STATE OF FLORIDA
FIRST DISTRICT COURT OF APPEAL

SOUTHERN ALLIANCE FOR CLEAN ENERGY,

Appellant,

vs.

Case No. 1D-08-4900
DEP Permit No.1070025-005-AC

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

Appellees.

AN APPEAL OF A PERMIT ISSUED BY THE DEPARTMENT

ANSWER BRIEF OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION

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PRELIMINARY STATEMENT

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

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

STATEMENT OF THE CASE AND FACTS

This is an appeal from a final air construction permit issued by the DEP for which no administrative hearing was requested and for which no such hearing was held.

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

As part of each approved SIP, sections 160-165 of the Clean Air Act, 42 U.S.C. sections 7470-7475, require that each state implement special permitting for large sources of air pollutants locating in areas in which ambient air quality standards are attained. The special permitting is called "prevention of significant

deterioration", or PSD, permitting. For some states whose SIP cannot be approved for PSD permitting and for other states whose SIP is partially approved for PSD permitting, EPA has, within the state's SIP, delegated authority to process PSD permits using the federal permitting rule, 40 C.F.R. section 52.21 in accordance with 40 C.F.R. section 52.21(a)(1). For states whose SIP has been approved for PSD, PSD permits are issued independently and solely under state authority. Florida's PSD permitting is approved as part of the Florida SIP at 40 C.F.R. section 52.530.

PSD permitting regulates pollutants for which ambient air quality values have been established (criteria pollutants) and for certain other pollutants designated as being covered by the program (designated pollutants). See 40 C.F.R. § 51.166. The program does not apply to "hazardous air pollutants." See 42 U.S.C. § 7412(b)(6). Florida also administers a separate special permitting process for larger sources of hazardous air pollutants, the MACT program. Florida's case-by-case MACT program is not part of the approved SIP. It is separately approved by EPA pursuant to 40 C.F.R. Part 63.

The Department received Seminole's permit application in March 2006. [R. Vol. 3, pp. 412-600]. The permit was processed by DEP separately from, but in association with, an application for Siting certification under the Florida Power Plant Siting Act, sections 403.501-403.5185, Florida Statutes. [R. Vol. 2, 3, pp.

201-411]. DEP issued a Notice of Intent to Issue the Seminole permit on August 24, 2006. [R. Vol. 9, pp. 1510-56]. Seminole published the notice in the Palatka Daily News on September 8, 2008. [R. Vol. 9, pp. 1557-58]. The published notice reflected that a petition must be filed within 14 days of notice or publication to avoid a waiver of any right to an administrative hearing.

The Seminole PSD permit was initially processed pursuant to the statutory timing requirements set forth in section 403.509, Florida Statutes (2005), which required that DEP issue the PSD permit within 30 days of the issuance of the Siting Board certification. Absent the timing provision of section 403.509, Florida Statutes, all air construction permits, including PSD permits, are subject to the permit timing specifications of section 403.0876(2), Florida Statutes (2006), requiring issuance within 90 days of DEP's receipt of a complete application. During the summer of 2006, however, the provisions of section 403.509, Florida Statutes, changed, eliminating the link between the timing of the issuance of the PSD permit and the Siting Board certification. DEP relied upon the 2005 statute as authority to exceed the 90-day issuance clock.

Litigation delayed the issuance of the Siting certification. The DEP Secretary entered an order denying Siting Certification on behalf of the Siting Broad on August 20, 2007. See Seminole Electric Cooperative, Inc. v. Dep't of Envtl. Prot., 985 So. 2d 615, 621 (Fla. 5th DCA 2008). The Siting denial order

was appealed and the appellate decision reversing the Finoal Order of Denial was issued in June 2008 and released in August. Id. at 615. The certification was then issued in August 2008 and Seminole's PSD permit was issued on September 8, 2008. [R. Vol. 13, pp. 2284-2292.23].

While the Siting certification was delayed by the litigation, SACE submitted two letters to DEP concerning the Seminole permit. The first letter was submitted August 21, 2007 and the second letter was submitted July 3, 2008. [R. Vol. 12, pp. 2170-2232]. These two letters constitute SACE's sole involvement with Seminole's permitting process.

