STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

FLORIDA POWER CORPORATION, Petitioner, vs. DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondent, and LEGAL ENVIRONMENTAL ASSISTANCE FOUNDATION, INC., and SIERRA CLUB, INC., Intervenors.	)	OGC CASE NO. 96-2045 DOAH CASE NO. 96-5344

FINAL ORDER ON REMAND FROM THE
FIFTH DISTRICT COURT OF APPEAL OF FLORIDA

On December 26, 1995, Petitioner, Florida Power Corporation (hereafter "FPC"), filed an application with the Department of Environmental Protection (hereafter "DEP") for an air construction permit. FPC's application sought a permit from DEP to burn a blend of petroleum coke and coal in the existing coal-fired Units 1 and 2 at its Crystal River Power Plant in Citrus County, Florida (hereafter the "Plant"). FPC's application did not address the requirements of a Prevention of Significant Deterioration ("PSD") review by DEP because FPC contended that it qualified for an exemption from PSD

Rec. 1/5/99 from Perry Odom

permitting requirements under Rule 62-212.400(2)(c)4, Florida Administrative Code.[1]

This DEP rule exempts from PSD review the:

> [u]se of an alternative fuel or raw material which the facility was capable of accommodating before January 6, 1975, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975.

After reviewing FPC's application, DEP issued an Intent to Deny on June 25, 1996. In the Intent to Deny, DEP concluded that:

> [a]ccording to information in Department files, both Units 1 and 2 operated on liquid fuel prior to January 6, 1975. Very substantial modifications of the boilers and pollution control equipment were implemented thereafter by [FPC] to convert the units to coal-firing mode. Therefore the project does not qualify for the exemption from PSD review claimed by the company.

FPC subsequently filed a Petition for Administrative Hearing alleging that Units 1 and 2 at the Plant were capable of accommodating the proposed blend of petroleum coke and coal as of January 6, 1975, within the purview of the exemption provisions of Rule 62-212.400(2)(c)4. FPC's Petition also alleged that, contrary to the statements in DEP's Intent to Deny, any boiler modifications and pollution control improvements to Units 1 and 2 at the Plant required to burn the blend of petroleum coke and coal would be minor and not substantial.

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[1] Florida's PSD permitting program is based on the PSD permitting standards set forth in the federal Clean Air Act of 1970, as amended. Florida has fulfilled the requirements of administering the federal PSD program by obtaining approval from the United States Environmental Protection Agency (hereafter "EPA") of its state regulations based on the federal PSD standards. These PSD permitting standards are an essential element of Florida's State Implementation Plan. Florida's State Implementation Plan, containing PSD permitting regulations, is embodied in Chapters 62-204, 62-210, 62-212, 62-296, and 62-297, Florida Administrative Code.

On May 27, 1997, Petitions to Intervene were filed on behalf of Legal Environmental Assistance Foundation, Inc. (hereafter "LEAF"), and Sierra Club, Inc. ("Sierra Club").[2] These Petitions to intervene were granted by Administrative Law Judge Donald R. Alexander (hereafter "ALJ"), subject to the Intervenors providing proof of standing at the final hearing. A DOAH final hearing was held before the ALJ on June 2-3, 1997, in Tallahassee, Florida. Testimony and documentary evidence was presented at the final hearing by FPC and DEP and two exhibits were received into evidence on behalf of LEAF.

On September 23, 1997, the ALJ entered a Recommended Order concluding that FPC had demonstrated that Units 1 and 2 at the Plant were "capable of accommodating before January 6, 1975," a blend of petroleum coke and coal. The ALJ thus concluded that FPC was entitled to the exemption from PSD permitting requirements set forth in DEP Rule 62-212.400(2)(c)4. The ALJ ultimately recommended that DEP enter a Final Order granting FPC's requested air construction permit. A copy of this Recommended Order is attached as Exhibit A.

A series of procedural events then occurred, including the filing of Exceptions to the Recommended Order and Motion for Remand on behalf of DEP, and a remand by DEP to DOAH for further proceedings and entry of a new recommended order. Upon remand from DEP, the ALJ entered a Response to the Order on Remand on January 15, 1998, that, with one non-dispositive modification, adopted by reference the A LJ's September 23, 1997, Recommended Order as the Recommended Order on Remand.

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[2] LEAF and Sierra Club will sometimes be referred to collectively in this Final Order as "Intervenors."

A copy of the ALJ's Response to Order on Remand is attached hereto as Exhibit B. DEP filed Exceptions to the Recommended Order and Exceptions to the Response to Order on Remand on February 4, 1998. No Exceptions to the Response to the Order on Remand or to the Recommended Order were filed by either Intervenor. On March 2, 1998, a Final Order was entered by DEP rejecting the ALJ's recommendation, granting several exceptions filed on behalf of DEP, and denying the air permit applied for by FPC. The holding of DEP's Final Order denying FPC's permit application was primarily based upon the interpretation by DEP's Division of Air Resource Management permit review staff of the "capable of accommodating" language in Rule 62-212.400(2)(c)4 as applied to FPC's requested construction permit pertaining to the Plant's Units 1 and 2.

FPC then filed a timely notice of appeal to the Fifth District Court of Appeal of Florida (" 5th DCA") seeking judicial review of DEP's Final Order. Upon review of the appellate briefs, it became apparent to DEP's General Counsel that the evidence presented by DEP at the DOAH final hearing was insufficient to support and explicate its rule interpretation at issue in this proceeding. DEP's rule interpretation was based, in part, on assertions and conclusions contained in two letters written by EPA officials in the Region IV Office. In Conclusion of Law 37 of his Recommended Order, however, the ALJ had expressly declined to assign any evidentiary credibility or weight to these two letters from the EPA.

In recognition of this evidentiary hiatus in the record as to the agency's rule interpretation at issue in this case, DEP joined with FPC in the filing with the 5th DCA of a Joint Motion for Relinquishment of Jurisdiction, a copy of which is attached as Exhibit

C (exhibit omitted). The Joint Motion for Relinquishment of Jurisdiction contains an agreement by DEP to enter a Final Order on Remand from the 5th DCA vacating the original Final Order, adopting the ALJ's Recommended Order in its entirety, and granting FPC's permit application. An unsigned copy of the proposed Final Order on Remand was attached to the Joint Motion for Relinquishment of Jurisdiction as Exhibit 1. FPC agreed that its Motion for Attorney's Fees and Costs filed in the 5th DCA would be deemed to be withdrawn simultaneously with the entry by DEP of a Final Order on Remand as agreed in the Joint Motion for Relinquishment of Jurisdiction. The 5th DCA subsequently entered an order relinquishing jurisdiction and remanding the case back to the DEP for the purpose of the entry of a Final Order on Remand in accordance with the terms of the Joint Motion for Relinquishment of Jurisdiction. A copy of the 5th DCA's Order of Remand is attached as Exhibit D. The matter is now before the Secretary for final agency action.

RULING ON DEP'S EXCEPTIONS TO THE RECOMMENDED ORDER

Exception No. 1

DEP's first Exception challenges the correctness of the last sentence of Finding of Fact 10 of the Recommended Order. In his Finding of Fact 10, the ALJ asserts that:

> Therefore, in order to qualify for an exemption from PSD review, FPC must use "an alternative fuel...which [Units 1 and 2 were] capable of accommodating before January 6, 1975." In addition, FPC must show that "such change would [not] be prohibited under any federally enforceable permit condition which was established after January 6, 1975." Contrary to assertions by Respondent and Intervenors, in making this showing, there is no implied or explicit requirement in the rule that FPC demonstrate that it had a subjective intent to utilize petroleum coke prior to January 6, 1975. (emphasis supplied)

FPC currently uses coal as its primary fuel in both boilers at the Plant. FPC will continue to use coal as its primary fuel, but proposes to co-fire a five percent (plus or minus two percent) blend of petroleum coke in the burners at the Plant. It was established at the DOAH final hearing that FPC would not need to make any physical changes to the boilers or to the Plant to accomplish the burning of the proposed blend of coal and petroleum coke. FPC also established at the DOAH hearing that the proposed burning of the coal and petroleum coke blend would not exceed its current permitted air emission limits. Therefore, FPC's permit application now on review does not request permission to exceed any current maximum air emission rates set forth in the existing operation permits for the Plant's Units 1 and 2.

