SIERRA CLUB
FOUNDED 1892

October 30, 2008

Via hand-delivery

Ms. Erika Durr, Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
Colorado Building
1341 G Street N.W., Suite 600
Washington D.C. 20005

Re: Seminole Electric Cooperative, Inc., PSD Permit Number PSD-FL-375, PSD Appeal Number 08-09

Dear Ms. Durr:

Enclosed for filing is one original of the Motion for Leave to File a Reply to the FDEP's Request to Deny Review and Sierra Club's Reply to the FDEP's Request to Deny Review and Motion for Summary Disposition for the above-referenced PSD Appeal Case. If you have any questions about this filing or if I can be of any further assistance please call me at 415-977-5725.

Sincerely,

Joanne Spalding

Enclosures

cc. Motion for Leave to File a Reply to the FDEP's Request to Deny Review and Sierra Club's Reply to the FDEP's Request to Deny Review and Motion for Summary Disposition

85 Second Street, Second Floor San Francisco, CA 94105-3441 TEL: (415) 977-5772 FAX: (415) 977-5793 www.sierraclub.org

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

In the matter of:	)	PSD Appeal No. 08-09
	)	
In Re Seminole Electric Cooperative Inc.	)	
	)	
	)	
PSD Permit Number PSD-FL-375	)	
	)	

MOTION FOR LEAVE TO FILE A REPLY TO THE FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION'S REQUEST TO DENY REVIEW

By this motion, Sierra Club requests leave to reply to the Florida Department of Environmental Protection's (FDEP) request to deny review and motion for summary disposition of Sierra Club's petition for review. In support of this motion, Sierra Club states:

1. The question of the Board's jurisdiction over Prevention of Significant Deterioration permits issued in draft form under a delegation of permitting authority, and in final form after approval of a State Implementation Plan, has not been addressed by the Board.
2. This jurisdictional question is of considerable importance to the cooperative federalism design of the Clean Air Act and the Act's commitment to public participation.
3. FDEP's request to deny review on jurisdictional grounds raises arguments not fully addressed in either Sierra Club's petition for review or motion to hold proceedings in abeyance.
4. Allowing Sierra Club briefly to address these arguments would aid the Board in disposing of this petition for review.

Therefore, Sierra Club moves the Board for leave to file the attached reply to FDEP's request to deny review.

Date: October 30th, 2008

Respectfully submitted,

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

In the matter of:	PSD Appeal No. 08-09
In Re Seminole Electric Cooperative Inc.	
PSD Permit Number PSD-FL-375	

SIERRA CLUB'S REPLY TO THE FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION'S REQUEST TO DENY REVIEW AND MOTION FOR SUMMARY DISPOSITION

The Florida Department of Environmental Protection (FDEP) makes two arguments in its request to deny review. First, FDEP argues that the Environmental Protection Agency (EPA) nullified Sierra Club's right to seek Board review of Seminole's final Prevention of Significant Deterioration (PSD) permit when it approved Florida's State Implementation Plan (SIP). Second, FDEP maintains that Sierra Club may not challenge the Seminole permit because it did not challenge EPA's approval of Florida's SIP. The Board need not address either argument if it grants Sierra Club's earlier motion to stay these proceedings to allow Florida courts to take a first — and possibly dispositive — look at the issues in this case. But, if the Board does take up FDEP's request it should deny it and review the badly flawed Seminole permit.

I. FDEP's Jurisdictional Argument Ignores the Effect of SIP Approval on Pending Permits.

Sierra Club addressed FDEP's jurisdictional argument in its earlier motion. Briefly, the question is whether EPA approval of a SIP can defeat review of a

PSD permit that was issued in draft form under a delegated program, but in final form after SIP approval. This unintended consequence could result because Florida's approved SIP contains public participation procedures that differ from the procedures under the delegated program.

