Document	Date	Date Stmp	
District Court of Appeal of the sate of Florid 5th District- Seminole Electric Cooperative, Inc Appellate Case No. 5D07-3005	9/15/2007	9/17/2007	
DEP In Re: Seminole Electric Cooperative Seminole Generating Station Unit 3 No. PA 78-10A2 DEP Case No. 06-0780 DOAH Case no. 06-0929EPP Fifth DCA Case No. 5D07-3005 Directions to the Clerk		9/11/2007	
DEP In Re: Seminole Electric Cooperative Seminole Generating Station Unit 3 No. PA 78-10A2 DEP Case No. 06-0780 DOAH Case no. 06-0929EPP Seminole Electric Response to DEP's Motion to Withdraw Stipulation		6/28/2007	
Division of Administrative Hearings In Re: Seminole Electric Cooperative Seminole Generating Station Unit 3 No. PA 78-10A2 DOAH Case No. 06-0929EPP Fourth Status Report Following Order of Remand		6/1/2007	
Division of Administrative Hearings In Re: Seminole Electric Cooperative Seminole Generating Station Unit 3 No. PA 78-10A2 DOAH Case No. 06-0929EPP Status Report Following Order of Remand		4/23/2007	
Faxed Copy of DEP Proposed Schedule for Review of Site Certification Application Florida Power and Light Bobwhite-Manatee 230kV Transmission Line Project Transmission Line Siting Application No. TA 07-14 OGC Case No. 07-0026 DOAH Case No. 007-000105		1/16/2007	
Chapter 62-814 Electric and Magnetic Fields Fraft			
Unsigned Copy of Permit for 1070025-004-AC Sminole Generating Station Units 1-2 Pollution Controls Upgrad SIC No. 4911 Permit Expires: December 31, 2009			
DEP In RE: Seminole Electric Cooperative Seminole Generatin Station Unit 3 Power Plant Siting Application No. PA 78-10A2 OGC Case No. 06-0780 DOAH Case No. 06-0929EPP Order of Remand			
Sierra Club letter to Erika Durr, clerk of the board USEPA RE: Petition for Review for Seminole Electric Coop. Inc. Facility			
Draft Joint Proposed Final Order of the Parties Following Remand IN RE: Seminole Electric Coop. Inc.			
Page 25 starting with on January 7, 2007 Seminole and the Sierra Club entered in a Settlement Agreement			

SIERRA CLUB
FOUNDED 1892

October 6, 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: Petition for Review for Seminole Electric Cooperative, Inc. facility.

Dear Ms. Durr:

Enclosed for filing is one original of the Petition 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. Petition for Review

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

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

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

PETITION FOR REVIEW

Joanne Spalding
Sierra Club
85 Second Street, Second Floor
San Francisco, CA 94105
415-977-5725
415-977-5793 (Fax)
joanne.spalding@sierraclub.org

Kristin Henry
Sierra Club
85 Second Street
San Francisco, CA 94105-3441
415.977.5716 phone
415.977.5793 fax
kristin.henry@sierraclub.org

Table of Contents

PETITION FOR REVIEW AND REQUEST FOR ORAL ARGUMENT

INTRODUCTION

Pursuant to 40 C.F.R. § 124.19(a), Sierra Club petitions for review of the Prevention of Significant Deterioration ("PSD") Permit Number PSD-FL-375 ("Seminole PSD Permit") issued by the Florida Department of Environmental Protection ("FDEP") to Seminole Electric Cooperative Inc. ("Seminole") on September 5, 2008. A copy of the Seminole PSD Permit is attached as Exhibit 1. The Seminole PSD Permit authorizes construction of a new 750-megawatt pulverized coal-fired electric utility generating unit at the existing Seminole Generating Station in Palatka, Florida.

Sierra Club contends that FDEP committed numerous procedural and substantive errors in issuing the Seminole PSD Permit. Despite the serious errors that plagued the draft PSD permit, FDEP entirely ignored the detailed comments that Sierra Club submitted, as well as intervening federal case law, and issued the final permit without making any changes to the draft and without responding to a single Sierra Club comment. The Board should remand the permit and require FDEP to correct these flaws.

Sierra Club requests oral argument in this matter. Oral argument would assist the Board in its deliberations on the issues presented by the case because the issues raised are generally a source of significant public interest and are of a nature such that oral argument would materially assist in their resolution.

THRESHOLD PROCEDURAL REQUIREMENTS

Sierra Club satisfies the threshold requirements for filing a petition for review under Part 124. Sierra Club has standing to petition for review of the permit decision because it participated in the public comment period on the draft permit. 40 CFR §124.19(a). *See* comments filed on October 9, 2006, on behalf of the Sierra Club, attached as Exhibit 2. The issues raised by Sierra Club here were raised during the public comment period or are new issues resulting from the Supreme Court's decision in *Massachusetts v. Environmental Protection Agency*, 127 S.Ct. 1438 (2007), and the D.C. Circuit's decision in *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008), which were decided after the comment period closed and were therefore not reasonably ascertainable at the close of the public comment period.

FDEP issued the draft PSD permit under a federal delegation of authority but issued the final PSD permit after the Environmental Protection Agency ("EPA") approved the portion of Florida's State Implementation Plan ("SIP") covering PSD permits for electric power plants. Florida state rules for public participation, now approved in the SIP, are substantially different from the federal rules that applied under the delegation. At the time the draft permit was issued, Sierra Club fulfilled all applicable federal standing requirements for Environmental Appeals Board ("EAB") review, but the current SIP-approved state rules, if applied retroactively, could cut off review in state court. This unusual circumstance threatens to block all scrutiny of a badly flawed permit, despite the Clean Air Act PSD program's important purpose of ensuring "adequate procedural opportunities for informed public participation in the decisionmaking

process." *See* 42 U.S.C. § 7470(5). To prevent this unfortunate result, Sierra Club is filing both this petition for review and an appeal in Florida state court. *See* Ex. 3. Sierra Club will explain the unusual procedural history of this permitting decision in a Motion to Hold in Abeyance, which it will soon file with the Board.

ISSUES PRESENTED FOR REVIEW

Did FDEP clearly err by:

(1) failing to respond to Sierra Club's comments on the draft PSD permit;

(2) relying on a deeply flawed BACT analysis to establish emission limits for carbon monoxide, volatile organic compounds, particulate matter, and fluoride;

(3) not requiring a BACT emission limit for carbon dioxide ("CO_2") emissions from Seminole's new coal-fired unit;

(4) excusing compliance with BACT requirements during startup, shutdown, and malfunction ("SSM") events;

(5) failing to ensure that BACT emission limits will be enforceable;

(6) relying on inadequate preconstruction monitoring;

(7) failing to adequately analyze impacts to soils and vegetation;

(8) failing to assess the impact of the emissions limitation requirements imposed by Clean Air Act section 112(g) on the PSD analysis?

FACTUAL BACKGROUND

Seminole proposes to construct a supercritical coal-fired steam generating unit at its Seminole Generating Station in Palatka, Florida. The facility is located in an area designated as attainment, maintenance, or unclassifiable for each

pollutant subject to a national ambient air quality standard ("NAAQS"). Ex. 1 at 2. The new unit, Unit 3, would have a power output of 750 megawatts, increasing the capacity of the plant by nearly 60%. *Id.* In addition to the new boiler, the permit authorizes the construction of a spray dryer system and a mechanical draft cooling system. *Id.* The facility is a major source of hazardous air pollutants ("HAP"). *Id.* Unit 3 would emit approximately 6.5 million tons of carbon dioxide annually. *See* Ex. 4 (Letter from Natural Resources Defense Council and Southern Alliance for Clean Energy to FDEP, July 3, 2008) at 2.

FDEP issued a draft PSD permit for Unit 3 that was published on September 8, 2006. Ex. 5 (FDEP Final Determination) at 1. Sierra Club submitted timely comments on October 9, 2006, detailing numerous deficiencies in the draft permit. Ex. 2. On March 9, 2007, the Sierra Club and Seminole entered a settlement agreement in which Seminole agreed to seek reduced emissions limits and other changes to the permit and the Sierra Club agreed not to contest the final PSD permit as long as it was issued in accordance with the terms of the agreement. Ex. 6. FDEP was not a party to the settlement.

On April 2, 2007, the U.S. Supreme Court decided *Massachusetts v. EPA*, 127 S.Ct. 1438, holding that "greenhouse gases fit well within the Clean Air Act's capacious definition of 'air pollutant.'" Id. at 1462. As explained below, the Supreme Court's decision confirmed that the Seminole PSD permit must include an emissions limit for the 6.5 million tons of carbon dioxide that the new unit would emit annually. And in March, 2008, the D.C. Circuit issued the mandate for its decision in *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008), rendering the hazardous air pollution from the new Seminole unit subject to the

requirements of section 112 of the Clean Air Act. Commenters sent a letter to FDEP informing it of the implications of these decisions for the Seminole PSD permit before the agency issued the final permit. Ex. 4.

On September 5, 2008, FDEP issued a final PSD permit that is identical to the draft permit. Exs. 1 & 5. Ignoring the egregious flaws in the permit described in the Sierra Club comments, as well as the legal implications of the intervening federal court decisions, FDEP issued the final permit without change and without even responding to any of the Sierra Club's comments on the draft. *See* Ex. 5. Because the permit was not issued in accordance with the terms of the settlement between Seminole and Sierra Club, Sierra Club is free to contest it.

Sierra Club now petitions the Board for review of this permit and urges a remand so that FDEP can correct the many flaws in the draft permit and fully respond to Sierra Club's comments.

ARGUMENT

I. THE BOARD SHOULD REMAND THE PERMIT BECAUSE FDEP VIOLATED FEDERAL AND STATE LAW BY FAILING TO RESPOND TO COMMENTS

In a final determination issued along with the Seminole PSD permit, *see* Exs. 1 and 5, FDEP acknowledged that it had received Sierra Club's timely comments but offered no response whatsoever to them. This failure is a straightforward violation of both the federal rules applicable under the delegation and of Florida's SIP-approved state regulations and requires remand of the permit.

Federal law gives the public a right to comment on issuance of permits to major emitting facilities and requires a State Director to issue a response to comments when he or she issues a final permit decision. *See* 42 U.S.C. § 7475(a)(2); 40 C.F.R. § 124.17(a). In the response, the Director must "[b]riefly describe and respond to all significant comments on the draft permit . . . raised during the public comment period, or during any hearing." *Id.* The Director must also identify the provisions of the draft permit altered in the final permit decision, if any, and describe the reasons for the change. *Id.* Florida's PSD regulations are also clear on this point, providing that "[a]ny public comments received shall be . . . considered by [FDEP] in making a final determination to approve or deny the permit." Fla. Admin. Code r.. 62-210.350(2)(f).

Despite these unambiguous requirements, FDEP gave no indication that it had even considered Sierra Club's comments, much less offered a response. Instead, it put forward a non sequitur: Noting that it had received word of the settlement between Sierra Club and Seminole, FDEP explained that it was not a party to the settlement and stated that the settlement was, in any event, "outside of the [PSD] process that resolves all timely-received comments." But the status of the settlement between Seminole and Sierra Club, to which FDEP was not a party, has no bearing whatsoever upon FDEP's duty to consider and respond to Sierra Club's timely comments.[1] Tellingly, FDEP cites no authority for its failure to respond to Sierra Club's comments, a failure that is all the more perplexing

[1] Indeed, FDEP's decision to issue the final PSD permit without making the changes contemplated by the settlement effectively voided the agreement, because the Sierra Club agreed not to contest the final permit only if it was issued in accordance with the terms of the agreement. Ex. 6. Therefore, FDEP cannot justify its failure to respond to the Sierra Club's comments based on any claim that the Sierra Club had given up its right to challenge the permit in an agreement with the applicant.

given that FDEP declined to change the permit to conform to the settlement agreement. In short, the status of the settlement simply cannot justify FDEP's silence.

Both the Board and the D.C. Circuit Court of Appeals have underscored the importance of the response to comments. In *In the Matter of: Atochem North America, Inc. Calvert City, Kentucky*, 3 E.A.D. 498 (Adm'r. 1991), the Board vacated and remanded a permit granted after EPA only responded to one of the petitioner's two sets of comments. Despite EPA's averment that the second set of comments would not have altered its permit decision, the Board emphasized that one purpose behind the requirement to respond to comments is "to insure that such comments are given serious consideration during the course of the permit-writing process. *Id.* at 499. *See also In re Rockgen Energy Center*, 8 E.A.D. at 557 (citing *Atochem* in a case concerning a permit issued by a state agency because, "[a]lthough *Atochem* involved a permit issued by an EPA regional official rather than a state agency, we think the concerns expressed in *Atochem* apply in this case.")

In *In re Weber, #4-8*, 11 E.A.D. at 245, the Board held that EPA's error in responding to the petitioner's comments was "neither harmless, inconsequential, nor trivial." The Board explained that the regulations' goal is to ensure that the decision-maker has the benefit of both the comments and agency staff's response to them before making permit decision. *See id.* Despite recognizing that the required response "may not result in any change in the Region's ultimate permit decision," the Board vacated and remanded the permit because the decision-maker, lacking the response to comments, "did not base her decision on

the administrative record." *Id.* at 246. As the D.C. Circuit has asserted, "a dialogue is a two-way street: the opportunity to comment is meaningless unless the agency responds to significant points raised by the public." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977).

By failing to respond to Sierra Club's timely comments on the Seminole PSD permit, FDEP violated 40 C.F.R. § 124.17(a) and Fla. Admin. Code r. 62-210.350(2)(f). The Board has appropriately vacated permits when agencies' responses to comments were incomplete or belated, *see* 3 E.A.D. 498; 11 E.A.D. 241, and the violation here is even more egregious because FDEP simply did not respond to Sierra Club at all. This omission rendered the agency decisionmaker unable to make an informed decision on Seminole's permit application. Because the FDEP violated both state and federal regulations and because it has not therefore demonstrated that it has made an informed decision, the Board should vacate and remand the Seminole PSD permit.

II. THE BOARD SHOULD REMAND THE PERMIT BECAUSE FDEP DID NOT COMPLY WTH APPLICABLE REQUIREMENTS IN SETTING THE CARBON MONOXIDE, VOLATILE ORGANIC COMPOUNDS, PARTICULATE MATTER, AND FLOURIDE BACT LIMITS.

A. INTRODUCTION AND LEGAL BACKGROUND

The Best Available Control Technology ("BACT") determination for carbon monoxide ("CO"), volatile organic compounds ("VOC"), fluoride ("HF"), and particulate matter ("PM") for the Seminole Generating Station, Unit 3 represent a all-too-common breakdown of the BACT determination process. The Board must grant review to help get BACT back on track.

Specifically, the Clean Air Act defines BACT, in relevant part, as:

> The term "best available control technology" means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant. In no event shall application of ``best available control technology'' result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to section 7411 or 7412 of this title.

42 U.S.C. § 7479(3) (2008). The applicable PSD regulation, which defines BACT largely the same as the statute, provides:

> *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. In no event shall application of best available control technology result in emissions of any pollutant which would exceed the emissions allowed by any applicable standard under 40 CFR parts 60 and 61. If the Administrator determines that technological or economic limitations on the application of measurement methodology to a particular emissions unit would make the imposition of an emissions standard infeasible, a design, equipment, work practice, operational standard, or combination thereof, may be prescribed instead to satisfy the requirement for the application of best available control technology. Such standard shall, to the degree possible, set forth the emissions reduction achievable by implementation of such design, equipment, work practice or operation, and shall provide for compliance by means which achieve equivalent results.

40 C.F.R. 52.21(b)(12)(2008); see also 62 FL ADC 62-210.200 (40) (2008).

The Supreme Court has noted that the definition of BACT contains the strong, normative terms "maximum" and "achievable[.]" *Alaska Department of Environmental Conservation v. Environmental Protection Agency*, 540 U.S. 461, 485 (2004). The Supreme Court also held that a BACT determination must be "made on reasonable grounds properly supported on the record[.]" *Alaska*, 540 U.S. at 490. The EAB evaluates the BACT determination as it is documented in the record to see if it reflects 'considered judgment' by the Agency. *In re: Knauf Fiber Glass, GmbH*, 1999 EPA App. LEXIS 2, *27 (EAB) (*citing In re: Ash Grove Cement Co.*, RCRA Appeal Nos. 96-4 & 96-5, slip op. at 41 (EAB Nov.14, 1997).

In addition, the BACT standard is intended to require the use of "the latest technological developments [in pollution control] as a requirement in granting the permit," so as to "lead to rapid adoption of improvements in technology as new sources are built," rather than "the stagnation that occurs when everyone works against a single national standard for new sources." A&P S. Rep. No. 95-127 (Part 1 of 2), at 18 (1977). BACT is a technology forcing requirement. *See In re: Tennessee Valley Auth.*, 2000 EPA App. LEXIS 25, *78-79 ("the program Congress established was particularly aggressive in its pursuit of state-of-the-art technology at newly constructed sources"); *In re: Columbia Gulf Transmission*, 1989 EPA App. LEXIS 26, *10 ("BACT ... is principally a technology-forcing measure that is intended to foster rapid adoption of improvements in control technology"); S. Rep. No. 95-127 at 18 (BACT's forward-looking emphasis is the "most important" mechanism promoting the Clean Air Act's "philosophy of encouragement of technology development."); *See generally Alabama Power v.*

Costle, 636 F.2d 323, 372 (D.C. Cir. 1980) (noting that Prevention of Significant Deterioration Program is intended to be "technology forcing").

Finally, Congress has declared that the purpose of the PSD program, including its BACT determinations is:

> to assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process.

42 U.S.C. § 7470(5).

Despite the plain language of the definition of BACT and the clear case law, BACT has too often devolved into a "race-to-the-bottom" approach. That is, permitting agencies look at what other BACT limits currently exist in other permits and then set BACT limits based on those permit limits. A BACT limit in another permit has little to do with the maximum reductions and technology forcing that BACT mandates. While in theory a BACT limit in another permit could reflect another agency's determination of what is BACT for another source, because BACT must be based on a reasoned, documented, case-by-case analysis, the BACT limit in another permit, without its supporting analysis, does not provide any useful information in making a BACT determination.

Not only does setting BACT limits based on other BACT limits in other permits deviate from the plain language of the definition of BACT, it also eliminates the technology forcing and progressive nature of BACT. All too often, the only way BACT limits for coal-fired power plants advance to be more protective is when a particular source is forced to accept a lower limit not

because of BACT but because of another requirement such as the ambient impacts analysis or protection of air quality related values.

In this case, as explained below, FDEP's BACT analysis for CO, VOC, fluoride, and PM was limited to a review of limits in previously issued permits. Rather than select a BACT technology through the "top-down" BACT review, the FDEP set the permit limits by reviewing recently permitted projects and selecting emission limits that reflected the middle range these recent permits. The CO, VOC, fluoride, and PM BACT limits must be remanded because they do not represent BACT limits, which are technology forcing.

B. THE TOP-DOWN PROCESS IS A LONGSTANDING, CONSISTENT, AND SUFFICIENT VEHICLE FOR DETERMINING WHICH TECHNOLOGY IS BACT.

The top-down BACT process has been used by EPA and state permitting authorities for more than 20 years. *See In re Pennsauken County, New Jersey, Resource Recovery Facility*, 2 E.A.D. 667 (Adm'r, Nov. 10, 1988) (describing the genesis of the top-down approach to BACT analysis). EPA's interpretation of the statutory definition of BACT as requiring a detailed systematic analysis of the BACT definition factors, by the permit applicant,[2] was first set out in general guidance in 1987. *Id.* (*citing In re: Honolulu Resource Recovery Facility*, PSD Appeal No. 86-08 at 7, 6 n.9 (Adm'r June 22, 1987); NSR Manual at B.2. From its inception the top-down BACT analysis has required a detailed showing that there

[2] "Under the top-down methodology, applicants must apply [BACT] unless they can demonstrate that the technology is technically or economically infeasible. The top-down approach places the burden of proof on the applicant to justify why the proposed source is unable to apply the best technology available." *In re: Spokane Regional Waste-to-Energy Applicant*, PSD Appeal No. 88-12 (EPA June 9, 1989), at 9 (internal quotation marks omitted); *see also In re: Inter-Power of New York, Inc.* PSD Appeal Nos. 92-8 and 92-9 (EAB March 16, 1994) ("Under the 'top-down' approach, permit applicants must apply the most stringent control alternative, unless the applicant can demonstrate that the alternative is not technically or economically achievable.")

are significant technical, economic, energy, or environmental factors or other costs warranting the use of something other than the most stringent available technology as the basis for BACT.

Because the BACT determination is the central feature of the Act's PSD program, a common BACT analysis framework for use by all permiting authorities is a significant feature in realizing the program's goal to prevent significant deterioration in clean air areas, while allowing economic growth. Allowing business and economic development in the form of additional air pollutant emitting facilities, while holding air emissions relatively steady or decreasing them in an area, necessarily requires the introduction of new, more effective, innovative pollution controls on the new facilities. These goals come together in the BACT definition's insistence that the permiting authority evaluate the "best available controls," considering associated energy, environmental, and economic impacts and other costs." Indeed, this analysis allows for pollution control "[t]echnology transfer from one source category to another ... for BACT purposes." *Spokane Regional Waste to Energy Facility*, PSD Appeal No. 88-12 (June 9, 1989), p. 18, n. 24. In turn, a consistent framework for BACT analysis provides certainty to the permiting authority, and certainty to the applicant about the particular BACT analysis requirements with which it must comply. EPA's 1990 NSR Manual, documenting the earlier Agency directives on the BACT analysis, and building on prior experience to establish the organizational basis for a structured a top-down BACT process, has been frequently relied on by applicants and permiting authorities alike. *In re: Prairie State Generating Co.*,

PSD Appeal No. 05-05, slip op. at 16 (Aug. 24, 2006); *In re Knauf*, 8 EAD 121 199 EAP App. LEXIS 2 *19-20 (EAB 1999).

The NSR Manual's BACT framework was not the result of a formal agency rulemaking, and as such is not legally binding,[3] so strict application of the BACT methodology it describes is not mandatory. *In re: Prairie State*, slip op. at 16 (*quoting In re Cardinal FG Co.*, PSD Appeal No. 04-04, slip op. at 12 (EAB Mar. 22, 2005)). But "'a careful and detailed analysis of the criteria identified in the regulatory definition of BACT is required, and the methodology described in the NSR Manual provides a framework that assures adequate consideration of the regulatory criteria and consistency within the PSD permitting program.'" *Id.*

The top-down BACT process, implemented as documented in the NSR Manual,[4] in fact is designed to integrate and incorporate consideration of all of the elements and factors in the BACT definition. As such, it is complementary to the PSD program's underlying goal that as new, more effective control

---

[3] EPA has conceded this point to the U.S. Supreme Court. *Alaska Dep't Envtl. Conservation v. EPA*, 540 U.S. 461, 475 n.7 (2004). While the NSR Manual is not accorded the same weight as a binding Agency regulation, however, it has been looked to as the most current statement of the Agency's thinking on BACT issues. *In re: Masonite Corp.*, 1994 EPA App. LEXIS 36, * 21 n. 8 (citing *In re: Inter-Power of New York, Inc.*, PSD Appeal Nos. 92-8 and 92-9, at 6 n.8 (EAB, Mar. 16, 1994); *In re: Hawaiian Commercial & Sugar Co.*, PSD Appeal No. 92-1, at (EAB, July 20, 1992)).

[4] At step 1 of the analysis, the applicant must list all of the "production processes and available methods, systems and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for the control of each ... pollutant" emitted by the proposed facility. 43 U.S.C. §7479(3); NSR Manual at B.5, B.7. At the second step, analysis of technical feasibility for each listed option is performed, including "clearly documented analyses based on physical, chemical, and engineering principles, that technical difficulties would preclude [its successful use]." NSR Manual at B. 7. Technical feasibility includes an assessment of whether a particular technology is "demonstrated," that is, installed and operated successfully elsewhere, or if not demonstrated, then whether it is "available" and "applicable" – whether it can reasonably be installed and operated on the source type under consideration.[4] At step 3 of the top-down BACT analysis, the remaining control technologies from the initial list are ranked in declining order of emissions control effectiveness and document emissions reductions, economic impacts, associated environmental and energy impact associated with the application of each. NSR Manual at B.7-B.8. At step 4, the applicant must provide "an objective evaluation of each .... impact of the control alternative." Id. at B.8.

technology choices become available, it is adopted as the basis for the BACT emissions limit for new facilities so that incrementally cleaner air can be achieved through the application of better and better "best controls." The BACT determination at each step incorporates the issues that are germane to the adoption of a new, or more innovative technique for air pollution control: its technical feasibility (at step 2), associated energy environmental, and cost impacts of adopting the new cleaner controls or production process options (at step 3), collateral impacts associated with taking a new approach (at step 4). It does so, as required by the statute, on a "case-by-case" basis, such that the determination of BACT emissions limits for a new facility truly can yield the "best" available" and "maximum emissions reductions" while satisfying the applicant's business objectives.

C. THE CO AND VOC LIMIT DOES NOT REPRESENT A PERMISSIBLE BACT LIMIT.

1. The FDEP Improperly Disregarded Thermal Oxidation as BACT Technology to Control VOC and CO Emissions.

In its permit application, Seminole claimed that there was no feasible technology to control CO and VOC. Ex. 8 at 51. FDEP, however, acknowledged that thermal oxidation was a feasible control technology for both these pollutants. Despite this finding, FDEP did not require the application of this technology to Seminole Unit 3. The Board should remand the CO and VOC limits and require consideration of thermal oxidation as BACT control technology.

Thermal oxidation is an available pollution control technology. At least one Portland cement kiln, in Midlothian, Texas, uses thermal oxidation to control CO emissions. In fact, FDEP acknowledged that thermal oxidization is feasible

because of its use at this cement kiln in Texas. Moreover, Sierra Club commented that thermal oxidation is widely used in ethanol plants, refineries, and other sources to control VOC and CO emissions. Ex. 2 at 5-6.

Thermal oxidation routinely removes 90% of the CO and 98% of the VOC from similar gas streams. Thermal oxidation is much more efficient than "combustion controls" selected as BACT and is able to achieve emission limits that are at least ten times lower than those picked for Seminole. Therefore, thermal oxidation is an available control technology that must be considered in a top-down BACT analysis. NSR Manual B.11 Ex. 7 (Technical Evaluation) at 13.

FDEP rejected thermal oxidation as a BACT technology because this technology has not been used on coal-fired power plants, so the agency concluded that thermal oxidation is technically infeasible and was not further assessed. This determination was erroneous because transferring control technologies from other sources is a well-established component of identifying the BACT. The NSR workshop manual urges that technology transfer "must be considered" in the BACT analysis. The NSR Manual notes that "[o]pportunities for technology transfer lie where a control technology has been applied at source categories other than the source under consideration." NSR Manual at B.11. Elsewhere, the NSR Manual notes:

> [t]echnology transfer must be considered in identifying control options. The fact that a control option has never been applied to process emission units similar or identical to that proposed does not mean it can be ignored in the BACT analysis if the potential for its application exists.

NSR Manual at B.16; *see also* NSR Manual at 33.

In fact, the Environmental Appeals Board has recently repeated that a "control option is presumed to be applicable if it has been used on the same or similar types of source in past." *In re Indeck-Elwood*, PSD Appeal, 2006 WL 3073109 at *7 (US EPA Sept. 27, 2006); *see also In re Knauf Fiber Glass, GmbH,* 8 E.A.D. 121, 123-24 (EAB 1999).

Since thermal oxidation is a feasible BACT control technology under step 2 of the top-down process, its control effectiveness or achievable emission limits must be ranked along with other emission limits. The EAB should remand the permit limits for VOC and CO and require FDEP to analyze this technology in its BACT analysis.

2. **The VOC and CO Emission Limits do not Reflect the Maximum Degree of Reduction and, are thus not BACT limits.**

There are generally three categories of information agencies must consider for setting BACT emission limits. The first is emission limits in other permits. As explained above, this information is of very limited value in that it is backward looking and BACT is a forward looking, technology forcing strategy, and because looking only at a limit in a permit does not disclose anything about the maximum reduction that can be achieved, considering environmental, economic and energy impacts. The second category is actual emission data from actual operating sources. *See e.g.* New Source Review Workshop Manual (NSR Manual) at B.24 (experience of other sources provides basis for determining achievable limits). The third category is an evaluation of what can be achieved at the source based on currently existing control technology. *See e.g.* NSR Manual at B.24 (Manufactures' data and engineering estimates provide

basis for determining achievable limits); Id. at B.64 (Vendor Guarantee provides support for basis for choosing emission level).

There is no evidence in the record that indicates that FDEP considered anything other than the first category of information; the agency only compared emission limits contained in permits issued in the past. FDEP did not even get this limited analysis correct because it disregarded without any analysis other permits with lower CO and VOC limits.

FDEP set the emission limit for CO at 0.13 lb/MMBtu (coal only) and 0.15 lb/MMBtu 30-day rolling average (all fuels). FDEP selected these limits based exclusively on an analysis of past permit limits. The agency examined 14 permit limits for CO and noted that emission limits ranged from 0.10 to 0.20 lb/MMBtu. Ex. 7 at 13-14. FDEP set the CO emission limit at 0.13 lb/MMBtu (coal only) "because it is in the lower range of recent BACT Determination." Ex. 7 at 14. In addition, the agency established a 0.15 lb/MMBtu 30-day average limit because a value established by CEMS is a little higher than a value established by a stack test. *Id.* FDEP set this limit even though it acknowledged that "the majority of the above Determinations are based upon CEMS." *Id.*

FDEP set the emission limit for VOC at 0.0034 lb/MMBtu. As with CO, FDEP selected these permit limits based exclusively on an analysis of past permit limits. Ex. 7 at 14-15. The agency examined 15 permit limits for VOC and noted that the emission limits ranged from 0.0024 to 0.02 lb/MMBtu. *Id.* at 15.

The agency then set the emission limit at 0.0034 lb/MMBtu because "only one of [15 surveyed] BACT Determinations is more aggressive." *Id.*[5]

Essentially what FDEP did was to select the CO and VOC limits just because they are in the middle of the range of BACT permits and disregard the lower permit limits. The plain language of the Clean Air Act and its implementing regulations do not allow the agency discretion to simply disregard these lower permit limits. The Act requires that the "emission limitation" selected as BACT be based on "the maximum degree of reduction of each pollutant" that "is achievable for such facility." 42 U.S.C. § 7479(3) (2008); 40 C.F.R. § 52.21(b)(12) (2008); 62 FL ADC 62-210.200 (40) (2008). The statutory and regulatory terms, such as "maximum" and "achievable," constrain a permitting authority's discretion. *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 485-89 (2004). Indeed, EPA guidance specifically states that "[i]n the absence of a showing of differences between the proposed source and previously permitted sources achieving lower emissions limits, the permit agency should conclude that the lower emissions limit is representative for that control alternative." NSR Manual at B.24; *see also Newmont Nevada Energy Investments*, PSD Appeal No. 05-04, 2005 WL 3626598 (E.A.B. 2005); *In re Prairie State Generating Co.*, PSD Appeal No. 05-05, 2006 WL 2847225 (E.A.B. 2006).

For CO, three of the surveyed permits had emission limits lower than the Seminole limits: PSC Colorado (0.13 lb/MMBtu 8-hr average); Longview, WV (0.11 lb/MMBtu 3-hour average); and Thoroughbred, KY (0.10 lb/MMBtu 30-day

[5] This statement was incorrect. Two of the surveyed permits had VOC limits lower than Seminole 3's VOC limit. *See* Ex. 7 at 14.15.

rolling average). *Id.* Moreover, all three of these limits are confirmed by CEMS testing. For VOC, two of the surveyed permits had a lower VOC emission rate: Santee Cooper, S.C. (0.0024 lb/MMBtu); and Utah Intermountain (0.0027 lb/MMBtu). In addition, Sierra Club provided FDEP with evidence that 3 coal-fired pulverized coal units were actually achieving emissions lower than Seminole's VOC limit including: Trimble, KY (0.0032 lb/MMBtu), Bull Mountain, MT (0.0030 lb/MMBtu) and Springerville, AZ (0.0033 lb/MMBtu). *See* Ex. 7 at 7. Neither Seminole nor FDEP showed a difference between Seminole 3 and these previously permitted sources. Therefore, the FDEP should have concluded that the lower emission rates set in the permits for PSC Colorado, Longview, Santee Cooper, Utah Intermountain, Trimble, Bull Mountain, and Springerville are representative of emission rates achievable at Seminole 3. In light of this clearly erroneous and unreasoned CO and VOC emission limits, the EAB should remand these emission limitations back to the agency and require it to consider these lower emission rates already being achieved.

The fact that neither FDEP nor Seminole discussed why Seminole 3 could or could not achieve these lower permit limits is especially egregious given that Seminole 3 will use a supercritical boiler. Application at 1. A supercritical boiler is more efficient than a subcritical boiler or standard pulverized coal boiler, and thus is able to achieve lower emissions, including lower CO and VOC. Most of the permits surveyed by FDEP are plants that utilize less efficient subcritical boiler technology.[6] Thus, Unit 3 should be able to meet the lowest reported CO

[6] Seminole admits that the "boiler will be designed and operated for high-combustion efficiency, which will inherently minimize the production of CO." Ex. 8 (Application) at 51.

and VOC limits and likely could meet an even lower CO and VOC limits than previously permitted and relied on here. The technology forcing nature of BACT requires that FDEP lower the VOC and CO BACT limits to address the higher efficiency and thus lower emissions that can be achieved with a supercritical boiler. FDEP's decision is also contrary to the definition of BACT requiring that the lowest emission limit be selected unless adverse energy, environmental, and economic impacts are documented. NSR Manual at B.6.

The agency gratuitously claims that the CO and VOC emission limits are BACT. FDEP provides absolutely no evidence to support this bald assertion, and such assertions without any factual support at all cannot stand. This is especially true when the assertion is directly contradicted by evidence in the record such as the evidence that the PSC Colorado, Longview, Santee Cooper, Utah Intermountain, Trimble, Bull Mountain, and Springerville power plants all have permit limits lower than Seminole's.

In addition, FDEP did not respond to Petitioner's comments regarding CO and VOC emissions. As discussed in detail, above, FDEP has an obligation to respond to Sierra Club's comments. The agency's refusal to address these issues is a clear violation of the Clean Air Act. *See In the Matter of: Atochem North America, Inc. Calvert City, Kentucky, 3 E.A.D. 498 (Adm'r. 1991), In re Weber, #4-8*, 11 E.A.D. at 245; *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977). The EAB should remand the CO and VOC emission limits back to the FDEP with instructions to respond to Sierra Club's comments. *In re Weber, #4-8*, 11 E.A.D. at 245.

The agency states that it "review[ed] the BACT/RACT/LAER Clearinghouse for Pulverized Coal boilers" to determine what was the appropriate limit. Painfully absent is an evaluation of what plants are actually achieving. Coal fired power plants often have actual emission rates that are significantly lower than their permit limits. The definition of BACT is only concerned with what is achievable. *See* 42 U.S.C. § 7479(3); 40 C.F.R. 52.21(b)(12). To determine what is achievable the agency should have examined emission data from other facilities. In addition, there is no evidence in the record that FDEP analyzed applications for other permits, had discussions with state or federal permitting staff, reviewed trade journals or information from industry conferences, or reviewed vendor guarantees about what is achievable. NSR Manual at B.11 (Other information sources must be considered to assure that the lowest achievable emission limit is specified as BACT, including control technology vendors, technical literature, and foreign experience). Further, 62 FL ADC 62-210.200 (40)(a) (2008) expressly notes that the BACT determination shall be based on "[a]ll scientific, engineering, and technical material and other information available to the Department." A much wider range of information is available to FDEP than just recently permitted projects and the agency should have reviewed this information to determine what is BACT.

The key point is not the actual emission numbers but that the way those permit limits were selected was arbitrary. First, the agency arbitrarily selected the CO and VOC limits because "it is in the lower range of recent BACT Determination" and "only one of [15 surveyed] BACT Determinations is more aggressive." Ex. 7 at 14-15. This is the definition of an arbitrary determination.

Second, the agency's analysis ignores an important aspect of the issue; that is, what actual plants are achieving and what is an achievable emission limit. Finally, the agency did not respond to Sierra Club's comments on these issues, which represents a clear violation of the Clean Air Act.