FPC originally designed and built Unit 1 in 1966 and Unit 2 in 1969 to use coal as the primary fuel. However, from 1970/71 until 1976/78, fuel oil was the primary fuel fired in the units. Unit 1 was converted back to the use of coal as the primary fuel in 1979 and Unit 2 was converted back to the burning of coal in 1976. During a trial burn conducted in March and April, 1995, FPC did temporarily burn a blend of coal and petroleum coke in the Plant burners with authorization from DEP. Although petroleum coke is similar to coal when handled, stored and burned, FPC established at the DOAH final hearing that petroleum coke is actually a separate "alternative fuel."

The final sentence of Finding of Fact 10 of the Recommended Order underlined above appears to be the ALJ's view of the interpretation placed upon the exemption provisions of Rule 62-212.400(2)(c)4 by DEP's Division of Air Resource Management. DEP's Exceptions, however, concur with the ALJ's assertion in Finding of Fact 10 that

"subjective intent" is not the determinative factor as to whether a facility is "capable of accommodating" an alternative fuel within the purview of Rule 62-212.400(2)(c)4. Nevertheless, DEP contends in this Exception that the use of the alternative fuel must have been specifically "designed into the source" in order for a facility to be entitled to an exemption from the usual PSD permit review requirements under Rule 62-212.400(2)(c)4. This rule interpretation would require that the use of petroleum coke as an alternative fuel be expressly designated in the Plant's final design specifications and in the actual physical configuration of the facility and its relevant component parts prior to and after January 6, 1975.

The controlling statutory and case law of Florida provides that a governmental agency has the primary responsibility of interpreting rules and statutes dealing with matters within its regulatory jurisdiction and expertise. See, subsection 120.57(1)(j), Florida Statutes; Public Employees Relations Commission v. Dade County Police Benevolent Association, 467 So.2d 987, 989 (Fla. 1985); Florida Public Employees Council 79, AFSCME v. Daniels, 646 So.2d 813, 816 (Fla. 1st DCA 1994). Rule 62-212.400, Florida Administrative Code, is a rule adopted and enforced by DEP, as the governmental agency charged with the responsibility of regulating air pollutant emitting facilities.

DEP's Exception thus correctly notes that the Florida courts have consistently held that great deference should be accorded to administrative interpretations of statutes and rules which an agency is required to enforce, and that such administrative interpretations should not be overturned unless clearly erroneous. See e.g., Dept. of

Environmental Regulation v. Goldring, 477 So.2d 532, 534 (Fla. 1985); Suddath Van Lines, Inc. v. Dept. of Environmental Protection, 668 So.2d 209, 213 (Fla. 1st DCA 1996); Stuart Yacht Club & Marina v. Dept. of Natural Resources, 625 So.2d 1263, 1267 (Fla. 4th DCA 1993); Harloff v. City of Sarasota, 575 So.2d 1324, 1327 (Fla. 2d DCA 1991).

Furthermore, as DEP's Exception correctly observes, the administrative interpretation of the governing statutory and rule provisions by the enforcing agency does not have to be the only one, or even the most desirable interpretation. It is enough if the agency interpretation is a permissible one. Golfcrest Nursing Home v. Agency for Health Care Administration, 662 So.2d 1330, 1333 (Fla. 1st DCA 1995); Stuart Yacht Club, supra, at 1267; Little Munyon Island v. Dept. of Environmental Regulation, 492 So.2d 735, 737 (Fla. 1st DCA 1986).

Nevertheless, I conclude that this Exception must be denied based on evidentiary grounds. If an agency rule interpretation is challenged in a DOAH formal proceeding, the rule interpretation must be established and explicated by testimony of agency officials or other appropriate evidence in order to be entitled to great deference on administrative or judicial review. See, e.g., Grove Isle, Ltd. v. Bayshore Homeowners' Association, 418 So.2d 1046, 1049 (Fla. 1st DCA 1982) (rejecting the Dept. of Env. Regulation's interpretation of former Rule 17-4.242, F.A.C., because no evidence was presented by the agency to the DOAH hearing officer in support of its rule interpretation). In this proceeding, DEP's "designed into the source" interpretation of

the exemption provisions of Rule 62-212.400(2)(c)4 was not adequately supported and explicated at the DOAH final hearing.

DEP witness Al Linero did testify at the DOAH final hearing as to this "designed into the source" rule interpretation. Mr. Linero's testimony, however, does not support a finding that this "designed into the source" rule interpretation was an existing agency interpretation assigned by DEP to Rule 62-212.400(2)(c)4 prior to the time that FPC filed its permit application now on review. In contrast, the ALJ's unchallenged Finding of Fact 14 finds that "[a]fter completing his initial review, the DEP supervisor of the New Source Review program acknowledged in a memorandum to his supervisor that FPC was entitled to a permit but suggested that FPC be asked to change their [sic] minds."

In addition, the record reflects that DEP's "designed into the source" interpretation of Rule 62-212.400(2)(c)4 was based, in part, on conclusions contained in two letters written by EPA officials in the Region IV Office. In paragraph 37 of his Recommended Order, however, the ALJ expressly declined to assign any probative value or weight to these two letters from the EPA. It is the established case law of Florida that the probative value or weight accorded to evidence admitted at the DOAH final hearing below is a "factually-related" matter generally within the sound province of the ALJ as the trier of the facts. See, e.g., Martuccio v. Dept. of Professional Regulation, 622 So.2d 1305 (Fla. 1st DCA 1993); Heifetz v. Dept. of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Accordingly, the ALJ's ruling in this case not according any probative value or weight to the conclusions contained in the two letters written by the EPA officials is an evidentiary matter within the ALJ's

province. This evidentiary ruling should not be overturned on administrative review, absent a determination that this ruling was not based on substantial competent evidence of record or that the ruling failed to comply with "essential requirements of law." See subsection 120.57(1)(j), Florida Statutes. I find no basis for making such a determination in this Final Order on Remand.

Based on the above, DEP's Exception 1 is denied.

Exceptions 2, 3, 4, and 5

DEP's Exceptions 2, 3, 4, and 5 take exception respectively to the ALJ's Findings of Fact 28, 29, 33, 34, 35, and 37. In these four Exceptions, DEP essentially disagrees with the ALJ as to the relevancy and materiality of certain evidence relied upon by the ALJ to support the challenged factual findings. The provisions of subsection 120.57(1)(j), Florida Statutes, however, do not authorize a reviewing agency to reevaluate the quantity and quality of the evidence presented at a DOAH hearing beyond a determination of whether the evidence is competent and substantial. Brogan v. Carter, 671 So.2d 822, 823 (Fla. 1st DCA 1996).

Exceptions to DOAH recommended orders based on arguments as to the relevancy and materiality of evidence presented at a final hearing generally raise "factual issues susceptible to ordinary methods of proof that are not infused with [agency] policy considerations." Martuccio, supra, at 609; Heifetz, supra, at 1281. Thus, DEP's arguments regarding the relevancy and materiality of evidence presented by FPC at the DOAH final hearing appear to raise evidentiary matters within the sound province of the ALJ. I am also not free to modify the ALJ's findings of fact to fit DEP's

views of the evidence by reinterpreting the evidence or drawing inferences therefrom in a manner different from the inferences drawn by the ALJ. Id. at 1281-1282. Consequently, I decline to substitute my judgment for that of the ALJ on such evidentiary matters.

The record in this case contains documentary evidence and the cumulative expert testimony of several witnesses testifying on behalf of FPC as bases for the ALJ's challenged findings of fact. Therefore, there is no apparent basis in the record on review to support a determination in this Final Order on Remand that the challenged factual findings of the ALJ "were not based on competent substantial evidence or that the proceedings . . . did not comply with essential requirements of law" under subsection 120.57(1)(j), Florida Statutes. Accordingly, DEP's Exceptions 2, 3, 4, and 5 are denied.

Exception 6

This final Exception of DEP takes exception to Conclusions of law 43 and 45 of the Recommended Order. In Conclusion of Law 43, the ALJ concluded that FPC established "by a preponderance of the evidence" that petroleum coke is an alternative fuel within the meaning of the PSD exemption. The ALJ also concluded in Conclusion of Law 45 that FPC established "by a preponderance of the evidence" that co-firing petroleum coke in Units 1 and 2 could have been accomplished prior to January 6, 1975. Thus, in these two paragraphs of the Recommended Order, the ALJ applied the particular factual findings of this case to the governing regulatory law at issue.

