Exhibit 3
EPA Region 4's Brief Regarding Reviewability of Permit

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

SIERRA CLUB, INC.,

Appellant,

v. CASE NO. 01D08-4881

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

Appellees.
_____/

SOUTHERN ALLIANCE FOR CLEAN ENERGY,

Appellant,

v. CASE NO. 01DO8-4900

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

Appellees.
_____/

CONSOLIDATED ANSWER BRIEF OF APPELLEE SEMINOLE ELECTRIC COOPERATIVE, INC.

On Administrative Appeal from a Final Order of the Department of Environmental Protection

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PREFACE

For the Court's convenience, Appellee, Seminole Electric Cooperative, Inc. (Seminole), files this consolidated Answer Brief in response to the separate initial briefs filed by Southern Alliance for Clean Energy (SACE) and Sierra Club (collectively, Appellants). Arguments § I.B.1, § II.B.1, and § II.B.2 of this Answer Brief address issues relevant to both Appellants; whereas Arguments § I.B.2, § II.B.3, § II.B.4, and § II.B.5 address issues relevant only to Sierra Club.

STATEMENT OF THE CASE AND FACTS

This is a consolidated, direct appeal of an administrative final order of the Florida Department of Environmental Protection (DEP) granting Seminole an air quality "Prevention of Significant Deterioration" or "PSD" construction permit for a proposed third electric generating unit (Unit 3) at Seminole's existing Seminole Generating Station in Putnam County.

Seminole submits this Statement of the Case and Facts due to deficiencies in SACE and Sierra Club's initial briefs. SACE's initial brief contains a skeletal, four and a half page "Statement of the Case and Facts," which omitted important details regarding the Unit 3 project, the PSD permitting process, and the applicable law.[1]

[1] SACE's Statement of the Case and Facts provides incomplete descriptions of various rules in an apparent attempt to bolster arguments later in SACE's brief that the PSD permitting process was "hybrid" or "inconsistent." For instance, on page two of its brief, SACE points to 40 C.F.R. § 124.19 as providing "all interested persons the opportunity for an appeal within 30 days of the final permit." SACE,

Sierra Club's Statement of the Case and the Facts, on the other hand, summarizes its "extensive technical and legal objections" in a manner that portrays assertions as established facts, even though, as discussed below, those assertions were never scrutinized by an administrative law judge, because Sierra Club waived any rights to an evidentiary hearing under the Florida Administrative Procedure Act (APA).[2] To ensure that this Court is aware of important details of the procedural history of the Unit 3 project, as well as previous determinations regarding projected impacts, Seminole provides the following Statement of the Case and Facts.

A. Seminole Electric Cooperative and the Unit 3 Project

Seminole is a non-profit rural electric cooperative, created in accordance with Chapter 425, Florida Statutes, which generates and transmits electric power for member cooperatives that provide electricity to individuals and businesses in

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however, does not explain that the cited rule only provides for a potential right to "petition the Environmental Appeals Board," a federal administrative body adjunct to the Environmental Protection Agency, as opposed to some general right to appeal.

[2] Sierra Club's Statement of the Case and Facts is replete with hyperbolic assertions concerning alleged effects of particulate matter (which they gratuitously refer to as "coal soot") and other pollutants on public health. Importantly, because Sierra Club waived any right to an administrative hearing under the Florida APA, those and other assertions were never subject to challenge or scrutinized by an independent fact-finder. Moreover, DEP has adopted ambient air quality standards (AAQS) for particulate matter and other pollutants, and these AAQS are designed to protect human health and welfare. See Fla. Admin. Code R. 62-204.240 (2008). In its Technical Evaluation for the Unit 3 permit, DEP found that the Seminole Generating Station will comply with the AAQS with the addition of Unit 3. [R. Vol. 9, pp. 1530-36] Sierra Club has not challenged that finding.

Florida. [R. Vol. 2, p.1] The Seminole Generating Station currently consists of two coal-fired generating units that have been operating since 1984. [R. Vol. 1, p. 1; Vol. 3, p. 420] The Seminole Generating Station has been – and continues to be – modernized and retrofitted with sophisticated pollution controls and recycling capabilities. [R. Vol. 1, pp. 1-3; Vol. 3, pp. 420-23]

Due to the proposed pollution control features of Unit 3, combined with the emission reductions from the facility's two existing units, it has been determined that the Unit 3 project would significantly reduce existing environmental impacts, even with the addition of the new unit. [R. Vol. 9, pp. 1517, 1519]; Seminole Elec. Coop., Inc. v. Dep't of Envtl. Prot., 985 So. 2d 615, 617 (Fla. 5th DCA 2008); In re: Seminole Elec. Coop., Seminole Generating Station Unit 3 Power Plant Siting App. No. PA 78-10A2, 09 ER F.A.L.R. 015, ¶¶ 14-15 (DEP 2008).[3] For example, the Unit 3 project would substantially reduce current emissions of four regulated air pollutants and would eliminate the addition of most water pollutants. [R. Vol. 11, p. 1917, 1919] Notably, due to Unit 3's advanced pollution controls and emission reductions from the existing units, the addition of Unit 3 would cause no net increase in mercury emissions. [R. Vol. 3, pp. 449-450; Vol. 9, pp. 1517, 1519]

[3] In addition to the Environmental & Land Use Administrative Law Reporter, DEP's Final Order is available at http://www.dep.state.fl.us/legal/Final_Orders/2008/dep08-0829.pdf.

B. Unit 3 is certified under the Power Plant Siting Act

The PSD permit at issue in this appeal is but one of a handful of separate approvals that Seminole must receive prior to constructing a new electric generating unit. The Florida Power Plant Siting Act (PPSA) also requires certification of new steam electric generating units through a separate administrative proceeding. See §§ 403.501–.518, Fla. Stat. (2008). The PPSA provides a "centrally coordinated, one-stop licensing process" for power plant projects. Id. §§ 403.510(3), 403.502. The PPSA contemplates review by all state, regional, and local agencies with jurisdiction; provides for participation of third parties and the public; and subjects the entire process to APA strictures. Id. §§ 403.504, .507, .508(3)-(4). The PPSA also requires comprehensive conditions of certification to ensure compliance with all applicable air, water, land use, and other requirements. Id. §§ 403.509(3), .511, .514.

In addition to meeting all agency standards that apply at the time of certification, plants certified under the PPSA must comply with all applicable environmental requirements that are enacted after certification. Id. § 403.511(5)(a). Therefore, any new federal or state legal requirements mandating reductions in carbon dioxide (CO_2) or other greenhouse gas emissions from Unit 3 will apply when they go into effect. The Florida Public Service Commission (PSC) recognized this forward-looking aspect of the PPSA in its Determination of

Need for Unit 3, which specifically considered the estimated costs for Unit 3 to comply with future CO_2 restrictions. [R. Vol. 12, pp. 2094-95]

Seminole filed its PPSA site certification application for Unit 3 on March 9, 2006; however, DEP's final order granting certification of Unit 3 did not issue until over two years later. In re: Seminole Elec. Coop., 09 ER F.A.L.R. 015. This delay was due to an appeal related to DEP's certification of Unit 3. See Seminole Elec. Coop., 985 So. 2d at 620 (remanding with instructions that DEP enter a final order granting certification). DEP and Seminole were the only parties to that appeal. Id. at 616. Although Sierra Club had initially opposed certification of Unit 3 under the PPSA, it entered into a Settlement Agreement with Seminole on January 7, 2007, in order to "resolve all issues raised or which could be raised [by the Sierra Club] concerning Seminole's Unit 3 Project in the PPSA proceeding." [R. Vol. 12, p. 2149]; see also, Seminole Elec. Coop., 985 So. 2d at 619. In this initial Settlement Agreement, Seminole committed to purchasing and distributing low-energy, fluorescent light bulbs; committed to a program to develop additional renewable energy resources to offset a portion of Seminole's future electrical demand needs; and also agreed to additional air emission reductions. [R. Vol. 12, pp. 2148-49]; Seminole Elec. Coop., 985 So. 2d at 619. Sierra Club, in turn, agreed not to contest the PPSA certification of Unit 3. [R. Vol. 12, p. 2148]; Id. The PPSA agreement also anticipated a second Settlement Agreement, by which

Seminole and Sierra Club would settle differences regarding the PSD Permit. [R. Vol. 12, pp. 2147-49]

In accordance with the Fifth District Court of Appeal's instructions, DEP entered a final order granting certification of Unit 3. This final order recited the "[n]et beneficial environmental impacts" at Seminole's existing power plant due to the Unit 3 project, including net benefits with respect to "Air Quality." In re: Seminole Elec. Coop., 09 ER F.A.L.R. 015, at Findings of Fact ¶ 44. Among other things, DEP concluded:

> The Unit 3 Project will result in minimal adverse effects on human health, the environment, the ecology of the land and its wildlife, and the ecology of state waters and their aquatic life. ... If operated and maintained in accordance with this Final Order and the Department's proposed Conditions of Certification, the Unit 3 Project will comply with the applicable nonprocedural requirements of all agencies. Furthermore, certification of the Unit 3 project will fully balance the increasing demand for electrical power plant location and operation in this State with the broad interests of the public that are protected by the PPSA.

