SIERRA CLUB
FOUNDED 1892

November 13, 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 Seminole Electric's Response to Sierra Club's Motion to Hold Proceedings in Abeyance and Sierra Club's Reply in Support of its Motion to Hold Proceedings in Abeyance 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 Seminole Electric's Response to Sierra Club's Motion to Hold Proceedings in Abeyance and Sierra Club's Reply in Support of its Motion to Hold Proceedings in Abeyance

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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	)	
	)	

MOTION FOR LEAVE TO FILE A REPLY TO SEMINOLE ELECTRIC'S RESPONSE TO SIERRA CLUB'S MOTION TO HOLD PROCEEDINGS IN ABEYANCE

By this motion, Sierra Club requests leave to reply to Seminole Electric Cooperative, Inc.'s ("Seminole") response to Sierra Club's motion to hold proceedings in abeyance. In support of this motion, Sierra Club states:

1. In its response, Seminole argues that a settlement agreement binds Sierra Club and moots this action.
2. The relevance of this settlement has not otherwise been addressed before the Board.
3. In Sierra Club's view, Seminole has badly mischaracterized the terms and effect of the settlement.
4. Seminole also raises novel legal arguments for dismissal which neither the Florida Department of Environmental Protection nor Sierra Club have briefed.
5. Allowing Sierra Club to address Seminole's arguments would assist the Board in disposing of this petition for review.

Therefore, Sierra Club moves the Board for leave to file the attached reply to Seminole's response to Sierra Club's motion to hold proceedings in abeyance.

Date: November 13, 2008

Respectfully submitted,

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
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In the matter of:	)	PSD Appeal No. 08-09
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In Re Seminole Electric Cooperative Inc.	)	
	)	
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	)	

SIERRA CLUB'S REPLY IN SUPPORT OF ITS MOTION TO HOLD PROCEEDINGS IN ABEYANCE

By urging the Board to dismiss Sierra Club's petition for review and separately moving to dismiss Sierra Club's state court permit appeal, Seminole Electric Cooperative, Inc. ("Seminole") seeks to insulate its permit from review in any forum. Seminole argues that a settlement agreement bars Sierra Club's petition, that settled law controls this unusual procedural situation, and that staying these proceedings while Florida courts take a first look is inequitable; yet the settlement agreement is entirely unfulfilled, the law Seminole cites is inapposite, and no material delay would result from granting Sierra Club's motion. The Board should decline Seminole's invitation to rush to judgment and grant Sierra Club's motion.[1]

I. Sierra Club's Appeal is Justiciable

Seminole invites the Board to engage in an analysis of Florida contract law by insisting that an unfulfilled settlement agreement bars Sierra Club's appeal in this forum. Sierra Club has filed a declaratory judgment action in Florida state court to address this matter. *See* Sierra Club Complaint for Declaratory Relief, Ex. 1. If the Board stays this case while the Florida permit appeal proceeds, that declaratory judgment action will also likely be resolved.

If the Board does decide to reach this issue, it is clear that the settlement agreement does not preclude review of Seminole's PSD permit. Sierra Club agreed not to "contest FDEP's issuance of the final PSD permit" only if "the final

[1] Sierra Club does not oppose Seminole's motion to intervene.

PSD permit is issued in accordance with the terms and conditions of this Agreement." Seminole Ex. D at 1. As Seminole admits, the final PSD permit contains none of the terms Sierra Club and Seminole included in their settlement agreement. Seminole's Response at 5, 10; *see also* FDEP, Final Determination, Ex. 2 at 7 ("The final action of the Department is to issue the permit with no changes from the draft permit."). By the settlement's plain terms, Sierra Club was free to challenge the permit.

Seminole, however, asserts that because FDEP *might someday* revise the final PSD permit, Sierra Club should have sat on its hands while petition deadlines lapsed, forfeiting its right to seek review of the permit. While FDEP told Seminole that it has "opened a permit revision project to include the settlement agreement," opening a permit revision proceeding does not, by any stretch of the imagination, guarantee that FDEP will actually revise the permit to include the settlement terms. *See* Seminole Ex. F. On Seminole's theory, the possibility of a revised permit issuing at some unknown future date means that Sierra Club must forego its right to appeal Seminole's actual PSD permit.

Seminole argues that Sierra Club is trying to "wriggle out" of the settlement because the settlement did not explicitly preclude permit revision. Seminole Response at 10-11. Nonsense. The settlement depended upon issuance of a "final" PSD permit containing the settlement terms and Seminole's final permit has now issued without those terms. Sierra Club did not agree to allow FDEP and Seminole indefinite 'do-overs', abandoning any review of the final PSD permit Seminole holds.

