

**AGENDA
SITING BOARD
DEPARTMENT OF ENVIRONMENTAL PROTECTION
DECEMBER 5, 2006**

Hallaton "Buck" Owen
M.S. 48

(C-D)

DEPARTMENT OF ENVIRONMENTAL PROTECTION

Item 1 Minutes

NOV 27 2006

Submittal of the Minutes from the September 19, 2006 Cabinet Meeting. SITING COORDINATION

(See Attachment 1, Pages 1-2)

RECOMMEND APPROVAL

Item 2 Seminole Electric Cooperative, Inc. Land Use Order/Seminole Generating Station Unit 3

REQUEST: Consideration of an Order, to be executed by the Siting Board, adopting the Administrative Law Judge's Recommended Order recommending the Siting Board enter a Final Order finding the Seminole Generating Station Unit 3 site is in compliance with existing land use plans, zoning ordinances and site-specific zoning approvals of Putnam County, Florida, pursuant to Subsection 403.508(2), Florida Statutes.

COUNTY: Putnam

APPLICANT: Seminole Electric Cooperative, Inc.

LOCATION: The proposed power plant unit will be integrated into the existing, certified site located five miles north of the city of Palatka. The plant site is located entirely in the unincorporated area of Putnam County.

STAFF REMARKS: Seminole Electric Cooperative, Inc. (SECI) has applied for certification of Unit 3 within the existing and previously-certified Seminole Generating Station (SGS). SGS is a two parcel site totaling 1,922 acres that contains two existing 650 MW (net) coal electric generating units (Units 1 and 2). Units 1 and 2 are on the 1,917-acre main site. The SECI site also includes a 4.5-acre parcel housing plant water facilities on the St. Johns River, south of County Road 209. In March 1979, the Siting Board determined the SGS site was consistent and in compliance with the land use plans and zoning ordinances of Putnam County, as part of the original site certification proceedings for Units 1 and 2. The Unit 3 facilities will be located within the same areas as previously certified by the Siting Board for Units 1 and 2.

Unit 3 would add 750 MW of generating capacity. This additional generation will represent an incremental increase in the overall power-generating capacity of the SGS site from approximately 1,300 MW to over 2,050 MW. The new Unit 3 and its related facilities are similar to the existing units and will utilize many of the existing onsite facilities. Like the two existing units, the new Unit 3 will burn coal as its primary fuel with up to 30 percent petroleum coke. The new unit will consist of a turbine generator building, a new boiler building, scrubber modules, and a wet electrostatic precipitator. A single flue gas stack will serve the new unit. A new mechanical draft cooling tower will also be constructed on the site

Item 2 cont.

to serve the new Unit 3. The new cooling tower will have a lower profile than the existing natural draft cooling towers. The existing coal yard will be expanded to support the new unit and additional facilities will be added in the limestone scrubber area to handle the additional gypsum that will be created. SECI's Unit 3 project will integrate the new unit into the existing plant facilities. The existing administration building and parking lot will support the new unit. SECI will continue to use the existing rail spur, including for the delivery of coal and construction materials. The existing switchyard and transmission area will be utilized for the new unit. There will be no new off-site electrical transmission lines for the Unit 3 Project. The existing plant access off Highway 17 will be improved to enhance access for turning vehicles into the site. The existing units are supplied with cooling and other service water from the St. Johns River. SECI proposes to utilize the existing pump house on the 4.5-acre southern parcel and to install an additional water pipeline and duct bank within an existing pipeline easement to supply cooling water and also other service water (primarily for bottom ash handling and for the scrubber system) to the proposed Unit 3. There will be some enhancements to the pumps and motors inside the pump house to increase the capacity of water withdrawals. Otherwise, there will be no changes to the exterior of the existing pump house for the new Unit 3 project.

The cooling and other service water for Unit 3 will be conveyed to the main power plant site by an additional 36-inch pipeline to be placed underground and within the existing private pipeline easement. The existing easement was created in 1978, and the existing pipelines were installed as part of the development of Units 1 and 2. A pipeline system for Unit 3 will be placed in the existing easement. There will be no facilities constructed above the ground surface within that easement. The ground surface in the easement will be restored to its existing condition after the new water pipeline is installed.

The new Unit 3 will be able to co-exist with existing land uses in that the new Unit 3 is not expected to have a significant adverse impact to nearby residential development.

No agency objected to the land use aspects of the case. The Sierra Club has intervened in the case. The Administrative Law Judge recommended that the Siting Board find the site to be consistent and in compliance with existing land use plans, zoning ordinances and site-specific zoning approvals for Putnam County. On September 28, 2006, the Sierra Club filed exceptions to the Administrative Law Judge's Recommended Order on Land Use with the Department of Environmental Protection (DEP). On October 12, 2006, Seminole Electric Cooperative, Inc., filed its Responses to Sierra Club's exceptions. DEP has analyzed Sierra Club's exceptions, and has rejected them as shown in the draft Final Order.