As noted in the initial ruling above, DEP does have substantive jurisdiction and primary responsibility to interpret its own agency rules which it is required to enforce. On agency review of a DOAH recommended order, the Secretary of DEP also has the duty to make the ultimate legal determination of whether the underlying facts as found by the ALJ are sufficient to establish entitlement to the issuance of the requested permit. See Harloff, supra, at 1328; Bunch v. Dept. of Environmental Protection, 19 F.A.L.R. 2582, 2586 (Fla. DEP 1997); Save Our Suwannee, Inc. v. Piechocki and Department of Environmental Protection, 18 F.A.L.R. 1467, 1471 (Fla. DEP 1996); VQH Development, Inc. v. Dept. of Environmental Protection, 15 F.A.L.R. 3407, 3438 (Fla. DEP 1993).

In the rulings above, however, I have previously denied on evidentiary grounds the Department's Exceptions to the ALJ's findings of fact supporting FPC's contention that the Plant's Units 1 and 2 were "capable of accommodating" a blend of coal and petroleum coke prior to January 6, 1975. Based on the particular findings of fact in this case, I find no error in Conclusions of Law 43 and 45 wherein the ALJ applied these particular facts to the PSD exemption provisions of DEP Rule 62-212.400 (2)(c)4. DEP's Exception 6 is therefore denied.

IT IS THEREFORE ORDERED:

A. The Final Order entered in this case on March 2, 1998, is vacated.

B. The Recommended Order of the ALJ entered in this proceeding on September 23, 1997, as modified by the ALJ's Response to Order of Remand entered on January 15, 1998, is adopted in its entirety and is incorporated herein by reference.

C. DEP's Division of Air Resource Management is hereby directed to, within ten (10) days from the effective date of this Final Order on Remand, issue an air construction permit to FPC in the form shown in Exhibit E attached hereto and made a part hereof.

Any party to this proceeding has the right to seek judicial review of the Final Order on Remand pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the clerk of DEP in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final Order on Remand is filed with the clerk of DEP.

DONE AND ORDERED this 4th day of January, 1999, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Kirby B. Green III

KIRBY B. GREEN, III
Secretary
Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

FILED, ON THIS DATE, PURSUANT TO §120.52, FLORIDA STATUTES, WITH THE DESIGNATED DEPARTMENT CLERK, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.

Cynthia Booth
Deputy CLERK

1/5/99
DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Order has been sent by United States Postal Service to:

James S. Alves, Esquire
Post Office Box 6526
Tallahassee, FL 32314-6526

Peter Belmont
The Sierra Club
102 Fareham Place North
St. Petersburg, Fl. 33701

Gail Kamaras, Esquire
Legal Environmental Assistance Foundation
1115 North Gadsden Street
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David F. Genesion, Esq.
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Ann Cole, Clerk and
Donald R. Alexander, Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

and by hand delivery to:

W. Douglas Beason, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 5th day of January, 1999.

F. Perry Odom

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA POWER CORPORATION, Petitioner, vs. DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondent, and LEGAL ENVIRONMENTAL ASSISTANCE FOUNDATION, INC., and SIERRA CLUB, INC., Intervenors.	)	Case No. 96-5344

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on June 2 and 3, 1997, in Tallahassee, Florida, before Donald R. Alexander, the assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: James S. Alves, Esquire
Douglas S. Roberts, Esquire
W. Steve Sykes, Esquire
Post Office Box 6526
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For Respondent: W. Douglas Beason, Esquire
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For Intervenor (LEAF): Gail Kamaras, Esquire
Debra A. Swim, Esquire
1115 North Gadsden Street
Tallahassee, Florida 32303-6327

EXHIBIT A

For Intervenor: Jaime Austrich, Esquire
(Sierra Club) Post Office Box 1029
Lake City, Florida 32056-1029

STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner should be issued an air construction permit authorizing its Crystal River steam generating plant Units 1 and 2 to co-fire a five to seven percent blend of petroleum coke with coal.

PRELIMINARY STATEMENT

This matter began on June 25, 1996, when Respondent, Department of Environmental Protection, issued its Intent to Deny "a permit for the proposed project to burn a blend of petroleum coke and coal in the existing coal-fired Units 1 and 2 at the Crystal River Power Plant." On October 4, 1996, Petitioner, Florida Power Corporation, filed a Petition for Formal Administrative Hearing with Respondent for the purpose of contesting the proposed agency action.

The case was then referred by Respondent to the Division of Administrative Hearings on November 13, 1996, with a request that an Administrative Law Judge conduct a formal hearing. By notice of hearing dated December 2, 1996, a hearing was scheduled on February 3 and 4, 1997, in Tallahassee, Florida. At Petitioner's request, the hearing was continued to March 6 and 7, 1997. By agreement of the parties, the hearing was continued to June 3 and 4, 1997.

On May 27, 1997, Petitions to Intervene were filed by Legal Environmental Assistance Foundation, Inc. and Sierra Club, Inc.

After an objection was lodged by Petitioner, the undersigned conditionally allowed the prospective intervenors to participate in this proceeding subject to proof of standing at final hearing.

At final hearing, Petitioner presented the testimony of J. Michael Kennedy, manager of air programs in the Environmental Services Department and accepted as an expert in air quality permitting and compliance; Danny Douglas, plant manager for Crystal River Units 1 and 2 and accepted as an expert in power plant operations and management; Robert Kunkel, manager of systems performance engineering with ABB Combustion Engineering and accepted as an expert in power plant boiler design and engineering; and Kennard F. Kosdy, a principal in the environmental consulting firm Golder Associates, Inc. and accepted as an expert in air quality engineering and administration of air quality control requirements. Also, it offered petitioner's exhibits 1-47 and 49-67. All exhibits were received in evidence. Respondent presented the testimony of Al Linaro, administrator/technical supervisor of the new source review program and accepted as an expert in air quality engineering with an emphasis on the Prevention of Significant Deterioration program. Also, it offered respondent's exhibits 1-24. All exhibits were received in evidence except exhibit 1. Legal Environmental Assistance Foundation, Inc. offered intervenor's exhibits 1 and 2, which were received in evidence.

The transcript of hearing (three volumes) was filed on July 1, 1997. Proposed findings of fact and conclusions of law were

originally due on August 1, 1997, but this time was extended to August 15, 1997. Responses to each party's proposed order were authorized to be filed by August 25, 1997. All were timely filed by the parties, and they have been considered by the undersigned in the preparation of this Recommended Order. Finally, on September 5, 1997, Respondent filed a Motion to Strike certain attachments to Petitioner's Response to Proposed Recommended Order. The motion is dealt with in the Conclusions of Law portion of this order.

FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined:

A. Background

1. Petitioner, Florida Power Corporation (FPC), is an investor-owned public utility engaged in the sale of electricity to approximately 1.2 million customers. Among others, it operates the Crystal River Power Plant consisting of five electric-generating units in Citrus County, Florida. Units 1, 2, 4, and 5 are coal-fired, while Unit 3 is a nuclear unit.

2. Respondent, Department of Environmental Regulation (DEP), is a state agency charged with the statutory responsibility of regulating the construction and operation of business enterprises in a manner to prevent air pollution in excess of specified limits. Among other things, DEP issues air construction permits for a limited period of time to undertake and evaluate initial operations of a business enterprise; long-

term approval subsequently is available under an air operation permit. As a part of this process, and pursuant to federal law, DEP engages in a Prevention of Significant Deterioration (PSD) review to determine if non-exempt alterations to major facilities result in net emission increases greater than specified amounts. Under certain conditions, however, the use of alternative fuels or raw materials are exempted from PSD review.

3. Intervenor, Legal Environmental Assistance Foundation, Inc. (LEAF), is a non-profit Alabama corporation licensed to do business in the State of Florida. It is a public interest advocacy organization whose corporate purposes include securing environmental and health benefits from clean air and water. Intervenor, Sierra Club, Inc. (Sierra Club), is a public interest advocacy organization incorporated in California and doing business in Florida. Its corporate purposes include securing the environmental and health benefits of clean air and water.

4. On December 26, 1995, FPC filed an application with DEP for an air construction permit authorizing it to burn a blend of petroleum coke and coal in its existing coal-fired Units 1 and 2 at the Crystal River Power Plant in Citrus County, Florida. In the application, FPC did not address PSD review since it believed it qualified for an exemption from PSD permitting under Rule 62-212.400(2)(c)4., Florida Administrative Code. That rule exempts from PSD review the

> [u]se of an alternative fuel or raw material which the facility was capable of accommodating before January 6, 1975, unless such change would be prohibited under any

federally enforceable permit condition which was established after January 6, 1975.