Id. at Conclusions of Law ¶ 5.

C. The PSD Permitting Process

The parallel-tracked PSD permitting process was ongoing during the certification process for Unit 3. On August 24, 2006, DEP issued a draft PSD permit for Unit 3 along with its Technical Evaluation and Preliminary BACT Determination. [R. Vol. 9, pp. 1510-56] Seminole published DEP's Notice of Intent to issue the PSD permit in the *Palatka Daily News* on September 8, 2006.

[R. Vol. 9, pp. 1557-58] This public notice stated 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) and that interested persons would have the opportunity to file comments regarding the draft permit within 30 days (by October 9, 2006). [Id.]

1. Both Sierra Club and SACE Declined to Timely Petition for Administrative Hearing under the APA

Mirroring the language of Florida Administrative Code Rule 62-110.106(12), the public notice for the Unit 3 draft permit provided 14 days for substantially affected persons to file a petition for an administrative hearing under the Florida APA. [R. Vol. 9, p. 1558] Moreover, the public notice stated:

> The failure of any person to file a petition within the appropriate time period shall constitute a waiver of that person's right to request an administrative determination (hearing) under Sections 120.569 and 120.57, F.S., or to intervene in this proceeding and participate as a party to it.

[R. Vol. 9, p. 1558 (emphasis added)]

Neither SACE nor Sierra Club filed Chapter 120 petitions by the deadline set forth in DEP's public notice. SACE never filed any petition for hearing. For its part, Sierra Club filed an untimely "Motion for Enlargement of Time and Petition for Administrative Hearing" over three weeks after the deadline. [See R. Vol. 10, pp. 1875-91] On October 31, 2006, DEP issued an order dismissing Sierra Club's petition (with leave to amend and re-file) on grounds that it was

"untimely filed." [R. Vol. 10, pp. 1892-1912] DEP's Order stated that Sierra Club failed to demonstrate "any basis for excusable neglect" justifying its untimely filing; that Sierra Club had "105 members in Putnam County" and "520 members in St. Johns County;" that the *Palatka Daily News*, which published the public notice of the PSD permit, was circulated in these counties; and that Sierra Club also received actual notice of DEP's intent to issue the permit on September 5, 2006. [R. Vol. 10, pp. 1892-93]. DEP's order also advised Sierra Club that the "failure to timely file the petition in this proceeding constitutes such a waiver of their right to request an administrative proceeding under Chapter 120, F.S." [Id.]

DEP's order left Sierra Club with two options: either amend its petition to show why it "should be considered timely," or within thirty days "seek judicial review" of the order by "the filing of a notice of appeal...with the appropriate district court of appeal." [R. Vol. 10, pp. 1893-94]. Sierra Club did neither.

2. DEP Provided Sierra Club & SACE an Opportunity to Submit Comments

In addition to announcing the opportunity to petition for an administrative hearing regarding the PSD permit, DEP's public notice also explained that interested persons had an opportunity to submit written comments "for a period of thirty (30) days from the date of publication of the Public Notice." [R. Vol. 9, p. 1557] SACE and Sierra Club each submitted comments regarding the PSD permit, though only Sierra Club's comments were timely. [R. Vol. 12, p. 2277]

SACE filed its comments on August 21, 2007; 316 days after expiration of the comment period. [R. Vol. 12, pp. 2170-96] These comments concerned DEP's procedures for issuing PSD permits and legal developments regarding CO_2. [Id.] On July 3, 2008 -- 633 days after the comment period expired -- SACE again filed comments regarding the draft PSD permit. [R. Vol. 12 pp. 2197-232] This second batch of comments primarily restated prior comments, but also addressed legal developments regarding maximum achievable control technology (MACT) requirements for Hazardous Air Pollutants (HAPs). [Id.]

3. Status of Florida's PSD Program

Appellants note that at the time DEP issued the draft PSD permit, there was an issue as to whether Florida's PSD permitting program was "delegated" as opposed to "approved" by the U.S. Environmental Protection Agency (EPA). Although this distinction does not impact the Florida APA, it does impact the applicability of certain federal procedures. Specifically, if the Florida program was "delegated" rather than "approved," entities like Sierra Club who timely filed comments on the draft permit could challenge the final PSD permit before EPA's Environmental Appeals Board (EAB). See 40 C.F.R. § 124.19(a) (limiting standing before the EAB to challenge a final PSD permit issued under a delegated state PSD program to "any person who filed comments on [the] draft permit or participated in the public hearing"). After DEP issued the draft PSD permit, but

before DEP issued the final permit, EPA published notice that effective July 28, 2008, Florida's PSD program henceforth would be "approved" instead of "delegated." See 73 Fed. Reg. 36,435 (June 27, 2008) (amending 40 C.F.R. pt 52). This distinction means that instead of implementing PSD rules on EPA's behalf, DEP administers the program under state rules as an "approved" state. See id. The practical significance of that distinction is that federal administrative appeals to the EAB are not available.[4] See In re Humboldt Bay Repowering Project, PSD Appeal No. 08-08, Slip Op. at 3, 2008 WL 5324368 (E.A.B. 2008). ("Because the permit was issued under an approved State program, as opposed to authority delegated by the Federal government, it can be challenged only under the state system of review."). Thus, regardless of the status of Florida's program when the draft permit issued, the program was clearly approved when the final PSD permit issued.

4. Seminole & Sierra Club entered into a Settlement Agreement regarding the PSD Permit

Building on the first Settlement Agreement that resolved all issues regarding the certification of Unit 3, on March 9, 2007, Seminole and Sierra Club entered into a second Settlement Agreement that resolved all of the parties' differences concerning the Unit 3 PSD permit. [R Vol. 12, pp. 2165-69]. In this second Settlement Agreement, Seminole agreed to ask DEP to incorporate additional air

[4] Sierra Club disagrees with this interpretation. On October 6, 2008, Sierra Club filed a petition challenging Seminole's PSD permit before the EAB. In re Seminole Electric Coop., Inc., PSD Appeal No. 08-09.

emission reduction commitments into the PSD permit (including reductions of particulate matter and mercury emissions, as well as startup and shutdown emissions), 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." [R. Vol. 12, p. 2165] In addition to committing to seek incorporation of the Settlement Agreement into the permit, Seminole independently agreed to be "bound to [the Agreement's] limits and conditions." [R. Vol. 12, p. 2167]

Seminole asked DEP to incorporate the terms of the Settlement Agreement into the Unit 3 Final Permit on March 27, 2007 and again on September 2, 2008. [R. Vol. 12, pp. 2233-2242; 2237-42]

5. DEP Issues the Final PSD Permit.

The appeal regarding the certification of Unit 3 delayed the issuance of the PSD permit for nearly two years. On September 5, 2008, DEP issued a final PSD permit for Unit 3. [R. Vol. 12, pp. 2243-58] The PSD permit included a "Final Determination" that addressed the Settlement Agreement and the various comments submitted regarding the draft PSD permit. Citing the fact that the Settlement Agreement arose outside of the PSD permit proceeding and that DEP was not a party to the agreement, DEP issued the PSD permit without incorporating the changes that Seminole and the Sierra Club had agreed to. [R.

Vol. 12, p. 2277] Instead, DEP provided a procedure for incorporating the agreement that resolved Sierra Club's comments:

> To the extent the applicant [Seminole] wants to incorporate those changes [provided in the Settlement Agreement] into an air construction permit for that facility, an application to revise the PSD permit may be submitted.

[Id.].

With respect to SACE's late-filed comments, the Final Determination stated:

> Finally, comments were received from the Natural Resources Defense Council and [SACE] by letter dated July 3, 2008 almost 2 years after the end of the public comment period. These comments were not timely but are in the Department's files.

[Id.] The Final Determination addressed a new legal development regarding HAPs by noting that a federal court had vacated the Clean Air Mercury Rule (CAMR) and, as result, a case-by-case determination of MACT may be required for HAPs emissions from Unit 3. [Id.] (SACE raised this issue in its second untimely comment letter. [R. Vol. 12, pp. 2170-96]) As with the incorporation of the Sierra Club-Seminole Settlement Agreement, DEP stated it would address the MACT issue through a "separate agency action."

