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ENVIR. APPEALS BOARD

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

In re: Seminole Electric Cooperative, Inc. Permit No. PSD-FL-375	PSD Appeal No. 08-09

EPA REGION 4's BRIEF REGARDING REVIEWABILITY OF PERMIT

On May 19, 2009, the Environmental Appeals Board ("EAB" or "Board") issued an Order requesting EPA Region 4, in consultation with the Office of General Counsel, to file a brief in the above-captioned matter responding to a series of questions regarding the reviewability of a permit that was prepared in draft form under a Prevention of Significant Deterioration ("PSD") program that was delegated and issued in final form after the approval of the PSD program into the Florida State Implementation Plan ("SIP"). The underlying case involves an appeal of a PSD permit issued by the Florida Department of Environmental Protection ("FDEP") under the Clean Air Act ("CAA") to Seminole Electric Cooperative ("Seminole") for the construction of a new coal-fired, 750-megawatt unit at Seminole's Palatka, Florida facility.

As discussed more fully below, Region 4's position is that the EAB does not have the jurisdiction to consider this appeal of the PSD permit issued to Seminole because FDEP did not issue the permit in final form on the basis of delegated federal authority. However, Sierra Club's timely submission of public comments in accordance with the then-applicable implementation plan preserved its rights under federal law to obtain judicial review of FDEP's action. If Florida law does not permit judicial review of the permit under the circumstances present in this case, or

FDEP does not take corrective action to enable review in a Florida judicial forum, Seminole will not have a valid PSD permit under federal law because the CAA requires that Sierra Club have an opportunity for judicial review under the circumstances in this case.

I. BACKGROUND

A. Federal and State Laws Apply to Permitting Air Pollution Sources in Florida

The crux of the dispute before the Board over the reviewability of the Seminole permit is the interaction of the state and federal law applicable to the permitting of air pollution sources in the State of Florida. The applicable federal law derives from the provisions of the CAA and the Code of Federal Regulations ("CFR") discussed below and in prior opinions of the EAB. The governing state law is found in the relevant sections of the Florida Statutes and Florida Administrative Code. Seminole must construct and operate Unit 3 at the Palatka facility in compliance with both federal and state laws.

Under section 165 of the CAA, a major source of air pollutants may not be constructed without a PSD permit. 42 U.S.C. § 7475(a). This requirement of federal law can be satisfied by obtaining a preconstruction permit under a PSD program that is administered within a state in one of the following three ways:

> First, the program can be run by EPA pursuant to a Federal Implementation Plan ("FIP"). Second, EPA can delegate its authority to operate the PSD program to a state, in which case the state issues PSD permits as federal permits on behalf of EPA. Third, EPA can approve a state PSD program if it meets the applicable requirements of federal law, in which case the program is incorporated into the state's "State Implementation Plan" ("SIP"). In this last instance, the state would conduct PSD permitting under its own authority.

In re Milford Power Plant, 8 E.A.D. 670, 673 (EAB 1999) (internal citation omitted).

Under the third form of PSD program administration discussed above, the state program must meet the requirements of 40 CFR § 51.166 of EPA's regulations to be approved by the

Agency. When EPA approves a state PSD program, it determines that compliance with the state law by the state permitting authority will be sufficient to ensure compliance with the PSD permitting requirements of the CAA. Upon SIP-approval, the state regulations that are approved as the SIP have the force and effect of federal law and are federally-enforceable. 42 U.S.C. §§ 7410; 7413; *see also Nat'l Mining Ass'n v. EPA*, 59 F.3d 1351, 1363-1634 (D.C. Cir. 1995); *Union Electric Co. v. EPA*, 515 F.2d 206, 211 (8th Cir. 1975) *aff'd* 427 U.S. 256 (1976). Thus, in the case of SIP-approved PSD programs, the federal law and state law governing issuance of construction permits for large air pollution sources are essentially the same. *See In re Milford Power Plant*, 8 E.A.D. at 673 (state conducts PSD permitting "under its own authority").

However, if EPA determines that compliance with state law is insufficient to meet the PSD permitting requirements of the CAA, EPA may withhold approval of a state PSD permitting program. 40 CFR § 52.21(a)(1). In these cases, either EPA (under the first form of program administration described above) or the state (through the second form of administration) must apply the federal regulations found at 40 CFR § 52.21 and Part 124 to ensure compliance with federal law. In these circumstances, the federal law applicable to PSD permitting can operate in parallel with the state law governing construction permits because both forms of law are independently applicable. Under the second form of program administration, if EPA delegates the responsibility to implement federal law to a state permitting authority, the state has a responsibility to ensure compliance with both federal law and state law, but these laws are not necessarily one and the same. *See In re West Suburban Recycling and Energy Center*, L.P., 6 E.A.D. 692, 707 (EAB 1996). In these circumstances, a construction permit issued under state law is not necessarily a PSD permit meeting all the requirements of federal law. *Id.* at 710.

B. Historical Summary of Florida's PSD Program[1]

The administration of the PSD program for electric power plants in Florida has followed an unusual path. There have been several changes over time between the three forms of administration described above, including the most recent change during the pendency of the process for issuing the Seminole permit.

Electric power plants subject to the Florida Power Plant Siting Act ("PPSA") (a state law found at Florida Statutes Section 403.501 *et. seq.*) have historically been permitted by FDEP (through a federal delegation of authority from EPA) under the federal PSD program rather than the Florida SIP-approved PSD permitting program. The Florida PSD program was initially approved by EPA into the Florida SIP on December 22, 1983 (48 *Fed. Reg.* 52,713). The approval transferred to FDEP the legal authority to process and issue PSD permits to sources in Florida that are required to obtain PSD permits.

One category of sources not covered by EPA's 1983 approval of Florida's PSD program was electric power plants. This was because, at the time, a separate Florida law known as the Florida PPSA, required permits for electric power plants to be issued solely by the Power Plant Site Certification Board under the PPSA, rather than by FDEP under Florida's PSD regulations. Such a conflict between the PPSA and Florida's PSD program created impediments to implementation and enforcement of the State's PSD program by FDEP for such power plants and precluded EPA's SIP-approval of Florida's PSD program as to these sources. As a result, for electric power plants subject to the PPSA, FDEP has been operating under either a partial or full delegation of authority to implement the federal PSD program since 1983, while various attempts

[1] A complete and detailed history of the Florida PSD program is provided in the recent rulemakings approving Florida's PSD program into the SIP. 73 *Fed. Reg.* 18,466,18,471 (April 4, 2008)(Proposal); 73 *Fed. Reg.* 36,435, 36,437 (June 27, 2008) (Final rule). This section of the brief provides a summary for purposes of responding to the Board's questions.

to amend the PPSA to correct the conflict were made. On November 5, 1985, EPA delegated partial authority to FDEP to conduct the technical and administrative portion of the federal PSD program for power plants subject to the Florida PPSA (with EPA retaining final permitting authority). Letter from Jack E. Ravan, EPA Region 4, to Victoria J. Tschinkel, Florida Department of Environmental Regulation (November 5, 1985) [Exhibit 1 (attached)].

In 1993, the Florida Legislature amended the PPSA to address concerns over the inappropriate influence of the Florida Power Plant Siting Board's certification decisions on the PSD permitting process. In light of this 1993 amendment to the PPSA, FDEP requested that EPA grant it full federal delegation of PSD permitting authority for sources subject to both the federal PSD regulations and the PPSA. Because the 1993 PPSA amendment made clear that FDEP is the final permitting authority for PSD and new source review permits and can act in a manner different from the PPSA Siting Board if Florida's PSD or new source review regulations require such a different action, EPA granted full federal delegation to FDEP on October 26, 1993. Letter from Patrick Tobin, EPA Region 4, to Virginia Wetherell, Florida Department of Environmental Protection (October 26, 1993) [Exhibit 1 to Sierra Club's Motion to Hold Proceedings in Abeyance (EAB Docket Item # 16)].

In the October 26, 1993 letter, EPA explained that, "[w]e have determined that the procedures for new source review by the State of Florida provide an adequate and effective procedure for the implementation of the PSD program ... we hereby delegate our authority for all portions of the Federal PSD program, as described in 40 C.F.R. § 52.21, to the State of Florida for sources subject to review under the PPSA located or to be located in the State of Florida and subject to review under the federal regulations for PSD." The October 26, 1993 letter further identified the requirements of the full delegation, including compliance with 40

CFR § 52.21 as well as public participation requirements found at 40 CFR §§ 124.3-124.14; 124.15-124.19. Page 3.

The statutory amendment to the PPSA made by the Florida Legislature in 1993 formed the basis of the State's 2006 request for EPA approval to apply Florida's SIP-approved PSD program for other sources, rather than the federal PSD program, to sources subject to the PPSA.

C. Current Status of Florida's PSD Program

On February 3, 2006, FDEP submitted SIP revisions to EPA modifying Florida's PSD rules and explaining why the State's PSD permitting program should be SIP-approved for all sources, including electric power plants.[2] After an initial attempt to issue a direct final rule in 2007, on April 4, 2008, EPA initiated a rulemaking process proposing approval and conditional approval[3] of the February 3, 2006 SIP revisions. In that proposal, EPA explained that electric power plants would become subject to the State's SIP-approved program. 73 *Fed. Reg.* 18,466 (April 4, 2008). EPA took final action approving Florida's PSD program revisions into the SIP on June 27, 2008. 73 *Fed. Reg.* 36,435. In that final action, EPA explained the following:

> EPA is now approving Florida's February 3, 2006, request that EPA grant Florida SIP-approval to implement the State's PSD program for electric power plants subject to the PPSA. EPA is approving this specific request under section 110 because there is no longer a conflict between the State's PSD regulations and the PPSA and because FDEP now has adequate and effective procedures for full implementation of the State's PSD program for electric power plants.

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[2] The letters referenced in this Brief, as well as other documents including Florida's SIP revision, are available in the Docket for EPA's most recent rulemaking action approving revisions to Florida's PSD program into the SIP. On www.regulations.gov, see Docket No. EPA-R04-OAR-2006-0130.

[3] The conditional approval regarded certain aspects of the revision responding to EPA's 2002 New Source Review Reform Rules. Florida has since provided EPA with a SIP submission revising its PSD program consistent with the elements that were subject to the conditional approval. EPA is processing that SIP revision.

Id. at 36,437/2. In addition, EPA explained that "EPA's October 26, 1993, federal delegation of PSD authority to FDEP will be withdrawn effective July 28, 2008." *Id.* at 36,437/3.