Sierra Club perfected its right to contest the Seminole permit by filing timely comments on the draft permit. *See* 40 C.F.R. § 124.19(a). Sierra Club was not required to comply with Florida's supplemental state process. *See In re West Suburban Recycling and Energy Center*, 6 E.A.D. 692, 707 (EAD 1996). Yet, now that Florida's SIP has been approved and a final permit issued, Seminole has moved to dismiss Sierra Club's state court appeal on the ground that Sierra Club did not comply with Florida's procedures. *See* Ex. 1 at 6-8, 11-12. FDEP meanwhile contends that the Board also lacks jurisdiction, and Seminole agrees. *See id.* at 4 n. 1. The result is that, if both Seminole and FDEP prevail, the SIP approval will render the Seminole permit permanently unreviewable, even though both the terms of the federal delegation and Florida's state procedures are designed to ensure adequate review.

Shifts in procedure like that created by the SIP approval should not apply retroactively if they would produce such unjust results. "When application of a new [procedural rule] would *wholly eliminate* claims for substantive rights or remedial actions [available] under the old law, the application is impermissibly retroactive." *Brown v. Angelone*, 150 F.3d 370, 373 (4th Cir. 1998) (considering procedural rules in the statute of limitations context) (emphasis in original, quotation marks omitted). As the Supreme Court has emphasized, "the mere

fact that a rule is procedural does not mean that it applies to every pending case," *Landgraf v. USI Film Products*, 511 U.S. 244, 275 n. 29, and ought not do so if application "would work injustice." *Id.* (citation omitted).

Neither the regulation approving Florida's SIP nor Florida's state procedures can eliminate Sierra Club's right of review. At most, they could shift jurisdiction over that right from the Board to the Florida courts. *See Landgraf*, 511 U.S. at 274 (observing that "a new jurisdictional rule usually takes away no substantive right but simply changes the tribunal that is to hear the case") (quotation marks and citation omitted). Any other result would retroactively substitute Florida law for the conditions of the federal delegation, disrupting the careful terms under which the Clean Air Act's cooperative federalism and public participation mandates are implemented. Indeed, one of the bedrock principles of the PSD program is to "assure that any decision to permit increased air pollution . . . is made only after careful evaluation . . . and after adequate procedural opportunities for informed public participation." *See* 42 U.S.C. § 7470(5).

Of course, the Board need not step in to address these issues unless the Florida courts fail to do so. To preserve these issues for review in that event, the Board should not dismiss this petition until it is clear that the Florida courts have accepted jurisdiction.

II. FDEP's SIP Approval Argument Is Irrelevant.

FDEP argues that the Board should not consider the narrow question of how the SIP approval affects review of the Seminole permit because Sierra Club

did not sue EPA over that approval. This argument is a non sequitur. The merits of the SIP approval are not at issue, and Sierra Club need not challenge the SIP approval to protect its right to contest a particular permit.

FDEP's argument that Sierra Club should sue EPA in federal court if it disputes the conclusion that Florida's SIP contains "adequate and effective procedures," is true but irrelevant. *See* FDEP Request at 2-3; *see also* Approval and Promulgation of Implementation Plans Florida; Prevention of Significant Deterioration, 73 Fed. Reg. 36,435, 36,437 (June 27, 2008). Contrary to FDEP's understanding, Sierra Club is *not* arguing that "differences between state and federal administrative processes," FDEP Request at 3, should have barred SIP approval. Instead, it is arguing that Florida's procedures should not apply retroactively to permits processed under the federal delegation. The issue is not the SIP approval, but rather the *effect* of that approval — which Sierra Club assumes to have been proper — upon review of Seminole's permit. FDEP contends the approval cut off jurisdiction; Sierra Club disagrees. Neither position turns upon the merits of the SIP approval.

