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NATURAL RESOURCES DEFENSE COUNCIL;
SOUTHERN ALLIANCE FOR CLEAN ENERGY

July 3, 2008

VIA EMAIL AND US MAIL

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**RE: COMMENTS ON SEMINOLE ELECTRIC COOPERATIVE, INC'S
PROPOSED ADDITION OF NEW UNIT 3**

The Natural Resource Defense Council and the Southern Alliance for Clean Energy respectfully file the comments below on Seminole Electric Cooperative's application for a prevention of significant deterioration ("PSD") permit. These comments address serious Florida Department of Environmental Protection ("FDEP") procedural inconsistencies with federal PSD permitting process requirements; the State's failure to perform a Maximum Achievable Control Technology ("MACT") analysis for Hazardous Air Pollutants ("HAP"s); and the State's obligation to consider and establish emission limitation for CO₂ emissions in the context of the PSD permit's BACT analysis. These comments are appropriate in light of new developments that were not reasonably ascertainable during the original period allowed for public comment. We request that the FDEP specifically deny Seminole Electric Cooperative, Inc.'s ("Seminole"'s) permit

application based on the issues raised in this comment, or alternatively reopen proceedings on Seminole's PSD permit, allow for a supplemental public hearing, correct procedural defects in the permitting process, and specifically address in detail all public comments (including the MACT and CO₂ emission issues raised herein) before taking any final action other than denial.¹

BACKGROUND

On March 9, 2006, Seminole filed an application for a PSD permit with the Florida Department of Environmental Protection ("FDEP"). This proposed facility would add an additional new 750MW coal boiler at a facility that already has 1,300MW of coal-based electricity generation. The facility as a whole will emit almost 30,000 tons of SO₂ per year, more than 23,000 tons of NO_x, and more than a hundred pounds of mercury – a regulated HAP pursuant to section 112 of the Clean Air Act ("CAA"). The new boiler itself would result in a large increase in pollutant emissions, including particulate matter (more than 420 tons per year), CO (more than 4920 tpy), and VOC (more than 73 tpy). And, significantly, the new boiler would emit approximately 6.5 million tons of CO₂ for each year of operation.

On July 3, 2006, FDEP determined that Seminole's application was complete.

On August 24, 2006, FDEP issued a Notice of Intent to Issue an Air Permit, which was

¹ FDEP has issued a Final Order denying Seminole's request for power plant certification [State of Florida Department of Environmental Protection, *In Re: Seminole Electric Cooperative Seminole Generating Station Unit 3 Power Plant Siting Application No. PA 78-10A2: Final Order*, August, 17, 2007]. While the Final Order does not specifically dispose of the PSD permit, we request that FDEP make a specific and distinct determination on the PSD permit that is consistent with the considerations raised herein by denying the Seminole PSD permit. The discussion herein provides significant grounds for denial. If the PSD permit is ever revived, FDEP must specifically address the procedural and substantive issues raised in this comment letter.

published by Seminole in the Palatka Daily News. FDEP provided a period of 30 days from publication for the submission of public comments on the Notice of Intent. FDEP has yet to be issue the PSD permit for the proposed 750 MW coal-fired Seminole unit.

On February 8, 2008, the D.C. Circuit Court of Appeals, in *New Jersey v. EPA*, D.C. Cir. Case No. 05-1097, vacated the EPA's Clean Air Mercury Rule ("CAMR"). In vacating EPA's CAMR, the Court concluded that the Agency had illegally attempted to remove electric generating units ("EGU"s) from the list of source categories established pursuant to CAA § 112(c). Accordingly, EPA's purported "delisting" was ineffectual, and the December 2000 source category listing of EGUs remains in effect.²

The FDEP Notice of Intent to issue a PSD permit for the Seminole coal unit and FDEP's supporting materials do not include a MACT analysis or purport to address FDEP's MACT-related obligations. Nor does the supporting material incorporate any MACT emission limitations or other requirements applicable to mercury or any other HAPs. The FDEP must conduct a full MACT analysis and issue a MACT determination in accordance with CAA section 112(g) and EPA's implementing regulations (see 40 C.F.R. § 63.42-43). This is a free-standing pre-construction obligation that applies whether or not the PSD permit process is complete, but that should be coordinated with the PSD permit.

² As the Court explained:

On December 20, 2000, the Administrator announced — in light of the study mandated by section 112(n)(1)(A), as well as subsequent information and consideration of alternative feasible control strategies — that it was "appropriate and necessary" to regulate coal- and oil-fired EGUs under section 112 because, as relevant, mercury emissions from EGUs, which are the largest domestic source of mercury emissions, present significant hazards to public health and the environment. Regulatory Finding on the Emissions of Hazardous Air Pollutants From Electric Utility Steam Generating Units, 65 Fed. Reg. 79,825, 79,827 (Dec. 20, 2000) ("2000 Determination"). "As a result the source category for Coal- and Oil-Fired [EGUs] was added to the list of source categories under section 112(c)" on December 20, 2000.

Because Seminole has not obtained a final and effective case-by-case MACT determination, any actual construction activity that Seminole undertakes will constitute a violation of the CAA and will subject Seminole to potential enforcement action (including citizen suits under CAA § 304). In light of Seminole's failure to obtain a valid MACT determination, therefore, FDEP should notify Seminole that it may not commence construction and initiate a case-by-case MACT determination proceeding that meets all applicable substantive and procedural requirements.

Additionally, on April 2, 2007, the U.S. Supreme Court issued a decision in *Massachusetts v. EPA* (*Massachusetts v. Environmental Protection Agency*, 127 U.S. 1438, 167 L.Ed.2d 248 (2007)). In its decision, the Court resoundingly rejected the core claims upon which EPA relied to avoid regulating global warming pollutants under the CAA's mobile source emissions control provisions. The first of EPA's claims was that the Agency lacked the legal authority under the CAA to regulate global warming pollutants. The second of EPA's claims was that, even if the Agency had the authority to regulate, it could appropriately decline to do so based entirely on non-statutory policy considerations. As a result of this ruling, on May 14, 2007, President Bush issued an Executive Order acknowledging the Supreme Court decision and committing EPA to work with other federal agencies to propose appropriate regulations under the CAA to address global warming pollutants from mobile sources.³

As we observed in our August, 2007 letter (attached), one implication of the Supreme Court's decision is that CO₂ is now clearly a "pollutant" for purposes of the CAA, and because CO₂ is already "subject to regulation" under the Act (*see* CAA § 821)

³ Exec. Order No. 13,432, 72 Fed. Reg. 27717 (May 14, 2007).

– and subject to further regulation – emission limits for CO₂ must be included in the PSD permit for Seminole’s proposed coal-fired power plant.

DISCUSSION

I. PROCEDURAL CONCERNS

Thus far, the process for evaluating the PSD permit application submitted by Seminole has been procedurally confusing and inconsistent with applicable law. This process has real implications for the substantive adequacy of the permit evaluation and adversely affects the ability of the public to meaningfully participate in decision-making process. FDEP must remedy these regulatory deficiencies in order to ensure that the permit approval process is legally sufficient and provides an adequate opportunity for public participation as required by applicable federal regulations. A detailed discussion is presented below.

Procedural Requirements for Florida PSD Permits

First, major new sources of emissions (or major modifications to existing sources) in Florida must comply with the pre-construction permitting requirements of the Clean Air Act. These requirements are embodied respectively in the Act’s Prevention of Significant Deterioration (“PSD”) and Nonattainment New Source Review (“NNSR”) permitting provisions, depending on whether or not the source is located in an area that is meeting the national ambient air quality standards (“NAAQS”) for a particular pollutant.

See CAA §§ 165, 173. Because Seminole proposes to build its new coal plant in an area that is attaining the NAAQS, the PSD provisions of the CAA are relevant here.