SUMMARY OF THE ARGUMENT

This is not an appeal of an agency decision after hearing, nor is it an appeal of an agency order denying party status. This is an appeal of a final agency order by an entity who never became a party to any process resulting in the final agency action below. SACE was provided a clear point of entry to participate in an administrative proceeding but failed to file any petition, and in so doing, failed to become a party. Therefore, under section 120.68, Florida Statutes, this Court lacks jurisdiction to review the final agency action because the appeal has been brought by a non-party who has waived its right to petition for hearing below.

Furthermore, SACE cannot support a state court appellate right based upon adherence to federal administrative rules. As clearly reflected in the Department's

Notice of Intent to Issue, Seminole's application was processed pursuant to Florida statutes and Department rules, both procedural and substantive. Whether that process complies with federal requirements is not relevant; to establish standing in the state administrative process, SACE was required to take action to become a party below by filing a petition for an administrative hearing. Here, the record reflects that SACE failed to avail itself of the available opportunity. For that reason, it cannot invoke this Court's jurisdiction to review the permit for the first time through this appeal, which should, accordingly, be dismissed.

Moreover, even if SACE had perfected its standing to challenge this permit under Florida's Administrative Procedures Act, there is still no basis for reversal of the agency action. DEP processed the Seminole permit pursuant to DEP rules, which provide for publication of detailed information concerning PSD permits. The record shows that DEP properly assessed both the pollutants and the appropriate technology and imposed the appropriate emissions limits for the Seminole permit. DEP identified each pollutant subject to "best available control technology" (BACT), based upon engineering data and experience as provided by rule, and correctly considered all information provided. DEP correctly did not include carbon dioxide because it is not yet listed as a pollutant subject to BACT analysis under DEP rules; furthermore, DEP currently has no other rules limiting emissions of carbon dioxide from stationary sources of air pollution. In any event,

the appropriateness of an individual emissions limit is a factual issue that could have been determined through fact-finding in administrative hearing, had SACE not waived its right to a hearing.

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

ARGUMENT

I. SACE HAS NO STANDING TO BRING THIS APPEAL

A. Standard of Review

Whether a party has standing to bring an action is a question of law that is to

be reviewed de novo. See Mid-Chattahoochee River Users v. Dep't of Envtl. Prot., 948 So. 2d 794, 796 (Fla. 1st DCA 2006) (citing Hospice of Palm Beach County, Inc. v. State Agency for Health Care Admin., 876 So. 2d 4, 7 (Fla. 1st DCA 2004)).

B. By Failing to Pursue Available Opportunities to Become a Party to the Permit Process Below, SACE Waived Its Party Status and Any Right to Appeal the Permit under Section 120.68, Florida Statutes

For this Court to exercise its jurisdiction pursuant to section 120.68, Florida Statutes, SACE must establish that it is a "party" to the proceeding. See § 120.68, Fla. Stat. (2008) ("A party who is adversely affected by final agency action is entitled to judicial review."). However, SACE waived party status by not filing a petition for administrative hearing. Furthermore, SACE fails to fall within the statutory definition of "party" pursuant to section 120.52(13), Florida Statutes. By waiving its party status below and, in the alternative, failing to satisfy the statutory definition of "party," this Court lacks the jurisdiction to review the final agency action at issue here.

Section 120.68, Florida Statutes, provides that "[a] party who is adversely affected by a final agency action is entitled to judicial review." See § 120.68(1), Fla. Stat. (2008). The courts have found four requirements that must be met for this Court to exercise its jurisdiction to review final agency action: (1) the action is

final; (2) the agency is subject to provisions of the act; (3) the person seeking review was a party to the action; and, (4) the party was adversely affected by the action. See Legal Envtl. Assistance Fund., Inc. v. Clark, 668 So. 2d 982, 986 (Fla. 1996); Norkunas v. Fla. Bldg. Comm., et al, 982 So. 2d 1227, 1228 (Fla. 1st DCA 2008). While the Seminole permit is final and DEP is an agency subject to the provisions of the Florida Administrative Procedures Act, SACE has not shown that it meets the other two criteria necessary to invoke this Court's jurisdiction.