6. The Pending PSD Permit Modification Proceeding

Soon after issuing the PSD permit, DEP characterized Seminole's written requests to incorporate the Settlement Agreement as a request to modify the just-issued permit. [R. Vol. 13, p. 2293] Consistent with its commitment in the Final Determination, DEP's official response to Seminole states that DEP "has opened a

permit revision project to include the settlement agreement." [Id.] On December 22, 2008, approximately two months after the instant appeals were filed, Seminole submitted a comprehensive application to modify the Unit 3 PSD permit to incorporate the Settlement Agreement regarding the PSD permit and to address the legal developments concerning HAPs.[5] On January 16, 2009, DEP requested additional information regarding certain aspects of Seminole's application, which Sierra Club acknowledged in a comment letter submitted to DEP regarding HAPs issues associated with the application to modify the PSD permit.[6]

SUMMARY OF THE ARGUMENT

This appeal should be dismissed because Appellants waived their Florida APA rights and therefore are not "parties" entitled to judicial review of DEP's agency action. This case is about Florida administrative law. Florida's APA is clear that judicial review of agency action is only available to parties. Under DEP rules, which have not changed since the issuance of the draft permit, Appellants had to file a petition for hearing on DEP's draft permit in order to gain party status.

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[5] See Florida Department of Environmental Protection, NSR/PSD Construction Permits, Seminole Electric Cooperative Palatka Generating Station, Application for Revisions for Final Permit (Dec. 18, 2008), available at http://www.dep.state.fl.us/Air/permitting/construction/seminole/0000353E.pdf.

[6] See Florida Department of Environmental Protection, NSR/PSD Construction Permits, Seminole Electric Cooperative Palatka Generating Station, Sierra Club Comments regarding Hazardous Air Pollutants, 2 (Jan. 30, 2009), available at http://www.dep.state.fl.us/air/permitting/construction/seminole/00003813.pdf.

However, SACE filed no petition, and DEP properly denied Sierra Club's late-filed petition as untimely. Accordingly, neither Appellant is a "party," and this appeal must be dismissed. Otherwise, the APA process would be turned on its head: this Court would be forced to serve the fact-finding role of an administrative law judge and the expert role of DEP, as the agency with expertise in interpreting and applying Florida's PSD permitting rules.

Prior to the issuance of the final permit, Sierra Club and Seminole entered into a complete settlement of all Unit 3 issues related to the PSD permit. Accordingly, no justiciable controversy exists and Sierra Club's appeal must be dismissed. The mere fact that DEP is implementing the Settlement Agreement via permit modification does not provide Sierra Club an excuse to renege on its agreement.

None of Appellants' assertions regarding the final permit have merit. DEP is already addressing HAPs requirements through a permit modification as outlined in its Final Determination for the Unit 3 permit. Thus, Appellants are already receiving the relief they seek, and this issue is moot.

Appellants simply ignore the applicable DEP regulations in asking this Court to impose a new regulatory requirement that PSD permits include Best Available Control Technology (BACT) limits for CO_2. Under the plain language of DEP's rules, BACT emission limits are not required for CO_2. Furthermore,

although not directly applicable in this case, federal law does not now, and did not at the time DEP issued the final permit, require BACT limits for CO_2. DEP established appropriate BACT emission limits for particulate matter (PM), carbon monoxide (CO), volatile organic compounds (VOC), and hydrogen fluoride. Likewise, DEP appropriately considered and established BACT limits on emissions during periods of startup, shutdown and malfunction. Under established Florida law, an agency's interpretation of its governing statutes and rules does not have to be the only interpretation, or even the most desirable, so long as it is a permissible interpretation. Although Sierra Club may disagree with DEP's exercise of discretion in setting BACT limits, it cannot establish that DEP's BACT determinations were clearly erroneous or that DEP otherwise abused its discretion in interpreting its governing statutes or rules.

Finally, DEP properly followed its own rules in considering Sierra Club's comments on the draft permit. Accordingly, if this Court concludes that it has jurisdiction over these appeals, the Court should decline Sierra Club's request to remand this case for further written response to Sierra Club's comments.

For these reasons, the Court should dismiss this appeal or, assuming the Court concludes it has jurisdiction, affirm DEP's final agency action.

ARGUMENT

I. THE APPELLANTS LACK STANDING TO APPEAL

A. STANDARD OF REVIEW

Whether a court has subject matter jurisdiction is a question of law reviewed de novo. Jacobsen v. Ross Stores, 882 So. 2d 431, 432 (Fla. 1st DCA 2004).

B. ARGUMENT

1. SIERRA CLUB & SACE WAIVED THEIR RIGHTS TO BECOME PARTIES TO THE ADMINISTRATIVE PROCEEDING BELOW, AND AS NON-PARTIES, LACK STANDING TO APPEAL

"It is a fundamental principle of appellate law that appeal jurisdiction is only available to parties," and "the Administrative Procedure Act only provides for review of agency action by parties." Orange County, Fla. v. Game & Fresh Water Fish Comm'n, 397 So. 2d 411, 413 (Fla. 5th DCA 1981). DEP rules make clear that the only way the Appellants could "participate as a party" in the administrative proceeding for Seminole's PSD permit was to timely "file a petition;" failure to do so constituted "waiver" of the Appellants' right to "intervene in th[e] proceeding and participate as a party to it." Fla. Admin. Code R. 62-110.106(12) (emphasis added); .106(3)(b) (2008). The essential undisputed facts of this case are: SACE filed no petition, and DEP denied Sierra Club's late-filed petition as untimely. [R Vol. 10, pp. 1892-1912] Each Appellant therefore waived its right to "participate as a party" in the administrative proceeding. In accordance with the "fundamental

principle" that only parties have appeal rights, Appellants lack standing to appeal, and these appeals must be dismissed.

Appellants bring this appeal pursuant to Section 120.68(1), Florida Statutes, which authorizes judicial review of administrative action by "[a] party who is adversely affected by final agency action." § 120.68(1), Fla. Stat. (2008) (emphasis added). Pursuant to Section 120.68(1), "in order to have standing to seek such review, a person must show: (1) the action is final; (2) the agency is subject to the provisions of the Act; (3) he was a party to the action which he seeks to appeal; and (4) he was adversely affected by the action." Daniels v. Florida Parole & Probation Comm'n, 401 So. 2d 1351, 1353 (Fla. 1st DCA 1981) (emphasis added). Under part three of this four-part test, if an "appellant was not a party to the proceedings below, he is without standing to institute an appeal." Norkunas v. State Bldg. Comm'n, 982 So. 2d 1227, 1228 (Fla. 1st DCA 2008). If an appellant lacks standing, then the court lacks subject matter jurisdiction over the appeal. See Univ. Psychiatric Ctr., Inc. v. Dep't of Health & Rehab. Servs., 597 So. 2d 400, 401 (Fla. 1st DCA 1992).

Appellants' standing to institute this appeal turns squarely on whether they were parties to the administrative proceeding below. The Florida APA defines the term "party" in pertinent parts as "[s]pecifically named persons whose substantial interests are being determined in the proceeding" or "[a]ny other person who...is

entitled to participate in whole or in part in the proceeding, or whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party." § 120.52(13)(a)-(b), Fla. Stat. (emphasis added). DEP rules state that in order to make an appearance as a party in an administrative proceeding, including a PSD permit proceeding, one must timely file a petition for hearing and that failure to do so constitutes waiver of any right to request an administrative determination or to intervene in the proceeding as a party. See Fla. Admin. Code R. 62-110.106(3)(b) ("Failure to file a petition within the applicable time period after receiving notice of agency action shall constitute waiver of any right to request an administrative proceeding under chapter 120 of the Florida Statutes.") (emphasis added); .106(12) (requiring the public notice of agency action to state that "[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 . . . intervene in this proceeding and participate as a party to it.") (emphasis added).

Applying this legal framework to the circumstances at hand, this appeal must be dismissed. SACE and Sierra Club were not parties to the Seminole Unit 3 PSD permit proceeding, despite a sufficient notice and opportunity to become parties. Seminole published a public notice of the project in the *Palatka Daily*

News.[7] In accordance with DEP's rules, this notice warned Appellants that their failure to timely file a petition would "constitute a waiver" of the "right to request an administrative determination (hearing)" under the Florida APA or intervene in the proceeding and "participate as a party to it." [R Vol. 9, pp. 1557-58] (quoting Fla. Admin. Code Rule 62-110.106(12)).

