HOPPING GREEN SAMS & SMITH
PROFESSIONAL ASSOCIATION
ATTORNEYS AND COUNSELORS
123 SOUTH CALHOUN STREET
POST OFFICE BOX 6526
TALLAHASSEE, FLORIDA 32314
(904) 222-7500
FAX (904) 224-9359
FAX (904) 425-3415

JAMES S. ALVES
BRIAN H. BIBEAU
KATHLEEN BLIZZARD
ELIZABETH C. BOWMAN
RICHARD S. BRIGHTMAN
PETER C. CUNNINGHAM
RALPH A. DEMEO
THOMAS M. DEROSE
WILLIAM H. GREEN
WADE L. HOPPING
FRANK E. MATTHEWS
RICHARD D. MELSON
MICHAEL P. PETROVICH
DAVID L. POWELL
WILLIAM D. PRESTON
CAROLYN S. RAEPPLE
DOUGLAS S. ROBERTS
GARY P. SAMS
ROBERT P. SMITH
CHERYL G. STUART

GARY K. HUNTER, JR.
JONATHAN T. JOHNSON
ROBERT A. MANNING
ANGELA R. MORRISON
GARY V. PERKO
KAREN M. PETERSON
R. SCOTT RUTH
W. STEVE SYKES
T. KENT WETHERELL, II

OF COUNSEL
W. ROBERT FOKES

Writer's Direct Dial No.
(904) 425-2360

May 21, 1997

Brian Beals
U.S. Environmental Protection Agency
Region IV
345 Courtland Street, NE
Atlanta, GA 30365

RE: Florida DEP's May 13, 1997 Correspondence

Dear Mr. Beals:

The Florida Department of Environmental Protection's (DEP's) May 13, 1997 letter to you inexplicably neglected to address EPA's subsequent clarification to the NSPS regulations, as reflected in 39 Fed. Reg. 36946-36950 (October 15, 1974). Specifically, EPA initially proposed to include this additional sentence to the "capable of accommodating" exemption: "A facility shall be considered to be designed to accommodate an alternative fuel or raw material if provisions for that use were included in the final construction specifications." This sentence, if it had been adopted, arguably could have supported DEP's contention that a conscious intention to utilize an alternative fuel must have existed to qualify for the exemption.

In adopting the final rule, however, EPA declined to promulgate that proposed language. Instead, EPA inserted this sentence: "A facility shall be considered to be designed to accommodate an alternative fuel or raw material if that use could be accomplished under the facility's construction specifications, as amended prior to the change." This final language, which remains in effect today (in both EPA's and DEP's rules), clearly denotes EPA's intention to emphasize what could have been accomplished. And that regulatory intention is embodied consistently in EPA's interpretive guidance, which has focused on whether equipment capable of accomplishing use of an alternative fuel was in existence prior to January 6, 1975 (for purposes of PSD applicability) or the applicability date (for NSPS purposes).

For example, in September 19, 1979 "PSD Guidance," EPA determined that Savannah Electric's Effingham Plant "would be treated as being capable of accommodating the fuel, if the design of the source allowed firing of the fuel." (Emphasis added.) And in the February 9, 1983 "KPL Applicability Determination," concerning a gas plant's proposal to utilize petroleum coke, EPA concerned itself with whether the existing boilers "had the physical capability of handling" bottom ash associated with petroleum coke. The point of emphasis in the KPL determination was whether that plant, prior to January 6, 1975, had been designed with equipment enabling the use of petcoke. EPA would not have addressed whether the plant's original equipment was adequate to utilize petroleum coke if (as suggested by DEP) the "capable of accommodating" exemption is limited to so-called "principal fuels," or if KPL was required to demonstrate that it had a conscious intention to use petroleum coke prior to 1975. In fact, there is no interpretive guidance embracing DEP's novel interpretation, which contradicts the plain meaning and regulatory history of the capable of accommodating exemption.

(Note that in the KPL case EPA concluded that using petroleum coke was not exempt from PSD review because that plant "never had the physical capability to handle bottom ash." By way of comparison, Florida Power Corporation's coal-fired Crystal River Plant, Units 1 and 2, originally had the physical capability of handling bottom ash, and that capability was never relinquished, in accordance with Bridgeport Harbor (1983) and similar guidance.)

EPA's endorsement of DEP's misinterpretation of the capable of accommodating exemption could have national implications for the many facilities that recently have relied (and, prospectively, intend to rely) on the existing rule language and EPA's long-standing interpretations for blending used oil, petroleum coke, and similar alternative fuels with coal or oil.

Thank you for your attention to this matter.