(See Attachment 2, Pages 1-52)

RECOMMEND APPROVAL

**MINUTES
DEPARTMENT OF ENVIRONMENTAL PROTECTION
SITING BOARD
SEPTEMBER 19, 2006**

The Governor and Cabinet, sitting as the Siting Board for the Department of Environmental Protection, met on this date in the lower level meeting room of the Capitol with the following members present:

**Honorable Jeb Bush
Honorable Charlie Crist
Honorable Tom Gallagher
Honorable Charlie Bronson**

**Governor
Attorney General
Chief Financial Officer
Commissioner of Agriculture**

**Presented by:
Ms. Colleen Castille**

**Secretary, Department of Environmental
Protection**

Item 1 Minutes

Upon motion by Mr. Bronson, seconded by Mr. Crist, and without objection, the Minutes from the May 16, 2006 Cabinet Meeting were approved.

**Item 2 Hillsborough County Consolidated Final Order/Land Use/Site Certification/
Hillsborough County Resource Recovery Facility Expansion**

Upon motion by Mr. Gallagher, seconded by Mr. Crist, and without objection, the following item was approved.

REQUEST: Consideration of an Order, to be executed by the Siting Board, adopting the Administrative Law Judge's Recommended Order finding the Hillsborough County Resource Recovery Facility Expansion to be in compliance with the local land use plans and zoning ordinances; and adopting the Administrative Law Judge's Recommended Order recommending the Siting Board grant full and final certification to Hillsborough County, under Section 403, Part II, Florida Statutes, for the location, construction and operation of the County's Resource Recovery Facility Unit 4, pursuant to Subsections 403.509(1), and 403.511(1), Florida Statutes.

COUNTY: Hillsborough

APPLICANT: Hillsborough County (HC)

LOCATION: The Resource Recovery Facility (RRF) site is located at 350 N. Falkenburg Road on a 50.4-acre site in the southern portion of a 353-acre tract of land owned by Hillsborough County in Section 18, Township 29 and Range 20. The site is bounded on the south by a railroad track that is owned by CSX Railroad; on the west by a 230 Kilovolt (KV) transmission line corridor and easement owned by Tampa Electric Company (TECO), and lands owned by Tampa Bay Water; on the north by vacant improved pasture land, the Falkenburg Road Jail, Hillsborough County Department of Animal Services, and Hillsborough County Sheriff's Office (District 2); and on the east by Falkenburg Road and some vacant land.

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STAFF REMARKS: On November 21, 2005, Hillsborough County (HC) filed a Site Certification Application (SCA) with the Department of Environmental Protection (DEP) pursuant to the Florida Electrical Power Plant Siting Act (PPSA), Sections 403.501 through 403.518, Florida Statutes (F.S.). The SCA proposes the construction and operation of a new 600 tons per day (tpd) boiler and a 17 MW, steam turbine, electric power generation unit at the HC's existing resource recovery facility (RRF) site.

The existing RRF currently has three existing units each composed of a 400 tpd boiler with each unit producing steam for a 29 MW steam turbine and electrical power generator. The existing RRF was certified pursuant to the Siting Act in 1984 and began operation in 1987. In the 1984 certification, HC was authorized to construct and operate four units for a total of 39 MW. The RRF expansion project (RRF Unit 4) SCA seeks to increase the 1984 certification by 200 tpd solid waste processing capacity and 8 MW steam electric power generation.

The fuel for the RRF is municipal solid waste (MSW) and the RRF is a mass-burn type facility. That is, the MSW is not preprocessed, other than shredding of large items, before being used as fuel for the boiler. The present RRF has a certified continuous design rated capacity of 1,600 tpd. The SCA proposes to increase the continuous design rated capacity by adding a 600 tpd mass-burn unit. Natural gas fired auxiliary burners are used when an inadequate amount of heat is available from the mass burn units.

On August 2, 2006, the Administrative Law Judge issued a Recommended Order finding the RRF site to be in compliance with the local land use plans and zoning ordinances. The Administrative Law Judge also issued a Recommended Order recommending the Siting Board grant full and final certification to Hillsborough County.

RECOMMEND APPROVAL

* * * *

There being no further business the meeting was adjourned.

