

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

In the matter of:

PSD Appeal No. 08-09

In Re Seminole Electric Cooperative, Inc.
_____ /

Motion to Dismiss Sierra Club Appeal as Moot

Seminole Electric Cooperative (Seminole) hereby files this request to dismiss as moot Sierra Club's appeal of Florida Department of Environmental Protection's (FDEP's) issuance of a Prevention of Significant Deterioration (PSD) permit for Seminole Generating Station Unit 3 and in support thereof states:

1. On June 12, 2009, FDEP issued a Draft Permit Revision to Seminole's PSD permit [Exhibit 1], which incorporates the terms and conditions of a Settlement Agreement between Seminole and Sierra Club regarding the PSD permit. Seminole and Sierra Club entered into this Settlement Agreement in March 2007. Final incorporation of the terms of the agreement into the PSD permit was delayed by two events: (1) litigation (not involving the Sierra Club) regarding the certification of Unit 3 pursuant to Florida's Power Plant Siting Act (PPSA)¹ and (2) the PSD permit modification process to incorporate, among other things, the terms of the Settlement Agreement and new limitations on emissions of hazardous air pollutant emissions in light of the intervening vacatur of the Clean Air Mercury Rule.²

¹ See Seminole Elec. Coop. v. Department of Env'tl. Prot., 985 So.2d 615 (Fla. 5th DCA 2008).

² The PSD permitting history for Unit 3, including the modification application, comments submitted by Sierra Club, and FDEP information requests, is accessible at <http://www.dep.state.fl.us/air/permitting/construction/seminole.htm>.

2. In the Settlement Agreement, Seminole agreed “to ask FDEP to include the [Settlement Agreement’s] limits and conditions in the Final PSD permit for Seminole Unit 3 and agree[d] to be bound to these limits and conditions.” [Exhibit 2, p. 3, ¶ 11]. Sierra Club in turn agreed “to not object, challenge, appeal, or initiate or assist in challenge or appeal by others, or in any other way impede or interfere with the issuance of a final PSD permit in accordance with the terms and conditions identified in this Agreement.” [Id.] The Settlement Agreement also stated:

This Agreement reflects the Parties agreement to settle all remaining issues related to the PSD permit for Unit 3. The Parties concur that this Agreement 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. Provided that the final PSD permit is issued in accordance with the terms and conditions of this Agreement, Sierra Club agrees not to contest FDEP’s issuance of the final PSD permit in any administrative or judicial forum. Seminole agrees not to contest any conditions in the final PSD permit if it is issued in accordance with the terms and conditions of this Agreement.

[Id. at p. 1, ¶ G.]

3. In accordance with its obligations under the Agreement, Seminole requested that FDEP incorporate the Settlement Agreement into the PSD permit in March 2007 and again in September 2008 after the PPSA certification litigation concluded. FDEP responded that the Settlement Agreement would have to be incorporated via permit revision. Seminole thus filed an application for a permit revision.

4. In its November 13, 2008 memorandum to this Board, Sierra Club expressed concerns that FDEP’s then ongoing efforts to amend the PSD permit to incorporate the Settlement Agreement “did not, by any stretch of the imagination, guarantee that FDEP will actually revise the permit to include settlement terms” and that “Sierra Club did not agree to allow FDEP and Seminole to indefinite ‘do-overs’, abandoning any review of the final PSD

permit Seminole holds.”³ [Sierra Club, Reply in Support of its Motion to Hold Proceedings in Abeyance, p. 2].

5. Sierra Club’s fears never materialized; FDEP has issued a Draft PSD Permit Revision that includes the settlement terms. [Exhibit 1, pp. SC-1 – SC-2]. With the Settlement Agreement now expressly incorporated into a modified PSD permit, Seminole has completed compliance with its obligations, and Sierra Club has received the specific outcome it bargained for under the Settlement Agreement. The Draft PSD Permit Revision renders Sierra Club’s appeal of the underlying, unmodified PSD permit moot. See, e.g. ITT Rayonier Inc. v. U.S., 651 F.2d 343, 345 (5th Cir. Unit B Nov. 1981) (“Generally settlement of a dispute between two parties renders moot any case between them growing out of that dispute. A court will find mootness even if the parties remain at odds over the particular issue they are litigating.”); U.S. Fire Ins. Co. v. Caulkins Indiantown Citrus Co., 931 F.2d 744 (11th Cir. 1991). Whatever rights Sierra Club may or may not have had prior to express incorporation of the terms of the Settlement Agreement into the PSD permit are inconsequential to Sierra Club’s inability to continue this appeal. Lewis v. Cont’l Bank Corp., 494 U.S. 472, 477 (U.S. 1990) (“To sustain our jurisdiction in the present case, it is not enough that a dispute was very much alive when suit was filed, or when review was obtained...”). This appeal should be dismissed as moot.

6. Counsel for Seminole has consulted with Counsel for FDEP and is authorized to represent that FDEP does not object to this motion.

WHEREFORE, Seminole respectfully requests that the Environmental Appeals Board dismiss this appeal as moot.

³ Sierra Club’s November 2008 memorandum also refers to an action for Declaratory Judgment in Florida Circuit Court, in which Sierra Club sought to have the Settlement Agreement declared void. [Sierra Club, Reply, p. 1] Significantly, Sierra Club voluntarily dismissed that action on February 19, 2009. [Exhibit 3].

Respectfully submitted this 2^d day of July, 2009.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Dismiss Sierra Club Appeal as Moot, has been furnished via U.S. Mail this __ day of July, 2009 to:

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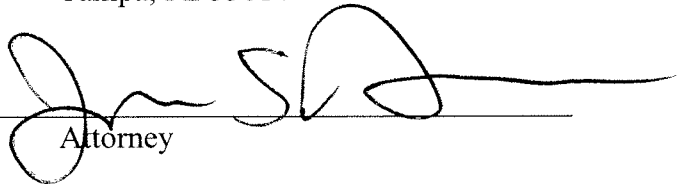
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