Nor does the Florida case Seminole relies upon, *Thomas v. Fusilier*, 966 So. 2d 1001 (Fla. 5th Dist. Ct. App. 2007), have any bearing here. *Thomas* concerns a divorce settlement in which the wife was a few days late in moving from the family home. *Id.* at 1002. The husband argued that she had, as a result, forfeited her rights to a quarter-million dollar payment. *Id.* The issue was whether "a brief delay by one party," the wife, to meet the contractual deadline breached the contract when the contract did not explicitly state that "time was of the essence." *Id.* at 1002-03. The court held not. *Id.* at 1003. But the issue

here, unlike in *Thomas*, is not a party's tardiness in performing and FDEP is not, in any event, a party to the settlement. Rather, the question is whether the complete failure of a condition precedent, here the issuance of the final PSD permit incorporating the settlement, excuses Sierra Club from its obligations. The answer to that question is plainly yes because "[t]here must be at least a substantial performance of conditions precedent in order to authorize a recovery as for performance of a contract." *See, e.g., Alvarez v. Rendon*, 953 So.2d 702, 708 (Fla. 5th Dist. Ct. App. 2007) (quoting *Cohen v. Rothman*, 127 So.2d 143, 147 (Fla. 3rd Dist. Ct. App. 1961)); *see also Cohen*, 127 So. 2d at 147 (referring to this principle as "elementary") (quotation marks and citation omitted).

At bottom, there is no colorable argument that Sierra Club's petition is barred by FDEP issuing a permit that does not comply with the settlement.

II. Seminole's Argument that the Board Lacks Jurisdiction is Wrong

Like FDEP, Seminole argues that the Board lacks jurisdiction over this matter. Sierra Club has already responded to this general argument (*see* Motion to Hold Proceedings in Abeyance ("Stay Motion") at 10-14, Reply to FDEP's Request to Deny Review), and will not further respond to arguments it has already addressed: the claim that Sierra Club should have challenged the approval of Florida's SIP (Reply to FDEP at 3-6), and the claim that Sierra Club was required to follow optional state procedures in order to preserve its right to appeal the final permit (Stay Motion at 11-13). In the event that the Board wishes to adjudicate this matter instead of staying this case, Sierra Club addresses only the new authority Seminole raises.

As Sierra Club has argued (Stay Motion at 12-13), when EPA approved Florida's SIP for PSD permits, it included a savings clause, providing that federal procedures continue to apply for "[p]ermits issued by EPA prior to the approval of the Florida PSD rule." *See* 40 C.F.R. § 52.530(d)(2). Seminole responds by citing a definition drawn from a separate regulation to argue that this savings clause does not preserve the Board's jurisdiction over such permits if the Florida courts fail to exercise review. Seminole is wrong.

Seminole relies upon a regulation, 40 C.F.R. § 124.2(a), that defines "permit" to exclude draft permits, providing that the term "does not include . . . any permit which has not yet been the subject of final agency action, such as a 'draft permit'." Thus, according to Seminole, the savings clause's reference to 'permits' does not apply to draft permits, but only to final permits. Seminole Response at 7-9. The trouble for Seminole's argument is that its preferred definition does not apply here. The cited regulation explicitly provides that "the definitions below [including the permit definition] apply to [Part 124], *except for PSD permits which are governed by the definitions in § 124.41*." 40 C.F.R. § 124.2(a) (emphasis added). In other words, Seminole's argument rests upon a regulation that is facially inapplicable to PSD permits.

The applicable definition for PSD permits instead provides only that "'Permit' or 'PSD permit' means a permit issued under 40 C.F.R. 52.21 [which governs federal and delegated programs] or by an approved State." 40 C.F.R. § 124.41. Lacking the explicit exclusion of draft permits found in 40 C.F.R. § 124.2(a), this definition may easily be read to include them, particularly when read in tandem with the savings clause. And, while the PSD definitions regulation, 40 C.F.R. § 124.41, separately defines 'draft permit' by reference to 40 C.F.R. § 124.2(a), the PSD 'permit' definition does not borrow from that section. *See* 40 C.F.R. § 124.41. Had EPA wished to maintain the exclusion of draft permits in the PSD context, it could have used the 40 C.F.R. § 124.2(a) 'permit' definition, but it did not. This difference supports Sierra Club's argument that EPA carefully drafted its SIP approval regulations to ensure that no permit would escape review.

Seminole's remaining citations cannot repair its error. It points to 40 C.F.R. § 124.19(a) to establish that the Board may review only a "final PSD permit decision." Seminole Response at 7. But that regulation only establishes the unremarkable proposition that a draft permit would not be subject to a petition for review. No one disputes that, if the Board may review the Seminole permit at all, it may only do so now that the permit has become final. The regulation sheds no light, however, on the real question here: whether the savings clause (and the

structure of the Clean Air Act) preserves the right of review Sierra Club perfected under the rules applicable when the draft permit issued.