In practice, the CAA's PSD program is typically administered by state permitting agencies.⁴ This can happen in one of two ways. First, a state may have its own PSD program, adopted under state law that U.S. EPA has approved into the state implementation plan ("SIP") that the CAA requires each state have. Second, a state without an approved state PSD program can arrange with U.S. EPA to take delegation of the federal PSD program, and issue federal PSD permits essentially acting in the shoes of the U.S. EPA. See 40 C.F.R. § 52.21(u). In a few states, Florida included, there is a combination of these two approaches whereby PSD permits for some sources are issued under state law, and permits for other sources are issued under the federal PSD permit program pursuant to a delegation of federal authority.

Florida's state PSD program extends to all new major sources and major modifications *except* sources subject to the State's Power Plant Siting Act ("PPSA"). As a result, for any source subject to the PPSA, the state of Florida (through FDEP) issues federal PSD permits under a delegation agreement with the U.S. EPA. This fact is made clear by EPA's October 23, 1993 letter granting full delegation of the federal PSD program for sources subject to the PPSA. Letter from EPA Region IV to Virginia B. Wetherell, *Notice of Full Delegation of PSD Permitting Authority for Power Plants* (Sept. 23, 1993) ("PSD Delegation Letter").

In the PSD Delegation Letter, EPA makes clear that the extent of the State's authority is to administer and apply the federal PSD program, which is embodied in

⁴ There are exceptions to this – for example, when a major source is proposed on Indian Tribal Land the appropriate EPA Regional Office will typically do the CAA permitting.

EPA's regulations at 40 C.F.R. 52.21 (substantive provisions) and 40 C.F.R. § 124 (procedural provisions). In particular, EPA states:

[W]e hereby delegate our authority for all portions of the federal PSD program, as described in 40 C.F.R. § 52.21, to the State of Florida for sources subject to review under the PPSA . . . as follows:

A. * * *

B. EPA delegates to the State of Florida its authority *and procedures* for technical review and evaluation of new sources and public participation pursuant to 40 C.F.R. § 124.3-124.14, and its authority under 40 C.F.R. § 124.15-124.19 to take final action on an application.

C. For purposes of and in accordance with paragraph B above, the State of Florida *shall follow* the procedures in 40 C.F.R. § 124.3-124.19, except that the word "Director" and the phrase "Regional Administrator" shall mean "State Director." . . .

D. This Delegation is based on the following conditions:

1. * * *

2. In accomplishing the delegated PSD review, the State of Florida will apply all applicable federal air permitting rules and follow the applicable federal permitting process. If at any time it is determine that the state rules or statutes prohibit the department from applying any such standard or procedure, the pertinent portion of the delegation may be revoked.

* * * *

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

PSD Delegation Letter at 2-4. Based on this delegation, the FDEP may do nothing more than implement the substantive and procedural framework of the federal PSD program – it may not, for example, substitute a different set of requirements or procedures based on state law.

One unique distinction between an EPA-approved state PSD program and a delegated federal PSD program is the fact that when a state is administering the federal PSD program (acting in the shoes of the Regional Administrator) any appeal of a PSD permit must proceed directly to EPA's Environmental Appeals Board in Washington, D.C. and may not proceed through the state administrative and/or judicial appeal process.⁵

FDEP's Failure to Comply with Applicable Law

With regard to Seminole's permit application, it has been unclear throughout the evaluation process precisely what approval criteria FDEP was applying and what procedural rules it was following. Among the earliest materials that FDEP issued was a letter transmitting a "Notice of Intent" to issue an air permit. *See* Letter from Trina Veilhauer, FDEP Bureau of Air Regulation, to James R. Frauen, Seminole (August 24, 2006) (with attached Written Notice of Intent to Issue Air Permit and Public Notice of Intent to Issue Air Permit). While these materials could reflect an intent to issue a CAA PSD permit,⁶ neither the Letter itself nor the attached materials ever mention the federal CAA, the State's delegation agreement with U.S. EPA, or the applicable federal PSD regulations. Rather, the Letter (and the attached Notices) refer only to Florida Statutes

⁵ Decisions of the EAB may be subsequently appealed to the appropriate federal circuit court.

⁶ For example, the materials refer specifically to the State's preliminary determination of best available control technology (BACT) – a core requirement of federal PSD permits.

and the Florida Administrative Code. While the Florida Code liberally cross references or incorporates the requirements of the federal regulations for PSD permitting, there are some glaring inconsistencies in FDEP's handling of Seminole's permit application when compared to the procedures required under EPA's regulations in 40 C.F.R. § 124.

- Most significantly, FDEP's Public Notice of Intent fails entirely to identify the correct procedure for public participation in the permitting process and for administrative challenge of the PSD permit. The Notice states:

A person whose substantial interests are affected by the proposed permitting decision may petition for an administrative hearing in accordance with Sections 120.569 and 120.57, [Florida Statutes ("F.S.")].

The petition must contain the information set forth below⁷ and must be filed with (received by) the Department's Agency Clerk in the Office of General Counsel of the Department of Environmental Protection, 3900 Commonwealth Boulevard, Mail Station #35, Tallahassee, Florida 32399-3000 (Telephone: 850/245-2241; Fax: 850/245-2303). Petitions filed by any person other than those entitled to written notice under Section

⁷ The relevant provision provides:

A petition that disputes the material facts on which the Permitting Authority's action is based must contain the following information: (a) The name and address of each agency affected and each agency's file or identification number, if known; (b) The name, address, and telephone number of the petitioner; the name, address and telephone number of the petitioner's representative, if any, which shall be the address for service purposes during the course of the proceeding; and an explanation of how the petitioner's substantial interests will be affected by the agency determination; (c) A statement of how and when each petitioner received notice of the agency action or proposed action; (d) A statement of all disputed issues of material fact; If there are none, the petitioner shall so indicate; (e) A concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification of the agency's proposed action; (f) A statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency's proposed action; and, (g) A statement of the relief sought by the petitioner, stating precisely the action the petitioner wishes the agency to take with respect to the agency's proposed action. A petition that does not dispute the material facts upon which the Permitting Authority's action is based shall state that no such facts are in dispute and otherwise shall contain the same information as set forth above, as required by Rule 28-106.301, F.A.C.

120.60(3), F.S., must be filed *within fourteen (14) days of publication of this Public Notice* or receipt of a written notice, whichever occurs first.

Under Section 120.60(3), F.S., however, any person who asked the Permitting Authority for notice of agency action may file a petition within fourteen (14) days of receipt of that notice, regardless of the date of publication. A petitioner shall 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 within the appropriate time period shall constitute a waiver of that person's right to request an administrative determination (hearing) under Sections 120.569 and 120.57, F.S., or to intervene in this proceeding and participate as a party to it.* Any subsequent intervention will be only at the approval of the presiding officer upon the filing of a motion in compliance with Rule 28-106.205, F.A.C.

This procedure directly contradicts the express procedures of 40 C.F.R. § 124.19 by establishing an appeal process that impermissibly circumvents the U.S. Environmental Appeals Board and by adding a significant additional burden to members of the public wishing to participate in a permit proceeding.⁸ Aside from being inconsistent and impermissible on their face, FDEP's procedures are not even arguably equivalent to the procedural requirements embodied in the federal regulations. For example, the State procedure establishes significantly more burdensome time frames – requiring the filing of a petition within *14 days* of the filing of the Public Notice of the Intent to Issue. These procedures also indicate

⁸ Pursuant to EPA's delegation of authority to the State of Florida, the procedures of 40 C.F.R. § 124 were binding upon FDEP at the time of its issuance of this Notice and remain so today.

that missing this deadline will preclude any later involvement in the administrative case or in any subsequent judicial action.⁹

- FDEP's Public Notice of Intent to Issue Air Permit expressly limits participation in any petition challenging the draft permit to individuals "whose substantial interests are affected by the proposed permitting decision." Public Notice of Intent at 2. This limitation is in direct conflict with the provision of 40 C.F.R. § 124, which allows "any interested person" to file comments and allows "any person" who filed comments (or participated in a public hearing) to petition the Environmental Appeals Board for review of any condition of a permit.¹⁰ Because "substantial interests" are a term of art under Florida law,¹¹ this departure from the federal rules is particularly important, as it may prevent otherwise "interested" persons from participating in the process at all.¹²
- FDEP's Public Notice of Intent also suggests that the PSD permitting process has been (or will be) conflated with the state's Power Plant Siting Act process. The Notice states:

⁹ Under the federal PSD program, *any person* has the right to file comments on a draft permit (or participate in a hearing). "After the close of the public comment period under §124.10 on a draft permit, the Regional Administrator shall issue a final permit decision." 40 C.F.R. § 124.15. Thereafter, upon issuance of a final permit, *any person* who filed comments or participated in a hearing may file a petition for review with the EAB. Petitioners have *30 days* from the issuance of a final PSD permit to file their petition with the Board. See 40 C.F.R. § 124.19. Moreover, the federal rules provide that even parties that did not file comments or participate in hearing may appeal a final permit decision "to the extent of the changes from the draft to the final permit decision." 40 C.F.R. § 124.19(a).

