSD regulations into the State Implementation Plan. *See* Approval and Promulgation of Florida PSD Implementation Plans, 73 Fed. Reg. 36,435, 36,437 (June 27, 2008); Approval and Promulgation of Florida PSD Implementation Plans, 73 Fed. Reg. 18,466, 18,471 (proposed Apr. 4, 2008).

[6] *See generally* 40 C.F.R. §§ 52.519-.568 (Florida SIP); Fla. Admin. Code Ann. rr. 62-204.100 to -297.620 (Florida PSD regulations approved by EPA).

[7] The Florida Department of Environmental Regulation ("FDER") is the predecessor agency to the FDEP. We refer primarily to FDEP in this opinion, even for those periods prior to FDEP's existence.

[8] The Region's partial delegations of the EPP PSD program authorized FDEP to conduct only the technical and administrative portions of the federal program, reserving for EPA the authority to issue actual PSD permits. *E.g.*, Letter from Greer C. Tidwell, Regional Administrator, EPA Region 4, to Carol M. Browner, FDER, at 2 (Aug. 7, 1992) ("1992 Tidwell Partial Delegation Letter") (revoking full delegation and reverting to partial delegation); Letter from Jack E. Ravan, EPA Region 4, to Victoria J. Tschinkel, FDER (Nov. 5, 1985) (granting partial delegation); Letter from Rebecca W. Hanmer, Regional Administrator, EPA Region 4, to Jacob D. Varn, FDER (Oct. 27, 1980) (granting partial delegation), *available at* Partial Delegation of PSD Authority to Florida, 46 Fed. Reg. 10,204 (Feb. 2, 1981). The Region granted full delegations in 1986 and 1993. *See* Florida Electrical Power Plant Siting Act Extricating the Implementation, 51 Fed. Reg. 37,972, 37,972-73 (Oct. 27, 1986) ("[FDEP] will henceforth issue PSD construction permits to all sources reviewed under the PPSA for which complete PPSA certificate applications are submitted."); Letter from Patrick Tobin, Acting Regional Administrator, EPA Region 4, to Virginia B. Weatherell, Secretary, FDEP, at 3 (Oct. 26, 1993); *see also* 1992 Tidwell Partial Delegation Letter at 2 (describing full delegation granted on September 25, 1986).

granted on October 26, 1993.[9] Letter from Patrick Tobin, Acting Regional Administrator, EPA Region 4, to Virginia B. Weatherell, Secretary, FDEP, at 3 (Oct. 26, 1993) ("1993 Tobin Full Delegation Letter").

Over a decade passed, during which FDEP issued PSD permits pursuant to the 1993 full delegation. The final stretch to an approved State EPP PSD program commenced on February 3, 2006, when FDEP requested approval of the Florida PSD permitting program for EPPs.[10] FDEP, *Proposed Revision to SIP*, No. 2006-01, at 27 (Feb. 3, 2006); *see* Approval and Promulgation of Florida PSD Implementation Plans, 73 Fed. Reg. 18,466, 18,466-67 (proposed Apr. 4, 2008). This request was based on the 1993 amendments to the PPSA. 73 Fed. Reg. at 18,472. After an initial attempt on May 27, 2007, to issue a direct final rule approving the Florida PSD permitting program for EPPs, *see* 72 Fed. Reg. at 29,275, on April 4, 2008, EPA proposed to approve the inclusion of EPPs in the PSD portion of Florida's SIP. 73 Fed. Reg. at 18,472. This time, no comment being received, and noting the State's "adequate and effective procedures for full implementation of the State's PSD program for [EPPs,]" EPA approved the program, effective July 28, 2008. Approval and Promulgation of Florida PSD Implementation Plans, 73 Fed. Reg. 36,435, 36,437 (June 27, 2008).

C. *Administration of PSD Program: Delegated or Approved States*

A state may issue a PSD permit under either of two authorities: as EPA's delegate, or pursuant to a state PSD program approved by EPA. *In re Milford Power Plant*, 8 E.A.D. 670, 673 (EAB 1999). In the former event, state-issued permits are federal permits. *In re Hillman Power Co.*, 10 E.A.D. 673, 675 (EAB 2002). The state acts on behalf, or "in the shoes," of EPA. Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,413 (May 19, 1980). In the latter event, a state PSD program is "approved into" the state's SIP only after determined by EPA to meet all applicable federal standards.[11] The state thereafter processes PSD

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[9] The Region conferred "full delegation of the permitting authority for sources subject to both the federal [PSD] regulations and the [PPSA]," determining that the 1993 PPSA amendments clarified that "FDEP [was] the final permitting authority for PSD and new source review permits [in Florida] and [could] act in a manner different from the PPSA Siting Board if Florida's PSD or new source review regulations required[d] such a different action." 72 Fed. Reg. at 29,275.