D. THE FLUORIDE LIMIT DOES NOT REPRESENT A PERMISSIBLE BACT LIMIT

As with CO and VOC, there is no evidence in the record that indicates that FDEP considered anything other than the emission limits contained in permits issued in the past when establishing a BACT limit for flouride. Moreover, FDEP did not even get this narrow analysis correct because it arbitrarily ignored past permits that had lower emission limits for fluorides.

FDEP set the emission limit for fluorides (HF) at .00023 lb/MMBtu (1.72 lb/hr equivalent. Ex. 1 at 8. As with CO and VOC, the FDEP selected these permit limits based exclusively on an analysis of past permit limits. Ex. 7 at 15. The agency examined ten permit limits for fluoride and noted that the emission limits ranged from 0.00016 to 0.0009 lb/MMBtu. *Id.* The agency then set the emission limit at .00023 lb/MMBtu because "in the lower quartile of recent BACT Determinations." *Id.*

FDEP's decision is arbitrary and capricious because, as discussed *supra,* the BACT analysis must involve more than a review of past permitted levels. To determine what is achievable FDEP should have examined emission data from other facilities. In addition, there is no evidence in the administrative record that the agency analyzed applications for other permits, had discussions with state or federal permitting staff, reviewed trade journals or information from industry conferences, reviewed vendor guarantees about what is achievable, or reviewed

foreign experience with control technology. NSR Manual at B.11 (Other information sources must be considered to assure that the lowest achievable emission limit is specified as BACT, including control technology vendors, technical literature, and foreign experience); 62 FL ADC 62-210.200(40)(a) (2008) (BACT determination shall be based on "[a]ll scientific, engineering, and technical material and other information available to the Department.")

In addition, the decision is arbitrary and capricious because there was evidence before the agency that a number of facilities had lower emission limits. FDEP set the fluoride limit because "it was in the lower quartile of recent BACT Determinations." Ex. 7 at 15. This is not how a BACT limit is to be set. A BACT limit is meant to reflect the maximum degree of emission reduction achievable. The agency did not have the discretion to simply disregard and not adopt the best-performing fluoride emission rate, i.e. that emission limit set for Thoroughbred Generating Station in Kentucky with its fluoride emission rate of 0.00016 lb/MMBtu. *See Newmont Nevada Energy Investments*, PSD Appeal No. 05-04, 2005 WL 3626598 (E.A.B. 2005); *In re Prairie State Generating Co.*, PSD Appeal No. 05-05, 2006 WL 2847225 (E.A.B. 2006). This approach is problematic because the agency rejects this more stringent fluoride limit without any discussion as to whether Seminole 3 could or could not achieve this lower fluoride limit. *See* NSR Manual at B.24 ("In the absence of a showing of differences between the proposed source and previously permitted sources achieving lower emissions limits, the permit agency should conclude that the lower emissions limit is representative for that control alternative.")

Moreover, Sierra Club raised this lower emission rate in its comments, Ex. 2 at 8, and FDEP did not respond to these comments. *See* Final Determination. The agency, however, was required to address these comments before issuing the final PSD permit for Seminole 3. *See In the Matter of: Atochem North America, Inc. Calvert City, Kentucky, 3 E.A.D. 498 (Adm'r. 1991), In re Weber, #4-8*, 11 E.A.D. at 245; *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977).

Finally, given the vicinity of the Okefenokee, Chassahowitzka, and Wolf Island Wildlife Refuge, FDEP's refusal to determine what is the lowest achievable emission limit is particularly arbitrary because, as the U.S. Environmental Protection Agency has explained, "exposure of sensitive plant species to 0.5 micrograms per cubic meter of fluorides ... for 30 days has resulted in significant foliar necrosis." NSR Manual at D-4.

E. THE PARTICULATE MATTER LIMIT DOES NOT REPRESENT A PERMISSIBLE BACT LIMIT.

1. The Emission Limit for Filterable PM Does Not Represent BACT.

FDEP set the emission limit for particulate matter at 0.013 lb/MMBtu. Ex. 1 at 8. Once again, FDEP selected this limit based exclusively on an analysis of past permit limits. Ex. 7 at 12. The agency examined fifteen permit limits for PM and noted that the emission limits ranged from 0.012 to 0.02 lb/MMBtu. *Id.* The agency then set the emission limit at .00023 lb/MMBtu because "at the low end of recent BACT Determinations." *Id.*

Two permits surveyed by the FDEP had PM emission limits lower than the Seminole 3 emission limit. PSC Colorado and Utah Intermountain PSC had

emission limits for PM10 filterable of PM10: 0.012 lb/MMBtu. In addition, Petitioners brought four additional permits to FDEP's attention: Reliant Energy Seward, Pennsylvania with a PM emission rate 0.010 lbs/mmBTU; JEA Northside, FL with a PM emission rate 0.011 lbs/mmBTU; Northampton, Pennsylvania with a PM10 emission rate of 0.0088 lb/MMBtu; and Baldwin facility with a PM emission rate of 0.006 lb/MMBtu. Ex. 2 at 9-10,

The Clean Air Act requires that the "emission limitation" selected as BACT be based on "the maximum degree of reduction of each pollutant" that "is achievable for such facility." 42 U.S.C. § 7479(3) (2008); 40 C.F.R. § 52.21(b)(12) (2008); 62 FL ADC 62-210.200 (40) (2008). The statutory and regulatory terms, such as "maximum" and "achievable," constrain a permitting authority's discretion. *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 485-89 (2004). Indeed, EPA guidance specifically states that "[i]n the absence of a showing of differences between the proposed source and previously permitted sources achieving lower emissions limits, the permit agency should conclude that the lower emissions limit is representative for that control alternative." NSR Manual at B.24; *see also Newmont Nevada Energy Investments*, PSD Appeal No. 05-04, 2005 WL 3626598 (E.A.B. 2005); *In re Prairie State Generating Co.*, PSD Appeal No. 05-05, 2006 WL 2847225 (E.A.B. 2006).

Six permits identified by FDEP and Sierra Club had lower permitted PM emission rates – PSC Colorado, Utah Intermountain, Northampton, Baldwin, Reliant Energy, and JEA Northside. Neither Seminole nor FDEP showed a difference between Seminole 3 and these previously permitted sources. Therefore, FDEP should have concluded that the lower emission rates set in the

permits for these facilities are representative of emission rates achievable at Seminole 3. In light of this clearly erroneous and unreasoned PM emission limitation, the EAB should remand the PM emission limitation back to the agency and require it to consider these lower emission rates already being achieved.

In addition, FDEP never responded to Sierra Club's comment regarding the lower permitted limits at PSC Colorado, Utah Intermountain, Northampton, Baldwin, Reliant Energy, and JEA Northside. *See* Ex. 5 at 2-3. As discussed in detail *supra*, the agency was required to address these comments before issuing the final PSD permit for Seminole 3. *See In the Matter of: Atochem North America, Inc. Calvert City, Kentucky, 3 E.A.D. 498 (Adm'r. 1991), In re Weber, #4-8*, 11 E.A.D. at 245; *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977).

Moreover, a BACT emission limit is not set by simply reviewing previously issued permits. The agency must also examine actual emission data from actual operating sources. *See e.g.* New Source Review Workshop Manual (NSR Manual) at B.24 (experience of other sources provides basis for determining achievable limits). Sierra Club informed FDEP that the actual emission data from the Northampton facility demonstrated that it was achieving much lower PM emissions than required under its permits. Petitioners noted that the Northampton facility in Pennsylvania, which has a PM emission limit of 0.0088 lb/MMBtu, was actually achieving emission rates of 0.0045 lb/MMBtu. Ex. 2 at 9. This was demonstrated through compliance testing in February 2001. *Id.* In addition, Petitioners noted that it was because of Northampton actual emissions

data that EPA established a PM emission limit for the Baldwin facility of 0.006 lb/MMBtu. Id. at 9-10.

Finally, the agency must evaluate what can be achieved at the source based on currently existing control technology. *See e.g.* NSR Manual at B.24 (Manufactures' data and engineering estimates provide basis for determining achievable limits); *Id.* at B.64 (Vendor Guarantee provides support for basis for choosing emission level). FDEP and Seminole discarded an available control technology – a baghouse or fabric filter technology – without going through the appropriate top down BACT analysis.

Utilizing a baghouse or fabric filter technology would significantly reduce PM emissions from Unit 3. Seminole, however, discarded this technology as a viable option because Unit 3 will burn high sulfur coal and there is an unknown long-term reliability of fabric filters when used with high-sulfur coal. Ex. 8 at 50. Seminole also claimed that there is only one plant burning high sulfur coal that utilizes baghouses.

Seminole's assessment does not meet the rigors of an appropriate top down BACT analysis for four reasons. First, Unit 3 could burn low-sulfur coal. BACT determinations must consider better coal quality as a way to reduce emissions. EPA recognizes that Congress explicitly amended the definition of BACT to ensure clean fuels are considered:

> The phrase 'clean fuels' was added to the definition of BACT in the 1990 Clean Air Act amendments. EPA described the amendment to add 'clean fuels' to the definition of BACT at the time the Act passed, 'as ... codifying its present practice, which holds that clean fuels are an available means of reducing emissions to be considered along with other approaches to identifying BACT level controls.' EPA policy with regard to BACT has for a long time

> required that the permit writer examine the inherent cleanliness of the fuel.

Inter-Power of New York, PSD Appeal Nos. 92-8 and 92-9, 5 E.A.D. 130, 134 (E.A.B. 1994) (emphasis added, internal citations omitted). EPA requires permitting agencies to consider clean fuels in every BACT analysis, as a recognized method of pollution prevention. *Knauf*, 8 E.A.D. at 136; *In re: Old Dominion Electric Cooperative*, 3 E.A.D. 779, 794, n.39 (E.A.B. 1992) ("BACT analysis should include consideration of cleaner forms of the fuel proposed by the source."); *Hibbing Taconite*, 2 E.A.D. 838, 842-843 (E.A.B. 1989) (remanding a permit because the permitting agency failed to consider burning natural gas as a viable pollution control strategy).

Therefore, Seminole is required to consider using cleaner fuels in step one of the top-down BACT process and either establish a PM BACT limit based on the cleanest coal available, or justify its basis for not doing so. Moreover, utilizing lower sulfur coal has multi-pollutant benefits, included but not limited to, lower sulfur oxides ("Sox") emissions, lower sulfuric acid mist ("SAM") emissions, lower nitrogen oxides ("NOx") emissions, and of course, enhanced attractiveness of a fabric filter (due to improved ash properties and lower SO_3 concentrations).

Second, Seminole could implement measures to reduce SO_3 emissions, the root problem for baghouses. These include blending an alkali with the coal, alkali injection into the boiler, use of a low conversion SCR catalyst with an SO_2 to SO_3 conversion rate of 0.5% or less, or alkali injection upstream of the baghouse.

Third, Unit 3 could be designed to minimize baghouse fouling by operating the air preheater at temperatures above the acid condensation point and using bags that have been demonstrated to have low failure rates in high sulfur applications, e.g., membrane bags instead of acid-resistant fiberglass.[7]

Fourth, a number of recently permitted high sulfur coal projects will use baghouses including—Longview, WV, Trimble, KY, Oak Creek, WI, and Dallman Unit 4, IL. The latter three projects are under construction with baghouses. This demonstrates that the utility industry and its vendors consider baghouses in high sulfur applications to be commercially available and feasible, requiring that baghouses be evaluated as BACT for Seminole, rather than summarily rejected.

Therefore, Seminole and FDEP must consider the additional and significant PM reductions associated with using a baghouse. The Board should remand the PM permit limits back to FDEP with instructions to consider this control technology in a proper top-down BACT analysis.

2. The permit must set a BACT limit for condensable PM.

The Seminole permit has no limit for condensable PM. *See* Seminole Permit at 8. FDEP did not set a condensable PM ("CPM") limit despite the fact that EPA has taken the position, for at least fourteen years, that condensable PM is part of a source's PM emissions and must be considered in a BACT analysis. In a March 31, 1994, letter to the Iowa Department of Natural Resources, EPA responds to a series of questions. The first two are relevant here:

---

[7] *See*, for example, McIlvaine FGD and DeNOx Newsletter, SCR Affected Fabric Filter Operation at Wateree, No. 340, August 2006 and J.A. Robinson, Jr., Experiences from Three Years of SCR Operation, 2006 Environmental Control Conference, May 16-18, 2006.

Iowa DNR: Does the Environmental Protection Agency (EPA) definition for PM-10 include condensable particulate matter (CPM)?

US EPA: Yes, the definition of PM-10 includes CPM.

Iowa DNR: Are the States required to compute PM-10 as the sum of in stack and condensable PM-10?

US EPA: Since CPM is considered PM-10 and, when emitted, can contribute to ambient PM-10 levels, applicants for PSD permits must address CPM if the proposed emission unit is a potential CPM emitter.

Letter from Thompson Pace, OAQPS, EPA to Sean Fitzsimmons, Iowa DNR (Mar. 31, 1994).[8] In a March 30, 2004 memo, Air and Radiation Division Director, Stephen Rothblatt, requested EPA Headquarters to issue a nationwide memo to remind states that they must include a condensable PM BACT limits in coal plant permits. EPA Region 5 has submitted comments on the draft Peabody permit informing IEPA it must include a condensable PM limit. The Wisconsin DNR has proposed a permit for Weston 4 that includes a condensable PM limit.

On September 27, 2006, the Environmental Appeals Board issued a decision in *In re: Indeck-Elwood*, LLC, PSD Appeal No. 03-04, 2006 WL 3073109 (E.A.B. 2006). In this decision the Board remanded the PSD permit issued by the Illinois EPA to "reconsider whether a PM limitation, including a limitation for condensable particulate matter is appropriate, and if so, to modify the permit accordingly." The Board noted that the U.S. "EPA has previously expressed the position that it is important to account for CPM 'where condensibles constitute a

[8] *See also,* 56 Fed. Reg. 65,433 (Dec. 17, 1991) ("Since CPM emissions form very fine particles in the PM10 size range and are considered PM10 emissions ...."); 55 Fed. Reg. 14,246 (Apr. 17, 1990) ("However, the EPA recognizes that condensable emissions are also PM10, and that emissions that contribute to ambient PM10 ... concentrations are the sum of in-stack PM10, and condensable emissions.")

significant fraction of the total PM10 because otherwise, the PM10 impact will be underestimated.'" *AES Puerto Rico L.P.*, 8 E.A.D. 324, 348 (EAB 1999) (citing Letter from Thompson G. Pace, U.S. EPA, to Sean Fitzsimmons, Iowa Department of Natural Resources (Mar. 31, 1994)), aff'd sub nom. *Sur Contra La Contaminación v. EPA*, 202 F.3d 443 (1st Cir. 2000). In addition, the Board noted that the Illinois had to consider regulating CPM because the Illinois EPA had recently issued a permit to Prairie State that set two limits for particulate matter, one stated as filterable PM and another stated as filterable and condensable PM. *In re Prairie State Generating Co.*, PSD Appeal No. 05-05, 2006 WL 2847225 (E.A.B. 2006).

If CPM can be "effectively controlled" FDEP must establish a limit for this pollutant. NSR Manual B.56. ("To complete the BACT process, the reviewing agency must establish an enforceable emission limit for each subject emission unit at the source and for each pollutant subject to review that is emitted from the source.") (emphasis added). The only exception to establishing an emission limit is if "technological or economic limitations in the application of a measurement methodology to a particular emission unit would make an emission limit infeasible." *Id.* EPA has established a method for CPM measurement, and consequently FDEP must establish a CPM limit.

Sierra Club and EPA both informed the FDEP that other similar facilities had CPM limits. In fact, five of the fifteen permits surveyed by FDEP had CPM limits. These include PSC Colorado, Montana Dakota Utilities, West Virginia Longview, Iowa MidAmerican, and Wisconsin Public Service. Ex. 7 at 12. The agency did not have the discretion to simply disregard and not adopt of the best-

performing CPM emission rate, i.e. that emission limit set for Wisconsin Public Service with its condensable emission rate of 0.018 lb/MMBtu. *See Newmont Nevada Energy Investments*, PSD Appeal No. 05-04, 2005 WL 3626598 (E.A.B. 2005); *In re Prairie State Generating Co.,* PSD Appeal No. 05-05, 2006 WL 2847225 (E.A.B. 2006). This is problematic because FDEP rejected this more stringent CPM limit without any discussion as to whether Unit 3 could or could not achieve this limit. *See* NSR Manual at B.24 ("In the absence of a showing of differences between the proposed source and previously permitted sources achieving lower emissions limits, the permit agency should conclude that the lower emissions limit is representative for that control alternative.") The existence of a similar facility with a lower emissions limit creates an obligation for Seminole and FDEP to consider and document whether that same emission level can be achieved at Unit 3. Other permits for similar facilities have regulated CPM and Seminole's permit must include no less. The Board should remand this particulate matter emission limit and require FDEP to consider a CPM limit.

Moreover, Sierra Club and EPA raised this issue in its comments, Ex. 2 at 11-12, and FDEP did not respond to these comments. *See* Final Determination. The agency states that "if testing demonstrates that condensables can be measured accurately, the Department may address this issue in the future." *Id.* at 3. This statement does not address the comments raised by the Sierra Club and skirts the comments raised by the EPA. The agency was required to specifically address these comments before issuing the final PSD permit for Unit 3. *See In the Matter of: Atochem North America, Inc. Calvert City, Kentucky, 3 E.A.D. 498*

(Adm'r. 1991), In re Weber, #4-8, 11 E.A.D. at 245; *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35-36

III. THE SEMINOLE PSD PERMIT SHOULD BE REMANDED BECAUSE IT LACKS A CO_2 BACT EMISSION LIMIT.

FDEP issued the Seminole PSD Permit authorizing construction of a new coal-fired electric utility generating unit that would emit 6.5 million tons of carbon dioxide annually without including an emission limit for CO_2. Sierra Club's comments on the draft permit noted that it was deficient for failing to consider CO_2 emissions in the BACT analysis. Ex. 2 at 56. Sierra Club also commented that a favorable decision in the *Massachusetts v. EPA* case "would likely require the establishment of CO_2 emission limits for the Seminole Plant." Ex. 2 at 54-55. FDEP ignored these comments as well as the intervening Supreme Court decision in *Massachusetts v. Envtl. Protection Agency*, 127 S.Ct. 1438 (2007), and issued the permit without including a BACT limit for CO_2.

The Clean Air Act prohibits the construction of a new major emitting facility in an attainment area except in accordance with a PSD construction permit. 42 U.S.C. § 7475(a); 40 C.F.R. §52.21(a)(2)(iii). Section 165 of the Act requires that a PSD permit include a BACT emission limit "for each pollutant subject to regulation under this chapter emitted from, or which results from" the facility. 42 U.S.C. § 7475(a)(4); *see also* 42 U.S.C. § 7479(3). EPA repeated that language in its implementing regulations: BACT is required for "any pollutant that otherwise is subject to regulation under the Act." 40 C.F.R. § 52.21(b)(50)(iv). The D.C. Circuit relied on the broad language of the statute to conclude that BACT applies "immediately to each type of pollutant regulated for any purpose under any

provision of the Act." *Alabama Power v. Costle*, 636 F.2d 323, 403 (D.C. Cir. 1979). Moreover, the Supreme Court has instructed EPA to interpret broadly worded provisions of the Clean Air Act in a manner that gives effect to the congressional intent to promote regulatory flexibility that can address changing circumstances and scientific developments. *Massachusetts*, 127 S.Ct. at 1462.

The Seminole PSD Permit must include a BACT emission limit for carbon dioxide because it is a pollutant subject to regulation under the Act emitted from the facility. Carbon dioxide has been *regulated* under the Clean Air Act since 1993, when EPA adopted regulations implementing Section 821 that require monitoring, recordkeeping and reporting of CO_2 emissions by certain covered sources. *See* 42 U.S.C. § 7651k note; Pub. L. 101-549; 104 Stat. 2699; 40 C.F.R. § 75.1 *et seq.* On April 2, 2007, the Supreme Court held that carbon dioxide and other greenhouse gases are "pollutants" under the Clean Air Act. *Massachusetts v. EPA*, 127 S.Ct. at 1460. Now having been definitively ruled a *pollutant*, CO_2 is accordingly a *regulated pollutant* under the Act, and FDEP is required to impose a CO_2 BACT emission limit in the Seminole PSD permit.

A. Carbon Dioxide is a "Pollutant Subject to Regulation Under the Act" Because It Is Regulated Under Section 821.

Carbon dioxide is regulated under Section 821(a) of the Clean Air Act Amendments of 1990, which provides:

> Monitoring. – The Administrator of the Environmental Protection Agency ***shall promulgate regulations*** within 18 months after the enactment of the Clean Air Act Amendments of 1990 ***to require that all affected sources subject to Title V of the Clean Air Act shall also monitor carbon dioxide emissions*** according to the same timetable as in Sections 511(b) and (c). ***The regulations shall require that such data shall be reported to the Administrator***. The provisions of Section

> 511(e) of Title V of the Clean Air Act shall apply for purposes of this Section in the same manner and to the same extent as such provision applies to the monitoring and data referred to in Section 511.[9]

42 U.S.C. § 7651k note; Pub.L. 101-549; 104 Stat. 2699 (emphasis added). EPA has consistently interpreted the regulations required by Section 821 of the Act to constitute regulation under the Clean Air Act. In 1993, EPA promulgated the regulations mandated by Section 821. Those regulations require monitoring and reporting of CO_2 emissions and are enforceable pursuant to Clean Air Act sections 113 and 304, 42 U.S.C. §§ 7413 and 7604. They require CO_2 emissions monitoring (40 C.F.R. §§ 75.1(b), 75.10(a)(3)); preparing and maintaining monitoring plans (40 C.F.R. § 75.33); maintaining records (40 C.F.R. § 75.57); and reporting such information to EPA (40 C.F.R. §§ 75.60 – 64). The regulations prohibit operation in violation of these requirements and provide that a violation of any Part 75 requirement is a violation of the Act. 40 C.F.R. § 75.5.[10]

The statutory language is clear: In Section 821 Congress ordered EPA "to promulgate regulations" requiring that hundreds of facilities covered by Title IV monitor and report their CO_2 emissions, and in Section 165, Congress required a BACT limit for "any pollutant subject to regulation" under the Act. The combined effect of these two statutory mandates is that BACT limits are applicable to CO_2 pursuant to Section 165.

---

[9] According to the Reporter's notes, these references to Title V are meant to refer to Title IV, and the references to Section 511 are meant to refer to Section 412.

[10] Because violations of Section 821 are subject to the enforcement provisions of the Act, CO_2 is regulated under both the enforcement provisions of the Act and Section 821.

B. Carbon Dioxide is Subject to Regulation Under the Act Because It is Regulated In New Source Performance Standards Issued Under the Act.

In addition to section 821 of the Act and its implementing regulations, greenhouse gases such as carbon dioxide and methane are also regulated as a component of landfill gases. EPA has promulgated emission guidelines and standards of performance for municipal solid waste (MSW) landfill emissions. 40 C.F.R. §§ 60.33c, 60.752. "MSW landfill emissions" are defined as "gas generated by the decomposition of organic waste deposited in an MSW landfill or derived from the evolution of organic compounds in the waste." 40 C.F.R. § 60.751. EPA has specifically identified carbon dioxide as one of the components of the regulated "MSW landfill emissions." *See* Air Emissions from Municipal Solid Waste Landfills – Background Information for Final Standards and Guidelines, U.S. EPA, EPA-453/R-94-021 (Dec. 1995), available at http://www.epa.gov/ttn/atw/landfill/landflpg.html (explaining "MSW landfill emissions, or [landfill gas], is composed of methane, carbon dioxide, and NMOC."). Thus, carbon dioxide is regulated through the landfill emission regulations at 40 C.F.R. Part 60 Subparts Cc, WWW. *See also* 56 Fed. Reg. 24468 (May 30, 1991) ("Today's notice designates air emissions from MSW landfills, hereafter referred to as 'MSW landfill emissions,' as the air pollutant to be controlled").

C. Carbon Dioxide is Subject to Regulation Under the Act Because It is Regulated In State Implementation Plans Approved Under the Act.

Finally, carbon dioxide is also regulated under various state implementation plans (SIPs), which in turn constitutes regulation under the Clean

Air Act. Most significantly, EPA has now approved and promulgated a Delaware state implementation plan revision that sets limits on CO_2 emissions. Specifically, in a Federal Register notice that became effective on May 29, 2008, EPA promulgated its approval of CO_2 emission standards, operating requirements, record keeping and reporting requirements, and emissions certification, compliance and enforcement obligations for new and existing stationary electric generators in Delaware. *See* 73 Fed. Reg. 23,101.

Critically, EPA approved emission standards for CO_2. The control requirements approved and promulgated by EPA included a CO_2 emission standard of 1900 lbs/MWh for existing distributed generators, 1900 lbs/MWh for new distributed generators installed on or after January 1, 2008, and 1,650 lb/MWh for new distributed generators installed on or after January 1, 2012. *See* Delaware Department of Natural Resources and Environmental Control (DNREC), Regulation No. 1144: Control of Stationary Generator Emissions, §3.2; *see also* 73 Fed. Reg. at 23,102-103 (codifying approval in the Code of Federal Regulations at 40 C.F.R. § 52.420).

In EPA's proposed and final rulemaking notices, the Agency plainly stated that it was approving the SIP revision "under the Clean Air Act" (see 73 Fed. Reg. 11,845 (March 5, 2008)) and "in accordance with the Clean Air Act." *See* 73 Fed. Reg. at 23,101. EPA's action in approving the SIP revision made the control requirements and obligations part of the "applicable implementation plan" enforceable under the Clean Air Act. *See* 42 U.S.C. §7602(q).

Many Clean Air Act provisions authorize EPA enforcement of requirements and prohibitions under the "applicable implementation plan." *See,*

e.g., 42 U.S.C. § 7413(a)(1) (authorizing EPA Administrator to issue a compliance order, issue an administrative penalty, or bring civil action against the violating party); *id.* at (a)(2) (Administrator may enforce the "applicable implementation plan" if states fail to do so); *id.* at (b)(1) (requiring the Administrator to commence a civil action or assess and recover a civil penalty against the owner or operator of a source or facility that violates an "applicable implementation plan"). In addition, EPA's action makes the emission standards and limitations enforceable by a citizen suit under section 304 of the Clean Air Act. 42 U.S.C. § 7604.

The Supreme Court has made clear that the requirements under an EPA-approved state implementation plan are federally-enforceable obligations under the federal Clean Air Act:

> The language of the Clean Air Act plainly states that EPA may bring an action for penalties or injunctive relief whenever a person is in violation of any requirement of an "applicable implementation plan." § 113(b)(2), 42 U.S.C. § 7413(b)(2) (1982 ed.). There can be little or no doubt that the existing SIP remains the "applicable implementation plan" even after the State has submitted a proposed revision.

General Motors Corp. v. United States, 496 U.S. 530, 540 (1990).

Thus CO_2 is a pollutant subject to regulation under the Clean Air Act both because it is subject to monitoring and reporting requirements, and because it is subject to emissions limits. A BACT limit is therefore required for the CO_2 emissions from Seminole Unit 3. The Board should remand the PSD permit and instruct FDEP to include a CO_2 BACT emissions limit.

IV. FDEP's BACT ANALYSIS FOR STARTUP, SHUTDOWN, AND MALFUNCTION EVENTS IS INADEQUATE

The PSD permit for Seminole Unit 3 excuses compliance with BACT requirements during startup, shutdown, and malfunction (SSM) events, provided that Seminole adheres to "[b]est operational practices to minimize emissions" and the duration of such events is "minimized" and "in no case exceeds 60 hours during any calendar month." Ex. 1, Final Permit, § III(A)(29), at 10-11. EPA described 60 hours as "excessive." Ex. 5 at 3. Indeed, Seminole may exceed BACT limits for 120 straight hours if an SSM event occurs near the end of one month and bleeds over into the next. Such violations are explicitly excluded from other compliance demonstrations, and will only count against annual emissions caps. *See* Ex. 1 at §§ III(A)(30), p.11; III(A)(38)(h), p. 13. Failing to set numeric limits for excess emissions in this way was illegal under the federal delegation and remains illegal under Florida's SIP approved rules.[11]

BACT, although sometimes expressed in terms of technology, is "an emission limitation," *see* 42 U.S.C. § 7479(3), and the Clean Air Act makes clear that emissions limitations must "limit[ ] the quantity, rate, or concentration of emissions of air pollutants on a *continuous* basis," *see* 42 U.S.C. § 7602(k) (emphasis added). As such:

> It is well established that BACT requirements cannot be waived or otherwise ignored during periods of startup and shutdowns. . . . [U]nder the PSD program automatic exclusions from otherwise applicable emission limits during [startup, shutdown, and malfunction] events are inappropriate. Indeed, EPA has, since 1977, disallowed automatic or blanket exemptions for excess emissions during startup, shutdown, maintenance, and malfunctions by defining most periods of excess emissions as "violations" of the applicable emission limitations.

[11] Sierra Club raised this issue in its comments on the draft permits. *See* Ex. 2 at 48-49.

In re Indeck-Elwood, LLC, PSD Appeal No. 03-04, slip op. at 66 (EAB, Sept. 27, 2006); *see also In re Prairie State Generating Co.*, PSD Appeal No. 05-05, slip op. at 115 (EAB, August 24, 2006) (holding that "BACT requirements cannot be waived or otherwise ignored during periods of startup and shutdown," although requirements may vary at different times) (quoting *In re Tallmadge Generating Station*, PSD Appeal No. 0-12, slip op. at 24 (EAB, May 21, 2003); *In re Rockgen Energy Center*, 8 E.A.D. 536, 551-55 (EAB 1999) (holding that BACT requirements apply during startup and shutdown). For this reason, "exceedances of numeric BACT limits during SSM events have been ordinarily regarded as violations" of the Clean Air Act. *In re Indeck-Elwood, LLC*, slip op, at 71. As the Board has explained, citing EPA guidance:

> Startup and shutdown of process equipment are part of the normal operation of a source and should be accounted for in the planning, design and implementation of operating procedures for the process and control equipment. Accordingly, it is reasonable to expect that careful and prudent planning and design will eliminate violations of emission limitations during such periods.
>
> . . . .
>
> [EPA Guidance.] In other words, because routine startup and shutdown of process equipment are considered part of the normal operation of a source, these events are foreseeable and can be planned and scheduled at the discretion of the owner/operator. Excess emissions (i.e., air emissions that exceed any applicable emission limitation) that occur during these periods are therefore generally not excused and are considered illegal. Apparently, EPA's rationale for considering all excess emissions as violations of applicable standards is that SIPs and PSD programs are ambient-based programs established to protect increments and the [National Ambient Air Quality Standards]. See [EPA Guidance] (explaining that the same rationale for considering all excess emissions as violations under the State Implementation Plan applies in the PSD context). The Agency feared that "[w]ithout clear definition and limitations, * * * automatic exemption provisions could effectively shield excess emissions arising from poor operations and maintenance or design, thus precluding attainment."

Id., slip op. at 71-73 (citations omitted, last two alterations in original).

So, the exclusions for excess emissions in the Seminole permit could only survive if the vague requirement that Seminole use "best operational practices" satisfies BACT. EPA observed as much in comments on the draft Seminole permit, writing that "[a]ny pollutants emitted from Unit 3 during startup and shutdown that are subject to PSD review are . . . subject to BACT requirements," and that, "[i]f the numeric BACT emissions limits for regular operations can not be met during startup and shutdown, then numeric limits need to be established [for those periods] or work practice BACT requirements should be established." *See* Ex 5 at 3. FDEP responded that it intended "adherence to 'best management practices' to represent BACT." *Id.* at 4. While, in rare circumstances, such practices might represent BACT, FDEP simply has not demonstrated that they do so here.

Such a demonstration requires a rigorous analysis. Under the federal BACT definition, applicable to the draft permit, a "work practice, operational standard, or combination thereof, may be prescribed" only if EPA "determines" that "technological or economic limitations on the application of measurement methodology would make the imposition of an emissions standard infeasible." 40 C.F.R. § 52.21(b)(12). Such a standard "shall, to the degree possible, set forth the emission reductions achievable by implementation" of the work practice or operational standard. *Id.* Florida's requirements, approved in the SIP, are word-for-word identical. *See* Fla. Admin. Code Ann. r. 62-210.200(40)(b).

Yet, no such analysis or determination appears in the Seminole permit. Instead, to justify itself FDEP appears to rely on a misreading of a Florida

regulation, Fla. Admin. Code Ann. § 62-210.700. That rule, which applies generally to air permits for stationary sources, whether or not PSD applies, provides that "excess emissions resulting from startup, shutdown or malfunction . . . shall be permitted providing (1) best operational practices to minimize emissions are adhered to and (2) the duration of excess emissions shall be minimized"; section 5 of the rule, which FDEP cites in the Seminole permit, allows FDEP to adjust "maximum and minimum factors to provide reasonable and practical regulatory controls." But these requirements are general stationary source standards and do not substitute for a BACT determination.

It is, of course, true that if emissions above those allowed during normal operations are to be tolerated, they should be constrained by best operational practices. But that is all that Fla. Admin. Code Ann. § 62-210.700(5) establishes in the BACT context, whatever it may mean for other sorts of air permit. It nowhere contains an exception to the general BACT requirement that operational practices may be adopted if and only if the imposition of a direct emission standard is infeasible, as a carefully constrained last resort. *See* 40 C.F.R. § 52.21(b)(12); Fla. Admin. Code Ann. r. 62-210.200(40)(b). In this case, FDEP has not made an infeasibility determination.

Nor does Fla. Admin. Code Ann. § 62-210.700 give FDEP license to ignore the requirement that it "shall, to the degree possible, set forth the emission reductions achievable by implementation" of an operational standard, *see* 40 C.F.R. § 52.21(b)(12); Fla. Admin. Code Ann. r. 62-210.200(40)(b), even if adopting such a standard were appropriate here. Yet, FDEP is silent on the

extent of such reductions. *See In re Indeck-Elwood, LLC*, slip op. at 74 (holding a failure to include such a discussion to be improper).

FDEP cannot forego the careful BACT analysis that applies in the PSD context by pointing to general stationary source standards. The Clean Air Act does not condone such a result. Under the PSD program, "*[n]o* major emitting facility . . . may be constructed . . . unless . . . the proposed facility is subject to [BACT]." 42 U.S.C. § 7475(a)(4). This requirement is central to "protect[ing] public health and welfare," 42 U.S.C. § 7470(1). FDEP may not avoid it by misreading state regulations. Worse still, at the time of the draft permit, the state rule did not even apply to Seminole's application, which had to be judged under federal PSD standards.

In short, FDEP has botched its BACT analysis for SSM events entirely. It has made no feasibility determination and has not even complied with the standards for operational limitations that would apply if it had done so. Infeasibility is "the only clear vehicle for non-numeric BACT limits," *In re Indeck-Elwood, LLC*, slip op. at 73, and to employ it FDEP would have had to "make an on-the-record determination that . . . compliance [with numeric emissions limitations] is infeasible during startup and shutdown and include a discussion of the specific reasons for this conclusion." *In re Tallmadge*, slip op. at 27. Here, not only has FDEP not offered such an analysis, it has pointed to no "apparent record support" that might support an infeasibility determination. *See In re Indeck-Elwood, LLC*, slip op. at 73-74. Instead, it has put forward only the feeble requirement that Seminole should "minimize emissions." It is precisely this language that the Board has recently held to be "too infirm to comport with the

relevant regulatory requirements," as "nothing in it can reasonably be interpreted as requiring the permittee to employ measures that, at a minimum, will achieve a reduction in emissions equivalent to the level of reductions expected from the application of numeric limitations." *Id.*, slip op. at 74.[12]

The proper remedy is well-established. Because there is no "on-the-record determination pointing to technical or economical limitations on the application of measurement methodology to [the Seminole plant], or some other reference point for allowing non-numeric BACT limits," the Board "cannot conclude that [FDEP] legitimately substituted numeric limits with work and operational practices." *Id.*, slip op. at 75. "Under these circumstances . . . the permit provisions substituting work and operational practices for BACT numeric limits must be remanded." *Id.*; *see also In re Tallmadge*, slip op. at 26-28 (remanding); *In re Rockgen Energy Center*, 8 E.A.D. at 554-55 (same).