D. Procedural History of the Seminole Permit

On September 8, 2006, FDEP issued a "Public Notice of Intent to Issue Air Permit" regarding the issuance of a PSD permit (No. PSD-FL-375) for the construction of the new Unit 3 at the Seminole Generating Station in Palatka, Florida. Exhibit 2 to Sierra Club's Motion to Hold Proceedings in Abeyance (EAB Docket Item # 17). In that public notice, FDEP cites to its authority under Florida statutes and rules to issue the permit. Although this public notice was issued when Florida held delegated federal authority to implement the PSD program for electric power plants, this public notice does not cite to 40 CFR § 52.21 or Part 124, or make any mention at all of Florida's status as delegated for PSD purposes. With respect to public participation, the public notice explains the following:

> **Comments:** The Permitting Authority will accept written comments concerning the Draft Permit for a period of thirty (30) days from the date of publication of the Public Notice. ...
>
> **Petitions:** A person whose substantial interests are affected by the proposed permitting decision may petition for an administrative hearing in accordance with Sections 120.569 and 120.57, F.S. ... Petitions ... must be filed within fourteen (14) days of publication of this Public Notice or receipt of written notice, whichever occurs first. ... The failure of any person to file a petition within the appropriate time period shall constitute a waiver of that person's right to request an administrative determination (hearing) under Sections 120.569 and 120.57, F.S. or to intervene in this proceeding and participate as a party to it.[4]

Consistent with the October 26, 1993 letter (EAB Docket Item # 16) providing the delegation of authority, at the time of this public notice, FDEP was required to comply with 40 CFR § 52.21 and 40 CFR Part 124 in issuing PSD permits to power plants. *See In re: Russell City Energy*

[4] Under Florida's Administrator Procedures Act (APA), an administrative hearing is an evidentiary (fact-finding) process that develops the record supporting a final action by FDEP.

Center, PSD Appeal No. 08-01 (EAB, June 29, 2008) (delegated state agency must insure strict compliance with federal PSD requirements for public notice). These federal rules, and in particular the public participation requirements of these rules, were also incorporated by reference into Florida law. *See* Florida Administrative Code (FAC) 62-212.400(11) (2006) ("No permit shall issue until the applicant and Department have complied with all applicable notice and participation provisions of 40 C.F.R. 52.21(q), adopted by reference at Rule 62-204.800, and Rules 62-210.350 and 62-110.106, F.A.C.").[5] The federal rules applicable at the time of the public notice did not require that a party request a hearing within 14 days of the public notice to preserve review. To obtain administrative review under this federal law, one only had to submit comments during the comment period. 40 C.F.R. § 124.19(a)

On October 9, 2006, during the public comment period, Sierra Club filed timely public comments on the draft PSD permit. The comment period closed on October 9, 2006. Although Sierra Club submitted public comments within the public comment period, it did not request an administrative hearing under Chapter 120 of the Florida Statutes (the Florida APA) within 14 days, as explained in the public notice. FDEP issued the final Seminole PSD permit on September 5, 2008. This was a few months after EPA took final action to approve Florida's SIP-approved PSD program for permitting of electric power plants.

On October 6, 2008, Sierra Club filed a petition for review with the EAB alleging that the EAB should review the matter because the draft permit was issued under a federal delegation, while acknowledging that the final permit was issued under the SIP-approved program. Sierra Club also appealed the permit in Florida state court (consistent with the customary method for challenging PSD permits issued pursuant to SIP-approved programs). Sierra Club explained that

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[5] Florida has since removed the reference to 52.21(q) from this rule. 35 Fla. Admin Weekly 3224-25 (June 20, 2008).

it was seeking EAB review due to concern that its request for state court review would be dismissed because it did not request an administrative hearing within 14 days of the public notice, thus potentially resulting in Sierra Club being barred from challenging the final permit in any forum.

FDEP and Seminole are presently arguing that neither the EAB nor the Florida courts have the authority to consider Sierra Club's request for administrative and judicial review of the state's PSD permitting decision. Florida's administrative procedures only allow "parties" to challenge final permits. FDEP and Seminole filed briefs before the Florida court arguing that "party" status may only be obtained by petitioning for an administrative hearing of the permit within 14 days after the draft permit public notice is published. *Sierra Club v. State of Florida*, Case No. 1D-08-4881, "Answer Brief of Florida Department of Environmental Protection" at 9-18 (April 1, 2009) (Fla. 1st Dist. Ct. Appeal) [Exhibit 2 (attached)]; *Sierra Club v. State of Florida*, Case No. 1D-08-4881, "Consolidated Answer Brief of Appellee Seminole Electric Cooperative, Inc." at 16-24 (March 30, 2009) (Fla. 1st Dist. Ct. Appeal) [Exhibit 3 (attached)]. However, Sierra Club is arguing that it preserved its opportunity for judicial review under Florida law because the Florida Statutes incorporated 40 CFR § 52.21 and the Part 124 procedures by reference at the time of the public notice on the Seminole permit. *Sierra Club v. State of Florida*, Case No. 1D-08-4881, "Consolidated Reply Brief of Appellant Sierra Club" at 4-8 (April 27, 2009) (Fla. 1st Dist. Ct. Appeal) [Exhibit 4 (attached)]. Region 4 expresses no opinion here as to how the Florida courts should resolve this dispute over the reviewability of the permit under Florida law, which remains pending at this time.[6] The focus of this brief is on the

[6] On June 25, 2009, the Florida court dismissed an appeal by an additional party (the Southern Alliance for Clean Energy) that failed to submit timely public comments on the draft PSD permit or to request an administrative hearing under Florida's Administrative procedures. *Southern*

EAB's questions and the requirements for review under the federal law established in the CAA and the implementation plan applicable to the Seminole permit application at each stage of review.

E. EAB Order of May 19, 2009

In its Order of May 19, 2009, the Board requested that EPA Region 4 file a brief addressing three questions that arise from the parties' arguments regarding the reviewability of this PSD permit, which was noticed in draft form under a delegation of federal authority and issued in final form under a SIP-approved PSD program. In the analysis that follows, Region 4 addresses the following questions of the Board:

> 1. Does the regulation granting final approval of the Florida DEP PSD program, its regulatory history, or applicable guidance address the availability of, or appropriate forum for, permit review in an instance, such as this where a petitioner complied with the federal but not state rules at a time when the federal rules applied?
>
> (a) Are there any record documents or applicable guidance that address which procedural rules apply when a draft permit goes through public comment under a federally delegated PSD and is issued in final after the state PSD program is federally approved?
>
> 2. If this fact pattern is not squarely addressed in the PSD plan approval regulation, its history, applicable guidance, or record documents, what is the Region's position on the availability of permit review in this instance?
>
> 3. What is the Region's interpretation of the so-called "savings clause" of 40 CFR § 52.530(d)(2), which retains the federal regulatory requirements of 40 CFR § 52.21 for "permits issued by EPA"? Specifically, does this language apply or not apply to the Seminole Permit?

Alliance for Clean Energy v. State of Florida, Case No. 1D08-4900, Order of the Court [granting motion to dismiss] (Fla. 1st Dist. Ct. Appeal, June 25, 2009).

II. ANALYSIS AND RESPONSES TO BOARD'S QUESTIONS

A. Region 4's SIP Approval Rulemaking and Record Do Not Address the Availability of Permit Review in these Circumstances and Region 4 Has Not Identified Any Guidance that Directly Addresses this Issue (Question 1)

Region 4 did not address the procedural circumstances presented in this case in any of its rulemakings to approve the Florida's PSD program into the SIP. Region 4 has not located any regulatory history or record documents from these rulemaking actions that address the availability of, or appropriate forum for, permit review in a situation where a PSD permit is public-noticed under a federal delegation of authority but finalized after approval of the state's PSD program. Furthermore, Region 4 has not located any example where another EPA Region or headquarters office[7] addressed a similar situation or otherwise issued a policy or interpretive statement addressing a situation where a party seeking review of a PSD permit followed the federal rules in effect at the time of the public notice but not the state rules. Likewise, Region 4 has not identified any provision of federal law or EPA guidance that directly addresses the jurisdictional issue presented in this matter. Furthermore, the Florida Statutes and Florida Administrative Code provisions approved into the Florida SIP by Region 4 do not address this situation. However, as discussed in more detail below, Region 4 has located some EPA statements on a related issue that may assist the Board in evaluating the appropriate forum for reviewability of the Seminole permit.

B. The Board Does Not Have Jurisdiction to Review FDEP's Action (Question 2; see also Section "D" below)

The EAB does not have the jurisdiction to consider this appeal of the PSD permit issued to Seminole because FDEP did not issue the permit under delegated federal authority. Although

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[7] In accordance with the Board's order, Region 4 consulted with OGC. In addition, Region 4 has consulted with the Office of Air and Radiation and other Regional Offices.

the federal regulations at 40 CFR § 52.21 and Part 124 were also applicable at the time of the public notice and the draft Seminole permit, Florida issued the final permit on the basis of state regulations that were fully-approved into the Florida SIP for this type of source. For purposes of determining the jurisdiction of the Board to hear this appeal, the rules in effect at the time of final permit issuance are applicable.

Region 4 withdrew its delegation of federal authority to FDEP on July 28, 2008. Thus, at the time of permit issuance, FDEP did not have any delegated federal authority to issue a PSD permit to Seminole under 40 CFR § 52.21. Florida did not purport to take any final action on this permit on the basis of delegated federal authority and had no such authority after July 28, 2008. Although the 2006 public notice may have served to meet the requirements of section 52.21 in effect at that time, Florida has not expressed any intent to take final action on this permit under 40 CFR § 52.21. FDEP has stated in this appeal that it intended to issue a PSD permit as an approved state.

According to its own terms, "Part 124 does not apply to PSD permits issued by an approved State." 40 CFR § 124.1(e). An "approved state" is defined in federal regulations as a state that administers an "approved program." 40 CFR § 124.41. An "approved program" is defined as a SIP providing for the issuance of PSD permits which has been approved by EPA in accordance with the CAA and its implementing regulations. *Id*; *see also Milford Power Plant,* 8 E.A.D. at 673. The EAB has recognized this jurisdictional limit in prior decisions (including one cited in its May 19, 2009, Order directing Region 4 to submit this brief) as well as the EAB Practice Manual (June 2004). *See, e.g., Milford Power Plant* 8 E.A.D. at 673; *In re Carlton, Inc. North Shore Power Plant,* 9 E.A.D. 690 (EAB 2001) (dismissing a petition for review of a state issued minor PSD permit); EAB Practice Manual at 27 (Section III.B.).