Even if FDEP's argument had any bearing upon the issues before the Board, it is simply not a coherent position. Failure to challenge a rule in court does not bar all future litigation over that rule's implementation, as FDEP suggests. As a general matter, the courts favor more readily justiciable "concrete action[s] applying the regulation to the claimant's situation," *Lujan v. Nat'l Wildlife Found.*, 497 U.S. 871, 891 (1990), over "abstract disagreements over administrative policies," *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 736

(1998) (citation omitted). In this case, Sierra Club has not even brought an as-applied challenge to the SIP. It makes only the far more modest argument that the SIP approval should not defeat review of Seminole's permit in the circumstances of this case.

Moreover, FDEP's position makes little practical sense. Florida's efforts to obtain SIP approval for electric power plant permits muddled along for more than a quarter-century. *See* Proposed Rules: Approval and Promulgation of Implementation Plans Florida; Prevention of Significant Deterioration, 73 Fed. Reg. 18,466, 18,471-72 (Apr. 4, 2008). Since 1981, when Florida first drafted PSD rules, the state has operated under a partial delegation, then a full delegation, then had its delegation revoked, and then received a full delegation again. *See id.* Only in July of this year did approval of Florida's PSD program for power plants take effect. It is unreasonable to require members of the public interested in a single PSD permit to track the status of the program for years and then challenge EPA approval of the whole program simply to protect their right to contest that one permit. Such a requirement would be especially burdensome for a party that, like Sierra Club, complied with applicable public participation requirements and simply seeks to maintain a right it has established. Sierra Club does not here claim that Florida procedures are illegal, only that they are inapplicable in this particular case. Attempting to derail the entire SIP approval in these circumstances would serve neither judicial nor administrative economy.

FDEP seeks to litigate a phantom disagreement over the SIP approval, rather than the permit before the Board. Its objections do not address the actual dispute and the Board should disregard them.

III. Conclusion

Sierra Club's petition for review and FDEP's request to deny it implicate substantial questions concerning the Clean Air Act's public participation mandate and commitment to cooperative federalism. If the Florida courts take jurisdiction, the Board need not wrestle with these issues; if the Florida courts do not, Sierra Club has provided sound reasons for the Board to take up its petition. Because so much depends upon the state court action, Sierra Club respectfully suggests that the Board rule on FDEP's request only if state court proceedings make such a decision necessary. The Board should grant Sierra Club's earlier motion to hold these proceedings in abeyance, leaving FDEP's request to deny review pending until it becomes necessary to address it.

Date: October 30, 2008

Respectfully submitted,

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EXHIBIT 1

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

SIERRA CLUB, INC.

Appellant,

vs.

Case No: 1D-08-4881
Final Permit No. PSD-FL-375
Project No. 1070025-005-AC

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

Appellees.

_____/

MOTION TO DISMISS FOR LACK OF JURISDICTION

Appellee, Seminole Electric Cooperative, Inc. (Seminole), by and through undersigned counsel and pursuant to Rule 9.300(a), Fla. R. App. P., hereby respectfully moves to dismiss this appeal for lack of subject matter jurisdiction on grounds that the Appellant, Sierra Club, Inc. (Sierra Club), failed to secure party status in the agency action below and therefore lacks standing.

PROCEDURAL BACKGROUND

1. On August 24, 2006, the Florida Department of Environmental Protection (DEP) issued a draft air quality construction permit, called a Prevention of Significant Deterioration (PSD) permit, associated with a proposed third electric generating unit (Unit 3) at Seminole's existing electric power generating plant in

Putnam County. A PSD permit is one of a handful of separate approvals that Seminole must receive prior to constructing a new electric generating unit. The Florida Power Plant Siting Act also requires that a new electric generating unit be certified through a separate administrative proceeding. See §§ 403.501–.518, Fla.Stat. (2008)

2. Seminole published DEP's Notice of Intent to issue the PSD permit in the Palatka Daily News on September 8, 2006. This public notice stated that interested persons would have the opportunity to file comments regarding the draft permit within 30 days (by October 9, 2006) and that substantially affected persons opposing permit issuance could file a petition for an administrative hearing within 14 days of the notice (by September 22, 2006). Mirroring the language of Rule 62-110.106(12), of the Florida Administrative Code, the public notice stated, "[t]he failure of any person to file a petition within the appropriate time period shall constitute a waiver of that person's right to 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." (Emphasis added). [See attached public notice, Exhibit A].