¹⁰ There is no valid argument that the term "interested" person under the federal rules is equivalent to Florida's interpretation of "substantially affected interests."

¹¹ Under Florida law to establish that the substantial interests of a party will be determined by an agency, for purposes of the Administrative Procedure Act (APA), "requires a showing that: (1) the proposed action will result in injury-in-fact which is of sufficient immediacy to justify a hearing; and (2) the injury is of the type that the statute pursuant to which the agency has acted is designed to protect." *Fairbanks, Inc. v. State, Dept. of Transp.*, 635 So.2d 58, 59 (Fla. 1st DCA 1994).

¹² It is also unclear whether FDEP's process contains an express provision, as do the federal rules, allowing for the introduction of new issues after the close of the period for public comment where such issues were not reasonably ascertainable during the comment period. See 40 C.F.R. § 124.13. If not, this would constitute another departure that has the effect of limiting meaningful public participation.

For the purposes of judicial review, the Department may, when possible, consolidate a request for administrative hearing on this draft permit within a Power Plant Certification Hearing.

As a result, it is not even entirely clear whether an independent PSD permit hearing, focusing specifically on PSD issues, is available.

- Under the federal rules, upon issuing a draft PSD permit, the permitting authority is required to also issue either a “statement of basis” (pursuant to 40 C.F.R. § 124.7), a Fact Sheet (pursuant to 40 C.F.R. § 124.8), or both. A statement of basis must “briefly describe the derivation of the conditions or the draft permit and the reasons for them.” 40 C.F.R. § 124.7. A fact sheet must “briefly set forth the principal facts and the significant factual, legal, methodological and policy questions considered in preparing the draft permit,” including a description of the facility, the types and quantities of pollutant, the degree of PSD increment consumption, a brief summary of the basis for the draft permits conditions (including legal citations), reasons for denying requested variances, and a description of the procedures for reaching a final decision. 40 C.F.R. § 124.8. Any fact sheet or statement of basis must “be sent to the applicant and, on request, to any other person.” 40 C.F.R. § 124.7(b), 124.8(a). The statement of basis and/or fact sheet (as well as all documents cited therein) are also specifically required to be a part of the administrative record under 40 C.F.R. § 124.9.

However, there is no indication in FDEP’s Notice of Intent or Public Notice

Document that any fact sheet or statement of basis was ever prepared.¹³

¹³ The Notice of Intent identifies available documents as including the draft permit, a technical evaluation and preliminary BACT determination document, the application, and other information submitted by the applicant. See August 24 Fauen Letter, Notice attachments. We note as well that the Public Notice appears

- The federal regulations provide that:

All public notices issued under this part shall contain the following minimum information:

* * *

A brief description of the comment procedures require by §§ 124.11 and 124.12 and *the time and place of any hearing that will be held*, including a statement of procedures to request a hearing (unless a hearing has already been scheduled) and other procedures by which the public may participate in the final permit decision.

FDEP's notice, however, did not include the time and place for any hearing.

Moreover, contrary to the plain language of 40 C.F.R. § 124.11, FDEP's notice suggested that it was within FDEP's discretion to deny a request for hearing based on lack of "sufficient interest." See Public Notice of Intent to Issue Air Permit at 2.¹⁴ FDEP's actions in this regard impermissibly depart from the requirements of the federal law, and have the effect of potentially stifling public involvement in the permitting process.

- Additionally, EPA has acknowledged its obligation to undertake consultation under Section 7 of the Endangered Species Act for any federally issued PSD permit – including any permit issued by a state pursuant to a delegation agreement

to have been publish only in the Palatka Daily News, a paper with a small regional readership (with a circulation of only about 12,000 -15,000) that does not reach all the potentially interested persons in the State of Florida. Thus, the adequacy of the public notice itself is in question.

¹⁴ In fact, the public has an absolute right to a public hearing under the EPA's regulations if one is requested – a member of the public need not demonstrate that there is "sufficient interest" in a public hearing in order to trigger the right to be heard. The *only* limitation on requests for public hearings is that they must be in writing and must state the nature of the issues proposed to be raised.

like the one that Florida is currently operating under.¹⁵ Here, it appears that there has been no such consultation whatsoever.

Clearly, FDEP has not followed the appropriate federal procedural rules in handling this permit application. Indeed, it is difficult to determine whether in fact the permit notice was intended to effectuate the issuance of a federal PSD permit at all¹⁶ -- and regardless of intent, the process that FDEP has followed cannot effectuate the issuance of a federal PSD permit. This failure to comply with applicable law has limited involvement in the administrative process, and created significant and impermissible barriers to public participation.

The harm to the public is ongoing -- as many members of the public may have failed to become involved as a result of FDEP's failure to conform to the applicable federal rules. Public participation may have been prejudiced due to the perceived burden associated with participation in the process that FDEP described in its initial notice; due to lack of notice resulting from the limited publication of notice documents; due to lack of information resulting from the absence of a conforming statement of basis or fact sheet; due to perceived standing restrictions resulting from FDEP's impermissibly narrow description of a "substantial interest" standing requirement; or due to the inability to meet FDEP's impermissibly truncated deadline for filing an appeal. As a result of the State's procedural errors, any such members of the public are now nominally precluded from participating in the administrative process.

¹⁵ See *In re Prairie State*, PSD Appeal 05-05 (Aug. 24, 2006).

¹⁶ States have an obligation to sufficiently distinguish federal and state permitting activities so that the public can understand what administrative actions are taking place and what action is required on their part to meaningfully participate. See, e.g., *In re Amerada Hess Corp.*, PSD Appeal 04-03 (Feb. 1, 2005). In this case, at best FDEP was being intentionally vague about the nature of the process and what was required of the public to fully participate. If FDEP itself was uncertain what procedural requirements would ultimately apply, it should have specifically addressed this issue to give the public the information necessary to decide when, where, and how to participate. FDEP's failure to do so constitutes a significant procedural error that prejudices the entire permitting process.

Additionally, the EPA has conceded that FDEP's existing PSD permitting process is inconsistent with federal rules and therefore cannot even provide a valid basis for issuing a *state* PSD permit. Specifically EPA recently proposed to issue a *conditional* SIP approval of Florida's state PSD program, contingent on the state making certain revisions to Florida state laws governing the issuance of PSD permits.¹⁷ The EPA explained:

[a]lthough EPA has determined that some of the differences in Florida's PSD program are acceptable, some differences are not consistent with the federal rules. Therefore, EPA has determined that Florida's PSD program *does not meet all the program requirements for the preparation, adoption and submittal of implementation plans for the Prevention of Significant Deterioration of Air Quality, set forth at 40 CFR 51.166 and revisions are necessary for full approval.*¹⁸

The EPA mandated the following changes in the Florida PSD process as a precondition to full approval of the State's PSD program:

Florida must (1) revise the definition of "new emissions unit" to be consistent with the federal definition or revise the definition to define what is meant by "beginning normal operation" and provide an equivalency demonstration supporting the revised definition; (2) revise the definition of "significant emissions rate" to include ozone depleting substances; (3) withdraw the request that EPA include a significant emissions rate for mercury in the Florida SIP, specifically section 200.243(a) 2 of F.A.C. Chapter 62-210; and (4) revise the recordkeeping requirements at 62-212.300 to be consistent with federal requirements.¹⁹

However, even were EPA to finalize its conditional approval of Florida's PSD program, this would not and could not retroactively remedy the procedural flaws in the permitting process for Seminole's proposed new unit.