Seminole's authority showing that the Board lacks jurisdiction over state-issued permits is similarly unhelpful. Seminole Response at 6-7. That general point is undisputed. *See* 40 C.F.R. § 124.1(e). But that is all the unpublished Board order and state court case Seminole offers establish. *In re: Missouri CAFO General Permit*, NPDES Appeal No. 02-11 (EAB, March 18, 2003) denied a petition for Board review of a state permit, explaining that federal approval of a state program did not render state permits federal. *See id.* at 4. Seminole's state case, *Chipperfield v. Missouri Air Conservation Comm'n*, 229 S.W. 3d 226, 242 (Mo. S.D. 2007), likewise notes in an aside that the Board does not hear state permit appeals. Neither examines a permit straddling SIP approval, nor the impact of a savings clause.

The two Board cases Seminole uses to argue that the SIP approval cut off jurisdiction do not address this question. First, both are Clean Water Act appeals, and so do not control in the Clean Air Act context. And, second, both actually deal with whether substantive proposed regulations should be applied when reviewing final permits issued while the regulations were still pending. Unsurprisingly, the Board said no. In *In the Matter of: Homestake Mining Co.*, 2 E.A.D. 195, 199-200 (EAB 1986), the petitioner "claim[ed] that . . . changes to the NPDES regulations proposed as a result of [a recent settlement] should be incorporated into its final permit despite the fact that, at the time its final permit was issued, the regulations containing such changes were still in their *proposed* form and had not yet been promulgated as final rules." *Id.* (emphasis in original). That issue does not bear on this case, where the question is simply whether existing appellate rights were destroyed by final SIP approval.[2]

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[2] Seminole has not even properly quoted *Homestake*. The language it uses is drawn from a footnote addressing whether a permit may be modified in light of new regulations. Seminole Response at 7 (quoting *Homestake*, 2 E.A.D. 195, at n. 8). The Board explained that such modifications had recently been allowed by a revised rule and then quoted an older case which had, until the rule revision, disallowed such changes. Seminole draws its language from this quotation,

Seminole's second case is equally irrelevant. The cited section of that case, *In re Phelps Dodge Corp. Verde Valley Ranch Development*, 10 E.A.D. 460 (EAB 2002), concerned whether a new source performance standard applied to a development project. *Id.* at 475-78. In resolving that question, the parties incidentally discussed "pending effluent limitation guidelines" which might "play a significant role" in future cases. *Id.* at 478 n. 10. The Board made the commonsense point that it had to apply the existing applicable regulations, not the regulations [which] may exist at some point in the future," and quoted *Homestake*. *Phelps Dodge* does not speak to this case: Like *Homestake*, it does not address whether the Board can exercise jurisdiction over permits straddling state and federal permitting regimes, nor whether perfected appellate rights can be extinguished by SIP approval.

In short, Seminole's authority provides no grounds for the Board to deny jurisdiction before it is clear that review rights persist in another forum.

III. Granting Sierra Club's Motion Will Not Cause Inequitable Delay

Seminole's last argument is that holding these proceedings in abeyance is inequitable and will cause delay. But Sierra Club is not, as Seminole suggests, trying to secure multiple "bites at the apple." *See* Seminole's Response at 13. Instead, all Sierra Club seeks is *one* bite: to exercise its right of review, a right that the Clean Air Act recognizes is central to the PSD permitting program. *See, e.g.*, 42 U.S.C. §§ 7470(5); 7475(a)(2).

Seminole's "bites" turn out to be a mouthful of nothing. Seminole first insists that Sierra Club should have timely petitioned for an optional formal state hearing and then, second, should have appealed FDEP's decision that Sierra Club's petition was untimely. As Sierra Club has earlier explained at length, the state petition requirements were purely optional, and could not affect its appeal rights. *See In re West Suburban Recycling and Energy Center*, 6 E.A.D. 692, 706-09 (EAB 1996). There is no reason to penalize it for declining to expend resources upon them. And the third "bite," Seminole and Sierra Club's

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which rehearsed law no longer fully applicable at the time *Homestake* was decided. This extract of obsolete law has no force here.

agreement that issuance of the final PSD permit containing various protective conditions would settle this case, likewise means nothing because the final permit does not contain those terms.

Finally, Seminole complains of Sierra Club's state court appeal and this petition for review, which it characterizes as "serial litigation," leading "sequentially [to] two appeals." *See* Seminole's Response at 13. Not so. Sierra Club's motion clearly states that "[i[f the Florida courts exercise jurisdiction, then Sierra Club will dismiss this petition." Stay Motion at 2. Sierra Club has made abundantly clear that it filed in both state court and before the Board solely to ensure that one, and only one, forum would recognize its perfected right to review. That Seminole would prefer that its permit escape any scrutiny does not render review inequitable.

All that remains of Seminole's argument is that it is somehow unfair that Florida courts may take some time to deliberate. But that holds whether or not the Board grants Sierra Club's motion to hold Board proceedings in abeyance. Unless review itself is unfair to Seminole, there is nothing to its objection.