GOVERNOR AND CHAIRMAN

SECRETARY

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**STATE OF FLORIDA
SITING BOARD**

**IN RE: SEMINOLE ELECTRIC)
COOPERATIVE SEMINOLE GENERATING)
STATION UNIT 3 POWER PLANT SITING)
APPLICATION NUMBER PA 78-10A2)**

**OGC CASE NO. 06-0780
DOAH CASE NO. 06-0929EPP**

LAND USE ORDER

On August 31, 2006, an administrative law judge with the Division of Administrative Hearings ("DOAH") submitted his Recommended Order on Land Use and Zoning ("Recommended Order") in this administrative proceeding. Copies of the Recommended Order were served on counsel for Seminole Electric Cooperative, Inc. ("SECI"), Florida Department of Environmental Protection ("DEP"), Putnam County, Sierra Club, Inc. ("Sierra Club"), and other designated governmental agencies. A copy of the Recommended Order is attached hereto as Exhibit A. Sierra Club initially filed its Exceptions to the Recommended Order with DOAH, which does not have jurisdiction under the Administrative Procedure Act to review exceptions to its recommended orders.

On September 28, 2006, after the expiration of the 15-day deadline for filing exceptions to recommended orders, Sierra Club requested an extension of time to correctly file its Exceptions with DEP. DEP filed a statement of no opposition to this request for extension of time. By separate motion, SECI did not object to Sierra Club's late filing; and Sierra Club agreed to a 14-day extension for SECI to file its response to these Exceptions. In addition, on October 6, 2006, SECI filed a Second Notice of Voluntary Waiver of the 45-day period for the Siting Board Consideration of the Recommended Order on Land Use. This Waiver allows the Recommended Order On Land Use and proposed Siting Board Land Use Order to be considered

by the Siting Board at its meeting on December 5, 2006. The matter is now before the Governor and Cabinet, sitting as the "Siting Board," for final action under the Florida Electrical Power Plant Siting Act ("PPSA") embodied in §§ 403.501-403.518, Florida Statutes.

BACKGROUND

The following material facts and procedural matters are either stipulated to or are uncontested in this proceeding. SECI is a member-owned generation and transmission electric cooperative that supplies power to ten electric cooperative members throughout Florida. These cooperatives primarily serve rural areas of the State. SECI's members currently serve approximately 1.6 million customers throughout the State.

On March 9, 2006, SECI filed an application with DEP for power plant site certification under the PPSA for the SECI Unit 3 Project ("Unit 3" or "Project") in an unincorporated area of Putnam County, Florida. The Project is located on a site comprised of two parcels of land totaling approximately 2,000 acres in size located approximately five miles north of the city of Palatka (the "Site"). The St. Johns River is located to the south and to the east of the Site.

The larger parcel on the Site, which contains existing coal-fired Units 1 and 2 and almost all related facilities, began operation in 1984. Other existing facilities on the larger parcel include: two boiler buildings and the turbine generator buildings; precipitators, scrubber modules, and a combined flue stack; two natural draft cooling towers; a coal yard for unloading and storage of coal; an A-frame storage building for limestone used in the scrubber process; a rail spur and rail loop used to bring coal into the Plant site; and a coal conveyor to bring the coal from the coal yard to the boilers. The new Unit 3 will be constructed on this larger parcel.

The Site also includes a smaller parcel, approximately 4.5 acres in size, located approximately 1,000 feet to the south along the St. Johns River. An intake pump house is

located on this parcel to pump water from the river for use by the existing units. Currently, there are four underground pipes (one of which is not in use) and an underground duct bank with electrical conduit. The underground pipes and duct bank continue from the smaller parcel to the larger parcel through an existing privately-granted easement.

The Site and the existing two steam electric generating units, Units 1 and 2, were certified in proceedings under the PPSA in 1978 and 1979. In 1978, when the Site initially was being developed and certified under the PPSA, Putnam County was in the process of developing its Comprehensive Plan and its Future Land Use Map (FLUM). However, the County had zoning regulations in place, and rezoned the larger and smaller parcels as a PUD for the purpose of an electrical generating facility.

During the 1978 land use hearing, which also addressed the pipeline easement providing access to the St. Johns River, the hearing officer concluded that the Site was consistent and in compliance with the land use plans and zoning regulations in effect at that time. In its Order Relating to Land Use and Zoning, entered on March 21, 1979, the Siting Board adopted the hearing officer's conclusions and determined that the Site, including the intake pump house and pipeline easement, was consistent and in compliance with the land use plans and zoning ordinances of Putnam County. In this 1979 Order Relating to Land Use and Zoning, the Siting Board also ordered the "responsible zoning and planning authorities . . . to refrain from hereafter changing such land use plans or zoning ordinances so as to affect the proposed site." IN RE: Seminole Electric Cooperative, Inc., Application for Power Plant Site Certification, Putnam County, DOAH Case No. 78-1388, 1979 Fla. ENV LEXIS 10 (Siting Board Mar. 21, 1979).