[10] The request coincided with Florida's SIP submission to EPA addressing the 2002 new source review reform rules. 73 Fed. Reg. at 18,466.

[11] Although "most states have received EPA approval for their PSD programs," 72 Fed. Reg. at 29,275, PSD program approval is not lightly given. Extensive requirements must be put in place by the state. *See* 40 C.F.R. § 51.166. These align state-approved programs in a "largely-identical" way to the federal program. NSR Manual at 1; *see also* 73 Fed. Reg. at 18,471 (proposing EPA approval of Florida EPP PSD program). The state then puts the proposed program through public notice and hearing before submitting it to EPA. CAA §§ 110(a)(1), (*l*), 42 U.S.C. §§ 7410(a)(1), (*l*). Only if EPA
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permit applications under its own authority. *Milford*, 8 E.A.D. at 673 (citing CAA §§ 110, 116, 161, 42 U.S.C. §§ 7410, 7416, 7471).

Depending on the capacity – as EPA delegate or SIP-approved – the state stands in a posture of greater or lesser independence of EPA.[12] Delegated states "in the shoes" of federal regulators naturally occupy the more dependent side of this scale. While Florida operated a fully delegated EPP PSD permit program, for example, because the State carried out EPA's program, EPA charged the State with following EPA's numerous 40 C.F.R. part 124 procedures for public participation and permit issuance. *E.g.*, 1993 Tobin Full Delegation Letter at 3. General EPA oversight was also ensured by requiring that all preliminary and final permit determinations and their supporting documentation be provided to EPA, as well as quarterly status reports on all facilities subject to the program. *Id.* EPA clearly stated its intention to step in and take appropriate action in the event of actions "inconsistent" with the delegation, or to revoke the delegation in the event of inadequate or ineffective state implementation. *Id.* at 3-4. Lastly, recognizing sharp boundaries between delegated and approved PSD programs, EPA cautioned that program delegation "should not be construed as a [PSD approved program] transfer." *Id.* at 5.

It is such "transfer" of authority from federal to state hands that fundamentally sets apart the delegated state program from the approved state program. "A permit issued by a delegate is still an 'EPA-issued permit'; a permit issued by a transferee [s]tate is a '[s]tate-issued permit.'"[13] 45 Fed. Reg. at 33,413. As EPA characterized Florida's status upon approving the EPP PSD program, the State thereafter operates not on EPA's behalf, but "in lieu of" the federal government program. 73 Fed. Reg. at 36,437. An approved state is "empower[ed] * * * to administer [the program] under its own authority." *In re Carlton*, 9 E.A.D. 690, 691 n.2 (EAB 2001).

Once so "empowered" by approval, and reflecting strong congressional intent that "EPA may not run roughshod over the procedural prerogatives that the [CAA] has reserved to the states," *Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028, 1036 (7th Cir. 1984), a state PSD program runs in a manner largely independent of EPA oversight. EPA retains some levers to exert necessary oversight

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finds that the program ultimately submitted by the state meets federal standards is it incorporated into the SIP. CAA §§ 110, 42 U.S.C. §§ 7410.

[12] The Clean Air Act's general tenor is one of "'partnership between the states and the federal government.'" *Virginia v. EPA*, 108 F.3d 1397, 1408 (D.C. Cir. 1997) (quoting *Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028, 1036 (7th Cir. 1984)).

[13] A pre-existing delegation is withdrawn at the point of program approval. *See, e.g.*, 73 Fed. Reg. at 36,457 (Florida delegation withdrawal).

or control, but they are few, generally invoked only for permit-specific issues, and impose a not-insignificant burden should EPA choose to intervene and wield them. One option is a "SIP call," with EPA requiring a revised state plan to correct a "substantially inadequate" SIP. CAA § 110(k)(5), 42 U.S.C. § 7410(k)(5). Incumbent on EPA, however, is first producing a "finding" of program inadequacy. *Id.* Another option is EPA wielding enforcement authority to prevent facility construction. CAA §§ 113, 167, 42 U.S.C. §§ 7413, 7477.