As explained above, the "Public Notice of Intent to Issue" for the Seminole permit was published in the Palatka Daily News September 6, 2006. [R. Vol. 9, pp.1557-8]. The notice contained detailed information concerning the requirements to become a party to the permit action, including the fourteen day timeline within which to file a petition. [R. Vol. 9, pp.1555-56]. The published notice also clearly reflected,

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

[R. Vol. 9, p. 1558] (emphasis added). Rather than acting on the above information, the record reflects that SACE took no action at all concerning the Seminole permit until August 21, 2007, when it first sent a letter with comments to

DEP, nearly a year after the Notice of Intent to Issue was published. [R. Vol. 12, pp. 2170-2196].

DEP's governing statute, found at section 403.815, Florida Statutes, the implementing rule, found at Florida Administrative Code Rule 62-110.106, and the published DEP notice itself all specify that a petition must be filed within fourteen days of notice or publication to avoid a waiver of rights to an administrative proceeding. SACE failed to file any petition. In so doing, SACE forfeited its right to seek to become a party to an administrative proceeding. Cf. Klein v Dep't of Educ., 908 So. 2d 1097 (Fla. 1st DCA 2005) (finding that a person who was afforded the chance to seek remedies pursuant to Chapter 120, Florida Statutes, but failed to do so must "be deemed to have waived his right to request a hearing on the issue.") (citing Patz v. Dep't of Health, 864 So. 2d 79, 81 (Fla. 3d DCA 2003); Reinshuttle v. Agency for Health Care Admin., 849 So. 2d 434 (Fla. 1st DCA 2003)).

In addition to waiving its right to participate as a party below, SACE has not demonstrated that it meets the statutory definition of a "party," as is required to invoke this Court's appellate review. The term "party" is defined at section 120.52(13), Florida Statutes, to include:

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

> (b) Any other person who, as a matter of constitutional right, provision of statute, or provision of agency regulation, is entitled to participate in whole or in part in the proceeding, or whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party.
>
> (c) Any other person, including an agency staff member, allowed by the agency to intervene or participate in the proceeding as a party. An agency may by rule authorize limited forms of participation in agency proceedings for persons who are not eligible to become parties....

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

First, SACE is clearly not a "specifically named person" within the meaning of subsection (a). Nor has DEP allowed SACE "to intervene or participate as a party" within the meaning of subsection (c). While DEP does "authorize limited forms of participation" by providing persons who may not be eligible to become a party[1] the ability to provide public comment, see rule 62-210.350, F.A.C., DEP's published Notice of Intent to Issue clearly stated that it did not confer party status to public commenters, inviting interested persons to request a formal process and make an appearance as a party.

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[1] For purposes of administrative proceedings, an organization represents the interests of its members. Fla. Chapter of the Sierra Club v. Suwannee American Cement Co., 802 So. 2d 520 (Fla. 1st DCA 2001). An organization must show that its members will be subject to an injury in fact. Agrico Chemical Co. v Dep't of Envt'l Reg., 406 So. 2d 478, 482 (Fla. 2d DCA 1981). SACE has shown only a general interest in environmental matters. Such general interest is not sufficient to establish standing. Fla. Chapter of the Sierra Club, 802 So. 2d at 522-23.

Having failed to meet the requirements of sections 120.52(13)(a) or (c), Florida Statutes, SACE would need to establish that it comes within the purview of section 120.52(13)(b), Florida Statutes, involving those who are entitled to participate in the proceeding or those whose substantial interests will be affected by the proposed agency action and who make an appearance as a party. See § 120.52(13)(b), Fla. Stat. (2008). As detailed above, SACE did not become a party to this action below when given the opportunity. Therefore, by failing to pursue the appropriate process, SACE abandoned any claim to becoming a "party" and invoking this Court's jurisdiction for the purposes of appellate review.[2]

C. SACE Cannot Rely upon Federal Procedures to Claim Standing in This Court

Perhaps in recognition that it has no legitimate claim to invoke this Court's jurisdiction pursuant to section 120.68, Florida Statutes, SACE, as a non-party, argues instead that it should have standing in a Florida court because it would be entitled to review under federal rules as a "person who filed comments." [SACE Amended Initial Brief p. 12]. However, DEP properly processed the permit pursuant to its own rules as an approved program, meaning the federal procedural