V. THE PSD PERMIT FAILS TO ENSURE THAT BACT EMISSION LIMITS WILL BE ENFORCEABLE.

Because BACT must be met "on a continuous basis," see 42 U.S.C. § 7602(k), monitoring provisions in a PSD permit must be adequate to ensure continuous compliance. "[W]ithout a reliable and accurate means of ensuring compliance, emissions controls would be meaningless because they would be unenforceable." *In re ConocoPhillips Co.*, PSD Appeal No. 07-02, slip op. at 41-42 (EAB, June 2, 2008). In its comments, Ex. 2 at 41-46, Sierra Club raised significant concerns over the adequacy of Seminole's monitoring technology to assure BACT compliance. FDEP has provided no response which could

[12] The presence of annual emissions limits that include startup, shutdown, and malfunction events does not save the permit, as the exclusions apply to shorter-term BACT limits. *See In re Indeck-Elwood, LLC*, slip op. at 62 n.82 (so holding).

"adequately explain and support its rationale," *id.*, slip op. at 43, for adopting these measures.

Compliance with potential to emit and BACT limits should be demonstrated continuously. Based on EPA's guidance in the NSR Manual, the hierarchy for specifying monitoring to determine compliance is as follows: (1) continuous direct measurement of emissions where feasible; (2) initial and periodic direct measurement of emissions where continuous monitoring is not feasible; (3) use of indirect monitoring, e.g., indicator surrogate monitoring, where direct monitoring is not feasible; and (4) equipment and work practice standards where direct and indirect monitoring are not feasible. *See, e.g.*, NSR Manual at B.56; *In re ConocoPhillips Co.*, slip op. at 38-39. In general, "the permit must include conditions allowing the applicable enforcement authority to show continual compliance." *In re ConocoPhillips Co.*, slip op. at 38-39 (quoting *In re Shell Offshore, Inc.* PSD Appeal Nos., 07-01 & 07-02, slip op. at 52 n. 54). The permit fails to follow this hierarchy because it allows periodic testing when continuous direct measurement is feasible, allows indirect monitoring and equipment and work practices when periodic testing is feasible, and specifies inadequate testing when periodic monitoring is appropriate.

If a permitting authority deviates from the NSR Manual, the Board will "scrutinize such a determination carefully to ensure that all regulatory criteria were considered and applied appropriately." *In re Knauf Fiber Glass, GMBH*, 8 E.A.D. 121, 129 n. 14 (EAB 1999). In such cases, the agency must provide "an analysis that is at least as detailed as that contemplated by the NSR Manual." *In re Indeck-Elwood, LLC*, PSD Appeal No. 03-04, slip op. at 47 (EAB, Sept. 27,

2006). Whatever test or technique the agency selects must be adequately justified. While the Board will "generally defer" on such issues, "[t]he permitting authority's rationale for its conclusions . . . must be adequately explained and supported in the record." *In re ConocoPhillips*, slip op. at 26, 43 (quotation marks and alterations omitted). Further, "[o]nly where the record demonstrates that the permitting authority duly considered the issues raised in the comments and that the approach ultimately adopted by the permitting authority is rational, in light of all the information in the record, will the Board defer to the permitting authority's expertise." *Id.*, slip op. at 26; *see also id.* (collecting cases so stating).

FDEP has entirely failed to respond to the concerns Sierra Club has raised, or to explain why it has selected monitoring measures that appear to be inadequate. The flaws in the present provisions are extensive. In its comments, Sierra Club alerted FDEP to the following four issues, among others:

First, the permit requires infrequent periodic direct measurement (stack tests) to determine compliance with PM/PM10, VOC, HF, SAM, NH3, and Hg) emissions. But a stack test normally lasts only a few hours and is conducted under ideal, prearranged conditions. Staged annual or other periodic testing tells one nothing about emissions during routine operation or startups and shutdowns on the other 364 days of the year. In addition, emissions can vary over a factor of 10 or more from hour to hour and from day to day. An infrequent stack test will, therefore, not be representative of a source's ongoing emissions. In short, it is well known that "[m]anual stack tests are generally performed under optimum operating conditions, and as such, do not reflect the full-time emission conditions from a source." *See* Emission Monitoring of Stationary Sources, 40 Fed. Reg.

46,240, 46,241 (Oct. 6, 1975). As such, Sierra Club urged FDEP to move away from stack tests, which may simply miss significant violations of emissions limits.

Second, to assure that sources comply with emission limits, Sierra Club suggested that monitoring be performed more frequently than specified by the permit and that Continuous Emissions Monitors (CEMS) be used where possible. Particulate matter can be monitored with CEMS and the record does not demonstrate that CEMS for these pollutants is not feasible. Indeed, CEMS for particulate matter have been found feasible and have been required in several permits, including those issued to Longview, WV; Prairie State, IL; Iatan, MO; Trimble, KY, and Dalman Unit 4, IL. Therefore a PM CEMS should be required to determine compliance with the filterable PM/PM10 limit.

Third, even where CEMS would not be feasible, Sierra Club urged that more frequent stack testing be required, along with regular monitoring of key operating parameters or indicator pollutants that have been correlated with the applicable emission limits. The stack testing frequency in the permit is far too low, ranging from only one initial stack test (VOC) to testing every 5 years (HF) to annual testing (SAM). A typical stack test lasts about 3 hours. Over the 30 plus-year life of the facility, testing once for 3 hours would test only 3 hours out of 262,800 potential operating hours. Annual testing would test only 90 hours out of 262,800 potential operating hours or only 0.03 percent of the time. This testing frequency, Sierra Club commented, is inadequate to demonstrate continuous compliance with BACT limits and emission caps relied on to net out of PSD review. Thus, Sierra Club explained that FDEP should require quarterly stack testing for the first two years, with reductions to a lower frequency only after

compliance has been demonstrated. The comments also asked that surrogate parameters be continuously monitored. A surrogate is an indicator parameter that is related to the parameter of interest, commonly used in PSD permits to demonstrate continuous compliance with limit on VOCs, HF, and SAM. The Sierra Club recommended that the permit be modified to require the use of surrogates to determine continuous compliance with the proposed limits on VOCs (CO), HF (coal fluoride content), and SAMs (SO2 until a continuous monitor for SAM is installed) if a study demonstrated an acceptable correlation between the parameter and the surrogate.

Fourth, Sierra Club explained that the VOC limit was not enforceable because the test methods FDEP authorized did not accurately measure VOC. To comply with the Clean Air Act, the owner of an emission source must set VOC emission limits based on total VOC mass. 40 C.F.R. § 51.100(s). One cannot determine if VOC emissions are less than the PSD significance threshold or demonstrate that VOC emissions remain below this threshold unless one calculates VOCs on a total VOC mass basis.[13] The test methods listed in the permit do not reliably calculate VOCs on a total VOC mass basis. The available VOC test methods in 40 C.F.R § 60—Methods 18, 25, and 25a—do not directly address the issue of reporting VOC emissions "as VOC." As the comments set out, the available methods appeared likely to consistently underestimate the mass of VOCs actually being emitted from the project. Sierra Club

[13] Letter from Stephen D. Page, Direct, Office of Air Quality Planning and Standards, U.S. EPA, to Mary a. Gade, December 30, 2003. http://www.epa.gov/Region7/programs/artd/air/nsr/nsrmemos/gade.pdf#search=%22midwest%20scaling%20protocol%22.

recommended that the Permit be revised to evaluate available methods to measure VOCs and select a method that complies with 40 C.F.R. § 51.100(s).

FDEP was silent in the face of these criticisms and issued the final permit unaltered from the draft permit. It did not justify its departure from the NSR Manual, did not provide a reasoned basis in the record for adopting the measures it did in the face of the flaws Sierra Club identified, and, in sum, made no effort whatsoever to respond to Sierra Club's comments. FDEP has not, as a result, "provided sufficient rationale for the Board to determine whether it has exercised considered judgment," *see In re ConocoPhillips Co.*, slip op. at 43, and is therefore not entitled to any deference, *see id.* at 26. FDEP is obliged "not only explain the monitoring and observation provisions . . . and how they were derived, but also should ensure and explain how the conditions of the permit serve the purposes for which they are intended." *Id.* Further, the rationale for these decisions "must be apparent from the record." *Id.*, slip op. at 44; *see also In re Indeck-Elwood, LLC*, slip op. at 47 (explaining the detailed analysis required for departures from the NSR Manual). Because FDEP has not fulfilled these basic requirements of agency decisionmaking, and has as a result compromised the enforceability of BACT requirements, the Board should remand and require it to reconsider its decisions, taking Sierra Club's concerns into account.

THE BOARD SHOULD REMAND THE PERMIT BECAUSE IT RELIES ON INADEQUATE PRECONSTRUCTION MONITORING

Under the federal PSD program, permit applicants must as a baseline provide "an analysis of ambient air quality" in the area affected. 40 C.F.R. §

52.21(m)(1). For any pollutant for which a NAAQS has been established, this analysis must be based upon "continuous air quality monitoring data" for the area, which generally must "have been gathered over a period of at least one year and shall represent at least the year preceding receipt of the application." *Id.* at § 52.21(m)(1)(iii)-(iv). Florida has directly adopted these requirements into its PSD program. *See* Fla. Admin. Code Ann. r. 62-212.400(7). Seminole did not fulfill these mandates, instead relying upon out-dated data from distant monitoring stations. FDEP's decision to issue a permit on this shaky grounding warrants a remand.

According to Seminole's permit application, much of its meteorological PSD modeling is based upon data that was sixteen years old at the time of the application, and gathered from stations far away from the plant site. Seminole Application at 65. The data was gathered from stations at the Jacksonville, Florida airport, fifty-five miles away from the plant site, and Waycross, Georgia, over a hundred miles removed, *id.*, and dates from 1986-90. *Id.* Air monitoring data for CO and ozone, in turn, was drawn from stations in Jacksonville and Gainesville, which is over forty miles away from the site, with only PM_{10} data coming from nearby Palatka. *Id.* at 76-77. Although FDEP apparently considered the Jacksonville and Gainesville stations to have data "representative" of the project site, *id.*, there is no record evidence for this, or that the Waycross station bears any resemblance at all to the Seminole project area. Nor is there any evidence presented that meteorological conditions in the late 1980s, when that data was gathered, are similar to those in the present or at the project site. Yet, Seminole grounds its air quality monitoring on this data.

Such an ill-supported baseline is inappropriate. The EPA's *Ambient Monitoring Guidelines for Prevention of Significant Deterioration*, EPA-405/4-87-007, at 6-8 (May 1987) emphasize that original, site-specific monitoring is generally preferable, and particularly so in areas, like this one, where many emissions sources are operating. In such cases, use of existing data is generally appropriate only for monitors located within 10 km "of the points of proposed emissions," *id.* at 6-7; *see also* 40 C.F.R. Pt. 51, App. W §8.3.3.1(a) ("Spatial or geographic representativeness is best achieved by collection of all of the needed model input data in close proximity to the site of the sources"). Yet, here, Seminole relied upon significant amounts of data from miles away, much of it gathered well before the application was submitted. FDEP should have required that Seminole conduct extensive preconstruction monitoring to supplement the data available, but did not do so. The result is to leave the baseline upon which all of its analysis is built ill-supported.

Sierra Club raised these concerns in its comments, Ex. 2 at 49-50, but FDEP provided no response, despite clear federal and state requirements that it do so. *See* 42 U.S.C. § 7475(a)(2); 40 C.F.R. § 124.17(a); Fla. Admin. Code r. 62-210.350(2)(f). So, if there is a justification for the failure to require site-specific preconstruction monitoring, FDEP has not provided it.

This silence supports a remand. While, the "choice of appropriate data sets for the air quality analysis is an issue largely left to the discretion of the permitting authority," the agency nonetheless must "adequately justi[fy] [the decision] in the record." *In re Knauf Fiber Glass, GMBH*, 8 E.A.D. 121,147 (EAB 1999). FDEP has provided no such justification, and so the Board has no

grounds to uphold its decision. "Under the circumstances, this matter must be remanded to [FDEP] so that it can demonstrate, to a greater degree than heretofore, that it has given, or will give . . . thoughtful and full consideration to all public comments before making the final permit decision." *In re Rockgen Energy Center*, 8 E.A.D. 536, 557 (EAB 1999).

VI. THE FAILURE TO ADEQUATELY ANALYZE IMPACT TO SOILS AND VEGETATION WARRANTS A REMAND.

Under both Florida and federal regulations, a PSD permit may not issue until the applicant has "provide[d] an analysis of the impairment to . . . soils and vegetation that would occur as a result of the source." 40 C.F.R. § 52.21(o); Fla. Admin. Code Ann. r. 62-212.400(8)(a). While this "regulation itself does not specifically require a baseline assessment of the existing soils and vegetation, presumably such an analysis would necessarily be part of the inquiry into whether the proposed source would impair the soils and vegetation." *In re Indeck-Elwood, LLC*, PSD Appeal No. 03-04, slip op. at 43 n. 63 (EAB, Sept. 27, 2006). The Seminole project would impact three national wildlife refuges, all PSD Class I areas within 300 km of the site, yet neither Seminole nor FDEP conducted a careful analysis of these impacts, despite the clear requirements of the state and federal rules. Nor did FDEP respond to the concerns Sierra Club raised in its comments, *see* Ex. 2 at 18-21, regarding these impacts. These failures require a remand.

Although the soil and vegetation analysis requirements apply generally, they are particularly important when ecologically sensitive areas are nearby, as there are here. The Clean Air Act requires FDEP to consider and protect natural

resources. Among the purposes of the PSD program are to "preserve, protect and enhance the air quality in... areas of natural, recreational, scenic or historic value." 42 U.S.C. § 7470(2). To preserve and protect such areas the Act mandates that "[n]o major emitting facility ... may be constructed ... unless ... (2)... the required analysis has been conducted in accordance with regulations promulgated by the Administrator, and a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations." 42 U.S.C. § 7475(a)(2). EPA has further explained that such an analysis "should be based on an inventory of soils and vegetation types found in the impact area [and] [t]his inventory should include all vegetation with any commercial or recreational value, and may be available from conservation groups, State agencies, and universities." NSR Manual at D.4.

Seminole identified three PSD Class I areas within 300 km of the proposed Seminole site. Seminole Air Permit Application, at 59. The Okefenokee National Wildlife Area, which includes the Okefenokee Wildlife Refuge, lies 108 km north of the project and contains the Okefenokee Swamp, which is covered with cypress, blackgum, and bay forests scattered throughout a flooded prairie made of grasses, sedges, and various aquatic plants.[14] The peripheral upland and almost 70 islands within the swamp are forested with pine interspersed with hardwood hammocks. With its varied habitats, the Okefenokee

[14]U.S. Fish and Wildlife Serv., Okefenokee Wildlife Refuge available at http://www.fws.gov/okefenokee/.

is known for its abundance of plants, wildlife and birds. The Okefenokee Wildlife Refuge is home to endangered wildlife and plants, including the Florida panther, American alligator, and indigo snake.[15]

The second closest National Wilderness Area is the Chassahowitzka National Wildlife Refuge, which is located 137 km to the southeast of the proposed Seminole 3. Air Permit Application, at 59. The Chassahowitzka consists of coastal saltmarsh, shallow bays, tidal streams, and rivers, mangrove islands, and coastal maritime hammock.[16] The refuge provides habitat for approximately 250 species of birds, over 50 species of reptiles and amphibians, and at least 25 species of mammals. Endangered and threatened species on the refuge include the West Indian manatee, sea turtles, and bald eagles.[17]

The Wolf Island National Wildlife Refuge is located 186 km to the north. Air Permit Application, at 59. Wolf Island NWR, which includes Egg Island and Little Egg Island, was established on April 3, 1930 as a migratory bird sanctuary. The refuge consists of a long narrow strip of oceanfront beach backed by a broad band of salt marsh.[18] Several species of threatened and endangered species can be found within the Wolf Island NWR, including the bald eagle, American alligator, loggerhead sea turtle, piping plover, and wood stork.[19]

---

[15] U.S. Fish and Wildlife Serv., Okefenokee National Wildlife Refuge Amphibians, Fish, Mammals and Reptiles List available at http://www.fws.gov/okefenokee/okefenokee_amphib_fish_mam_rep98.pdf.
[16] U.S. Fish and Wildlife Serv., Chasshowitzka National Wildlife Refuge, available at http://www.fws.gov/chassahowitzka/.
[17] Id.
[18] U.S. Fish and Wildlife Serv., Wolf Island National Wildlife Refuge, available at http://www.fws.gov/wolfisland/index.htm.
[19] U.S. Fish and Wildlife Serv., Threatened and Endangered Species of Savannah Coastal Refuges, available at http://www.fws.gov/savannah/endangered.htm.

Unfortunately, identifying the existence of these areas is all that Seminole did. In its application, it generically discusses the sorts of harms to soils and vegetation that its pollutants may cause, *see* Seminole Application at 80-81, but failed to conduct any sort of rigorous on-the-ground analysis.

Instead, with regard to soils, Seminole explained that "[t]he soils of Class I areas are generally classified as histosols or entisols," noted that those soil types are "relatively insensitive to atmospheric inputs," and then concluded that any impacts upon the national wildlife areas would be insignificant. *Id.* at 80. Seminole did not, however, actually sample the soils in the areas in question, nor conduct any sort of testing upon them. It did not, in other words, base its analysis upon an "inventory of the soils and vegetation types found in the impact area," as the NSR Manual requires at D.4, and nor did it use "an analysis that is at least as detailed as that contemplated by the NSR Manual." *In re Indeck-Elwood, LLC*, slip op. at 46-47 (citing *In re Knauf Fiber Glass, GMBH*, 8 E.A.D. 121, 129 n. 14 (EAB 1999). Instead, it strung together assumptions about the impacts of its emissions upon wildlife areas of national importance. Because "the language of the statute contemplates a comparative analysis of some kind between the existing baseline conditions of soils . . . at the site and in the potentially affected area, and the effects of the emissions on such baseline conditions," *In re Indeck-Elwood, LLC*, slip op. at 42-43, the failure to establish an empirically-valid baseline is fatal to Seminole's analysis.

The vegetation analysis was little better. Again, Seminole conducted no survey of the vegetation growing in the three National Wildlife Areas. Instead, it described generally the effects of various pollutants on plants, *See* Seminole

Application at 80-83, and then modeled emissions solely from the project upon the three sensitive areas. *Id.* at 81-83. Seminole, in other words, ignored existing pollutant loads, ecological conditions on the ground, and the actual makeup of the botanic communities it could affect. But these sites do not experience impacts only from the proposed project and they do not consist of "vegetation" but of individual species with varying sensitivities to air pollution. Yet, "in order to determine whether is any vegetation of significant commercial or recreational value for which an analysis would need to be performed, one would presumably need to know what plant species were at issue." *In re Indeck-Elwood, LLC*, slip op. at 43 n. 63. Seminole should, in other words, have identified the relevant species, gauged their present health in situ, and then modeled the impacts of its emissions when added to existing conditions. That its analysis was inadequate is clear, as the Board has rejected a vegetation analysis that at least contained *some* species data because the data was out-of-date and did not accurately characterize the impacted site, *see id.* , slip op. at 45. Here, Seminole did not rely upon a specific species list at all. It analysis was purely generic, and so falls well below the standard set by *In re Indeck-Elwood, LLC.*

FDEP's silence on these concerns is unsupportable. It not only accepted Seminole's cursory analysis at face value, it nowhere responded to Sierra Club's detailed critique. The Board has held a permitting agency's response to similar criticisms improper when those responses were "largely conclusory" and did "not provide or reference any more detailed analyses" supporting their conclusions. *Id.*, slip op. at 39-40. FDEP did not provide even conclusory responses: it did not respond at all. "At bottom, . . . in view of the proximity of the [Seminole] facility"

to the national wildlife areas, " and the comments received pertaining to the draft permit identifying a number of the problems with [FDEP's] analysis . . . [FDEP's] response to the comments and its record support for its conclusions regarding soil and vegetation impacts were lacking." *Id.*, slip op. at 47.

In similar circumstances, the Board has remanded for the permitting agency either to "clarify how its decision both comports with the requirement for a more rigorous analysis and addresses the comments that were received on this issue" or to "perform or consider analysis . . . sufficient to address the concerns." *Id.*, slip op. at 50-51. The Board should do so here. Any remand should direct that FDEP consider soils and vegetations impacts in both the three PSD Class I areas and in the region affected by the project generally.

VII. FDEP'S FAILURE TO ASSESS THE IMPACT OF THE RECENTLY MANDATED CASE-BY-CASE MACT DETERMINATION ON THE SEMINOLE PSD PERMIT REQUIRES REMAND.

Sierra Club's comments on the draft permit detailed extensive flaws with the analysis of mercury emissions. *See* Ex. 2 at 21-31. After the comment period on the draft permit closed, the D.C. Circuit issued its opinion in *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008), which vacated the Clean Air Mercury Rule and had the effect of requiring new electric generating units, including Seminole, to comply with section 112(g) of the Clean Air Act, 42 U.S.C. § 7412(g). Section 112(g) requires the permitting authority to determine that new or modified major sources of hazardous air pollution will meet maximum achievable control technology (MACT) emission limitations for each hazardous pollutant (HAP) emitted by the facility. In its Final Determination, FDEP acknowledged the D.C. Circuit decision and stated, "The Department will require an application for case-

by-case MACT and will issue its determination thereof in a separate agency action." Ex. 5 at 1.

It is both unreasonable and unlawful for FDEP to issue the PSD permit for Seminole without first, or simultaneously, conducting the required case-by-case MACT determination, and specifically determining, on the record, the impact that MACT-related requirements will have on the PSD control technology assessment (especially the BACT analysis) and the corresponding permit limitations. Until a case-by-case MACT review has been conducted – or at the very least until FDEP has performed a meaningful assessment of the likely implications of MACT-related emission limits – FDEP has no way of assessing how the technology-forcing MACT requirements may affect the plant's ability to control PSD pollutants. The technologies prescribed to meet MACT may allow for far greater cost-effective reductions in PSD pollutants than may have been true when FDEP issued the draft PSD permit. Or changes in fuels required pursuant to MACT may necessitate entirely different pollution-control methods as BACT. Or the MACT limits may affect the emissions calculations that were the basis of the Department's earlier PSD analysis. The Board should remand the permit and require FDEP to consider the implications of the MACT requirements in its PSD analysis.

A. The Clean Air Act Requires Case-by-case MACT for Seminole

The Clean Air Act requires that EPA list "all categories of and subcategories of major sources" of HAP, 42 U.S.C. § 7412(c)(1),[20] and

[20] A major source is, without limitation, "*any* stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year of any hazardous air pollutant or 25 ton

promulgate regulations that establish "emissions standards . . . applicable to new and existing sources of hazardous air pollutants [that] require the maximum degree of reduction in emission" that the Administrator determines is achievable, 42 U.S.C. § 7412(d)(2). These "maximum achievable control technology" standards for new sources must be no less stringent than "the emission control that is achieved in practice by the best controlled similar source." 42 U.S.C. § 7412(d)(3). The Act requires that EPA meet certain deadlines for promulgating standards under section 112(d) to control emissions of these pollutants from identified categories of major sources. *See, e.g.*, 42 U.S.C. § 7412(c)(5), (c)(6), (c)(8), (e)(1), (e)(3). If EPA has failed to promulgate emission standards under section 112(d), however, new sources (and modifications to existing sources) must obtain MACT emission limitations, established on a case-by-basis, before they can be built. *See* 42 U.S.C. § 7412(g)(2).[21] In particular, Section 112(g)(2)(B) provides:

> After the effective date of a permit program under subchapter V of this chapter in any State, no person may construct or reconstruct *any* major source of hazardous air pollutants, unless the Administrator (or the State) determines that the maximum achievable control technology emission limitation under this section for new sources will be met. Such determination shall be made on a case-by-case basis where no applicable emission limitations have been established by the Administrator.

42 U.S.C. § 7412(g)(2)(B) (emphasis added); *see also* 40 C.F.R. § 63.42(c).

---

per year or more of any combination of hazardous air pollutants." 42 U.S.C. § 112(a)(1) (emphasis added).

[21] Florida regulations adopt the EPA regulations found at 40 C.F.R. Part 63, Subpart B, governing section 112(g) determinations for major sources, with certain important changes that make the relationship between the PSD and MACT determinations even more clear, as discussed in section VIII.D.2 below. *See* 62-204.800(11)(d)2 F.A.C.

In 2000, EPA added coal- and oil-fired electric generating units ("EGUs") to the list of major sources of HAP,[22] after completing the study of hazardous emissions from EGUs required under CAA section 112(n).[23] By virtue of this action, EGUs became a listed section 112 source category for which EPA is required to establish MACT standards.

EPA has failed to meet its obligation to promulgate MACT standards for new and existing coal- and oil-fired electric generating units (EGUs). This failure is made clear by *New Jersey v. EPA*, 517 F.3d 574. In vacating EPA's "clean air mercury rule," the Court noted that the Agency had illegally attempted to remove EGUs from the list of source categories established pursuant to section 112(c). Accordingly, EPA's purported "delisting" was ineffectual, and the December 2000 source category listing of EGUs remains in effect.[24]

In the Final Determination, FDEP acknowledges that by virtue of *New Jersey*, Seminole is now obligated to obtain a MACT determination before it may begin construction on the new unit. Ex. 5 at 1. Thus, at this juncture, it is clear that the proposed Seminole plant is subject to case-by-case MACT review.

B. Case-by-case MACT Issues are Properly Before the Board on Review

---

[22] See 65 Fed. Reg. 79825, 79828 (Dec. 29, 2000) (2000 Listing Decision).

[23] U.S. Environmental Protection Agency, *Study of Hazardous Air Pollutant Emissions from Electric Utility Steam Generating Units—Final Report to Congress* ("Utility Study"), (Feb. 1998). The full report is available at: http://www.epa.gov/mercury/report.htm and is incorporated by reference here.

[24] Specifically, in vacating EPA's delisting decision and the associated Clean Air Mercury Rule (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.

517 F.3d at 584.

As FDEP acknowledges, the outcome of the *New Jersey* case more than a year after the close of the comment period changed the nature of the substantive preconstruction requirements to which the Seminole project is subject. Because of this new circumstance, the Board should consider Sierra Club's claim that FDEP must assess the impact of the MACT requirement on the PSD analysis for Seminole before issuing a final PSD permit.

Pursuant to 40 C.F.R. § 124.13, "in order to demonstrate that an issue has been preserved for appeal, a petitioner must show that any issues being appealed were raised with reasonable specificity during the public comment period." *In re Indeck Elwood*, PSD Appeal 03-04, slip op. at 23 (EAB, Sept. 22, 2006), 13 E.A.D. [redacted] "Alternatively, a petitioner may demonstrate that an issue was not reasonably ascertainable during the public comment period." *Id.* n.49 (citing *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 250 n.8 (EAB 1999)). In this instance, Sierra Club raised issues on the Draft Permit advocating a BACT emissions limit for the control of mercury based on Florida regulations. *See* Ex. 2 at 22. In addition, other commenters submitted a letter to FDEP on July 3, 2008, to alert the agency to the implications of the case-by-case MACT requirement on its ongoing PSD review. *See* Ex. 4 (Letter from Natural Resources Defense Council and Southern Alliance for Clean Energy to FDEP, July 3, 2008) at 19-21. The Board should consider the MACT-related issues raised in this Petition because they were not "reasonably ascertainably" during the comment period on the Draft Permit.[25]

[25] Petitioner notes that the situation here is very different than that in *In re Christian County* (PSD Appeal No. 07-01 (EAB 2007)), where the Board found that the CO_2 related implications flowing from the Supreme Court's decision in *Massachusetts v. EPA* were reasonably ascertainable

C. *MACT Includes Technology-Forcing Requirements That Are More Stringent Than BACT*

The MACT process is an analytic exercise with a more stringent set of technology-forcing criteria that is likely to result in more stringent emission limits than BACT. Indeed, there is a long line of D.C. Circuit case law defining the parameters of the MACT process and acknowledging Congress's intent to impose particularly stringent controls on HAP.

The MACT process involves a two-step analysis that results in numerical emissions limits for hazardous air pollutants.[26] The first step requires that the regulatory authority establish a "MACT floor" – a minimum level of stringency for the MACT standard based on specifically enumerated criteria. For new major sources, such as Seminole, the MACT floor may "not be less stringent than the emission control that is achieved in practice by the best controlled similar source." 42 U.S.C. § 7412(d)(3). The second step of the MACT analysis involves consideration of "beyond the floor" controls – emission limitations that are more stringent than the MACT floor. Such additional pollution control requirements are mandatory where they would be "achievable" considering cost and other factors enumerated in the Act. *See* 42 U.S.C. § 7412(d)(2); *see also*

---

during the comment period for that permit. In this instance, unlike in *Christian County*, the *New Jersey* case was still in its early stages during the comment period for Seminole (in fact, while one-page petitions for review were filed in 2005, opening briefs in the *New Jersey* case were not filed until January 2007, months after the Seminole comment period had closed). Moreover, it only became clear that the delisting-related challenge would significantly factor into the Court's decision when the court issued its Order scheduling oral argument in November 2007, over a year after the close of the comment period on Seminole draft permit. Also, there is no evidence here, as there was in *Christian County*, that this issue had in fact been raised or specifically considered by the parties in other proceedings prior to the relevant comment period. Thus, in order to give meaning to the term "reasonably" in the rule's reference to "reasonably ascertainable," the Board must recognize "reasonable" limits on the ability of the public in permit proceedings to foresee the outcome of possibly related ongoing, early-stage litigation. Accordingly, the Board's jurisdiction over the MACT-related issues raised here is proper.

[26] Under certain circumstances, EPA may impose work practice requirements in lieu of numerical emission limits, but this authority is specifically constrained by the act. See 42 U.S.C. § 7412(h).

See Nat'l Lime Ass'n v. EPA, 233 F.3d 625, 639 (D.C. Cir. 2000) (hereinafter "*National Lime*").

MACT standards must include emission limitations for each HAP that a facility will emit, and the Clean Air Act specifically lists more than 180 individual hazardous air pollutants that are potentially subject to control under the Act's MACT program. 42 U.S.C. § 7412(b). As the D.C. Circuit has explained, the regulating agency has a "clear statutory obligation to set emission standards for each listed HAP" that a facility will emit. *National Lime*, 233 F.3d at 634. Therefore, when a facility is subject to the Clean Air Act's case-by-case MACT provisions, FDEP must establish emissions limitations for each and every HAP that the facility will emit. With respect to electric generating units, like Seminole, this means FDEP must specifically identify the full range of HAP emissions the facility will emit, and establish standards pursuant to section 112(g) that address each of those HAPs.

In its 2000 Listing Decision, EPA concluded 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, 79828 (Dec. 29, 2000). And in the final report to Congress, required under section 112(n), EPA explained that EGUs typically emit some 67 listed HAP (including in addition to mercury, toxics like arsenic, beryllium, cadmium, chromium, dioxins, lead, and manganese). Utility Study, n. XXX *supra*. Once the applicant has identified each HAP that its proposed facility will emit, the regulator must establish MACT *independently for each HAP*. Thus, for each HAP, the regulator must identify the individual best performing similar source and identify the emission performance

that that source achieves in practice. While such emission limitations may include standards for categories of pollutants that are represented by a "surrogate" pollutant, a regulator may not arbitrarily identify a surrogate without specifically linking the surrogate with *each HAP* that it is intended to represent. *See Mossville Envt'l Action Now v. EPA*, 370 F.3d 1232, 1243 (D.C. Cir. 2004).[27] Accordingly, in this instance, FDEP will need to identify the emission limitation achieved in practice by the single best performing similar source for each of dozens of HAP that the Seminole plant is likely to emit.

Each such MACT floor must accurately reflect the level of performance that the relevant best performing source *actually achieves*, and may not consider cost, technical or economic feasibility, or achievability for the source that will be subject to the MACT limit. *See, e.g., National Lime*, 233 F.3d at 640 ("cost may not influence the determination of a MACT floor, which depends exclusively upon the emission reductions achieved by the best-performing sources."); *Cement Kiln Recycling Coalition v. EPA,* 255 F.3d 855, 857-58 (D.C. Cir. 2001) (same).

[27] The Court in *Mossville* rejected EPA's reliance on vinyl chloride as a surrogate for all HAP form PVC production facilities, ruling unambiguously that EPA was required to "establish a correlation between the surrogate and the HAP" and that to do so the agency was affirmatively required to identify each HAP that the facility would emit, and directly link each such HAP with the chosen surrogate. 370 F.3d at 1243. It was fatally insufficient for EPA to simply assert without detailed, HAP-specific analysis that vinyl chloride was an appropriate surrogate for all HAP. In fact, surrogates are appropriate only where they meet certain criteria intended to ensure that they will actually serve to demonstrate MACT level control of all represented HAP. In particular, the D.C. Circuit has explained that the use of surrogates is permissible only if it is scientifically reasonable. *See National Lime,* 233 F.3d at 637. At minimum, to rely on a surrogate, the regulator must demonstrate that the surrogate and the class of pollutants it represents are "invariably present" together in the emissions; that the applicable control technology "indiscriminately captures" both the surrogate and the represented pollutants; and that these controls are the "*only means by which facilities 'achieve' reductions*" in the target pollutants. *See Sierra Club v. EPA*, 353 F.3d 976, 984 (2004) (*citing National Lime*, 233 F.3d at 639) (addressing EPA's use of PM as a surrogate for metal HAP). If a target HAP and its proposed surrogate do not behave similarly with respect to controllability, then the surrogate approach is impermissible. For example, if different control technologies, or the same technology used under different conditions, will remove HAP in different proportions with respect to the surrogate pollutant, then the surrogate may not be used unless there is a mechanism to ensure that in each instance the individual target HAP itself will be controlled at least to the degree that that HAP is controlled by the best performing source.

On numerous occasions, the D.C. Circuit has specifically rejected EPA's attempt to set floors at levels that it believed would "reflect what the agency determines to be *achievable* through the use of particular technology." *Cement Kiln,* 255 F.3d 855, 861 ("EPA may not deviate from section [112(d)(3)]'s requirement that floors reflect what the best performers are *actually achieving* by claiming that floors must be *achievable* by all sources using MACT technology.") (emphasis added). Whatever process a permitting agency uses to establish MACT floors, it "must show not only that it believes its methodology provides an accurate picture of the relevant sources' actual performance, but also *why* its methodology yields the required estimate."[28] *Id.* at 862; *see also Sierra Club v. EPA,* 233 F.3d at 632 ("to comply with the statute, EPA's method of setting emission floors must reasonably estimate the performance of relevant best performing plants").

Significantly, when identifying a MACT floor for new units, the method of control that the reference unit employs is *entirely irrelevant.* The actual performance of the best performing similar source (for each HAP) *is* the MACT floor – whether that level of performance is achieved through use of emissions control equipment, through process controls or cleaner processes, through management of operating parameters, through use of cleaner inputs or fuels, by some other mechanism, or by some combination of measures. *See Cement Kiln,*

[28] In this respect, the permitting agency may not rely on permit limits as reflecting the MACT floor unless it can affirmatively demonstrate that the relevant permit limits, in fact, reflect the emissions control *achieved in practice* by the relevant best performing sources. *Northeast Maryland Waste Disposal Authority v. EPA*, 358 F.3d 936, 953-54 (D.C. Cir. 2004) (*citing Sierra Club v. EPA*, 167 F.3d 658 (D.C.Cir.1999)). This requirement is a significant departure from BACT, where EPA routinely relies on permit limits with no demonstration that the permit limits reflect the best actual performance.

255 F.3d at 863 ("The statute itself . . . directs EPA to consider factors such as 'process changes, substitution of materials or other modifications . . . design, equipment, work practice, or other operational standards . . . [or] a combination of above, suggesting that 'Congress itself recognized that many factors . . . affect sources' emissions" (internal citations omitted)) (quoting Sierra Club's Opening Brief in *Cement Kiln*).[29]

Indeed, the effectiveness of measures leading to superior emissions performance at the MACT floor reference facility need not be quantified, or even quantifiable. *See Cement Kiln,* 255 F.3d at 865. Once the best performing source has been identified for a particular pollutant, that source's actual level of performance is the MACT floor even if the regulator cannot identify *how* the source achieves its emissions control, and even if the source does not *intentionally* control emissions at all. *See Sierra Club v. EPA*, 479 F.3d at 882-83 (D.C. Cir. 2007) (explaining that reliance on the actual performance of the relevant best performing source as the MACT floor "requires neither an intentional action nor a deliberate strategy to reduce emissions"). In short, with respect to MACT floors, method of control and achievability at the proposed facility as proposed are *categorically irrelevant* – if a proposed facility cannot

[29] The Legislative History of the CAA Amendments of 1990 states:

> The technologies, practices or strategies which are to be considered in setting emission standards under this subsection go beyond the traditional end-of-stack treatment or abatement systems. The Administrator is to give priority to technologies or strategies which reduce the amount of pollution generated through process changes or the substitution of materials less hazardous.