D. *Jurisdiction to Review PSD Permits*

The carefully crafted division between federal and state PSD program spheres persists for designating the sovereign with authority to pass judgment on final permits. Implementing regulations provide the permit review roadmap.

Because part 124 governs appeals from federally issued PSD permits, and a delegated state "stands in [federal] shoes," 45 Fed. Reg. at 33,413, administrative appeals of PSD permits issued by delegated states are committed to the Environmental Appeals Board.[14] 40 C.F.R. § 124.19; *Hillman*, 10 E.A.D. at 675 (stating that delegated state permits are considered EPA-issued and proceed on appeal to Board). For approved programs, appellate review of PSD permits takes an appropriately separate track. The regulation could not be more explicit. "Part 124 does not apply to PSD permits issued by an approved [s]tate." 40 C.F.R. § 124.1(e). "[Approved state program] permits are regarded as creatures of state law that can be challenged only under the state system of review." *Carlton*, 9 E.A.D. at 693. They "fall[] outside the body of federal permits subject to Board review" since the state acts under state authority. *Id.*; *accord In re Alcoa-Warrick Power Plant*, PSD Appeal No. 02-14, at 3 n.2 (EAB Mar. 5, 2003) (Order Denying Petition for Review); *see also In re Michigan CAFO General Permit*, NPDES Appeal No. 02-11, at 3-4 (EAB Mar. 18, 2003) (Order Dismissing Petition for Review) (declining to review NPDES permit issued pursuant to approved state program); Environmental Appeals Board, *Practice Manual* § III.B, at 27 (Nov. 1994) ("EAB Practice Manual") (citing *In re Great Lakes Chem. Corp.*, 5 E.A.D. 395, 396-97 (EAB 1994)).

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[14] Board jurisdiction over delegated state PSD permits, however, is "not all-encompassing * * * [, but] specifically restrict[ed] * * * to review of federal requirements." *Milford*, 8 E.A.D at 673. For example, the Board lacks authority to review conditions of a PSD permit adopted solely pursuant to state law. *See In re Sutter Power Plant*, 8 E.A.D. 680, 688, 690 (EAB 1999); *see also In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 167-68 (EAB 1999) ("The Board may not review, in a PSD appeal, the decisions of a state agency made pursuant to non-PSD portions of the CAA or to state or local initiatives and not otherwise relating to the permit conditions implementing the PSD program.").

E. *Seminole Permitting Decision and Subsequent Procedural History*

1. *Draft Permit Proceedings*

On September 8, 2006, the *Palatka Daily News* published notice of FDEP's intent to issue the Seminole permit. The notice announced public availability of the draft permit and the period in which FDEP would accept written comments concerning it. FDEP, Public Notice of Intent to Issue Air Permit No. PSD-FL-375; *see also Sierra Club v. Seminole Elec. Coop.*, OGC Case No. 06-2157, at 1 (FDEP Oct. 31, 2006) (Order Dismissing Petition with Leave to Amend) ("FDEP Order") (presenting factual background). Sierra Club timely filed comments in accordance with the then-applicable 40 C.F.R. part 124 procedures for public participation. Sierra Club's Motion to Hold Proceedings in Abeyance at 7 ("Motion for Abeyance").

Although Florida's delegated status at the time of the proposed permit meant that federal, not state, requirements applied, Florida law appears to include requirements beyond the delegated program requirements, which requirements would apply solely as a matter of state law. These mandate petitions to FDEP within fourteen days of "receipt of notice of an agency action" – including publication of the intent to issue a PSD permit – or the prospective petitioner's right to request a hearing before a state administrative law judge is waived. Fla. Admin. Code Ann. r. 62-110.106(3)(a)(1)-(b). This fourteen-day deadline is apparently a prerequisite to obtaining "party status," itself a prerequisite to State judicial review of a PSD permit. Fla. Stat. §§ 120.52(13)(a)-(b), 120.68(1); Fla. Admin. Code Ann. r. 62-110.106(3)(b).