5. After reviewing the application, DEP issued an Intent to Deny on June 25, 1996. In that document, DEP stated that

> [a]ccording to information in Department files, both Units 1 and 2 operated on liquid fuel prior to January 6, 1975. Very substantial modifications of the boilers and pollution control equipment were implemented thereafter by [FPC] to convert the units to coal-firing mode. Therefore the project does not qualify for the exemption from PSD review claimed by the company.

6. Contending that it was entitled to an exemption from PSD review and therefore a permit, FPC filed a Petition for Administrative Hearing on October 4, 1996. In its Petition, FPC generally alleged that petroleum coke is a product with characteristics very similar to coal; Units 1 and 2 were capable of accommodating coal and petroleum coke as of January 6, 1975; and contrary to the statements in the Intent to Deny, any boiler modifications and pollution control improvements to those units were minor and not substantial.

B. The Permitting Program

7. The PSD program is based on similar PSD requirements found in the federal Clean Air Act of 1970, as amended (the Act). The permitting program is a federally required element of DEP's State Implementation Plan (SIP) under Section 110 of the Act. DEP has fulfilled the requirement of administering the federal PSD program by obtaining approval from the Environmental Protection Agency (EPA) of state PSD regulations that meet the requirements of federal law. The requirements of the SIP are

found in Chapters 62-204, 62-210, 62-212, 62-296, and 62-297, Florida Administrative Code.

8. Chapter 62-212 contains the preconstruction review requirements for proposed new facilities and modifications to existing facilities. Rule 62-212.400, Florida Administrative Code, establishes the general preconstruction review requirements and specific requirements for emission units subject to PSD review. The provisions of the rule generally apply to the construction or modification of a major stationary source located in an area in which the state ambient air quality standards are being met.

9. Paragraph (2)(c) of the rule identifies certain exemptions from those requirements. More specifically, subparagraph (2)(c)4. provides that a modification that occurs for the following reason shall not be subject to the requirements of the rule:

> 4. Use of an alternative fuel or raw material which the facility was capable of accommodating before January 6, 1975, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975.

The rule essentially tracks verbatim the EPA regulation found at 40 CFR 52.21(b)(2)(iii)(e)1.

10. Therefore, in order to qualify for an exemption from PSD review, FPC must use "an alternative fuel . . . which [Units 1 and 2 were] capable of accommodating before January 6, 1975." In addition, FPC must show that "such change would [not] be prohibited under any federally enforceable permit condition which

was established after January 6, 1975." Contrary to assertions by Respondent and Intervenors, in making this showing, there is no implied or explicit requirement in the rule that FPC demonstrate that it had a subjective intent to utilize petroleum coke prior to January 6, 1975.

C. The Application and DEP's Response

11. In its application, FPC proposes to co-fire a five percent (plus or minus two percent) blend of petroleum coke with coal, by weight. It does not propose to make any physical changes to Units 1 and 2 to utilize petroleum coke. Also, it does not request an increase in any permitted air emission rates for the units because it can meet its current limits while burning the proposed blend rate of petroleum coke with coal.

12. The application included extensive fuel analysis and air emissions data obtained from a DEP-authorized petroleum coke trial burn conducted from March 8 until April 4, 1995.

13. Although it is not proposing to make physical changes to the plant, FPC applied for the air construction permit in deference to DEP's interpretation that such a permit is required when a permittee utilizes an alternative fuel.

14. After completing his initial review, the DEP supervisor of the New Source Review program acknowledged in a memorandum to his supervisor that FPC was "entitled to a permit" but suggested that FPC be asked to "change their minds."

15. Before the permit was issued, however, DEP changed its mind and issued an Intent to Deny on the ground that prior to

January 6, 1975, Units 1 and 2 were not capable of accommodating coal or a blend of petroleum coke with coal.

D. The Units

16. Unit 1 has a generating capacity of 400 MW and commenced operation as a coal-fired plant in October 1966. It fired coal until March 1970, fuel oil until October 1978, and then again fired coal from June 1979 to the present.

17. Unit 2 has a generating capacity of 500 MW and commenced operations as a coal-fired plant in November 1969. It fired coal until September 1971, fired fuel oil from December 1971 until October 1976, and then again fired coal from December 1976 to the present.

18. Original equipment installed during the initial construction of Units 1 and 2 included the following: the barge unloader, which removes coal from barges that deliver coal from New Orleans; the stacker/reclaimer, which stacks the coal into piles and then reclaims the coal by directing it from the coal piles to conveyors that deliver it to the units; the crusher house, which has two crushers that crush the coal on the way to units down to nuggets no larger than three-quarters of an inch in diameter; the silos, which store the crushed coal; the feeders, located below the silos, which regulate the flow of coal from the silos to the pulverizers; the pulverizers, which grind the coal in preparation for combustion and then direct the pulverized coal to the burners, which are located on the corners of each unit's boiler; and the boilers, where the fuel is combusted, imparting

heat to water contained in the waterwalls and thereby producing steam for electrical generation.

19. The foregoing equipment was reflected in the plant's construction specifications and remains in operation, on site, at the plant. Components and parts of this equipment have been maintained, replaced, and repaired periodically. The original operations manual for the barge unloader, stacker/reclaimer, crushers, and conveyor systems are still kept and utilized on site.

20. The primary fuel utilized in Units 1 and 2 is coal, although these units also co-fire from one to five percent number 2 fuel oil and used oil.

21. The combustion of fuel in Units 1 and 2 results in air emissions. As a result of changing regulatory requirements, there have been substantial improvements to the units' air pollution control capabilities since original construction.

E. Existing Air Permits

22. Unit 1 currently operates under Air Operation Permit Number A009-169341. Unit 2 operates under Air Operation Permit Number A-009-191820. Both permits were amended by DEP on October 8, 1996. Although each air operation permit contains an expiration date that has been surpassed, the permits remain in effect under DEP's regulations during the pendency of the agency's review of FPC's applications for air operation permits under the new Title V program found in Chapter 62-213, Florida Administrative Code.

23. The air operation permits governing Units 1 and 2 contain mass emission rate limitations of 0.1 pounds/million (mm) British thermal units (Btu) or particulate matter (PM), and 2.1 pounds/mmBtu for sulfur dioxide. These mass emission rate limitations restrict the amount of each pollutant (measured in pounds) that is to be released into the atmosphere per million Btu of heat energy by burning fuel. The PM limitation is applicable to Units 1 and 2 under state regulations originally promulgated in 1972.

24. The sulfur dioxide limitation was established in 1978 as a result of a PSD air quality analysis performed in conjunction with the permitting of Units 4 and 5. Prior to 1978, sulfur dioxide limits promulgated early in 1975 imposed a limit of 6.17 pounds/mmBtu on coal-fired operations at Units 1 and 2.

25. Because Units 1 and 2 were subjected to a PSD air quality impact analysis along with Units 4 and 5, the units' sulfur dioxide emission limits were reduced from 6.17 to 2.1 pounds/mmBtu. The 2.1 pounds/mmBtu sulfur dioxide emission limitation applicable to Units 1 and 2 was set with the intention of assuring no adverse air quality impacts.

26. The sulfur dioxide impacts associated with Units 1, 2, 4, and 5, after collectively being subjected to PSD air quality review, were much lower than the sulfur dioxide impacts previously associated with only Units 1 and 2.

F. Is Petroleum Coke an Alternative Fuel?

27. Petroleum coke is a by-product of the oil refining

process and is produced by many major oil companies. The oil refineries refine the light ends and liquid products of oil to produce gasoline and kerosene, resulting in a solid material that resembles and has the fuel characteristics of coal.

28. Both historically and presently, it has been commonplace for electric utilities to rely on petroleum coke as fuel. For example, during the period 1969 through 1974, regular shipments of petroleum coke were sent to various electric utility companies throughout the United States to be co-fired with coal. In addition, DEP has issued permits for Tampa Electric Company to co-fire petroleum coke with coal.

29. In 1987 and again in 1990, the EPA promulgated air-emission regulations which specifically define "coal" as including "petroleum coke." DEP has incorporated these regulations by reference at Rule 62-204.800(7)(b) 3. and 4., Florida Administrative Code.