3. On October 9, 2006, the Appellant, Sierra Club submitted timely comments regarding the draft PSD permit. On October 16, 2006, Sierra Club filed

an untimely "Motion of Enlargement of Time and Petition for Administrative Hearing" (petition).

4. On October 31, 2006, DEP issued an order dismissing Sierra Club's petition for an administrative hearing on grounds that it was "untimely filed." [See attached Order Dismissing Petition with Leave to Amend, Exhibit B]. DEP's Order stated that Sierra Club failed to demonstrate "any basis for excusable neglect" in untimely filing the petition; that Sierra Club had "105 members in Putnam County" and "520 members in St. John County;" that the Palatka Daily News, which published the public notice of the PSD permit, was circulated in these counties; and that Sierra Club received actual notice of DEP's intent to issue the permit on September 5, 2006 (in addition to the newspaper notice). In short, Sierra Club's failure to timely submit a petition challenging the PSD permit constituted a waiver of its rights under Florida law.

5. DEP's October 31, 2006 order essentially left Sierra Club with two options: either amend its petition to demonstrate why it "should be considered timely," or within thirty days "seek judicial review" of the order by "the filing of a notice of appeal...with the appropriate district court of appeal." Sierra Club did not avail itself of either of these options; Sierra Club did not file an amended petition or appeal DEP's Order Dismissing Petition with Leave to Amend.

6. Although Sierra Club failed to timely file a petition (or amended petition) under Chapter 120, Florida Statutes, in opposition to Seminole's Unit 3 PSD permit, during that time (August – November, 2006) Sierra Club was a party in the distinctly separate Unit 3 certification proceeding under the Florida Power Plant Siting Act. See §§ 403.501–.518, Fla. Stat. (Pursuant to Section 403.509(4), Florida Statutes, DEP exercises separate authority to issue PSD permits, which are issued in conjunction with federal requirements.) Moreover, because Sierra Club timely submitted comments on the draft PSD permit, at that point the potential existed that if DEP issued the final PSD permit while EPA still considered Florida a "delegated" PSD permitting program, Sierra Club could challenge the final PSD permit before the Federal Environmental Appeals Board. See 40 C.F.R. § 124.19(a) (limiting standing to challenge a final PSD permit issued under a delegated state PSD permitting program before the Environmental Appeals Board to "any person who filed comments on [the] draft permit or participated in the public hearing").[1]

[1] Later, EPA published notice that effective July 28, 2008, Florida's PSD program henceforth would be "approved" instead of "delegated." See EPA, Approval & Promulgation of Implementation Plans Florida: Prevention of Significant Deterioration, 73 Fed. Reg. 36,435 (June 27, 2008). This distinction means that instead of implementing the PSD regulations on EPA's behalf, DEP would administer the program as an "approved" state. An artifact of this distinction is that federal administrative appeals to the Environmental Appeals Board are no longer available.

7. Seminole and Sierra Club subsequently entered into two Settlement Agreements that resolved Sierra Club's substantive air quality-related concerns and all potential legal claims related to both the certification of Unit 3 under the Florida Electric Power Plant Siting Act and the issuance of Unit 3's final PSD permit. [See attached January 7, 2007 and March 9, 2007 Settlement Agreements between the Sierra Club and Seminole, Exhibits C & D, respectively]. In the March 9, 2007 Settlement Agreement, Seminole agreed to ask DEP to incorporate numerous air emission reduction commitments into the final PSD permit, and Sierra Club agreed "not to contest FDEP's issuance of the final PSD permit in any administrative or judicial forum," so long as "the final PSD permit is issued in accordance with the terms and conditions of this Agreement." This Settlement Agreement acknowledged that the Sierra Club was a "party" in the Power Plant Siting Act process (page 1, paragraph C), but made no representation as to whether it was a party in the PSD proceeding.