Proposed Unit 3 and Related Facilities

SECT's proposed new Unit 3 is designed for a capacity of 750 megawatts. Unit 3 and its related facilities are much like the existing facilities and will utilize many of the existing onsite facilities. Like the two existing units, the new Unit 3 will burn coal as its primary fuel with up to 30 percent petroleum coke. Unit 3 will consist of a turbine generator building, a new boiler building, precipitators, scrubber modules, and a wet electrostatic precipitator. A single flue gas stack will serve the new unit. A new mechanical draft cooling tower will also be constructed on the site to serve the new Unit 3. The new cooling tower will have a lower profile than the existing natural draft cooling towers. The existing coal yard at the Site will be expanded for Unit 3 and additional facilities will be added in the limestone scrubber area to handle the additional gypsum that will be created. Construction of the Project is planned to begin in the latter part of 2008, and Unit 3 is expected to start operation in May of 2012.

DOAH ADMINISTRATIVE PROCEEDING

This formal administrative proceeding was presided over by DOAH Administrative Law Judge, J. Lawrence Johnston (the "ALJ"). In compliance with §§ 403.508(1) and (2) of the PPSA, a land use hearing was held by the ALJ in Palatka for the sole purpose of determining whether the Project Site is "consistent and in compliance with existing land use plans and zoning ordinances" of Putnam County.

On May 24, 2006, a Prehearing Stipulation ("Stipulation") was filed with DOAH by 10 governmental agencies (including DEP and Putnam County) and other parties. The Stipulation indicated that no agency party contested the determination that the Site of the Unit 3 Project is consistent and in compliance with local land use plans and zoning ordinances of Putnam County. Sierra Club, however, asserted the position that the existing water intake pump house at the Site

with larger capacity pump inside, and a new underground water pipeline and electrical duct bank proposed to be added within an existing pipeline easement, constitute "industrial" facilities that are not consistent with the County's current land use plan.

The ALJ held a formal administrative hearing on land use in this case in Palatka on June 1, 2006. Only DEP, SECI, and Sierra Club appeared and participated in the land use hearing, and SECI was the only party that presented evidence at this hearing. Timely proposed recommended orders were submitted to the ALJ by SECI and Sierra Club, and the ALJ indicated that he considered these proposed recommended orders in the preparation of his Recommended Order on Land Use and Zoning.

RECOMMENDED ORDER ON LAND USE AND ZONING

In this Recommended Order, the ALJ found that the Siting Board previously determined in March of 1979 that the site of the proposed Unit 3 Project is consistent and in compliance with existing land use plans and zoning ordinances of Putnam County." The ALJ also found that there will be no physical changes to the existing pump house at the Site and the additional underground water pipe and duct bank will not be visible. The ALJ further found that the Sierra Club offered no evidence contradicting Putnam County's interpretation of its own Comprehensive Plan land development regulations; offered no evidence as to how the community could be adversely affected by the continued use of the pump house, with larger pump, and the addition of underground water pipes and duct bank in the existing pipeline easement; and offered no evidence that these facilities for the pumping and conveyance of river water to the plant Site constitute "industrial" uses under the land use plans and zoning regulations of Putnam County. The ALJ ultimately recommended that the Siting Board

determine that the Unit 3 Project Site is consistent and in compliance with applicable land use plans and zoning ordinances of Putnam County.

STANDARDS OF ADMINISTRATIVE REVIEW OF RECOMMENDED ORDERS

In its review of the subject Recommended Order, the Sitting Board may not reweigh the evidence, resolve conflicts therein, or judge the credibility of witnesses, as these are evidentiary matters written the provisions of the ALJ as the tier of fact. Bellair v. Dept. of Environmental Protection, 695 So.2d 1305, 1307 (Fla 1st DCA 1997); Maynard v. Unemployment Appeals Commission, 609 So.2d 143, 145 (Fla. 4th DCA 1992). Furthermore, the ALJ's findings of fact may not be rejected or modified by a reviewing agency "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." Section 120.57(1)(l), Florida Statutes.

Furthermore, an agency reviewing a DOAH recommended order has no authority to make independent or supplemental findings of fact in its final order. See, e.g., North Port, Fla. v. Consolidated Minerals, 645 So.2d 485 (Fla. 2d DCA 1994). The scope of agency review of factual findings of recommended orders is limited to ascertaining whether the administrative law judge's existing findings of fact are supported by competent substantial evidence of record. Id., 645 So.2d at 487.