S. Rep. No. 101-228, at 168. *See also National Lime*, 233 F.3d at 634.

achieve the identified MACT limit, the proposed facility, *not* the MACT limit, must change.[30]

Finally, the quality of inputs and fuel may not serve as a justification for ignoring a facility as the best performing similar source. Inputs, including fuel quality, are without question within the scope of those measures that Congress intended sources would use to comply with MACT requirements. Moreover, the unavailability of comparable fuels or inputs is *not* a justification for deviating from the statutory obligation to identify and impose MACT floor limits that reflect the actual performance of the best performing similar source. *See Sierra Club*, 479 F. 3d at 882-83 (rejecting EPA's reliance on the same justifications it offered in *Cement Kiln* for deviating from the MACT floor requirements in the Act, "i.e., a lack of data to quantify the effects of non-technology factors and a concern that floors based on clean [inputs] would be unachievable because of the inability of [sources] to switch [inputs]").[31]

---

[30] As the D.C. Circuit has recognized, "section [112(d)(3)] provides that 'the maximum degree of reduction in emission that is deemed achievable . . . shall not be less stringent than' what the best-performing sources 'achieve.' Section 112(d)(3) therefore limits the scope of the word 'achievable' in section [112(d)(2)]." *Cement Kiln*, 255 F.3d at 861. *See also Sierra Club v. EPA*, 479 F.3d 875 (D.C. Cir. 2007).

[31] Finally, "similar source" for purposes of new EGU's should be broadly construed – to do otherwise would undermine the clear intent of Congress to emphasize process changes and other emission control options not associated with end-of-stack controls. EPA has acknowledged that "similar source" is a broader term than "source category," explaining that it

> "believes that because the Act specifically indicates that existing source MACT should be determined from within the source category and does not make this distinction for new source MACT, that Congress intends for transfer technologies to be considered when establishing the minimum criteria for new sources.

61 Fed. Reg. 68,384-385. This view is consistent with Congressional intent for process changes, substitution, and other non-technology controls to play a preferential role in reducing HAP. *See National Lime*, 233 F.3d at 634 ("The technologies, practices or strategies which are to be considered in setting emission standards under this subsection go beyond the traditional end-of-the-stack treatment or abatement system. The Administrator is to give priority to technologies or strategies which reduce the amount of pollution generated through process changes or the substitution of materials less hazardous. Pollution prevention is to be the preferred strategy wherever possible."(citing S. Rep No. 101-228, at 168)). Accordingly, it would be inconsistent with the intent of the Act for a regulator to narrowly define the universe of sources that it

In short, it is clear from the language of the MACT provisions and from relevant case law, that the emissions control analysis under this regulatory program is different from and significantly more stringent than BACT.[32] As discussed below, these differences have important implications for the regulatory process at issue in this case.

D. FDEP's Failure to Consider the PSD Implications of Mandatory MACT Review is Unreasonable and Unjustifiable

FDEP cannot conduct a reasonably complete BACT analysis without first (or simultaneously) performing a MACT analysis. In this instance, FDEP not only failed to conduct a case-by-case MACT analysis, it failed to perform *any* analysis of what MACT would require and what implications MACT-related requirements would have on the proposed facility's ability to control PSD pollutants. The agency simply issued the final PSD permit without making a single change from the draft permit, entirely ignoring the intervening imposition of the MACT requirement and the potential impact of that requirement on emissions of PSD pollutants. Moreover, FDEP did not respond to comments pointing out the importance of considering the interactions between MACT and PSD (and the BACT emission limits in particular).

In the context of preconstruction review under the PSD program, the Clean Air Act specifically recognizes the significance of *all* preconstruction

---

considers to be "similar" to artificially exclude control options that are in fact contributing to the superior emissions performance at the best performing sources. At minimum, with respect to coal-fired EGUs, "similar source" should be understood to include all coal-based steam generating units as EPA defines that term in its regulations.

[32] As the Board knows well, BACT expressly requires consideration of cost and other factors, and contemplate limits that are tempered on a case-by-case basis to ensure availability, technological feasibility, and practical and economic achievability of control measures that will allow the source to meet the identified numerical emissions limitation.

requirements. Indeed, the PSD permitting provisions reference MACT (both directly and indirectly) and provide a clear indication that Congress recognized the collective significance of the various preconstruction permitting requirements, and the potential for interaction between parallel analyses, especially MACT and BACT. Moreover, Florida regulations require that the MACT determination be made in the context of the PSD permitting process.

1. *Section 165(a)(3) Contemplates Case-by-case MACT as a PSD Requirement*

Congress identified the basic prohibitions of the PSD program and laid out the various preconstruction obligations for new major sources of emissions in section 165(a) of the Clean Air Act. Significantly, Congress made compliance with those preconstruction obligations a substantive component of PSD requirements. *See* 42 U.S.C. § 7475(a). In particular, this section states:

> No major emitting facility . . . may be constructed in any area to which this part applies unless . . .
> (3) the owner or operator of such facility demonstrates . . . that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of *any . . . applicable emission standard or standard of performance under this chapter.*

42 U.S.C. § 7475(a) (emphasis added). That is, in addition to the obligation to obtain a PSD permit (§165(a)(1)), to meet specific public participation requirements (§165(a)(2)), to impose BACT (§165(a)(4)), and to conduct an analysis of air quality impacts (§165(a)(6)), the PSD provisions themselves require an applicant to "demonstrate" that it will meet case-by-case MACT (§165(a)(3)). Thus, the Act incorporates compliance with case-by-case MACT into the core prohibition of the PSD provisions, indicating that these preconstruction requirements are interrelated.

Because a case-by-case MACT "demonstration" (pursuant to section 112(g)) is subsumed as one of the PSD program's emission limitation requirements (through section 165(a)(3)), and because it is likely to have significant implications for the level of control achievable and appropriate under another mandatory PSD emission control provision (BACT), it is unreasonable for the MACT analysis to occur in isolation, as a separate and distinct process after the other PSD analysis has already reached its conclusion.

a. Section 169(3) Contemplates Cross-consideration of MACT in the BACT Analysis

The Clean Air Act specifically references the section 112 MACT provisions in the definition of BACT. After generally defining BACT, the Act states:

> In no event shall application of 'best available control technology' result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to section . . . 112 of this title.

42 U.S.C. § 7479(3). This language further demonstrates that Congress was aware of possible interactions between MACT and PSD review and explicitly required permitting authorities to take MACT into consideration when adopting PSD limits.

In effect, this provision establishes MACT as the "floor" for BACT emission limits when the two programs target the same pollutants (for example, when HAP emission controls use a PSD pollutant as a surrogate). When MACT applies on a case-by-case basis as a function of section 112(g) and the MACT analysis has yet to occur (as is the case here), it is *impossible* to know what the minimum stringency of the BACT limit must be. As a result, it is unreasonable to finalize the PSD permit in the absence of a case-by-case MACT analysis because that

analysis is essential to a mandatory component of BACT (identification of minimum stringency when MACT and BACT overlap).

2. *Florida Regulations Require FDEP to Incorporate the MACT Determination in the PSD Process*

Florida regulations adopt the EPA regulations found at 40 C.F.R. Part 63, Subpart B, governing section 112(g) determinations for major sources. *See* 62-204.800(11)(d)2 F.A.C. As explained below, however, the Florida regulations include an important modification of the federal regulations that demonstrates unambiguously that the MACT determination must be made as a part of the PSD process.

The federal regulations adopted by Florida require the permitting agency to prepare a "Notice of MACT Approval," which is:

> a document issued by a permitting authority containing all federally enforceable conditions necessary to enforce the application and operation of MACT or other control technologies such that the MACT emission limitation is met.

40 C.F.R. § 63.41. The Notice of MACT Approval must contain MACT emission limitations, as well as notification, operation and maintenance, performance testing, monitoring, reporting and record keeping requirements. 40 C.F.R. § 63.43(g)(1)&(2). The permitting authority must offer an opportunity for public input on the Notice of MACT Approval, which Florida replaces with its own procedures. *See* 40 C.F.R. § 63.43(h); 62-204.800(11)(d)2.e F.A.C.; 62-210.350 F.A.C. After the effective date of the Notice of MACT Approval, the provisions contained therein are federally enforceable. 40 C.F.R. § 63.43(g)(3).

In adopting these federal regulations, Florida explicitly brought the MACT determination into the PSD process by stating, "The 'Notice of MACT Approval'

as defined in 40 C.F.R. 63.41 shall be the air construction permit." 62-204.800(11)(d)2.b F.A.C. Thus the air construction permit *is* the Notice of MACT Approval, so clearly, that permit must contain any applicable MACT limits. Florida regulations state further that "[t]he Notice of MACT Approval shall become effective upon issuance of the air construction permit by the Department." 62-204.800(11)(d)2.f F.A.C. Thus, the air construction permit, which is the vehicle for the PSD analysis, must also include the MACT determination. Under Florida law, therefore, the MACT determination and PSD analysis must proceed in tandem.

3. FDEP's Failure to Conduct a MACT Analysis Requires a Remand

The case-by-case MACT determination will unquestionably affect the BACT analysis. Each of these two regulatory programs is inherently technology-based, and technology-forcing in the broadest sense of that term, potentially affecting not just add-on control technology, but process technology, raw inputs, fuel quality, fuel mix, operational parameters, work practices, etc. Thus, the impact of one regulatory program on these "technology" choices for the project necessarily will have implications for what is achievable or appropriate under the other program. And because the analysis under the MACT program is more rigid than BACT, as described above, MACT is likely to drive at least some of the basic emission control options for the Seminole plant. The fact that the MACT program addresses HAP while PSD addresses non-HAP pollutants is ultimately not particularly significant. Permitting agencies almost always elect to use surrogate pollutants for at least some HAP – and often those surrogates include pollutants that are actually regulated under the PSD program or that are subject

to similar control strategies. *See Sierra Club v. EPA*, 353 F.3d 976, 984 (2004) (*citing National Lime*, 233 F.3d at 639) (addressing EPA's use of PM as a surrogate for metal HAP).

As a result, in order to meet the strict HAP-related emissions requirements, sources will most likely need to rely on technologies (broadly construed) that are capable of reducing both HAP *and* PSD pollutants, thus creating the technical potential to achieve even greater PSD emissions reductions than would be required under the PSD program alone. For example, a given level of control might be considered not cost-effective under PSD analysis alone, but may be entirely feasible when considered in the light of the case-by-case MACT requirements. That is, the level of emissions control that represents the "greatest reduction achievable" for purposes of the PSD program is likely to be directly affected by emissions control measures that are required as a practical matter as a result of case-by-case MACT review.

Nor is it sufficient to to assume that later-adopted MACT emission limits can simply supersede the earlier PSD limits. Because MACT does not incorporate or require a broad review of the achievability of additional PSD pollutant reductions in light of the MACT-required technologies, the MACT process in isolation will be insufficient to ensure that the appropriate level of PSD pollutant control will be required.

At best, FDEP's decision to perform the MACT and PSD analyses in isolation might allow cross-pollination to occur in only one direction (the PSD analysis might affect the MACT determinations but not vice versa). This approach is unlawful because MACT is set based on specific statutory

requirements, as described above, not on the basis of a preexisting BACT analysis or previously adopted PSD permit limits.

The only way to ensure that both MACT- and PSD-related factors have been fully accounted for is to conduct the two analyses in tandem. The Board must remand the permit to FDEP to cure this deficiency.

4. FDEP Can Not Rescue This Permit by Promising to Reopen the Permit Later

The public notice opportunity in the MACT determination process will not resolve the agency's failure to perform necessary analysis in the PSD permitting process. Nor can a comment opportunity in an entirely different regulatory exercise cure FDEP's failure to provide the public with an adequate understanding of the basis for its decisionmaking *here*. FDEP has an independent obligation to complete *this* regulatory action in a rational and reasonable manner, and cannot rely on its ability to potentially reopen the permit later as an excuse to shirk that responsibility. FDEP must adequately justify and explain *this* permit decision on its own terms, on the record *now*, not later when another analysis proves that it is substantively flawed.

Aside from depriving the public of the ability to meaningfully comment on the agency's current PSD-related decisionmaking, FDEP's failure to perform any real evaluation of MACT, or the interaction between MACT and PSD, has denied the permit decisionmaker access to information that is necessary for a reasoned and well informed decision. For that reason alone, FDEP itself should be seeking, in the wake of *New Jersey v. EPA,* to supplement the record for this

permitting action, revisit the technical analysis, and provide a supplemental comment period.

In sum, because FDEP has failed to provide the public (and the relevant agency decisionmaker) with critical information necessary to identify the appropriate level of control for PSD pollutants, and denied the public a meaningful opportunity to consider and comment on the agency's analysis of the potential interactions between MACT and PSD in this instance (which it has yet to even conduct), at minimum the Board should remand the permit to with instructions to provide an adequate explanation of its decision and allow the public an opportunity to comment on both the agency's decision and its underlying technical rationale.

E. Policy Considerations Counsel In Favor of Conducting the MACT and BACT Analyses in Tandem

FDEP's refusal to coordinate MACT and PSD review cannot be understood as furthering a legitimate interest in avoiding some unreasonable prejudice to the permit applicant. Seminole may not begin construction unless and until it obtains a final and effective MACT determination consistent with applicable regulations. *See* 40 C.F.R. § 63.42-43 (providing that construction may not begin until a source has a final and effective MACT determination); 62-204.800(11)(d)2 F.A.C. Indeed, it would be unwise for Seminole to make any irrevocable commitments of resources prior to the MACT analysis, as it will not have a full understanding of the applicable emissions limitations and necessary emissions controls, process technologies, and other design and operational parameters until that regulatory process reaches completion. Accordingly, a

remand directing FDEP to conduct the PSD and MACT evaluations in concert would not materially prejudice the applicant.

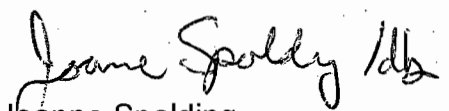
For the reasons given, FDEP's permit decision is based on clear errors of fact and law. To remedy these deficiencies, FDEP must conduct an additional assessment, provide the public an opportunity to comment, and re-issue the Final Permit only when and if it the Applicant has adequately demonstrated that it will comply with emission limits that fully and appropriately account for the combined obligations of both MACT and PSD. Accordingly, the Board must remand the PSD permit to FDEP with instructions conduct co-extensive MACT and PSD assessments that meaningfully and comprehensively account for all material interactions between the two programs.

CONCLUSION

For the foregoing reasons the Board should review and remand the Seminole PSD Permit to FDEP.

Dated: October 6, 2008

Respectfully submitted,



Joanne Spalding
Kristin Henry
Sierra Club
85 Second Street, Second Floor
San Francisco, CA 94105
415-977-5725
fax: 415-977-5793

THE 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.	)))))	DEP CASE NO. 06-0780 DOAH CASE NO. 06-0929EPP

JOINT PROPOSED FINAL ORDER OF THE PARTIES FOLLOWING REMAND

This Final Order is issued pursuant to Section 403.509(1)(a), Florida Statutes (F.S.) (2006) after the filing of a Joint Stipulation Between the Parties, dated February 22, 2006, stating that that no disputed issues of material fact or law exist between the parties to this Power Plant Site Certification proceeding, and also the filing of a Supplemental Joint Stipulation dated _____, 2007. Pursuant to Section 403.508(4), F.S., the parties are Seminole Electric Cooperative, Inc. ("Seminole" or "Applicant"), the Department of Environmental Protection ("the Department" or "DEP"), the Florida Department of Community Affairs ("FDCA"), the Florida Department of Transportation ("FDOT"), the Sierra Club and the St. Johns River Water Management District ("SJRWMD"). No other person or agency filed a notice of intent to be a party or a motion to intervene under Section 403.508, F.S. The Joint Stipulation Between the Parties stated that the parties do not object to cancellation of the site certification hearing in this matter and do not object to entry of a Final Order by the Department. The Supplemental Joint Stipulation included proposed Findings of Fact and Conclusions of Law.

Deleted: FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION ¶ AND SEMINOLE ELECTRIC COOPERATIVE, INC.¶

Deleted: in accordance with

Deleted: demonstrating

Deleted: in

Deleted: s

STATEMENT OF THE ISSUE

The issue to be decided in this proceeding is whether to approve certification in accordance with the Florida Electrical Power Plant Siting Act, Sections 403.501, et seq., F.S.,

authorizing Seminole to construct and operate a new electrical generating unit at Seminole's existing Seminole Generating Station site (consisting of existing Units 1 and 2) in an unincorporated area of Putnam County. No parties dispute or object to approval of certification for the Project. Pursuant to section 403.509(1), F.S., the Department is to "act upon the application by written order in accordance with the terms of the [PPSA] and the stipulation of the parties in requesting cancellation of the certification hearing."

PRELIMINARY STATEMENT

On March 9, 2006, Seminole filed a Site Certification Application ("SCA") to construct and operate a new electrical power plant unit ("Unit 3") at the existing Seminole Generating Station ("SGS") site in Putnam County, Florida. The existing site, which presently includes Units 1 and 2 and directly associated facilities, is located approximately five miles north of the city of Palatka.

The Department determined that Seminole's SCA was complete on March 24, 2006. DEP then issued a Notice of Insufficiency on May 15, 2006. Seminole filed its Response to the Department's Notice of Insufficiency on May 30, 2006, and then submitted a Response to Sufficiency Request for Information on June 30, 2006. On July 26, 2006, the Department determined that Seminole's SCA was sufficient.

Pursuant to Section 403.507, F.S., several reviewing agencies submitted agency reports and proposed Conditions of Certification on Seminole's Unit 3 SCA. On November 9, 2006, the Department issued its Staff Analysis Report ("SAR"), incorporating the reports and recommendations of the reviewing agencies. In the SAR, the Department recommended certification of the proposed Seminole Generating Station Unit 3, subject to a comprehensive set of Conditions of Certification.

On June 1, 2006, a land use hearing was held for the purposes of determining whether Seminole's Unit 3 project is consistent and in compliance with local land use plans and zoning ordinances of Putnam County. On August 31, 2006, the assigned Administrative Law Judge entered a Recommended Order concluding that the Unit 3 project and site are consistent and in compliance with Putnam County's land use plans and zoning ordinances. On December 5, 2006, the Siting Board unanimously approved a final order adopting the Recommended Land Use Order and finding the Unit 3 project to be consistent and in compliance with applicable land use plans and zoning ordinances. The Siting Board's Final Order on Land Use was signed by the Governor and issued on December 8, 2006.

Public notice of the filing of the Site Certification Application was published by the Applicant in the Palatka Daily News on April 7, 2006, and by the Department on April 7, 2006, in the Florida Administrative Weekly ("FAW"). Pursuant to Section 403.5115(1)(e), F.S., notice of the certification hearing originally scheduled to begin on January 9, 2007, was published in the Palatka Daily News on November 25, 2006, and by the Department in the FAW on November 22, 2006. By Order of the Administrative Law Judge, dated January 8, 2007, the certification hearing was rescheduled for March 15, 2007. That notice was published in the Palatka Daily News on January 18, 2007.

On February 22, 2007, the Applicant, DEP, DCA, DOT, the Sierra Club, and the SJRWMD filed a Joint Stipulation Between the Parties addressing certification issues. In that Stipulation, all parties agreed that Seminole's Unit 3 project should be certified subject to the Conditions of Certification included in the SAR.

Section 403.508(6)(a), F.S., provides that the "administrative law judge [may] cancel the certification hearing and relinquish jurisdiction to the department, if the all parties to the

Deleted: Pursuant to
Deleted: a
Deleted: may be cancelled,
Deleted: ing
Deleted: D

proceeding stipulate that there are no disputed issues of fact or law to be raised at the certification hearing." The Joint Stipulation Between the Parties of February 22, 2007 stipulated that there are no disputed issues of fact or law to be raised at the certification hearing and requested that jurisdiction be relinquished to the Department for entry of a final order of certification for the project. Sufficient time remained to publish public notices of the cancellation of the hearing at least three days prior to the scheduled hearing date, as required under Section 403.508(6)(a), Florida Statutes.

Pursuant to Section 403.508(6)(b), F.S., the Administrative Law Judge assigned by the Division of Administrative Hearings timely issued an order on February 23, 2007, granting the parties' request to cancel the certification hearing. In accordance with section 403.508(6)(c), F.S., DEP published notice of cancellation of the certification hearing in the FAW on [_____], and the Applicant published a similar notice on [_____] in the Palatka [Florida] Daily News.

Under section 403.508(6)(d)2., F.S., the "parties may submit proposed recommended orders to the department no later than 10 days after the administrative law judge issues an order relinquishing jurisdiction." DEP and the applicant Seminole Electric Cooperative elected to submit a proposed final order on March 4, 2007.

On April 4, 2007, the Department entered an Order of Remand to the Division of Administrative Hearings for further proceedings or for submittal of a further stipulation of the parties addressing the provisions of sections 403.509(3)(e), (f) and (g) F.S., in order to enter a final order of certification by the Department.

On April ____, 2007, the parties filed with the Administrative Law Judge a Supplemental Joint Stipulation following Remand pursuant to section 403.508(6)(a), F.S. which adopts a joint

Deleted: o

Deleted: r

proposed final order of all of the parties addressing the issues in the department's Order of Remand as well as the other criteria contained in section 403.509(3), F.S.

No party to this proceeding is recommending denial of certification for the Unit 3 project or changes to the Conditions of Certification presented in the Department's SAR. The agency parties agree that Seminole's Site Certification Application, as supplemented by Seminole's Sufficiency Responses filed on June 30, 2006, in conjunction with the agreed-upon Conditions of Certification, provide reasonable assurances that construction and operation of the proposed Unit 3 project will comply with all applicable agency standards and meet the criteria for certification under the PPSA. In a Settlement Agreement entered on January 7, 2007, the Sierra Club agreed not to contest certification of Unit 3 under the Power Plant Siting Act in accordance with the Conditions of Certification in the SAR, and also agreed to the process resulting in the cancellation of the certification hearing and the Department issuing this Final Order pursuant to Sections 403.508(6)(a) and 403.509(1)(a), F.S.

FINDINGS OF FACT

Deleted: Background

The Applicant

1. Seminole Electric Cooperative, Inc., is a non-profit generation and transmission electric cooperative that generates and transmits electric power for ten member cooperatives that provide electricity in 46 of Florida's 67 counties. Seminole was created in 1948 under the federal Rural Electrification Act of 1936 to serve Florida's electric cooperatives. Seminole and the network of Florida electric cooperatives currently serve approximately 1.6 million individuals and businesses in two-thirds of the counties throughout Florida. (SCA, Exec. Summary, p. 1; 1-1)

The Existing Seminole Generating Station Site

2. Seminole Generating Station Units 1 and 2, in Putnam County, originally were approved under the Florida Electric Power Plant Siting Act by the Governor and Cabinet, sitting as the Siting Board, in 1979. Both of these coal-fired units were in commercial operation by the end of 1984. Seminole has undertaken several environmental improvements since the original certification in 1979. For example, in 2000, at Seminole's request, the SGS Conditions of Certification were modified to authorize Seminole to install an oxidation system that converts the output from the Flue Gas Desulfurization ("FGD") air pollution control systems on Units 1 and 2 to gypsum that is reused for wallboard manufacturing, thereby eliminating the disposal of hundreds of thousands of tons per year of solid waste. Additional, recent improvements to Units 1 and 2 are described below in paragraph 8. (SCA, Exec. Summary, p. 1; Appendix 10.4.1)

3. The Seminole Generating Station site primarily is comprised of two parcels. Parcel 1 of the SGS Site is an approximately 1,917-acre tract of land. SGS Parcel 2 is approximately 4.5 acres in area, and it includes approximately 212 feet of frontage on the St. Johns River, which serves as the northernmost boundary of a sovereign submerged land lease from the State of Florida to Seminole. SGS Parcel 2 is located south of County Road 209, and is the site of a pump house that serves the Seminole Generating Station. Underground pipelines that provide plant makeup water and discharge plant wastewater, and also electrical conduits to provide electric power to the pump house, are located within an existing 100-foot wide privately granted easement that connects SGS Parcel 1 and SGS Parcel 2. SGS Unit 3 is proposed to be located within the southeastern portion of SGS Parcel 1. (SCA, p. 2-1)

4. Existing Seminole Generating Station Units 1 and 2 are nominal 650 megawatt ("MW") coal-fired electrical generating units. These units burn bituminous coal or a blend of coal and petroleum coke up to a maximum of 30 percent petroleum coke. Currently, one train

per day provides coal and petroleum coke for Units 1 and 2. Onsite coal and petroleum coke storage is provided for up to 45 to 60 days of fuel inventory. Coal and petroleum coke are unloaded from rail cars and transported to Units 1 and 2 on a covered conveyor system. The existing units are equipped with electrostatic precipitators ("ESP"s) that remove fly ash from the flue gas. Also, a flue gas desulfurization ("FGD") system contains "wet scrubbers" that remove sulfur dioxide ("SO2") from the flue gas of Units 1 and 2. The FGD system produces a gypsum that is used in the production of wallboard at a wallboard production facility at a site located directly adjacent to the existing Units 1 and 2. Two natural draft cooling towers provide offstream cooling for the existing units. Water for the existing units is supplied from the St. Johns River and the Floridan Aquifer. Existing wastewaters from operation of Units 1 and 2 are treated at the plant's wastewater treatment facility and then combined with cooling tower blowdown, treated sanitary wastewater, and other wastewaters for discharge to the St. Johns River. (SCA, Section 2.1.2)

5. The main entrance to the SGS site is located on U.S. Highway 17. Employees also use a secondary entrance on County Road 209 West. U.S. Highway 17 is a four-laned divided State highway under the jurisdiction of the Florida Department of Transportation. (SCA Section 2.2.8.2)

6. The land surrounding the existing SGS site is predominantly undeveloped land. Adjoining land is used for agricultural purposes or forestry. The previously mentioned wallboard manufacturing plant is located immediately adjacent to the SGS site on the northwest boundary. Relatively low density residential housing occurs along the St. Johns River south of the SGS site. The existing rail line enters the Seminole Generating Station site on its western boundary parallel to U.S. Highway 17. (SCA Section 2.1.3)

7. The pattern of undeveloped land in the vicinity of the SGS site has been projected to remain the same for the near future as evidenced by the County's future land use map. These maps depict the area as primarily agricultural except along the St. Johns River where scattered residential use is found. (SCA Section 2.2.3)

Proposed Unit 3

8. The proposed Seminole Generating Station Unit 3 consists of a nominal 750 megawatt advanced supercritical pulverized coal unit utilizing state-of-the-art emission controls. The term "supercritical" refers to higher steam operating pressures than conventional boiler designs, achieving greater efficiency. By maximizing the megawatt output per unit of fuel consumed, the air pollutant emissions per megawatt output are minimized. Unit 3 will utilize modern burner technology to minimize generation of NOx, CO and VOC in the boiler. Also, an SCR system will be used to remove approximately 90% of the NOx generated by Unit 3. An electrostatic precipitator will collect and remove fine particles. A wet flue gas desulfurization system will remove approximately 98% of the sulfur dioxide while producing a commercial grade gypsum to be used in the manufacture of wallboard. A wet ESP will also be used for control of sulfuric acid mist and trace elements. The combined effect of the air emission control technology proposed for Unit 3 is expected to remove approximately 90% of the mercury that would otherwise be emitted by Unit 3. (SCA, Sections 3.1 and 3.4)

9. The Seminole Unit 3 project will be located in Putnam County, which is designated as an attainment area for all air pollutants. This designation indicates that Putnam County is in compliance with the federal and state ambient air quality standards. (SCA, page 2-37)

10. In 2006, Seminole applied for and received from the Department a modification to its existing Conditions of Certification and a corresponding air construction permit authorizing

Deleted: <#>In 2006, Seminole applied for and received from the Department a modification to its existing Conditions of Certification and a corresponding air construction permit authorizing several air pollution control upgrades and efficiency improvements to Units 1 and 2, including the following:¶
<#>Installation of low-nitrogen oxide ("NOx") burners and modified overfire air systems on Units 1 and 2, to meet an annual average NOx emission limitation of 0.46 lb/mmBtu, as applicable in 2008 pursuant to Title IV of the federal Clean Air Act and corresponding state regulations.¶
<#>Installation of a urea-based selective catalytic reduction ("SCR") control systems on Units 1 and 2, designed to be capable of achieving substantial nitrogen oxides (NOx) reductions (to 0.07 lb/mmBtu).¶
<#>Upgrades to the flue gas desulfurization systems for Units 1 and 2 to achieve up to 95% post-combustion SO_2 removal efficiency.¶
<#>Substantial reductions in mercury emissions from Units 1 and 2 due to the combined effect of the new SCRs and FGD upgrades.¶
<#>An alkali injection air pollution control system for Units 1 and 2 to control for potential SO_3 formation by the new SCR systems.¶
<#>A carbon burnout (CBO) system to produce a final fly ash product that will have substantially lower carbon and ammonia levels, and therefore be suitable for beneficial reuse, while also recovering energy to improve the heat rate of Units 1 and 2. ¶
(SCA, pp. 3-4 to 3-6; SAR, Appendix A; DEP Order Modifying Conditions of Certification, Case No. PA78-10J)¶

Formatted: Bullets and Numbering

several air pollution control upgrades and efficiency improvements to Units 1 and 2, including the following:

- Installation of low-nitrogen oxide ("NOx") burners and modified overfire air systems on Units 1 and 2, to meet an annual average NOx emission limitation of 0.46 lb/mmBtu, as applicable in 2008 pursuant to Title IV of the federal Clean Air Act and corresponding state regulations.
- Installation of a urea-based selective catalytic reduction ("SCR") control systems on Units 1 and 2, designed to be capable of achieving substantial nitrogen oxides (NOx) reductions (to 0.07 lb/mmBtu).
- Upgrades to the flue gas desulfurization systems for Units 1 and 2 to achieve up to 95% post-combustion SO_2 removal efficiency.
- Substantial reductions in mercury emissions from Units 1 and 2 due to the combined effect of the new SCRs and FGD upgrades.
- An alkali injection air pollution control system for Units 1 and 2 to control for potential SO_3 formation by the new SCR systems.
- A carbon burnout (CBO) system to produce a final fly ash product that will have substantially lower carbon and ammonia levels, and therefore be suitable for beneficial reuse, while also recovering energy to improve the heat rate of Units 1 and 2.

(SCA, pp. 3-4 to 3-6; SAR, Appendix A; DEP Order Modifying Conditions of Certification, Case No. PA78-10J)

Net Environmental Impacts

Formatted: Bullets and Numbering

11. The Findings of Fact in the following paragraphs of this Final Order demonstrate that Seminole's Unit 3 project, through the use of reasonable and available methods, has minimized potential adverse effects on human health, the environment, the ecology of the land and wildlife, as well as state waters and aquatic wildlife.

Air Quality- - The Unit 3 project features very substantial reductions in facility-wide SO_2, NOx, sulfuric acid mist, and mercury air emissions, and compliance with applicable air quality requirements. The proposed urea-based (as opposed to ammonia) SCR system will enhance community safety.

Water Quality - - Elimination of several process water discharge streams will result in reductions in mass loading of nutrients and several additional pollutants to the St. Johns River. Current discharges of wastewater from Units 1 and 2 via groundwater percolation ponds will be eliminated.

Water Conservation - - The combined Units 1-3 surface water intake, as proposed, will meet consumptive use criteria, and will be lower than the applicability threshold of EPA's Phase II surface water intake rules. Enhanced on-site water reuse will result in no need to increase current groundwater consumptive use levels.

Land Use - - Seminole's proposed utilization of the existing SGS site and infrastructure is environmentally beneficial. (SCA, Exec. Summary, p. 3)

Coal Combustion Product Reuse - - Reuse of FGD product, fly ash, and bottom ash will minimize solid waste disposal.

Air Quality Review

Formatted: Bullets and Numbering

12. The Department's Division of Air Resource Management (DARM) conducted a separate Prevention of Significant Deterioration (PSD) review for the Unit 3 Project. In it's PSD

review DARM determined that the Unit 3 project will comply with all appropriate state and federal air pollution regulations. (DEP SAR, p. 9)

13. The PSD regulations require that Best Available Control Technology (BACT) be applied to control air emissions from sources such as Unit 3. The BACT requirements are intended to insure that the air pollution control systems incorporated in the design of a proposed facility reflect the latest in control technologies used in a particular industry. A decision on BACT is based on balancing environmental benefits with energy, economic and other impacts. (SCA, page 5-15)

14. A preliminary BACT determination was made by DARM setting air emission limitations for the Unit 3 project for carbon monoxide (CO), particulate matter (PM/PM10), fluorides (HF) and volatile organic compounds (VOCs), which were determined to be the only pollutants that will increase in amounts requiring such review. (SAR, Appendix A)

15. Seminole's planned upgrades to the air pollution control systems for the existing Units 1 and 2 allow Seminole to add the Unit 3 to the Seminole Generating Station while substantially reducing emissions of NOx, SO2, SAM, and mercury from Units 1, 2 and 3 combined. (SCA, page 3-6; Sufficiency Response, Section 1, Attachment 1-1; SAR, page 9)

16. DARM reviewed Seminole's PSD air permit application and made a preliminary determination that the Unit 3 Project will comply with all applicable state and federal air pollution regulations. DARM determined that the maximum ground-level concentrations due to PM10, NOx and CO emissions as a result of the Unit 3 Project are less than the significant impact levels. DARM determined that maximum ground-level concentrations of SO2 predicted to occur as a result of the Unit 3 project will be below the associated AAQS which are designed to protect public health and welfare. Seminole conducted an air quality related values (AQRV)

Deleted: obtained approval for

Deleted: as discussed in paragraph 8 above. These upgrades to Units 1 and 2

Deleted: <#>Air pollution control equipment will be installed on Unit 3 and associated systems to minimize air emissions, as discussed in Paragraph 9 above. Due to the pollution control upgrades on Units 1 and 2, the facility-wide air emissions after Unit 3 comes on line will actually be less than current levels for several air pollutants. The new Unit 3 cooling tower will use drift eliminators to minimize PM emissions. Particulate matter emissions from material handling will be minimized through the use of best management practices, such as covered conveying systems, baghouses at transfer points and water sprays for dust suppression. (SCA, pages 3-11, 3-18; Appendix 10.1.5; SAR, page 10)¶

analysis for the nearest Class I air quality areas. This analysis indicated that no adverse impacts on these areas are projected. A regional haze analysis was also performed using a long range transport model to evaluate impacts on the PSD Class I areas. This analysis showed no significant impacts on visibility in the Class I areas. (SCA Appendix 10.1.5; Sufficiency Response, Section 1; SAR, page 14) Final agency action on Seminole's separate PSD air permit application pursuant to Section 403.087, F.S. and Rule 62-212, F.A.C. will be taken by the Department pursuant to Section 403.509(3), F.S. (2005). The conditions of that permit will be incorporated into the Conditions of Certification. (SAR, Appendix I)

Formatted: Bullets and Numbering

17. On January 7, 2007, Seminole and the Sierra Club entered into a Settlement Agreement resolving all issues raised or that could be raised by the Sierra Club under the Power Plant Siting Act concerning SGS Unit 3. This Sierra Club/Seminole Settlement Agreement includes these two provisions:

> 1. Seminole agrees to purchase and distribute $200,000 worth of compact fluorescent light bulbs to its member cooperatives for distribution to end users. Seminole agrees to work with the Sierra Club on the procurement and distribution of the compact fluorescent light bulbs, as well as the launching and public announcement of the compact fluorescent light bulb program. Such purchase shall take place within 180 days after the issuance of all approvals necessary to construct Unit 3 and the distribution of the light bulbs will take promptly thereafter.
>
> 2. Seminole commits to use best efforts for investigating additional renewable energy opportunities and incentives which can be implemented by Seminole or by its member electrical cooperatives that will further the use of renewable energy in Florida and reduce the reliance on fossil fuels for the production of electricity in the State. Seminole agrees to help fund and assign a project manager to a series of workshops and meetings with renewable energy experts and the public in Florida to investigate options and to analyze the economic and technical feasibility of renewable energy projects that Seminole can implement in the future. This commitment includes but is not limited to solar, wind, biomass co-firing at its power plants, and

methane capture at the Putnam County Central Landfill. Seminole also commits to continue to develop and implement additional programs that will result in offsets of emissions of greenhouse gases.