The Appellants unquestionably failed to comply with the clearly spelled-out procedure for becoming a party to the state administrative proceeding. SACE never filed any petition. Similarly, Sierra Club sat on its rights and filed an untimely petition. [R. Vol. 10, 1875-91] In dismissing Sierra Club's untimely petition, DEP provided Sierra Club with an opportunity to justify its late filing. [R. Vol. 10, pp. 1892-1912] But Sierra Club declined. As such, Sierra Club never obtained party status.

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[7] Contrary to SACE's assertions, the public notice for the draft permit complied with the law. The notice mirrored the language of Florida Administrative Code Rule 62-110.106(12), and it was published in a newspaper of general circulation in the county where the project is located, as required by Rule 62-110.106(5). SACE does not cite any legal authority for its argument that the public notice was required to "mention the federal CAA, the State's delegation agreement with U.S. EPA, or the applicable federal PSD regulations and procedures." [SACE Initial Brief, p.18] Also contrary to SACE's assertion that the public notice did not mention "the applicable federal PSD...procedures" [Id.], the notice provided a detailed paragraph entitled "Comments," which stated (in accordance with the DEP rule based on federal PSD procedures) that interested persons had 30 days to file comments or request a public hearing. [R. Vol. 9, p. 1557]. SACE's block quote of the public notice on page 19 of its initial brief notably omits this paragraph.

Notwithstanding their failure to secure party status in accordance with the APA, DEP rules, and the public notice, Sierra Club and SACE argue that submitting comments rendered them parties with state appellate rights. Sierra Club even asserts that the parallel opportunity to file comments somehow rendered the requirement to file a petition "optional." [Sierra Club Brief, pp. 42-44]

Florida law requires more than the mere submission of comments. In St. Joe Paper Co. v. Department of Community Affairs, 657 So. 2d 27, 28 (Fla. 1st DCA 1995), this Court held that granting an entity party status in an administrative proceeding based on the submission of comments was an impermissible "unilateral expansion" of the controlling statute. Id. This Court explained that the statute provided for the submission of comments as an additional statutory prerequisite for participation in the state administrative process, not as a replacement for being an "affected person." Id. Here, filing comments was not a prerequisite to party status, but there is no basis to conclude that it somehow expanded the APA definition of "party" or obviated the need to file a petition to gain party status. To conclude otherwise would be a "unilateral expansion" of the controlling statute and this Court's jurisdiction, contrary to this Court's reasoning in St. Joe Paper.

The federal regulations cited by Appellants do not purport to grant commenting entities "party" status in a state administrative proceeding or standing to invoke a state appellate court's jurisdiction. See 40 C.F.R. §§ 124.10(b)(1);

124.13; & 124.19(a). Nor could they. Under the Florida Constitution, a District Court of Appeal only has "the power of direct review of administrative action, as prescribed by general law," Art. V, § 4(b)(2), Florida Constitution. The Florida APA, which is "a 'general law' within the meaning of the constitution," Eckert v. Bd. of Comm'rs of N. Broward Hosp. Dist., 720 So. 2d 1151, 1152 (Fla. 4th DCA 1998), provides no support for the Appellants' theory that filing comments in accordance with certain federal requirements somehow vests a state appellate court with jurisdiction and grants SACE and Sierra Club standing to appeal state administrative action in a state appellate court.

Appellants' other jurisdictional arguments are equally unavailing. Sierra Club attempts to avoid dismissal by stating that the Florida rules for becoming a party under the Florida APA are "newly applicable." [Sierra Club, Brief at 44] Sierra Club refuses to acknowledge, however, that the Florida rules for becoming a party and obtaining state appellate rights have not changed in any regard. Both the initial public notice for the draft Unit 3 PSD permit and DEP's denial of Sierra Club's untimely petition unequivocally alerted Sierra Club that its failure to file a timely petition constituted a waiver of any right to become a party to the proceeding. [See R. Vol. 9, p. 1558; Vol. 10, pp. 1892-93] No volume of repeated citations to federal regulations (that do not even purport to grant Sierra Club state appellate rights) can overcome this essential fact.

Environmental Confederation of Southwest Florida v. Florida Department of Environmental Protection, 886 So. 2d 1013 (Fla. 1st DCA 2004) -- the only case cited by Sierra Club on this issue -- is clearly distinguishable. In that case, the path to party status in the state administrative proceeding changed during the course of the proceeding. That is not the case here. Sierra Club's obligation to petition for hearing to gain party status under Florida's APA never changed. Thus, the Court's dismissal of Sierra Club's appeal would not retroactively deny Sierra Club's right to an adjudication; Sierra Club itself extinguished any rights it had to participate as a party in state administrative proceedings when it failed to file a timely petition under Florida's APA and then chose not to appeal DEP's order of dismissal.

SACE notes that sections 120.68(7)(a) and 120.52(12), Florida Statutes, imply that reviewable final agency action may occur without a hearing below. However, these sections do not even suggest that a non-party that waived its rights to participate in a state administrative proceeding can appeal the final agency action. Further, SACE references these sections based on its incorrect assertion that in this case "agency action [was] finalized under procedures not providing for such a hearing." [SACE brief, at 13]. DEP rules and the public notice for the draft PSD permit for Unit 3 clearly provided an opportunity for an APA hearing, and SACE thus had an obligation to "*affirmatively* seek a hearing within the permissible timeframe." Prime Orlando Properties, Inc. v. Dep't of Bus. Reg., 502

So. 2d 456, 458 (Fla. 1st DCA 1986) (emphasis in original). "Failure to do so has been construed as a waiver of the right to a hearing." Id; see also, City of Punta Gorda v. Public Emp. Relations Comm'n, 358 So. 2d 81, 82 (Fla. 1st DCA 1978) ("We do not interpret Chapter 120 as requiring an agency to convene an unrequested formal hearing whenever it perceives the possibility of a disputed issue of material fact.").

SACE's reliance on Daniels, 401 So. 2d 1351, a 27-year old parole board case, is also misplaced. In Daniels, the appellant had no opportunity for an administrative hearing because the parole proceeding was "not specifically recognized under Chapter 120. . . ." Id. at 1354. Further, the Parole and Probation Commission had argued "that the Commission is an executive creature whose actions are entirely immune from judicial review." Id. at 1352. In this case, by contrast, there is no question that DEP provided Appellants with the opportunity to request a hearing under the Florida APA. [R. Vol. 9, p. 1558]; Fla. Admin. Code R. 62-110.106(3)(b); .106(12). However, SACE and Sierra Club waived their hearing rights.

Having failed to exercise their rights in a timely manner and therefore having failed to gain party status under Florida's APA, Appellants cannot circumvent the fundamental principle expressed in section 120.68(1), Florida Statutes -- the very statute they claim gives this court jurisdiction -- that the APA

only provides for review of agency action by parties. See Orange County, 397 So. 2d at 413. The Appellants simply ignore that they waived any right to initiate a Florida APA proceeding specifically intended to "give affected persons an opportunity to change the agency's mind." Capeletti Bros., Inc. v. State Dept. of Gen. Servs., 432 So. 2d 1359, 1363 (Fla. 1st DCA 1983) (citation omitted). Therefore, in addition to expanding the scope of section 120.68(1), Florida Statutes, allowing their non-party appeal would override the public benefits of Florida administrative proceedings, such as "promoting consistency in matters which are within agency discretion and expertise, permitting full development of a technical issue and factual record prior to court review, and avoiding unnecessary judicial decisions by giving the agency the first opportunity to correct any errors and possibly moot the need for court action." Cent. Fla. Investments, Inc. v. Orange County Code Enforcement, 790 So. 2d 593, 596 (Fla. 5th DCA 2001). Appellants seek to turn the Florida APA process on its head, essentially inviting this Court to step into the shoes of an administrative law judge (as fact-finder) and DEP (as the agency with expertise in interpreting and applying environmental rules) to consider fact-intensive, technical allegations regarding the PSD permit. This Court should decline the Appellants' invitation and dismiss this appeal.

2. BECAUSE SIERRA CLUB AND SEMINOLE SETTLED ALL MATTERS ASSOCIATED WITH THE PSD PERMIT, NO JUSTICIABLE CONTROVERSY EXISTS AND SIERRA CLUB'S APPEAL SHOULD BE DISMISSED.

On March 9, 2007, Sierra Club and Seminole entered into a Settlement Agreement that "represents a complete settlement of all Unit 3 issues related to the issuance of the PSD permit." [R. Vol. 12, p. 2168]. 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." Shelby v. Superformance Int'l., Inc., 435 F.3d 42, 45 (1st Cir. 2006) (citation omitted); see also Isol Auto Supply v. Diaz, 969 So. 2d 1054, 1055 (Fla. 1st DCA 2007) ("The settlement of a case renders it moot."). Further, "the public policy of the State of Florida...highly favors settlement agreements among parties and will seek to enforce them whenever possible." Hernandez v. Gil, 958 So. 2d 390, 391 (Fla. 3d DCA 2007) (quoting Sun Microsystems of Ca., Inc. v. Eng'g & Mfg. Sys., C.A., 682 So. 2d 219, 220 (Fla. 3d DCA 1996)). In light of Sierra Club's "complete settlement" with Seminole, this appeal should be dismissed.