Great deference is accorded to agency interpretations of statutes and rules within their regulatory jurisdiction; and these interpretations should not be overturned unless "clearly erroneous." See, e.g., Falk v. Beard, 614 So. 2d 1086, 1089; State Contracting v. Dept. of Transportation, 709 So.2d 607, 610 (Fla. 1st DCA 1988). These agency interpretations of their own statutes and rules do not have to be the only reasonable interpretations. It is enough if such agency interpretations are "permissible" ones. Falk v. Beard, 614 So.2d 1086, 1089 (Fla. 1993);

Suddath Van Lines, Inc. v. Dept. of Environmental Protection, 668 So. 2d 209, 212 (Fla 1st DCA 1996).

RULINGS ON SIERRA CLUB'S AMENDED EXCEPTIONS

Exception No. 1

Sierra Club challenges that portion of the ALJ's Findings of Fact 19 which determined the "existing pump house and underground water pipes and electrical duct bank" to be "allowed uses in both the Agricultural II and in the Rural Residential future land use districts, as a Type 2 Community Facility." Sierra Club essentially concludes that the existing pump house and underground water pipes and electrical duct bank are not allowed uses in an Agricultural II and Rural Residential future land use districts. Sierra Club contends that these uses are not "compatible with the overall character of the existing and future development of the area" as provided under Policy A.1.9.3.A.4.e, Putnam County Comprehensive Plan; and are not "directly related to Agricultural uses" as provided under Policy A.1.9.3.A.10.c, Putnam County Comprehensive Plan.

Sierra Club also argues that the "pumps are not Type 2 Community Facilities as defined by the comprehensive plan's glossary because they are not 'light infrastructure facilities.'" Nevertheless, this Exception of Sierra Club does not include "appropriate and specific citations to the record" to support its contentions as required by § 120.57(1)(k), Florida Statutes. Instead, Sierra Club cites to provisions of Putnam County's comprehensive plan, as well as other statutory definitions to support its contention.

Contrary to Sierra Club's argument on incompatibility, there appears to be competent substantial evidence of record supporting the challenged factual findings of the ALJ pertaining to the provisions of the Putnam County comprehensive plan Policy A.1.9.3.A.4.e. requiring Type 2

community facilities to be compatible with the overall character of the existing and future development of the area. First, it is undisputed that the Siting Board previously determined that the parcel containing the existing pump house, pipeline, and duct bank easement was consistent and in compliance with the land use plans and zoning regulations of Putnam County in a Siting Board Order Relating to Land Use and Zoning, dated March 21, 1979. See In Re: Seminole Electric Cooperative, Inc., Application for Power Plant Site Certification, Putnam County, DOAH Case No. 78-1388, 1979 Fla. ENV LEXIS 10 Siting Board, March 21, 1979. (Seminole Exhibit 1) Under § 403.508(2), Florida Statutes, once the Siting Board has determined that the proposed site conforms with the existing land use plans in effect as of the date of the application, the responsible zoning or planning authority is prohibited from changing the land use plans or zoning ordinances "so as to affect the proposed site unless the certification of the site is subsequently denied or withdrawn."

In addition, at the time the Site was being developed and certified under the PPSA in 1978, Putnam County had adopted a PUD zoning for the Site for the purpose of an electrical generating plant, but had not yet adopted a Future Land Use Map (FLUM). (Finding of Fact 7) The subsequent adoption by Putnam County of its FLUM designated that part of the Site where existing Units 1 and 2 are located as "Industrial," and designated the parcel containing the pump house as part "Rural Residential" and part "Agricultural II." The pipeline easement area was designated "Agricultural II." (See Findings of Fact 18, 19, and 20) In the Recommended Order now on review by the Siting Board, the ALJ concluded that these assignments of future land use categories were consistent with the Siting Board's 1979 Order Relating to Land Use and Zoning, and "did not affect the use of those properties for such uses." (Conclusion of Law 38)

The facilities for the new Unit 3 will be located adjacent to and integrated with the existing facilities for units 1 and 2. A new pipeline and a new duct bank will be constructed within the existing pipeline easement. No changes will be made to the existing pump house building itself, but pumps within the existing pump house will be upgraded. (See Findings of Fact 10, 11, 12 and 13) On January 10, 2006, the Putnam County Commission adopted an ordinance amending the PUD zoning for both parcels at the Site to accommodate the construction of the proposed Unit 3. In making its decision to amend the PUD zoning, the Putnam County Commission determined that the Unit 3 project and its proposed Site are consistent with the County's Comprehensive Plan and met the requirements of the County's land development code. (See Findings of Fact 22, 23 and 24.)