Formatted: Bullets and Numbering

18. On March 9, 2007, Seminole and the Sierra Club entered into a second Settlement Agreement, resolving all of the Sierra Club's issues concerning issuance of the PSD Permit for Unit 3. This second Sierra Club/Seminole Settlement Agreement requires significant, additional air emission reduction at SGS, both facility-wide and at Unit 3. Combined with the air emission reductions described above in Finding of Fact No. 15, with operation of Unit 3 there will be a 38% reduction below current SGS SO2 annual air emissions, 77% reduction below current NOx annual emissions, 22% reduction below current annual emissions of sulphuric acid mist, and an 11% reduction below current annual emissions of mercury. With Unit 3, there will be a reduction in SO_2 emissions of 11,174 TPY, a reduction in NOx emissions of 17,839 TPY, a reduction in sulphuric acid mist of 464 TPY, and a reduction in mercury emissions of 14 lbs/yr. Moreover, the following was included in the second Sierra Club/Seminole Settlement Agreement:

> 12. By September 1, 2007, Seminole agrees to publish a Request for Proposal (RFP) soliciting bids for up to 100 MW of renewable energy, which may include solar, wind, geothermal and/or biomass. Seminole is committed to pursuing renewable energy opportunities, and agrees to evaluate and implement, in good faith, viable bids. In accordance with Seminole's existing bid evaluation policy, a viable bid is one that is reasonable based on an analysis of technical, commercial and economic issues, including reliability, fuel supply (as applicable), siting issues, transmission, and financial viability of vendor, and whether the project is in the best interest of Seminole and its members. If Seminole does not receive viable bids in response to this RFP, Seminole will publish another such RFP within eighteen months of the first. Seminole will continue to actively pursue renewable energy opportunities, and will evaluate and implement, in good faith, viable bids in the manner described above.

Integration of Unit 3 to the Existing Site

Formatted: Bullets and Numbering

19. The design of Unit 3 will maximize the co-use of existing site facilities to the greatest extent possible. The existing plant systems that will also be used for Unit 3 include the coal unloading and storage facilities, the coal pile runoff pond system, the process wastewater treatment system, surface water intake and discharge structures, the plant switchyard, entrance road, the existing groundwater well system, the limestone storage system, the solid waste disposal area, and the associated transmission lines. No new offsite transmission lines are required for Unit 3. Also, existing warehouse, administrative, and maintenance buildings will support Unit 3. The SGS Unit 3 power block will contain fuel bunkers, a boiler, steam turbine generator, step-down transformers, pollution control equipment, water treatment equipment, ash handling equipment, and related facilities. The existing fuel storage and handling area will be expanded from approximately 60 acres to approximately 84 acres to support the new SGS Unit 3 facility. (SCA Sections 3.1 and 3.2)

20. Coal and petroleum coke will continue to be delivered by rail from the existing CSX railroad line. Unit 3 will increase fuel deliveries to approximately 1.6 trains per day. A new 200,000 gallon fuel oil storage tank will be provided to supply fuel for the new Unit 3. Fuel oil will be used for startup, flame stabilization, emergency reserve capacity and limited supplemental load. The existing fuel oil unloading system will be used to fill the new fuel oil tank. (SCA Sections 3.1; 3.3)

21. A new mechanical draft cooling tower will be used to dissipate heat from the Unit 3 closed-cycle condenser cooling and auxiliary cooling systems. Unit 3 will utilize water from the St. Johns River and the Floridan Aquifer as water supply sources for plant operations. Surface water will be withdrawn from the St. Johns River using the existing river water intake structure

system with minor upgrades. This intake water will provide makeup water to the Unit 3 heat dissipation system to replace water lost to evaporation, drift and blowdown. River water will also be used for plant service water, including pump bearing cooling water, equipment maintenance, cleaning and flushing, and area and floor washing. (SCA Section 3.5; 4.5)

22. The existing onsite domestic wastewater treatment system at the SGS site is adequate to support the Unit 3 addition. To insure continued reliability, the existing system will be replaced with a like-kind replacement. The existing onsite potable water system will be expanded to supply the additional 50 employees. (SCA Sections 3.5.2 to 3.5.3)

Water Quality Considerations

Formatted: Bullets and Numbering

23. Unit 3 process wastewaters such as low volume wastes, coal runoff, bottom ash collection systems, equipment cleaning, demineralization regeneration, pre-treatment backwash, and FGD wash water will be collected and treated in the plant's wastewater treatment facility. Significantly, these treated waste streams will not be discharged to surface water, as is currently done for Units 1 and 2. Instead, with the build-out of Unit 3, the treated wastewater from all three units will be routed to a new "zero liquid discharge" (ZLD) system. The ZLD system will remove dissolved solids from the Units 1, 2, and 3 wastewater, and condensate from the ZLD system will be reused as makeup for the steam cycle for all three units. The waste concentrate from the ZLD system will be evaporated in a spray dryer, and the residue will be disposed in the onsite landfill or off site in permitted landfills. With the addition of the ZLD system, the only wastewater proposed to be discharged to the St. Johns River will be cooling tower blowdown from Units 1, 2 and 3. The ZLD system will eliminate the existing discharges of several water pollutants, including nitrogen, to the St. Johns River. (SCA Sections 3.5.4; 5.2.1; Appendix 10.1, Table 10.1.2-6)

24. Because the combined maximum intake design capacity of Units 1, 2, and 3 will be less than 50 MGD, the Seminole Generating Station is not subject to EPA's Section 316(b) intake regulations. The through-screen velocity of the SGS intake will not exceed 0.5 feet per second, thereby minimizing any potential for adverse impacts to aquatic life. (SCA, Sections 5.1.2.2, Appendix 10.1.1)

Formatted: Bullets and Numbering

25. The Department's Staff Analysis Report acknowledged that the ZLD system will result in reductions in mass pollutant loadings to the St. Johns River and stated that based on initial analysis, the requested mixing zones for cooling tower blowdown discharges will meet applicable requirements. Final action on these surface water discharge issues will be addressed in the Department's final agency action in response to Seminole's pending application for a revision to the Seminole Generating Station National Pollutant Discharge Elimination System (NPDES) permit. This is a separate permit to be issued by the Department pursuant to Section 403.0885, F.S. and Rule 62-620, F.A.C. The conditions of that permit revision, when issued, will be included in the Power Plant Siting Act Conditions of Certification for the Seminole Generating Station. (SAR, p. 15)

Consumptive Water Use

Formatted: Bullets and Numbering

26. The SGS Unit 3 project will implement recycling, reuse, and various conservation practices in order to minimize water use requirements. Cooling water will be recycled in the cooling towers before being discharged as blowdown to the river. The Flue Gas Desulfurization (FGD) system will recycle water multiple times based on the amount of chlorides in the water. Stormwater from the active landfill areas will be collected and used as makeup to the FGD system. Boiler blowdown and air pre-heater wash will also be reused in the FGD system rather

than being disposed of in percolation ponds. (Sufficiency Response, Sections 8.3 and 8.4; SAR, Appendix II-2).

27. Seminole demonstrated that the combined surface water withdrawal from Units 1, 2, and 3 is insignificant relative to the flow rates in the St. Johns River. The proposed withdrawal rate from all three units represents only 0.6 percent of the actual flow of the St. Johns River, as measured at the closest gauging station located at Buffalo Bluff near Satsuma. Accordingly, the SJRMWD concluded that impacts on the river are expected to be insignificant, and much less than the natural variations associated with tidal influences. For similar reasons, the SJRWMD concluded that there would be no adverse impacts on wetlands adjacent to the river. (SCA, Section 5.3.1, Appendix 10.8; SAR, Appendix II-3)

28. At the SGS site, potable and process water is supplied to the existing units from two onsite production wells that withdraw groundwater from the Floridan Aquifer. Current annual average daily withdrawal is authorized at 0.55 mgd. During the original licensing of Units 1 and 2, the impacts of this withdrawal were determined to be minor and to not cause an adverse impact to offsite users. The Seminole Generating Station with Unit 3 will continue to utilize water from the Floridan Aquifer. Significantly, Unit 3 will not require additional groundwater greater than the existing consumptive use limitations in the current SGS conditions of certification. Therefore, no new impacts to offsite users are anticipated beyond that already authorized for the site. (SCA Section 5.3.2)

29. The onsite stormwater management system to handle site drainage for Unit 3 will be designed and operated to meet all applicable local, regional, state and federal requirements. (SCA, p. 3-4, Section 3.8, Appendix 10.9; Sufficiency Responses, Section 4.0)

30. Construction of the Unit 3 Project will affect a total of 228 acres within the 1917 acre parcel 1 area of the SGS site. During construction, heavily travelled areas will be stabilized with limerock and other more lightly travelled areas will be seeded with grass to prevent erosion. The primary access to Highway 17 at the plant entrance will be modified from two lanes to four lanes at the beginning of the construction process to minimize traffic impacts onsite and on U.S. Highway 17. (SCA, Sections 3.2; 3.9.2; 4.1) No explosives for blasting will be used during construction of Unit 3. Foundations required to support heavy loads, such as the boiler and air pollution control equipment are expected to use mat foundations although pilings may be used to support these facilities. (SCA Section 4.1.1)

31. Temporary dewatering activities may be required during construction of Unit 3. This will be accomplished using standard construction dewatering techniques in which well points will be installed around the areas to be excavated, or excavations will be directly dewatered by pumping. Discharges from dewatering will be routed to the onsite stormwater detention ponds. Lowering the water table through dewatering allows for safe and efficient excavation, construction and back filling of foundations, and other below grade facilities. Dewatering is expected to last a total of 16 months. Limited impacts to groundwater will occur and no offsite impacts to groundwater are anticipated from construction dewatering. (SCA Section 4.1.1; Sufficiency Response 4.5; SAR, Appendix II-2)

32. During construction, portable toilets and/or permitted holding tanks will be provided for the construction labor force. A licensed contractor will remove all sanitary sewage from these facilities for disposal at an approved off site treatment facility. Potable water for consumption during construction will be obtained from bottled potable water. (SCA Section 4.1.1)

Deleted: <#>Coal combustion products from Unit 3 will be reused to the maximum extent feasible. Bottom ash will continue to be sold to concrete and concrete block manufacturers. Fly ash will be sold for reuse to the maximum extent feasible. Gypsum will be sold to the adjacent wallboard manufacturing facility. The new ZLD system will produce a dry solid reject which will be disposed in the onsite landfill or in an off site permitted landfill. Any coal combustion products not reused and miscellaneous plant waste will be managed onsite within the existing landfill area or disposed off site in a permitted landfill. All new onsite landfill areas that receive solid waste from Unit 3 will feature a double liner and leachate collection and removal system installed to serve the Unit 3 waste. Any hazardous waste generated, such as spent solvents, cleaning materials and other wastes, will be collected and managed in a permitted hazardous waste storage facility in accordance with applicable regulations. No impacts are anticipated from hazardous waste generated from the operation of Unit 3. (SCA Sections 3.7; 5.4.1, 5.4.2; Sufficiency Response, Section 3)¶

Formatted: Bullets and Numbering

Deleted: <#>Solid waste generated during construction will be disposed of in accordance with applicable rules and regulations. Construction and demolition wastes, such as scrap wood and metal, will be transferred to a storage area on the site where it will be separated for salvage and recycling. Typical municipal solid waste will be collected in appropriate waste collection containers for disposal in an offsite approved location. All hazardous waste generated during construction will be properly stored, transported and disposed of in accordance with applicable regulations and the site hazardous waste management plan. Used oil from construction vehicles and equipment will be collected by contractors in appropriate containers and transported off site. (SCA Section 4.1.1) ¶

Stormwater and Potential Wetland Impacts

33. The entire area within which construction at SGS Unit 3 will occur is located above the 100-year flood plain. Project construction will not adversely impact site flood elevations on adjacent areas and will not cause flooding on off site property. (SCA Section 4.1.3)

34. Construction activities will alter onsite runoff in several parts of the project area. However, no adverse effects are anticipated from this alteration. Surface water runoff from active construction areas will be directed to properly sized and designed stormwater swales and ponds that meet applicable agency standards. Due to the existing nature of the SGS site and the proposed stormwater controls, adverse impacts to surrounding surface waters will not occur during site preparation and construction. (SCA Sections 4.1.4; 4.2.1; Appendix 10.9; Sufficiency Response Section 4.0)

Additional Ecological Considerations

35. Construction of the Unit 3 project will require the temporary impact to 0.04 acres of the river bank and river bottom for the construction of a new 325 foot-long, 36-inch diameter intake pipe. This new pipe will be adjacent to the existing intake pipeline, extending from the existing river water pump house into the St. Johns River within the existing submerged land easement issued by the Board of Trustees of the Internal Improvement Trust Fund. At the shoreline, to minimize turbidity, sheet piling will be installed around the excavation trench for the pipeline in an area of approximately 10 feet by 30 feet. The trench will be backfilled and the shoreline restored after construction. No adverse impacts to the St. Johns River are anticipated as the result of the new intake pipe. (SCA Sections 4.2.1.1, 4.2.1.2, 4.3.1.2)

36. The power block and related facilities have been located to avoid wetland habitats on the SGS site, with the exception of a 0.46-acre isolated shrub marsh wetland of low ecological

value adjacent to the existing coal yard. Also, installation of a new pipeline and electrical duct bank between the pump house and Unit 3, within the existing pipeline easement, will temporarily impact a total of 0.47 acres of wetlands. The construction in these areas will comply with applicable state and local regulations. No significant adverse impacts to aquatic systems are anticipated as a result of this construction. Disturbed wetland areas will be returned to their prior condition after construction of the pipeline and duct bank. (SCA Sections 4.2.1.1; 4.2.1.2; 4.3.1.2)

37. Construction of the SGS Unit 3 power block and pollution control systems will be located on cleared grassland and is not projected to result in any adverse ecological impacts. (SCA Section 4.3.1.1) No changes of wildlife populations on adjacent properties are expected including listed species. Noise and lighting impacts are minimal and are not anticipated to deter the continued use of undeveloped forest areas within the vicinity by listed species of wildlife. (SCA Section 5.8.1)

38. The areas to be impacted by the Unit 3 project do not support any threatened or endangered flora. No federally listed animal species occur in the areas to be impacted by Unit 3. The state-listed gopher tortoise does occur within upland pine flatwoods proposed for construction activities. The Florida Fish and Wildlife Conservation Commission (FWCC) lists the gopher tortoise as a species of special concern. Impacts to the gopher tortoise will be avoided or minimized through burrow avoidance, tortoise relocation or mitigation through purchase of suitable gopher tortoise habitat offsite, in consultation with the FWCC. The presence or absence of other protected species, including the Eastern Indigo snake will be verified during preclearing surveys of the area and standard protection measures. (SCA Section 4.3.1.3)

Socioeconomic Considerations

39. The Unit 3 project's construction is expected to have a small demographic impact on the community surrounding the site. The Unit 3 construction work force is expected to average approximately 600 employees over the four year construction period. It is anticipated that onsite construction activities will begin no later than the third quarter of 2008. Construction is expected to be completed no later than the third quarter of 2012. Peak construction is expected to occur in mid-2010 with approximately 1500 workers on site. The majority of the construction workers are expected to commute to the site from within a commuting distance of up to sixty miles. Contractors will be responsible for hiring the construction work force.

40. Construction of the Unit 3 is expected to have direct economic benefits, including employment opportunities created by the construction. Direct benefits of plant construction will also result from the purchase of materials and equipment from local suppliers and from equipment purchased or leased within the state. A significant portion of these purchases will be made in Putnam County and nearby counties. It is expected that a majority of the construction wages paid during construction will be spent within Putnam County and the surrounding areas. These wages will create additional demands for goods and services. As this money is spent, it will create a multiplier effect within the area, thereby generating economic activity, including additional jobs and earnings. (SCA Sections 4.5.1; 7.1.1 and 7.1.2)

Formatted: Bullets and Numbering

41. Operation of the new Unit 3 is expected to provide significant beneficial socioeconomic benefits to Putnam County and the surrounding area. Operation of the new Unit 3 is expected to add 50 new employees to supplement the existing work force of approximately 280 employees. In addition, property tax revenues from the Seminole facility, including the Unit 3 project, paid to Putnam County and other governmental entities is estimated to be over $130

Deleted: have

million for the first ten years of the life of the plant following construction. Because the Seminole plant is largely self-sufficient, it will not require many public utilities or services that residential and commercial development typically requires. The sum total of operating and capital revenues and costs from the project to local government agencies is projected to be a substantial net surplus to Putnam County. In addition to the local government fiscal benefits, sales and other tax benefits will accrue to the state of Florida. In addition to the direct benefit of the increased employment payroll, these direct earnings from plant operations will also generate indirect earnings benefits in the local economy due to the increase in the demand for goods and services. (SCA Section 7.1)

Traffic Analysis

Formatted: Bullets and Numbering

42. Construction traffic will affect area roadways on a temporary basis during the construction period. The worst-case impact for construction traffic will occur during maximum employment during the year 2010. A traffic impact analysis was conducted to determine impacts during the period of the peak construction work force. This included calculations of the future turning movements at intersections in the traffic study area. The intersection of U.S. Highway 17 and the plant entrance road requires signalization and widening to two approach lanes to maintain acceptable levels of traffic service during construction of Unit 3. In addition, the site entrance drive will be widened to provide two exit lanes, one for right turns and the other for left turns onto U.S. Highway 17. (SCA Section 4.5.2; Sufficiency Response, Section 9) Project traffic impacts during operation of Unit 3 were also evaluated based on an increase of employment of 50 employees. Total future traffic beginning in 2013, the first full year of Unit 3 operation, was evaluated. The evaluation identified the need for a signal at the U.S. Highway 17 and project entrance to insure acceptable levels of service with projected total traffic. The

improvements proposed for Unit 3 construction will maintain an acceptable level of traffic during plant construction and operation. (SCA Section 5.9; Sufficiency Response, Section 9)

Potential Noise Impact Analysis

Formatted: Bullets and Numbering

43. A noise impact evaluation for the construction period was conducted to predict maximum noise levels produced by a combination of likely construction-related noise sources. The predicted noise levels for construction are not expected to adversely impact sensitive receptors in the vicinity of the site. The actual or measured noise levels are expected to be lower than those predicted due to the conservative nature of the analysis. When steam blows to clean piping are conducted, which result in elevated noise levels for short durations, notification will be made to areas expected to experience elevated noise levels. (SCA Section 4.5.5)

44. A noise impact assessment was also conducted for noise generated during operation of the Unit 3 project. Noise impact modeling was performed using an environmental noise propagation computer program, to predict maximum noise levels produced during operation with background noise levels. While there are no applicable federal or state noise standards, the Unit 3 project will comply with the sound level limits contained in the Putnam County noise ordinance. (SCA Section 5.7)

Coal Combustion Products, Reuse, and Solid Waste

Formatted: Bullets and Numbering

45. Coal combustion products from Unit 3 will be reused to the maximum extent feasible. Bottom ash will continue to be sold to concrete and concrete block manufacturers. Fly ash will be sold for reuse to the maximum extent feasible. Gypsum will be sold to the adjacent wallboard manufacturing facility. The new ZLD system will produce a dry solid reject which will be disposed in the onsite landfill or in an off site permitted landfill. Any coal combustion products not reused and miscellaneous plant waste will be managed onsite within the existing

landfill area or disposed off site in a permitted landfill. All new onsite landfill areas that receive solid waste from Unit 3 will feature a double liner and leachate collection and removal system installed to serve the Unit 3 waste. Any hazardous waste generated, such as spent solvents, cleaning materials and other wastes, will be collected and managed in a permitted hazardous waste storage facility in accordance with applicable regulations. No impacts are anticipated from hazardous waste generated from the operation of Unit 3. (SCA Sections 3.7; 5.4.1, 5.4.2; Sufficiency Response, Section 3)

46. Solid waste generated during construction will be disposed of in accordance with applicable rules and regulations. Construction and demolition wastes, such as scrap wood and metal, will be transferred to a storage area on the site where it will be separated for salvage and recycling. Typical municipal solid waste will be collected in appropriate waste collection containers for disposal in an offsite approved location. All hazardous waste generated during construction will be properly stored, transported and disposed of in accordance with applicable regulations and the site hazardous waste management plan. Used oil from construction vehicles and equipment will be collected by contractors in appropriate containers and transported off site. (SCA Section 4.1.1)

47. On August 7, 2006, the Florida Public Service Commission (PSC) issued its affirmative determination of need for the Seminole Unit 3 Project. The PSC addressed the criteria set forth in Section 403.519, F.S. The PSC determined that there is a need for the proposed Unit 3 taking into account the need for electric system reliability and integrity. The PSC found that without the addition of 750 megawatts from the Unit 3 project, Seminole will not meet its 15 percent reserve margin criterion in the year 2012 and Seminole's members and customers will be faced with an unacceptably high risk of service interruptions. The PSC found

Deleted: <#>Net beneficial environmental impacts at the Seminole Generating Station associated with Unit 3, in combination with the Units 1 and 2 upgrades described above, are summarized as follows:¶
Air Quality- - Reductions in facility-wide SO_2, NOx, sulfuric acid mist, and mercury air emissions, and compliance with applicable air quality requirements. The proposed urea-based (as opposed to ammonia) SCR system will enhance community safety.¶
Water Quality - - Elimination of several process water discharge streams will result in reductions in mass loading of nutrients and several additional pollutants to the St. Johns River. Mixing zones for cooling tower blowdown discharges are required only on account of the concentration of river intake constituents. Several proposed mixing zones will be smaller than current mixing zones. Current discharges of wastewater from Units 1 and 2 via groundwater percolation ponds will be eliminated.¶
Water Conservation - - The combined Units 1-3 surface water intake, as proposed, will meet consumptive use criteria, and will be lower than the applicability threshold of EPA's Phase II surface water intake rules. Enhanced on-site water reuse will result in no need to increase current groundwater consumptive use levels.¶
Coal Combustion Product Reuse - - Reuse of FGD product, fly ash, and bottom ash will minimize solid waste disposal.¶
Land Use - - Seminole's proposed utilization of the existing SGS site and infrastructure is environmentally beneficial. (SCA, Exec. Summary, p. 3)¶

that Seminole has chosen a proven generating technology and that Seminole has experience with the construction and operation of pulverized coal units. The estimated costs for Unit 3 appeared reasonable to the PSC. Therefore, the PSC found that Seminole's Unit 3 project will contribute to the provision of adequate electricity at a reasonable cost. The PSC also found that Seminole's Unit 3 project is the most cost-effective alternative available to Seminole. the PSC found that there are no conservation measures reasonably available to Seminole that might mitigate the need for the proposed power plant. (SAR, Appendix II-1, PSC Need Determination Order No. PSC-06-0674-FOF-EC)

Agency Positions

48. On November 3, 2006, DEP issued its Staff Analysis Report on the Seminole Generating Station Unit 3 Project. The DEP recommended that "if the Seminole Electric Cooperative, Inc., as the applicant, agrees to abide by the conditions of certification, attached and incorporated herein, the Department would recommend certification of the Seminole Generating Station Unit 3." (SAR, page 19)

49. The Florida Public Service Commission issued its order determining the need for the Project. (SAR, Appendix II-1) That determination of need served as the PSC's report to the Department for the certification of the Project.

50. The Florida Fish and Wildlife Conservation Commission submitted a letter on September 1, 2006 indicating that the Commission "does not object to certification of the Project under the condition that if protected species...are impacted..., then the FWC shall be contacted prior to taking any action related to those species." (SAR, Appendix II-2)

51. The St. Johns River Water Management District submitted their agency report on October 11, 2006. The SJRWMD recommended approval of the Site Certification Application

Deleted: <#>On January 7, 2007, Seminole and the Sierra Club entered into a Settlement Agreement resolving all issues raised or that could be raised by the Sierra Club under the Power Plant Siting Act concerning SGS Unit 3. This Sierra Club/Seminole Settlement Agreement contains these two provisions in response to the Sierra Club's concerns regarding emissions of greenhouse gases from Unit 3:¶
1. . Seminole agrees to purchase and distribute $200,000 worth of compact fluorescent light bulbs to its member cooperatives for distribution to end users. Seminole agrees to work with the Sierra Club on the procurement and distribution of the compact fluorescent light bulbs, as well as the launching and public announcement of the compact fluorescent light bulb program. Such purchase shall take place within 180 days after the issuance of all approvals necessary to construct Unit 3 and the distribution of the light bulbs will take promptly thereafter.¶
¶
2. . Seminole commits to use best efforts for investigating additional renewable energy opportunities and incentives which can be implemented by Seminole or by its member electrical cooperatives that will further the use of renewable energy in Florida and reduce the reliance on fossil fuels for the production of electricity in the State. Seminole agrees to help fund and assign a project manager to a series of workshops and meetings with renewable energy experts and the public in Florida to investigate options and to analyze the economic and technical feasibility of renewable energy projects that Seminole can implement in the future. This commitment includes but is not limited to solar, wind, biomass co-firing at its power plants, and methane capture at the Putnam County Central Landfill. Seminole also commits to continue to develop and implement additional programs that will result in offsets of emissions of greenhouse gases.¶
¶
Seminole has already begun implementing both of these conditions. ¶
<#>On March 9, 2007, Seminole and the Sierra Club entered into a second Settlement Agreement, resolving all of the Sierra Club's issues concerning issuance of the PSD Permit for Unit 3. This second Sierra Club/Seminole Settlement Agreement requires significant, additional air emission reduction at SGS, both facility-wide and at Unit 3. For example, Seminole committed that with operation of Unit 3 there will be a 38% reduction below current SGS SO2 air emissions, 7... [1]

Formatted: Bullets and Numbering

for SGS Unit 3 with a number of conditions of certification. That report concluded that the Unit 3 project met the SJRWMD's permitting requirements. (SAR, Appendix II-3)

52. On October 30, 2006, the Florida Department of Transportation submitted a revised report recommending approval, subject to that Agency's recommended conditions. (SAR, Appendix II-4)

53. The Florida Department of State, Division of Historical Resources submitted a letter on September 29, 2006 indicating that the Division had reviewed additional archaeological and historical survey of the site and concluded that no additional historic cultural resources existed on the site for the Unit 3 project. (SAR, Appendix II-5)

54. The foregoing facts demonstrate that the Seminole Generating Station Unit 3 project, has provided reasonable assurances that: operational safeguards are technically sufficient for public welfare and protection; complies with applicable nonprocedural requirements of the Agencies; is consistent with applicable local government comprehensive plans and land development regulations; meets the electrical energy needs of the state in an orderly and timely fashion; has effected a reasonable balance between the need for the facility and potential air, water, and additional ecological factors; minimizes, through reasonable and available methods, the adverse effects on human health, the environment, and ecology of the land and waters and associated wildlife; and serves and protects the broad interest of the public.

Deleted: <#>The foregoing facts reflect compliance with applicable environmental requirements, improved environmental performance from the existing facility, and responsiveness to climate change considerations as well as sensitivity and responsiveness to water conservation, land use considerations, potential traffic impacts, and additional relevant considerations.¶

Deleted: through the use of reasonable and available methods, has minimized potential adverse effects on human health, the environment, and the ecology of the land and wildlife, as well as state waters and aquatic wildlife

CONCLUSIONS OF LAW

Deleted: <#>By providing 60% more electric power from the existing power plant facility, while lessening many aspects of the environmental profile of that facility, in order to serve the demonstrated need of a non-profit cooperative network that provides electric power to most of Florida's counties, it is determined that the Unit 3 project is in the public interest.¶

1. Pursuant to Section 403.509(1)(a), since the administrative law judge has granted the request to cancel the certification hearing and relinquished jurisdiction to the Department of Environmental Protection, the Department is to issue a final order in this matter consistent with the terms of the PPSA and the stipulation of the parties that no disputed issues of law or fact

Deleted: has jurisdiction to enter a

exist between them.. No site certification hearing was conducted, in accordance with Sections 403.508(6), 509(1)(a), and 403.5185, F.S.

2. In accordance with Chapter 403, Part II, F.S., and Chapter 62-17, F.A.C., proper notice was accorded all persons, entities and parties entitled to such notice. All necessary and required governmental agencies, as well as members of the public, either participated in or had the opportunity to participate in the certification hearing. Reports and studies were issued by the Department, the Florida Fish and Wildlife Conservation Commission, the St. Johns River Water Management District, the Department of Transportation and the Department of State's Division of Historical Resources.

3. The Florida Public Service Commission has issued its affirmative determination that a need exists for the Unit 3 electrical generating facility and the electricity it will produce, in accord with Section 403.519, F.S. The new Unit 3 is needed by 2012 to ensure a reliable and cost-effective electric supply for the members of Seminole Electric Cooperative's member cooperatives in Florida.

4. Competent, substantial evidence of record demonstrates that Seminole Electric Cooperative has met its burden of proof to demonstrate that the Seminole Generating Station Unit 3 project meets the criteria for certification under the PPSA, as found in section 403.509(3), F.S. (2006). Seminole has demonstrated that the safeguards for construction and operation of the Unit 3 project are technically sufficient to protect the public welfare of the citizens of Florida, as required by section 403.509(3)(a), F.S. (2006). The Department has made its preliminary determination that the Unit 3 project will employ best available control technologies for control of air emissions subject to the Department's Prevention of Significant Deterioration (PSD) permitting program. The additional air emissions controls on Units 1 and 2 at the SGS site will

Deleted: FDEP

result in a decrease in emissions of SO2, NOx, sulfuric acid mist and mercury following the addition of Unit 3. The use of a zero liquid discharge system with the commencement of Unit 3 will eliminate discharges of industrial wastewater, with only cooling water blowdown being discharged to the St. Johns River, which will protect the water quality of the river. Reuse of coal combustion products, including gypsum and flyash, in useful products will reduce the need for onsite or offsite disposal of such materials, thereby protecting groundwater from potential impacts from such disposal. These methods are technically sufficient to protect the public welfare of the citizens of Florida.

5. The Unit 3 project will comply with applicable nonprocedural requirements of the agencies who have reviewed the project, as required by section 403.509(3)(b), F.S.. The Department has determined initially that the Unit 3 project will employ the best available control technologies for control of air emissions under the rules of the department's PSD permitting program. The Department has further reached a preliminary determination that the project will not cause or contribute to exceedances of any ambient air quality standards that have been adopted by the State of Florida for the protection of the public health, safety and welfare, and will not cause an exceedance of any air quality requirements designed to protect Class I air quality areas, such as National Parks and federally-designated wilderness areas. All requirements applicable to surface water discharges will be met. The withdrawals of water from the St. Johns River and the Floridan aquifer will meet the consumptive use permitting criteria of the St. Johns River Water Management District. The addition of turn lanes and traffic lights at the SGS site entrance will maintain traffic within acceptable and safe levels. No variances from agency standards are required for the project. There are reasonable assurances that Unit 3 can be operated and maintained in accordance with this Final Order and the Department's proposed

Conditions of Certification, and that the Unit 3 project will comply with the applicable nonprocedural requirements of all agencies.

6. In accordance with section 403.509(3)(d), F.S,. the Florida Pubic Service Commission has made its determination that the Unit 3 Project is needed by 2012 to meet the energy needs of Florida in an orderly and timely fashion.

7. Pursuant to section 403.509(3)(e), F.S., Seminole Electric's Unit 3 project represents a reasonable balance between the need for the Unit 3 project, as determined by the PSC and the impacts upon air and water quality, fish and wildlife, water resources and other natural resources of the state resulting from the construction and operation of the Unit 3 project. The Public Service Commission has determined that the Unit 3 project is the most cost-effective option available to Seminole to supply the additional electricity to be provided from the new Unit 3. The record evidence indicates that the Unit 3 project will result in minimal impact to the state's environment and natural resources. The Unit 3 project will also result in significant reductions in existing environmental impacts from the SGS site, through the reduction of air emissions from the two existing units and the elimination of existing industrial wastewater discharges to the St. Johns River. Seminole will be able to add the new Unit 3 while decreasing emissions of SO2, NOx, sulfuric acid mist and mercury from the SGS site, thereby minimizing the effects of project-related air emissions on air quality, the environment, or wildlife. Use of the zero liquid discharge system to eliminate current and future discharges of industrial wastewater streams from the three generating units at the SGS site will minimize impacts to the state's waters and their aquatic life as well as state water resources, including the St. Johns River. Withdrawals of water from the St. Johns River will utilize an existing intake structure, and these withdrawals will not have a significant adverse effect on the St. Johns River or its aquatic life.

Deleted: The

Deleted: will result in minimal adverse

Deleted: effects on human health, the environment, the ecology of the land and its wildlife, and the ecology of state waters and their aquatic life.

Deleted: P

No listed, threatened or endangered species inhabit the project site, except gopher tortoises; impacts to this species shall be minimized through avoidance, relocation to a suitable offsite gopher tortoise habitat, or mitigation in accordance with the FWCC's regulations. Therefore, the Unit 3 project represents a reasonable balance between the need for the electricity from the new Unit 3 at the SGS site and the impacts on air, water, wildlife and other natural resources from the Project's construction and operation.

Deleted: possibly

Deleted: ed

Deleted: or Seminole will obtain

8. In addition, the Unit 3 project will not conflict with the State Comprehensive Plan or the local comprehensive plan for Putnam County, Florida, as required by section 403.509(3)(c), F.S,..

9. As required by section 403.509(3)(f), F.S,.the Unit 3 project will minimize, through the use of reasonable and available methods, the potential adverse effects of the Unit 3 project on human health, the environment, and the ecology of the land and its wildlife and the ecology of state waters and their aquatic life. The record evidence indicates that the project will have minimal effects on the human or natural environment. The use of an existing power plant site and many of the existing onsite facilities minimizes the impacts that would result if the project were undertaken at another location. There will be no increase in emissions of several significant air pollutants including mercury with the addition of Unit 3. Best available control technologies will be employed on Unit 3 to further control air emissions. A new zero liquid discharge system will be installed with Unit 3 to eliminate current discharges of industrial wastewaters from the SGS site. Air and water quality standards will be met by the project, indicating that human health, the environment and wildlife will be protected from any such impacts. Wetland impacts due to Unit 3 will be minimal, due in part to the extensive use of

existing facilities on the SGS site. Water withdrawals will not have an adverse effect on the St. Johns River or its aquatic life.

10. The Unit 3 project will serve and protect the broad interests of the public in accordance with section 403.509(3)(g), F.S,. The public interest will be served, in part, as the Unit 3 project will provide a reliable, cost-effective source of electricity to meet the growing demands for electricity for the cooperative systems in Florida served by Seminole Electric. The public interest will be protected in several ways. The electricity from Unit 3 will be supplied using a fuel-efficient electrical generating technology that minimizes impacts to air quality through efficient fuel combustion and the use of demonstrated "best available" air emissions control technologies, in addition to the reductions of existing air emissions from the SGS site. The public interest in water quality is protected through the elimination of existing wastewater discharges and the use of the lowest quality water available to meet the needs of Unit 3. Wildlife resources will not be affected by air emissions, water use or discharges or plant construction. The addition of the new Unit 3 will also promote the public interest because it will have significant direct and indirect economic benefits through the addition of new jobs during construction and operation and will contribute to an expanded tax base for Putnam County to support governmental services in that county and the State of Florida.

Deleted: If operated and maintained in accordance with this Final Order and the Department's proposed Conditions of Certification, the Unit 3 project will comply with the applicable nonprocedural requirements of all agencies

Deleted: Furthermore, certification of the Unit 3 project will fully balance the increasing demand for electrical power plant location and operation in this State with the broad interests of the public that are protected by the PPSA.