[2] SACE's reliance upon section 120.68(7), Florida Statutes, is misplaced. Review pursuant to section 120.68, including paragraph (7), is available to "a party" adversely affected by final agency action. See § 120.68(1), Fla. Stat. (2008). As explained in detail, SACE is not a "party" to this proceeding; therefore, this Court cannot exercise jurisdiction pursuant to section 120.68(7), Florida Statutes.

rules at 40 C.F.R. Part 124 are not applicable here.[3] While SACE argues that DEP should have used federal rules to process the Seminole permit, or, in the alternative, that DEP was using a hybrid state/federal process, DEP's Notice of Intent to Issue Permit listed both the procedural and the substantive rules and statutes the DEP considered in issuing the permit in the published notice. [R. Vol. 9, pp. 1557-1558]. The stated authorities governing permit issuance were clearly Florida authorities. SACE's attempts to paint the Department's actions as confusing or misleading, arguing that it was unclear whether state or federal air permitting rules controlled issuance of Seminole's permit, is a misstatement of the record and provide no basis for this Court to accept jurisdiction.

The Seminole permit was issued pursuant to Florida Administrative Rule Chapters 62-4, 62-204, 62-210, 62-212, 62-296 and 62-297. [R. Vol. 13, pp. 2284-2292.23]. DEP issues permits pursuant to its own statutory authority, found at section 403.087, Florida Statutes; however, DEP's permit rules, including DEP PSD permit rules, are also approved by EPA as part of the Florida state

[3] Contrary to SACE's assertion, 40 C.F.R. Part 124 does not provide judicial appeal rights to all commenting persons; the rule provides only an opportunity to petition the Environmental Protection Agency's Environmental Appeal Board (Board) for administrative review. It appears that SACE has filed no such petition. 40 C.F.R. section 124.19(e) provides access to federal appellate review only to persons who participated in the federal administrative hearing process, which SACE has not.

Furthermore, review before the board is only available if Seminole's permit was issued pursuant to a "delegated" program, which DEP contests.

implementation plan (SIP).[4] DEP's PSD process is found at Florida Administrative Code Rule 62-212.400, which includes requirements for modeling and monitoring as well as for evaluating and limiting emissions from proposed projects, such as that of the Seminole permit.

SACE argues that DEP should have processed the Seminole permit using 40 C.F.R. section 52.21 pursuant to a 1993 letter, not part of the record on appeal, supposedly evidencing a "delegation agreement." However, the letter demonstrates no agreement and, furthermore, contains no discussion of events taking place some thirteen years later. In addition, when EPA wishes to approve or disapprove a state implementation plan, it must comply with the federal rulemaking process. Sierra Club v. Ga Power Co., 443 F.3d 1346, 1354-55, (USCA 11th Cir 2006); see also, Envtl. Integrity Project v EPA, 425 F.3d 992 (DC Cir. 2005). Had EPA disapproved any or all of DEP's PSD permit program, such disapproval would have been reflected in DEP's PSD approval rule. El Comite Para Bienestar De Earliment v. Warmerdam, 539 F. 3d 1062, 1070 (9th Cir. 2008); see also, 40 C.F.R. § 52.21 (a)(1).

SACE also cites a federal register notice of June 27, 2008, to support its contention that DEP was required to use federal rules in processing the Seminole

[4] The DEP's approved SIP is located at 40 C.F.R. Part 52, Subpart K, sections 52.520-52.530.

permit. The federal register notices recites some history of controversy concerning the subject of power plant permits. However, that document does not address the fact that the DEP's approved SIP never required that DEP process the Seminole permit using federal rules. 40 C.F.R. section 52.21 governs EPA-issued PSD permits and specifies that states must use that rule to process PSD permits when EPA has disapproved all or part of the state's implementation plan for PSD permits.[5] The federal rule states that any disapprovals of state authority to use its own rules are listed in the subpart addressing the specific state plan.

Florida's "PSD approval rule" is found at 40 C.F.R. section 52.530. That rule has, since 1983, required use of the federal PSD rule, 40 C.F.R. § 52.21, only for projects located on Indian reservations and for permits issued by EPA before the Florida PSD program was approved in 1983[6]. 40 C.F.R. § 52.530(d). Nothing

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[5] 40 C.F.R. section 52.21(a)(1) says: "The provisions of this section are applicable to any State implementation plan which has been disapproved with respect to prevention of significant deterioration of air quality in any portion of any State where the existing air quality is better than the national ambient air quality standards. Specific disapprovals are listed where applicable, in subparts B through DDD of this part."