By its own terms, the Settlement Agreement between Seminole and Sierra Club "consists of full and fair consideration for the release of all claims of the Sierra Club with respect to issuance of the PSD permit for Unit 3." [R. Vol. 12, p. 2165] In the Agreement, Seminole committed to significant emission reductions

and environmentally beneficial project upgrades, and in exchange Sierra Club agreed not to contest the PSD permit in "any judicial or administrative forum," so long as "the final PSD permit is issued in accordance with the terms and conditions of this Agreement." [Id.]. As DEP noted in its Final Determination for 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." [R. Vol. 12, p.2277]. DEP responded to the Settlement Agreement by issuing the final PSD permit as initially noticed and then opening a permit file to incorporate the Settlement Agreement's terms. [R. Vol. 13, p. 2293] With all potential claims fully settled and DEP's incorporation of the Settlement Agreement underway, no justiciable controversy exists, and this appeal should be dismissed as moot. See Isol Auto Supply, 969 So. 2d at 1055.

Despite Sierra Club's pledge to release "all claims...with respect to issuance of the PSD permit for Unit 3," Sierra Club now attempts to utilize DEP's approach to implementing the Settlement Agreement (i.e. first issuing a final PSD permit as originally proposed and then amending the permit to incorporate the Settlement Agreement) as an excuse to renege on its agreement not to oppose the PSD permit. While the Agreement contemplated that DEP would issue a "final PSD permit in accordance with the terms and conditions identified in this Agreement" [R. Vol. 12, p. 2165], it 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 air emission reductions into the permit, and (2) that is exactly what DEP is doing.

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."). Seminole's commitment in the agreement to reduce air emissions is independently enforceable, because Seminole specifically "agree[d] to be bound by [the Settlement Agreement's] limits and conditions." [R. Vol. 12, p. 2167]. 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. To the contrary, Seminole is working with DEP to incorporate the Settlement Agreement into its final PSD permit.[8] [R. Vol. 12, 2233-42; Vol. 13, p. 2293] The Settlement Agreement resolves Sierra Club's concerns, belying their claims on appeal. Because Seminole and Sierra Club fully

[8] See Florida Department of Environmental Protection, NSR / PSD Construction Permits, Seminole Electric Cooperative Palatka Generating Station, Application for Revisions for Final Permit (Dec. 18, 2008) available at http://www.dep.state.fl.us/Air/permitting/construction/seminole/0000353E.pdf.

settled this case, no justiciable controversy exists, and Sierra Club's appeal should be dismissed.

II. IF THIS COURT DETERMINES IT HAS JURISDICTION, APPELLANTS' SUBSTANTIVE ARGUMENTS LACK MERIT

A. STANDARD OF REVIEW

Section 120.68(7), Florida Statutes, provides the standard of review of agency action. Under Section 120.68(7), the Court shall remand or set aside agency action, only if it finds that:

> (a) there has been no hearing prior to agency action and the reviewing court finds that the validity of the action depends upon disputed facts;
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> (b) The agency's action depends on any finding of fact that is not supported by competent, substantial evidence in the record of a hearing conducted pursuant to ss. 120.569 and 120.57; however, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact;
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> (c) The fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure;
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> (d) The agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action; or
>
> (e) The agency's exercise of discretion was:
>
> 1. Outside the range of discretion delegated to the agency by law;
>
> 2. Inconsistent with agency rule;

3. Inconsistent with officially stated agency policy or a prior agency practice, if deviation therefrom is not explained by the agency; or

4. Otherwise in violation of a constitutional or statutory provision;

but the court shall not substitute its judgment for that of the agency on an issue of discretion.

In this case, Appellants waived any rights to a hearing pursuant to sections 120.569 and 120.57, Florida Statutes. Accordingly, there are no findings of fact for this Court to review.

Under Florida law, "[a]n agency's interpretation of the statute that it is charged with enforcing is entitled to great deference." Level 3 Communications, LLC v. Jacobs, 841 So. 2d 447, 450 (Fla. 2003). The same deference is accorded to the meaning assigned to rules by officials charged with their administration. Pan American World Airways v. Florida Pub. Serv. Comm'n, 427 So. 2d 716, 719 (Fla. 1983). Thus, in reviewing an agency's interpretation of law, courts apply the "clearly erroneous" standard of review, which means the interpretation will be upheld if the agency's construction falls within the permissible range of interpretations. Colbert v. Dep't of Health, 890 So. 2d 1165, 1166 (Fla. 1st DCA 2004).

B. ARGUMENT

1. APPELLANTS' REQUEST FOR REMAND TO ADDRESS HAZARDOUS AIR POLLUTANT REQUIREMENTS IS MOOT AND SHOULD BE DENIED.

Both Sierra Club and SACE request that the Court remand the Unit 3 PSD permit to address requirements for Hazardous Air Pollutants (HAPs) in light of the D.C. Circuit's opinion in New Jersey v. EPA, 517 F.3d 574 (D.C. Cir. 2008), which was issued in the interim between the draft and final PSD permits. However, Appellants fail to advise the Court that DEP specifically stated in its Final Determination for the Unit 3 permit that it was requiring Seminole to submit an application to address such requirements "in a separate agency action." [R. Vol., 13, p. 2284] In fact, Seminole has submitted such an application, which DEP is now processing.[9] Thus, Appellants are already receiving the relief they seek, and the issue is moot. See Physicians Health Care Plans, Inc. v. Agency for Health Care Admin., 706 So. 2d 113 (Fla. 1st DCA 1998) (Appeal of administrative order denying petition to initiate rulemaking rendered moot by agency's initiation of rulemaking on same subject).

Appellants cite no legal authority that requires DEP to address HAPs requirements in the initial Unit 3 PSD permit rather than in a permit modification.

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[9] See Florida Department of Environmental Protection, NSR / PSD Construction Permits, Seminole Electric Cooperative Palatka Generating Station, Application for Revisions for Final Permit (Dec. 18, 2008) at http://www.dep.state.fl.us/Air/permitting/construction/seminole/0000353E.pdf.

Rather, the procedure to be followed is a matter of discretion to be decided by DEP rather than the Court. See § 120.68(7), Fla. Stat. (2008) ("The court shall not substitute its judgment for that of the agency on an issue of discretion."). Further, there is no record basis to suggest that the two-staged process being pursued by DEP would impair the fairness of the proceeding since Appellants will have the opportunity to petition for an administrative hearing under the APA to the extent they ultimately dispute DEP's final action on Seminoles' pending application.

For these reasons, assuming the Court has jurisdiction over these appeals, it should deny Appellants' request for remand as moot.

2. NEITHER FLORIDA'S PSD RULES NOR THE FEDERAL CLEAN AIR ACT REQUIRED DEP TO INCLUDE A BACT LIMIT FOR CARBON DIOXIDE IN THE PSD PERMIT FOR SEMINOLE UNIT 3.

Both Appellants argue that DEP should have established a Best Available Control Technology (BACT) limit for carbon dioxide (CO_2) in the final PSD permit for Unit 3. In doing so, Appellants ask this Court to impose an entirely new regulatory requirement that would have far-ranging implications for sources throughout Florida and, potentially, the nation. Appellants can cite no instances in the history of Florida's PSD program in which BACT has been imposed for CO_2. That is because no existing state rules require, or even authorize, DEP to impose BACT emission limits for CO_2. Furthermore, although not directly applicable in this case, federal law does not require imposition of such limits either.

For purposes of determining the applicability of BACT to new sources, such as Seminole Unit 3, DEP's rules provide that "[t]he owner or operator of a new major stationary source shall apply best available control technology for each PSD pollutant that the source would have the potential to emit in significant amounts." Fla. Admin. Code R. 62-212.400(10)(b) (emphasis added). In turn, DEP rules define "PSD pollutant" as "[a]ny pollutant listed as having a significant emission rate as defined in Rule 62-210.200, F.A.C." Id. R. 62-210.200(254). On its face, Rule 62-210.200 does not list CO_2 as a pollutant having a significant emission rate. Id. R. 62-210.200(280).[10] Thus, under the plain language of Florida's rules, BACT emission limits are simply not required for CO_2. Without question, DEP must follow its own rules. See Cleveland Clinic Fla. Hosp. v. Agency for Health Care Admin., 679 So. 2d 1237, 1242 (Fla. 1st DCA 1996).