The rules that have applied thus far, and that still apply today, are embodied in the federal regulations addressing the issuance of federal PSD permits – rules that FDEP has

¹⁷ See 73 Fed. Reg. 18466, April 4, 2008.

¹⁸ *Id.* at 18469

¹⁹ *Id.* at 18473

utterly failed to follow. Thus, FDEP cannot now issue a valid federal PSD permit.

Similarly, EPA has specifically found that the rules that FDEP appears to have followed in this instance do “not meet all the program requirements for the preparation, adoption and submittal of implementation plans for the Prevention of Significant Deterioration of Air Quality, set forth at 40 CFR 51.166” and therefore cannot, without changes, support the full approval of Florida’s state PSD program. In short, FDEP may not simply pretend that the federal requirements do not now apply, nor may the state rely on application of an un-approved (and un-approvable) state PSD program in lieu of the federal program without revisiting the permit afresh under an EPA-approved PSD program. Accordingly, FDEP has followed neither a valid federal PSD process nor a valid and approvable state PSD process, the very foundation of Seminole’s PSD permit is inherently unstable.²⁰

In light of the procedural concerns outlined above, in order to validly issue a federal or state PSD permit, FDEP must re-notice the PSD permit, clearly explain the status of Florida’s PSD program and the available regulatory options, and transparently follow the appropriate procedural rules for public participation, hearing, information dissemination, and appeals, and appropriately apply the applicable substantive standards and requirements. Additionally, before it may initiate any state PSD permit process, Florida must incorporate the requirements cited in EPA’s proposed conditional SIP approval and await a final EPA approval of the state’s PSD program.

II. OBLIGATION TO PERFORM MACT ANALYSIS

New Jersey v. EPA requires a MACT determination

²⁰ Indeed, the process at this point is so hopelessly confused that the only way to salvage the PSD permit exercise is to start over from the beginning with a clear and open explanation of the status of Florida’s PSD program and the available regulatory options.

On February 8, 2008, the D.C. Circuit Court of Appeals held that EPA improperly attempted to remove coal-fired power plants from the section 112 (c) list of source categories subject to CAA requirements for hazardous air pollutant emission reduction standards. *New Jersey v. Environmental Protection Agency*, No. 05-1097, slip op. at 17 (D.C. Cir. 2008). The Court's decision made clear that because EPA's attempted delisting was illegal, relevant sources remain listed under section 112 of the CAA.²¹ As a result, permitting agencies, including FDEP, must perform a full case-by-case MACT analysis for all new and modified EGU's to ensure appropriate MACT level control of mercury and other HAPs..

In vacating EPA's "clean air mercury rule ("CAMR")," the Court acknowledged that the Agency had illegally attempted to remove EGUs from the list of source categories established pursuant to CAA § 112(c). Accordingly, EPA's purported "delisting" was ineffectual, and the December 2000 source category listing of EGUs remains in effect. Specifically, in vacating EPA's delisting decision and the associated CAMR, the Court concluded:

[I]n view of the plain text and structure of section 112, we grant the petitions and vacate the Delisting Rule. *See Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). This requires vacation of CAMR's regulations for both new and existing EGUs. EPA promulgated the CAMR regulations for existing EGUs under section 111(d), but under EPA's own interpretation of the section, it cannot be used to regulate sources listed under section 112; EPA thus concedes that if EGUs *remain listed under section 112, as we hold*, then the CAMR regulations for existing sources must fall. Resp't Br. at 99, 101-02; see also Delisting Rule, 70 Fed. Reg. at 16,031.

Because EGUs are a listed category of major source under CAA § 112(c), because

²¹ The court's decision also constitutes an intervening event that justifies the submission of these comments at this time.

EPA's attempt to delist this source category was illegal and ineffectual, and because the triggering criteria for applicability of CAA § 112(g) has been satisfied (i.e., the "effective date of a permit program under subchapter V"), it is clear that the proposed Seminole coal plant may not move forward unless and until FDEP performs a comprehensive MACT analysis, and establishes case-by-case emission limitations for each HAP that the facility would emit, and ensures that the facility will meet those limits. Consistent with the express requirements of section 112(d), these standards must reduce emissions of HAPs to the greatest degree achievable, and may be no less stringent than "the emission control that is *achieved in practice* by the best controlled similar source."²²

Neither the Notice of Intent to Issue an Air Permit for the Seminole plant (that FDEP issued on August 24, 2006), nor any of FDEP's supporting materials, include a MACT analysis or purport to address the Act's MACT-related provisions. Nor does the Notice of Intent to Issue and Air Permit or any FDEP supporting material incorporate any MACT emission limitations or other requirements applicable to mercury and other HAPs.²³

We note that the EPA Regulatory Finding upon which EPA's listing decision was based states that "Coal- and oil-fired electric utility steam generating units ... emit a *significant number of the 188 HAP on the section 112(b) list.*" 65 Fed. Reg. 79825,

²² The D.C. Cir. has issued numerous opinions that directly address the Agency's obligations when adopting standards under section 112(d). See *National Min. Ass'n v. E.P.A.*, 59 F.3d 1351 (D.C. Cir. 1995); *National Lime Ass'n v. E.P.A.*, 233 F.3d 625 (D.C. Cir. 2000); *Cement Kiln Recycling Coalition v. E.P.A.*, 255 F.3d 855 (D.C. Cir. 2001); *Sierra Club v. E.P.A.*, 353 F.3d 976 (D.C. Cir. 2004); *Mossville Environmental Action Now v. E.P.A.*, 370 F.3d 1232 (D.C. Cir. 2004); *Sierra Club v. Environmental Protection Agency*, 479 F.3d 875 (D.C. Cir. 2007); *Natural Resources Defense Council v. E.P.A.*, 489 F.3d 1364 (D.C. Cir. 2007). FDEP's identification of MACT limitations for the Seminole facility must be consistent with the D.C. Circuit's guidance regarding the establishment of MACT standards under section 112(d) as expressed in these cases.

²³ See FDEP Seminole supporting air permitting material at http://www.dep.state.fl.us/Air/permitting/construction/seminole_palatka.htm

79827-79828 (Dec. 20, 2000) (emphasis added). EPA has developed a “selected” listing of approximately 67 hazardous air pollutants emitted by coal-fired power plants that includes, in addition to mercury, toxics like arsenic, beryllium, cadmium, chromium, dioxins, lead, and manganese. 65 Fed. Reg. 79825, 79828 (Dec. 29, 2000); see also U.S. Environmental Protection Agency, *Study of Hazardous Air Pollutant Emissions from Electric Utility Steam Generating Units—Final Report to Congress* (“Utility Study”), ES 1-2 (Feb. 1998). The D.C. Circuit Court of Appeals has specifically recognized EPA’s “clear statutory obligation to set emissions standards for *each* . . . HAP [listed in CAA §112(b)].” *National Lime Ass’n v. EPA*, 233 F.3d 625, 634 (D.C. Cir. 2000). Thus, the MACT determination for the Seminole facility must *specifically address* all of the 67 (or more) hazardous air pollutants the Seminole plant may emit.

Because FDEP has yet to address HAP emissions from the proposed facility whether or not FDEP reopens the PSD portions of the CAA approval for the plant (which it should) *construction may not begin* until the Agency has performed a robust MACT analysis, provided an opportunity for public notice and comment (consistent with applicable EPA regulations), and adopted final HAP emissions limitations that fully comply with the requirements of section 112(d) and 112(g).

