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

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

MOTION TO HOLD PROCEEDINGS IN ABEYANCE

Sierra Club asks the Board to hold proceedings in this case in abeyance pending resolution of the Sierra Club's parallel appeal of the Seminole PSD permit in Florida state court.

INTRODUCTION

Sierra Club is challenging the final Prevention of Significant Deterioration ("PSD") permit for a 750-megawatt coal-fired power plant that Seminole Electric Cooperative, Inc., proposes to build at its existing facility in Palatka, Florida.

This case arises due to an unusual procedural situation involving the transition of Florida's PSD program for power plants from delegated to approved status. When the Florida Department of Environmental Protection ("FDEP") issued the draft Seminole PSD permit, FDEP was acting under delegated authority from EPA, but it issued the final permit years later, after EPA approved Florida's PSD program for power plants.

The problem in this case is that, due to these particular circumstances, the Seminole PSD permit could escape review even though it is seriously flawed and the Sierra Club properly preserved its right to contest the permit under the

procedures that governed during the public participation period. Between them, Seminole and FDEP argue that neither the Board – which has exclusive jurisdiction to hear permit appeals under the delegation agreement – nor Florida state courts – which have exclusive jurisdiction under the approved program -- have jurisdiction to hear an appeal of the Seminole permit.

In order to preserve its rights, Sierra Club has filed appeals both here and in Florida state court. Sierra Club asks that the Board stay proceedings in this case while Florida courts, which will certainly have jurisdiction over future PSD permit appeals, take the initial stab at resolving this procedural puzzle. If the Florida courts exercise jurisdiction, then Sierra Club will dismiss this petition.

FACTUAL AND PROCEDURAL BACKGROUND

I. Florida PSD Permitting Authority and Procedures

a. Procedures Under the Delegation

Prior to July 28, 2008, FDEP operated a delegated PSD program for power plants. Letter from Patrick Tobin, EPA Region IV, to Virginia Wetherell, Florida FDEP at 1-2 (Oct. 26, 1993) ("Delegation Letter"), attached as Ex. 1. FDEP did not process PSD permit applications for power plants under Florida's SIP – as it did for all other sources, *see id.*-- but instead applied the federal PSD program using authority delegated to it by EPA, *see* 40 C.F.R. § 52.21(u) (providing such authority). The Delegation Letter made clear that Florida could not deviate from the federal PSD program's procedures:

> C. For purposes of [PSD review], the State of Florida shall follow the procedures in 40 C.F.R. §§ 124.3-124.19, except that the word "Director" and the phrase "Regional Administrator" shall mean "State Director."
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> . . . .
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> D. This delegation is based upon the following conditions:
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> . . . .
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> 2. In accomplishing the delegated PSD review, the State of Florida will apply all applicable federal air permitting rules and follow the applicable federal permit processing procedures. If at any time it is determined that the state rules or statutes prohibit the Department from applying any such standard or procedure, the pertinent portion of the delegation may be revoked.

Delegation Letter at 3.

These federal requirements include 40 C.F.R. § 124.10(b), which establishes a thirty-day comment period for draft permits, and 40 C.F.R. §§ 124.11 & 124.12, which jointly provide that "[d]uring the public comment period . . . any interested person . . . may request a public hearing" and that such a hearing "shall" be held whenever there is a "significant degree of public interest in a draft permit." Most importantly, under the terms of the federal delegation, "any person who filed comments on [a] draft permit or participated in [a] public hearing may petition the Environmental Appeals Board" for review of a final permit decision. 40 C.F.R. § 124.19(a).

The Board's jurisdiction to review final permits issued under a delegated program is exclusive: "in accordance with the federal regulations, review of [a state agency's] PSD permit decisions must be had in accordance with the procedures set forth at 40 C.F.R. 124.19, which vest sole authority to review such decisions in the Board." *In re West Surburban Recycling and Energy Center, L.P.*, 6 E.A.D. 692, 703 (EAB 1996).