8. On September 5, 2008, DEP issued the PSD permit for Seminole's Unit 3.[2] Citing the fact that the Settlement Agreements arose "outside" of the PSD

[2] The issuance of the PSD permit was delayed due to an appeal proceeding related to DEP's certification of Unit 3 under the Power Plant Siting Act. See, Seminole Elec. Coop., Inc. v. Department of Envtl. Protection, 985 So. 2d 615 (Fla. 5th DCA 2008) (remanding with instructions that DEP enter a final order approving of certification). This recent judicial decision briefly described both Seminole-Sierra Club Settlement Agreements and noted the distinction between Power Plant Siting Act and PSD permit proceedings. Id. at 619, n.1. DEP's final order approving the

permit proceeding, DEP issued the PSD permit without incorporating the changes that Seminole and the Sierra Club had agreed to, while committing to revise the permit to incorporate the changes in a subsequent proceeding. [See attached DEP Final Determination, Exhibit E]. Soon after issuing the Unit 3 PSD permit, DEP characterized one of Seminole's written requests to incorporate the agreed-upon emission reductions as a request to modify the just-issued PSD permit. Consistent with its commitment in the Final Determination, DEP's official response to Seminole states that the Department "has opened a permit revision project to include the settlement agreement." [See attached September 19, 2008 letter from DEP to Seminole, Exhibit F].

9. On October 3, 2008, nearly two years after DEP initially dismissed Sierra Club's petition challenging the draft PSD permit as untimely, Sierra Club filed an appeal in the First District Court of Appeal opposing the Unit 3 PSD permit.

ARGUMENT

10. "It is a fundamental principle of appellate law that appeal jurisdiction is only available to parties," and "the Administrative Procedure Act only provides for review of agency action by parties." Orange County, Fla. v. Game & Fresh

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certification of Unit 3 issued on August 18, 2008. Seminole Elec. Coop., Inc. v Department of Envtl. Protection, Fla. Admin. Order No. 06-0929 (Dept. of Envtl. Prot. Aug. 18, 2008).

Water Fish Comm'n, 397 So. 2d 411, 413 (Fla. 5th DCA 1981). In accordance with this "fundamental principle," this Court lacks subject matter jurisdiction over this matter, because Sierra Club was not a party to the Unit 3 PSD permit administrative proceeding, and therefore lacks standing to appeal.

11. Sierra Club brought this appeal pursuant to Section 120.68(1), Florida Statutes.[3] This section authorizes judicial review of administrative action by "[a] party who is adversely affected by final agency action." § 120.68(1), F.S. (2008) (emphasis added).

12. Pursuant to Section 120.68(1), Florida Statutes, "in order to have standing to seek such review, a person must show: (1) the action is final; (2) the agency is subject to the provisions of the Act; (3) he was a party to the action which he seeks to appeal; and (4) he was adversely affected by the action."

[3] In its Notice of Appeal, Sierra Club also states that this appeal is brought in part under "40 C.F.R. § 124.10(b)(1), 40 C.F.R. § 124.13, and 40 C.F.R. § 124.19(a)." These federal regulations concern federal procedures for submitting public comments on certain draft federal or federally delegated permits and procedures for federal appeals to the Environmental Appeals Board. The referenced federal regulations do not purport to grant, nor could they grant, any entities standing to appeal actions before the First District Court of Appeal of Florida or any other state appellate court. Further, the Florida Administrative Procedure Act and applicable DEP rules do not reference these federal regulations as providing any basis for appellate review. See §§ 120.68, 120.54(6), Fla. Stat. (2008); Fla. Admin. Code Ann. r. 62-110.106, 62-210.350(2) (2008). In short, the cited federal regulations do not provide Sierra Club any basis to seek review of this matter before the First District Court of Appeal of Florida.