[6] 40 C.F.R. section 52.530(d) states:"(d) The requirements of sections 160 through 165 of the Clean Air Act are not met since the Florida plan, as submitted, does not apply to certain sources. Therefore, the provisions of Sec. section 52.21 except paragraph (a)(1) are hereby incorporated by reference and made a part of the Florida plan for:
(1) Sources proposing to locate on Indian reservations in Florida; and
(2) Permits issued by EPA prior to approval of the Florida PSD rule."

in the rule approving Florida's PSD program ever required DEP to use 40 C.F.R. section 52.21 to process permits for power plants; and, furthermore, nothing in the July 2008 federal register notice altered 40 C.F.R. section 52.530(d), the rule section which specifies when DEP must use 40 C.F.R. section 52.21 to process PSD permits.

In addition, the record shows that EPA provided detailed comments on the proposed permit on October 5, 2006. [R. Vol. 9, pp. 1567-1571]. It is clear EPA understood that DEP was processing the permit pursuant to DEP's own rules. For example, the letter references a decrease in emissions pursuant to "DEP's regulations," at paragraph (b) of the item "Netting Analysis."[R. Vol. 9, p. 1568]. But EPA made no comment concerning any obligation to use federal rules to process the permit. In addition, when directly addressing the permit itself, EPA did not state that DEP's process was procedurally defective in any way. EPA's comments were entirely technical and do not support SACE's theory that DEP was required to process the permit using 40 C.F.R. section 52.21.

SACE also alleges Florida Administrative Code Rule 62-204.800, DEP's central repository of all federal air regulations, requires DEP to use the federal regulation in lieu of DEP's own specific permitting rules. However, this argument mistakes the DEP rule. DEP adopts many federal regulations by reference and uses those regulations in a variety of ways. Adopting a federal rule by reference

into Florida Administrative Code Rule 62-204.800 does not, however, make the referenced rule superior to the more specific DEP rules, nor does it confer general applicability upon it. Florida Administrative Code Rule 62-204.800 contains its own applicability limitation in the rule's introductory paragraph:

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

Fla. Admin. Code R. 62-204.800 (effective 1-1-2005) (emphasis added). The qualifying rule language clearly provides that the referenced materials are not of general applicability unless they are made so in citing language of the other DEP air pollution rules. DEP may use part of a federal regulation for definitional purposes or use only a limited process contained within a federal rule. DEP uses portions of 40 C.F.R. section 52.21 for both those purposes within its own rules.

Ultimately, although SACE devotes considerable time arguing that DEP did not conform to the federal process in issuing Seminole's permit, the federal rules cited by SACE did not govern the process.[7] Therefore, whether DEP complied

[7] DEP has adopted its own very specific permit processing rules, including a general permit processing rule at Florida Administrative Code Rule 62-210.300, a particular rule for processing "PSD permits" at Florida Administrative Code Rule 62-212.400, a public notice rule at Florida Administrative Code Rule 62-110.106, and a rule allowing public comment and governing dissemination of information

with the federal rules regarding public notice, for example, is irrelevant;[8] as the

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for PSD permits at Florida Administrative Code Rule 62-210.350(2). DEP properly processed the Seminole permit in conformity with those rules.

[8] SACE lists five examples of DEP's alleged failure to follow the federal rules: the Notice of Intent did not mention the Clean Air Act or federal processes; the notice failed to identify correct public participation process; DEP procedure does not allow for introduction of new issues; the notice indicated that hearings might be consolidated; and, DEP did not issue any statement of basis.

Regarding the first claim, Seminole's permit was properly issued using DEP's own rules and not federal rules; therefore, the Department was under no obligation to mention the federal process. The notice is extensive and provides all the information required by DEP's public notice rules and, incidentally, by the federal public notice rule. See Fla Admin Code R 62-110.106, 62-210.350; see also 40 C.F.R. § 124.10.

SACE also claims that the notice the notice is unclear because it provides a point of entry to persons to file a petition pursuant to sections 120.569 and 120.57, Florida Statutes. DEP is required to provide such information by section 403.815, Florida Statutes and by Florida Administrative code Rule 62-110.106. But the notice also contains an entirely separate section providing information about how persons wanting only to provide comments should submit those comments. [R. Vol. 9, p. 1556].