30. Given these considerations, it is found that petroleum coke constitutes an alternative fuel within the meaning of Rule 62-212.400(4)(c)4., Florida Administrative Code.

G. Were the Units Capable of Accommodating the Fuel?

31. Petroleum coke and coal are operationally equivalent. Petroleum coke can be handled, stored, and burned with the existing coal handling equipment at Units 1 and 2. The barge unloader, stacker/reclaimer, storage areas, conveyors, silos, crusher house, pulverizers, and burners, all installed prior to 1975, can handle petroleum coke.

32. The equipment comprising Units 1 and 2 does not require any modification in order to burn a blend of petroleum coke with coal. Also, there will be no net impact on steam generator design or operation, and there will be no decline in performance or adverse impacts to the boilers.

33. FPC could have co-fired petroleum coke with coal historically without making physical alterations or derating the units. Similarly, petroleum coke can be fired in Units 1 and 2 now without alterations or derating. These findings are further supported by Petitioner's Exhibits 35 and 36, which are reference books published in 1948 and 1967 by the manufacturer of the equipment installed at Units 1 and 2. They confirm that prior to 1975, petroleum coke was suitable for the manufacturer's boilers and pulverizers.

34. Unrebutted testimony demonstrated that Units 1 and 2 could have co-fired petroleum coke with oil during the oil-firing period. Even when Units 1 and 2 fired oil instead of coal for a period of time in the 1970s, the coal-handling equipment remained in existence on-site and available for use, and both units remained readily convertible to their original, coal-firing modes. Because the plant remained capable of accommodating coal, it also remained capable of accommodating petroleum coke.

35. In light of the foregoing, it is found that co-firing petroleum coke with coal at Units 1 and 2 could have been accomplished prior to January 6, 1975.

H. Are there Post-January 6, 1975, Prohibitions?

36. There is no evidence to support a finding that a federally enforceable permit condition was established after January 6, 1975, that prohibits co-firing petroleum coke with coal.

I. Miscellaneous

37. By letters dated February 14 and June 2, 1997, the EPA Region IV office replied to inquiries from DEP regarding the instant application. The conclusions reached in those letters, however, were based on a misapprehension of the facts in this case. Therefore, the undersigned has not credited these letters.

38. To prove up its standing, LEAF introduced into evidence a copy of its articles of incorporation and a brochure describing the organization. In addition, it asserted that the air quality for its members would be "at risk" if Units 1 and 2 did not meet PSD standards and air emissions were "increased."

39. Intervenor Sierra Club proffered that a substantial number of members "live, work, or recreate in the vicinity of the Crystal River Units 1 and 2, and in the area subject to the air emissions by those units," and that those members "would be substantially affected by the proposed exemption."

CONCLUSIONS OF LAW

40. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Section 120.569, Florida Statutes (Supp. 1996).

41. As the permit applicant, FPC has the ultimate burden of

persuasion of entitlement to an air construction permit. See, e.g., Cordes v. State, Dep't of Environmental Regulation, 582 So. 2d 652, 654 (Fla. 1st DCA 1991).

42. The contested issue in this case is whether FPC's proposal to co-fire petroleum coke with coal is exempt from the requirement to obtain a PSD permit under Rule 62-212.400(2)(c)4., Florida Administrative Code. That rule exempts from PSD review:

> [u]se of an alternative fuel or raw material which the facility was capable of accommodating before January 6, 1975, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975.

If the exemption applies, FPC is entitled to an air construction permit. If the exemption does not apply, the permit should be denied.

43. By a preponderance of the evidence, FPC has demonstrated that petroleum coke is an alternative fuel within the meaning of the PSD exemption. This conclusion is supported by the established facts that petroleum coke is similar to coal with respect to handling and combustion, has the characteristics of fuel, and is commonly sold and utilized as fuel. Moreover, both the EPA and DEP historically have referred to it as an alternative fuel.

44. FPC has also demonstrated that no federally enforceable permit condition established since January 6, 1975, prohibits utilization of a petroleum coke blend with coal at Units 1 and 2.

45. Finally, by a preponderance of the evidence FPC has established that co-firing petroleum coke in Units 1 and 2 could

have been accomplished prior to January 6, 1975. On this issue, it was shown that the units could and did burn coal prior to 1975 and that petroleum coke is operationally equivalent to coal. This being so, FPC is entitled to an exemption from PSD review, and it should be issued an air construction permit.

46. Intervenors have demonstrated, at least minimally, that they are substantially affected by these proceedings and should be accorded intervenor status. A showing of "special injury" is not required. Friends of the Everglades v. Bd. of Trustees, 595 So. 2d 186 (Fla. 1st DCA 1992).

47. Respondent's Motion to Strike the attachments to Petitioner's Response to Proposed Order is denied.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that the Department of Environmental Protection enter a final order granting the application of Florida Power Corporation and issuing the requested air construction permit.

DONE AND ORDERED this 23rd day of September, 1997, in Tallahassee, Leon County, Florida.

DONALD R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1560
(904) 488-9675 SUNCOM 278-9675
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of September, 1997.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the Department of Environmental Protection.

APPENDIX SS-1, STACK SAMPLING FACILITIES (version dated 10/07/96)

Stack Sampling Facilities Provided by the Owner of an Emissions Unit. This section describes the minimum requirements for stack sampling facilities that are necessary to sample point emissions units. Sampling facilities include sampling ports, work platforms, access to work platforms, electrical power, and sampling equipment support. Emissions units must provide these facilities at their expense. All stack sampling facilities must meet any Occupational Safety and Health Administration (OSHA) Safety and Health Standards described in 29 CFR Part 1910, Subparts D and E.

(a) Permanent Test Facilities. The owner or operator of an emissions unit for which a compliance test, other than a visible emissions test, is required on at least an annual basis, shall install and maintain permanent stack sampling facilities.

(b) Temporary Test Facilities. The owner or operator of an emissions unit that is not required to conduct a compliance test on at least an annual basis may use permanent or temporary stack sampling facilities. If the owner chooses to use temporary sampling facilities on an emissions unit, and the Department elects to test the unit, such temporary facilities shall be installed on the emissions unit within 5 days of a request by the Department and remain on the emissions unit until the test is completed.

(c) Sampling Ports.

1. All sampling ports shall have a minimum inside diameter of 3 inches.
2. The ports shall be capable of being sealed when not in use.
3. The sampling ports shall be located in the stack at least 2 stack diameters or equivalent diameters downstream and at least 0.5 stack diameter or equivalent diameter upstream from any fan, bend, constriction or other flow disturbance.
4. For emissions units for which a complete application to construct has been filed prior to December 1, 1980, at least two sampling ports, 90 degrees apart, shall be installed at each sampling location on all circular stacks that have an outside diameter of 15 feet or less. For stacks with a larger diameter, four sampling ports, each 90 degrees apart, shall be installed. For emissions units for which a complete application to construct is filed on or after December 1, 1980, at least two sampling ports, 90 degrees apart, shall be installed at each sampling location on all circular stacks that have an outside diameter of 10 feet or less. For stacks with larger diameters, four sampling ports, each 90 degrees apart, shall be installed. On horizontal circular ducts, the ports shall be located so that the probe can enter the stack vertically, horizontally or at a 45 degree angle.
5. On rectangular ducts, the cross sectional area shall be divided into the number of equal areas in accordance with EPA Method 1. Sampling ports shall be provided which allow access to each sampling point. The ports shall be located so that the probe can be inserted perpendicular to the gas flow.

(d) Work Platforms.

1. Minimum size of the working platform shall be 24 square feet in area. Platforms shall be at least 3 feet wide.
2. On circular stacks with 2 sampling ports, the platform shall extend at least 110 degrees around the stack.
3. On circular stacks with more than two sampling ports, the work platform shall extend 360 degrees around the stack.
4. All platforms shall be equipped with an adequate safety rail (ropes are not acceptable), toeboard, and hinged floor-opening cover if ladder access is used to reach the platform. The safety rail directly in line with the sampling ports shall be removable so that no obstruction exists in an area 14 inches below each sample port and 6 inches on either side of the sampling port.

(e) Access to Work Platform.

1. Ladders to the work platform exceeding 15 feet in length shall have safety cages or fall arresters with a minimum of 3 compatible safety belts available for use by sampling personnel.

2. Walkways over free-fall areas shall be equipped with safety rails and toeboards.

(f) Electrical Power.