IV. Conclusion

Seminole urges the Board to jump the gun on the Florida courts and dismiss Sierra Club's petition without waiting to ensure that Sierra Club's right of review is protected. Holding these proceedings in abeyance causes Seminole no injury, generates no delay, and is by far the most efficient way for the Board to approach the uncommon jurisdictional questions raised by Sierra Club's petition. Sierra Club again respectfully requests that the Board take this cautious course.

Date: November 13, 2008

Respectfully submitted,

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EXHIBIT 1

IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

SIERRA CLUB

Plaintiff,

v. Case No.: 08-_____-CA

SEMINOLE ELECTRIC
COOPERATIVE, INC.

Defendant.

COMPLAINT FOR DECLARATORY RELIEF

COMES NOW Plaintiff, Sierra Club, by and through its undersigned attorney, and brings this action against Seminole Electric Cooperative, Inc. ("Seminole"), pursuant to §§ 86.011 and 86.021, Florida Statutes, and alleges:

1. This is an action for declaratory relief.

2. This Court has jurisdiction pursuant to §§ 26.012(2) and 86.011, Florida Statutes.

3. Venue is proper pursuant to §§ 47.011, Florida Statutes, because the cause of action accrued in Leon County.

4. Sierra Club is a non-profit corporation with over 750,000 members. The Sierra Club's Florida Chapter has over 33,000 members.

5. Seminole is an electric cooperative and wholesale energy supplier.

6. Sierra Club and Seminole entered into a Settlement Agreement on March 9, 2007 ("Agreement"), which is attached as Exhibit 1.

7. Sierra Club has an immediate interest in determining the status of the Agreement because Seminole has threatened legal action against Sierra Club to enforce the Agreement.

8. The Agreement concerns Seminole's application to the Florida Department of

Environmental Protection ("FDEP") for a prevention of significant deterioration ("PSD") permit under the Clean Air Act to authorize construction of a new 750-megawatt electrical generating unit, known as "Unit 3", at the Seminole Generating Station site.

9. The parties entered into the Agreement subsequent to FDEP's issuance of a draft PSD permit for Unit 3. The Agreement included specific limits and conditions on the operation of Unit 3 and set forth agreed-upon emission rates for several pollutants.

10. The Agreement stated: "*Provided that the final PSD permit is issued in accordance with the terms and conditions of this Agreement*, Sierra Club agrees not to contest FDEP's issuance of the final PSD permit in any administrative or judicial form." Ex. 1, ¶ G (emphasis added). The Agreement further stated, "Sierra Club agrees to not object, challenge, appeal, or initiate or assist in any challenge or appeal by others, or in any other way impede or interfere with the issuance of *a final PSD permit in accordance with the terms and conditions identified in this Agreement.*" Ex. 1, ¶ 11 (emphasis added).

11. Sierra Club's performance under the Agreement was thus conditioned upon the final PSD permit being issued in accordance with the limits and conditions on the operation of Unit 3 that the Parties set forth in the Agreement.

12. On September 5, 2008, in Tallahassee, FDEP issued the Final Permit (PSD-FL-375) for Seminole Unit 3. *See* Ex. 2, Notice of Permit and Final Permit.

13. The Final Permit was not issued in accordance with the terms and conditions identified in the Agreement. Specifically, the emissions rates were unchanged from the Draft Permit. *See* Ex. 3, Final Determination, at 7 ("The final action of the Department is to issue the permit with no changes from the draft permit.").

14. Sierra Club appealed the Final Permit in the First District Court of Appeal,

Tallahassee, on October 3, 2008. Due to procedural complications not relevant to this action, Sierra Club also submitted a petition for review of the Final Permit to the federal Environmental Appeals Board on October 6, 2008.

15. By letter dated October 22, 2008, Seminole's counsel stated that Seminole's position is that the Agreement remains in effect even though the final PSD permit was not issued in accordance with the agreed-upon terms. *See* Ex. 4.

16. The October 22 letter also stated that Sierra Club's appeals of the Final Permit were "thwarting" the Agreement, and that it served as a "notice letter to the Sierra Club pursuant to paragraph 17 on page 4 of the Settlement Agreement." Ex. 4, at 2. Paragraph 17 of the Agreement sets forth the notice requirements should any party seek to "file any lawsuit to enforce this Agreement." Ex. 1, ¶ 17.

COUNT I
DECLARATORY STATEMENT

17. Paragraphs 1 – 16 are incorporated by reference.

18. Under Florida contract law, a contract that is conditioned upon the happening of a particular event is rendered unenforceable if that event fails to occur.

19. The Agreement was conditioned upon issuance of the Final PSD Permit for Seminole Unit 3 in accordance with the terms and conditions set forth in the Agreement.

20. Upon FDEP's issuance of the Final PSD Permit that did not include the terms and conditions set forth in the Agreement, and the condition failed upon which the Agreement is based.