The federal procedures are fundamental to a delegation under 40 C.F.R. § 52.21(u). "These requirements . . . apply to permits issued by state or local governments pursuant to a delegation of federal authority, as is the case here." *In re Russell City Energy Center*, PSD Appeal No. 08-01, slip op. at 7 (EAB, July 29, 2008). The delegate has a basic "responsibility to conduct its review and make its decisions *on the basis of the federal PSD program contained in 40 C.F.R. § 52.21* . . . . which in turn encompasses the permit issuance procedures of 40 C.F.R. Part 124." *In re West Surburban Recycling and Energy Center*, 6 E.A.D. at 707 (emphasis in original).

While these federal procedures governed PSD permits for power plants, Florida procedures governed other PSD permits. At the time the draft Seminole permit was issued, the Florida rule governing public participation in PSD permitting decisions, Fla. Admin. Code Ann. r. 62-212.400(11) (2006), provided that both the federal and state public participation schemes were available:

> Public Participation. No [PSD] permit shall be issued until the applicant and the Department have complied with all applicable public notice and participation provisions of 40 C.F.R. [§] 52.21(q), adopted by reference at Rule 62-204.800, and Rules 62-210.350 and 62-110.106, F.A.C.

The federal provision referred to, 40 C.F.R. § 52.21(q), in turn specifies that PSD permits are to be processed using the procedures set out at 40 C.F.R. Part 124 – in other words, the procedures required by the Delegation Letter.

The Florida rules go further, however, requiring that FDEP comply with general procedures for "Decisions Determining Substantial Interests." Fla. Admin. Code Ann. r. 62-110.106; *see also* Fla. Admin. Code Ann. r. 62-210.350(2)(a). Among other things, these rules provide for state administrative

contested case hearings on draft permits. These state hearings differ substantially from the relatively informal public meetings provided under the federal regulations, which allow for general public comment and discussion in the presence of the agency. *See* 40 C.F.R. § 124.12. Instead, the state hearings referred to in Fla. Admin. Code Ann. r. 62-110.106 are court-like proceedings. Such hearings are generally held before a state administrative law judge, and are formal proceedings, with sworn testimony, cross-examination, and discovery proceedings. *See* Fla. Stat. Ann. § 120.569(2)(a), (f), (j), (k)(2); 120.57(1)(b), (2).

In short, Florida allowed for state administrative review for power plant PSD permits, in addition to the required federal procedures. The state proceedings, however, are available only if parties adhere to a 14-day deadline for petitions requesting a public hearing on a draft permit. Fla. Admin. Code Ann. r. 62-110.106(3)(a)(1).

Notably, while the Florida rule governing public participation in PSD permitting decisions, Fla. Admin. Code Ann. r. 62-212.400(11) (2006), required FDEP to provide a public opportunity both to file comments and to participate in a formal administrative hearing, it did not and could not require the public to participate in both proceedings in order to preserve the right to appeal the final permit because EAB had exclusive jurisdiction over challenges to final PSD permits for power plants under the delegation agreement. Participating as a party in any state administrative hearing was not necessary to be able to petition the Board for review of the final permit and could not confer the right to appeal a final permit in state court.

b. Procedures under the Florida SIP

These supplemental state procedures recently took on added force when EPA approved the portion of Florida's SIP covering PSD permits for electric power plants. *See* Approval and Promulgation of Implementation Plans Florida; Prevention of Significant Deterioration, 73 Fed. Reg. 36,435 (June 27, 2008) ("SIP Approval"); *see also* 40 C.F.R. §§ 52.520(c) (listing approved regulations), 52.530(a) (approving power plant PSD program). EPA's SIP approval revoked the delegation of PSD authority to Florida. As EPA explained:

> As a result of this final action, EPA's October 26, 1993, federal delegation of PSD authority to FDEP will be withdrawn effective July 28, 2008. This final approval means that Florida's SIP-approved PSD permitting program . . . applies to electric power plants in Florida in lieu of the current federally delegated PSD program.

Id., 73 Fed. Reg. at 36,437.

The result of this approval was to allow Florida to follow its approved state procedures for new permits going forward. As discussed above, these procedures differ notably from the federal rules.