The EAB Practice Manual further explains the EAB's jurisdiction provided by Part 124 as follows:

> Section 124.19(a) creates a direct appeal to the EAB from *federally-issued* RCRA, UIC, PSD and NPDES permit decisions. The EAB generally does not have authority to review state-issued permits; such permits are reviewable only under the laws of the state that issued the permit." *In re Great Lakes Chem. Corp.*, 5 E.A.D. 395, 396 (EAB 1994) (parenthetical omitted)(emphasis in original)(footnote omitted).

EAB Practice Manual at 27 (Section III.B.). Since Florida did not have delegated federal authority to issue PSD permits under 40 CFR § 52.21 after Region 4 rescinded that delegation, the Seminole permit was not "federally-issued." Because the federal rules do not contemplate that the EAB would review PSD permits issued by states under a SIP-approved program, federal laws do not provide the EAB with authority to remedy the permit.

Thus, Region 4 agrees in part with Seminole's argument that the rules applicable to a permit are those in effect when the final permit is issued. Seminole's Motion for Leave to Intervene and Response to Sierra Club's Motion to Hold Proceedings in Abeyance at 7 (EAB Docket Item #25); *see also Ziffrin, Inc. v. United States, 318 U.S. 73 (1942)*; *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 614 (EAB 2006) (clarifying that the holding in *Ziffrin* pertains to a change in law between the time of a permit application and an initial permit decision). Florida's final action to issue the permit to Seminole was an action based on the Florida Statutes and Florida Administrative Code and not also an action under 40 CFR § 52.21 of EPA's regulations. However, as discussed in more detail below, Region 4 does not agree that waiver of a right to judicial review under the CAA can be established on the basis of Florida statutes and regulations that were not incorporated into federal law at the time of the alleged waiver. The waiver of a claim should be governed by the law in effect at the time of the alleged waiver. *See Garfinkle v. Dooley*, 672 F.2d 1340, 1347 (11th Cir. 1982) (recognizing that a right

waived must exist at the time it is waived). As discussed further below, under the particular circumstances of this case, the Seminole permit must be judicially reviewable by Sierra Club as a matter of federal law because Sierra Club did not waive administrative or judicial review under federal law. Nonetheless, since FDEP issued the final PSD permit to Seminole after Florida's PSD program was fully-approved into the SIP for this type of source, Sierra Club's October 6, 2008 Petition for Review is not properly filed before the EAB under the clear terms of Part 124 and the EAB's precedents. These principles are not altered by the Part 52 regulation cited by Sierra Club.

C. The "Savings Clause" Language Does Not Apply to the Seminole Permit (Question 3)

The so-called "savings clause" found in 40 CFR § 52.530(d) does not apply to the Seminole permit because this permit was not issued by EPA or an EPA delegate. This paragraph of the regulation states the following:

> 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 § 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.

Id. Since the Seminole facility is not located on Indian Country, the first part of the second sentence of this provision is clearly not applicable. Furthermore, the second part of this sentence was never intended to cover permits issued by a state permitting authority, and the language in this clause is not reasonably interpreted to apply to a draft permit under Part 124 of EPA's regulations.

The second part of the final sentence in section 52.530(d) addresses the transition from an EPA-administered PSD permit program to a state-administered program (via either delegation or

SIP-approval). On May 9, 1985, EPA addressed this issue in a Memorandum entitled *Improved New Source Review/Prevention of Significant Deterioration (NSR/PSD) Program Transfer,* from Darryl D. Tyler, Director, Control Programs Development Division to Director, Air Division, Regions I-X on page 6 at item number 7. This memorandum explained as follows:

> Jurisdiction of Existing PSD Permits. When EPA approves a PSD SIP, it is necessary to determine jurisdiction over any existing PSD permits previously issued by EPA. If the State wishes to have responsibility for these permits and will commit to reissue these permits under the State program, EPA should announce the transfer of authority in the Federal Register. If the State wishes to have responsibility for these permits and either will not or cannot commit to reissue these permits, EPA can still transfer control by retaining 40 CFR 52.21 in the SIP and delegating authority to the State (i.e. using a memorandum of understanding as in a program delegation). In this case, the supplementary information in the final rulemaking Federal Register notice should announce the delegation of priority for the existing permits. If a State declines the opportunity to take responsibility for EPA-issued permits, EPA will again retain 40 CFR 52.21 authority for these permits. In either of these last two cases, the CFR language contained in the final Federal Register promulgation package should contain provisions which retain EPA's authority and exclude the State's authority for these existing permits.

Id. This matter is discussed briefly in EPA's 1981 final rulemaking on Florida's PSD program wherein EPA enacted the relevant language above in 52.530(d). In that rulemaking, Region 4 stated the following:

> Florida's PSD program does not apply to sources locating on Indian lands or to permits previously issued by EPA. EPA will retain jurisdiction to issue PSD permits for sources locating on Indian lands and to enforce its previously issued permits.

48 *Fed. Reg.* at 52,714/1. Thus, this regulatory history makes clear that 40 CFR § 52.530(d)(2) was intended to apply to permits that were issued *by EPA* prior to either Florida's SIP-approval (in 1981) or subsequent delegation of authorities.

As described in the Board's May 19, 2009 Order, Sierra Club argues that the term "permit" in 40 CFR § 52.530(d)(2) can be read to include *draft* permits and that this somehow

suggests that the Seminole permit is a permit that was "issued" by EPA (or a delegate of EPA) prior to approval of the Florida PSD program into the SIP. Board's May 19, 2009 Order at 4. Since Part 52 contains no definition of the term "permit" that is controlling, some parties have looked to provisions in Part 124 that are incorporated into Part 52 in section 52.21(q).

Sierra Club's reading of the phrase "permits issued" in section 52.530 conflicts with the terms of the regulations in Part 124 that define the Board's jurisdiction to hear appeals of PSD permits. As Seminole points out, section 124.2 of EPA's regulations specifically excludes a "draft permit" or "proposed permit" from the definition of the term "permit" used in Part 124. 40 CFR § 124.2. However, section 124.41 provides a replacement definition for the term "permit" in the context of the PSD program which covers "a permit issued under 40 CFR § 52.21 or by an approved state." Although this specific definition applicable to PSD permits makes no distinction between draft or federal permits, other provisions of Part 124 that are applicable to PSD permits do reflect this distinction. The terms of section 124.19 indicate that an appeal to the Board is available only to consider "a PSD final permit decision" by any party that filed comments on the "draft permit." 40 C.F.R. § 124.19(a). Section 124.15(a) establishes that a "final permit decision" is issued after the public comment period on a draft permit. Furthermore, the latter section uses various forms of the verb "issue" to describe the action of approving the final permit, whereas the term "issue" is not used to describe the action of preparing a draft permit in section 124.6. In the latter regulation, the term "issue" is used to describe only a "notice of intent to deny" or a tentative decision to issue a permit rather than a final decision to issue a permit. 40 C.F.R. § 124.6(b),(c).

If accepted, Sierra Club's reading of the term "permits issued" would not necessarily be limited to this particular situation and would lead to the absurd result of making draft PSD

permits subject to an appeal before the EAB. If the Board were to construe the term "permits" to include draft permits prepared under section 52.21, then this would result in the Board having to entertain appeals of draft permits prior to the completion of the public comment period or the preparation of a response to comments document. Such a practice would make these steps in the permitting process superfluous and leave the Board without a meaningful record on which to conduct its review of the action of a Regional Administrator or her delegate. *See, e.g., In Re Northern Michigan University, Ripley Heating Plant*, PSD Appeal No. 08-02, slip op. at 47 (EAB, Feb. 18, 2009) (explaining importance of complete permit record for judicial review); *In re Prairie State Generation Station*, 12 E.A.D. 176, 179-180 (EAB 2005) (addressing importance of response to comments as key part of permitting record).

Thus, for the reasons discussed above, Region 4's position is that 40 C.F.R. § 52.530(d) does not apply to the Seminole matter. Sierra Club's suggested interpretation of that provision is not consistent with EPA's intent in promulgating that rule.

D. Although the EAB Lacks Authority to Review the Action of FDEP at Issue Here, the CAA Nevertheless Requires that Sierra Club Receive an Opportunity for Judicial Review Under the Circumstances of this Case (Question 2).

As a matter of federal law, a PSD permit must be subject to judicial review by a person who submitted timely public comments under the applicable CAA implementation plan in effect at the time of the public notice. While this principle does not compel the EAB to accept jurisdiction over this appeal in contravention of its precedent and the most appropriate reading of the applicable federal regulations, it informs the current status of the Seminole PSD permit. Further, this requirement of federal law does not necessarily change the Florida law applicable to the actions of FDEP.

The CAA requires that Sierra Club have an opportunity for judicial review under the circumstances in this case. Region 4's action to approve Florida's PSD program did not authorize FDEP to deny a party the opportunity to obtain judicial review of a PSD permit under the circumstances present here. If Florida law does not allow for judicial review of the permit under the circumstances present in this case, or FDEP does not take corrective action to enable review in a Florida judicial forum, Seminole will not have a valid PSD permit under federal law.

1. <u>The CAA requires an opportunity for judicial review of a PSD permit by a party that participated in the public comment process under the applicable implementation plan.</u>

Consistent with prior statements of EPA, Region 4 interprets the provisions of the CAA described below to require an opportunity for judicial review of a decision to grant or deny a PSD permit. 61 *Fed. Reg*. 1880, 1882 (Jan. 24, 1996) (proposed disapproval of Virginia's PSD program due to standing requirements that limited judicial review). The Agency has previously observed that the opportunity for public review and comment provided in the statute and regulations is seriously compromised where an affected member of the public is unable to obtain judicial review of an alleged failure of the permitting authority to abide by PSD permitting rules. 61 *Fed. Reg*. at 1882. Thus, when a party such as Sierra Club has preserved an opportunity for such review under the applicable program in effect at the time of the public notice of a draft PSD permit, that review should not be denied as a result of a subsequent change to the SIP and the program under which the PSD permit is being administered.

Public participation is an important requirement of the PSD permitting program. *See Russell City*, PSD Appeal No. 08-01, slip. op. at 22-25. One of the statutory goals of the PSD program is to "assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision

and after adequate procedural opportunities for informed public participation in the decisionmaking process." 42 U.S.C. § 7470(5). In addition, before a PSD permit may be issued, the permitting authority must provide "a public hearing" and "opportunity for interested persons … to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations." 42 U.S.C. § 7475(a)(2). EPA has implemented this requirement in regulations at 40 CFR §§ 51.166(q) and 52.21(q), and Part 124.