Moreover, were Seminole to begin construction of the proposed unit without first obtaining a valid MACT determination for all HAPs that the facility will emit, such activity would constitute a clear violation of the Act, and would subject Seminole to a possible CAA enforcement action.

FDEP Must Reopen the PSD Permit Analysis for Seminole

Finally, a robust MACT analysis and strict MACT limitations for mercury and

other HAPs are likely to require changes to facility design and/or operational parameters. As a result, the detailed analysis of emissions performance and other environmental implications of the project required under the PSD program may no longer be fully accurate. Among other things, use of activated carbon injection to remove mercury from the flue gas would result in elevated levels of mercury and other toxins in the solid waste produced by the proposed plant.²⁴ These solid wastes will need to be properly disposed of, and may pose a serious threat to groundwater resources if managed improperly. Among other things, MACT-related controls could also affect the facility's water use profile, change energy demands, facilitate greater control of non-HAP emissions, and require or preclude the use of certain design criteria, fuel, pollution control equipment, or work practices. As a result, in addition to the procedural reasons outlined above, FDEP should specifically reopen the PSD permit process for the proposed Seminole plant in order to specifically coordinate MACT and PSD-related analyses.²⁵

In order to ensure that the PSD permit requirements continue to reflect the greatest degree of emission reduction achievable, pursuant to the criteria of CAA § 165

²⁴ In its 2000 Regulatory Determination on Wastes from the Combustion of Fossil Fuels, EPA anticipated that an increase in the toxicity of CCW could result from the more stringent regulation of power plant hazardous air emissions under the Clean Air Act. EPA pledged: "We will reevaluate risk posed by managing coal combustion solid wastes if levels of mercury or other hazardous constituents change due to any future Clean Air Act air pollution control requirements for coal burning utilities." 65 Fed. Reg. 32,221. In a subsequent 2006 Study, EPA demonstrated such heightened risk, especially from arsenic and selenium, from CCW generated by coal-fired power plants with activated carbon injection. US EPA. *Characterization of Mercury-Enriched Coal Combustion Residues from Electric Utilities Using Enhanced Sorbents for Mercury Control*, EPA/600/R-06/008 (January 2006) (finding that arsenic may leach at levels 100 times its maximum contaminant level (MCL) and selenium at levels up to 200 times its MCL). In a report to be released later this year, EPA will address CCW generated by coal-fired power plants employing wet scrubbers – preliminary data indicate that toxic metals in CCW from these plants are also cause for concern. U.S. EPA, Office of Research and Development. "Evaluating the Fate of Metals from Management of Coal Combustion Residues from Implementation of Multi-Pollutant Controls at Coal-Fired Electric Utilities," Presentation for 32nd Annual EPA-A&WMA Information Exchange, December 4, 2007.

²⁵ Among other things, this coordinated federal regulatory assessment may provide additional justification for conducting a robust evaluation of alternatives to the project (both under BACT and under CAA § 165(a)(2)).

and 169, and to ensure that all other environmental impacts are appropriately considered, FDEP must reexamine the PSD permit limits and other permit conditions in light of the MACT analysis required by section 112(g). Additionally, FDEP must provide the public with an opportunity to comment on EPA's conclusions regarding the affect that compliance with section 112(g) will have on the appropriateness of the project and on the level of stringency of the emission limits under section 165.

III. OBLIGATION TO ESTABLISH CO₂ LIMITATIONS

Mass v. EPA requires establishment of CO₂ limits

On April 2, 2007, the Supreme Court's issued its landmark ruling in *Massachusetts v. EPA*, overturning EPA's impermissible interpretation of the CAA, which that Agency had relied upon to avoid regulating greenhouse gases. *Massachusetts v. Environmental Protection Agency*, 127 U.S. 1438, 167 L.Ed.2d 248 (2007). The Court explained:

Because EPA believes that Congress did not intend it to regulate substances that contribute to climate change, the agency maintains that carbon dioxide is not an "air pollutant" within the meaning of the provision.

The statutory text forecloses EPA's reading. The Clean Air Act's sweeping definition of "air pollutant" includes "any air pollution agent or combination of such agents, including any physical, chemical ... substance or matter which is emitted into or otherwise enters the ambient air...." § 7602(g) (emphasis added). On its face, the definition embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word "any." Carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are without a doubt "physical [and]

chemical ... substance [s] which [are] emitted into ... the ambient air.” The statute is unambiguous

As a result of the Court’s finding that CO₂ and other global warming pollutants are “pollutants” for purposes of the clean air act, these substances are pollutants “subject to regulation under the Act” as this phrase is used in the PSD provisions of the Act. Therefore, the Court’s decision triggers the obligation for permitting agencies, including FDEP, to include carbon dioxide emission limits in PSD permits. 40 C.F.R. § 52.21(b)(50)(iv).²⁶

It is now clear that there is a strong link between human activities, an increase in global warming pollutants (like CO₂), and changes in the global climate. It has also become clear that CO₂ is a harmful pollutant that endangers public health, the environment, species, ecosystems, and human economic and physical welfare. In addition to the Supreme Court decision in Mass v. EPA, there have been other important, and complimentary, developments in our understanding of global warming and its impacts. In February 2007 (after the close of the comment period for the Seminole project) the Intergovernmental Panel on Climate Change (“IPCC”) released a summary of the contribution of Working Group I to its Fourth Assessment Report. The Summary concludes, among other things:

- The global atmospheric concentration of carbon dioxide has increased from a pre-industrial value of about 280 ppm to 379 ppm in 2005;
- The atmospheric concentration of carbon dioxide in 2005 exceeds by far the natural range over the last 650,000 years;

²⁶ The Court’s decision also constitutes an intervening event that justifies the submission of these comments at this time. Moreover, the undersigned have raised these issues already in a letter submitted in November 2007, and have received no response from FDEP.

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- The primary source of the increased atmospheric concentration of carbon dioxide since the pre-industrial period results from fossil fuel use;
 - There is at least a 9 out of 10 chance that the global average net effect of human activities since 1750 has been one of warming;
 - Warming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice, and rising global average sea level;
 - At continental, regional and ocean basin scales, numerous long term changes have been observed. These include changes in arctic temperatures and ice, widespread changes in precipitation amounts, ocean salinity, wind patterns and aspects of extreme weather including droughts, heavy precipitation, heat waves and the intensity of tropical cyclones;
 - There is greater than a 90% likelihood that most of the observed increases in global average temperatures since the mid-20th century are due to the observed increases in anthropogenic greenhouse gas emissions;
 - For the next two decades, warming of about 0.2 Degrees Celsius per decade is projected for a range of emission scenarios;
 - There is greater than a 90% likelihood that hot extremes, heat waves and heavy precipitation events will continue to become more frequent; and
 - Anthropogenic warming and sea level rise would continue for centuries due to the time scales associated with climate processes and feedbacks, even if greenhouse gas concentrations were to be stabilized.

In April 2007, the IPCC also released a Summary of the Contribution of Working Group II to its Fourth Assessment Report. This Summary concludes, among other things:

- Temperature increases have had effects on agriculture and forestry management at Northern Hemisphere higher latitudes;
- Drought-affected areas will likely increase in extent. Heavy precipitation events which are very likely to increase in frequency, will augment flood risk; and
- In North America, major challenges are projected for crops that are near the warm end of their suitable range or depend on highly utilized water resources.

Moreover, in May 2008, EPA participated in the release of a report prepared by the Committee on Environment and Natural Resources National Science and Technology Council, entitled “Scientific Assessment of the Effects of Global Change on the United States,” which reached many of the same conclusions outlined above.²⁷

Absent any emission limitations, the Seminole plant will emit some 6.5 million tons of carbon dioxide every year (more than 325 million tons over the 50-plus year life of the facility). FDEP’s failure to establish CO₂ BACT limits for sources that are among the largest and longest-lived greenhouse gas emitters is inconsistent with applicable law and reflects bad policy from both a state and federal perspective.²⁸ Despite the Supreme Court ruling, and the clear evidence of harm from CO₂ emissions and global warming, and other developments, FDEP did not reexamine Seminole’s PSD permit to specifically identify a best available control technology limit for CO₂ emissions, or to otherwise address CO₂ emissions from the proposed Seminole facility.