The federal regulation codifying EPA's approval of Florida's PSD program contains a saving provision clarifying that federal procedures continue to apply to permits issued prior to the approval. That regulation, 40 C.F.R. § 52.530(d), does not distinguish between draft and final permits. It states that "the provisions of [40 C.F.R. § 52.21] . . . are hereby incorporated by reference and made a part of the Florida plan for . . . (2) Permits issued by EPA prior to approval of the

Florida PSD rule."[1] As noted above, 40 C.F.R. § 52.21 adopts the procedures set out at 40 C.F.R. Part 124, including a right of review for commenting parties.

II. The Seminole PSD Permit

On September 8, 2006, public notice of the draft Seminole permit was published. *See* Ex. 2. The notice was drawn largely from sample language in Fla. Admin. Code Ann. r. 62-110.106(7)(c), (7)(d), & (12). It set out procedures both for the comment period and public meeting required by the federal regulations and for the petition process available under the Florida rules:

> **Comments**: The Permitting Authority will accept written comments concerning the Draft Permit for a period of thirty (30) days from the date of publication of the Public Notice. As part of his or her comments, any person may also request that the Permitting Authority hold a public meeting on this permitting action. If the Permitting Authority determines that there is sufficient interest for a public meeting, it will publish notice of the time, date, and location in the Florida Administrative Weekly and in a newspaper of general circulation in the area affected by the permitting action. . . . .
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> **Petitions**: A person whose substantial interests are affected by the proposed permitting decision may petition for an administrative hearing. . . . . Petitions . . . must be filed within fourteen (14) days of publication of this Public Notice or receipt of a written notice, whichever occurs first. . . . . The failure of any person to file a petition within the appropriate time period shall constitute a waiver of that person's right to request an administrative determination (hearing) . . .or to intervene in this proceeding and participate as a party to it. . . .Persons whose substantial interests will be affected by any such final decision of the Permitting Authority on the application have the right to petition to become a party to the proceeding, in accordance with the requirements set forth above.

In accordance with the notice and the federal procedures, Sierra Club timely filed extensive comments on the draft Seminole permit. By doing so, Sierra Club fully preserved its right to challenge the final permit under then-

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[1] EPA permits include those issued by Florida operating under the delegation. *See In re Rockgen*, 8 E.A.D. 536, 537 n.1. (EAB 1999) ("A permit issued by a delegate is still an 'EPA-issued permit'") (citation omitted).

controlling federal law. 40 C.F.R. § 124.10(b); Fla. Admin. Code Ann. r. 62-210.350(2).[2]

Sierra Club also attempted to participate in the supplemental state hearing process, but filed its petition after the 14-day deadline. Sierra Club filed a motion to extend the state 14-day deadline, but FDEP denied this motion and dismissed the petition. *Sierra Club v. Seminole Electric Coop., Inc.*, OGC Case No. 06-2157 (Oct. 31, 2006), attached as Ex. 3. At that point, Sierra Club recognized that there was no point in invoking the supplemental state administrative proceeding, because the state was operating a delegated program with exclusive appeal to this Board, and thus no state court review of these administrative proceedings was available. *See In re West Surburban Recycling and Energy Center*, 6 E.A.D. at 703-04. Accordingly, Sierra Club did not appeal this decision.

More than a year passed and FDEP did not issue a final permit. In June, 2008, EPA approved Florida's SIP for power plant PSD permits, effective July 28, 2008, and on September 5, 2008, FDEP issued the final Seminole permit. *See* FDEP's Final Determination, Ex. 4.

The notice for the final permit refers only to Florida review procedures, stating that "[a]ny party to this order has the right to seek judicial review of it under Section 120.68, F.S. by filing a notice of appeal under Rule 9.110 of the Florida Rules of Appellate procedure." It offers no guidance on the continued vitality of the federal procedures applying to the draft permit and gives no

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[2] Notice of the draft permit was published on September 8, 2006. Thirty days from that date was Sunday, October 8, and under the federal computation of time rules, the comment period ended on Monday, October 9, the date of Sierra Club's comments. 40 C.F.R. § 124.20.

assurances that parties who had perfected their rights under those procedures would receive review in the Florida courts.