In addition, the provisions of the CAA establish a right to judicial review of PSD permitting decisions and compliance with PSD permitting obligations. In section 307(b)(1), Congress provided the opportunity for judicial review of any final action of the Administrator under the Clean Air Act. 42 U.S.C. § 7607(b)(1). EPA has previously interpreted this provision to provide an opportunity for judicial review of PSD permitting decisions when EPA is the permitting authority. 61 *Fed. Reg.* at 1882. In addition, section 304(a)(3) establishes a right for citizens to bring suit to enforce a violation of a PSD permit or the failure of a major source to obtain such a permit. 42 U.S.C. § 7604(a)(3).

Under the federal PSD permitting program, these rights are recognized in the Part 124 regulations. Under Part 124, a party must first exhaust its administrative remedies in an appeal to the EAB before it may obtain judicial review. In accordance with the CAA and its implementing regulations, EPA has previously observed that "any member of the public who has participated in the public comment process and meets the threshold standing requirements of Article III of the U.S. Constitution may petition for administrative review of the permit within 30 days of issuance and ultimately seek judicial review of the administrative disposition of the permit." 61 *Fed. Reg.* at 1882.

The requirements for public participation and judicial review are not diminished when a state issues a PSD permit under a SIP-approved program or as a delegate of EPA. In reviewing the Virginia PSD program, EPA observed that there is no indication that citizens' rights to judicial review would be diminished upon EPA approval of a state's PSD program. 61 *Fed. Reg.* at 1882. In addition, EPA cited legislative history suggesting that the Congress intended that such a right to review be available through the state administrative and judicial process. *Id.* (citing Subcommittee of the on Environmental Pollution of the Senate Committee on Environment and Public Works, 95th Congress, 1st Session. A Section-by-Section Analysis of S. 252 and S. 253, Clean Air Act Amendments, 36, reprinted in 5 Legislative History of the Clean Air Act 3892 (1977)).

Based on these provisions of the CAA and legislative history, EPA expressed the view that Congress intended for state judicial review of PSD permit decisions to be available for members of the public who can satisfy threshold standing requirements under Article III of the Constitution. 61 *Fed. Reg.* at 1882. EPA proposed to disapprove the Virginia PSD program because Virginia law "does not enable any member of the public who participated in the public comment process on a PSD permit and who meets the threshold standing requirements of Article III of the Constitution to obtain judicial review of the permit in the Commonwealth's court system." *Id.* Virginia later corrected the deficiencies in the standing requirements under state law, and EPA approved the program without any additional discussion of the judicial review requirements. 63 *Fed. Reg.* 13,795 (Mar. 23, 1998).

EPA has continued to adhere to the interpretation expressed in the proposed disapproval of the Virginia PSD program. In its final action on the Virginia PSD program approval, EPA did not indicate that public comments had persuaded the Agency to change its view that a

meaningful public participation process includes an opportunity for judicial review. *Id.* More recently, in approving the South Dakota PSD program, EPA cited the Virginia rulemaking[8] and stated the following: "[w]e interpret the statute and regulations to require at minimum an opportunity for state judicial review of PSD permits." 72 *Fed. Reg.* 72,617, 72,619 (Dec. 21, 2007). Since South Dakota law provides an opportunity for administrative and judicial review of PSD permitting decisions, EPA determined that the South Dakota PSD program satisfied this requirement. *Id.*

In the case of the Seminole permit, if FDEP obtains the relief it is seeking and both the EAB and Florida courts decline to review Sierra Club's appeals under the facts of this case, there will be no opportunity for review of this permit by a "member of the public who participated in the public comment process on a PSD permit." 61 *Fed. Reg.* at 1882. As discussed in more detailed below, Sierra Club participated in the public comment process for the Seminole permit by submitting timely public comments in accordance with the public participation procedures set forth in the CAA and Part 124, which were applicable in 2006. Denying Sierra Club an opportunity to obtain judicial review of FDEP's final permitting decision under these circumstances would be inconsistent with EPA's interpretation of the CAA.

2. When approving Florida's PSD program, Region 4 did not intend to authorize FDEP to deny judicial review to a party that preserved its opportunity for such review under federal law.

No action by Region 4 reflected the intent to approve (or had the actual effect of approving) procedures that would deny judicial review to a party that participated in the public comment process on a PSD permit consistent with the procedures applicable under federal law at

[8] The Agency's 1996 proposal was also cited by the Supreme Court in a dissent joined by four justices. *See Alaska Dept. of Envt'l Conservation v. EPA*, 540 US 461, 506-508 (2004) (dissenting opinion).

the time of public notice of that permit. As discussed earlier, Region 4's rulemakings approving the Florida PSD program did not address permits that were finalized after the SIP-approval but public-noticed under a delegated federal PSD program. While Region 4's approval of the FDEP's 2006 PSD program SIP submission was appropriate, the Region could not have approved a SIP submission that authorized denying judicial review of a permit decision to a party that participated in the public comment process applicable under the implementation plan in effect at the time of the public notice. The CAA requirement to provide an opportunity for judicial review of a PSD permit would be frustrated if Sierra Club is denied its opportunity to obtain judicial review of Florida's action solely because the applicable implementation plan changed after Sierra Club preserved its right to review under the federal rules in effect at the time of the public notice.

As a general matter, Region 4 properly approved Florida's PSD program because Florida law provides an opportunity for an administrative hearing and judicial review of a PSD permitting decision by FDEP under its SIP-approved program. *See, e.g.,* FAC 62-212 (Florida's PSD program, implemented through authority provided by Florida Statutes Chapter 403); Florida Statutes § 403.90 (provides for judicial review of any permit issued under the authority of this Chapter). In the typical case, Florida issues both the public notice and final permit decision on a PSD permit in accordance with the then EPA-approved SIP (consistent with other state SIP-approved PSD programs). These permits issued in both draft and final form by Florida pursuant to its SIP-approved program are reviewable in the Florida state court system and a failure to exhaust administrative remedies under state law would waive judicial review for purposes of both state and federal law. However, in the unique case of the Seminole permit, as described below, Sierra Club cannot be said to have waived a right to review under federal law.

3. The public notice for the Seminole PSD permit was flawed and insufficient to establish waiver of Sierra Club's right to judicial review under federal law.

Florida's public notice for this permit focused on the procedural requirements of state law and did not explain its status as "delegated" or cite to the applicable federal regulations at 40 CFR § 52.21 or Part 124. In FDEP's Brief in Support of It's Request to Deny Review and Motion for Summary Disposition filed with the EAB (EAB Docket Item #13), "FDEP admits that at the time the draft permit was issued the Florida PSD program was considered delegated by EPA." Page 3. However, FDEP is arguing in State court that it did not "ever purport to process the permit pursuant to any federal rule." Exhibit 2 at 15. If the latter is in fact the case, then no permitting authority would have issued a public notice for the Seminole permit satisfying the requirements of federal law (since neither Florida nor Region 4 would have done so).

However, the FDEP public notice did provide notice of the opportunity to comment on the permit within 30 days, and that standing alone was arguably consistent with procedures applicable under Part 124. Since FDEP did not state clearly at the time that it was only applying state law and not also acting under its delegated federal authority, Sierra Club reasonably assumed that Florida's public notice was intended to satisfy the procedures required under both state and federal law. Sierra Club was aware of Florida's PSD program being a delegated program, and thus conformed its participation in the public process to the requirements set forth in 40 CFR § 52.21 and Part 124. *See* Petition for Review at 3-8 (EAB Docket Item # 1). Although FDEP had submitted a request for EPA approval to apply Florida's PSD program to PPSA sources in February 2006, Region 4 did not provide notice of proposed action on the request until 2007.

Even if Florida's public notice for this permit met minimum requirements under the federal law in effect at the time, with respect to the waiver of administrative and judicial review, the public notice stated only that the failure to file a petition for an administrative hearing in accordance with Chapter 120 of the Florida Statutes would constitute waiver of the right to an administrative hearing under sections 120.569 and 120.57 or to participate as a party to the permit proceeding under state law. There was no notification to the public that FDEP had requested a change in the PSD program status for PPSA sources or that a failure to request a public hearing under the state procedures would also result in a waiver of a right to review under the then-applicable federal law. Under the applicable implementation plan in effect at the time of the public notice, such a waiver cannot be the result of Sierra Club's decision not to invoke the state procedures.

Although FDEP was required as a matter of state law to follow the public participation procedures under the Florida APA, compliance with state law throughout the processing of the Seminole permit did not ensure compliance with federal law. The state procedures were not incorporated into the CAA implementation plan applicable to the Seminole permit at the time of public notice. Region 4's delegation of the authority to implement the PSD program did not make the Florida state law the plan applicable to the Seminole permit application in 2006 at the time FDEP issued its public notice. Florida's public participation procedures were not made a part of the implementation plan applicable to this permit until Region 4 fully-approved Florida's PSD program into the SIP on June 27, 2008 and rescinded the delegation agreement.

FDEP and Seminole dispute Sierra Club's argument regarding the retroactive application of state law on the basis that the Florida administrative procedures have not changed between the time of public notice and final action, but this is not the issue. Sierra Club's argument rests on

federal law, while FDEP and Seminole respond only with an argument based on state law. Even if unchanged throughout the permitting process, the Florida administrative procedures would have to be retroactively incorporated into the CAA implementation plan applicable at the time of the public notice for this permit to establish that Sierra Club waived its opportunity for judicial review under federal law.