Deleted: P

Deleted: serve and protect the broad interest of the public

CONCLUSION

Having reviewed the matters of record and being otherwise duly advised, the Department of Environmental Protection concludes that, if constructed and operated in accordance with the evidence presented in the record and the Conditions of Certification, the project will meet the requirements of the act and will implement the stipulation of among the parties to this proceeding, and therefore Seminole Electric Cooperative's Unit 3 Project should be approved.

THEREFORE IT IS ORDERED:

Site certification of Seminole Electric Cooperative, Inc.'s Seminole Generating Station Unit 3, as described in the Site Certification Application and the record as a whole, is hereby APPROVED. The Project is subject to the Conditions of Certification, dated November 9, 2006 (SAR, Appendix I) which is attached (Exhibit A) and incorporated by reference herein.

NOTICE OF RIGHTS

Any party adversely affected by this Final Order has the right to seek judicial review of it under Sec. 120.68, F.S. Judicial review must be sought by filing a notice of appeal under Rule 9.110, Florida Rules of Appellate Procedure, with the Clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000, and by filing a copy of the notice of appeal accompanied by the applicable filing fees with the appropriate district court of appeal. The notice of appeal must be filed within 30 days after this Final Order is filed with the Clerk of the Department.

DONE AND ORDERED this _____ day of _____, 2007, in Tallahassee, Leon County, Florida.

FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION

_____
MICHAEL SOLE, Secretary

3900 Commonwealth Blvd.
Tallahassee, FL 3239903000

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

_____

CLERK

_____

DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing have been furnished to the following by hand delivery or overnight delivery on this _____ day of _____, 2007:

Deleted: March

Scott A. Goorland, Esq.
Senior Assistant General Counsel
Department of Environmental Protection
3900 Commonwealth Blvd., MS 35
Tallahassee, FL 32399-3000

James V. Antista, Esq.
Fish and Wildlife Conservation Commission
620 South Meridian Street
Tallahassee, FL 32399-1600

Kelly A. Martinson, Esq.
Department of Community Affairs
2555 Shumard Oak Boulevard
Tallahassee, FL 32399-2100

Sheauching Yu, Esq.
Department of Transportation
Haydon Burns Building
605 Suwannee Street, MS 58
Tallahassee, FL 32399-0450

Martha Carter Brown, Esq.
Florida Public Service Commission
Gerald Gunter Building
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Gordon B. Johnston, Esq.
County Attorney
601 Southeast 25th Avenue
Ocala, FL 34471

Mark Scruby, Esq.
Clay County Attorney
Post Office Box 1366
Green Cove Springs, FL 32043

Vance W. Kidder, Esq.
St. Johns River Water Management District
4049 Reid Street
Palatka, FL 32177

Brian Teeple
Northeast Florida Regional Planning Council
6850 Belfort Oaks Place
Jacksonville, FL 32216

Michael P. Halpin
Office of Siting Coordination
Department of Environmental Protection
2600 Blair Stone Road
Tallahassee, FL 32399

Russell D. Castleberry, Esq.
Post Office Box 758
Palatka, FL 32178

Patrick Gilligan
Attorney for City of Ocala
1531 SE 36 Avenue
Ocala, FL 34471

Wayne Smith
Union County Board of County Comm.
15 Northeast First Street
Lake Butler, FL 32054

Ronald Williams
Columbia County Board of County Comm.
Post Office Drawer 1529
Lake City, FL 32058

Timothy Keyser, Esq.
Sierra Club
Post Office Box 62
Interlachen, FL 32148-0092

James S. Alves, Esq.
Douglas S. Roberts, Esq.
Hopping Green & Sams
Post Office Box 6526
Tallahassee, FL 32314

Attorney

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

SEMINOLE ELECTRIC COOPERATIVE, INC.,

Appellant,

v.

STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Appellee.
_____/

Appellate Case No. 5D07-3005
DOAH Case No. 06-0929EPP
DEP/OGC Case No. 06-0316

DATE: September 15, 2007

MEDIATION QUESTIONNAIRE*

This questionnaire is sent to obtain information for the Court's use in determining whether this case is appropriate for appellate mediation. Pursuant to administrative order, copy enclosed, **each party is ordered to file a completed questionnaire with Penny H. Cooper, Court Mediation Coordinator, Fifth District Court of Appeal, 300 S. Beach St., Daytona Beach, FL 32114, within ten (10) days of the date of the Court's acknowledgment of the notice of appeal** with a copy served on opposing counsel (except for the Confidential Statement Regarding Appropriateness of Appellate Mediation, which is only to be filed with the Mediation Coordinator of the court).

FAILURE TO RETURN QUESTIONNAIRE AND CONFIDENTIAL STATEMENT MAY RESULT IN SANCTIONS

Appellant's Counsel

Douglas S. Roberts
Florida Bar No. 0559466
James S. Alves
Florida Bar No. 0443750
Hopping Green & Sams, P.A.
Post Office Box 6526
Tallahassee, FL 32314
(850) 222-7500
(850) 224-8551 (Fax)
robertsd@hgslaw.com

Appellee's Counsel

Jack Chisolm
Deputy General Counsel
Department of Environmental Protection
3900 Commonwealth Blvd.
Tallahassee, FL 32399-300
(850) 245-2275
(850) 245-2302 (Fax)
Jack.Chisolm@dep.state.fl.us

NATURE OF THE CASE

_____Business Tort
_____Employment
_____Insurance
_____Real Estate
__x__Other Administrative proceeding under Power Plant Siting Act, Chapter 403, Part II, F.S.

_____ Contract
_____ Family matter (with children issues)
_____ Family matter (without children issues)
_____ Personal injury/wrongful death

ISSUES ON APPEAL (To be completed by Appellants/Cross-Appellants only): Describe each expected issue on appeal as now known and the standard of review which will be applicable to each issue (completion of the questionnaire will not limit issues which may be raised in the briefs).
Appellee exceeded its authority in denying approval of site certification (permit) for Appellant's electrical power plant. Appellee failed to enforce stipulation of parties that there were no disputed issues of law or fact preventing final approval of the project. Standard of review: de novo.

MEDIATION

Was the case mediated at the trial level? Yes _____ No __x___

Has the case been mediated since entry of the order appealed? Yes __ No _x__

- NOTICE -

You are hereby given an extension to file your directions to the clerk and court reporter, upon your receipt of this form. If appellate mediation is ordered in this case, you will be given an automatic extension of the deadlines for preparation of the transcript, preparation of the record and filing of briefs, **said time to run from the date of the notification from the Court that mediation is ordered until 10 days after mediation has concluded.** [Mediation session has concluded with either an impasse or full or partial settlement]. The court will send an Order Declining Referral To Mediation if mediation is not ordered in this case.

(It is the intention of the Court that the mediation process will not substantially slow down the appellate process. However, the above extensions will give the parties the opportunity to save the costs of the record and brief preparation, if mediation is successful. Accordingly, additional extensions of deadlines pending mediation will normally not be granted absent stipulation of the parties and court order).

September 14, 2007
Date:

Douglas S. Roberts
James S. Alves
Hopping Green & Sams, P.A.
Post Office Box 6526
Tallahassee, FL 32314

Attorneys for:
Seminole Electric Cooperative, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing have been furnished to the following by U.S. Mail on this 14th day of September, 2007:

Jack Chisolm, Esq.
Deputy General Counsel
Department of Environmental Protection
3900 Commonwealth Blvd., MS 35
Tallahassee, FL 32399-3000

James V. Antista, Esq.
Fish and Wildlife Conservation Commission
620 South Meridian Street
Tallahassee, FL 32399-1600

Kelly A. Martinson, Esq.
Department of Community Affairs
2555 Shumard Oak Boulevard
Tallahassee, FL 32399-2100

Sheauching Yu, Esq.
Department of Transportation
Haydon Burns Building
605 Suwannee Street, MS 58
Tallahassee, FL 32399-0450

Martha Carter Brown, Esq.
Florida Public Service Commission
Gerald Gunter Building
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Gordon B. Johnston, Esq.
County Attorney
601 Southeast 25th Avenue
Ocala, FL 34471

Mark Scruby, Esq.
Clay County Attorney
Post Office Box 1366
Green Cove Springs, FL 32043

Vance W. Kidder, Esq.
St. Johns River Water Management District
4049 Reid Street
Palatka, FL 32177

Brian Teeple
NE Florida Regional Planning Council
6850 Belfort Oaks Place
Jacksonville, FL 32216

Mike Halpin
Office of Siting Coordination
Department of Environmental Protection
2600 Blair Stone Road
Tallahassee, FL 32399

Russell D. Castleberry, Esq.
Post Office Box 758
Palatka, FL 32178

Patrick Gilligan
Attorney for City of Ocala
1531 SE 36 Avenue
Ocala, FL 34471

Wayne Smith
Union County Board of County Comm.
15 Northeast First Street
Lake Butler, FL 32054

Ronald Williams
Columbia County Board of County Comm.
Post Office Drawer 1529
Lake City, FL 32058

Timothy Keyser, Esq.
Sierra Club
Post Office Box 62
Interlachen, FL 32148-0092

Attorney

THE 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.	)))))	DEP CASE NO. 06-0780 DOAH CASE NO. 06-0929EPP Fifth DCA Case No. 5D07-3005

DIRECTIONS TO THE CLERK

Pursuant to Rule 9.200(a)(1), Florida Rules of Appellate Procedure (F.R.A.P.) Seminole Electric Cooperative, Inc. ("Seminole"), by and through its undersigned counsel, hereby directs the Clerk to include the following documents and exhibits in the record on appeal in this case:

1. The Appellant directs the Clerk to include all of the materials listed in Rule 9.200(a)(1), F.R.A.P. As the Appellant, Seminole is not seeking to exclude any portions of the record in this proceeding.

2. Pursuant to Rule 9.200(d), forward the record to the Clerk of the Fifth District Court of Appeal at the address below.

Susan Wright, Clerk
Fifth District Court of Appeal
300 South Beach Street
Daytona Beach, FL 32114

Respectfully submitted this 10th day of September, 2007.

HOPPING GREEN & SAMS, P.A.

By: _____

Douglas S. Roberts
Fla. Bar No. 0559466
Robert A. Manning
Fla. Bar No. 0035173
P.O. Box 6526
Tallahassee, FL 32314
(850) 222-7500

Attorneys for SEMINOLE ELECTRIC COOPERATIVE, INC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing have been furnished to the following by U.S. Mail on this 10th day of September, 2007:

Jack Chisolm, Esq.
Deputy General Counsel
Department of Environmental Protection
3900 Commonwealth Blvd., MS 35
Tallahassee, FL 32399-3000

James V. Antista, Esq.
Fish and Wildlife Conservation Commission
620 South Meridian Street
Tallahassee, FL 32399-1600

Kelly A. Martinson, Esq.
Department of Community Affairs
2555 Shumard Oak Boulevard
Tallahassee, FL 32399-2100

Sheauching Yu, Esq.
Department of Transportation
Haydon Burns Building
605 Suwannee Street, MS 58
Tallahassee, FL 32399-0450

Martha Carter Brown, Esq.
Florida Public Service Commission
Gerald Gunter Building
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Gordon B. Johnston, Esq.
County Attorney
601 Southeast 25th Avenue
Ocala, FL 34471

Mark Scruby, Esq.
Clay County Attorney
Post Office Box 1366
Green Cove Springs, FL 32043

Vance W. Kidder, Esq.
St. Johns River Water Management District
4049 Reid Street
Palatka, FL 32177

Brian Teeple
Northeast Florida Regional Planning Council
6850 Belfort Oaks Place
Jacksonville, FL 32216

Mike Halpin
Office of Siting Coordination
Department of Environmental Protection
2600 Blair Stone Road
Tallahassee, FL 32399

Russell D. Castleberry, Esq.
Post Office Box 758
Palatka, FL 32178

Patrick Gilligan
Attorney for City of Ocala
1531 SE 36 Avenue
Ocala, FL 34471

Wayne Smith
Union County Board of County Comm.
15 Northeast First Street
Lake Butler, FL 32054

Ronald Williams
Columbia County Board of County Comm.
Post Office Drawer 1529
Lake City, FL 32058

Timothy Keyser, Esq.
Sierra Club
Post Office Box 62
Interlachen, FL 32148-0092

Attorney

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.	))))	DEP CASE NO. 06-0780 DOAH CASE NO. 06-0929EPP

SEMINOLE ELECTRIC COOPERATIVE, INC.'S RESPONSE TO DEP'S MOTION TO WITHDRAW STIPULATION

Seminole Electric Cooperative, Inc. ("Seminole"), pursuant to Rule 28-106.204, Florida Administrative Code ("F.A.C.") hereby responds to the Department of Environmental Protection's ("DEP") Motion to Withdraw Stipulation which was filed on June 19, 2007. In its filing, DEP seeks to have the Joint Stipulation Between the Parties, filed on February 22, 2007, "deemed void or withdrawn,"[1] and based on a lack of such a Joint Stipulation, requests that Seminole's June 12, 2007 Motion to Relinquish Jurisdiction be denied and an administrative hearing be conducted. In sum, DEP's Motion should be denied for failure to provide a factual or legal basis for withdrawal of the Joint Stipulation, and DEP's failure to address its other equivalent stipulations and filings in this proceeding. Regardless of the ruling on DEP's Motion, however, there continues to be no basis to conduct a hearing in this matter.

In accordance with Section 403.508(6)(a), Florida Statutes ("F.S."), DEP entered the Joint Stipulation freely, knowingly and deliberately, stipulating with all parties that there are "no disputed issues of fact" and "no disputed issues of law to be raised at the certification hearing" which was previously scheduled in this proceeding, and that they "do not object to the certification of the project" or "the entry of a final order of certification for the Project by the

[1] DEP is presumably seeking only to have its inclusion in the Joint Stipulation withdrawn, since its Motion provides no statement regarding conferring with any other party and does not purport to be on behalf of any other party.

Secretary." Joint Stipulation, p. 7. DEP now argues that the Stipulation is "so deficient that it should be deemed a nullity" and that new "facts" and pending policy formulation justify its withdrawal.

Requirements for Stipulations under Section 403.508(6), F.S.

DEP's argument that the Stipulation should have contained a recitation of "what the agreed facts and law were" and "identify the facts that were uncontested," attempts to read into the plain language of Section 403.508(6)(a), F.S., requirements that are simply not there. That provision merely requires the parties to stipulate that "there are no disputed issues of fact or law to be raised at the certification hearing." Contrary to DEP's assertions, there is no requirement that the parties agree upon specific facts or state how those facts relate to the law, or address how those facts result in issuance of certification in a stipulation entered under this statute. There is no provision found or cited by DEP in Section 403.508, or any other provision of the Power Plant Siting Act ("PPSA"), that requires such a stipulation to identify specific facts or apply those facts to the law before seeking cancellation of the site certification hearing. Rather, pursuant to Section 403.508(6)(d)2., F.S., "parties may submit proposed recommended orders to the Department no later than 10 days after the Administrative Law Judge issues an order relinquishing jurisdiction" to assist the Secretary by providing proposed Findings of Fact and Conclusions of Law. (emphasis added). Significantly, as described in Seminole's June 19 Motion, DEP and Seminole jointly and voluntarily submitted such a Proposed Final Order to the Secretary, wherein DEP expressly agreed to and included detailed Findings of Fact and Conclusions of Law. (See Notice of Filing Joint Proposed Final Order, dated March 5, 2007). Accordingly, not only does Section 403.508(6)(a), F.S. not require the Stipulation to contain

agreed upon facts or the application of those facts to the law, but DEP agreed to such details in the Joint Proposed Final Order.

Therefore, far from being "so deficient," the Stipulation entered into by all parties, including DEP, on February 19, 2007 fully satisfied the legal requirements of Section 403.508(6)(a), F.S. The terms of this stipulation are neither "so vague as to be unenforceable" nor "anticipate future agreement on critical issues" as DEP would now seek to have the statute and the Stipulation require. All of the parties, including DEP, were simply following the process created by the PPSA for situations where the parties have resolved any and all disputed issues. This same process was followed by the parties and the ALJ in the Orlando Utilities Commission's coal-fired IGCC project site certification proceeding. DOAH Case No. 06-0735EPP. DEP found this process, involving an equivalent stipulation of the parties, to be fully acceptable when it entered a final order granting certification to the OUC coal fired IGCC project on December 8, 2006. DEP fails to explain why the same stipulation that it found to be wholly acceptable for one site certification proceeding six months ago is not acceptable in this site certification proceeding. Accordingly, the Joint Stipulation for Seminole's Unit 3 Project meets the requirements of the statute, reflects the unambiguous agreement of the parties to those statutory requirements, and conforms to recent precedent.

Minimum Requirements to Withdraw from a Stipulation

As DEP admits in its Motion, the parties to litigation are bound by stipulations on matters appropriate for such stipulations. Gunn Plumbing, Inc. v. Dania Bank, 252 So. 2d 1 (Fla. 1971) ("A stipulation properly entered into and relating to a matter to which it is appropriate to stipulate is binding upon the parties." 252 So. 2d at 4). Further, a stipulation is not only binding upon the parties, it is also binding upon trial and appellate courts that review such stipulations,

and by extension, to DEP when acting in its judicial capacity in entering a final order in an administrative proceeding such as this PPSA proceeding. McGoey v. State, 736 So. 2d 31 (Fla. 3rd DCA 1999) ("When appropriately made, stipulations are binding not only upon the parties but also upon the trial and appellate courts."). Florida courts have also held that "it is well settled that a stipulation entered into between parties in good faith and without fraud, misrepresentation or mistake is binding on the parties and the court. . . . Unless grounds for rescission or withdrawal are shown, the trial court is bound to strictly enforce the agreement between the parties." EGYB, Inc. v. First Union Nat'l Bank of Florida, 630 So.2d 1216, 1217 (Fla. 5th DCA 1994). Beyond attempting to read new legal requirements into the Power Plant Siting Act, DEP has offered no evidence or allegations that this Stipulation results from "fraud, misrepresentation or mistake."

Further, "if a party enters into an agreement, not as a result of a mistake of fact, but merely due to a lack of *full* knowledge of the facts, caused by the parties' failure to exercise due diligence to ascertain them, there is no proper ground for relief." Sunshine Utilities of Cent. Florida, Inc. v. Florida Public Service Comm'n, 624 So. 2d 306, 310 (Fla. 1st DCA 1993) (emphasis added). In Florida Independent Auto. Dealers Ass'n Helath and Welfare Ben. Plan v. Fidelity Sec. Life Ins. Co., 636 So. 2d 37 (Fla. 5th DCA 1994), an insolvent insurance company sought to be excused from a stipulation that its receiver had executed. The insurance company based its request for relief from the stipulation on the receipt of erroneous information regarding the validity of certain claims. However, the trial court, which was upheld by the appellate court on this issue, found that the erroneous information was not the product of any fraud, overreaching or misrepresentation. In fact, the receiver for the insolvent insurance company had access to the correct information prior to entering into a stipulation. In those circumstances, the

insurer was held to the terms of the stipulation due to its lack of due diligence in ascertaining the actual facts. However, the stipulation in that case was voided for other procedural reasons.

In a similar vein, DEP argues that new intervening "facts" concerning the composition of the Siting Board and the potential regulation of greenhouse gas emissions is information that was not available to DEP at the time it entered into the Joint Stipulation.[2] To the contrary, as of February 19, 2007, the date DEP signed the Joint Stipulation, it was common knowledge that a new Governor and two new Cabinet members had taken office and therefore were new members of the Siting Board. Similarly, the issue of greenhouse gases had been widely discussed both among policymakers and the public for the past several years. Again, DEP accurately states that it does not currently regulate greenhouse gas emissions, and at the time of signing the Joint Stipulation was seeking legislative authority to develop an inventory of greenhouse gas emissions in Florida. Further, because DEP's "new facts" were common knowledge, DEP has not met the minimum requirements to obtain relief from a stipulation in the Sunshine Utilities decision (624 So. 2d 306) -- that is, that the facts were beyond knowledge by a reasonable exercise of due diligence. Accordingly, DEP has not identified any new, mistaken or unknown "facts" that would allow DEP to withdraw from its Stipulation.

Further, allowing DEP to withdraw from its Stipulation at this date, and requiring a certification hearing, would be highly prejudicial to Seminole. Specifically, the 2012 in-service date determined necessary by the Public Service Commission could not be met if this proceeding

---

[2] DEP's Motion is also legally deficient, as the courts in both Gunn Plumbing (cited above) and Fawaz v. Florida Polymers, 622 So. 2d 492, 495 (Fla. 1st DCA 1993) (and cases cited therein) held that a motion seeking to withdraw from a stipulation must be supported by an affidavit showing good cause, asserting that the stipulation was obtained by fraud, misrepresentation or mistake of fact not ascertainable through an exercise of reasonable due diligence. See also Curr v. Helene Transp. Corp., 287 So. 2d 695 (Fla. 3rd DCA 1973). DEP has offered no such affidavit showing good cause to relieve DEP of this Stipulation, rendering its Motion to Withdraw Stipulation legally deficient and baseless.

is subjected to months of additional pre-hearing, hearing and post-hearing processes, not to mention potential appeals.

DEP's Additional Stipulations and Filings

Significantly, DEP fails to acknowledge or address several other separate stipulations and filings that DEP submitted into the record in this proceeding, each reflecting DEP's belief that there were no disputed issues of fact or law and that the Project should be certified because it met the requirements of the PPSA. For example, DEP stated its position in the Prehearing Stipulation filed on January 4, 2007, as follows:

> The Department of Environmental Protection has reviewed Seminole's application for site certification for the Seminole Generating Station Unit 3 Project. It is the Department's position that Seminole's application for site certification for the Project should be granted in accordance with conditions of certification proposed by the Department of Environmental Protection. The proposed electrical generating facility meets all requirements of the Florida Electrical Power Plant Siting Act, Section 403.501, et seq.

(emphasis added). DEP's instant Motion fails to address these very substantial statements by the Department acknowledging its belief that Seminole's proposed power plant meets the requirements for certification under the PPSA, and which fails to identify any disputed issues of fact or law needing to be addressed at a hearing. Further, on January 8, 2007, DEP entered into a Joint Motion of FDEP, Seminole Electric Cooperative and Sierra Club for a continuance to allow time for cancellation of the previously-scheduled site certification hearing. That Joint Motion acknowledged a resolution of outstanding issues between Seminole and the Sierra Club, and stated that "Seminole, the Sierra Club and the Department [of Environmental Protection] intent [sic] to pursue cancellation of the site certification hearing, pursuant to Section 403.508(6), Florida Statutes." Joint Motion at page 1. Further, paragraph 8 of this Joint Motion states that "in light of the Settlement Agreement between the Sierra Club and Seminole,

the undersigned parties [which includes DEP] believe that there are no remaining disputed issues of fact or law to be addressed at the site certification hearing in this matter." Joint Motion at page 3. The Joint Motion went on to say that "there is no longer a statutory requirement to conduct a site certification hearing if there are no disputed issues of law or fact exist [sic] among the parties to this site certification proceeding on Seminole's Unit 3 Project." DEP also filed a Staff Analysis Report on November 9, 2006 and a Joint Proposed Final Order on March 5, 2007, recommending certification of the Project and identifying no further issues that should be considered at an administrative hearing. Accordingly, even if DEP were allowed to withdraw from the Joint Stipulation dated February 19, 2007, DEP would still be bound by its other stipulation and filings which it submitted into the record of this proceeding.

Consideration of Greenhouse Gas Emissions

Seminole is well aware of the issues related to emissions of greenhouse gases and possible future regulation of such emissions. Seminole has already taken steps to mitigate the emissions of such greenhouse gases, as it has acknowledged in this proceeding. This is reflected, in part, in the Settlement Agreement between Seminole and the Sierra Club which was attached to the Joint Motion of the parties dated January 8, 2007 and filed in this proceeding. See paragraphs 1 and 2, found on page 2 of the Settlement Agreement attached to that Joint Motion. Seminole committed to use its best efforts to investigate additional renewable energy opportunities and incentives, as well as to continue to develop and implement additional programs that will result in offsets of emissions of greenhouse gases. The issue of CO2 cost was also addressed separately in the Public Service Commission's (PSC) affirmative need order for Seminole's Unit 3 Project, dated August 7, 2006. At pages 5 and 7 of its Final Order, the PSC discussed the economic evaluation of the Seminole Unit 3 Project based, in

part, on environmental costs from a future CO2 emission allowance program. The PSC's final need determination order is found in Appendix II-1 of the DEP's Staff Analysis Report filed with the Division on November 9, 2006. Thus, the issue of greenhouse gases has been addressed in this proceeding; it is not a new issue that must now be addressed at DEP's last minute behest.

Seminole's proposed new Unit 3 is also not avoiding or circumventing any regulatory requirements. To the contrary, DEP readily acknowledges in paragraph 6 of its Motion that it does not currently regulate emissions of carbon dioxide, and moreover, pursuant to Section 403.511(5)(a), F.S., of the Power Plant Siting Act, "an electrical power plant certified pursuant to this act shall comply with rules adopted by the Department subsequent to the issuance of the certification which prescribed new or stricter criteria, to the extent that the rules are applicable to the electrical power plants. . . . [S]ubsequently adopted rules which prescribe new or stricter criteria shall operate as automatic modifications to certifications." (emphasis added). Thus, if the nascent greenhouse gas regulatory programs that are being considered by the federal and state legislatures are adopted by the Florida Legislature, and when DEP adopts rules to implement such legislation, the Seminole Unit 3 Project will be subject to those future regulations. Accordingly, granting DEP's Motion to Withdraw from the Stipulation will not allow the Seminole Unit 3 Project to be subjected to more or less regulation; it is subject to existing law, and will be subject to future laws.

Given the lack of any federal or state legislative directive or program to regulate greenhouse gas emissions, DEP's apparent approach to undertake such regulation on a case-by-case basis, presently in the context of the certification of the Seminole Unit 3 Project, is improper under Florida's Administrative Procedure Act (APA). As prescribed by Section 120.54(1)(a),

F.S., "[r]ulemaking is not a matter of agency discretion. Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by [Section 120.54] as soon as feasible and practicable."[3] Yet DEP's premise for requesting a certification hearing in this case (stated in paragraph 10 of its Motion) is that "greenhouse gases by utilities and other producers of air pollution is an issue for which state policy is currently being formulated" and "should be considered in the context of this proceeding." To the extent DEP is attempting to develop statewide policy in the context of this certification proceeding, such action is prohibited by the APA sections cited above, as well as Section 120.53, F.S. requiring specific statutory authority to adopt a rule. Moreover, if DEP is attempting to develop incipient policy in this proceeding (assuming, arguendo, clear legislative authority), requesting an administrative hearing in this context essentially (and improperly) delegates its rulemaking authority to develop such policy to the Siting Board.

In addition to DEP not regulating carbon dioxide emissions, Governor Crist recently vetoed CS/SB 7123, cited by DEP at paragraph 9 of its Motion for the proposition that the "Florida Legislature passed legislation expressing concern over the impact of greenhouse gases," including providing DEP authority to develop an inventory of greenhouse gas emissions in Florida. It is significant that by this veto, the state of Florida has deferred consideration of any state-wide legislatively-enacted regulatory program until at least the 2008 Legislative session. In the absence of any Florida legislation or rules on the subject of greenhouse gases, it is unfathomable that any orderly development of public policy on

[3] § 120.52(15) states in relevant part, " 'Rule' means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule.

greenhouse gases can be developed in a single site certification proceeding under the policy formulation process that DEP is now proposing.

DEP's Additional Issues That "Should be Considered"

In paragraph 15 of its Motion, DEP for the first time identifies issues which it states "should be considered in this proceeding." Eight of the issues relate to greenhouse gases and comprise an unjustifiable attempt to ask additional "completeness" or "sufficiency" questions, nearly a year late.[4] DEP determined that Seminole's Site Certification Application was complete on March 24, 2006. On May 15, 2006, DEP filed a Notice of Insufficiency requiring Seminole to respond to more than 75 questions and subparts from 10 separate agencies or divisions; the issues DEP now identifies were not included. Following Seminole's response, DEP formally determined that Seminole's application contained sufficient information on July 26, 2006. Further, DEP issued its Staff Analysis Report on November 9, 2006, and entered a Prehearing Stipulation on January 4, 2007, identifying all issues about which DEP or any other agency expressed concern, and its position on all issues, including a recommendation that the certification should be granted. In neither document did DEP identify the issues it now raises in paragraphs 15(a) through (j) of its Motion. Accordingly, not only is there no legal basis for raising these issues, or a standard for considering them, DEP has repeatedly failed to identify them in a timely manner, and thus should be precluded from raising them at this time.

In paragraph 15(J) of its Motion, DEP suggests that one of the issues to be considered at a future administrative hearing is "whether additional conditions of certification can address these concerns" related to greenhouse gas emissions. However, DEP's own Rule 62-

[4] Curiously, DEP has also raised mercury emissions as an issue needing further consideration, when there are existing regulatory standards for such emissions and DEP has already thoroughly evaluated and stipulated to the Seminole Unit 3 Project's ability to comply with such requirements. In fact, the Project will result in a facility-wide reduction in mercury emissions, and Unit 3 will be subject to a limit several times more stringent than required.

17.133(6), F.A.C., provides that "any . . . proposed condition must cite the specific statutes, rule, regulation, or ordinance as applicable which provides the substantive, nonprocedural legal authority for the agency's jurisdiction for the . . . proposed condition." Given DEP's admission that there are no applicable regulatory requirements for greenhouse gas emissions, it is uncertain how DEP could propose any "additional conditions of certification" while complying with its requirements to cite the specific authority for such conditions.

Importantly, the Order of Remand entered by the DEP Secretary on April 4, 2007, makes no reference to greenhouse gas emissions as an issue that must be addressed as part of the Secretary's request for additional stipulations of the parties or as an issue that should be raised at any future administrative proceedings. It is therefore uncertain what basis DEP now has for suggesting that effects and controls of greenhouse gas emissions are issues that should be considered in this proceeding under the Order of Remand. Rather than representing a reasonable extension of the Order of Remand, it seems that DEP's recitation of greenhouse gas emission issues in its Motion to Withdraw Stipulation is offered more to infuse new issues into this already-settled case than to shed any light on the issues that the Secretary requested be addressed under the Order of Remand, or that the PPSA requires be addressed in a certification proceeding.

Conclusion

For the foregoing reasons, Seminole Electric Cooperative requests that the ALJ deny DEP's Motion to Withdraw Stipulation. DEP must be held to the terms of its multiple stipulations and filings that the Seminole Unit 3 Project meets the requirements for certification under the PPSA and that no disputed issues of fact or law exist that warrant a hearing in this proceeding. Accordingly, Seminole requests that the ALJ enter an order to relinquish

jurisdiction to DEP for entry of the final order in this proceeding, for the reasons stated in Seminole's Motion.

Counsel for Seminole is available for a hearing on these Motions if the ALJ believes it to be helpful.

Respectfully submitted this 26th day of June, 2007.

HOPPING GREEN & SAMS, P.A.

By: Robert A. Manning

James S. Alves
Fla. Bar No. 0443750
Robert A. Manning
Fla. Bar No. 0035173
Douglas S. Roberts
Fla. Bar No. 0559466
P.O. Box 6526
Tallahassee, FL 32314
(850) 222-7500

Attorneys for SEMINOLE ELECTRIC COOPERATIVE, INC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing have been furnished to the following by U.S. Mail on this 26th day of June, 2007:

Jack Chisholm, Esq. (e-mail)
Senior Assistant General Counsel
Department of Environmental Protection
3900 Commonwealth Blvd., MS 35
Tallahassee, FL 32399-3000

James V. Antista, Esq.
Fish and Wildlife Conservation Commission
620 South Meridian Street
Tallahassee, FL 32399-1600

Kelly A. Martinson, Esq.
Department of Community Affairs
2555 Shumard Oak Boulevard
Tallahassee, FL 32399-2100

Sheauching Yu, Esq.
Department of Transportation
Haydon Burns Building
605 Suwannee Street, MS 58
Tallahassee, FL 32399-0450

Martha Carter Brown, Esq.
Florida Public Service Commission
Gerald Gunter Building
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Gordon B. Johnston, Esq.
County Attorney
601 Southeast 25th Avenue
Ocala, FL 34471

Mark Scruby, Esq.
Clay County Attorney
Post Office Box 1366
Green Cove Springs, FL 32043

Robert A. Manning
Attorney

Vance W. Kidder, Esq.
St. Johns River Water Management District
4049 Reid Street
Palatka, FL 32177

Brian Teeple
Northeast Fla. Regional Planning Council
6850 Belfort Oaks Place
Jacksonville, FL 32216

Michael P. Halpin
Office of Siting Coordination
Department of Environmental Protection
2600 Blair Stone Road
Tallahassee, FL 32399

Russell D. Castleberry, Esq.
Post Office Box 758
Palatka, FL 32178

Patrick Gilligan
Attorney for City of Ocala
1531 SE 36 Avenue
Ocala, FL 34471

Wayne Smith
Union County Board of County Comm.
15 Northeast First Street
Lake Butler, FL 32054

Ronald Williams
Columbia County Board of County Comm.
Post Office Drawer 1529
Lake City, FL 32058

Timothy Keyser, Esq.
Sierra Club
Post Office Box 62
Interlachen, FL 32148-0092

THE STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

In Re: Seminole Electric Cooperative)
Seminole Generating Station Unit 3)
Power Plant Siting Application) DOAH CASE NO. 06-0929EPP
No. PA 78-10A2.)
)

FOURTH STATUS REPORT FOLLOWING ORDER OF REMAND

The undersigned counsel for the Florida Department of Environmental Protection (FDEP) and Seminole Electric Cooperative, Inc., (Seminole) submit this status report following the Order of Remand, entered by the Secretary of the Department of Environmental Protection on April 4, 2007 and the earlier status reports dated April 23, 2007, May 7, 2007, and May 21, 2007, respectively. The Order of Remand directed that a further factual record be developed through either administrative proceedings or submittal of a stipulation of the parties providing more detailed findings related to the criteria for certification under section 403.509(3)(e), (f) and (g), F.S. (2006). The earlier status reports indicated an additional status report would be provided by May 30, 2007.

FDEP and Seminole have conferred and believe that it is possible to fulfill the Order of Remand through a further stipulation of the parties. At this time, undersigned counsel do not believe that further administrative hearings are required.

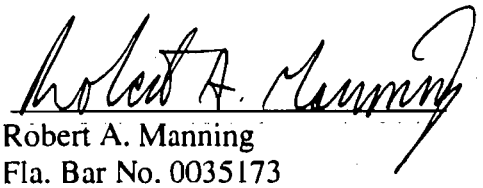
On May 25, 2007, counsel for Seminole circulated to all of the parties a draft Supplemental Stipulation, responsive to the Order of Remand. To date, counsel for the Department of Community Affairs and the St. Johns River Water Management District have indicated their concurrence in this draft, and the Department of Transportation forwarded two minor edits. The Department of Environmental Protection and the Sierra Club have

asked for additional time to consider the document. Counsel for FDEP has authorized counsel for Seminole to sign this Report on his behalf.

Accordingly, the undersigned counsel provide this status report and request that the Administrative Law Judge allow for a further status report to be filed on or before June 13, 2007.

Respectfully submitted this 30th day May, 2007.

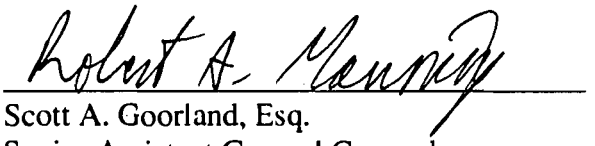
HOPPING GREEN & SAMS, P.A.