Sierra Club petitioned FDEP for a state administrative hearing under these exclusively state rules not within fourteen days, but over a month after the notice of the draft permit had been published. Sierra Club's Motion for Enlargement of Time and Petition for Administrative Hearing, *Sierra Club v. Seminole Elec. Coop.*, OGC Case No. 06-2157 (FDEP Oct. 31, 2006); *see also* FDEP Order at 1; Motion for Abeyance at 8. Sierra Club also moved to extend the administrative hearing request deadline so that its petition for review could be considered timely. FDEP Order at 1-3; Motion for Abeyance at 8. FDEP denied Sierra Club's request for a deadline extension for failure to show cause for excusable neglect and dismissed Sierra Club's petition as untimely filed. FDEP Order at 2.

2. *Final Permit Proceedings*

FDEP – by then administering a fully approved PSD program for EPPs – issued the final Seminole permit on September 5, 2008. On October 3, 2008, Sierra Club filed an action in Florida state court, challenging the Seminole per-

mit.[15] On October 6, 2008, Sierra Club petitioned the Board for review. *See generally* Sierra Club's Petition for Review ("Petition"). The Petition alleges FDEP failures to adequately respond to comments and flaws in the BACT and maximum achievable control technology analyses. *Id.* at 4. FDEP responded to the Petition by seeking summary disposition. FDEP's Request to Deny Review and Motion for Summary Disposition. The Board lacks jurisdiction to review the Seminole permit, FDEP argues, because the permit was issued by an approved state PSD program rather than by, or under delegation from, EPA. FDEP's Brief in Support of Its Request to Deny Review and Motion for Summary Disposition ("FDEP Br."). Therefore, claimed FDEP, the Board is not the appropriate forum for Sierra Club's permit review request. *Id.* at 2.

Sierra Club subsequently requested that the Board hold its proceedings in abeyance to allow Sierra Club's concurrently filed state court challenge to proceed. Motion for Abeyance at 1, 10. Pressing its case for Board jurisdiction, Sierra Club argues that EPA's approval of the Florida EPP PSD program, codified at 40 C.F.R. § 52.530(d)(2), reserved federal jurisdiction over final permits whose draft permits were prepared prior to EPP PSD program approval. Motion for Abeyance at 12-13. It also asserts that the delegation-to-approval structure of the CAA and its implementing regulations were not intended to shield a permit from review. Sierra Club's Reply to FDEP's Request to Deny Review at 2 ("SC Reply to FDEP Br.").

By motion dated November 3, 2008, Seminole requested leave to intervene in the proceedings and to respond to Sierra Club's motion for abeyance. Sierra Club sought leave on November 13, 2008, to reply to Seminole's motion. The Board did not receive a response from FDEP concerning Sierra Club's motion for abeyance.[16]

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[15] On September 9, 2009, the Florida First District Court of Appeal dismissed the state action, stating that "Sierra Club failed to secure party status in the agency action below and therefore lacks standing." *Sierra Club v. Fla. Dep't of Envtl. Prot.*, No. 1D-08-4881 (Fla. Dist. Ct. App. Sept. 9, 2009).

[16] The Board generally allows "the permit applicant to respond to a petition filed by a third-party petitioner if the permit applicant has filed a request to respond." EAB Practice Manual § III.D.1, at 30-31. The Board has also granted permittees' motions for intervention. *See, e.g.*, *In re Gen. Motors, Inc.*, 10 E.A.D. 360, 368-69 (EAB 2002); *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 470 (EAB 2002). Accordingly, the Board grants Seminole's Motion for Leave to Intervene and accepts for filing the Response to Sierra Club's Motion to Hold Proceedings in Abeyance. The Board also grants Sierra Club's motion for leave to file a reply to Seminole's response, and accepts Sierra Club's reply brief for filing.

By motion dated July 2, 2009, Seminole also moved to dismiss the Petition as moot on the ground that FDEP had issued a "Draft Permit Revision to Seminole's PSD permit [that] incorporates the terms of a Settlement Agreement between Seminole and Sierra Club regarding the PSD permit." Seminole Motion to Dismiss at 1. On July 17, 2009, Sierra Club responded in opposition to this motion. Sierra Club's Response to Seminole Motion to Dismiss.