FDEP's present position in the EAB and state courts amounts to the contention that Sierra Club's waiver of its rights under state law means that Sierra Club also waived its right to review under federal law. However, Sierra Club plainly did not do the latter under the federal rules in effect at the time of the public notice.[9] The concept of waiver is defined as "the intentional relinquishment of a known right." *Garfinkle v. Dooley*, 672 F.2d 1340, 1347 (11th Cir. 1982). A waiver requires "(1) the existence at the time of the waiver [of] a right, privilege, advantage, or benefit which may be waived; (2) the actual or constructive knowledge thereof; and (3) an intention to relinquish such right, privilege, advantage, or benefit." *Id.* Sierra Club had no notice that the law would change -- let alone, as FDEP and Seminole argue, change with retroactive effect -- before final action on the permit. Public commenters had no basis to expect that Florida would assert that no review of the permit would be available in any forum if they submitted public comments but elected not to request a hearing under the Florida APA

[9] Although Sierra Club subsequently entered into a settlement agreement with Seminole under which Sierra Club agreed not to appeal the permit if certain conditions were met, this agreement was negotiated after Sierra Club preserved its right to judicial review under federal law by submitting timely comments. Sierra Club contends that agreement was nullified by FDEP's failure to issue a permit in accordance with the agreement. Seminole now contends this appeal is moot because FDEP has proposed to amend the permit to conform to the terms of the agreement. Motion to Dismiss Sierra Club Appeal as Moot (EAB Docket Item # 34). Region 4 does not take a position here as to the effect of the agreement and proposed permit revision. Since the questions in the Board's May 19, 2009 Order would not necessarily be reached if the settlement agreement precludes review or makes this case moot, Region 4 has assumed only for purposes of this discussion that the settlement agreement is not operative.

procedures. To even argue there was a waiver as a matter of federal law, Florida would have at least needed to provide Sierra Club with notice that its decision not to invoke administrative remedies under state law would also have the effect of waiving its right to administrative and judicial review under federal law. However, even such a notice may not have been sufficient to establish waiver because it would not by itself change the nature of the federal law in effect at the time of the public notice.

4. If FDEP continues to maintain that it never processed the Seminole permit pursuant to any federal rule or the Florida court denies review under the circumstances presented, Seminole will not have a valid PSD permit meeting the requirements of the Federal CAA.

To the extent no permitting authority issued a public notice for this permit in accordance with federal regulations or Sierra Club is not able to obtain review of the permit in any forum on the basis of its timely submission of comments after such a notice, the construction permit that FDEP issued to Seminole cannot be considered a valid PSD permit meeting the requirements of the CAA. In 2006, FDEP was required under a delegation from Region 4 to issue a public notice for the Seminole PSD permit in accordance with federal regulations. To the extent FDEP issued a public notice for this permit that satisfied the requirements of the federal law in effect at the time, the CAA requires judicial review of this permit under the circumstances. Region 4 did not authorize Florida to deny review in this situation. If review is completely denied, Seminole's permit will not fulfill the requirements of federal law.

The Florida First District Court of Appeal has not yet addressed the implications under Florida law of the fact that 40 CFR § 52.21(q) and other provisions were incorporated by reference into Florida law at the time of the public notice for the permit. Thus, there remains a possibility that the Florida courts will determine that the permit is reviewable in state court on the grounds that the procedures Sierra Club followed were applicable under state law. Region 4

does not offer an opinion here as to the requirements of state law or whether the Florida courts should grant Sierra Club the relief it requests as a matter of state law. However, if Florida law compels a result under these facts that is not consistent with federal law under the CAA, then the action of the FDEP in issuing the Seminole PSD permit cannot be considered to be action in accordance with the CAA.

If there was no public notice satisfying the requirements of federal regulations or such notice was provided and Florida law precludes review of the FDEP's action under the circumstances presented here, additional action will be needed to ensure that Seminole's construction is authorized under federal law. Since Florida is currently a SIP-approved state with respect to power plant permits, and EPA Region 4 did not retain any authority to issue permits for this type of source under the federal regulations, FDEP may need to provide a new public notice that enables Sierra Club and any other party that preserved a right to judicial review under federal law with a right to perfect its right to judicial review in the Florida courts.[10] If additional developments make clear that Seminole does not have a permit meeting the requirements of the CAA, EPA has the authority, among other things, to issue an order to stop construction at the source, pursuant to sections 113(a)(5) and/or 167 of the CAA, 42 U.S.C. §§ 7413(a)(5), 7477.

[10] On June 12, FDEP issued a new public notice for "a minor revision of the original air construction permit for Unit 3." This notice states that "PSD preconstruction review is not triggered" and that "the Department did not conduct a new review for Best Available Control Technology (BACT) nor make any changes to the prior BACT determinations." Exhibit 1 to Seminole's Motion to Dismiss Sierra Club Appeal as Moot (EAB Docket Item #34.3). This type of notice (issued after the FDEP PSD program was fully approved by EPA) could correct such a problem if it provides the opportunity for a party such as Sierra Club to perfect its right of review under the state law that is now a part of the approved implementation plan applicable to this type of source.

III. CONCLUSION

As is described above, there do not appear to be any directly applicable regulations, guidance or other documents discussing the jurisdictional issues in this unique situation of the Seminole permit. The law does, however, support Region 4's position that review by the EAB is not appropriate in this circumstance. In addition, prior EPA interpretations support the view that, unless Florida confirms that it has issued a public notice for this permit under federal law and also ensures that judicial review of FDEP's permitting decision (and any administrative remedy that must be exhausted to obtain that review) is available to Sierra Club, the permit issued to Seminole will not be a valid PSD permit as a matter of federal law.

July 16, 2009.

Respectfully submitted,

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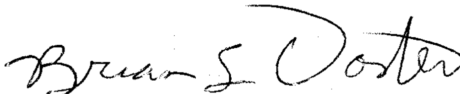

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CERTIFICATE OF SERVICE

I hereby certify that copies of "EPA Region 4's Brief Regarding Reviewability of Permit" were served on the following persons by First Class U.S. Mail and electronic mail. Since the following parties already served copies of Exhibits 2-4 to this brief upon each other as parties in another matter, to avoid excess duplication, these Exhibits were served only by electronic mail and not by U.S. Mail:

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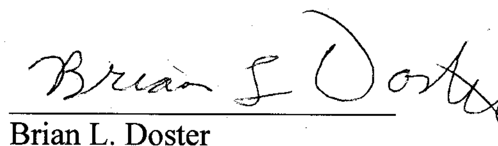

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Exhibit 1

EPA Region 4's Brief Regarding Reviewability of Permit

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET
ATLANTA, GEORGIA 30365

NOV - 5 1985

REF: 4APT-AP

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Ms. Victoria J. Tschinkel
Secretary, Department of
Environmental Regulation
Twin Towers Office Building
2600 Blair Stone Road
Tallahassee, Florida 32301

RE: Partial Delegation Request

Dear Ms. Tschinkel:

This is in response to your letter of October 9, 1985, requesting responsibility for implementation of the technical and administrative portions of the Prevention of Significant Deterioration (PSD) of Air Quality program as it is applied to sources subject to or reviewed under the Electrical Power Plant Siting Act, PHC §§403.501-403.517 and regulated under FAC Chapter 17-17. We have determined that the procedures for new source review by the State of Florida provide an adequate and effective procedure for the implementation of the technical and administrative portions of the PSD program for the sources described above. Therefore, pursuant to 40 CFR Subpart A (General Provisions) and 40 CFR §52.21(u) (Delegation of Authority), we hereby delegate our authority for the technical and administrative portions of the federal PSD program, as described in 40 CFR §52.21, to the State of Florida as follows:

A. EPA delegates its authority for the technical and administrative review of all sources which are subject to or reviewed under the Electrical Power Plant Siting Act located or to be located in the State of Florida and subject to review under the federal regulations for the Prevention of Significant Air Quality Deterioration, promulgated in 40 CFR §52.21.

B. EPA delegates to the State of Florida its authority and procedures for technical review and evaluation of new sources and public participation pursuant to 40 CFR §124.3-124.14, but not its authority under 40 CFR §124.15-124.19 to take final action on an application or its authority to take enforcement action.

C. For purposes of and in accordance with paragraph B above, the State of Florida shall follow the procedures in 40 CFR §§124.3-124.14 , except that the word "Director" and the phrase "Regional Administrator" shall mean "State Director". A copy of the State's preliminary determination, a copy of all materials submitted by the owner or operator of the source seeking the PSD permit, a copy or summary of the materials (if any) considered by the State in making its preliminary determination, and a copy

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of the notice shall be sent to the EPA Regional Office immediately upon issuance of a preliminary determination. Immediately upon issuance of a final determination, the state shall forward a copy of the final analysis to the EPA Regional Office. Upon receipt of the State's final analysis, the EPA Regional Office shall take final action on an application pursuant to 40 CFR §124.15.

D. This delegation is based upon the following conditions:

1. Quarterly reports containing pertinent information relating to the status of sources subject to 40 CFR §52.21 (or other reports as required by the Regional Administrator) will be submitted to EPA by the State of Florida as part of the existing reports normally submitted to EPA through program plan reporting.

2. In accomplishing the delegated PSD technical and administrative review, the State of Florida will apply all applicable federal air permitting rules and follow the applicable federal permit processing procedures. If at any time it is determined the state rules or statutes prohibit the Department from applying any such standard or procedure, the pertinent portion of the delegation may be revoked.

3. If the Regional Administrator determines that the State procedure for implementing the technical and administrative portions of PSD is inadequate, or is not being effectively carried out, this delegation may be revoked in whole or in part. Any such revocation shall be effective as of the date specified in a Notice of Revocation to the Florida Department of Environmental Regulation.

4. Acceptance of this delegation of presently promulgated PSD regulations (40 CFR §52.21, as amended 8/7/80) does not commit the State of Florida to accept responsibility for new federal standards or requirements promulgated after the effective date of this delegation.

5. Public availability of information shall be in accordance with 40 CFR §52.21(q).

6. EPA shall overview the conduct of the technical and administrative portions of the PSD program through an overview program consistent with that described in the State/EPA agreement.

The State and EPA will develop a system of communication sufficient to guarantee a program that includes the items described below:

A. Each agency is informed of the current compliance status of subject sources in the State of Florida.

B. Prior EPA concurrence is obtained on any matter involving interpretation of 40 CFR §52.21 (including unique questions of applicability of the standards).

A notice announcing this delegation will be published in the Federal Register in the near future. The notice will state, among other things, that effective immediately, all reports required pursuant to PSD regulations by covered sources located or to be located in the State of Florida should be submitted to the Bureau of Air Quality Management, Department of Environmental Regulation, Twin Towers Office Building, 2600 Blair Stone Road, Tallahassee, Florida, 32301. Any such reports which have been or may be received by EPA, Region IV, will be promptly transmitted to the State Agency.

Since this delegation is effective immediately, there is no requirement that the State notify EPA of its acceptance. Unless EPA receives from the State written notice of objections within ten (10) days of receipt of this letter, the State will be deemed to have accepted all of the terms of the delegation.

Sincerely yours,

Jack E. Ravan
Regional Administrator

EPA4PER070407

Exhibit 2

EPA Region 4's Brief Regarding Reviewability of Permit

STATE OF FLORIDA
FIRST DISTRICT COURT OF APPEAL

SIERRA CLUB, INC.,

Appellant,

vs.