III. Challenges to the Final PSD Permit

Because of the unique procedural posture of this case and the uncertainty as to the appropriate forum in which to challenge the final permit, Sierra Club filed its petition for review here as well as a notice of appeal in Florida's First District Court of Appeal, docketed as *Sierra Club, Inc. v. State of Florida Department of Environmental Protection* (1st DCA No. 1D08-4881). *See* Ex. 5.

In response to the state court action, Seminole has moved to dismiss, arguing that the court may not consider the appeal because the Sierra Club did not secure party status under Florida law. *See* Ex. 6. Seminole acknowledges that Sierra Club complied with the procedures required to appeal the final permit to the EAB under the delegated program, *id.* at 4, but contends that Sierra Club now has no avenue to contest the permit because submitting comments is insufficient under Florida law to achieve party status, *id.* at 9, and EPA's action in approving Florida's PSD program deprived Sierra Club of the right to petition the EAB, *id.* at 4 n.1. Seminole states:

> [B]ecause Sierra Club timely submitted comments on the draft PSD permit, at that point the potential existed that if DEP issued the final PSD permit while EPA still considered Florida a "delegated" PSD permitting program, Sierra Club could challenge the final PSD permit before the Federal Environmental Appeals Board. See 40 C.F.R. § 124.19(a).

Ex. 6 at 4. In a footnote, Seminole then describes EPA's approval of Florida's PSD program and adds, "An artifact of this distinction [between the delegated

and approved programs] is that federal administrative appeals to the Environmental Appeals Board are no longer available." *Id.* at 4 n.1.

In other words, Seminole contends that EPA's approval of Florida's PSD program had the effect of cutting off Sierra Club's right to appeal the final permit in any forum.

ARGUMENT

The Board should stay this proceeding pending the outcome of Sierra Club's state court appeal, and consider the petition for review in the event that Florida courts hold that Sierra Club has no right to contest the Seminole PSD permit even though it complied with all procedures that applied when the draft permit was issued. Requiring retroactive compliance with such optional state provisions upon SIP approval would vitiate the terms of the federal delegation then applicable and frustrate the Clean Air Act's mandate for public participation.

Ordinarily, the Board would not review permits issued under a state SIP. *See, e.g., In re Carlton, Inc. North Shore Power Plant*, 9 E.A.D. 690, 692-93 (EAB 2001). The unique situation here may warrant departure from this ordinary rule, however, if Seminole succeeds in its argument that the SIP-approved Florida procedures apply retroactively to cut off review of the permit. The EAB "has consistently acted to ensure that permitting authorities rigorously adhere to procedural requirements that facilitate public participation and input during EPA permitting." *In re Russell City Energy Center*, PSD Appeal No. 08-01, slip op. at 22 (citing *In re Weber, #4-8*, 11 E.A.D. 241, 245 (EAB 2003); *In re Rockgen Energy Center*, 8 E.A.D. 536, 557 (EAB 1999)).

Sierra Club is not aware of any EAB opinion directly addressing this unusual circumstance, in which basic public participation requirements have shifted due to SIP approval. In general, though, the Board has been very clear that the "Board's remedial intervention" may be "necessary to safeguard the integrity of EPA's procedural regime for assuring public participation in Agency permitting." *In re Russell City Energy Center*, PSD Appeal No. 08-01, slip op. at 22.; *see also In re Weber, #4-8*, 11 E.A.D. at 246 (concluding that "because of the importance of adhering fully to the public participation requirements of these regulations, . . . a remand is in order"); *In re Rockgen Energy Center*, 8 E.A.D. at 56-58 (granting review and remanding to ensure procedural compliance).