SACE also takes issue with the notice being published in the Palatka Daily News, claiming it is a newspaper of minor circulation and would not reach interested persons statewide. However, both DEP's rules and Florida Statutes require that notice must be published "in a newspaper of general circulation" in the area affected. See §403.815, Fla. Stat. (2008); Fla. Admin. Code R. 62-110.106.

Next, SACE argues that DEP should have accepted its late comments because federal rules would allow late comments. SACE is incorrect. Nothing in the federal rules allows late comments about matters that were ascertainable during the normal comment period. 40 C.F.R. section 124.14 gives the Administrator the discretion to re-open a public comment period. Florida Administrative Code Rule 62-110.106(7)(a)4. has a similar provision to provide re-publication "if the subject activity or project is substantially modified..." SACE makes no allegation that any substantial modifications were made to the permit between the time of publication of the notice and issuance of the final permit. SACE has shown no basis for DEP to re-open the public comment period.

published Notice of Intent to Issue clearly stated, the Department applied Florida rules and statues to the Seminole permit. Whether SACE followed the federal procedures necessary to obtain federal review has no bearing here. The Notice clearly stated the governing rules and statutes for Seminole's permit, including the avenue by which SACE could obtain a hearing on the proposed agency action. SACE chose not to avail itself of that process, and cannot now seek to challenge final agency action in an appellate court.

D. Exceptions to the Doctrine of Exhaustion of Administrative Remedies Create No Basis for this Court to Exercise Jurisdiction

SACE's argument that this Court has subject matter jurisdiction to review the final agency action here due to exceptions to the doctrine of exhaustion of administrative remedies is without merit. SACE cites Bankers Insurance Company v. Florida Residential Property & Casualty Joint Underwriting Assocation, et. al., 689 So. 2d 1127 (Fla. 1st DCA 1997), for the proposition that conflicting administrative procedures in the instant case prevented SACE from having an adequate remedy under Chapter 120, Florida Statutes, creating jurisdiction for this

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SACE also raises the question whether an independent PSD permit hearing, would have been available. SACE did not file a petition requesting a hearing, so it can hardly complain that hearing consolidation might be available.

SACE finally alleges that the notice does not include a "statement of basis" or "fact sheet" as required by federal rule. The Technical Evaluation and Preliminary BACT Determination contains the "statement of basis" for the DEP proposed permit. [R. Vol. 9, pp. 1514-1536].

Court to remand the case back to the Department. Bankers Insurance Co. states that "[d]eclaratory and injunctive relief is available as a remedy for adverse administrative action 'only in those extraordinary cases where a party has no other adequate administrative remedy to cure egregious agency errors or where a party's constitutional rights are endangered.'" Id. at 1129 (quoting Metro. Dade County v. Dep't of Commerce, 365 So. 2d 432, 433 (Fla. 3d DCA 1978)). The case goes on to provide factors used in evaluating whether an administrative remedy will be found inadequate:

> 1) the complaint must demonstrate some compelling reason why the APA (Chapter 120, Florida Statutes) does not avail the complainants in their grievance against the agency; or (2) the complaint must allege a lack of general authority in the agency and, if it is shown, that the APA has no remedy for it; or (3) illegal conduct by the agency must be shown and, if that is the case, that the APA cannot remedy that illegality; or (4) agency ignorance of the law, the facts, or public good must be shown and, if any of that is the case, that the Act provides no remedy; or (5) a claim must be made that the agency ignores or refuses to recognize related or substantial interests and refuses to afford a hearing or otherwise refuses to recognize that the complainants' grievance is cognizable administratively.

Bankers Ins. Co., 689 so. 2dd at 1129 (quoting Communities Fin. Corp. v. Fla. Dep't of Envtl. Reg., 416 So. 2d 813, 816 (Fla. 1st DCA 1982)). None of the factors apply in the instant case.