Case No. 1D-08-4881
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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Rule 62-210.200(4)(b) , Florida Admininistrative Code 25

Rule 62-210.200(254), Florida Admininistrative Code 27

Rule 62-210.200(280) , Florida Admininistrative Code 27

Rule 62-210.300, Florida Admininistrative Code 32

Rule 62-210.350, Florida Admininistrative Code 13, 31, 32, 33

Chapter 62-212, Florida Admininistrative Code 20, 27

Rule 62-212.300(3)(b), Florida Admininistrative Code 30

Rule 62-212.400, Florida Admininistrative Code 19, 20, 30, 32

Rule 62-212.400(10) , Florida Admininistrative Code 20, 27

Chapter 62-296, Florida Admininistrative Code 20, 27

Chapter 62-297, Florida Admininistrative Code 20, 27

Federal Administrative Decisions

In re Miners Advocacy Council,
4 E.A.D. 40, 42 (EAB, May 29, 1992) 15

PRELIMINARY STATEMENT

For purposes of this brief, the Department of Environmental Protection shall be referred to as "DEP" or the "Department"; appellant Sierra Club, Inc., shall be referred to as "Sierra Club"; 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, which shall be referred to as "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". The DEP also issues air construction permits that require other types of analyses and limitations for other types of pollutants, including limiting hazardous air pollutants, which shall be referred to as "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 limitation, but for HAP rather than for PSD pollutants;

a MACT 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 permit issued by the Florida DEP. This is not an appeal from an agency decision after an administrative hearing. Neither is it an appeal from a denial of an administrative hearing. This is an appeal from a final air construction permit issued by the DEP for which no administrative hearing was timely 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., sections 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 requirements 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 (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 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. Any delegation of federal authority is reflected in each state's approved SIP. See 40 C.F.R. § 52.21(a)(1). 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 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 so urces 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 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 was required to be filed within 14 days of notice or publication to avoid a waiver of any right to an administrative hearing. On October 16, 2006, Sierra Club filed a petition for administrative hearing concerning the Seminole permit. (R. Vol . 10, pp. 1875-91). On October 31, 2006, DEP dismissed the petition as untimely filed, granting Sierra Club leave to amend but stating the order was final unless an amended petition was filed as provided. (R. Vol. 10, pp.1892-1912). Sierra Club did not file an amended petition and Sierra Club did not appeal the final order.

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 preconstruction 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, the provisions of section 403.509, Florida Statutes, changed to eliminate 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. A Siting certification denial order was entered by the Secretary of DEP 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 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)

Sierra Club has filed a separate action before the EPA's Environmental Appeals Board (EAB) to contest whether Florida's SIP contained an approved or a delegated PSD program when the Seminole permit was being processed and issued and whether DEP complied with appropriate standards for establishing PSD limits.

Initial Brief, pp. 9-10) DEP is a party to that action also.[1] That action is still pending.

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 appealed from. Sierra Club was provided a clear point of entry to participate in an administrative proceeding but failed to file a timely petition. Sierra Club was then granted leave to amend its late-filed petition to show why it should be considered timely but, again, it failed to file an amended petition. Sierra Club chose not to appeal that dismissal. Sierra Club abandoned its attempt to become a party; therefore, under section 120.68, Florida Statues, this Court lacks jurisdiction to review the final agency action where such appeal has been brought by a non-party who has waived its right to petition for hearing below.

Furthermore, Sierra Club cannot support a state court appellate right based upon federal administrative rules. Rather, to establish standing in the state administrative process, Sierra Club was required to take action to become a party below (by filing a timely petition for hearing in the state administrative proceedings, amending its petition, or seeking to appeal from the decision

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[1] Sierra Club's action before the EAB is only available if Seminole's permit was issued pursuant to a "delegated" program, which DEP contests.

addressing its late-filed petition). Here, the record reflects that Sierra Club failed to avail itself of these available opportunities. 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.

Further, there was no change of any statute or rule, state or federal, depriving Sierra Club of a right to claim party status for purposes of appeal. The provisions of applicable statutes and rules have remained substantially the same throughout the permit process.

Moreover, even if Seminole had perfected its standing to challenge this permit, there is still no basis for reversal of the agency action. DEP processed the Seminole permit pursuant to DEP rules, which provide that technology review must include evaluation of multiple factors and technological judgment. 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 control requirements and correctly did not include carbon dioxide because carbon dioxide is not yet listed as a pollutant subject to best available control technology analysis under DEP rules; furthermore, DEP currently has no other rules limiting stationary source emissions of carbon dioxide. DEP correctly established limits for each pollutant subject to the best available control technology requirements of DEP rules, based upon engineering

data and experience as provided by rule, and correctly considered all information provided. 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 Sierra Club not waived its right to a hearing.

While Sierra Club is correct that the DEP permit did not include Maximum Available Control Technology (MACT) for control of hazardous air pollutants (HAP), 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, because 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 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 Sierra Club with the opportunity to request a hearing on that permit. Remand on this issue is both unnecessary and unwarranted.

ARGUMENT

I. SIERRA CLUB 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. Sierra Club Failed To Become A Party To The Permit Action

For this Court to exercise its jurisdiction pursuant to section 120.68, Florida Statutes, Sierra Club must establish that it is a "party" to the proceeding. However, Sierra Club waived party status by not filing a timely petition, by not amending its petition when given the opportunity, and finally, by not appealing the dismissal of its petition. As explained above, the "Public Notice of Intent to Issue" for the Seminole permit was published in the Palatka Daily News September 6, 2006.[2] (R. Vol. 9, pp.1557-8). The notice contained detailed information concerning the requirements to become a party to the permit action, including the 14 day timeline

[2] In addition, the record shows that on September 5, 2006, even before the notice was published, Sierra Club was informed that the Intent to Issue Air Permit had been issued to Seminole. (R. Vol. 10, p.1893).

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." (emphasis added).

(R. Vol. 9, p. 1558). The record also shows that Sierra Club failed act upon that information.

Rather, the record reflects that, although Sierra Club filed extensive documents as "comments" on October 9, 2008, the 31st day after publication of the notice,[3] (R. Vol. 9-10, pp. 1572-1868) Sierra Club then waited an additional 7 days before filing a Motion for Extension of Time and Petition for Administrative Hearing. (R. Vol. 10, pp.1875-1891). The explanation for delay given in Sierra Club's petition was that Sierra Club did not have time to evaluate the draft permit because it was busy working on a separate action; that its members did not read the published notice; and that the timing provisions of section 403.815, Florida Statutes, are unreasonable.[4] (R. Vol. 10, pp. 1881-3).

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[3] October 8, 2006, the 30th day, was a Sunday.

[4] Thus, the reasons given for Sierra Club's failure to timely file a petition in the first instance were, on their face, legally insufficient to raise any "equitable tolling" issue. See § 120.679(c), Fla. Stat. ("This paragraph does not eliminate the availability of equitable tolling as a defense to the untimely filing of a petition.");

DEP's governing statute, section 403.815, Florida Statutes, the implementing rule at Florida Administrative Code Rule 62-110.106, and the DEP notice itself all specify that a petition must be filed within 14 days of notice or publication to avoid a waiver of rights to an administrative proceeding. Because the petition was filed on the 38th day, DEP dismissed the petition as untimely and granted Sierra Club leave to amend the petition. (R. Vol. 10, pp. 1892-1912). That order reflected that it would become final if Sierra Club did not submit an amended petition within fifteen days, and also provided Sierra Club with appellate rights. As explained above, Sierra Club failed to either file an amended petition or appeal the dismissal. In so doing, Sierra Club 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 has been granted a point of entry to challenge an administrative action but has failed to take action required to avail himself of the opportunity has waived his right to request a hearing).

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see also Jancyn Mfg. Corp. v. State, Dep't. of Health, 742 So. 2d 473, 476 (Fla. 1st DCA 1999) ("Because the record reveals that the failure to seek yet another extension or to file for a chapter 120 proceeding was the result of appellant's own inattention, and not the result of a mistake or agency misrepresentation, we affirm."); Whiting v. Florida Dep't of Law Enforcement, 849 So. 2d 1149, 1151 (Fla. 5th DCA 2003) (affirming dismissal of an untimely petition for an administrative hearing under section 120.569(2)(c), Florida Statutes, where "Whiting has claimed only his mistaken belief as to when the time period ended, and that PERC's fax was not available to him at the time he wanted to fax his notice").

In addition to waiving its right to participate as a party below, Sierra Club has failed to demonstrate that it meets the statutory definition of a "party," as is required to invoke this Court's appellate review. 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). There are 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. 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, Sierra Club has not shown that it meets the other two criteria necessary to invoke this Court's jurisdiction. Sierra Club does not meet the statutory definition of a party as set forth in section 120.52(13), Florida Statutes; moreover, because it is not a party, it cannot be a party adversely affected by the permit. The term "party" is defined at section 120.52(13), Florida Statutes:

> (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). Sierra Club does not fit within any of these categories of designated "parties."

First, Sierra Club is clearly not a "specifically named person" within the meaning of subsection (a). Nor has DEP allowed Sierra Club "to intervene or participate as a party" within the meaning of subsection (c) since the record shows that DEP specifically dismissed Sierra Club's petition to become a party. (R. Vol. 10, pp. 1892-1912). While DEP does "authorize limited forms of participation" by providing persons who may not be eligible to become a party an ability to provide public comment, see rule 62-210.350, Fla. Admin. Code., 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.

Having failed to meet sections 120.52(13)(a) or (c), Florida Statutes, Sierra Club 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, Sierra Club did not become a party to this action below when given the opportunity. Therefore, by failing to pursue the appropriate process, Sierra Club abandoned any claim to becoming a "party" and invoking this Court's jurisdiction for the purposes of appellate review.

C. Neither Federal Procedural Rules Nor State Administrative Requirements Have Changed To Prejudice Sierra Club

Perhaps in recognition that it has no legitimate claim to invoke this Court's jurisdiction pursuant to section 120.68, Florida Statutes, Sierra Club, as a non-party, argues instead that it should have standing because it was somehow deprived of a right to review the agency's action in this instance. Sierra Club alleges that the administrative review process changed during the pendency of the Department's processing of Seminole's permit, claiming that it assumed review of the permit in Florida was optional and in addition to the opportunity for review that could occur at the federal level. However, the only avenue available to Sierra Club to appeal to state court was through Florida's administrative process. Whether Sierra Club believed that review under chapter 120, Florida's Administrative Procedures Act, was optional, applicable procedures to obtain such in-state review are clearly not optional and have not changed since the Department's decision to

issue Seminole's permit. Sierra Club's allegations of forbearance do not excuse their failure to avail themselves of a still-viable alternative in Florida's Division of Administrative Hearings (DOAH).