²⁷ Available at: <http://www.climate-science.gov/Library/scientific-assessment/>.

²⁸ This failure is not only sufficient to provide grounds for administrative review, it is also inconsistent as a policy matter with the major policy undertakings of Florida’s leadership led by Governor Crist – it would be contrary to sensible energy and climate planning for FDEP to proceed with issuing this permit without the benefit of insights of the State’s current policy endeavors.

A. The Clean Air Act Requires BACT For Each Pollutant “Subject to Regulation”

The Clean Air Act prohibits the construction of a new major stationary source of air pollutants except in accordance with a prevention of significant deterioration (PSD) construction permit. 42 U.S.C. § 7475(a); 40 C.F.R. §52.21(a)(2)(iii).²⁹ A PSD permit must include a BACT limit “for each pollutant subject to regulation under [the Clean Air Act]” for which emissions exceed specified significance levels. 42 U.S.C. §§ 7475(a), 7479; 40 C.F.R. §§ 52.21(b)(1), (b)(2), (b)(12), (b)(50), (j)(2). BACT, in turn, is required “for each regulated NSR pollutant that it would have the potential to emit in significant amounts.” 40 C.F.R. § 52.21(j)(1) (emphasis added). Section 52.21(b)(50) defines “Regulated NSR pollutant” as the following:

- (i) Any pollutant for which a national ambient air quality standard has been promulgated and any constituents or precursors for such pollutants identified by the Administrator (e.g., volatile organic compounds are precursors for ozone);
- (ii) Any pollutant that is subject to any standard promulgated under Section 111 of the Act;
- (iii) Any Class I or Class II substance subject to a standard promulgated under or established by title VI of the Act; or
- (iv) Any pollutant that otherwise is subject to regulation under the Act; except that any or all hazardous air pollutants either listed in section 112 of the Act or added to the list pursuant to section 112(b)(2) of the Act, which have not been delisted pursuant to section 112(b)(3) of the Act, are not regulated NSR pollutants unless the listed hazardous air pollutant is also regulated as a constituent or precursor of a general pollutant listed under section 108 of the Act.

40 C.F.R. § 52.21(b)(50) (emphasis added). The statutory and regulatory definitions of BACT similarly applies to all air pollutants “subject to regulation” under the Act:

²⁹ As discussed above, Florida now administers the federal PSD program through a delegation agreement with U.S. EPA. Accordingly, Florida is subject to and bound by the specific provisions of the federal PSD program, as embodied in the Code of Federal Regulations, and the precedent of rulings by the EAB.

Best available control technology means an emissions limitation (including a visible emission standard) based on the maximum degree of reduction for each pollutant subject to regulation under Act which would be emitted from any proposed major stationary source or major modification which the Administrator, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant.

40 C.F.R. § 52.21(b)(12) (emphasis added); see also 42 U.S.C. 7479(3). In short, a PSD permit must include a BACT limit for each pollutant subject to regulation. See 42 U.S.C. § 42 U.S.C. §§ 7475(a). This reading of the Act was recently confirmed by a Georgia state court, which found that Georgia's Department of Natural Resources had impermissibly failed to adopt a BACT limit for CO₂ in the PSD permitting process for the proposed Longleaf coal plant in Early County, Georgia.³⁰

B. Carbon Dioxide is a Pollutant Subject to Regulation Under the Act

Carbon dioxide is a "pollutant," as that term is used in the Clean Air Act and the PSD regulations. Section 302(g) of the Clean Air Act defines "air pollutant" expansively to include "any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters into the ambient air." 42 U.S.C. § 7602(g) (emphasis added).

The Clean Air Act's sweeping definition of "air pollutant" includes "any air pollution agent or combination of such agents, including *any* physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air" §7602(g) (emphasis added). On its face, the definition embraces all airborne compounds of whatever stripe, and underscores that intent through the

³⁰ *Friends of the Chattahoochee v. Couch*, Docket No. 2008CV146398, Superior Court of Fulton County (June 30, 2008).

repeated use of the word “any.” Carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are without a doubt “physical [and] chemical . . . substance[s] which [are] emitted into . . . the ambient air.” The statute is unambiguous.

127 U.S. 1438, 1460 (emphasis in original). The Court, also clearly recognized the fact that CO₂ (among other things) contributes to global warming, and the fact that global warming poses a significant threat to public health, welfare, and the environment.

Other entities (such as the IPCC) have also recognized the enormous potential for health, environmental, and economic harm from global warming. EPA itself recognizes that global warming is likely to have numerous and particularly severe adverse public health and environmental consequences, including direct heat-related effects, extreme weather events, climate-sensitive disease impacts, air quality effects, agricultural effects (and related impacts on nutrition), wildlife and habitat impacts, biodiversity impacts, impacts on marine life, economic effects, and social disruption (such as population displacement).³¹ Indeed, numerous studies directly link global warming with increases in a variety of serious environmental, health, economic, and ecological impacts.³²

³¹ See <http://www.epa.gov/climatechange/effects/health.html>.

³² Reports in late 2006 suggest that global warming is likely to cause extreme events that will damage ecosystems, harm public health, and disrupt society well before the end of the century. <http://www.commondreams.org/headlines06/1021-01.htm>. See, also http://www.pewclimate.org/global-warming-in-depth/environmental_impacts/reports/ (with links to the following studies: Observed Impacts of Climate Change in the U.S., Coping With Global Climate Change: The Role of Adaptation in the United States, A Synthesis of Potential Climate Change Impacts on the United States, Coral Reefs & Global Climate Change: Potential Contributions of Climate Change to Stresses on Coral Reef Ecosystems, Forests & Global Climate Change: Potential Impacts on U.S. Forest Resources, Coastal and Marine Ecosystems and Global Climate Change: Potential Effects on U.S. Resources, Aquatic Ecosystems and Global Climate Change: Potential Impacts on Inland Freshwater and Coastal Wetland Ecosystems in the United States, Human Health & Global Climate Change: A Review of Potential Impacts in the United States, Ecosystems & Global Climate Change: A Review of Potential Impacts on U.S. Terrestrial Ecosystems and Biodiversity, Sea-Level Rise & Global Climate Change: A Review of Impacts to U.S. Coasts, Water and Global Climate Change: Potential Impacts on U.S. Water Resources, The Science of Climate Change: Global and U.S. Perspectives, Agriculture & Global Climate Change: A Review of Impacts to U.S. Agricultural Resources). These studies are incorporated here by reference.

Moreover, a recent assessment of global warming's economic impacts concluded that the economic and social welfare impacts of global warming will be profound.³³

The term "subject to regulation" as that term is used in the Act and the PSD regulations means not only pollutants that are currently regulated, but pollutants that EPA has an obligation to regulate or for which EPA and the states possess but have not exercised authority to impose specific requirements. Notably, carbon dioxide meets either test – it is currently regulated and it is subject to further regulation under the Act.

i. Carbon Dioxide Is Currently Regulated Under the Act.

Even if the term "subject to regulation" in the Act and 40 C.F.R. § 52.21(b)(50) were limited to pollutants that are currently regulated under another Clean Air Act provision, a BACT limit for carbon dioxide is required because Carbon dioxide is currently regulated under the Clean Air Act's acid rain provisions. Given that the Supreme Court has announced that CO₂ is also a "pollutant" under the Act, this combination of factors means that CO₂ is a pollutant subject to regulation and therefore must be treated as an NSR pollutant under the PSD program.