The Board has previously taken action to ensure that portions of a permit would not escape review due to gaps between state and federal procedures in *In re Amerada Hess Corp. Port Reading Refinery*, PSD Appeal No. 04-03 (EAB, Feb. 1, 2005). In that case, a state placed what appeared to be non-PSD conditions in a PSD permit but provided no state mechanisms for review of those conditions. *See id.*, slip op. at 13. The Board agreed with the petitioner that "the only review of the PSD Permit available . . . is before the Board, and if the Board allows the non-PSD conditions to remain in the Permit they will escape review entirely" because they were outside of the Board's PSD review jurisdiction. *Id.*, slip op. at 13 (quotation marks and alteration in the original omitted). It therefore granted review and remanded with instructions to address the permit conditions, either by removing them from the permit or by making clear that they were federally reviewable PSD conditions. *Id.*, slip op. at 14. The same concerns

pertain here because, as in *Amerada Hess*, tensions between state and federal procedures threaten to thwart review in either forum.

Similarly, the Board held that state procedures can supplement but not alter federal procedures under a delegated program in *In re West Suburban Recycling and Energy Center*, 6 E.A.D. at 706-09. In that case, the Illinois Environmental Protection Agency, operating under a federal PSD program delegation, made PSD approval an "integral part of the Illinois construction permit program" and then argued that it could deny federal PSD permits on Illinois state law grounds. *See id.* at 706-07. The Board agreed that combined permitting processes could be allowed as an "accession to administrative convenience," *id.* at 708, but held that state procedures could not replace federal requirements and so disagreed with Illinois. No state rules could "diminish the importance of carrying out the PSD review obligations imposed by the Delegation Agreement in a manner that is timely and consistent with the federal PSD regulations, regardless of whether the PSD review obligations mesh perfectly with the state permit review process." *Id.*; *see also id.* at 708 n. 21(observing that "this concept is embodied in the [40 C.F.R.] Part 124 permit review regulations").

Allowing review to fail solely because of state procedures is all the more inappropriate here because the federal regulation codifying EPA's approval of Florida's PSD program makes clear that federal procedures continue to apply to permits issued prior to the approval. That regulation provides that "the provisions of [40 C.F.R. § 52.21] . . . are hereby incorporated by reference and made a part of the Florida plan for . . . (2) Permits issued by EPA prior to approval of the

Florida PSD rule."[3] 40 C.F.R. § 52.530(d). Section 52.21 adopts the procedures set out at 40 C.F.R. Part 124, including the right of commenting parties to petition for review. The Florida PSD rule for power plants was not approved until the summer of 2008, nearly two years after the draft permit issued and the public participation period closed. EPA's regulation approving Florida's program draws no distinctions between draft and final permits, 40 C.F.R. § 52.530(d)(2), so the Seminole draft permit falls under this exception. At a minimum, the regulation acts as a saving clause, making clear that the SIP approval did not nullify the legal significance of the federal procedures applicable before it became effective, and that the Sierra Club therefore has a right to review in some forum. If state courts refuse to recognize this right, then 40 C.F.R. § 52.530(d)(2) supplies a textual basis for the Board to take jurisdiction over this petition.

Resolution of the Sierra Club's Florida state court appeal is likely to shed significant light on the procedural issues in this case and, if the Florida court takes jurisdiction, to fully address the merits of the issues raised in Sierra Club's petition here. Only if the Florida court declines to consider the merits of Seminole permit would the Board's involvement likely to be necessary to resolve this matter. Sierra Club therefore believes 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 here

[3] Such permits include those issued by Florida operating under the delegation. "Because [Florida] acts as EPA's delegate in implementing the federal PSD program . . ., the permit is considered an EPA-issued permit for purposes of federal law." *See In re Rockgen*, 8 E.A.D. at 537 n.1; *see also Sierra Club v. U.S. E.P.A.*, 499 F.3d 653, 654 (7th Cir. 2007) ("The federal Environmental Protection Agency (actually, Illinois's counterpart to the EPA, exercising authority that the federal EPA had delegated to it, but we can ignore that detail) issued a permit . . . . ").

for the duration of the Sierra Club's Florida state court appeal. If the Board so requests, the Sierra Club will provide regular status reports on the progress of the Florida litigation.

CONCLUSION

For these reasons, Sierra Club requests that the Board hold these proceedings in abeyance pending resolution of Sierra Club's state court appeal.

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Respectfully submitted,

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