Sierra Club argues that DEP operated as a "delegated" state and that it was going forth under the assumption that it could petition for review before the EAB;[5] however, the record does not support Sierra Club's premise that Florida is a "delegated" program, nor did DEP ever purport to process the permit pursuant to any federal rule. DEP's public notice states clearly that DEP was processing the permit according to and under authority of Florida statutes and DEP's own permit processing rules. (R. Vol. 9, pp. 1555-6). Moreover, the record shows that EPA provided extensive comment to DEP concerning the Seminole permit on October 5, 2006. (R. Vol. 9, pp. 1567-1571). Nothing in EPA's comments references delegation or the application of federal rules.

Furthermore, the federal rules themselves do not support Sierra Club's argument that DEP was processing the permit under delegated authority.[6] The

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[5] Review before the EAB is discretionary. Regardless of the status of Florida's PSD permit program as "delegated" or "approved," the EAB has discretion to deny any petition. There simply is no appeal as of right to the EAB on an EPA permit decision. In re Miners Advocacy Council, 4 E.A.D. 40, 42 (EAB, May 29, 1992). However, Sierra Club would have the option of appealing the EAB's decision to deny review to the federal courts.

[6] The federal "PSD rule", 40 C.F.R. section 52.21, states at paragraph(a)(1) that:

Department acted as an approved program when issuing Seminole's permit, and provided a clear path to review of the agency's decision through the state process. Having failed to avail itself of that option, Sierra Club cannot now seek to challenge the agency's decision in an appellate court.

The gravamen of Sierra Club's argument is that it failed to petition for an administrative hearing based on its misunderstanding of DEP's program resulting

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> 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. (emphasis added).

Since 1983, 40 C.F.R. subpart K, section 52.530 has provided:

> (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 section 52.21 except paragraph (a)(1) are hereby incorporated by reference and made a part of the Florida plan for:
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> (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 addition, when EPA wishes to approve or disapprove a state permitting rule, it must comply with the federal rulemaking process. El Comite Para Bienestar De Earliment v. Warmerdam, 539 F. 3d 1062 (USCA 9th Cir 2008). EPA cannot avoid proper rulemaking process in making such determinations. Envt'l Integrity Project v EPA, 425 F.3d 992 (USCA DC Cir 2005). Had EPA disapproved any or all of DEP's PSD permit program, that disapproval would have been reflected in the federal rule.

in an erroneous strategic decision. Sierra Club's allegations of misunderstanding and forbearance do not excuse its failure to timely take advantage of the clear opportunity to petition for a state administrative hearing, confirmed by the record in this case. Moreover, the procedures to obtain review in Florida are plainly mandatory and have not changed since DEP processed Seminole's application.

Section 403.815, Florida Statutes, provides, "[t]he failure to request a hearing within 14 days after publication of notice of proposed agency action constitutes a waiver of any right to a hearing on the application under sections 120.569 and 120.57." See § 403.815, Fla. Stat. (2008). DEP's implementing rule, Florida Administrative Code Rule 62-110.106, and the public notice published September 8, 2006, state precisely the same. (R. Vol. 9, p. 1555-6). Neither the statute nor the rule has changed since 2006, when the application for the Seminole permit was submitted. (R. Vol. 3, pp.412-600).

Further, the definition of "party" at section 120.52(13), Florida Statutes, has remained the same, although it was renumbered from subsection (12) during the period between 2006 to 2008. The provisions of sections 120.569 and 120.57, Florida Statutes, have remained essentially the same since 2006. The provisions of section 120.68, Florida Statutes, have not changed since 2003, and section 403.815, Florida Statutes, has remained the same since 1996. The DEP rule governing petitions, Florida Administrative Code Rule 62-110.106, has had the

same provisions since 1998. While Sierra Club states that the forum for appellate review changed during Seminole's permitting process, what has actually changed is Sierra Club's understanding that the appropriate vehicle for challenging the agency-issued permit in this case was a petition for hearing under Florida's Administrative Procedures Act. Because establishing standing to challenge the permit through filing a timely and sufficient petition is not and never has been "optional," Sierra Club's purported direct appeal from the permit issued should be dismissed for lack of standing.

II. DEP PROPERLY PROCESSED THE SEMINOLE PERMIT UNDER THE APPLICABLE RULES AND IMPOSED APPROPRIATE EMISSION LIMITS

A. Standard of Review

Even if Sierra Club 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 Sierra Club waived its rights by failing to file a timely petition and then, after being given opportunity to appeal that order, abandoned the process, Sierra Club cannot now contest the facts on appeal.

B. DEP Properly Used Florida Administrative Code Rule 62-212.400 To Evaluate The Seminole Permit

The Seminole permit was issued pursuant to Florida Administrative Code 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 at section 403.087, Florida Statutes, but the DEP PSD permit rules are also approved by EPA as part of the Florida SIP. DEP's PSD process[7] is contained 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.[8] The evaluation and emissions limiting process is contained in paragraph (10) of Rule 62-212.400, which limits the application of the process to those pollutants identified as "PSD pollutants".[9]

DEP rules define "best available control technology" (BACT) at Florida Administrative Code Rule 62-210.200, which provides, in pertinent part, that BACT is :

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[7] PSD is a process for evaluating and limiting emissions.

[8] The specific approval for DEP to issue federal PSD permits is 40 C.F.R. section 52.530.

[9] Florida Administrative Code Rule 62-212.400(10), provides as follows:

> (b) The 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.
> (c) The owner or operator of a major modification shall apply best available control technology for each PSD pollutant which would result in a significant net emissions increase at the source. (This requirement applies to each proposed emissions unit at which a net emissions increase in the pollutant would occur as a result of a physical change or change in the method of operation in the unit.)

(a) An emission limitation, including a visible emissions standard, based on the maximum degree of reduction of each pollutant emitted which the Department, on a case by case basis, determines is achievable through application of production processes and available methods, systems and techniques (including fuel cleaning or treatment or innovative fuel combustion techniques) for control of each such pollutant, taking into account:

1. Energy, environmental and economic impacts, and other costs;
2. All scientific, engineering, and technical material and other information available to the Department; and
3. The emission limiting standards or BACT determinations of Florida and any other state.

(b) If the Department determines that technological or economic limitations on the application of measurement methodology to a particular part of an emissions unit or facility would make the imposition of an emission standard infeasible, a design, equipment, work practice, operational standard or combination thereof, may be prescribed instead to satisfy the requirement for the application of BACT. Such standard shall, to the degree possible, set forth the emissions reductions achievable by implementation of such design, equipment, work practice or operation.

See Fla. Admin. Code R. 62-210.200. The rule establishes what elements DEP must use to evaluate the limitations and technologies to apply to a specific permitting situation. The rule is part of DEP's approved SIP and was therefore appropriately used to process the Seminole permit.

C. DEP Properly Applied Its Governing Rule Requirements To Determine Appropriate Emissions Limits in Seminole's Permit

DEP's application of its evaluation and limitation process is reflected in the Technical Evaluation and Proposed Permit. (R. Vol. 9, pp. 1515-54). The Technical Evaluation shows that DEP used a "top-down" type of process for

determining BACT (R. Vol. 9, p.1526). The Technical Evalaution also shows that DEP examined each PSD pollutant likely to be emitted at significant rates. [Vol 9, pp. 1519, 1524.) DEP determined that some PSD pollutants, including sulfur dioxide, nitrogen oxides, sulfuric acid mist, mercury, and lead, were not likely to be emitted at significant rates but that carbon monoxide, volatile organic compounds, particulate matter and particulate of ten microns (PM/PM_{10}), and hydrogen flourides were likely to be emitted at significant rates. (R. Vol 9., p. 1524)

Regarding BACT for PM/PM_{10}, the record shows that DEP analyzed data provided by the permit applicant. (R. Vol. 9, pp1519-20, 1525.) The record also shows that DEP consulted the permit requirements established from other states and evaluated several potentially available technologies. (R. Vol. 9, p. 1525). DEP rejected the applicant's proposed limit, stating it "does not include a technology-forcing component" and required a "more aggressive limit." (R. Vol. 9, p. 1525).. The record clearly shows that DEP considered precisely the factors included in the DEP rule definition of BACT. In addition, the record shows that DEP required that "condensibles be captured and reported" (R. Vol. 9, p.1525), and in response to an EPA recommendation for a "placeholder" if "testing has demonstrated that condensables can be measured accurately", DEP agreed that the issue could be deferred. (R. Vol. 13, pp. 2285-6). Had the Seminole permit been subject to an

administrative hearing, the permitting record would clearly provide competent and substantial evidence that DEP properly addressed BACT for PM/PM_{10}.

Regarding the control of carbon monoxide, the record shows DEP considered a number of technologies, including thermal oxidation, catalytic oxidation, and proper boiler design and operation. (R. Vol. 9, pp. 1520, 1525-6). DEP stated that it was "unwilling to reject thermal oxidation on the basis of being infeasible" because it had been used in a different context, but DEP recognized "that practical considerations exist when establishing BACT for a proven technology in an unproven configuration." (R. Vol. 9, p. 1526). DEP discussed, in its analysis, the variability of limits recently imposed in permits from other states but recognized that the compliance determination is significant when determining a limit. (R. Vol. 9, p.1527). The limit of 0.13 lb/MMBtu must be demonstrated based upon a three hour "initial stack test" rather than a rolling average. (R. Vol. 9, p. 1527). Again, had the Seminole permit been subject to an administrative hearing, the permitting record would clearly provide competent and substantial evidence that DEP properly addressed BACT for carbon monoxide.

For control of volatile organic compounds (VOC), DEP reiterated that VOC and CO are both resultant from combustion practices. (R. Vol. 9, pp. 1520-1, 1527). DEP determined that the applicant-proposed BACT "does not appear to be adequately stringent" and that "wet pollution control systems" "are well suited for

removing large percentages of HAP's [hazardous air pollutants] and VOC's." (R. Vol. 9, p.1528). DEP established a limit of 0.0034 lb/MMBtu "demonstrated via an initial stack test". (R. Vol 9. P.1528). Had the Seminole permit been subject to an adminstrative hearing, the record would clearly provide competent and substantial evidence that DEP properly addressed BACT for VOC.