21. Therefore, the FDEP's action in issuing the Final PSD Permit rendered the Agreement unenforceable and released Sierra Club from any and all obligations under the

Agreement.

REQUEST FOR RELIEF

22. Based on the foregoing facts, Sierra Club respectfully requests:

a) a declaration that the conditions of the Agreement were not met, and that Sierra Club is therefore released from its obligations under the Agreement;

b) a declaration that the Agreement was rendered null and void upon FDEP's issuance of the final PSD permit for Seminole Unit 3 that is not in accordance with the terms and conditions of the Agreement; and

c) Any additional relief this court deems proper.

Respectfully filed with this court on this 28th day of October, 2008.

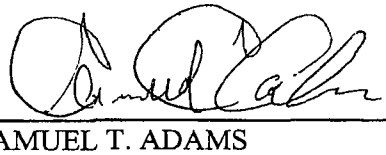

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EXHIBIT 2

FINAL DETERMINATION

Seminole Electric Cooperative, Inc.
Seminole Generating Station
DEP File No. 1070025-005-AC

The Department distributed a public notice package on August 25, 2006 to allow the applicant, Seminole Electric Cooperative, Inc. (SECI) to construct a new supercritical coal-fired steam generating unit at the existing Seminole Generating Station (SGS), located at 890 US Highway 17, North of Palatka, Putnam County. The Public Notice of Intent to Issue concerning the draft permit was published in the Palatka Daily News on September 8, 2006. Since the Draft Permit was issued, the federal Clean Air Interstate and Clean Air Mercury Rules (CAMR) have been vacated by the federal courts. This litigation is not yet final but it appears a case-by-case determination of maximum achievable control technology (MACT) will be required for SECI Unit 3 due to the vacature of CAMR. The Department will require an application for case-by-case MACT and will issue its determination thereof in a separate agency action.

COMMENTS/CHANGES

Comments were received by the Department from Mitchell Williams, a local resident on September 12, 2006. Comments were received from EPA Region 4 by letter dated October 5, 2006. Comments were received from the applicant by letter dated September 27, 2006. Comments were also received from the Sierra Club by letter dated October 9, 2006. On March 9, 2007 the applicant and the Sierra Club entered into a Settlement Agreement, to which the permitting authority was not a party and which was outside of the Prevention of Significant Deterioration (PSD) process that resolves all timely-received comments submitted by the applicant and the Sierra Club related to the draft PSD permit. To the extent the applicant wants to incorporate those changes into an air construction permit for that facility, an application to revise the PSD permit may be submitted. Finally, comments were received from the Natural Resources Defense Council and Southern Alliance for Clean Energy by letter dated July 3, 2008 almost 2 years after the end of the public comment period. These comments were not timely but are in the Department's files. Other timely received comments are addressed below:

EPA Comment 1. Netting Analysis

a. Florida Department of Environmental Protection (FDEP) indicates on page 5 of the technical evaluation that the Unit 1 and Unit 2 baseline period for the nitrogen oxides netting analysis is calendar years 2001-2002. In accordance with FDEP's rules, the baseline period for EUSGUs must be "within the 5-year period immediately preceding the date a complete permit application is received by the Department." Since the Unit 3 PSD permit application was not deemed complete until July 3, 2006, not all of calendar year 2001 is available for baseline emissions calculations unless FDEP explicitly deems a different (earlier) period to be more representative of normal source operation. FDEP should explain why emissions during all of calendar year 2001 are available for baseline emissions calculations purposes.

b. Referencing FDEP's regulations, a decrease in emissions is creditable in a netting analysis only if "It has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change." We do not find in the technical evaluation (which is a key part of the public record for this permitting action) any assessment of this qualitative significance requirement with regard to the creditable emissions decreases proposed for avoidance of PSD review for sulfur dioxide, nitrogen oxides, and sulfuric acid mist.

RESPONSE:

a. During a February 2006 meeting which was held with the applicant to discuss the processing of the SGS Unit 3 application, FDEP agreed to calendar year 2001 as the first

available year available for calculating baseline emissions. The application was received approximately 2 weeks later, on March 9, 2006.

b. FDEP affirms that it has determined the increases from the SGS Unit 3 project have a lesser qualitative significance than do the decreases from the SGS Units 1 and 2 pollution control upgrade project.