On July 16, 2009, at the Board's order, the Region, in consultation with the EPA Office of General Counsel, filed a brief that addressed several Board questions regarding reviewability in the circumstance of a draft permit noticed for public comment under a delegated PSD program but issued as a final permit after the approval of the program into the state SIP. Region's Brief Regarding Reviewability of Permit ("Region's Br."); *see also* Order Requesting EPA Region 4 to File Brief (May 19, 2009).[17] The case now stands ready for Board decision.

II. *DISCUSSION*

Only in the past year did Florida's exertions to achieve approved EPP PSD program status bear final fruit. Efforts spanning some thirty years, including numerous legislative enactments and regulatory initiatives, ended when Florida's EPP PSD program was approved into the SIP. Sierra Club now petitions the Board to exercise its appellate powers over a matter arguably exclusively committed to state court.

A. *Sierra Club's Argument*

Sierra Club centers on the terms of EPA's approval of Florida's EPP PSD program. It reads into an express exclusion from the regulation approving the transfer of the program to the State – for "[p]ermits issued by EPA prior to approval of the Florida PSD [program]," 40 C.F.R. § 52.530(d)(2) – both final permits issued by the time of program approval and permits in "draft" at the time of approval. Motion for Abeyance at 6; Sierra Club's Reply in Support of Its Motion to Hold Proceedings in Abeyance 4 ("SC Reply Supporting Motion for Abeyance"). Section 52.530(d)(2), the contention goes, functions as a "savings clause" for such draft permits, preserving them for Board review as if permanently retaining their initial, delegated program character.

Sierra Club's reasoning draws on EPA's silence. According to Sierra Club, had EPA not intended to retain jurisdiction over draft permits, it would have expressly stated that draft permits were not so retained. Motion for Abeyance at 13; SC Reply Supporting Motion for Abeyance at 4. Because EPA did not single out draft permits when referring to "permits issued" in section 52.530(d)(2), EPA must have meant that drafts be considered "permits issued" forever subject to part 124 review. Motion for Abeyance at 12-13. This "savings clause" argument

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[17] Sierra Club sought leave to file a reply to the Region's brief, and Seminole sought leave to reply to Sierra Club, both of which the Board now grants. The Board further accepts for filing Sierra Club's Reply to the Region's Brief Regarding Reviewability of the Permit ("SC Reply to Region's Br.") and Seminole's [Surreply] to Sierra Club's Reply to the Region's Brief Regarding Reviewability of the Permit.

Sierra Club finds in tandem with the definition of "permit" generally applicable to the PSD permitting process. *Id.* at 13; SC Reply Supporting Motion for Abeyance at 4; *see also* 40 C.F.R. § 124.41. Sierra Club argues that the PSD "permit" definition also can "easily be read" to include draft permits since, as the Florida program approval "savings clause," it does not explicitly exclude them. SC Reply Supporting Motion for Abeyance at 3-5. Therefore, because FDEP prepared the draft Seminole permit under then-delegated authority from EPA, Sierra Club argues, federal part 124 administrative review requirements persist even though FDEP issued the final Seminole permit *after* receiving and operating under PSD program approval.

Additionally, Sierra Club argues that if Seminole's and FDEP's waiver and jurisdiction arguments before the Florida tribunal and Board, respectively, prevail, the Seminole permit would escape review. According to Sierra Club, such a result would be "unjust" and the "unintended consequences" of EPP PSD program approval. SC Reply to FDEP Br. at 2. Allowed to go unchecked, warns Sierra Club, this would "vitiate the terms of the federal delegation then applicable and frustrate the Clean Air Act's mandate for public participation." Motion for Abeyance at 10. Sierra Club argues that the usual rule precluding Board review of permits issued by an approved state should yield in the "unique situation" this case poses; otherwise, the "integrity" of the permitting regime, and public participation in particular, will suffer. *Id.* at 10-11.

The sum of its regulatory interpretation and justice arguments is that passage of Florida's EPP PSD program from federal to state hands, and Florida's assumption of the prerogative to review PSD permits in its state courts, should be nullified as to the Seminole permit to allow Board review in the event that the Florida court denies review.[18]

B. *Analysis*

The basic framework for resolving issues of jurisdiction is long settled. Permits issued by an approved state program may be challenged only in a state forum; permits issued under a delegated state program may be reviewed only by the Board. *E.g.*, 40 C.F.R. § 124.1(e) (providing that part 124 is inapplicable to "PSD permits issued by an approved [s]tate"); Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,413 (May 19, 1980) (noting that part 124 does not apply to state-approved PSD permits); *In re Carlton*, 9 E.A.D. 690, 693 (EAB 2001) (pro-