By: 

Robert A. Manning
Fla. Bar No. 0035173
Douglas S. Roberts
Fla. Bar No. 0559466
P.O. Box 6526
Tallahassee, FL 32314
(850) 222-7500

Attorneys for
SEMINOLE ELECTRIC
COOPERATIVE, INC.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION

By: 

Scott A. Goorland, Esq.
Senior Assistant General Counsel
Department of Environmental Protection
3900 Commonwealth Blvd., MS 35
Tallahassee, FL 32399-3000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing have been furnished to the following by hand delivery or overnight delivery on this 30th day of May, 2007:

Scott A. Goorland, Esq.
Senior Assistant General Counsel
Department of Environmental Protection
3900 Commonwealth Blvd., MS 35
Tallahassee, FL 32399-3000

James V. Antista, Esq.
Fish and Wildlife Conservation Commission
620 South Meridian Street
Tallahassee, FL 32399-1600

Kelly A. Martinson, Esq.
Department of Community Affairs
2555 Shumard Oak Boulevard
Tallahassee, FL 32399-2100

Sheauching Yu, Esq.
Department of Transportation
Haydon Burns Building
605 Suwannee Street, MS 58
Tallahassee, FL 32399-0450

Martha Carter Brown, Esq.
Florida Public Service Commission
Gerald Gunter Building
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Gordon B. Johnston, Esq.
County Attorney
601 Southeast 25th Avenue
Ocala, FL 34471

Mark Scruby, Esq.
Clay County Attorney
Post Office Box 1366
Green Cove Springs, FL 32043

Vance W. Kidder, Esq.
St. Johns River Water Management District
4049 Reid Street
Palatka, FL 32177

Brian Teeple
Northeast Florida Regional Planning Council
6850 Belfort Oaks Place
Jacksonville, FL 32216

Michael P. Halpin
Office of Siting Coordination
Department of Environmental Protection
2600 Blair Stone Road
Tallahassee, FL 32399

Russell D. Castleberry, Esq.
Post Office Box 758
Palatka, FL 32178

Patrick Gilligan
Attorney for City of Ocala
1531 SE 36 Avenue
Ocala, FL 34471

Wayne Smith
Union County Board of County Comm.
15 Northeast First Street
Lake Butler, FL 32054

Ronald Williams
Columbia County Board of County Comm.
Post Office Drawer 1529
Lake City, FL 32058

Timothy Keyser, Esq.
Sierra Club
Post Office Box 62
Interlachen, FL 32148-0092

Attorney

THE STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

In Re: Seminole Electric Cooperative) Seminole Generating Station Unit 3 Power Plant Siting Application No. PA 78-10A2.	))))	DOAH CASE NO. 06-0929EPP

STATUS REPORT FOLLOWING ORDER OF REMAND

The undersigned counsel for the Florida Department of Environmental Protection (FDEP) and Seminole Electric Cooperative, Inc., (Seminole) submit this status report following the Order of Remand, entered by the Secretary of the Department of Environmental Protection on April 4, 2007. The Order of Remand directed that a further factual record be developed through either administrative proceedings or submittal of a stipulation of the parties providing more detailed findings related to the criteria for certification under section 403.509(3)(e), (f) and (g), F.S. (2006).

FDEP and Seminole have conferred and believe that it is possible to fulfill the Order of Remand through a further stipulation of the parties and the submittal of a revised Proposed Final Order. Undersigned counsel do not believe that further administrative hearings are required at this time.

Undersigned counsel are preparing further stipulations that will be circulated and discussed among the several parties to this proceeding. It is expected that this will require 7 to 10 days to complete these discussions of the parties.

Accordingly, the undersigned counsel provide this status report and request that the Administrative Law Judge provide an additional 14 days for the submittal of a further status report on this matter.

Respectfully submitted this 23rd day April, 2007.

HOPPING GREEN & SAMS, P.A.

By: _____

James S. Alves
Fla. Bar No. 0443750
Douglas S. Roberts
Fla. Bar No. 0559466
P.O. Box 6526
Tallahassee, FL 32314
(850) 222-7500

Attorneys for
SEMINOLE ELECTRIC
COOPERATIVE, INC.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION

By: _____

Scott A. Goorland, Esq.
Senior Assistant General Counsel
Department of Environmental Protection
3900 Commonwealth Blvd., MS 35
Tallahassee, FL 32399-3000

DEPARTMENT OF ENVIRONMENTAL PROTECTION'S
PROPOSED SCHEDULE FOR
REVIEW OF SITE CERTIFICATION APPLICATION
FLORIDA POWER AND LIGHT
BOBWHITE-MANATEE 230 kV TRANSMISSION LINE PROJECT
TRANSMISSION LINE SITING APPLICATION NO. TA 07-14
OGC CASE NO. 07-0026
DOAH CASE NO. 007-000105

January 2, 2007	Florida Power and Light ("FPL") files Site Certification Application ("SCA") for project with Department of Environmental Protection ("DEP") and all agencies.
January 9, 2007	DEP requests the appointment of an Administrative Law Judge (ALJ), files list of additional persons and agencies entitled to notice and copies of the application and amendments.
January 10, 2007	ALJ appointed.
January 17, 2007	DEP files proposed schedule of dates for processing of application.
January 23, 2007	DEP and FPL publish notice of the filing of the SCA.
February 1, 2007	Agencies' statements on completeness of the application due to DEP.
February 8, 2007	DEP issues initial determination on completeness. (Schedule assumes application is not complete at this point.)
February 21, 2007	Agencies issue preliminary statements of issues.
February 22, 2007	FPL to file response to DEP determination on completeness. FPL files additional information in response to DEP determination on completeness. (Schedule assumes FPL will file additional information.)
February 26, 2007	Deadline for holding of local government informational public meetings.
March 8, 2007	Agencies file second statements on completeness based on additional information submitted by FPL.
March 15, 2007	DEP issues second completeness determination. (Schedule assumes application complete at this point. If a determination of incompleteness is issued, then pursuant to Section 403.5066, F.S., all time frames are tolled until the application is determined complete.)
March 25, 2007	Deadline for DEP and FPL publish notice of the certification hearing before the administrative law judge.

April 2, 2007	Agencies file reports.
April 5, 2007	Deadline for local governments to advise the ALJ whether they wish to have a public hearing within their county.
April 10, 2007	ALJ schedules local components of the certification hearing in each county from which an applicable local government requested such a hearing component.
April 16, 2007	Deadline for filing of alternate corridor proposals.
April 23, 2007	FPL and DEP file acceptance or rejection of alternate corridors. (If accepted, a revised processing schedule for processing the remainder of the case shall be filed.)
April 27, 2007	DEP issues Project Analysis Report.
April 30, 2007	Deadline for filing of notices of intent to be a party or petition to intervene.
May 29- June 1, 2007	Certification Hearing (local components of certification hearing held in counties (if requested) per schedule set by ALJ).
September 18, 2007	Anticipated date for hearing before Siting Board on certification.

TO BE REVISED DUE TO ALTERNATE CORRIDOR FILING

Chapter: 62-814

ELECTRIC AND MAGNETIC FIELDS

EMF
Rule
DRAFT

62-814.100 Intent, Findings, Basis of Standards, and Research Needs.

(1) Intent. The intent and purpose of this chapter is to establish electric and magnetic field (EMF) standards for 60 hertz electrical transmission lines and substations rated at 69 kV or greater, to prescribe how compliance with those standards shall be determined, and to establish rules for all electrical facilities, pursuant to Sections 403.061(30) and 403.523(1) and (14), F.S., relating to the protection of public health and welfare from such electrical facilities.

(2) Findings. Based on the information available to the Department, the Department makes the following general findings:

(a) The Department has reviewed the present scientific data on the potential for health effects of electric and magnetic fields. The Department has also reviewed data on the existing or potential electric and magnetic field levels near electrical transmission and distribution lines and substations in Florida. Although there is no conclusive evidence that there is any danger or hazard to public health at the levels of existing 60 hertz electric and magnetic fields found in Florida, there is evidence of biological effects and a potential for adverse health effects on the public. ~~Further research is needed to determine if there are health effects and the exposure levels at which such effects may occur.~~

Formatted: Strikethrough

(b) With respect to 60 hertz EMF, reasonable measures include ~~urging more applied research on the potential adverse human health effects of EMF and EMF mitigation techniques; performing a comprehensive review of the state of the science and submitting annual reports to the Environmental Regulation Commission commencing in 1993; reviewing the provisions of this rule not later than July of 1994; and~~ requiring all new and modified transmission lines and substations to meet standards which are achievable through the use of available EMF reduction technology and measures, but in no case to allow any new or modified transmission line or substation,

Formatted: Strikethrough

under normal conditions, to cause electric or magnetic field strengths greater than the highest operating voltage and the maximum current rating (MCR) values for existing transmission lines and substations.

(3) Basis of EMF Standards.

(a) Electric Field Strength. The electric field strength standards in this rule are based on the avoidance of the perception of an electric field at the edge of the right-of-way (ROW) or within a ROW; and on the reasonable measures and status quo cap criteria stated under paragraph (2), Findings, above. Compliance with the National Electrical Safety Code (NESC), which applies to all electrical transmission lines and substations within Florida through rules administered by the Florida Public Service Commission (PSC), ensures that unsafe conditions will not exist in the vicinity of these facilities, but compliance with that code does not ensure that a person will not experience tingling sensation or mild, though harmless, shock within the ROW.

(b) Magnetic Field Strength. The magnetic field strength standards in this rule are based on the reasonable measures and status quo cap criteria stated under paragraph (2), Findings, above.

(c) Both Field Strengths. For both electric and magnetic fields, the standards apply to the maximum field strength that occurs, or is predicted to occur by the model prescribed in this rule (whichever is greater) under any normal operating mode (all operating conditions except emergency load conditions). Under most normal load conditions, the actual magnetic field strength at the edge of the ROW will be about one-half of the standards, which are to be met at the facilities maximum current rating (MCR).

~~(4) Additional Research Needed. Continued research is needed on the potential adverse human health and welfare effects of 60 hertz EMF and EMF mitigation techniques because existing knowledge is inadequate to confidently conclude that no further action is needed.~~

(54) Categories of Electrical Facilities. This chapter sets forth three categories of electrical facilities for regulation in regards to the electric and magnetic fields associated with these facilities.

(a) The first category is for existing electrical facilities on which construction was commenced prior to March 21, 1989, and new distribution lines. These facilities will be allowed to operate in accordance with subsection 62-814.400(2), F.A.C.

(b) The second category of electrical facilities is for those which were certified pursuant to Chapter 403, Part Two, F.S., after April 15, 1988, but before March 21, 1989. These facilities will be subject to specific standards moderated by the individual circumstances of the facility.

(c) The third category is for new transmission lines and substations the construction of which commenced after March 21, 1989.

(65) Effect of Rule. The effect of this chapter is to establish requirements to reasonably protect the public health and welfare from electric and magnetic fields associated with electrical transmission lines, distribution lines and substations.

Formatted: Strikethrough

Formatted: Strikethrough

Formatted: Underline

Formatted: Strikethrough

Formatted: Underline

Specific Authority 403.061(7), 403.523(1) FS. Law Implemented 403.061(30), 403.523(14) FS. History–New 3-21-89, Amended 1-7-93, Formerly 17-274.100, 17-814.100.

62-814.200 Electric and Magnetic Fields; Definitions.

Words, terms and phrases used in this chapter, unless otherwise indicated, shall have the meaning set forth in the Standards Dictionary of Electrical and Electronic Terms (ANSI/IEEE Standards No. 100-1988) adopted by reference in Rule 62-814.300, F.A.C. In addition, the following words or terms, when used in this chapter, shall have the following indicated meanings:

(1) "ANSI" means the American National Standards Institute.

(2) "Balanced Current" means currents in three-phase electrical systems which are equal in amplitude and separated by a phase angle of 120 degrees.

(3) "Balanced Voltage" means voltages in a three-phase system which are equal in amplitude and separated by a phase angle of 120 degrees.

(4) "Commence Construction" means, as applied to the construction of a new transmission line, or new substation supplied by a new transmission line, or new distribution line, that the facility owner has begun a continuous program of actual on-site construction or physical modification of the electrical facility, to be completed

within a reasonable period of time.

(5) "Department" means the Florida Department of Environmental Protection.

(6) "Distribution Line" means a system of conductors used to transport electrical energy at voltages of less than 69 kV including service drops from transformers to residences or businesses.

(7) "Electrical Facility" means the components of an electrical transmission line, distribution line or substation that produce or affect electric and magnetic fields.

(8) "Facility Owner" means an owner or operator of an electrical facility.

(9) "Gauss" means the unit of magnetic flux density that will induce an electromotive force of 1 x 10 to the -8 volt in each linear centimeter of a wire moving laterally with a speed of one centimeter per second at right angles to the magnetic flux.

(10) "Hertz" means the unit of frequency of an electrical facility equivalent to a cycle per second.

(11) "Highest Operating Voltage" means the maximum voltage value set forth for a particular transmission line on Table 1, ANSI C 84.1-1982, or ANSI C 92.2-1981, or the maximum operating voltage as established by the facility owner.

(12) "IEEE" means the Institute of Electrical and Electronic Engineers.

(13) "Kilovolts/meter" means a unit of measurement of electric field strength generally measured at a point one meter above the ground and expressed as kV/m.

(14) "Maximum Current Rating" or "MCR" means the maximum quantity of electric current, expressed in amperes, that can be continuously carried on the conductors of an electrical circuit as determined by the facility owner.

(15) "Maximum Electric Field Strength" means the amplitude (Root Mean Square) of the electric field produced by an electrical facility operating at the highest operating voltage expressed in kV/m at a height of one meter above ground level.

(16) "Maximum Magnetic Field" means the amplitude (Root Mean Square) of the magnetic flux density produced by an electrical facility operating at MCR measured in Gauss one meter above the earth's surface.

(17) "Minimum Conductor Height" means the minimum vertical distance from the earth's surface to the geometric center of the conductor or conductor bundle at MCR.

(18) "Modified" as it relates to electrical facilities means a transmission line or substation that is altered or upgraded to operate at a higher nominal voltage or current after March 21, 1989.

(19) "New Distribution Line" means a distribution line that commenced construction after March 21, 1989.

(20) "New Electrical Facility" means an electrical facility which commenced construction after March 21, 1989.

(21) "New Substation" means a substation that commenced construction after March 21, 1989, that is built to connect new transmission lines of 69 kV or larger with other electrical facilities, or a substation into which a new transmission line is built.

(22) "New Transmission Line" means a transmission line upon which construction commenced after March 21, 1989, or an existing transmission line which commences construction for the purpose of reinsulating to operate at a higher nominal voltage or reconductoring to operate at a higher MCR after March 21, 1989. This does not include transmission lines which are relocated or rebuilt unless such lines are modified. This also does not include conductors used to connect existing transmission lines to substations unless a new edge of right-of-way is created on or immediately adjacent to private property.

(23) "NESC" means the National Electrical Safety Code.

(24) "Nominal Voltage" means the voltage classification as defined in Table 1, ANSI C 84.1-1982 or ANSI C 92.2-1981.

(25) "Residential, Commercial or Industrial Building" means a structure that persons use for their residence, for commercial transactions, or for manufacturing a product. It includes structures used by providers of private and governmental services. It does not include buildings visited by people for short periods of time on a non-daily basis.

(26) "Right-of-Way" (ROW), as used herein, is a term intended to be used only for purposes of determining the appropriate points for compliance with this rule, and not for the purpose of determining a legal interest in property. "Right-of-way" means the area between two edges of ROW. Each edge of the ROW shall be identified as the

farthermost point located by application of the following methods:

(a) The boundary of land where the facility owner has a property interest, such as, but not limited to, an easement, prescriptive easement, or fee simple title, and which is used or designated for construction, operation and maintenance of transmission lines.

(b) In areas where the facility owner does not have a property interest in the land where the transmission line or distribution line will be located, the ROW will be assumed to extend to the closer of:

1. The edge of the nearest residential, commercial or industrial building in existence prior to the date the electrical facility commenced construction or obtained a permit, whichever is sooner; or

2. Fifty feet from the point beneath the conductor closest to the edge of the ROW being determined.

(c) In areas where the transmission line or distribution line is adjacent to or within the property boundary of a linear easement of a railroad, utility pipeline, communication line, or public utility linear facility, or public road or canal, the ROW will be assumed to extend to the closer of:

1. The farthermost edge of the linear easement, or 50 feet from the point beneath the conductor closest to the edge of the ROW being determined, whichever is farther; or

2. The edge of the nearest residential, commercial or industrial building in existence prior to the date the electrical facility commenced construction or obtained a permit, whichever is sooner. OR

(d) In areas where the transmission line or distribution line is adjacent to or within property owned by federal, state, regional or local governmental agencies, the ROW will be assumed to extend to the closer of:

1. The edge of the nearest residential, commercial or industrial building in existence prior to the date the electrical facility commenced construction or obtained a permit, whichever is sooner; or

2. Fifty feet from the point beneath the conductor closest to the edge of the ROW being determined.

(27) "Secretary" means the Secretary of the Department of Environmental Protection.

(28) "Substation" means the electrical facility and related property used for the connection of transmission lines or distribution lines to other such electrical facilities or electrical generating plants.

(29) "Transmission Line" means a system of conductors used to transport electrical energy at voltages of 69 kV or greater.

Specific Authority 403.061(7), 403.523(1) FS. Law Implemented 403.061(30), 403.523(14) FS. History–New 3-21-89, Amended 1-7-93, Formerly 17-274.200, 17-814.200.

62-814.300 General Technical Requirements.

(1) The technical standards and criteria contained in the standard manuals and technical publications listed in subsection (2) below are hereby incorporated by reference and shall be applied unless a deviation is approved, in determining whether proposed new or modified electrical facilities comply with the provisions of this chapter.

(2) Standard Manuals and Publications.

(a) Standards Dictionary of Electrical and Electronic Terms (ANSI/IEEE Standards No. 100-1988). Copies are available from the Institute of Electrical and Electronics Engineers, Inc., Service Center, 445 Hoes Lane, Piscataway, NJ, 08854-4150, or (908) 981-1393.

(b) Appendix E, ANSI C 84.1-1989. Copies are available from the American National Standards Institute Service Center, 11 West 42nd Street, New York, NY 10036, or (212) 642-4900.

(c) IEEE Standard No. 644-1987. Copies are available from the Institute of Electrical and Electronics Engineers, Inc., Service Center.

(d) ANSI C 92.2-1987. Copies are available from the American National Standards Institute Service Center, or the Institute of Electrical and Electronics Engineers, Inc., Service Center.

~~(3) Copies of the publications listed in subsection (2) are available for inspection at the Department's Information Center, 2600 Blair Stone Road, Tallahassee, Florida 32399-2400.~~

Formatted: Strikethrough

Specific Authority 403.061(7), 403.523(1) FS. Law Implemented 403.061(30), 403.523(14) FS. History–New 3-21-89, Amended 1-7-93, Formerly 17-274.300, Formerly 17-814.310.

62-814.310 Deviations from Standards and Criteria.

(1) Deviations from the standards and criteria contained in publications listed in subsection 62-814.300(2), F.A.C., above or equivalent methodology for the computation and measurement methodology referenced in Rule 62-814.460, F.A.C., may be approved by the Department provided the applicant's engineer's report provides reasonable assurance that the proposed design, calculations or measurement methods will result in electrical facilities meeting the requirements of this rule.

(2) The Department may approve deviations from the standards and criteria contained in the publications listed in subsection 62-814.300(2), F.A.C., above or equivalent methodology for the computation or measurement of electric and magnetic fields upon a finding that conformance to them will not result in noncompliance with the remainder of this chapter or other rules of this Department in accordance with the following:

(a) The owner or operator of any electrical facility subject to the provisions of this section may request in writing a determination by the Secretary or the Secretary's designee that any requirement of Rule 62-814.300 or 62-814.460, F.A.C., relating to measurement or calculation of electric or magnetic fields, procedures, test equipment, methodology, or test facilities shall not apply to such electrical facility, and shall request approval of alternate standards or criteria.

(b) The request shall set forth the following information, at a minimum:

1. Specific electrical facility for which an exception is required.

2. The specific provision(s) of Rule 62-814.300 or 62-814.460, F.A.C., from which an exception is sought.

3. The basis for the exception, including but not limited to any hardship which would result from compliance with the provisions of Rule 62-814.300 or 62-814.460, F.A.C.

4. The alternate standard(s) or criteria for which approval is sought and a demonstration that such alternate standard(s) or criteria shall be adequate to demonstrate compliance with the field strength standards contained in this chapter.

(c) The Secretary or the Secretary's designee shall specify by order each alternate standard or criteria approved for an individual electrical facility in accordance with this section or shall issue an order denying the request for approval. The Department's order shall be the final agency action, reviewable in accordance with Section 120.57, F.S.

Specific Authority 403.061(7), 403.523(1) FS. Law Implemented 403.061(30), 403.523(14) FS. History–New 3-21-89, Amended 1-7-93, Formerly 17-274.301, 17-814.310.

62-814.400 General Standards.

(1) No electrical facility, subject to the provisions of this chapter, shall be operated in such a way that it exceeds the standards set forth in Rule 62-814.450, F.A.C., except as provided in Rule 62-814.480, F.A.C.

(2) All existing electrical facilities on which construction was commenced on or prior to March 21, 1989, and all new distribution lines shall be allowed to operate at their maximum current ratings, highest operating voltage, and emergency conditions, provided that such facilities comply with the National Electrical Safety Code (NESC) as required by the Florida Public Service Commission.

(3) Except as otherwise provided in Rule 62-814.480, F.A.C., no facility owner shall operate a new transmission line with a nominal voltage of 230 kV or greater above the highest operating voltage or MCR such that the standards in Rule 62-814.450, F.A.C., are exceeded.

Specific Authority 403.061(7), 403.523(1) FS. Law Implemented 403.061(30), 403.523(14) FS. History–New 3-21-89, Amended 1-7-93, Formerly 17-274.400, 17-814.400.

62-814.450 Electric and Magnetic Field Standards.

(1) Existing electrical facilities for which construction was commenced on or prior to March 21, 1989 (Reserved).

~~(2) Transmission lines certified pursuant to Chapter 403, Part Two, F.S., after April 15, 1988, and prior to March 21, 1989.~~

~~(a) For the Lake Tarpon-Kathleen transmission line where the ROW width is 100 feet:~~

~~1. The maximum electric field at the edge of the ROW shall not exceed 1.56 kV/m and on the ROW shall not exceed 8.94 kV/m.~~

~~2. The peak daily magnetic field at the edge of the ROW shall be limited to 35 milliGauss under normal load conditions. Under load conditions in excess of 500 MW, the peak daily magnetic field shall be limited to 229 milliGauss. Load conditions in excess of 500 MW shall occur for no more than 15 hours in any given year, except for non-permanent load conditions caused by malfunction or maintenance outages in the transmission grid or generation facilities within or outside of Florida. Florida Power Corporation shall report annually to the Department the amount of time during which the 500 MW normal load condition was exceeded.~~

~~(b) For the Lake Tarpon-Kathleen transmission line where the ROW width is 190 feet:~~

~~1. The maximum electric field at the edge of the ROW shall not exceed 1.90 kV/m and on the ROW shall not exceed 8.80 kV/m.~~

~~2. The peak daily magnetic field at the edge of the ROW shall be limited to 24 milliGauss under normal load conditions. Under load conditions in excess of 500 MW, the peak daily magnetic field shall be limited to 154 milliGauss. Load conditions in excess of 500 MW shall occur for no more than 15 hours in any given year, except for non-permanent load conditions caused by malfunction or maintenance outages in the transmission grid or generation facilities within or outside of Florida. Florida Power Corporation shall report annually to the Department the amount of time during which the 500 MW normal load condition was exceeded.~~

~~(3)~~2) New transmission lines and substations.

(a) The maximum electric field at the edge of the transmission line ROW containing a 500 kV nominal voltage or less transmission line or at the property boundary of a new substation containing faciities operating at these voltages shall not exceed 2.00 kV/m.

(b) The maximum electric field at the edge of the transmission line ROW for a line with a nominal voltage greater than 500 kV or at the property boundary of a new substation containing facilities operating at these voltages shall not exceed 5.50 kV/m

~~(c)~~ The maximum electric field on the ROW of a 230 kV or smaller transmission line shall not exceed 8 kV/m.

~~(d)~~ The maximum electric field on the ROW of a transmission line with a nominal voltage greater than 230 kV and up to 500 kV shall not exceed 10 kV/m.~~(e)~~ The maximum electric field on the ROW of a transmission line greater than 500 kV shall not exceed 15 kV/m.

~~(f)~~ The maximum magnetic field at the edge of a 230 kV or smaller transmission line ROW or at the property boundary of a new substation serving such lines shall not exceed 150 milliGauss.

~~(g)~~ The maximum magnetic field at the edge of the transmission line ROW for a transmission line with a nominal voltage greater than 230 kV and up to 500 kV or at the property boundary of a new substation containing facilities operating at these voltages shall not exceed 200 milliGauss, except for double circuit 500 kV lines to be constructed on ROWs existing on March 21, 1989, as identified below where the limit will be 250 milliGauss.

(h) The maximum magnetic field at the edge of the ROW for a transmission line with a nominal voltage greater than 500 kV line or at the property boundary of a new substation containing facilities operating at these voltages shall not exceed 250 milliGauss.

~~(i)~~ For existing ROWs extending from the Andytown substation to the Orange River substation, Andytown substation to the Martin Generating Plant, and the Martin Generating Plant to the Midway substation, where the facility owner has acquired, prior to March 21, 1989, a ROW sufficiently wide for two or more 500 kV transmission lines and has constructed one or more 500 kV transmission lines on this ROW prior to March 21, 1989, the maximum magnetic field at the edge of the ROW or property boundary of a new or modified substation shall not exceed 250 milliGauss.

Formatted: Strikethrough

Formatted: Strikethrough

Formatted: Underline

Deleted: b

Deleted: c

Deleted: 500 kV

Deleted: ¶

Deleted: d

Deleted: e

Deleted: line

Deleted: serving a 500 kV line

Deleted: f

(j) Table of New Transmission Line and Substation Standards

KV rating	Property boundary of new Substation	Edge of the Transmission Line Right Of Way	On the Transmission Line Right Of Way
<=250 KV	2.00 KV/m & 150 milliGauss	2.00 KV/m & 150 milliGauss	8 KV/m
<=500KV and > 250KV	2.00 KV/m & 200 milliGauss*	2.00 KV/m & 200 milliGauss	10 KV/m
>500KV	5.50 KV/m & 250 milliGauss	5.50 KV/m & 250 milliGauss	15 KV/m

Specific Authority 403.061(7), 403.523(1) FS. Law Implemented 403.061(30), 403.523(14) FS. History–New 3-21-89, Amended 1-7-93, Formerly 17-274.450, 17-814.450.

62-814.460 Computation and Measurement Methodology.

(1) Computations to establish compliance with the standards set forth in Rule 62-814.450, F.A.C., shall be performed by the use of the Bonneville Power Administration (BPA) Corona and Field Effects Program for calculating electric and magnetic fields set forth in paragraphs 62-814.470(1) and (2), F.A.C., below. When electric and magnetic field calculations are made using the BPA Corona and Field Effects Program, the following input data will be used:

(a) Magnetic field calculations.

1. The MCR currents will be used.

2. The conductor will be at its minimum clearance to the earth.

3. Currents will be assumed to be balanced in phase and in magnitude with no zero-sequence current.

(b) Electric field calculations.

1. The highest operating voltage will be used.

2. The conductor will be at its minimum clearance to the earth or other conductor height, whichever produces the highest electric field along the ROW.

3. Voltages will be assumed to be balanced in phase and in magnitude.

(c) Equivalent methodology. The Department and the facility owner may agree on substituting other equivalent methodology to verify compliance, in accordance with Rule 62-814.310, F.A.C.

(2) On-site measurements of electric and magnetic fields, when made, shall be conducted in accordance with the procedures set forth and with instruments conforming to and calibrated in accordance with the IEEE Standard No. 644-1987.

Specific Authority 403.061(7), 403.523(1) FS. Law Implemented 403.061(30), 403.523(14) FS. History–New 3-21-89, Amended 1-7-93, Formerly 17-274.460, 17-814.460.

62-814.470 Compliance Methodology.

(1) New Transmission Lines for Which Construction Was Commenced After March 21, 1989.

(a) Compliance with the electric field standards set forth in Rule 62-814.450, F.A.C., shall be determined by calculations using the highest operating voltage for a new transmission line, together with parallel transmission lines then existing in the ROW.

(b) Compliance with the magnetic field standard set forth in Rule 62-814.450, F.A.C., shall be determined by calculations at the MCR current for a new transmission line, together with parallel transmission lines then existing in the ROW.

(c) Where calculations under this section indicate that operation of existing electrical facilities on an existing ROW produces electric or magnetic fields at levels higher than the limits specified for new facilities in Rule 62-814.450, F.A.C., a new electrical facility may be constructed and operated on that existing ROW provided that the new facility does not increase the electric or magnetic fields above the maximum field values created by the existing line. Where calculations under this section indicate that the existing electrical facility produces field strengths less than the limits in Rule 62-814.450, F.A.C., then the limits in Rule 62-814.450, F.A.C., shall apply.

(d) Measurements shall be made in conformance with the criteria of Rule 62-814.460, F.A.C., above.

(2) New Substations for Which Construction Was Commenced After March 21, 1989.

Formatted: Font: Not Italic
Formatted: Indent: Left: 0.25", Hanging: 0.16", Space After: 0 pt
Formatted: Font: Not Italic
Formatted: Font: Bold, Not Italic
Formatted: Font: 9 pt
Formatted: Bullets and Numbering
Formatted: Font: 9 pt
Formatted: Indent: Left: 6.5"
Formatted Table
Formatted: Font: 9 pt, Bold
Formatted: Font: 9 pt, Bold
Formatted: Font: 9 pt
Formatted: Font: 9 pt
Formatted: Font: 9 pt
Formatted: Font: 9 pt

(a) Compliance with the electric field standard set forth in Rule 62-814.450, F.A.C., shall be determined by calculations using the highest operating voltages for the entering and exiting new transmission lines together with existing transmission lines associated with the substation and shall be equal to the maximum edge of ROW electric field of any new transmission line entering or exiting the substation property boundary calculated pursuant to subsection (1).

(b) Compliance with the magnetic field standard set forth in Rule 62-814.450, F.A.C., shall be determined by calculations using the MCR current of the entering and exiting new transmission lines together with existing transmission lines associated with the substation and shall be equal to the maximum value of the edge of ROW magnetic field of any new transmission line entering or exiting the substation property calculated pursuant to subsection (1).

(3) Access. Department employees shall have access to all electrical facilities with reasonable notice to the facility owner for the purpose of determining compliance in accordance with Section 403.091, F.S.

Specific Authority 403.061(7), 403.091, 403.523(1) FS. Law Implemented 403.061(30), 403.091, 403.523(14) FS. History–New 3-21-89, Amended 1-7-93, Formerly 17-274.470, 17-814.470.

62-814.480 Emergency Exemptions.

An electrical facility that exceeds the maximum current rating (MCR) or highest operating voltage due to emergency conditions is exempt from the provisions of Rule 62-814.450, F.A.C., provided the facility owner exercises reasonable practices to minimize the time the facility exceeds the MCR or highest operating voltage, and reports the duration of the exceedance and reasons for the exceedance to the Department pursuant to subsection 62-814.510(2), F.A.C. The Department may consult with the Florida Public Service Commission to verify any emergency conditions. Emergency conditions mean conditions that cause the MCR or highest operating voltage to be exceeded due to unexpected, unforeseen or unanticipated events such as, but not limited to, failure of generating or electrical facilities due to natural or man-made causes beyond the control of the facility owner.

Specific Authority 403.061(7), 403.081, 403.523(1) FS. Law Implemented 403.061(30), 403.523(14) FS. History–New 3-21-89, Amended 1-7-93, Formerly 17-274.480, 17-814.480.

62-814.510 Monitoring and Reporting.

(1) Monitoring for compliance shall be accomplished by including devices for measuring and recording voltage and current flow or their equivalent on all new 230 kV or greater transmission lines in accordance with this chapter.

(2) Reporting of exceedances of highest operating voltage or MCR on new 230 kV and greater transmission lines shall be made when the standards of Rule 62-814.450, F.A.C., are exceeded, as determined pursuant to paragraphs (a) and (b) below. Notification shall be made to the Department in writing within 30 days of the determination of an exceedance.

(a) An exceedance of any of the standards of Rule 62-814.450, F.A.C., shall be considered a violation if the average field strength exceeds the standard for a one-hour period.

(b) The one-hour average shall be based on no less than six readings per hour with at least one data scan per ten-minute period.

(c) The data that is used to determine compliance with the standards of Rule 62-814.450, F.A.C., shall be stored by the facility owner for a period of not less than one year.

Specific Authority 403.061(7), 403.523(1) FS. Law Implemented 403.061(30), 403.523(14) FS. History–New 3-21-89, Amended 1-7-93, Formerly 17-274.510, 17-814.510.

62-814.520 Compliance.

(1) No certification, as described in paragraph 2 of this section, for a new electrical facility may be issued unless the applicant gives reasonable assurance that the standards of this rule and other rules of the Department will be complied with.

(2) Any electrical facility owner seeking certification of an electrical facility under the provisions of the Florida Electrical Power Plant Siting Act or the Transmission Line Siting Act, Chapter 403, Part II, F.S., after March 21, 1989, shall include in the application for certification sufficient information to demonstrate compliance with the standards of this rule.

(3) Any facility owner seeking to construct a new transmission line of nominal voltage of 230 kV or larger or a new substation served by transmission lines of 230 kV or larger, which is not subject to Chapter 403, Part II, F.S., shall submit to the Department a completed DEP Form 62-814.900 at least 90 days prior to the start of construction. The information on that form shall be of sufficient detail to show compliance with the standards of Rule 62-814.450, F.A.C., and shall be certified by an engineer practicing in Florida and regulated by Chapter 471, F.S. Any facility owner seeking a permit subject to the provisions of Chapter 62-312, F.A.C., for new 230 kV or larger transmission lines shall include a completed DEP Form 62-814.900 from an engineer practicing in Florida and regulated by Chapter 471, F.S., with the other applicable application forms.

(4) On or before March 31 of each year, any facility owner that placed in operation, during the preceding calendar year, a transmission line of nominal voltage less than 230 kV or a new substation serving new transmission lines of less than 230 kV, shall submit to the Department a statement and a completed DEP Form 62-814.900 from an engineer practicing in Florida and regulated by Chapter 471, F.S., verifying that the electrical facility complies with the criteria set forth in Rules 62-814.400 and 62-814.450, F.A.C.

Specific Authority 403.061(7), 403.523(1) FS. Law Implemented 403.061(30), 403.0877, 403.523(14) FS. History–New 3-21-89, Amended 1-7-93, Formerly 17-274.520, 17-814.520.

62-814.530 Time of Compliance.

(1) A facility owner shall take immediate action after discovery of an exceedance to bring the facility into compliance with the requirements of Rule 62-814.450, F.A.C., unless a specific provision of this chapter authorizes a longer period of time.

(2) Failure by a facility owner to comply with the requirements of this chapter, or any conditions of certification or variance authorized under Sections 403.511, or 403.531, F.S., shall be a violation of this chapter and shall subject that facility owner to enforcement action under Chapter 403, F.S.

Specific Authority 403.061(7), (30), 403.161, 403.523(1) FS. Law Implemented 403.061(30), 403.523(14) FS. History–New 1-7-93, Formerly 17-274.530, 17-814.530.

62-814.900 Form and Instructions.

The form and instructions used by the Department under Rule Chapter 62-814, F.A.C., are adopted and incorporated by reference in this section. The form is listed by rule number, which is the same as the form number. Its title is "Report on Compliance with Electric and Magnetic Field (EMF) Standards," effective January 7, 1993. Copies of the form may be obtained by writing to the Administrator, Siting Coordination Office, Department of Environmental Protection, 2600 Blair Stone Road, Mailstop 48, Tallahassee, Florida 32399-2400.

Formatted: Underline

Specific Authority 403.061(7), 403.523(1) FS. Law Implemented 403.061(30), 403.523(14) FS. History–New 1-7-93, Formerly 17-274.901, 17-814.900.

PERMITTEE

Seminole Electric Cooperative, Inc.
16313 North Dale Mabry Highway
Tampa, FL 33618

Authorized Representative:
James R. Frauen, Project Director

Air Permit No. 1070025-004-AC
Seminole Generating Station
Units 1-2 Pollution Controls Upgrade
Facility ID No. 1070025
SIC No. 4911
Permit Expires: December 31, 2009

PROJECT AND LOCATION

This permit authorizes the construction and/or upgrade of pollution control equipment for Units 1 and 2 at the existing Seminole Generating Station, which is located at 890 North U.S. Highway 17, north of Palatka, in Putnam County, Florida. The map coordinates are: Zone 17; 438.80 km East; and 3289.20 km North.