EPA Comment 2: Clarification of Pound-per-Hour Emissions Limits

a. Condition III.A.10 in the draft permit consists of a table with emissions limits labeled as either "BACT Emission Limits" or "Non-BACT Established Emission Limits." (The acronym BACT means best available control technology.) The limits are listed in terms of pounds (lb)/ per million British thermal units (MMBtu) and in terms of lb/hour (hr) "equivalent." We are not sure what is meant by the word "equivalent." Specifically, we are not sure if the lb/hr "equivalent" values are enforceable permit limits. If not, they should be made enforceable unless the following statement in Condition III.A.4 represents an enforceable restriction: "The steam generator shall be designed for a maximum heat input of 7,500 MMBtu per hour of coal." Unless the permit contains an enforceable restriction on maximum heat input, the lb/MMBtu limits by themselves do not provide an enforceable limit on total mass emissions to the atmosphere.

b. The "equivalent" lb/hr rates for the most part are based on the limits in lb/MMBtu times 7,500 MMBtu/hr. There appears to be an error in the volatile organic compound (VOC) equivalent lb/hr rate of 16.7 lb/hr. The stated VOC limit is 0.0034 lb/MMBtu which yields a value of 25.5 lb/hr when multiplied by 7,500 MMBtu/hr.

RESPONSE:

a. The intent of the permit is to make the heat input an enforceable restriction. The lb/hr "equivalent" values are listed for informational purposes only.

b. Agreed that this was a calculation error. This error will be corrected when the Department issues a case-by-case MACT determination in the near future.

EPA Comment 3: Particulate Matter Emissions Limits

a. The particulate matter (PM)/PM less than 10 microns (PM_{10}) emissions limit specified in Condition III.A.15 of the draft permit is for filterables only. Condensables are to be measured and reported but are not restricted by an emissions limit. Most recent permits for EUSGU pulverized coal boilers have included an emissions limit for condensables in addition to (or in combination with) and emissions limit for filterables. We recommend that the final permit include place holder language that will allow setting an emissions limit for condensables after testing has demonstrated that condensables can be measured accurately.

b. In Condition III.A.15, FDEP specifies that the PM/PM_{10} emissions limit of 0.013 lb/MMBtu applies "while firing 100% coal." We recommend that this condition be rephrased to indicate the emissions limit that applies when firing a mixture of coal and petcoke as well as when firing coal only.

RESPONSE:

a. As EPA suggests, if testing demonstrates that condensables can be measured accurately, the Department may address this issue in the future.

b. The Department will delete the words "while firing 100% coal" from Condition III.A.15 when the Department issues its case-by-case MACT determination in the near future.

EPA Comment 4: PM Continuous Emissions Monitoring System (CEMS)

a. The draft permit does not require use of a PM CEMS to assess compliance with the filterable PM/PM_{10} emissions limit. Since a PM CEMS can be used with a wet plume, we recommend that a PM CEMS be required to demonstrate compliance with the filterables limit.

b. If a PM CEMS is not required, we recommend that FDEP require some other continuously monitored parameter to indicate acceptable performance of the dry electrostatic precipitator which is the primary PM control device. Please advise us if FDEP intends to wait until issuance of a title V permit before specifying such parameter monitoring requirements.

RESPONSE: The Department intends to wait until issuance of the Title V permit before specifying parameter monitoring requirements.

EPA Comment 5: Startup and Shutdown

a. Startup and shutdown are part of normal source operation for Unit 3. Any pollutants emitted from Unit 3 during startup and shutdown that are subject to PSD review are therefore subject to BACT requirements. If the numeric BACT emissions limits for regular operation can not be met during startup and shutdown, then numeric limits need to be established for startup and shutdown operations or work practice BACT requirements should be established. We understand that FDEP intends for best management practices (including the 60-hour-per-month restriction in Condition III.A.29.b) to be used for minimization of emissions during startup and shutdown. If it is FDEP's position that adherence to best management practices represents BACT for startup and shutdown, we request that this be stated in the final determination. Please note that numeric emissions limits for startup and shutdown have been addressed by the EPA Environmental Appeals Board (EAB) in two recent PSD permit appeals for coal-fired EUSGUs. (See the August 24, 2006, EAB order for the Prairie State Generating Station project in Illinois and the September 27, 2006, EAB order for the Indeck-Ellwood project in Illinois.)

b. The allowance of 60 hours per month (equivalent to 30 days per year) for startup, shutdown, and malfunction seems excessive for a 750-megawatt EUSGU. We would expect such a unit would not be in a condition of startup, shutdown, or malfunction this often throughout its lifetime.

c. Condition III.A.30 of the draft permit contains a parenthetical phrase indicating that emissions measured during startup, shutdown, and malfunction are to be included for demonstration of compliance with annual emissions limits. We recommend that the final permit contain a direct statement rather than just a parenthetical phrase making clear that startup, shutdown, and malfunction emissions must be included when demonstrating compliance with annual emissions limits.

RESPONSE:

a. The Department intends for the adherence to "best management practices" to represent BACT for the purpose of startup and shutdown.

b. The Department does not expect that this large steam generating unit will be in a startup or shutdown condition very often. However, the Department is aware that supercritical boilers have fairly complicated start-up systems due to ramping operation being required and difficulty in establishing metal matching conditions (see: http://www.hitachi.us/supportingdocs/forbus/powerindustrial/CG2004.pdf).

c. The permit requires startup, shutdown, and malfunction emissions be included when demonstrating compliance with annual emissions limits regardless of whether that phrase is in parenthesis or not. No change is required.