For control of hydrogen flourides (HF), DEP's technological analysis and evaluation concluded that the combination of wet and dry emissions control systems in place for other pollutants would assure "97 percent removal." (R. Vol. 9, p. 1528). DEP also evaluated the ranges of limits imposed in other, recently-issued permits[10] and established the limit based upon the 97 percent expected removal. (R. Vol. 9, p. 1528). The emissions limit must be demonstrated by testing rather than as a rolling average. (R. Vol. 9, p. 1528). Had the Seminole permit been subject to an administrative hearing the permitting record would clearly provide competent and substantial evidence that DEP properly addressed BACT for HF.

The record also shows that DEP evaluated the possible impacts of excess emissions resulting from startup and shut-down operations. DEP determined that emissions related to fuel contaminants, SO_2 and PM, could be minimized; DEP established the practices that would be required to minimize emissions. (R. Vol. 9,

[10] The permit dates, most from 2004 and 2005, indicate that, given the timeframe required to install electric power units, many of the units have not yet begun or have only recently begun operations.

p. 1529). Regarding use of best operational practices during start-up and shutdown, the definition of BACT allows use of operational practices, saying:

> [i]f the Department determines that technological or economic limitations on the application of measurement methodology to a particular part of an emissions unit or facility would make the imposition of an emission standard infeasible, a design, equipment, work practice, operational standard or combination thereof, may be prescribed instead to satisfy the requirement for the application of BACT.

Fla. Admin. Code R. 62-210.200(4)(b). Again, as with the other permitting concerns raised above, had the Seminole permit been subject to an administrative hearing, the record would provide competent and substantial evidence supporting the final permit's BACT for start-up and shut-down operations.

The record shows that in evaluating the Seminole permit, DEP complied with its governing rules to evaluate control technology and emissions limits for those PSD pollutants likely to be emitted at significant rates. DEP established those limits as permit limits. (R. Vol. 12, 13 pp. 2243-58, 2291-2). Morevover, the record shows that DEP explained its analysis for the technology and limit chosen for each pollutant. (R. Vol. 9, pp. 1514-1536). The record also shows that DEP evaluated the permit using a top-down process even though such a process is not required. See Ak. Dep't of Envt'l. Conservation v. EPA, 540 U.S. 461, 476 fn 7 (2004). The record also shows that, contrary to the situation of Alaska Department of Environmental Conservation, in which EPA had objected to the Alaskan

process, the EPA made no objections to the BACT requirements of the Seminole permit. Nor did EPA exercise any oversight role to negate the state BACT process, although it clearly has that authority. Id. at 490 ("Congress, however, vested EPA with explicit and sweeping authority to enforce CAA 'requirements' relating to construction and modification of sources under the PSD program, including BACT. We don't see why Congress ...would then preclude the Agency from verifying substantive compliance with BACT provisions.") (R. Vol. 9, pp. 1567-71). The only comment EPA made concerning appropriateness of emissions limits was in regards to nitrogen oxides, and even then, EPA admitted that the pollutant was not subject to BACT. (R. Vol. 9, p. 1571). The record contains ample information that would be competent and substantial evidence at hearing that DEP made a reasoned engineering judgment in establishing emissions limits.

DEP has considerable experience in this area. DEP has been issuing PSD permits for nearly 30 years. The agency's experience and technical expertise should be afforded deference in a technical area such as the appropriate numerical permit limits at issue here. The record clearly shows that DEP complied with its governing rules to apply BACT to all the PSD pollutants that were expected to have significant rate increases.

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

Next, Sierra Club argues that, given recent case law defining carbon dioxide (CO_2) as a pollutant, DEP is required to regulate CO_2 through PSD permitting. Sierra Club cites Massachusetts v. EPA, 549 U.S. 497 (2007), which found that carbon dioxide (CO_2) meets the statutory definition of "pollutant" in the Clean Air Act, 42 U.S.C. section 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.[11] Florida Administrative Code Rule 62-212.400(10), provides that a

[11] Nothing in Florida Administrative Code Rule chapters 62-4, 62-204, 62-210, 62-212, 62-296 and 62-297, or any other air pollution stationary source rule, currently regulates CO_2.

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,[12] 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.

E. Pursuant to DEP rules, MACT Permits May be Separately Issued from PSD Permits

Sierra Club asserts that a MACT permit must be issued with a PSD permit, and since the two were 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

[12] Nor does the adoption of 40 C.F.R. section 52.21 into Florida Administrative Code 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 Code 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. <u>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</u>.

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.

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.[13]

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

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

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).[14]

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.[15] While DEP can properly issue the MACT permit in conjunction with the PSD permit, the two permits must always be evaluated separately. MACT permits 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 Code Rule 62-212.400. Furthermore, the pollutants subject to case-by-case MACT are, with the exception

[14] The application submitted December 22, 2008, also addresses this issue.
[15] The DEP rule governing case-by-case MACT permits is Florida Administrative Code 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.

of mercury, not listed as PSD pollutants.[16] 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.[17]

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 PSD permit separately from a MACT permit.[18] 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. Sierra Club has established no basis for reversal of the agency's permitting decision on this issue.

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

[17] 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: "The provisions of part C of this subchapter (prevention of significant deterioration) shall not apply to pollutants listed under this section."

[18] 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].

F. DEP Properly Applied Its Governing Rule Requirements To Consider All Public Input

DEP's rule govening public notice for preconstruction permits is Florida Administrative Code Rule 62-210.350, which requires at paragraph (2)(f) that DEP "consider" timely received public comments in making its permitting decision. DEP did so and reflected its consideration in its Final Determination. (R. Vol. 13, pp.2284-90).

Contrary to Sierra Club's position, there is no reason that this court should follow any federal procedural decisions concerning public comment and the processing of permits. The Seminole permit was processed pursuant to DEP permit processing rules at Florida Administrative Code Rules 62-210.300 and 62-212.400. Public notice was provided pursuant to Florida Administrative Code Rules 62-110.106 and 62-210.350. The public notice presented ample opportunity for an affected person to become a party. (R. Vol. 9, pp. 1557-8). The notice also provided an opportunity to comment, although the notice made clear that the primary avenue for determination of the terms and conditions of the permit was the administrative process. (R. Vol. 9, p 1558). Florida's Administrative Procedures Act, at sections 120.569 and 120.57, Florida Statutes, provides the opportunity for a complete de novo process.

As reflected in the record, DEP was well aware of Sierra Club's comments and of a "settlement agreement" made between Seminole and Sierra Club in 2007,

after both had submitted comments to DEP. (R. Vol. 12, pp.2165-9).[19] Because the agreement purported to resolve "all timely received comments submitted by the applicant and Sierra Club related to the draft permit," the agreement, which also claimed to "settle all remaining issues related to the PSD permit for Unit 3," was specifically addressed in DEP's final determination as a revision to Sierra Club's and Seminole's previously-submitted comments. (R. Vol. 12, p 2165; Vol. 13, p. 2284) The record also shows, however, that DEP independently considered the comments of both Seminole and Sierra Club. The DEP copy of the Sierra Club-Seminole agreement is annotated with calculations and statements such as "different in comments" and "more restrictive than comments". (R. Vol. 12 pp. 2166-7). DEP agreed in its final permit determination to consider incorporating the agreement into Seminole's permit after proper application. (R. Vol. 13 p. 2284). DEP also separately agreed to process the agreement issues with the case-by-case MACT permit by letter of September 19, 2008. (R. Vol. 13, p.2293). [20]

[19] The agreement was titled a "settlement agreement," although no litigation was pending concerning the permit. DEP was not a party to the agreement.
[20] Although it is necessarily not part of the record on appeal, Seminole Electric Cooperative, Inc., made application on December 22, 2008, for a permit to address both the "settlement agreement" and case-by-case MACT. DEP has assigned project number 1070025-011-AC to that application. It can be accessed by web at http:// www.dep.state.fl.us/air and by linking to the permitting and air permit search links. When DEP is ready to issue its proposed agency action on this application, the process will require a public notice pursuant to Florida Administrative Code Rules 62-110.106 and 62-210.350, with opportunity for public hearing. Application review process is currently ongoing.

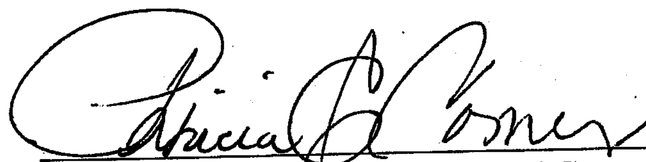
DEP emphasizes, however, that it was never party to the agreement and had no obligation to change the PSD permit based upon the terms of the agreement. DEP's rule requires the agency to consider all information timely received but does not oblige the agency to change its determination in response. The record shows that DEP received multiple comments and that DEP considered them all but determined that no change was warranted to the proposed agency action. (R. Vol. 13, pp. 2284-90). Had the Seminole permit been subject to an administrative hearing, the permitting record would clearly provide competent and substantial evidence that DEP considered the Sierra Club comments.

Despite the circumstance that no administrative hearing was held to consider the terms and conditions of the Seminole permit, the record shows ample materials that would constitute, in an administrative hearing, competent and substantial evidence to support the DEP permit determinations and a conclusion that DEP properly followed its own procedures and applied the proper rules in issuing Seminole's permit.

III. CONCLUSION

For the foregoing reasons, DEP respectfully requests that this court dismiss the appeal of Sierra Club or, if this court determines that Sierra Club has standing to bring this appeal, DEP requests that this court affirm the decision of DEP to issue the Seminole permit.

Respectfully submitted this 1st day of April, 2009.



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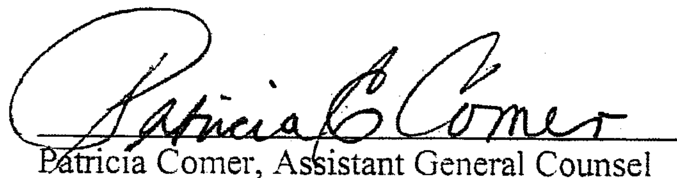

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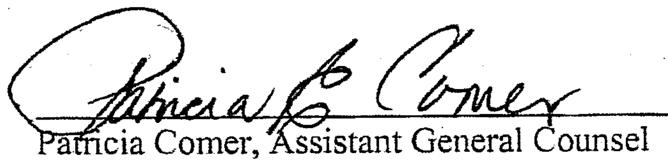
CERTIFICATE OF COMPLIANCE

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



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