First, SACE's failure to pursue Chapter 120 remedies does not provide a "compelling reason" why such remedies are no longer available; furthermore, air

permitting is clearly within the Department's authority, and SACE alleges no illegal conduct on behalf of DEP. The Department has ignored neither the law nor the public good, nor did DEP refuse to recognize SACE's interests. In fact, the Department afforded SACE an opportunity to become a party to the proceedings below. Finally, although SACE alleges that DEP acted in excess of its delegated powers by ignoring the required federal procedures in issuing Seminole's permit, in fact, as explained above, the Department appropriately followed the applicable state rules and procedures. SACE's assertions do not meet the necessary criteria for relief pursuant to any exceptions to the doctrine of administrative remedies. Not only were SACE's administrative remedies not exhausted in the instant case, they were never pursued, and relief is not warranted. See Dep't of Envtl. Prot. v. PZ Const. Co., Inc., 633 So. 2d 76 (Fla. 3d DCA 1994) ("The company opted not to pursue its administrative avenues of relief; 'we cannot conclude that the remedies of the administrative process were inadequate.'") (quoting Communities Fin. Corp. v. Dep't of Envt'l Reg., 416 So. 2d 813, 816 (Fla. 1st DCA 1982)).

II. DEP PROPERLY PROCESSED THE SEMINOLE PERMIT

A. Standard Of Review

Even if SACE were able to demonstrate that this Court has jurisdiction to review the permit, they have demonstrated no basis for reversal of the agency action. The standard of review of an agency decision on issues of law is set out in

section 120.68(7)(d), Florida Statutes, providing that an appellate court may set aside a final administrative order if the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action. However, the courts have held that an agency decision interpreting a statute within its substantive jurisdiction should not be reversed unless it is clearly erroneous. Brown v. Comm'n on Ethics, 969 So. 2d 553, 557 (Fla. 1st DCA 2007)("[I]f the agency has interpreted a statute within its jurisdiction.... the interpretation may have been based on a history that is best known by the agency or special expertise the agency has in applying the statute."). When an agency has exercised its discretion on a matter within its substantive jurisdiction, the court shall not substitute its judgment for that of the agency unless the agency has exceeded the scope of its authority. See also Fla. Hosp. (Adventist Health) v. Florida AHCA, 823 So. 2d 844, 847-8 (Fla. 1st DCA 2002). Since the statutes and rules governing the permit at issue are within DEP's substantive jurisdiction, the "clearly erroneous" standard applies. Id. at 847.

Furthermore, it should be emphasized that any such arguments pertaining to whether Seminole's permit contains the appropriate pollutant limits are procedurally barred as being raised for the first time on appeal. See Rudloe v. Dep't of Envtl. Reg., 517 S0. 2d 1987 (Fla 1st DCA 1987), Rosenzweig v. Dep't of Transp., 979 So. 2d 1050, 1056 (Fla. 1st DCA 2008); Fla. Ass'n of Nurse

Anesthetists v. Dept of Prof'l Reg., 500 So. 2d 324 (Fla 1st DCA 1986) rev. den., 509 So. 2d 1117 (Fla 1987). Because SACE waived its rights by failing to file a timely petition, SACE cannot now contest the facts on appeal.

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

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

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

as having a significant emission rate, CO_2 is not defined as a "PSD pollutant" by DEP rule.[9] Florida Administrative Code Rule 62-212.400(10) provides that a BACT analysis must be done for "each PSD pollutant that the source would have the potential to emit in significant amounts." Since CO_2 is not listed as having any significant emission rate, it is not a PSD pollutant and it is not subject to the requirement of a BACT analysis. Because DEP processed the Seminole permit pursuant to its own rules,[10] and because those rules do not list CO_2 as a PSD pollutant, DEP was not required to perform a BACT analysis for CO_2.

C. Pursuant to DEP Rules, MACT Permits May be Separately Issued from PSD Permits

SACE asserts that a MACT permit must be issued with a PSD permit, and

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[9] Nothing in Florida Administrative Rule chapters 62-4, 62-204, 62-210, 62-212, 62-296 and 62-297, currently regulates CO_2. DEP does not currently have any other specific rule authority to establish permit emissions limits for CO_2.

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

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

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

since the two will be issued separately in this instance, Seminole's PSD permit is invalid. While DEP does not agree that DEP rules require a MACT permit to be combined with a PSD permit, DEP agrees that the evaluation of whether a MACT permit is necessary must be accomplished prior to construction of the Seminole project. The timing of the permit application helps explain DEP's decision to bifurcate these permits.