[18] The Board notes the issuance of the Florida First District Court of Appeal's September 9, 2009 order. *See* note 15, *supra.* Additionally, in reply to the Region's statement that "[t]he public notice for the Seminole PSD permit was flawed," Region's Br. at 23, Sierra Club "urges [the] Board to recognize that FDEP's flawed process resulted in an invalid permit and to refuse to condone post-hoc rationalizations or half measures to save this defective permit." SC Reply to Region's Br. at 5.

viding that permits issued by approved state programs "are regarded as creatures of state law that can be challenged only under the state system of review"). Sierra Club itself recognizes this reality: "Ordinarily, the Board would not review permits issued under a state SIP." Motion for Abeyance at 10. Nonetheless, Sierra Club argues that the appropriate forum for administrative review is altered when a petitioner has abided by all applicable federal program requirements during the draft permit phase and the final permit is issued by a federally approved state program. The Board considers whether Board review is essential, at least under the circumstances of this case, where the state permitting authority and the permit applicant have attempted to bar state court judicial review of the final permit with the claim that the petitioner failed to follow a purely state law procedure, not required by the then-applicable federal program, during the draft permit phase.

1. *Textual Authority*

Sierra Club advances its "savings clause" argument by grafting before "permits issued," the words employed by EPA's Florida EPP PSD approval and general part 124 procedures for PSD review, the prior, unuttered word "draft," thereby adding draft PSD permits to those held for federal review even after a state is approved for PSD program administration and issues the final permit. According to Sierra Club, refusing to recognize this reading would lead to "unjust results" of denied Board review. We assess these claims against the CAA's regulatory underpinnings.

Correctly, Sierra Club notes that EPA's regulation approving Florida's EPP PSD program, 40 C.F.R. § 52.530, and the part 124 definition of "PSD permit," *id.* § 124.41, lack an "explicit exclusion" for draft permits. SC Reply Supporting Motion for Abeyance at 3-4. But pairing these two truths to extract another – that "PSD permit" may "easily be read" to "save" for Board review final permits that were in "draft" form at the time of program approval – strains regulatory sense and policy.

The PSD permit definitions in 40 C.F.R. § 124.41 clearly and without ambiguity yield EPA intent precisely opposite that gleaned by Sierra Club: "permit" and "draft permit" are not interchangeable terms. Rather, "permit" and "draft permit" are separate categories separately defined.[19] Listed but a few lines of text

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[19] "'When construing an administrative regulation, the normal tenets of statutory construction are generally applied.'" *In re Howmet Corp.*, 13 E.A.D. 272-82 (EAB 2007), *appeal docketed*, No. 1:07-CV-01306 (D.D.C. July 23, 2007) (quoting *In re Bil-Dry Corp.*, 9 E.A.D. 575, 595 (EAB 2001)); *see also Black & Decker Corp. v. Comm'r*, 986 F.2d 60, 65 (4th Cir. 1993). Not only does plain meaning ordinarily guide the definition of a regulatory term, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 86 (2006), but "[u]nder well accepted canons of construction, a rule should be read in a manner that gives effect to all of its parts rather than in a way that renders some of its terms meaningless or redundant." *In re Beckman Prod. Servs.*, 8 E.A.D. 302, 310 (EAB 1999).

from "Permit or PSD permit" in section 124.41 is "Draft permit." "Draft permit," in turn, is defined by reference to section 124.2(a) as a "tentative decision," an expression of EPA "intent" to propose any number of actions on a permit. 40 C.F.R. § 124.2(a) (defining terms for general permitting programs). If a regulatory category set wholly apart from the "permit" category – "draft permit" – does not foreclose Sierra Club's claim that the "permit" subsumes "draft permit[s]," more decisive reinforcement awaits elsewhere in section 124.2. That section defines "permit" to "*not* include" one "not yet * * * the subject of final agency action, such as a 'draft permit' * * * ." *Id.* (emphasis added).