Section 821 of the Clean Air Act Amendments of 1990 directed EPA to promulgate regulations to require certain sources, including coal-fired power plants, to monitor carbon dioxide emissions and report monitoring data to EPA. 42 U.S.C. § 7651k note. In 1993, EPA promulgated such regulations, which are set forth at 40 C.F.R. Part 75. The regulations generally require monitoring of carbon dioxide emissions through the installation, certification, operation and maintenance of a continuous emission monitoring system or an alternative method (40 C.F.R. §§ 75.1(b), 75.10(a)(3));

³³ See STERN REVIEW ON THE ECONOMICS OF CLIMATE CHANGE, available at: http://www.hm-treasury.gov.uk/Independent_Reviews/stern_review_economics_climate_change/sternreview_index.cfm. (incorporated by reference here).

preparation and maintenance of a monitoring plan (40 C.F.R. § 75.33); maintenance of certain records (40 C.F.R. § 75.57); and reporting of certain information to EPA, including electronic quarterly reports of carbon dioxide emissions data (40 C.F.R. §§ 75.60 – 64). See e.g., *Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976) (finding record keeping and reporting requirements to be regulation, albeit permissible regulation, of speech). 40 C.F.R § 75.5 prohibits operation of an affected source in the absence of compliance with the substantive requirements of Part 75, and provides that a violation of any requirement of Part 75 is a violation of the Clean Air Act. Additionally, other CAA provisions and EPA's implementing regulations apply to these CO₂ monitoring, recordkeeping, and reporting requirements – like the Act's criminal violation provisions and citizen suit provisions. Thus, carbon dioxide is already regulated under the Act, and under EPA's existing regulations, as part of the Acid Rain provisions.³⁴

³⁴ Additionally, under the existing landfill gas regulations adopted under section 111 of the CAA, EPA has already specifically justified emissions regulations based on the climate-related impacts of greenhouse gases. In the rulemaking adopting requirements to reduce "landfill gas emissions," EPA defines landfill gas as "a gaseous by-product of the land application of municipal refuse typically formed through the anaerobic decomposition of waste materials and composed principally of methane and CO₂." 40 C.F.R. §§ 60.4248, 63.6175, 63.6675. EPA's rules then require "control" of landfill gas emissions. 40 C.F.R. § 60.752. In adopting these regulations, EPA specifically found that GHG emissions (in the form of methane and "CO₂ equivalents") endanger public health and welfare, and relied in part on the health and welfare benefits associated with GHG emission reductions to justify its final rule:

Briefly, specific health and welfare effects from [Landfill Gas] emissions are as follows: NMOC [non-methane organic compounds] contribute to ozone formation; some NMOC are known or suspected carcinogens, or cause other noncancer health effects; NMOC can cause an odor nuisance; methane emissions present a well-documented danger of fire and explosion on-site and off-site, and contribute to global climate change as a major greenhouse gas. Today's rules will serve to significantly reduce these potential problems associated with LFG emissions.

* * *

The Climate Change Action Plan, signed by the President in October, 1993, calls for EPA to promulgate a "tough" landfill gas rule as soon as possible. *This initiative also supports a more stringent emission rate cutoff that will achieve greater emission reduction.*

* * *

The additional methane reductions achieved by this option are also an important part of the total carbon reductions identified under the Administration's 1993 Climate Change Action Plan. *The EPA thus concludes that the chosen alternative is the most cost-effective to achieve the objectives of section 111 . . .*

* * *

ii. *Carbon Dioxide Is Subject to Further Regulation Under the Act.*

Notably, it is not required that carbon dioxide emissions be limited by existing regulations for carbon dioxide to be “subject to” regulation under the Clean Air Act. “Subject to” means “capable of being regulated” and not “currently regulated.” EPA itself has recognized the general principle that “[t]echnically, a pollutant is considered regulated once it is *subject to regulation* under the Act. A pollutant *need not be specifically regulated* by a section 111 or 112 standard to be considered regulated. (See 61 FR 38250, 38309, July 23, 1996.)” See RULES and REGULATIONS, ENVIRONMENTAL PROTECTION AGENCY, 40 CFR Part 70, Change to Definition of Major Source Tuesday, 66 Fed. Reg. 59161 (Nov. 27, 2001) (emphasis added).³⁵

There is a general concern within the scientific community that the increasing emissions of greenhouse gases could lead to climate change, although the rate and magnitude of these changes are uncertain.

In conclusion, while the social benefits of the rule have not been quantified, *significant health and welfare benefits are expected to result* from the reduction in landfill gas emissions caused by the rule.

See Standards of Performance for New Stationary Sources and Guidelines for control of Existing Sources: Municipal Solid Waste Landfills (Tuesday, March 12, 1996), 61 Fed. Reg. 9905, 9906, 991, 9914, 9917 (emphasis added). The proposed rule similarly evinced an intent to target GHGs:

In comparison to the President's proposed initiative of planting a billion trees a year in response to climate change, based on carbon dioxide (CO₂) emissions, EPA has roughly estimated (in 1992 dollars) that 1.1 to 2.0 billion trees would need to be planted at a cost of 0.57 to 1.1 billion dollars in order to achieve *an equivalent reduction in CO₂ as achieved by today's proposal*. While EPA has attempted to quantify the relationship between the President's tree planting initiative and the *equivalent CO₂ reduction achievable in this proposal*, it should be noted that ancillary benefits associated with planting trees (such as the establishment of shade and wildlife habitat) could not be quantified.

Carbon dioxide is also an important greenhouse gas contributing to climate change. Under the proposed standard, annual CO₂ emissions would increase, proportional to the relative use of flares compared to energy recovery for control. It should be noted, however, that methane contributes considerably more to climate change on a weight basis than CO₂. *Thus, the reduction of methane emissions is expected to have a positive impact on global climate change.*

56 Fed. Reg. 24468 at 24472 (emphasis added).

³⁵ Indeed, this principle only makes sense. For example, section 112(b) of the Act specifically lists more than 180 chemicals which it defines as “hazardous air pollutants” from stationary sources for purposes of section 112. However, whether or not EPA ever adopts any stationary source rule with actual emission limitations for an individual chemical, all of these chemicals are “subject to regulation” under the Act (however they are expressly excluded from NSR/PSD). In the wake of the Supreme Court’s recent decision, CO₂ must similarly be understood as “subject to regulation.”

Also, EPA has previously interpreted the phrase “subject to” in the context of the Resource Conservation and Recovery Act (RCRA) and Clean Water Act as meaning “should” be regulated, as opposed to currently regulated:

RCRA section 1004(27) excludes from the definition of solid waste “solid or dissolved materials in ... industrial discharges which are point sources subject to permits under [section 402 of the Clean Water Act].” For the purposes of the RCRA program, EPA has consistently interpreted the language “point sources *subject to permits* under [section 402 of the Clean Water Act]” to mean point sources that *should have* a NPDES permit in place, whether in fact they do or not. Under EPA’s interpretation of the “subject to” language, a facility that should, but does not, have the proper NPDES permit is in violation of the CWA, not RCRA.

Memo from Michael Shapiro and Lisa Friedman (OGC) to Waste Management Division Directors, *Interpretation of Industrial Wastewater Discharge Exclusion from the Definition of Solid Waste* at 2, (Feb. 17, 1995) (emphasis added).³⁶

Under both Sections 111 and 202, carbon dioxide can be regulated and, indeed, should be regulated. Section 202 of the Act requires EPA to set standards applicable to emissions of “any air pollutant” from motor vehicles, and Section 111 requires EPA to establish standards of performance for emissions of “air pollutants” from new stationary sources. 42 U.S.C. §§ 7411, 7521. Regulation under both programs is required where air pollution “may reasonably be anticipated to endanger public health or welfare.” 42 U.S.C. § 7411(b)(1)(A); 42 U.S.C. § 7521(a)(1).