Richard Zwolak, accepted by the ALJ as an expert in land use planning and zoning, presented uncontroverted testimony at the DOAH final hearing of the compatibility of the proposed Unit 3 to the character of the existing and future development of the area. (Tr. Vol. II, pages 12-13) The ALJ adopted this testimony in his Recommended Order and found that the proposed Unit 3: (1) "would be compatible with the existing land uses at and near the Site"; (2) "will have very similar operating characteristics to the existing units"; (3) "will be able to co-exist with existing land uses"; and (4) "is not expected to have a significant adverse impact to nearby residential development." (Finding of Fact 17)

Sierra Club's second contention, that Putnam County's comprehensive plan policy A.1.9.3.A.10.c. requires Type 2 community facilities to be "directly related to Agricultural uses," misstates that policy. That particular policy is only applicable to commercial and industrial uses located within an Agriculture II land-use designation, not to Type 2 community facilities. At the DOAH hearing, Mr. Zwolak testified "without contradiction" that the underground water pipes and

electrical duct banks were considered a Type 2 community facility defined in Putnam County's Comprehensive Plan as "light infrastructure facilities, including but not limited to, water wells, water tanks, sewage pump stations, electrical substations, and water and wastewater treatment plants with a capacity of less than 500,000 gallons per day." (Finding of Fact 30; Tr. Vol. II, pages 28-29; SECI Ex. 10a at page AA-44) Mr. Zwolak testified that Type 2 community facilities "are allowed in all 11 Putnam County's future land-use categories." (emphasis added) (Tr. Vol. II, page 28) Mr. Zwolak further testified that the pump house itself is "allowed as a type 2 community facility" under both Agriculture II and Rural Residential future land-use categories. (Tr. Vol. II, pages 30-31)

Sierra Club argues that Type 2 facilities such as the pump house and the separate electrical and duct bank located in the easement are "heavy industrial activities associated with electrical production on the larger parcel." This argument is not supported by any evidence in the record and is rejected. The ALJ specifically addressed in his Recommended Order whether the "pump house and cooling water pipeline are 'industrial' facilities which are not consistent with the future land use designations for the lands occupied by those facilities." (Finding of Fact 27) The ALJ reviewed Article 12, Section 12.01.01.a.2., of Putnam County's Land Development Code and determined that the additional cooling water pipeline and duct bank within the established easement containing similar pipelines and duct bank between the principal power plant site and the riverside pump house" are excluded from the definition of "development." (Finding of Fact 28) Thus no legislative action would be required to amend the County's land development code and its comprehensive plan. Even if the pipelines and duct banks were determined to be "development" subject to the County's comprehensive plan, SECI's expert land planner presented uncontroverted testimony at the final hearing that Type 2 community facilities are light infrastructure facilities

allowed in all eleven of Putnam County's Future Land Use categories. (Finding of Fact 30, Tr. Vol. II pages 28-29)

As noted above in the Standards of Administrative Review, a reviewing agency such as the Siting Board has no authority to reweigh the evidence presented at a DOAH formal hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. Likewise, the Siting Board is not free to modify the findings of fact in a DOAH recommended order by interpreting the evidence or testimony of a witness in a manner proposed by a party that is different from the reasonable interpretations made by an administrative law judge. Heifitz, 475 So.2d 1277, 1281-1282 (Fla. 1st DCA 1985). These evidentiary matters are within the province of the ALJ, as the trier of the facts. The Siting Board concludes the portions of Finding of Fact 19 challenged in this Exception appear to be reasonable interpretations by the ALJ of Putnam County's comprehensive plan supported by the expert testimony of Richard Zwolak. Accordingly, Sierra Club's Exception No. 1 is denied.

Exception No. 2

Sierra Club's second Exception contests that portion of the ALJ's Findings of Fact 32 stating that "Sierra Club offered no evidence contradicting Putnam County's interpretation of its own Comprehensive Plan land development regulations" and "offered no evidence as to how the community could be adversely affected" by the allowed uses. Sierra Club asserts that this finding of the ALJ misplaces the burden of proof upon the Petitioner, rather than the applicant, to show that the Site is consistent and in compliance with the applicable land use plan." Sierra Club argues that it is not required to "contradict Putnam County's interpretation of its own Comprehensive Plan or to show an adverse affect upon the community" because this is a de novo proceeding and the County's interpretation is "merely evidence" and not the final agency action.

It is true that a formal administrative hearing before a DOAH administrative law judge is not a review of prior agency action, but is a *de novo* proceeding intended to formulate final agency action. See, e.g., Hamilton County Commissioners v. State Dept. of Environmental Regulation, 587 So. 2d 1378, 1387 (Fla. 1st DCA 1991); McDonald v. Dept. of Banking and Finance, 346 So.2d 569, 584 (Fla. 1st DCA 1977). The burden of proof in a formal proceeding where an applicant is seeking a regulatory permit is governed by case law first enunciated in the seminal opinion rendered in the case of Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). In this J.W.C. opinion, the court concluded that the permit applicant has the initial burden of going forward with the evidence and the ultimate burden of providing reasonable assurance that its proposed activities will not violate applicable regulatory standards.