1. A minimum of two 120-volt AC, 20-amp outlets shall be provided at the sampling platform within 20 feet of each sampling port.

2. If extension cords are used to provide the electrical power, they shall be kept on the plant's property and be available immediately upon request by sampling personnel.

(g) Sampling Equipment Support.

1. A three-quarter inch eyebolt and an angle bracket shall be attached directly above each port on vertical stacks and above each row of sampling ports on the sides of horizontal ducts.

a. The bracket shall be a standard 3 inch x 3 inch x one-quarter inch equal-legs bracket which is 1 and one-half inches wide. A hole that is one-half inch in diameter shall be drilled through the exact center of the horizontal portion of the bracket. The horizontal portion of the bracket shall be located 14 inches above the centerline of the sampling port.

b. A three-eighth inch bolt which protrudes 2 inches from the stack may be substituted for the required bracket. The bolt shall be located 15 and one-half inches above the centerline of the sampling port.

c. The three-quarter inch eyebolt shall be capable of supporting a 500 pound working load. For stacks that are less than 12 feet in diameter, the eyebolt shall be located 48 inches above the horizontal portion of the angle bracket. For stacks that are greater than or equal to 12 feet in diameter, the eyebolt shall be located 60 inches above the horizontal portion of the angle bracket. If the eyebolt is more than 120 inches above the platform, a length of chain shall be attached to it to bring the free end of the chain to within safe reach from the platform.

2. A complete monorail or dualrail arrangement may be substituted for the eyebolt and bracket.

3. When the sample ports are located in the top of a horizontal duct, a frame shall be provided above the port to allow the sample probe to be secured during the test.

[Rule 62-297.310(6), F.A.C.]

TABLE 297.310-1 CALIBRATION SCHEDULE
(version dated 10/07/96)

[Note: This table is referenced in Rule 62-297.310, F.A.C.]

ITEM	MINIMUM CALIBRATION FREQUENCY	REFERENCE INSTRUMENT	TOLERANCE
Liquid in glass thermometer	Annually	ASTM Hg in glass ref. thermometer or equivalent, or thermometric points	+/-2%
Bimetallic thermometer	Quarterly	Calib. liq. in glass thermometer	5 degrees F
Thermocouple	Annually	ASTM Hg in glass ref. thermometer, NBS calibrated reference and potentiometer	5 degrees F
Barometer	Monthly	Hg barometer or NOAA station	+/-1% scale
Pitot Tube	When required or when damaged	By construction or measurements in wind tunnel D greater than 16" and standard pitot tube	See EPA Method 2, Fig. 2-2 & 2-3
Probe Nozzles	Before each test or when nicked, dented, or corroded	Micrometer	+/-0.001" mean of at least three readings Max. deviation between readings .004"
Dry Gas Meter and Orifice Meter	1. Full Scale: When received, When 5% change observed, Annually 2. One Point: Semiannually	Spirometer or calibrated wet test or dry gas test meter	2%
	3. Check after each test series	Comparison check	5%

[electronic file name: 297310-1.doc]

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

In the matter of:	)	
	)	
Florida Electric Power Coordinating Group, Inc.,	)	ASP No. 97-B-01
	)	
Petitioner.	)	

ORDER ON REQUEST FOR ALTERNATE PROCEDURES AND REQUIREMENTS

Pursuant to Rule 62-297.620, Florida Administrative Code (F.A.C.), the Florida Electric Coordinating Group, Incorporated, (FCG) petitioned for approval to: (1) Exempt fossil fuel steam generators which burn liquid and/or solid fuel for less than 400 hours during the federal fiscal year from the requirement to conduct an annual particulate matter compliance test; and, (2) Exempt fossil fuel steam generators which burn liquid and/or solid fuel for less than 400 hours during the federal fiscal year from the requirement to conduct an annual particulate matter compliance test during the year prior to renewal of an operation permit. This Order is intended to clarify particulate testing requirements for those fossil fuel steam generators which primarily burn gaseous fuels including, but not necessarily limited to natural gas.

Having considered the provisions of Rule 62-296.405(1), F.A.C., Rule 62-297.310(7), F.A.C., and all supporting documentation, the following Findings of Fact, Conclusions of Law, and Order are entered:

FINDINGS OF FACT

1. The Florida Electric Power Coordinating Group, Incorporated, petitioned the Department to exempt those fossil fuel steam generators which have a heat input of more than 250 million Btu per hour and burn solid and/or liquid fuel less than 400 hours during the year from the requirement to conduct an annual particulate matter compliance test. [Exhibit 1]

2. Rule 62-296.405(1)(a), F.A.C., applies to those fossil fuel steam generators that are not subject to the federal standards of performance for new stationary sources (NSPS) in 40 CFR 60 and which have a heat input of more than 250 million Btu per hour.

3. Rule 62-296.405(1)(a), F.A.C., limits visible emissions from affected fossil fuel steam generators to, "20 percent opacity except for either one six-minute period per hour during which

not exceed 40 percent. The option selected shall be specified in the emissions unit's construction and operation permits. Emissions units governed by this visible emission limit shall test for particulate emission compliance annually and as otherwise required by Rule 62-297, F.A.C."

4. Rule 62-296.405(1)(a), F.A.C., further states, "Emissions units electing to test for particulate matter emission compliance quarterly shall be allowed visible emissions of 40 percent opacity. The results of such tests shall be submitted to the Department. Upon demonstration that the particulate standard has been regularly complied with, the Secretary, upon petition by the applicant, shall reduce the frequency of particulate testing to no less than once annually.

5. Rule 297.310(7)(a)1., F.A.C., states, "The owner or operator of a new or modified emissions unit that is subject to an emission limiting standard shall conduct a compliance test that demonstrates compliance with the applicable emission limiting standard prior to obtaining an operation permit for such emissions unit."

6. Rule 297.310(7)(a)2., F.A.C., states, "The owner or operator of an emissions unit that is subject to any emission limiting standard shall conduct a compliance test that demonstrates compliance with the applicable emission limiting standard prior to obtaining a renewed operation permit. Emissions units that are required to conduct an annual compliance test may submit the most recent annual compliance test to satisfy the requirements of this provision.

7. Rule 297.310(7)(a)3., F.A.C., further states, "In renewing an air operation permit pursuant to Rule 62-210.300(2)(a)3.b., c., or d., F.A.C., the Department shall not require submission of emission compliance test results for any emissions unit that, during the year prior to renewal: a. Did not operate; or, b. In the case of a fuel burning emissions unit, burned liquid and/or solid fuel for a total of no more than 400 hours."

8. Rule 297.310(7)(a)4., F.A.C., states, "During each federal fiscal year (October 1 -- September 30), unless otherwise specified by rule, order, or permit, the owner or operator of each emissions unit shall have a formal compliance test conducted for: a. Visible emissions, if there is an applicable standard; b. Each of the following pollutants, if there is an applicable standard, and if the emissions unit emits or has the potential to emit: 5 tons per year or more of lead or lead compounds measured as elemental lead; 30 tons per year or more of acrylonitrile; or 100 tons per year or more of any other regulated air pollutant...."

9. Rule 297.310(7)(a)5., F.A.C., states, "An annual compliance test for particulate matter emissions shall not be required for any fuel burning emissions unit that, in a federal fiscal year, does not burn liquid and/or solid fuel, other than during startup, for a total of more than 400 hours."

10. Rule 297.310(7)(a)6., F.A.C., states, "For fossil fuel steam generators on a semi-annual particulate matter emission compliance testing schedule, a compliance test shall not be

required for any six-month period in which liquid and/or solid fuel is not burned for more than 200 hours other than during startup."

11. Rule 297.310(7)(a)7., F.A.C., states, "For emissions units electing to conduct particulate matter emission compliance testing quarterly pursuant to Rule 62-296.405(2)(a), F.A.C., a compliance test shall not be required for any quarter in which liquid and/or solid fuel is not burned for more than 100 hours other than during startup." [Note: The reference should be to Rule 62-296.405(1)(a), F.A.C., rather than Rule 62-296.405(2)(a), F.A.C.]

12. The fifth edition of the U. S. Environmental Protection Agency's Compilation of Air Pollutant Emission Factors, AP-42, that emissions of filterable particulate from gas-fired fossil fuel steam generators with a heat input of more than about 10 million Btu per hour may be expected to range from 0.001 to 0.006 pound per million Btu. [Exhibit 2]

13. Rule 62-296.405(1)(b), F.A.C. and the federal standards of performance for new stationary sources in 40 CFR 60.42, Subpart D, limit particulate emissions from uncontrolled fossil fuel fired steam generators with a heat input of more than 250 million Btu to 0.1 pound per million Btu.