EPA Comment 6: Compliance Demonstration for Coal/Petcoke Blend

a. In Condition III.A.22 of the draft permit, FDEP requires an initial compliance demonstration "when firing 100% coal." Please consider whether an initial compliance test is also needed for a blend of 70 percent coal and 30 percent petcoke. In other words, please assess whether a coal/petcoke blend might be the worst case for some pollutants. This comment is prompted in part by the fact that the carbon monoxide emissions limits in Conditions III.A.10 and 11 are higher for the all-fuel case than for the 100-percent coal case.

b. Condition III.A.23 of the draft permit does not include a specification of the fuel blend to be evaluated during subsequent annual compliance testing. We recommend that FDEP indicate whether such testing is to be based on firing 100 percent coal only, a coal/petcoke blend only, or both.

RESPONSE: The Department expects only few differences in "worst-case" emissions depending upon the fuel-type being fired. For example, it is anticipated that the BACT established emission level of PM may be higher while firing 100% coal versus the coal/petcoke blend, as will the emissions of mercury. However, the elevated sulfur levels in petcoke make the removal of sulfur dioxide (SO_2) emissions more challenging for the co-firing operation, even though the SO_2 limit was not established by BACT. It is not anticipated that the emissions of carbon monoxide (CO) will be significantly different depending upon the fuel being fired. The higher CO emission level (0.15 lb/MMBtu) which is authorized in Condition III.A.11.b is intended to accommodate the wide variety of "non-steady-state" conditions which the unit will be subject to, such as load-changing, soot-blowing, etc. No change was made.

EPA Comment 7: Facility-wide Emissions Limits

In Condition III.A.2 of the draft permit, FDEP establishes facility-wide emissions limits for sulfur dioxide, sulfuric acid mist, mercury, and nitrogen oxides. FDEP further states that these limits apply to Units 1, 2, and 3, the zero liquid discharge spray dryers, and the cooling towers. Please check to make sure that FDEP meant to include cooling towers. Cooling towers do not typically emit the four pollutants with facility-wide emissions limits.

RESPONSE: It is correct that cooling towers do not typically emit these four pollutants; however, no change is made to the permit in response to this comment.

EPA Comment 8: Coal Preparation and Nonmetallic Mineral Processing

In the technical evaluation (page 9 and 10), FDEP states that the emissions units affected by the PSD permit have to comply with a list of regulations. The regulations in this list include the federal new source performance standards (NSPS) for coal preparation plants and nonmetallic mineral processing plants. However, the draft permit does not include permit conditions for coal preparation units or limestone (nonmetallic mineral) handling units. If any of the NSPS listed in the technical evaluation do not apply, please delete them.

RESPONSE: The coal preparation units and limestone handling units are existing units and the applicable requirements are already identified in the facility's other permits. There is no need to repeat these requirements in this permit. No change was required.

EPA Comment 9: Carbon Burnout Permit Provision

Condition III.A.43 of the draft permit (applicable to Unit 3), specifies daily recordkeeping requirements for the "operation and configuration" of a carbon burnout unit "such that the permittee can demonstrate compliance with the emission limitations of the affected emissions units." We recommend that FDEP specify exactly what records are required by this condition.

RESPONSE: The unit must comply with NSPS limits, recordkeeping and reporting. In addition, this unit will have a CEMS. These provisions will adequately address this issue and no change was made to the permit.

EPA Comment 10: Integrated Gasification Combined Cycle (IGCC)

FDEP's technical evaluation (pages 11-12) contains a brief discussion of reasons for not considering IGCC as part of a BACT analysis for the proposed PC boiler. We will point out that, pursuant to section 165(a)(2) of the Clean Air Act, it may be necessary for FDEP to address any substantive comments proposing IGCC as an alternative to the proposed project.

RESPONSE: The Department is satisfied that this issue has been adequately addressed.

EPA Comment 11: Unit 3 Nitrogen Oxides Emissions

Based on the netting analysis, PSD review (including a best available control technology determination) is not required for nitrogen oxides (NO_x) emissions. For the record, however, we wish to comment that the proposed NO_x emissions limit for Unit 3 of 0.07 lb/MMBtu is not representative of the lowest emission rate that could be expected for a newly designed supercritical pulverized coal boiler firing bituminous coal.

RESPONSE: No response required.

Mitchell Williams Comment:

"I suggest that you put an immediate hold on the construction of the third coal plant by Seminole Electric Co-op in Palatka at this time. This is 2006 not 1936. I assume that the design is a familiar one that any plant manager in 1936 would recognize (Babcock & Wilcox turbo-alternators with reheat etc). Only the computer control room would look new. Same old low efficiency antique stuff.