STATEMENT OF BASIS

This air pollution construction permit is issued under the provisions of Chapter 403, F.S., and Chapters 62-4, 62-204, 62-210, 62-212, 62-296, and 62-297, F.A.C. The permittee is authorized to install the proposed equipment in accordance with the conditions of this permit and as described in the application, approved drawings, plans, and other documents on file with the Department. This air construction permit supplements all other valid air construction and operation permits.

CONTENTS

Joseph Kahn, P.E., Acting Director
Division of Air Resource Management

(Date)

FACILITY AND PROJECT DESCRIPTION

The existing Seminole Generating Station (SGS) consists of two 714.6 megawatt, electric, coal fired steam electric generators; a coal handling and storage system; a limestone unloading, handling and storage system; and a flue gas desulphurization (FGD) sludge stabilization system.

This project includes the replacement of the low NO_X burners; the addition of SCRs, an alkali injection system and carbon burnout (CBO); and improvements to the existing FGD system and steam turbines. The following units are affected by this air construction permit:

EMISSION UNIT NO.	SYSTEM	EMISSION UNIT DESCRIPTION
001	Steam Generation	SGS (Existing) Unit 1 upgraded to 735.9 MW
002	Steam Generation	SGS (Existing) Unit 2 upgraded to 735.9 MW
009	Materials Handling	Carbon Burn-Out (CBO™) Feed Fly Ash Silo (New)
010	Materials Handling	CBO™ Product Fly Ash Storage Dome (New)
011	Materials Handling	CBO™ Product Fly Ash Loadout Storage Silo (New)
012	Materials Handling	CBO™ Product Fly Ash Fugitives (New)
013	Hot Water Generation	CBO™ Process Fluidized Bed Combustor (New) NSPS Subpart Db

REGULATORY CLASSIFICATION

Title III: The existing facility is a major source of hazardous air pollutants (HAP).

Title IV: The existing facility operates units subject to the acid rain provisions of the Clean Air Act.

Title V: The existing facility is a Title V major source of air pollution in accordance with Chapter 213, F.A.C.

PSD: The existing facility is a PSD-major facility in accordance with Rule 62-212.400, F.A.C., although this project does not trigger a PSD Review.

SECTION 2. ADMINISTRATIVE REQUIREMENTS

1. Permitting Authority: All documents related to applications for permits to construct, modify, or operate emissions units at this facility shall be submitted to the Bureau of Air Regulation of the Florida Department of Environmental Protection (DEP) at 2600 Blair Stone Road (MS #5505), Tallahassee, Florida 32399-2400. Copies of all permit applications shall also be sent to the Compliance Authority.

2. Compliance Authority: All documents related to compliance activities such as reports, tests, and notifications shall be submitted to the Department's Northeast District Office at 7825 Baymeadows Way, Suite B200, Jacksonville, Florida 32256-7577.

3. Appendices: The following Appendices are attached as part of this permit: Appendix GC (General Conditions).

4. Applicable Regulations, Forms and Application Procedures: Unless otherwise indicated in this permit, the construction and operation of the subject emissions units shall be in accordance with the capacities and specifications stated in the application. The facility is subject to all applicable provisions of Chapter 403, F.S. and Chapters 62-4, 62-204, 62-210, 62-212, 62-213, 62-296, and 62-297, F.A.C. The permittee shall use the applicable forms listed in Rule 62-210.900, F.A.C. and follow the application procedures in Chapter 62-4, F.A.C. Issuance of this permit does not relieve the permittee from compliance with any applicable federal, state, or local permitting or regulations. [Rules 62-4, 62-204.800, 62-210.300 and 62-210.900, F.A.C.]

5. New or Additional Conditions: For good cause shown and after notice and an administrative hearing, if requested, the Department may require the permittee to conform to new or additional conditions. The Department shall allow the permittee a reasonable time to conform to the new or additional conditions, and on application of the permittee, the Department may grant additional time. [Rule 62-4.080, F.A.C.]

6. Construction Approval: No emissions unit or facility subject to this permit shall be constructed or modified without obtaining an air construction permit from the Department. Rule 62-210.200(76), F.A.C. defines *construction* as, "Construction –

   (a) The act of performing on-site fabrication, erection, installation or modification of an emissions unit or facility of a permanent nature, including installation of foundations or building supports; laying of underground pipe work or electrical conduit; and fabrication or installation of permanent storage structures, component parts of an emissions unit or facility, associated support equipment, or utility connections. Land clearing and other site preparation activities are not a part of the construction activities.

   (b) For the purposes of Rules 62-212.300, 62-212.400, 62-212.500, and 62-212.720, F.A.C., construction means any physical change or change in the method of operation (including fabrication, erection, installation, or modification of an emissions unit) that would result in a change in emissions.

   (c) For the purposes of the provisions of 40 CFR Parts 60 and 61, adopted by reference in Rule 62-204.800, F.A.C., construction means fabrication, erection, or installation of an affected facility.

   (d) For the purposes of the provisions of 40 CFR Part 63, adopted by reference in Rule 62-204.800, F.A.C., construction means the on-site fabrication, erection, or installation of an affected source. Construction does not include the removal of all equipment comprising an affected source from an existing location and reinstallation of such equipment at a new location. The owner or operator of an existing affected source that is relocated may elect not to reinstall minor ancillary equipment including piping, ductwork, and valves. However, removal and reinstallation of an affected source will be construed as reconstruction if it satisfies the criteria for reconstruction as defined in this section. The costs of replacing minor ancillary equipment must be considered in determining whether the existing affected source is reconstructed." Such permits shall be obtained prior to beginning construction or modification. [Rules 62-210.300(1) and 62-212.300(1)(a), F.A.C.]

7. Title V Permit: This permit authorizes construction of the permitted emissions units and initial operation to determine compliance with Department rules. A Title V operation permit is required for regular operation of the permitted emissions units. The permittee shall apply for a Title V operation permit at least 90 days prior to expiration of this permit, but no later than 180 days after completion of work and commencing operation. To apply for a Title V operation permit, the applicant shall submit the appropriate application form, compliance test results, and such additional information as the Department may by law require. [Rules 62-4.030, 62-4.050, 62-4.220, and Chapter 62-213, F.A.C.]

A. EU 001 and 002 – Boilers No. 1 and 2

This section of the permit addresses the following existing emissions units:

Emissions Unit Nos. 001 and 002
Steam Electric Generator Nos. 1 and 2 are existing, coal fired utility, dry bottom wall-fired boilers, each having a maximum generator rating of 714.6 megawatts, electric. The maximum heat input to each emissions unit is 7,172 million Btu per hour. Steam Electric Generator Nos. 1 and 2 are each equipped with an electrostatic precipitator (ESP) to control particulate matter, a wet limestone flue gas desulphurization (FGD) unit to control sulfur dioxide, and low NO_X burners and low excess-air firing to control nitrogen oxides. {Permitting note(s): IMPORTANT REGULATORY CLASSIFICATIONS - The emissions units are regulated under Acid Rain, Phase II and Phase I; NSPS - 40 CFR 60, Subpart Da, Standards of Performance for Electric Utility Steam Generating Units for Which Construction is Commenced After September 18, 1978, adopted and incorporated by reference in Rule 62-204.800(7), F.A.C.; Rule 212.400(5), F.A.C., Prevention of Significant Deterioration (PSD); and Rule 62-212.400(6), F.A.C., Best Available Control Technology (BACT) Determination, dated August 9, 1979. Steam Electric Generator No. 2 began commercial operation in 1984 and Steam Electric Generator No. 1 began commercial operation in 1985.}

PREVIOUS APPLICABLE REQUIREMENTS

1. Other Permits: The conditions of this permit supplement all previously issued air construction and operation permits for this emissions unit. Unless otherwise specified, these conditions are in addition to all other applicable permit conditions and regulations. [Rule 62-4.070, F.A.C.]

EQUIPMENT AND CONSTRUCTION

2. Flue Gas Desulphurization System (FGD) Upgrade: In order to reduce the emissions of sulfur dioxide, the permittee shall make upgrades to the existing Units 1 and 2 scrubbers so as to improve the SO_2 removal efficiency from approximately 87 to 95%. The improvements may include the following types of work: scrubber module modifications, upgrades to the modules mist eliminator wash system, expansion of the oxidation air system, modifications to the existing sparger rings in the absorber recycle tanks, upgrades to the Effluent Processing Facility (EPF) System and a new gypsum conveyor system. The upgrades will allow SGS to meet the 0.67 lb/MMBtu SO_2 emission limits specified in this permit. [Design]

3. Selective Catalytic Reduction (SCR) Systems: The permittee shall construct, tune, operate, and maintain a new SCR system for Units 1 and 2, to reduce emissions of nitrogen oxides (NO_X) as described in the application. The SCR system shall be designed to achieve a NO_X emission rate of no more than 0.07 lb/MMBtu. An SCR reagent system shall be installed, consisting of a new urea to ammonia processing system and associated bulk storage systems. The SCR system shall be designed for a maximum ammonia slip rate of 5 ppmvd @ 15% O_2. [Design]

4. Low NO_X Burner Replacement: The permittee shall replace, tune, operate and maintain low NO_X burners on Units 1 and 2. Additionally, the existing burner inlet systems will be modified to ensure even air flow, and the Overfire Air System (OFA) will be modified to utilize at least six ports per wall compared with the existing system design of four ports per wall. These replacements are designed to achieve the Acid Rain Program NO_X annual average emission limit of 0.46 lb/MMBtu, which will be effective in 2008. [Design]

5. Alkali Injection System: The permittee shall construct and operate a new alkali injection system on Units 1 and 2 to mitigate the potential impacts of SO_3 formation resulting from the operation of the SCR control systems. The design criteria shall ensure that sulfuric acid mist emissions do not increase above the sulfuric acid mist emissions baseline. [Design]

6. Turbine Upgrade: Each existing steam turbine for Units 1 and 2 shall be upgraded for increased unit

efficiency, and in order to recover portions of the lost electrical output from powering the above additions. Such efficiency improvements may include blade and/or rotor redesigns and replacements. The nominal gross MW rating per unit will increase from 714.6 to 735.9 MW although each boiler maximum heat input will remain at 7,172 MMBtu/hr. [Design]

PERFORMANCE REQUIREMENTS

This permit does not alter any specifications or limitations included in previous permits that define permitted capacities such as heat input rates, fuel consumption, or hours of operation. It does not authorize any additional fuels or such other methods of operation.

EMISSIONS STANDARDS

A concurrent application is being processed for a new SGS Unit 3. Where affected, the below emission standards are shown for this project (Pollution Control Upgrades) as "interim" limits which become effective once all upgrades are complete. As of the first monitoring period following the establishment of initial coal fires in SGS Unit 3, the latter "permanent" emission limits will become effective.

7. Sulfur Dioxide (SO_2):

   a. The interim Sulfur Dioxide emissions from Units 1 and 2 shall not exceed 0.67 lb/MMBtu (combined for Units 1 and 2), based upon a 24 hour block average via CEMS.

   b. The permanent limits shall be 0.38 lb/MMBtu (combined for Units 1 and 2), based upon a 24 hour block average via CEMS. = 11,937 TPY

   c. The combined emission rate shall be computed by adding the total lbs emitted for both Units 1 and 2, divided by the total MMBtu heat input for both Units 1 and 2 for each 24-hour block period.

   [PSD Avoidance]

8. Nitrogen Oxides (NO_X):

   a. The interim Nitrogen Oxide emissions from Units 1 and 2 shall not exceed 0.46 lb/MMBtu, based upon a 12-month rolling average. Compliance shall be determined by data collected from the certified continuous emissions monitor (CEM).

   b. The permanent limits shall be 0.33 lb/MMBtu (combined for Units 1 and 2), based upon a 12-month rolling average via CEMS.

   c. The combined emission rate shall be computed by adding the total lbs emitted for both Units 1 and 2, divided by the total MMBtu heat input for both Units 1 and 2 for each 12-month rolling period.

   d. When operating the CBO fluidized bed combustor, the affected Steam Electric Generating Unit shall not exceed 0.20 lb/MMBtu NO_X emissions based on a 30-day rolling average via CEMS.

   [40 CFR Parts 72 and 76; NSPS Subpart Db and PSD Avoidance]

9. Carbon Monoxide (CO)/Volatile Organic Compounds (VOC): The emission of Carbon Monoxide shall not exceed 12,565 TPY based upon a 12-month rolling total. The existing CO emission monitors which are installed in the stack shall be certified according to 40 CFR Part 60 and the data collected shall be combined and utilized to demonstrate compliance annually. Also, initial performance test data shall be submitted to demonstrate compliance with the burner CO guarantee of 0.20 lb/MMBtu. For VOC, an initial stack test (only) shall be required in order to demonstrate that the emissions do not exceed the established baseline emission rate of 0.06 lb/ton of coal. Testing shall be according to EPA Method 18, 25, 25A or 25B.

   [PSD Avoidance]

10. Sulfuric Acid Mist (SAM):

    a. The interim Sulfuric Acid Mist emissions from Units 1 and 2 shall not exceed 0.096 lb/MMBtu, based upon an initial stack test (only) via EPA Method 8 or 8A.

    b. The permanent limits shall be 0.031 lb/MMBtu (combined for Units 1 and 2), based upon annual stack test via EPA Method 8 or 8A.

    c. The combined emission rate shall be computed measuring the lb/MMBtu emission rate on each unit, multiplying each unit's maximum emission rate by its annual heat input (MMBtu), adding the total lbs emitted for both Units 1 and 2, and dividing by the total MMBtu heat input for both Units 1 and 2.

    [PSD Avoidance]

11. Particulate Matter (PM/PM_{10}): The emission limit for particulate matter shall not exceed 0.03 lb/MMBtu on each individual unit, as measured by an annual stack test via EPA Method 5B. [Current Title V Limit]

12. Mercury (Hg): The permanent emission limitation for mercury shall be 0.059 tons per year (combined for Units 1, 2 and any future emission units), based upon annual stack tests via EPA Method 101A or 108 or CEMS (when operational and certified). The combined total shall be computed by measuring the lb/MMBtu emission rate on each unit, multiplying each unit's emission rate by its annual heat input (MMBtu) and adding the total lbs emitted, divided by 2000. [Requested by Applicant]

EMISSIONS PERFORMANCE TESTING

13. Test Notification: The permittee shall notify the Compliance Authority in writing at least 15 days prior to any required tests. The notification shall include: the scheduled date, approximate start time, test team, contact name and phone number, description of unit to be tested, and the tests to be performed. [Rule 62-297.310(7)(a)9, F.A.C.]

14. Ammonia Slip, Performance Tests: Within 60 days after completing construction of each SCR system and bringing each unit on line, the permittee shall conduct tests to determine the ammonia slip rate in accordance with EPA Method CTM-027 or other methods approved by EPA. Subsequent tests shall be conducted during each federal fiscal year. If tests show ammonia slip emissions are greater than 5 ppmvd @ 15% O_2, the permittee shall take corrective actions such as repair, addition of catalyst, replacement of catalyst, etc. The corrective actions which are taken shall be submitted with the test data. [Rules 62-4.070(3) and 62-297.310(7), F.A.C.]

CONTINUOUS MONITORING REQUIREMENTS

15. NO_X and SO_2 CEMS: The permittee shall demonstrate compliance with the emissions standards specified in this permit with data collected from the existing NOx, SO_2, CO_2, and stack gas flow rate continuous monitors installed pursuant to the Acid Rain requirements. [Rules 62-4.070(3) and 62-212.400, F.A.C.]

16. CO CEMS: To demonstrate compliance, the permittee shall certify, calibrate, operate and maintain a continuous emissions monitoring system (CEMS) to continuously monitor and record the emissions of carbon monoxide. The existing Thermo Electron Corp Model 48C monitors may be utilized for this purpose, provided that they are able to demonstrate compliance with 40 CFR 60 Appendix B, Performance Specification 4 and Appendix F, Quality Assurance Procedures. CEMS shall monitor and record data during all periods of Units 1 and 2 operation, including startup, shutdown, malfunction or emergency conditions, but not including continuous monitoring system breakdowns, repairs, calibration checks, or zero and span adjustments. For each calendar quarter, monitor availability shall be 95% or greater. If unable to achieve this level, the permittee shall submit a report identifying the problems in achieving 95% monitor availability and a plan of corrective actions. The permittee shall implement the reported corrective actions within the next calendar quarter. [Rules 62-4.070(3), F.A.C. and requested by applicant]

RECORDS AND REPORTS

17. Test Reports: The permittee shall prepare and submit reports for all required tests in accordance with the provisions of Rule 62-297.310(8), F.A.C. The report shall include copies of the continuous monitoring records. Additionally, an official notification shall be made to the Compliance Authority 72 hours prior to the establishment of initial coal fires in SGS Unit 3, for the purpose of complying with the limits herein.

SECTION 3. EMISSIONS UNIT SPECIFIC CONDITIONS
B. EUs 009 to 013 – Combined Conditions

This section of the permit addresses the following emissions units:

EMISSION UNIT NO.	SYSTEM	EMISSION UNIT DESCRIPTION
009	Materials Handling	Carbon Burn-Out (CBO™) Feed Fly Ash Silo
010	Materials Handling	CBO™ Product Fly Ash Storage Dome
011	Materials Handling	CBO™ Product Fly Ash Loadout Storage Silo
012	Materials Handling	CBO™ Product Fly Ash Fugitives
013	Hot Water Generation	CBO™ Process Fluidized Bed Combustor NSPS Subpart Db

DESIGN AND ESSENTIAL POTENTIAL TO EMIT (PTE) PARAMETERS

1. CBO™ Process Fluidized Bed Combustor: The maximum design heat input rate to the CBO™ Process Fluidized Bed Combustor (EU-013) shall be 114.7 MMBtu/hr. The emissions from the CBO™ Process Fluidized Bed Combustor shall be routed back to Units 1 and 2 flue gas ductwork, upstream of the ESP, SCR and FGD System, so as to ensure that emissions are minimized. [Design; Rules 62-210(PTE) and 62-4.070(3), F.A.C.]

2. Baghouse Controls: Particulate emissions from Emission Units Nos. 009, 010 and 011 shall be controlled by baghouses that are designed, operated, and maintained to achieve a particulate matter design specification of 0.01 grains/acf of exhaust. New and replacement bags shall meet these specifications based on vendor design information. No particulate matter emissions tests are required. The permittee shall not circumvent the air pollution control equipment or allow the emission of air pollutants without this equipment operating properly. [Design; Rules 62-4.070(3) and 62-210.650, F.A.C.]

3. Hours of Operation: Emission Unit Numbers 009, 010, 011, 012 and 013 associated with the Carbon Burnout Unit are each allowed to operate continuously (8760 hrs/yr). [Rule 62-210.200(PTE), F.A.C.]

EMISSION LIMITATIONS AND PERFORMANCE STANDARDS

4. Authorized Fuels: Only fly ash generated from EU-001 and 002 may be used as fuel for the CBO™ Process Fluidized Bed Combustor (EU-013), except for the purposes of start-up. Start-up fuel shall be distillate fuel oil, limited to 0.5% sulfur and 14,300 gallons per calendar year. Records of fuel oil consumed for EU-013, demonstrating compliance with this condition shall be kept on-site so as to be readily available for review. Additionally, SGS shall totalize fuel usage data for annual (AOR) reporting. [Design; Rule 62-4.070(3), F.A.C.]

5. NSPS Provisions: EU-013 shall comply with the requirements of 40 CFR 60, Subpart Db. As a result of the configuration identified in above Condition 1, demonstration of the Subpart limits shall be allowed via the existing SGS Units 1 and 2 CEMS and stack testing. SGS shall include this demonstration upon initial installation and annually thereafter. [Note: Due to the configuration, there will be no practical method to test the CBO™ Unit separately. However, the combined emissions from the steam generating unit with the CBO™ Unit (when operating) shall comply with the NSPS NO_X limit of 0.20 lb/MMBtu on a 30 day rolling average via CEMS. The CBO™ Unit exhaust shall only be routed to one unit at a time.]

6. Baghouse Exhausts: As determined by EPA Method 9 observations, visible emissions shall not exceed 5% opacity from each baghouse exhaust point for Emissions Unit Nos. 009, 010 and 011. [Design; Rules 62-4.070(3), 62-210.650, and 62-297.620(4) F.A.C.]

7. Fugitive Dust Control: The following requirements shall be met to minimize fugitive dust emissions from the storage and handling facilities, including haul roads and CBO-related operations:
   a. All conveyors and conveyor transfer points will be enclosed to the extent practical, so as to preclude PM emissions.
   b. Water sprays or chemical wetting agents and stabilizers will be applied to storage piles, handling equipment, roadways, etc. as necessary to minimize opacity.

8. Maximum Expected Emissions: The following table identifies the maximum expected emissions, design specifications and fugitives associated with the CBO™ Process. This table is shown for convenience purposes and does not represent additional, allowable emission limitations beyond those listed within the permit. [Design]

Emissions Unit No.	Control Device	Exhaust Flow Rate (dscfm)	PM Emission Rate (gr/dscf)	PM Emission Rate (lb/hr)	PM Emission Rate (TPY)
009	Baghouse	3,000	0.01	0.3	1.1
010	Baghouse	6,000	0.01	0.5	2.3
011	Baghouse	6,000	0.01	0.5	2.3
012	Paved Roads; Watering	---	---	0.1	0.2
TOTALS				1.4	5.8

TEST METHODS AND PROCEDURES

9. Test Notification: At least 15 days prior to the date on which each formal compliance test is to begin, the permittee shall notify the Compliance Authority of: the date, time, and place of the test; and the contact person who will be responsible for coordinating and having the test conducted. [Rule 62-297.310(7)(a)9, F.A.C.]

10. Compliance Tests: Each baghouse exhaust point for EU-009, EU-010, and EU-011 shall be tested to demonstrate initial compliance with the specified opacity standard. The initial tests shall be conducted within 60 days after achieving permitted capacity, but not later than 180 days after initial operation of the unit. Thereafter, each baghouse exhaust point for EU-009, EU-010, and EU-011 shall be tested to demonstrate compliance with the specified opacity standard during each federal fiscal year (October 1st to September 30th) and within the 12-month period prior to renewing the operation permit. [Rule 62-297.310(7)(a)1 and 4, F.A.C.]

11. Test Procedures: All tests shall be conducted in accordance with EPA Method 9, which is described in 40 CFR 60, Appendix A, and adopted by reference in Rule 62-204.800, F.A.C. Tests shall also comply with the applicable requirements of Rule 62-297.310, F.A.C. Tests shall be conducted in accordance with all applicable requirements of Chapter 62-297, F.A.C. The minimum observation period for a visible emissions compliance test shall be thirty (30) minutes. The observation period shall include the period during which the highest opacity can reasonably be expected to occur. [Rules 62-204.800 and 62-297.310(4) and (5), F.A.C.; 40 CFR 60, Appendix A]

12. Special Compliance Tests: When the Compliance Authority, after investigation, has good reason (such as complaints, increased visible emissions or questionable maintenance of control equipment) to believe that any applicable emission standard contained in a Department rule or in a permit issued pursuant to those rules is being violated, it shall require the owner or operator of the emissions unit to conduct compliance tests which identify the nature and quantity of pollutant emissions from the emissions unit and to provide a report on the results of said tests to the Compliance Authority. [Rule 62-297.310(7)(b), F.A.C.]

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.	)	OGC CASE NO. 06-0780 DOAH CASE NO. 06-0929EPP

ORDER OF REMAND

On February 23, 2007, the Administrative Law Judge ("ALJ") assigned by the Division of Administrative Hearings ("DOAH"), issued an order closing file that granted the parties' request to cancel the certification hearing in accordance with Section 403.508(6), Florida Statutes. The order was issued pursuant to a Joint Stipulation Between The Parties filed on February 22, 2007. Therefore, under Section 403.509(1)(a), Florida Statutes, the Department of Environmental Protection ("DEP" or "Department") is required to prepare and enter a written order determining whether an application should be approved in accordance with the terms of the Florida Electrical Power Plant Siting Act ("PPSA") and the stipulation of the parties in requesting cancellation of the certification hearing. The matter is now before the Secretary of DEP for agency action.

STATEMENT OF THE ISSUE

The issue to be decided in this proceeding is whether DEP, acting in lieu of the Siting Board, should approve certification in accordance with the PPSA, Sections 403.501, et seq., Florida Statutes, authorizing Seminole Electric Cooperative, Inc., ("Seminole" or "Applicant") to construct and operate a new electrical generating unit at Seminole's existing

Seminole Generating Station site (consisting of existing Units 1 and 2) in an unincorporated area of Putnam County.

PRELIMINARY STATEMENT

On March 9, 2006, Seminole filed a Site Certification Application ("SCA") to construct and operate a new electrical power plant unit ("Unit 3") at the existing Seminole Generating Station ("SGS") site in Putnam County, Florida. The existing site, which presently includes Units 1 and 2 and directly associated facilities, is located approximately five miles north of the city of Palatka.

The Department determined that Seminole's SCA was complete on March 24, 2006. DEP then issued a Notice of Insufficiency on May 15, 2006. Seminole filed its Response to the Department's Notice of Insufficiency on May 30, 2006, and then submitted a Response to Sufficiency Request for Information on June 30, 2006. On July 26, 2006, the Department determined that Seminole's SCA was sufficient.

Pursuant to Section 403.507, Florida Statutes, several reviewing agencies submitted agency reports and proposed Conditions of Certification on Seminole's Unit 3 SCA. On November 9, 2006, the Department issued its Staff Analysis Report ("SAR"), incorporating the reports and recommendations of the reviewing agencies. In the SAR, the Department recommended certification of the proposed Seminole Generating Station Unit 3, subject to a comprehensive set of Conditions of Certification.

On June 1, 2006, a land use hearing was held for the purposes of determining whether Seminole's Unit 3 project was consistent and in compliance with local land use plans and zoning ordinances of Putnam County. On August 31, 2006, the assigned ALJ entered a Recommended Order, which concluded that the Unit 3 project and site were

consistent and in compliance with Putnam County's land use plans and zoning ordinances. On December 5, 2006, the Siting Board unanimously approved a Final Order adopting the land use Recommended Order, and finding that the Unit 3 project was consistent and in compliance with applicable land use plans and zoning ordinances. The Siting Board's Final Order on Land Use was signed by the Governor and issued on December 8, 2006.

Public notice of the filing of the Site Certification Application was published by the Applicant in the Palatka Daily News on April 7, 2006, and by the Department on April 7, 2006, in the Florida Administrative Weekly ("FAW"). Pursuant to Section 403.5115(1)(e), Florida Statutes, notice of the certification hearing originally scheduled to begin on January 9, 2007, was published in the Palatka Daily News on November 25, 2006, and by the Department in the FAW on November 22, 2006. By Order of the ALJ dated January 8, 2007, the certification hearing was rescheduled to March 15, 2007. That notice was published in the Palatka Daily News on January 18, 2007.

On February 22, 2007, the Applicant, DEP, the Department of Community Affairs, the Department of Transportation, the Sierra Club, and the St. Johns River Water Management District filed a Joint Stipulation addressing certification issues. In the Joint Stipulation, all parties stipulated that they do not object to certification of Seminole's Unit 3 project subject to the Conditions of Certification included in the SAR.

The Joint Stipulation of February 22, 2007, also stipulated pursuant to Section 403.508(6)(a), Florida Statutes, that there are no disputed issues of fact or law to be raised at the certification hearing and requested that the ALJ relinquish jurisdiction. Sufficient time remained to publish public notices of the cancellation of the hearing at least three days prior to the scheduled hearing date, as required under Section 403.508(6)(a), Florida Statutes.

The ALJ timely issued an order closing file on February 23, 2007, granting the parties' request to cancel the certification hearing. DEP published notice of cancellation of the certification hearing in the FAW on March 9, 2007. The Applicant published a similar notice on March 10, 2007, in the Palatka Daily News.

AUTHORITY FOR REMAND

The authority of a state agency to remand an administrative case back to DOAH for further proceedings where additional findings of fact and related conclusions of law are critical to the issuance of a coherent final order is well established by the controlling case law of Florida. See, e.g., Dept. of Environmental Protection v. Dept. of Management Services, Div. of Adm. Hearings, 667 So.2d 369 (Fla. 1st DCA 1995); Collier Development Corp. v. State, Dept. of Environmental Regulation, 592 So.2d 1107 (Fla. 2d DCA 1991); Dept. of Professional Regulation v. Wise, 575 So.2d 713 (Fla. 1st DCA 1991); Manasota 88, Inc. v. Tremor, 545 So.2d 439 (Fla. 2d DCA 1989); Miller v. State, Dept. of Environmental Regulation, 504 So.2d 1325 (Fla. 1st DCA 1987); Cohn v. Dept. of Professional Regulation, 477 So.2d 1039, 1047 (Fla. 3d DCA 1985).

NECESSITY FOR REMAND

It is normally the duty of the ALJ to make basic findings of fact in a formal proceeding where agency action is being formulated. See, e.g., Putnam County Environmental Council v. Georgia Pacific Corp., 24 FALR 4674, 4685 (Fla. DEP 2002); Miccosukee Tribe of Indians v. South Florida Water Management District, 20 FALR 4482, 4491 (Fla. DEP 1998), *aff'd*, 721 So.2d 389 (Fla. 3d DCA 1998); Barrininger v. Speer and Associates, 14 FALR 3660, 3667 n.8 (Fla. DER 1992); see also Save Anna Maria, Inc. v. Dept. of Transportation, 700 So.2d 113, 116 (Fla. 2d DCA 1997); 1800 Atlantic Developers v. Dept. of Environmental

Regulation, 552 So.2d 946, 955 (Fla. 1st DCA 1989), *rev. denied*, 562 So.2d 345 (Fla. 1990).

In PPSA cases Section 403.508(6)(a), Florida Statutes, permits the parties to request that the certification hearing be cancelled and the matter remanded to the Department when the parties stipulate that there are no disputed issues of fact or law to be raised at the certification hearing. If such a remand occurs, Section 403.509(1)(a), Florida Statutes, requires the Secretary to "act upon the application by written order in accordance with the terms of this act and the stipulation of the parties in requesting cancellation of the certification hearing." The PPSA requires that the Secretary consider how the location, construction, and operation of the proposed project will:

> (e) Effect a reasonable balance between the need for the facility as established pursuant to s. 403.519 and the impacts upon air and water quality, fish and wildlife, water resources, and other natural resources of the state resulting from the construction and operation of the facility.
>
> (f) Minimize, through the use of reasonable and available methods, the adverse effects on human health, the environment, and the ecology of the land and its wildlife and the ecology of state waters and their aquatic life.
>
> (g) Serve and protect the broad interests of the public.

The Joint Stipulation merely stipulated that there were no disputed issues of fact to be raised at the certification hearing. However, the Joint Stipulation did not contain specific findings of fact that would allow me to fulfill my obligations to consider and balance the factors listed above. It is therefore necessary to remand this matter to DOAH for the purpose of further developing a factual record through either further administrative proceedings or submittal of a stipulation that provides detailed facts addressing the factors set forth above.

It is therefore ORDERED:

This proceeding is remanded to DOAH for the purpose of developing a factual record through either further administrative proceedings or submittal of a stipulation that provides detailed facts addressing the factors set forth above.

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

DONE AND ORDERED this 4th day of April, 2007, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

MICHAEL W. SOLE
Secretary

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

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

Sydia Knaus
CLERK

4-4-07
DATE

CERTIFICATE OF SERVICE

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

James V. Antista, Esq.
Fish and Wildlife Conservation Commission
620 South Meridian Street
Tallahassee, FL 32399-1600

Brian Teeple
Northeast Florida Regional Planning Council
6850 Belfort Oaks Place
Jacksonville, FL 32216

Kelly A. Martinson, Esq.
Department of Community Affairs
2555 Shumard Oak Boulevard
Tallahassee, FL 32399-2100

Russell D. Castleberry, Esq.
Post Office Box 758
Palatka, FL 32178

Sheauching Yu, Esq.
Department of Transportation
Haydon Burns Building
605 Suwannee Street, MS 58
Tallahassee, FL 32399-0450

Patrick Gilligan
Attorney for City of Ocala
1531 SE 36 Avenue
Ocala, FL 34471

Martha Carter Brown, Esq.
Florida Public Service Commission
Gerald Gunter Building
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Wayne Smith
Union County Board of County Comm.
15 Northeast First Street
Lake Butler, FL 32054

Gordon B. Johnston, Esq.
County Attorney
601 Southeast 25th Avenue
Ocala, FL 34471

Ronald Williams
Columbia County Board of County Comm.
Post Office Drawer 1529
Lake City, FL 32058

Mark Scruby, Esq.
Clay County Attorney
Post Office Box 1366
Green Cove Springs, FL 32043

Timothy Keyser, Esq.
Sierra Club
Post Office Box 62
Interlachen, FL 32148-0092

Vance W. Kidder, Esq.
St. Johns River Water Management District
4049 Reid Street
Palatka, FL 32177

James S. Alves, Esq.
Douglas S. Roberts, Esq.
Hopping Green & Sams
Post Office Box 6526
Tallahassee, FL 32314

and by hand delivery to:

Scott Goorland, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

Michael P. Halpin
Office of Siting Coordination
Department of Environmental Protection
2600 Blair Stone Road
Tallahassee, FL 32399

this 5th day of April, 2007.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

FRANCINE M. FFOLKES
Senior Assistant General Counsel

3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000
Telephone 850/245-2242

Page 25: [1] Deleted Author

On January 7, 2007, Seminole and the Sierra Club entered into a Settlement Agreement resolving all issues raised or that could be raised by the Sierra Club under the Power Plant Siting Act concerning SGS Unit 3. This Sierra Club/Seminole Settlement Agreement contains these two provisions in response to the Sierra Club's concerns regarding emissions of greenhouse gases from Unit 3:

> 1. Seminole agrees to purchase and distribute $200,000 worth of compact fluorescent light bulbs to its member cooperatives for distribution to end users. Seminole agrees to work with the Sierra Club on the procurement and distribution of the compact fluorescent light bulbs, as well as the launching and public announcement of the compact fluorescent light bulb program. Such purchase shall take place within 180 days after the issuance of all approvals necessary to construct Unit 3 and the distribution of the light bulbs will take promptly thereafter.
>
> 2. Seminole commits to use best efforts for investigating additional renewable energy opportunities and incentives which can be implemented by Seminole or by its member electrical cooperatives that will further the use of renewable energy in Florida and reduce the reliance on fossil fuels for the production of electricity in the State. Seminole agrees to help fund and assign a project manager to a series of workshops and meetings with renewable energy experts and the public in Florida to investigate options and to analyze the economic and technical feasibility of renewable energy projects that Seminole can implement in the future. This commitment includes but is not limited to solar, wind, biomass co-firing at its power plants, and methane capture at the Putnam County Central Landfill. Seminole also commits to continue to develop and implement additional programs that will result in offsets of emissions of greenhouse gases.

Seminole has already begun implementing both of these conditions.

On March 9, 2007, Seminole and the Sierra Club entered into a second Settlement Agreement, resolving all of the Sierra Club's issues concerning issuance of

the PSD Permit for Unit 3. This second Sierra Club/Seminole Settlement Agreement requires significant, additional air emission reduction at SGS, both facility-wide and at Unit 3. For example, Seminole committed that with operation of Unit 3 there will be a 38% reduction below current SGS SO2 air emissions, 77% reduction below current NOx emissions, 22% reduction below current emissions of sulphuric acid mist, and an 11% reduction below current emissions of mercury. Moreover, in order to address concerns regarding greenhouse gases, the following was included in the second Sierra Club/Seminole Settlement Agreement:

> 12. By September 1, 2007, Seminole agrees to publish a Request for Proposal (RFP) soliciting bids for up to 100 MW of renewable energy, which may include solar, wind, geothermal and/or biomass. Seminole is committed to pursuing renewable energy opportunities, and agrees to evaluate and implement, in good faith, viable bids. In accordance with Seminole's existing bid evaluation policy, a viable bid is one that is reasonable based on an analysis of technical, commercial and economic issues, including reliability, fuel supply (as applicable), siting issues, transmission, and financial viability of vendor, and whether the project is in the best interest of Seminole and its members. If Seminole does not receive viable bids in response to this RFP, Seminole will publish another such RFP within eighteen months of the first. Seminole will continue to actively pursue renewable energy opportunities, and will evaluate and implement, in good faith, viable bids in the manner described above.

Seminole has already begun implementing this provision.