As explained above, the DEP PSD permit was initially processed subject to the Florida statutory timing requirements at section 403.509, Florida Statutes (2005), which required DEP to issue the PSD permit within 30 days of the issuance of the Siting Board certification. Absent the timing provision of section 403.509, Florida Statutes, all air preconstruction permits, including PSD permits, were subject to the permit timing specifications of section 403.0876(2), Florida Statutes (2006), requiring issuance within 90 days of DEP's receipt of a complete application. During the summer of 2006, the provisions of section 403.509, Florida Statutes, changed, eliminating the link between the timing of the PSD permit and the Siting Board certification. However, DEP was not ready to issue or deny Seminole's application when the statute changed.[11]

To prevent any question of a default permit, DEP relied upon the existing

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

statute in effect when the application became complete, issuing the PSD permit within 30 days after the Siting certification approval order. While the Siting certification appeal was proceeding, a federal court decision, New Jersey v. EPA, 517 F.3d 574 (DC Cir. 2008), raised the issue that a MACT permit may be required for Seminole. It appeared in the summer of 2008 that the Seminole PSD permit would have to be issued before a case-by-case MACT permit could be processed, so DEP completed the PSD permit process. DEP noted in the Final Determination that a separate permit application would be required, addressing case-by-case MACT as a result of the recent federal decision. [R. Vol. 13, pp. 2284].[12]

Regardless of the timing circumstances at issue here, DEP disagrees that the MACT evaluation must be included as part of the PSD permit issued to Seminole. The processes are completely different and are governed by separate rules. The requirement for a case-by-case MACT permit is a distinct permitting requirement from the requirement for a PSD permit under both federal law and state rules.[13] While DEP can properly issue the MACT permit in conjunction with the PSD permit, the two permits must always be evaluated separately. MACT permits

[12] The application for the MACT permit was submitted to DEP December 22, 2008, and is being processed.

[13] The DEP rule governing case-by-case MACT permits is Florida Administrative Rule 62-212.300(3)(b). The federal regulations governing case-by-case MACT permits are found at 40 C.F.R. sections 63.40-63.56.

involve a separate set of pollutants and a distinct set of evaluation criteria from those governed by the PSD process. The case-by-case MACT cannot be processed as a PSD permit under Florida Administrative Rule 62-212.400. Furthermore, the pollutants subject to case-by-case MACT are, with the exception of mercury, not listed as PSD pollutants.[14] Rather, they are identified as "Hazardous Air Pollutants." See Fla. Admin. Code R. 62-210.200. DEP uses federal substantive requirements and DEP procedures in issuing MACT permits, and the federal substantive requirements for MACT permits are much different from PSD permitting requirements.[15]

Thus, DEP agrees that it has the power to perform the two separate processes, for PSD and for case-by-case MACT, simultaneously and to include the resulting requirements as separate parts of a single pre-construction permit; typically, DEP would do so. DEP would likely have done so in the instant case permit had the circumstances not been exceptional. However, given the timing of Seminole's application, there is nothing in the rules preventing DEP from issuing a

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

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

PSD permit separately from a MACT permit.[16] Because of the various statutory timing provisions and litigation circumstances, and because the PSD permitting and the MACT permitting are separate processes, DEP reasonably decided to process the PSD permit separately from the MACT permit. SACE has established no basis for reversal of the agency's permitting decision on this issue.

CONCLUSION

For the foregoing reasons, DEP respectfully requests that this Court dismiss SACE's appeal. In the alternative, if this Court determines that SACE has standing to bring this appeal, DEP requests that this court affirm DEP's decision to issue the Seminole PSD permit.

Respectfully submitted this 13th day of April, 2009.

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

CERTIFCATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Department's Answer Brief has been furnished via U. S. Mail this 13st day of April, 2009, to:

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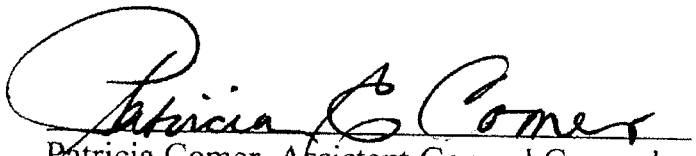
I HEREBY CERTIFY that this Answer Brief uses the Times New Roman 14-point font.



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