As mentioned above, on May 14, 2007, President Bush issued an Executive Order confirming that in light of the Supreme Court’s ruling that EPA can regulate greenhouse gases, including carbon dioxide, from motor vehicles, nonroad vehicles and nonroad

³⁶ The EPA memo is available at: [http://yosemite.epa.gov/osw/rcra.nsf/ea6e50dc6214725285256bf00063269d/C8FA9634A91B9FE08525670F006BF1ED/\\$file/11895.pdf](http://yosemite.epa.gov/osw/rcra.nsf/ea6e50dc6214725285256bf00063269d/C8FA9634A91B9FE08525670F006BF1ED/$file/11895.pdf) (last visited July 6, 2007).

engines under the Clean Air Act.³⁷ The Executive Order directs EPA to coordinate with other federal agencies in undertaking such regulatory action. The President's action strongly suggests that the Chief Executive is of the opinion that carbon dioxide is a "pollutant" and must be further regulated under the Clean Air Act.³⁸

Because carbon dioxide is currently regulated under the acid rain provisions of the Act, and has been acknowledged as a "pollutant" by the Supreme Court, EPA, and the President of the United States, it is currently a pollutant "subject to regulation" under the Act. Additionally, CO₂ is "subject to regulation" because it can and likely must be regulated under one or more additional Clean Air Act programs, including section 111 and 202.³⁹ As a result, CO₂ is an NSR pollutant, and permit issuers must establish emission limitations for CO₂ in conjunction with PSD permits.

³⁷ <http://www.whitehouse.gov/news/releases/2007/05/20070514-2.html> (last visited July 5, 2007).

³⁸ Indeed, in other contexts EPA has specifically acknowledged that the impact of global warming pollutants is an important consideration for potential new sources. See Letter from EPA Region 8 to Charles Richmond, Forest Supervisor Gunnison National Forest (June 1, 2007). This letter relates to an Environmental Impact Statement regarding a proposal to drill 168 methane drainage wells at the West Elk Mine in Gunnison County, CO. In this letter, the Deputy Regional Administrator explains:

The draft EIS does not present information on the amount of methane that is expected to be released from the proposed action . . . As indicated on EPA's website, methane is a greenhouse gas that remains in the atmosphere for approximately 9-15 years and is over 20 times more effective in trapping heat in the atmosphere than carbon dioxide (CO₂) over a 100-year period. Methane's relatively short atmospheric lifetime, coupled with its potency as a greenhouse gas, makes it a candidate for mitigation global warming over the near-term (i.e., next 25 years or so). . . . Given the project's release of significant quantities of methane, there is an important economic and environmental opportunity here to capture and utilize the methane resource. . . . [W]e recommend that the final EIS analyze measure for capturing all or part of the methane to be vented from the mine. . . . Methane capture and reuse is a reasonable alternative to the proposal of venting the methane to the atmosphere, and thus, we recommend that it be analyzed. . . . EPA believes that the information in the DEIS is insufficient and the missing information and analyses are substantial issues which must be resolved and disclosed in the Final Environmental Impact Statement.

³⁹ Any argument that CO₂ emissions and the global warming it causes do not endanger public health or welfare is utterly without merit. The weight of evidence in this regard is overwhelming. As discussed above, the Supreme Court addressed many of the harms associated with global warming, and others sources (including the IPCC and EPA) identify numerous other harms – health-based, environmental, economic, and social.

FDEP's failure to evaluate CO₂ and adopt a BACT limit for CO₂ in this case was a clearly erroneous.⁴⁰

IV. PERMITTING OF LARGE NEW SOURCE WITHOUT CO₂ LIMITS IS BAD ENVIRONMENTAL POLICY

Even assuming that, for some reason, CO₂ is not technically a CAA pollutant subject to regulation under the PSD program at this point in time – a conclusion that is not supported by law or fact – CO₂ will undeniably become an NSR pollutant once U.S. EPA takes action to regulate it under section 202 (consistent with the President's Executive Order and/or as a result of pending litigation). Moreover, legislative action to regulate CO₂, likely through a cap and trade program modeled after the acid-rain program, appears to be virtually certain – although the timing of such legislation remains unclear.

Additionally, 25 states are considering or have implemented state CO₂ emission reduction programs. In July 2007, Governor Crist signed Executive Order 07-127 mandating that the electric utility sector in Florida reduce CO₂ emissions to 2000 levels by 2017; to 1990 levels by 2025; and to 80% of 1990 emissions by 2050. This year, the Florida Legislature passed HB 7135 granting rule making authority to FDEP to design a cap and trade policy to reduce utility CO₂ emissions. FDEP has held several rulemaking workshops on developing a plan to substantially reduce electric utility CO₂ emissions pursuant to the governor's and legislature's directives. Evaluating CO₂ as a NSR

⁴⁰ Even assuming that BACT limits were not required for CO₂, permitting authorities are required to evaluate the collateral environmental impact of their BACT determinations – this should include an assessment of the impact associated with greenhouse gas emissions and global warming. This is especially true in light of the recent evidence regarding the scope and severity of global warming impacts (as noted above) and the listing of the polar bear as a threatened species as a direct result of global warming impacts.

pollutant would significantly advance state CO₂ emission goals and better serve the state under a federal CO₂ emission reduction program.

In light of these facts, a decision not to directly and specifically evaluate CO₂, and identify the greatest degree of CO₂ control achievable for the Seminole plant (consistent with BACT), would be the ultimate head-in-the-sand approach to global warming/energy policy.

A. FDEP has the authority to consider CO₂ emissions and establish CO₂ limits

Regardless of whether CO₂ is currently a pollutant subject to regulation under the Act, Florida has the authority to require evaluation of CO₂ emission and establish requirements to address these emissions. CAA § 165(a)(2) allows permitting authorities to broadly consider alternatives. The EAB has consistently held that states have broad discretion to consider various options (even under EPA's interpretation of the Act before *Mass v. EPA*), including, among other things, providing state permitting authorities with broad discretion to independently evaluate options and alternatives, and to adopt conditions or requirements that it deems appropriate.⁴¹ In fact, under this authority, a permitting authority can engage in a wide ranging exploration of options, including fuel switching, and other generation and non-generation alternatives. Under this authority of the State of Florida clearly has the discretion to require specific evaluation and control of CO₂ emissions, and/or to require other action to mitigate global warming impacts.

⁴¹ See *In re Prairies State*, PSD Appeal 05-05 (Aug. 24, 2006). The Board stated: Indeed, the permit issuer is not required to wait until an "alternative" is suggested in the public comments before the permit issuer may exercise the discretion to consider the alternative. Instead, the permit issuer may identify an alternative on its own. This interpretation of the authority conferred by CAA section 165(a)(2)'s reference to "alternatives" is consistent with the Agency's longstanding policy that, . . . "this is an aspect of the PSD permitting process in which states have the discretion to engage in a broader analysis if they so desire."

Failure to do so would be a material breach of the Agency's obligations to the people of the State of Florida.

B. There are steps that could be taken to reduce the global warming impacts of Seminole's project

FDEP could require any number of possible actions to address the CO₂ footprint of the proposed Seminole facility. Options include requiring specific energy efficiency, conservation or demand-side-management activities to reduce energy consumption, requiring development of renewable energy sources, requiring a change to a less CO₂-intensive fuel (like natural gas), requiring a construction of a smaller source, requiring the capture and disposal of CO₂, requiring construction of a more efficient facility, requiring the purchase of CO₂ offsets, or some combination of these approaches. However, the consideration of options must be part of a public process, and should happen only once the benefits of the current climate change focused policy exercise are available. To date, there has been no specific assessment of measures, alternatives, or options to address greenhouse gas emissions at the proposed Seminole plant.

CONCLUSION

For the reasons described above, the PSD permit application for Seminole's proposed 750MW coal fire boiler must be denied. Alternatively, before the permit can move forward in any form, the permit must be re-noticed in compliance with applicable rules for issuing PSD permits; the permitting process must explicitly address MACT review and CO₂ emissions as a part of the mandatory BACT analysis; and FDEP should exercise its discretion to broadly explore available options and to adopt requirements

(beyond and including BACT) that directly address the CO₂ emissions of the proposed plant.

Sincerely,

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