In its place they should be allowed to build a 21 Century plant and get Florida ahead of (not behind) California.

Here is what is needed. A coke-fired furnace (no scrubber needed) using 95% pure oxygen for combustion. To keep the gasifier cool enough to prevent melting, a heavy injection of superheated steam would be mixed with the stream of pure oxygen. At these temperatures (1800°F plus) steam reduces the carbon to carbon monoxide and the hydrogen is released to BURN AGAIN. Meaning that the plant runs partly on water. Possibly as much as 25% of the fuel could be water injected as superheated steam. This same trick can be used with a hot, air breathing furnace but the inert gases in the air prevent full efficiency of the process, and only 2 or 3% of the fuel can be water.

By using oxygen, coke, and steam you might reduce the total coke consumption by nearly half for the same power output. Meaning the exhaust from the plant would have half as much C02 (reduced greenhouse gases) and no nitrous oxides at all.

Since you then would have a really hot fire at your fingertips you might as well go whole hog in optimizing the design.

Throw out all the steam pipes except the ones to supply the steam to the gasifier. In their place substitute a closed cycle gas turbine with helium or C02 as the working fluid. All this shrinks down the entire plant to a fraction of its original size.

It also might be built much faster with modified jet, rocket, and refrigeration parts.

Making all this oxygen at the plant will mean they will have rivers of surplus liquid nitrogen and hot water to sell for cooling and heating purposes. This could help reduce the waste of electricity for these purposes.

And the fuel efficiency of the plant should be VERY HIGH. This same trick can be done with any fuel burning plant that has a high carbon content in the fuel (wood, oil, sewage, sludge, goat manure etc). It will be less effective with natural gas as there is less carbon in it, so only a reduced amount of water can be burned with it. However, pure oxygen can also greatly increase the efficiency of any fuel burning plant by eliminating the inert gases from the system. Convection heat is greatly reduced and radiant heat is greatly increased making even steam plants much smaller for a given output.

If you should have any doubts concerning what is presented here you can ask any of the rocket people at the Cape. They are always quick to tell you how the turbo-pumps on the Space Shuttle Main Engines (about the size of outboard motors) produce 100,000 horsepower each, and could easily light a small city."

RESPONSE: {Note: The following was excerpted from the July 6, 2006 Public Service Commission Staff Analysis for Seminole Unit 3 Need Determination}

"As part of the evaluation process, Seminole hired Burns & McDonnell to assist them in selecting the appropriate technology and provide a detailed, screening level evaluation of the cost of building and operating the preferred alternative. This request initially led to the August 2004 Feasibility Study. This study contains the results of the economic analyses of three alternative self-build projects: A new Brownfield 600 MW sub-critical solid fuel generating unit; a new Brownfield 600 MW supercritical solid fuel generating unit; and a new Greenfield 500 MW gas fired combined cycle unit. Other generating technologies were assessed, but were not considered for new generation at this time due to insufficient operational experience and information on cost and reliability of technology. The study found that the 20 year levelized bus bar cost for the three viable alternatives showed that the supercritical unit was the lowest at $52.77/MWh; sub-critical unit at $52.97/MWh; and combined cycle unit at $75.48/MWh. Seminole's interest in increasing the output of SGS Unit 3 from 600 MW to 750 MW led to the February 2005 Feasibility Study. This study, which is an update of Seminole's August 2004 Feasibility Study, concluded that both the supercritical and sub-critical solid fuel generating units were feasible and would be substantially more economically sized at 750 MW than at 600 MW (the 20 year levelized bus bar cost declined to $48.85/MWh for the supercritical coal unit, and to

$49.15/MWh for the sub-critical coal unit). Both remained far less expensive than a conventional gas fired combined cycle unit. Therefore, Seminole decided that 750 MW of base load capacity should be added in the 2012 time frame. The estimated capital cost for the 750 MW supercritical SGS Unit 3 project is approximately $1.4 billion in 2012 dollars. SGS Unit 3 will be located at Seminole's Generating Station (SGS) on a 1922 acre site in northeast Putnam County, approximately five miles from the City of Palatka. SGS Unit 3 will be a pulverized coal, balanced draft unit employing supercritical steam pressure and temperature with a mechanical draft cooling tower for condenser cooling water. The primary advantages of supercritical steam cycles over sub-critical steam cycles are improved plant efficiency due to elevated operating pressure and temperature, lower emissions and lower fuel consumption. SGS Unit 3 will also employ state-of-the-art emission control equipment to further reduce emissions."

CONCLUSION

The final action of the Department is to issue the permit with no changes from the draft permit.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion for Leave to File a Reply to Seminole Electric's Response to Sierra Club's Motion to Hold Proceedings in Abeyance and Sierra Club's Reply in Support of its Motion to Hold Proceedings in Abeyance were served by United States First Class Mail on the following persons this 13th of November, 2008:

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