Appellants turn a blind eye to the plain language of DEP's regulations and instead focus on an expansive interpretation of federal provisions requiring BACT for each pollutant "subject to regulation" under the Clean Air Act. [Sierra Club Brief, at p. 28 (citing 42 U.S.C. § 7475(a)(4) and 40 C.F.R. § 52.21(b)(50)(iv)); SACE Brief, at p.31 (citing 42 U.S.C. § 7475(a) and 40 C.F.R. §§ 52.21(b)(50)

[10] Specifically, Florida Administrative Code Rule 62-212.200(280) lists "significant emissions rates" for the following pollutants: carbon monoxide, nitrogen oxides, sulfur dioxide, particulate matter, ozone, lead, fluorides, sulfuric acid mist, hydrogen sulfide, total reduced sulfur, reduced sulfur compounds, municipal waste combustor organics, municipal waste combustor metals, municipal solid waste landfill emissions, and mercury.

and 52.21(b)(12))] As noted above, however, DEP's PSD Program was "approved" by EPA at the time DEP issued the final PSD permit for Unit 3. Thus, Florida's rules applied. See In re Carlton, Inc., 9 E.A.D. 690, 693, 2001 WL 206031 (E.A.B. 2001) ("[Approved State-issued] permits are regarded as creatures of state law ...."); see also Agency for Health Care Admin. v. Mount Sinai Med. Ctr. of Greater Miami, 690 So. 2d 689, 691 (Fla. 1st DCA 1997) ("The agency must apply the law in effect at the time it makes its final decision."). Without even acknowledging the relevant Florida rules, Sierra Club attempts to bootstrap certain federal provisions of 40 C.F.R. § 52.21 into the Florida rules by noting that DEP has incorporated by reference 40 C.F.R. Part 52, Subpart A. [Sierra Club Brief, at 28] However, the preface to DEP's "incorporation by reference" rule makes clear that "[p]rocedural and substantive requirements in the incorporated federal regulations are binding as a matter of state law only where the context so provides." Fla. Admin. Code R. 62-204.800. Nothing in the context of DEP's PSD rules in Florida Administrative Code Rule 62-212.400 reference the federal rules cited by Appellants, much less provide that they are binding as a matter of state law. Florida law does not require BACT for CO_2.[11]

[11] Although Florida law does not impose BACT limit for CO_2 for the Unit 3 PSD permit, the PPSA requires Unit 3 to comply with all applicable environmental requirements enacted after certification. § 403.511(5)(a), Fla. Stat. (2008). Therefore, any new federal or state requirements mandating reductions in CO2 and other greenhouse gas (GHG) emissions would apply to Unit 3 when the new

Regardless of the "approved" status of Florida's PSD program, the federal provisions cited by Appellants do not require imposition of BACT for CO_2. Appellants wrongly cite the U.S. Supreme Court's decision in Massachusetts v. EPA, 549 U.S. 497 (2007) as support for the proposition that CO_2 is "subject to regulation" under the Clean Air Act and, therefore, subject to BACT. In Massachusetts, the Court did not address BACT or any other PSD permitting requirements. Nor did it hold that CO_2 is "subject to regulation" under the Act. Rather, the Court held that greenhouse gases, such as CO_2, are "air pollutants" that EPA could regulate under the mobile source provisions of the Act. Id. at 532. Importantly, the Court specifically did not hold that CO_2 emissions must be regulated. See id. at 534-35 ("We need not and do not reach the question whether on remand EPA must make an endangerment finding [requiring CO_2 regulation]... We hold only that EPA must ground its reasons for action or inaction in the statute.") (citation omitted). Instead, the Court remanded so that EPA could

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requirements go into effect. In that regard, the 2008 Florida Legislature adopted section 403.44, Florida Statutes, authorizing DEP to adopt rules establishing a cap-and-trade program to regulate GHG emissions from utilities, and these rules will become effective when ratified by the Legislature. Id. § 403.44(5). Recognizing that GHG regulations would likely be imposed on Unit 3 at some future date, Seminole considered the potential costs of such regulations during the Florida PSC Determination of Need proceeding for Unit 3. [R. Vol. 12, pp. 2094-95]

address the issue through the rulemaking process.[12] Thus, while the Court determined that CO_2 could be regulated under the Clean Air Act, it left it to EPA to determine whether to do so.

In its comments on the draft PSD permit for Unit 3, Sierra Club itself recognized that CO_2 emission limits or controls were not required under existing law. Specifically, Sierra Club stated that "[i]t is highly likely that Seminole will eventually have to control its CO_2 emissions under the Clean Air Act or public nuisance law." [R. Vol. 10, p. 1625 (emphasis added)]. On appeal, however, both Appellants now attempt to rely on pre-existing federal rules requiring monitoring and reporting (as opposed to control) of CO_2 emissions in arguing that CO_2 is "subject to regulation" under the Clean Air Act. [Sierra Club Brief, at 29, and SACE Brief, at 34 (both citing various provisions of 40 C.F.R. Part 75)]. As Sierra Club notes in its Initial Brief, however, EPA has issued an official memorandum clarifying that pollutants such as CO_2, which merely require monitoring and reporting as opposed to emission controls, are not "subject to regulation" under the Clean Air Act and, therefore, are not subject to PSD permitting requirements. [Sierra Club Brief, at 29 n.21]; see also, 73 Fed. Reg.

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[12] EPA subsequently initiated that process by publishing an advanced notice of proposed rulemaking which "presents information relevant to, and solicits comment on, how to respond to the U.S. Supreme Court's decision in Massachusetts v. EPA." 73 Fed Reg. 44,354 (July 30, 2008).

80,300 (Dec. 31, 2008). Although EPA recently announced that it will be reconsidering that memorandum, the Agency did not stay its effect.[13] Thus, although EPA's thinking on this issue may be in flux, one thing is clear: CO_2 is not now and certainly was not at the time DEP issued the final Unit 3 PSD permit "subject to regulation" under the Clean Air Act. As such, BACT was not required under federal rules even assuming *arguendo* that they applied in this case.

For these reasons, this Court should reject Appellant's arguments that the Unit 3 PSD permit must include a BACT limit for CO_2.

3. DEP DID NOT ERR IN ESTABLISHING "BACT" EMISSION LIMITS FOR SEMINOLE'S UNIT 3 PROJECT

Sierra Club claims that DEP failed to establish appropriate BACT emission limits for particulate matter (PM), carbon monoxide (CO), volatile organic compounds (VOC), and hydrogen fluoride. This issue boils down to whether DEP appropriately interpreted and applied its governing statutes and rules. Under Florida law, "[a]n agency's interpretation of the statute that it is charged with enforcing is entitled to great deference." Level 3 Communications, LLC v. Jacobs, 841 So.2d 447, 450 (Fla. 2003). The same deference is accorded to the meaning assigned to rules by officials charged with their administration. Pan Am. World

[13] EPA Administrator Lisa P. Jackson announced EPA's intent to reconsider the memorandum in a letter dated February 17, 2009. The letter is available from EPA's website at www.epa.gov/nsr/documents/20090217LPJlettertosierraclub.pdf.

Airways v. Florida Pub. Serv. Comm'n, 427 So. 2d 716, 719 (Fla. 1983). Thus, in reviewing an agency's interpretation of law, courts apply the "clearly erroneous" standard of review, "meaning the interpretation will be upheld if the agency's construction falls within the permissible range of interpretations." Colbert v. Dep't of Health, 890 So. 2d 1165, 1166 (Fla. 1st DCA 2004) (citation omitted).

Sierra Club relies extensively on factual assertions from its comments on the draft PSD permit, an 18-year old draft EPA guidance document which is not part of the record below,[14] and federal administrative decisions of EPA's Environmental Appeals Board (EAB). As discussed above, Sierra Club waived any right to an APA hearing and thereby shielded its factual assertions from scrutiny by a neutral fact-finder. Therefore, these assertions are unsubstantiated, not established facts. Furthermore, Sierra Club itself recognizes that the draft EPA guidance document is "not legally binding" and that the EAB decisions are merely "persuasive." [Sierra Club Brief, at p.19]; see also, Chipperfield v. Missouri Air Conserv. Comm'n, 229 S.W.3d 226, 242 (Mo. App. 2007) (EAB decisions and draft NSR Manual are not binding on state environmental officials or state courts).