CONCLUSIONS OF LAW

1. The Department has jurisdiction to consider the matter pursuant to Section 403.061, Florida Statutes (F.S.), and Rule 62-297.620, F.A.C.

2. Pursuant to Rule 62-297.310(7), F.A.C., the Department may require Petitioner to conduct compliance tests that identify the nature and quantity of pollutant emissions, if, after investigation, it is believed that any applicable emission standard or condition of the applicable permits is being violated.

3. There is reason to believe that a fossil fuel steam generator which does not burn liquid and/or solid fuel (other than during startup) for a total of more than 400 hours in a federal fiscal year and complies with all other applicable limits and permit conditions is in compliance with the applicable particulate mass emission limiting standard.

ORDER

Having considered the requirements of Rule 62-296.405, F.A.C., Rule 62-297.310, F.A.C., and supporting documentation, it is hereby ordered that:

1. An annual compliance test for particulate matter emissions shall not be required for any fuel burning emissions unit that, in a federal fiscal year, does not burn liquid and/or solid fuel, other than during startup, for a total of more than 400 hours;

2. For fossil fuel steam generators on a semi-annual particulate matter emission compliance testing schedule, a compliance test shall not be required for any six-month period in which liquid and/or solid fuel is not burned for more than 200 hours other than during startup;

3. For emissions units electing to conduct particulate matter emission compliance testing quarterly pursuant to Rule 62-296.405(1)(a), F.A.C., a compliance test shall not be required for any quarter in which liquid and/or solid fuel is not burned for more than 100 hours other than during startup;

4. In renewing an air operation permit pursuant to Rule 62-210.300(2)(a)3.b., c., or d., F.A.C., the Department shall not require submission of particulate matter emission compliance test results for any fossil fuel steam generator emissions unit that burned liquid and/or solid fuel for a total of no more than 400 hours during the year prior to renewal.

5. Pursuant to Rule 62-297.310(7), F.A.C., owners of affected fossil fuel steam generators may be required to conduct compliance tests that identify the nature and quantity of pollutant emissions, if, after investigation, it is believed that any applicable emission standard or condition of the applicable permits is being violated.

6. Pursuant to Rule 62-297.310(8), F.A.C., owners of affected fossil fuel steam generators shall submit the compliance test report to the District Director of the Department district office having jurisdiction over the emissions unit and, where applicable, the Air Program Administrator of the appropriate Department-approved local air program within 45 days of completion of the test.

PETITION FOR ADMINISTRATIVE REVIEW

The Department will take the action described in this Order unless a timely petition for an administrative hearing is filed pursuant to sections 120.569 and 120.57 of the Florida Statutes, or a party requests mediation as an alternative remedy under section 120.573 before the deadline for filing a petition. Choosing mediation will not adversely affect the right to a hearing if mediation does not result in a settlement. The procedures for petitioning for a hearing are set forth below, followed by the procedures for requesting mediation.

A person whose substantial interests are affected by the Department's proposed decision may petition for an administrative hearing in accordance with sections 120.569 and 120.57 of the Florida Statutes. The petition must contain the information set forth below and must be filed (received) in the Office of General Counsel of the Department at 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000. Petitions must be filed within 21 days of receipt of this Order. A petitioner must mail a copy of the petition to the applicant at the address indicated above, at the time of filing. The failure of any person to file a petition (or a request for mediation, as discussed below) 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 of

the Florida Statutes, or to intervene in this proceeding and participate as a party to it. Any subsequent intervention will be only at the approval of the presiding officer upon the filing of a motion in compliance with Rule 28-5.207 of the Florida Administrative Code.

A petition must contain the following information:

(a) The name, address, and telephone number of each petitioner, the applicant's name and address, the Department File Number, and the county in which the project is proposed;

(b) A statement of how and when each petitioner received notice of the Department's action or proposed action;

(c) A statement of how each petitioner's substantial interests are affected by the Department's action or proposed action;

(d) A statement of the material facts disputed by each petitioner, if any;

(e) A statement of facts that the petitioner contends warrant reversal or modification of the Department's action or proposed action;

(f) A statement identifying the rules or statutes each petitioner contends require reversal or modification of the Department's action or proposed action; and,

(g) A statement of the relief sought by each petitioner, stating precisely the action each petitioner wants the Department to take with respect to the Department's action or proposed action in the notice of intent.

Because the administrative hearing process is designed to formulate final agency action, the filing of a petition means that the Department's final action may be different from the position taken by it in this Order. Persons whose substantial interests will be affected by any such final decision of the Department on the application have the right to petition to become a party to the proceeding, in accordance with the requirements set forth above.

A person whose substantial interests are affected by the Department's proposed decision, may elect to pursue mediation by asking all parties to the proceeding to agree to such mediation and by filing with the Department a request for mediation and the written agreement of all such parties to mediate the dispute. The request and agreement must be filed in (received by) the Office of General Counsel of the Department at 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000, by the same deadline as set forth above for the filing of a petition.

A request for mediation must contain the following information:

(a) The name, address, and telephone number of the person requesting mediation and that person's representative, if any;

(b) A statement of the preliminary agency action;

(c) A statement of the relief sought; and

(d) Either an explanation of how the requester's substantial interests will be affected by the action or proposed action addressed in this notice of intent or a statement clearly identifying the petition for hearing that the requester has already filed, and incorporating it by reference.

The agreement to mediate must include the following:

(a) The names, addresses, and telephone numbers of any persons who may attend the mediation;

(b) The name, address, and telephone number of the mediator selected by the parties, or a procedure for selecting a mediator within a specified time;

(c) The agreed allocation of the costs and fees associated with the mediation;

(d) The agreement of the parties on the confidentiality of discussions and documents introduced during mediation;

(e) The date, time, and place of the first mediation session, or a deadline for holding the first session, if no mediator has yet been chosen;

(f) The name of each party's representative who shall have authority to settle or recommend settlement; and

(g) The signatures of all parties or their authorized representatives.

As provided in section 120.573 of the Florida Statutes, the timely agreement of all parties to mediate will toll the time limitations imposed by sections 120.569 and 120.57 for requesting and holding an administrative hearing. Unless otherwise agreed by the parties, the mediation must be concluded within sixty days of the execution of the agreement. If mediation results in settlement of the administrative dispute, the Department must enter a final order incorporating the agreement of the parties. Persons whose substantial interests will be affected by such a modified final decision of the Department have a right to petition for a hearing only in accordance with the requirements for such petitions set forth above. If mediation terminates without settlement of the dispute, the Department shall notify all parties in writing that the administrative hearing processes under sections 120.569 and 120.57 remain available for disposition of the dispute, and the notice will

specify the deadlines that then will apply for challenging the agency action and electing remedies under those two statutes.

In addition to the above, a person subject to regulation has a right to apply for a variance from or waiver of the requirements of particular rules, on certain conditions, under section 120.542 of the Florida Statutes. The relief provided by this state statute applies only to state rules, not statutes, and not to any federal regulatory requirements. Applying for a variance or waiver does not substitute or extend the time for filing a petition for an administrative hearing or exercising any other right that a person may have in relation to the action proposed in this notice of intent.

The application for a variance or waiver is made by filing a petition with the Office of General Counsel of the Department, 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000.

The petition must specify the following information:

(a) The name, address, and telephone number of the petitioner;

(b) The name, address, and telephone number of the attorney or qualified representative of the petitioner, if any;

(c) Each rule or portion of a rule from which a variance or waiver is requested;

(d) The citation to the statute underlying (implemented by) the rule identified in (c) above;

(e) The type of action requested;

(f) The specific facts that would justify a variance or waiver for the petitioner;

(g) The reason why the variance or waiver would serve the purposes of the underlying statute (implemented by the rule); and

(h) A statement whether the variance or waiver is permanent or temporary and, if temporary, a statement of the dates showing the duration of the variance or waiver requested.