Very truly yours,

James S. Alves

cc: Douglas Beason, Esq.
Mike Kennedy, Esq.

Department of
Environmental Protection

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

Lawton Chiles
Governor

Virginia B. Wetherell
Secretary

May 13 1997

Mr. Brian Beals, Chief,
Air and Radiation Technology Branch
U.S. Environmental Protection Agency, Region IV
Atlanta Federal Center
100 Alabama Street S.W.
Atlanta, Georgia 30303-3104

Re: Request for Additional Assistance - PSD Applicability Determination
Florida Power Corporation Crystal River Units 1 and 2

The Florida Department of Environmental Protection (FDEP) and Florida Power Corporation (FPC) are involved in litigation concerning the applicability of the alternative fuels exemption to FPC's permit application to combust a blend of coal and petroleum coke in Crystal River Units 1 and 2. The Department's Prevention of Significant Deterioration (PSD) program applies to this change in method of operation because SO_2 emissions would increase by approximately 9400 tons per year (TPY). However, FPC asserts that Rule 62-212.400(2)(c)4, F.A.C., exempts from PSD review the "Use of an alternative fuel or raw material which the facility was capable of accommodating before January 6, 1975,..." The Department's rule tracks 40 CFR 52.21(b)(2)(iii)(e)(1).

By correspondence dated December 24, 1996, the Department requested EPA Region IV's assistance with regard to an applicability determination for the above-referenced facility. By correspondence dated February 14, 1997, Region IV notified the Department that it did not appear that the alternative fuels exemption applied to FPC's proposed project. By correspondence dated April 9, 1997, Region IV advised FPC that FDEP has the primary responsibility for interpreting its rules.

The Clean Air Act contains a separate exemption for federally-ordered coal conversions under Section 2(a) of the Energy Supply and Environmental Coordination Act of 1974 (ESECA). Crystal River Units 1 and 2 underwent such coal conversions pursuant to the ESECA in the late 1970's. The alternative fuels exemption which is the subject of the litigation, is not mentioned in the Clean Air Act (or any of the subsequent amendments). This subject exemption first appeared in a 1971 NSPS rule (Federal Register, Vol. 36, No. 247 at page 24877). The EPA stated that the definition of modification was clarified to exclude "fuel switches if the equipment was originally designed to accommodate such fuels." The justification given for the exemption was to *"eliminate inequities where equipment had been put into partial operation prior to the proposal of the standards."*

The PSD rules incorporated the intent expressed in the NSPS exemption by adding a similar exemption on December 5, 1974 (Federal Register, Vol. 39, No. 235 at page 42514). The exemption was carried over and discussed in the SIP Requirements implementing the 1977 Clean Air Act Amendments (FR Vol. 43, No. 118-June 19, 1978 at page 26396). It was clarified that Congress intended by Section 169(2)(C) that the definition of modification conform to usage elsewhere in the Act.

The Department submits there is no equity consideration in FPC's proposed project because FPC is able to make full use of its equipment by firing coal as originally intended. The FPC proposal is not eligible for exemption as a "fuel switch" as discussed in the NSPS. In the context of the exemption, the type of fuel switches contemplated at that time for fossil fuel-fired boilers were between oil, natural gas, and coal. Many units were specifically designed to accommodate one or more of these fuels. This becomes obvious upon reviewing literature from the 1970's such as EPA document EPA-450/3-78-123, "Industrial Boilers - Fuel Switching Methods, Costs, and Environmental Impacts." This document discusses only fuel switches between oil, coal, and natural gas. Similarly, the Background Information Document for NSPS Subpart D for Steam Generators mentions "The necessity of making use of all the principal fossil fuels - coal, oil, and natural gas."

The Department submits the capable of accommodating provision was intended to apply only to the principal fuels or those specifically stated in the design documents, applications, or other relevant information from the time that such units were planned. Crystal River 1 and 2 have already switched to coal by order of the FEA. A change to burning coal with a small amount of fuel modifier is not a switch or conversion in the context of either exemption. Region IV already discussed in its February 14 letter why the project would not be eligible for the exemption even if it were a switch.

We request your concurrence with our interpretation of the exemption and believe it further supports Region IV's previous conclusion that the alternative fuels exemption does not apply to the FPC petcoke project. A formal administrative hearing concerning this issue is currently scheduled to commence on June 3, 1997. We, therefore, request your early response on this important matter.

If you have any questions, please call me at 904/488-1344.

Sincerely

A. A. Linero 5/13

A. A. Linero, P.E. Administrator
New Source Review Section

AAL/aal/l

cc: J. Michael Kennedy, FPC