Daniels v. Florida Parole & Probation Comm'n, 401 So. 2d 1351, 1353 (Fla. 1st DCA 1981) (emphasis added).

13. Under part three of this four-part test, if an "appellant was not a party to the proceedings below, he is without standing to institute an appeal." Norkunas v. State Bldg. Comm'n, 982 So. 2d 1227, 1228 (Fla. 1st DCA 2008). If the appellant lacks standing, then the appellate court lacks subject matter jurisdiction to consider the appeal. See Rogers & Ford Constr. Corp. v. Carlandia Corp., 626 So. 2d 1350, 1352 (Fla. 1993) ("The determination of standing to sue concerns a court's exercise of jurisdiction to hear and decide the cause pled by a particular party."); University Psychiatric Ctr., Inc. v. Department of Health & Rehabilitative Servs., 597 So. 2d 400, 401 (Fla. 1st DCA 1992) ("[T]he petitioners lack standing to maintain this action, and the action must be dismissed for lack of subject matter jurisdiction.").

14. Applying these principles to the circumstances at hand, this appeal should be dismissed because Sierra Club was not a party to the Seminole Unit 3 PSD permit proceeding. Sierra Club failed to exercise its rights to become a party; its petition was untimely. DEP provided Sierra Club an opportunity to justify its neglect in late-filing the petition, and of course Sierra Club could have appealed DEP's Order. But Sierra Club declined. To the extent Sierra Club wishes to contest DEP's decision that the petition was untimely, its appeal is two years too

late. Having failed to secure status as a party below, Sierra Club cannot now appeal the issuance of the Unit 3 PSD permit.

15. Sierra Club may argue that its filing of timely comments regarding the Unit 3 PSD permit affords it "party" status under Florida's Administrative Procedure Act. However, Florida law requires more. See St. Joe Paper Co. v. Department of Cmty. Affairs, 657 So. 2d 27, 28-29 (Fla. 1st DCA 1995) (the mere submission of comments does not confer standing in an administrative proceeding under the Florida Administrative Procedure Act). The term "party" is defined in pertinent parts as "[s]pecifically named persons whose substantial interests are being determined in the proceeding" or "[a]ny other person who...is entitled to participate in whole or in part in the proceeding, or whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party." § 120.52(13)(a)-(b), Fla. Stat. (emphasis added). Simply put, Sierra Club failed to "make an appearance as a party." Timely filing a petition for hearing was a prerequisite to obtaining party status in this case; failure to do so constituted waiver. See, Fla. Admin. Code Ann. r. 62-110.106(3)(b) (2008) ("Failure to file a petition within the applicable time period after receiving notice of agency action shall constitute waiver of any right to request an administrative proceeding under Chapter 120, Florida Statutes."); Fla. Admin Code Ann. r. 62-110.106(12), (2008) (requiring the public notice of agency action to state that "[t]he failure of any

person to file a petition within the appropriate time period shall constitute a waiver of that person's right to . . . intervene in this proceeding and participate as a party to it"). DEP's denial of Sierra Club's untimely petition had the effect of denying Sierra Club's status as a party. Cf. Postal Colony Co. v. Askew, 348 So. 2d 338, 339 (Fla. 1st DCA 1977) ("Petitioners have standing to seek judicial review of this agency action. ...[T]he Administration Commission recognized petitioners as parties entitled to participate in the proceedings.").