The Department will grant a variance or waiver, when the petition demonstrates both that the application of the rule would create a substantial hardship or violate principles of fairness, as each of those terms is defined in section 120.542(2) of the Florida Statutes, and that the purpose of the underlying statute will be or has been achieved by other means by the petitioner. Persons subject to regulation pursuant to any federally delegated or approved air program should be aware that Florida is specifically not authorized to issue variances or waivers from any requirements of any such federally delegated or approved program. The requirements of the program remain fully

each of those terms is defined in section 120.542(2) of the Florida Statutes, and that the purpose of the underlying statute will be or has been achieved by other means by the petitioner. Persons subject to regulation pursuant to any federally delegated or approved air program should be aware that Florida is specifically not authorized to issue variances or waivers from any requirements of any such federally delegated or approved program. The requirements of the program remain fully enforceable by the Administrator of the EPA and by any person under the Clean Air Act unless and until the Administrator separately approves any variance or waiver in accordance with the procedures of the federal program.

This Order constitutes final agency action unless a petition is filed in accordance with the above paragraphs. Upon timely filing of a petition, this Order will not be effective until further Order of the Department.

RIGHT TO APPEAL

Any party to this Order has the right to seek judicial review of the Order pursuant to Section 120.68, F.S., by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the Clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000; and, by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date the Notice of Agency Action is filed with the Clerk of the Department.

DONE AND ORDERED this 17 day of March, 1997 in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Howard L. Rhodes

HOWARD L. RHODES, Director
Division of Air Resources Management
Twin Towers Office Building
2600 Blair Stone Road
Tallahassee, Florida 32399-2400
(904) 488-0114

CERTIFICATE OF SERVICE

The undersigned duly designated deputy clerk hereby certifies that a copy of the foregoing was mailed to Rich Piper, Chair, Florida Power Coordinating Group, Inc., 405 Reo Street, Suite 100, Tampa, Florida 33609-1004, on this 18th day of March 1997.

Clerk Stamp

FILING AND ACKNOWLEDGMENT
FILED, on this date, pursuant to §120.52(7), Florida Statutes, with the designated Department Clerk, receipt of which is hereby acknowledged.

Martha O. Willis 3-18-97
Clerk Date

Department of
Environmental Protection

Lawton Chiles
Governor

Twin Towers Office Building
2600 Blair Stone Road
Tallahassee, Florida 32399-2400

Virginia B. Wetherell
Secretary

July 9, 1997

Certified Mail - Return Receipt Requested

Mr. Rich Piper, Chair
Florida Power Coordinating Group, Inc.
405, Reo Street, Suite 100
Tampa, Florida 33609-1004

Dear Mr. Piper:

Enclosed is a copy of a Scrivener's Order correcting an error in the Order concerning particulate matter testing of natural gas fired boilers.

If you have any questions concerning the above, please call Yogesh Manocha at 904/488-6140, or write to me.

Sincerely,

M. D. Harley, P.E., DEE
P.E. Administrator
Emissions Monitoring Section
Bureau of Air Monitoring and
Mobile Sources

MDH:ym

cc: Dotty Diltz, FDEP
Pat Comer, FDEP

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

In the matter of:	)	
	)	
Florida Electric Power Coordinating Group, Inc.,	)	ASP No. 97-B-01
	)	
Petitioner.	)	

ORDER CORRECTING SCRIVENER'S ERROR

The Order which authorizes owners of natural gas fired fossil fuel steam generators to forgo particulate matter compliance testing on an annual basis and prior to renewal of an operation permit entered on the 17th day of March, 1997, is hereby corrected on page 4, paragraph number 4, by deleting the words "pursuant to Rule 62-210.300(2)(a)3.b., c., or d., F.A.C.":

4. In renewing an air operation permit ~~pursuant to Rule 62-210.300(2)(a)3.b., c., or d., F.A.C.,~~ the Department shall not require submission of particulate matter emission compliance test results for any fossil fuel steam generator emissions unit that burned liquid and/or solid fuel for a total of no more than 400 hours during the year prior to renewal.

DONE AND ORDERED this 2 day of July, 1997 in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Howard L Rhodes

HOWARD L. RHODES, Director
Division of Air Resources Management
Twin Towers Office Building
2600 Blair Stone Road
Tallahassee, Florida 32399-2400
(904) 488-0114

CERTIFICATE OF SERVICE

The undersigned duly designated deputy clerk hereby certifies that a copy of the foregoing was mailed to Rich Piper, Chair, Florida Power Coordinating Group, Inc., 405 Reo Street, Suite 100, Tampa, Florida 33609-1004, on this 10th day of July 1997.

Clerk Stamp

FILING AND ACKNOWLEDGMENT FILED, on this date, pursuant to §120.52(7), Florida Statutes, with the designated Department Clerk, receipt of which is hereby acknowledged.

Martha Jewell Wise 7/10/97
Clerk Date

BEFORE THE STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL REGULATION

In the Matter of: Petition for Reduction in Semiannual Particulate Emissions Compliance Testing, Crystal River Unit No.1; Florida Power Corporation Petitioner.	)	OGC File No. 86-1576

ORDER

On February 18, 1986, the Petitioner, Florida Power Corporation, filed a Petition for Reduction in the Frequency of Particulate Emissions Compliance Testing pursuant to Florida Administrative Code Rule 17-2.600(5)(b)1. for the following fossil fuel steam generating unit:

Crystal River Unit No.1

Pursuant to Florida Administrative Code Rule 17-2.600(5)(b)1., and by Order dated November 7, 1982, Petitioner has conducted semiannual particulate emission compliance tests. Florida Administrative Code Rule 17-2.600(5)(b)1. provides that the Department may reduce the frequency of particulate testing upon a demonstration that the particulate standard of 0.1 pound per million Btu heat input has been regularly met. The petition and supporting documentation submitted by Petitioner indicate that, since February 25, 1982, Petitioner has regularly met the particulate standard. It is therefore,

ORDERED that the Petition for Reduction in the Frequency of Particulate Emissions Compliance Testing in GRANTED. Petitioner may immediately commence testing on an annual basis. Test results from the first regularly scheduled compliance test conducted in FY 87 (October 1, 1986 - September 30, 1987), provided the results of that test meet the particulate standard and the 40% opacity standard, shall be accepted as results from

meet either the particulate standard or the 40% opacity standard in the future shall constitute grounds for revocation of this authorization.

Persons whose substantial interests are affected by the above proposed agency action have a right, pursuant to Section 120.57, Florida Statutes, to petition for an administrative determination (hearing) on the proposed action. The Petition must conform to the requirements of Chapters 17-103 and 28-5, Florida Administrative Code, and must be filed (received) with the Department's Office of General Counsel, 2600 Blair Stone Road, Tallahassee, Florida 32399-2400, within fourteen (14) days of publication of this notice. Failure to file a petition within the fourteen (14) days constitutes a waiver of any right such person has to an administrative determination (hearing) pursuant to Section 120.57, Florida Statutes.

If a petition is filed, the administrative hearing process is designed to formulate agency action. Accordingly, the Department's final action may be different from the proposed agency action. Persons whose substantial interests will be affected by any decision of the Department have the right to intervene in the proceeding. A petition for the intervention must be filed pursuant to Model Rule 28-5.207, Florida Administrative Code, at least five (5) days before the final hearing and be filed with the Hearing Officer if one has been assigned at the Division of Administrative Hearings, Department of Administration, 2009 Apalachee Parkway, Tallahassee, Florida 32301. If no Hearing Officer has been assigned, the petition is to filed with the Department's Office of General Counsel, 2600 Blair Stone Road, Tallahassee, Florida 32399-2400. Failure to petition to intervene within the allowed time frame constitues a

waiver of any right such person has to an administrative determination (hearing) under Section 120.57, Florida Statutes.

DONE AND ORDERED this 11th day of Dec., in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL REGULATION

VICTORIA J. TSCHINKEL
Secretary

Twin Towers Office Building
2600 Blair Stone Road
Tallahassee, Florida
32399-2400
Telephone (904)488-9730

FILING AND ACKNOWLEDGEMENT
FILED, on this date, pursuant to §120.52 Florida Statutes, with the designated Department Clerk, receipt of which is hereby acknowledged.

C. Hutchinson — Clerk

12-12-86 — Date

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ORDER has been furnished by United States Mail to J.A. Hancock, Vice President, Fossil Operations, Florida Power Corporation, Post Office Box 14042, St. Petersburg, Florida 33733; on this 12 day of December, 1986, in Tallahassee, Florida.

E. Gary Early
Assistant General Counsel

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL REGULATION

Twin Towers Office Building
2600 Blair Stone Road
Tallahassee, Florida
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