Moreover, in citing section 124.41's definition of "permit" as supporting its claim, Sierra Club ignores a key qualifying word. A PSD permit is an "issued" permit. *Id.* § 124.41. As underscored by sections 124.41's and 124.2(a)'s separate definitions of "draft permits," equating "draft" to "issued" permits confounds common sense. The latter denotes final action by the permitting authority, the former a proposed action in some preliminary stage. That EPA views the two as fundamentally different regulatory creatures is reinforced by its word choice at numerous other junctures in part 124's permit procedures. Draft permits are consistently characterized as "prepared," not "issued." *See, e.g., id.* § 124.6 ("Once an application is complete, the [State Director] shall tentatively decide whether to prepare a draft permit * * * or to deny the application."); *id.* § 124.9(a) (referencing provisions of draft permit "prepared" by EPA); *id.* § 124.9(b) (providing contents of record when"preparing" draft permit under § 124.6); *id.* § 124.10(a)(1)(ii) (providing for public notice when a draft permit has been "prepared"); *id.* § 124.10(b)(1) (providing public notice of the "preparation" of a draft permit). The "issue" nomenclature, to the contrary, is employed exclusively for final permit decisions. *See, e.g., id.* § 124.15 (titled "Issuance and effective date of permit") (stating the Regional Administrator shall "issue" a final permit decision); *id.* § 124.19(a) (providing deadline for timely petition to the Board after a PSD decision is "issued"); *id.* § 124.19(b) (authorizing and setting parameters for Board to initiative review of PSD permits "issued" under part 124).

2. "*Unjust Results*"

Relying on the principle of *In re Russell City Energy Ctr.*, 14 E.A.D. 159 (EAB 2008), Sierra Club also alleges that unfairness, in the form of an unreviewable permit, would result were the Board to deny review.[20] Motion for Abeyance at 10 ("The EAB 'has consistently acted to ensure that permitting authorities rigor-

[20] Sierra Club also relies on *In re Amerada Hess Corp.*, 12 E.A.D. 1 (EAB 2005), for the proposition that permit terms may not "escape" review. Motion for Abeyance at 11. There, non-PSD conditions in a PSD permit were rightly spotlighted as outside the ambit of any review, state or federal, and this defect corrected by the Board. *Id.* at 13-14. No such non-PSD conditions are alleged in the final Seminole permit.

ously adhere to procedural requirements that facilitate public participation.'") (quoting *Russell City*, 14 E.A.D. at 174). The Board recognizes that Sierra Club did appear to fully play by all applicable federal rules during the draft permit/delegated program phase of the Seminole permit proceedings. Sierra Club timely commented on the draft permit – all that was required of it under part 124 regulation – and complying with separate state procedures regarding administrative hearings were of no consequence to Sierra Club's fulfillment of then-applicable federal rules. Indeed, we note the Region's clear admonition that "when a party such as Sierra Club has preserved an opportunity for [judicial review of a PSD permit decision] 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." Region's Br. at 18. "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." *Id.*

Its unusual procedural posture aside, this case also demonstrates the advisability of federal and state permitting authorities clearly addressing any transitional issues relating to public participation and judicial review as part of state program approval. The Agency's declaration that "if FDEP obtains the relief it is seeking and both the Board and Florida courts decline to review Sierra Club's appeals under the facts of this case" then FDEP will have thwarted full public participation for the Seminole permit, Region's Br. at 21, emphasizes that one element of any PSD program SIP approval should be a clear articulation of public participation and judicial review procedures.

Finally, full consideration of possible "results" at stake in this case cannot end without recognizing the real world of permit administration in which they arise. Granting Board jurisdiction of the state-issued Seminole permit would set a precedent for others to claim entitlement to Board review of state permits in the same circumstances. Any erosion of the clear line preserving to approved states the power to adjudicate appeals of permit decisions issued under their own authority, an important prerogative of their autonomy, creates the potential for injecting unwarranted confusion into the national PSD program with regard to the CAA's carefully structured allocation of federal and state responsibilities.

III. *CONCLUSION*

The Florida EPP PSD program shifted from delegated to approved status between the draft and final Seminole permits. With this came the concomitant shift from part 124 Board review to State of Florida permit review, and the door

shut to Board review at the moment of program approval.[21] Sierra Club's petition to review permit number PSD-FL-375 is denied, and its motion to hold proceedings in abeyance and Seminole's motion to dismiss are denied for mootness.

So ordered.

[21] Because the Board lacks authority to review the Seminole permit, we decline to make any determination as to the permit's validity. *See* SC Reply to Region's Br. at 5 (requesting Board to make validity determination).