In the present proceeding, SECI thus had the initial burden to go forward with the evidence and make a preliminary showing that the proposed Unit 3 Project is consistent and in compliance with the adopted land use plans and zoning ordinances of Putnam County. SECI made such a preliminary showing in this case by presenting testimony and documentary evidence at the commencement of the final hearing, including the testimony of Richard Zwolak, the land use planning and zoning expert. The burden of going forward with the evidence then shifted to Sierra Club to contradict SECI's preliminary showing of reasonable assurance by presenting "contrary evidence of equivalent quality". J.W.C., Id. at 789. However, the record in this case affirms the ALJ's finding in paragraph 32 of the Recommended Order that Sierra Club did not offer any evidence at the final hearing contradicting SECI's preliminary showing that the Unit 3 Project is consistent and in compliance with Putnam County's land use plans and zoning ordinances or contradicting Putnam County's interpretation of its own Comprehensive Plan

development regulations. Sierra Club's suggestion that the ALJ's Finding of Fact 32 erroneously shifts the burden of proof or creates new evidentiary requirements for the Club is thus rejected.

Sierra Club's additional argument in this Exception is that the pump house at the Site is an industrial facility that cannot be placed on Rural Residential designated land. Sierra Club contends that the statutory definition of an electrical power plant under Section 403.503(12), Fla. Stat., which "includes associated facilities which directly support the . . . operation of the . . . plant" constitutes contrary evidence to SECT's contention that it did "not consider the proposed pump house as an industrial facility."

Sierra Club further contends that this statutory definition of electrical power plant under Section 403.503(12) of the PPSA constitutes contrary evidence to that portion of Findings of Fact 32 stating that Sierra Club "offered no evidence that these facilities for the pumping and conveyance of river water to the plant site constitute 'industrial' uses under the land use plans and zoning regulations of Putnam County." Nevertheless, Sierra Club does not provide any authority supporting this contention and does not elaborate on how this statutory definition of "electrical power plant" requires that all parts of a power plant be considered "industrial" and regulated as such under local government land use plans and zoning regulations. It did not cite to any portion of the Power Plant Siting Act, or laws governing land use planning, that would be competent substantial evidence to compel such a conclusion.

The scope of agency review of a DOAH recommended order is limited to ascertaining whether the ALJ's existing findings of fact are supported by competent substantial evidence of record. See, e.g., North Port, Fla. v. Consolidated Minerals, 645 So. 2d at 485, 487 (Fla. 2d DCA 1994). As stated in the above ruling denying Sierra Club's Exception No. 1, there is uncontroverted evidence in this record that the underground pipeline, duct bank, and pump house

at the Site are Type 2 facilities under Putnam County's Comprehensive Plan which allows this type of facility in both Agricultural II and Urban Residential areas. Competent substantial evidence must be sufficiently relevant and material so that a reasonable mind would accept it as adequate to support the conclusion reached. Perdue v. T.J.Palm, 755 So. 2d 660 (Fla. 4th DCA 1999); De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957). Sierra Club's bare conclusion in this Exception, unsupported by any testimony at the final hearing, that all components of a power plant must be designated or zoned "industrial" under local government land use plans and zoning regulations if related to the operation of the plant is thus rejected. Accordingly, Exception No. 2 is denied.

Exception No. 3.

Sierra Club's third Exception challenges the ALJ's legal conclusions in paragraphs 40 and 42 of the Recommended Order that "the installation of the new pipeline" within the existing pipeline easement is not considered "development" under Putnam County's Comprehensive Plan, and is thus "not subject to the County's Comprehensive Plan or . . . Land Development Code, which includes the County's zoning regulations." Sierra Club contends that the exclusion of the pipeline construction from Putnam County's definition of "development" does not exempt this use from being further regulated under Putnam County's Comprehensive Plan or subjected to further regulation in the County's Land Development Code. However, Sierra Club does not identify what specific Putnam County regulations purportedly affect the construction of pipelines; and the Club even concedes that this exemption is found in other chapters of the Florida Statutes regulating land use.

The record evidence discussed in the above ruling on Exception No. 1 supports the ALJ's challenged conclusion that the installation of a pipeline and a duct bank in the long-established

pipeline easement is exempt from the definition of "development" in Putnam County's Land Develop Code. This Land Develop Code exempts "work by any utility or other persons engaged in the distribution or transmission of gas or water for the purpose of inspecting, repairing, renewing or construction on established rights-of-way any sewers, mains, pipes, cables, utility tunnels, power lines, towers, poles, tracks or the like." Consequently, the Sierra Club's contrary interpretation of "development" in Putnam County's Land Develop Code is rejected.