Based primarily on the non-binding, federal NSR Manual, Sierra Club's Initial Brief includes an extensive discussion of the BACT process. While it is true

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[14] As shown on the first page of the excerpted NSR Manual included in the Appendix to Sierra Club's Brief, the Manual is dated October, 1990, and is still denominated a "Draft."

that BACT determinations can be quite technical, the process is essentially designed to first identify the "best available control technology" for the emissions source at issue based on consideration of energy, environmental and economic impacts, and other costs. See Fla. Admin. Code R. 62-210.200(40). Once the technology is selected, the permitting agency then establishes an emission limitation based on application of the selected technology to the source in question.

For the most part, Sierra Club does not challenge the various control technologies that DEP selected for Unit 3.[15] Rather, Sierra Club primarily claims that DEP should have imposed the most stringent emission limit ever imposed based on the use of those technologies in another permit anywhere in the country or the lowest emission rate achieved elsewhere in the country. However, even Sierra Club recognizes that DEP has the discretion to reject the most stringent emission limit imposed in another permit or the lowest emission rate achieved in

[15] In passing, Sierra Club does argue that "[t]he record reveals that DEP failed to properly examine other available control technologies for volatile organic compounds [VOC], carbon monoxide [CO] and particulate matter [PM]." [Sierra Club Brief, at 27]. This argument simply ignores the record. DEP's "Technical Evaluation and Preliminary BACT Determination" specifically addressed alternative technologies for all three of these pollutants. For CO and VOC, DEP evaluated thermal oxidation, catalytic oxidation and proper boiler design and operation. [R. Vol.9, pp.1525-26, § 5.2 (note that on at R. Vol. 9, p. 1521, DEP states that the discussion of these technologies in Section 5.2 of the Technical Evaluation applied to VOC as well as CO]. For PM, DEP specifically evaluated electrostatic precipitators (ESPs) and fabric filters. [R. Vol. 9, p.1510, §3.2] Sierra Club fails to identify any other control technologies it contends DEP should have evaluated for these pollutants.

the field. [Sierra Club Brief, at p.22]; see also, In re Prairie State Generating Co., Slip Op. at 72, 2006 WL 2847225 (E.A.B. 2006). ("[A] permit writer is not required to set the emissions limit at the most stringent emissions rate that has been demonstrated by a facility using similar emissions control technology.") (citation omitted), aff'd, Sierra Club v. EPA, 499 F.3d 653 (7th Cir. 2007). Sierra Club fails to establish that DEP abused that discretion.

Contrary to Sierra Club's argument, DEP did not "simply look" at emission limits for other permits and select a limit at the "middle or lower range" of the prior permit limits. For example, in setting the BACT emission limit for particulate matter, DEP analyzed Seminole's proposed limit of 0.015 lbs/mmBTU and concluded that it "does not include a technology-forcing component, but rather is more of an average of past BACT limits." [R. Vol. 9, p. 1525] Accordingly, DEP disagreed with Seminole and imposed a lower limit of 0.013 lbs/mmBTU, "which is in the low end of recent BACT determinations" -- indeed only 0.001 lbs/mmBTU higher than the lowest limit previously imposed. [Id.] Sierra Club claims that it brought to DEP's attention four additional permits with lower PM limits. However, at least three of those four permits were for circulating fluidized bed boilers (CFBs), which represent a completely different design than the

pulverized coal unit proposed by Seminole.[16] As DEP noted in its Technical Evaluation, EPA decisions and guidance indicate that "the BACT requirement [need not be considered] as a means to redefine the basic design of the source or change the fundamental scope of the project when considering available control technologies." [R. Vol. 9, p.1524] This factual discrepancy underscores Sierra Club's inappropriate attempt to have this Court act as fact-finder due to Sierra Club's failure to timely request an APA hearing.

For carbon monoxide (CO), DEP took into account the fact that "reducing CO emissions results in an increase of NOx emissions" and that NOx controls can increase products of incomplete combustion, such as CO and VOC. [R. Vol. 9, p.1526] Based on an extensive review of potentially available technologies as well as permit limits established for similar pulverized coal units across the country, DEP established a BACT limit of 0.13 lbs/mmBTU for CO "as it is in the lower range of recent BACT Determinations." [R. Vol. 9, p. 1527] As shown in a table presented in DEP's Technical Evaluation, this limit is as or more stringent than the seven most recent BACT Determinations for pulverized coal units and all but two of the last fifteen BACT determinations issued since November 2001. [Id.]

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[16] See [R. Vol. 4 p. 752](describing Reliant Energy and JEA Northside units as CFB boilers); see also, In re Newmont Nevada Energy Investments, 12 E.A.D. 429, 467, 2005 WL 3626598 (E.A.B. 2005) (noting that the Northampton unit cited by Sierra Club is a CFB unit and that state agency concluded "that CFB boilers are not comparable to [pulverized coal] boilers").

With regard to VOCs, DEP also rejected Seminole's proposed BACT limit because it "did not appear adequately stringent." [R. Vol. 9, p. 1528] Instead, DEP imposed a limit that is lower than all but one of the most recent BACT determinations for pulverized coal boilers. [Id.] Once again underscoring the fact-specific and technical nature of BACT determinations, Sierra Club wrongly asserts that two, rather than just one, of the permits surveyed had lower BACT limits for VOCs. [Sierra Club Brief, at 24] To the contrary, as noted in the Table included in DEP's Technical Evaluation, the second permit that Sierra Club alludes to – South Carolina Santee Cooper – did not establish a BACT limit, but rather established the Lowest Achievable Emission Rate (LAER) [R. Vol. 9, p. 1527 (Table)], which is an entirely different and more stringent requirement that applies in areas that do not meet ambient air quality standards (AAQS). See Fla. Admin. Code Rule 62-212.500(7) (requiring LAER for new or modified sources in "Nonattainment Areas," i.e. areas that do not meet the public health requirements embedded in AAQS). LAER limits are generally stricter than BACT limits, "because they are set without any consideration of energy or economic factors." United States v. Alabama Power Co., 372 F. Supp. 2d 1283, 1287 (N.D.Ala. 2005). Because the Seminole Generating Station is located in an area that meets all AAQS, LAER did not apply to Seminole Unit 3. [See R. Vol. 9, pp. 1520-36]

Finally, for hydrogen fluoride, DEP recognized that Seminole's installation of an electrostatic precipitator (ESP) followed by a wet flue gas desulfurization (FGD) system with the addition of a wet ESP (WESP) "assures extremely low emissions of fluorides." [R. Vol. 9, p. 1528] Moreover, DEP observed that the proposed emission rate of 0.00023 lbs/mmBTU as BACT is based on a 97 percent removal efficiency. [Id.] As shown in DEP's Technical Evaluation, this emission limit is lower than the four most recent BACT determinations and lower than all but two of the last ten BACT determinations made since October 2002. [Id.]

Based on the foregoing, Sierra Club cannot establish that DEP's BACT determinations were clearly erroneous or that DEP otherwise abused its discretion in interpreting its governing statutes or rules. Although Sierra Club may disagree with DEP's exercise of discretion, an agency's interpretation of its governing statutes and rules does not have to be the only, or even the most desirable, interpretation. It is enough if the agency interpretation is permissible. Golfcrest Nursing Home v. Agency for Health Care Admin., 662 So. 2d 1330, 1333 (Fla. 1st DCA 1995). Under the APA, "a court shall not substitute its judgment for that of the agency on an issue of discretion." § 120.68(7), Fla. Stat. (2008). Accordingly, this Court should reject Sierra Club's challenge of DEP's BACT determinations.

4. DEP PROPERLY ADDRESSED BACT FOR PERIODS OF STARTUP, SHUTOWN, AND MALFUNCIONS.

Sierra Club is wrong again in arguing that the PSD permit for Unit 3 allows Seminole to "ignore" BACT during startup, shutdown, and malfunction periods. The permit requires Seminole to implement "[b]est operational practices to minimize emissions" during such periods. [R. Vol. 13, p. 2252 (Specific Condition, No. 29.a)] The permit also requires Unit 3 to follow "an established startup and shutdown procedure which shall be submitted prior to the initial unit startup, for the Department's review and acceptance." [R. Vol. 13, p. 2253 (Specific Condition, No. 30] In its Technical Evaluation and Preliminary BACT Determination, the Department explained:

> Emissions during startup of the proposed unit will be minimized by the use of existing onsite steam and the use of No. 2 distillate oil igniters in the boiler to warm the boiler and steam turbine. The use of No. 2 fuel, along with the operation of the WESP and wet FGD systems will minimize emissions of those pollutants associated with contaminants in the fuel (PM and SO_2).
>
> Because the igniters and the boiler will be operating at low load conditions and the SCR will not be operating, excess emissions (when compared to the lb/MMBtu emission limits) for combustion products such as CO, VC, and NO_x are likely to occur. However the firing rate (BTU/hr) of the boiler is so low during these periods, that on a mass basis (lbs/hr), emissions are not likely to exceed the comparable hourly emission rates at full output. Additionally, the potential emissions (PTE) for Unit 3 are base on 100 percent capacity factor, and it stands to reason that for every hour that Unit 3 is off line (shut down), an hour of zero (or near zero) emissions exists.