16. Sierra Club may also attempt to rely on the attached Settlement Agreements as evidence of its party status. The Settlement Agreements, however, never once refer to Sierra Club as a party to the state PSD permit proceeding and for good reason: Seminole and Sierra Club entered into those agreements knowing full well that DEP had denied Sierra Club's petition to challenge the PSD permit and further that Sierra Club had elected not to make an effort to justify missing its deadline or appeal DEP's denial. The existence of the two Settlement Agreements must be understood in the full context of Sierra Club's potential rights under all state and federal forums at the time the two agreements were executed. Sierra Club was an opposing party to a separate Power Plant Siting Act certification proceeding when the first Settlement Agreement was executed, and because Sierra Club filed timely comments regarding the draft PSD permit, there was a potential that if DEP issued the final Unit 3 PSD permit while Florida was considered a

delegated PSD permitting program, Sierra Club could contest the final PSD permit before the Federal Environmental Appeals Board. See 40 C.F.R. § 124.19(a). (See footnote 1 on page 4.)

17. Regardless of the reasons for the Settlement Agreements, however, any argument that the Settlement Agreements could somehow confer standing on Sierra Club for purposes of this appeal is necessarily without merit. The Settlement Agreements were entered into between only Sierra Club and Seminole. The Settlement Agreements did not and could not replace statutory requirements for obtaining party status in Seminole's Unit 3 PSD permit proceeding, nor could the agreements confer subject matter jurisdiction on this Court. Rinella v. Abifaraj, 908 So. 2d 1126, 1129 (Fla. 1st DCA 2005) ("Subject matter jurisdiction, which arises only as a matter of law, cannot be created by waiver, acquiescence or agreement of the parties, by error or inadvertence of the parties or their counsel, or by the exercise of the power of the court.") (quoting Seven Hills, Inc. v. Bentley, 848 So. 2d 345, 350 (Fla. 1st DCA 2003)).

18. Having failed to exercise its rights in a timely manner and therefore never gained party status, Sierra Club cannot now circumvent the explicit requirement that it be a party in section 120.68(1), Florida Statutes, -- the very statute upon which it claims this court has jurisdiction -- and appeal the final PSD permit. Daniels v. Florida Parole & Probation Comm'n, 401 So. 2d at 1353 (Fla.

1st DCA 1981); Norkunas v. State Bldg. Comm'n, 982 So. 2d at 1228 (Fla. 1st DCA 2008). Because Sierra Club lacks standing, the First District Court of Appeal lacks subject matter jurisdiction over this matter. Rogers & Ford Constr. Corp. v. Carlandia, 626 So. 2d at 1352 (Fla. 1993). This appeal should be dismissed.

WHEREFORE, Appellee Seminole respectfully requests that this Court dismiss the Sierra Club's appeal with prejudice.

Respectfully submitted this 21st day of October, 2008.

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David W. Childs
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Hopping Green & Sams
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been provided by U.S. Mail this 21st day of October, 2008 to the following:

David G. Guest, Esq.
Alisa A. Coe, Esq.
Counsel for Sierra Club
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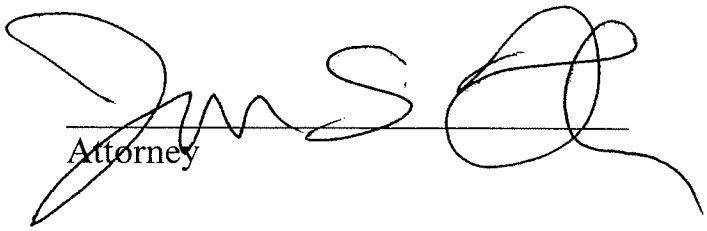

Attorney

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion for Leave to File a Reply to the FDEP's Request to Deny Review and Sierra Club's Reply to the FDEP's Request to Deny Review and Motion for Summary Disposition were served by United States First Class Mail on the following persons this 30th of October, 2008:

Brian L. Doster Air and Radiation Law Office Office of General Counsel Environmental Protection Agency 1200 Pennsylvania Ave. N.W. Washington, DC 20460	Patricia E. Comer Senior Assistant General Counsel Florida Bar No. 224146 Florida Department of Environmental Protection 3900 Commonwealth Boulevard-MS 35 Tallahassee, FL 32399-3000
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