[R. Vol. 9, p. 1529] In response to EPA's comments on the draft permit, DEP confirmed that it "intends that the adherence to these 'best management practices' to represent BACT for the purpose of startup and shutdown." [R. Vol. 13, p. 2287 (emphasis added)] DEP also noted that as a backstop, startup, malfunction, and shutdown emissions would "be included when demonstrating compliance with annual emissions... ." [Id.]

DEP's "Excess Emissions" rule specifically authorizes the imposition of work practices rather than numeric emission limits, see Fla. Admin. Code Rule 62-210.710, and Sierra Club itself recognizes that PSD permits may express BACT as work practices rather than numeric emission limits when such limits are infeasible. [Sierra Club Brief, at p. 33] However, Sierra Club yet again ignores the record when it argues that DEP "made no infeasibility finding." [Id.] As noted above, in its Technical Evaluation, DEP specifically explained that excess emissions are likely to occur during startup and shutdown "[b]ecause the igniters and the boiler will be operating at low load conditions and the SCR will not be operating. ..." [R. Vol. 9, p. 1529] In its Final Determination, DEP also explained that it "is aware that supercritical boilers have fairly complicated start-up systems due to ramping operation being required and difficulty in establishing metal matching conditions." [R. Vol. 12, p. 2280] Furthermore, the permit itself states: "Due to the large size of

this boiler and the design necessity to minimize thermal stresses, unit start-ups are expected to be long in duration." [R. Vol. 12, p. 2253]

Based on the foregoing, the record clearly demonstrates that DEP considered periods of startup, shutdown and malfunction and imposed BACT on emissions during those periods. As discussed above in response to Sierra Club's other BACT-related issues, DEP's interpretation of its own governing statutes and rules does not have to be the only interpretation, or even the most desirable, so long as it is permissible. See Golfcrest Nursing Home, 662 So. 2d at 1333. While Sierra Club may disagree with DEP's treatment of startup, shutdown and malfunction emissions, it provides no basis to conclude that DEP abused its discretion or otherwise interpreted its regulations impermissibly.

5. DEP PROPERLY FOLLOWED ITS RULES IN CONSIDERING SIERRA CLUB'S COMMENTS ON THE DRAFT PERMIT.

Sierra Club's asserts that DEP "did not respond in any way" [Sierra Club brief, p. 38] to Sierra Club's comments regarding the draft PSD permit. Not true. DEP's Final Determination stated:

> Comments were also received from Sierra Club by letter dated October 9, 2006. On March 9, 2007 the applicant and Sierra Club entered into a Settlement Agreement, to which the permitting authority was not a party and which was outside of the Prevention of Significant Deterioration (PSD) process that resolves all timely-received comments submitted by the applicant and Sierra Club related to the draft PSD permit. To the extent the applicant wants to

> incorporate those changes into an air construction permit for that facility, an application to revise the PSD permit may be submitted.

[R. Vol. 12, p. 2277] (emphasis added). Thus, DEP (1) recognized that Sierra Club submitted comments regarding the draft PSD permit; (2) acknowledged that the Settlement Agreement (by its own terms) resolved Sierra Club's concerns; and (3) provided a roadmap for incorporating the Settlement Agreement via permit revision. Further, (though again not mentioned by Sierra Club's brief) DEP is currently processing a permit modification to incorporate the Settlement Agreement. [R. Vol. 13, p. 2293] So, the comment and agency response process was far from "a mere paper exercise" as alleged by Sierra Club; rather, DEP specifically acknowledged and responded to Sierra Club's comments by providing a procedure to incorporate into a revised permit the same air emission reductions that Sierra Club had agreed constituted "a complete settlement of all Unit 3 issues related to the issuance of the PSD permit." [R. Vol. 12, p. 2168]

Sierra Club fails to cite to any state rule substantiating the claim that DEP's consideration of Sierra Club's comments was somehow inadequate. DEP Rule 62-210.350(2)(f) requires that, for projects subject to PSD review, "[a]ny public comments received...shall be considered by [DEP] in making a final determination to approve or deny the permit."[17] Notably, this DEP rule doe not require DEP to

[17] As discussed supra, page 33, DEP Rule 62-204.800 also incorporate by reference large sections of federal regulations that include the federal procedures for

provide a written response to comments regarding PSD permits. Specific DEP procedures for PSD permits thus differ from rules for certain other permits with a public comment process. See, e.g. Fla. Admin. Code R. 62-528.330 (requiring DEP to respond in writing to comments concerning draft underground injection well permits). Sierra Club failed to demonstrate that DEP handled Sierra Club's comments in a manner that contravened DEP's own rules. See Colbert, 890 So. 2d at 1166; § 120.68(7), Fla. Stat.

Sierra Club also notably fails to explain its dissatisfaction with an agency course of action that included not just consideration of Sierra Club's comments, but also a process for actually transposing the substance of the settlement agreement (resolving those comments) into an amended PSD permit. It is well understood by both Seminole and Sierra Club that Seminole cannot begin construction of Unit 3 until DEP revises the PSD permit to address HAPs requirements. See supra, § II.B.1; [R. Vol. 13, p. 2289; Vol. 13, p. 2293] Sierra Club is also well aware that Seminole is using that same permit revision process to incorporate the Settlement Agreement into a revised PSD permit (just as DEP

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comments; however, in referencing these rule sections, DEP makes clear that "[p]rocedural and substantive requirements in the incorporated federal regulations are binding as a matter of state law only where the context so provides." DEP provides no such context for federal commenting procedures in its PSD permitting rules. See Fla. Admin. Code R. 62-210.350. Further, because DEP unquestionably operated an approved program when the final permit issued, only Florida's rules applied. See In re Carlton, Inc., 9 E.A.D. at 693, 2001 WL 206031; see also Agency for Health Care Admin., 690 So. 2d at 691.

suggested in its Final Determination). [R. Vol. 12, pp. 2233-42, 2277; Vol. 13, p. 2293] It seems then, if Sierra Club was truly interested in equitably and efficiently resolving its concerns regarding the PSD permit, it would join Seminole and DEP in implementing the Settlement Agreement instead of seeking to tie up the Unit 3 project in further administrative proceedings.

If this the Court determines that it has jurisdiction over this appeal, the Court should decline Sierra Club's request to remand this case for further written response to Sierra Club's comments.

CONCLUSION

Having waived their rights to participate in the administrative proceeding below, Appellants should not now be allowed to tie up the Unit 3 project in more administrative proceedings. Furthermore, Appellants' concerns regarding the Unit 3 permit are either baseless or, in the case of HAPs, being addressed in a separate permit modification proceeding. Through this same process, DEP is incorporating the Settlement Agreement, which by its own terms resolves Sierra Club's concerns, into the Unit 3 permit. These factors make Sierra Club's unsubstantiated assertions regarding the Unit 3 project, (such as suggesting that breathing air near the Seminole Generating Station is comparable to smoking cigarettes [Sierra Club brief, p. 3]), ring hollow. As the Fifth District Court of Appeal noted, "the advanced pollution control features of Unit 3, when combined with proposed

upgrades to the existing units that would be made in conjunction with construction of Unit 3, would significantly reduce current environmental impacts of Seminole Generating Station." Seminole Elec. Coop., 985 So. 2d at 617 (emphasis added).

For the reasons set forth above, this appeal should be dismissed. Alternatively, if the Court concludes that it has jurisdiction, the Appellants' arguments should be rejected, and DEP's issuance of the final PSD permit for Seminole Generating Station Unit 3 should be affirmed.

Respectfully submitted this 30th day of March, 2009.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to the following counsel, this 30th day of March, 2009.

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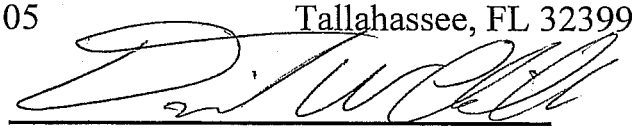

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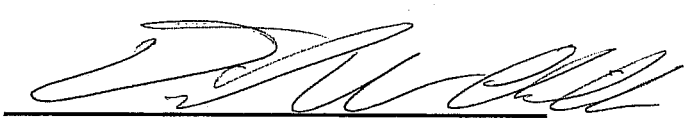
CERTIFICATE OF COMPLIANCE

I further certify that this brief is presented in 14-point Times New Roman and complies with the front requirements of Rule 9.210.



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