Sierra Club also takes exception to the ALJ's Conclusion of Law 42 which assumes, *arguendo*, that "[e]ven if the pipeline and duct bank were concluded to be 'development' subject to the County's Comprehensive Plan and Land Development Code, it would be a Type 2 community facility under the Comprehensive Plan which is allowed in all future land use categories in Putnam County, including lands designated for agricultural uses." Sierra Club's argument in support of this contention is virtually the same as that raised in its above challenge to the ALJ's Finding of Fact 19; and is rejected for the same reasons set forth in the ruling denying Sierra Club's Exception No. 1. Therefore, Exception No. 3 is denied.

Exception No. 4.

Sierra Club's fourth and final Exception challenges the portion of Conclusion of Law 43 asserting that "[c]ompetent substantial received at the hearing demonstrates that the Site and the Unit 3 Project, including the pump house and additional underground water pipe and electrical duct bank, are consistent and in compliance with Putnam County's land use plans." Sierra Club essentially argues, without any citation to the record, that the "evidence shows on the contrary that the pumping and piping of water to and from the river are industrial activities conducted on land designated as Rural Residential or Agriculture II." This Exception does not does not

comply with the provisions of Section 120.57(1)(k), Fla. Stat., requiring that exceptions to recommended orders "include appropriate and specific citations to the record."

In addition, this same argument has already been rejected in the above ruling denying Sierra Club's Exception No. 2 challenging the ALJ's Finding of Fact 32. Moreover, Sierra Club's related argument that such activities can only be consistent with Putnam County's Comprehensive Plan if they fall within the "development" exemption or are a Type 2 community facility was rejected in the above ruling denying Exception No. 1 in which Sierra Club challenged the ALJ's Finding of Fact 19. These rulings denying Sierra Club's Exception Nos. 1 and 2 are incorporated by reference herein and Exception No. 4 is likewise denied.

CONCLUSION

Having reviewed the Recommended Order, Exceptions, Responses, and other matters of record in this proceeding, and being otherwise duly advised, the Siting Board ORDERS that:

A. The ALJ's Recommended Order on Land Use and Zoning (Exhibit A) is adopted in its entirety and incorporated by reference herein.

B. As described by the evidence presented at the land use hearing, the Site of SECT's proposed Unit 3, which new unit will utilize coal as its primary fuel, is hereby determined to be consistent and in compliance with existing land use plans and zoning ordinances of Putnam County, Florida.

DONE AND ORDERED this _____ day of _____, 2006, in Tallahassee,
Florida, pursuant to a vote of the Governor and Cabinet, sitting as the Siting Board, at a duly
noticed and constituted Cabinet meeting held on _____, 2006.

THE GOVERNOR AND CABINET
SITTING AS THE SITING BOARD

THE HONORABLE JEB BUSH
GOVERNOR

FILING IS ACKNOWLEDGED 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 a copy of the foregoing Final Order on Land Use and Zoning

has been sent by United States Postal Service to:

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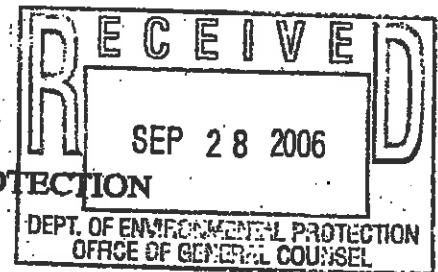
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this _____ day of _____, 2006.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION



IN RE: SEMINOLE ELECTRIC
COOPERATIVE SEMINOLE GENERATING
STATION UNIT 3 POWER PLANT
SITING APPLICATION NUMBER PA
78-10A2

Case No. 06-0929EPP

**SIERRA CLUB, INC.'s AMENDED EXCEPTIONS TO RECOMMENDED ORDER
ON LAND USE AND ZONING**

Sierra Club, Inc., by the undersigned attorney, submits the following exceptions to the recommended order as follows:

Exceptions to Proposed Findings of Fact

Although entire paragraphs are typed below for clarity, exceptions are made only as to the underlined portions.

19. Approximately two-thirds of the smaller parcel of the site fronting on the St. Johns River was designated Agricultural II and approximately one-third (the part contiguous to the river) was designated Rural Residential under the County's Comprehensive Plan and FLUM. The existing pump house is located on the Rural Residential part of the parcel. The underground water pipes and electrical duct bank lead from the pump house towards the larger parcel of the Site, which is designated Industrial. The existing pump house and underground water pipes and electrical duct bank are allowed uses in both the Agricultural II and in the Rural Residential future land use districts, as a Type 2 Community Facility.

Argument on exception. To be an "allowed" use in Rural Residential districts, Type 2 community facilities must be "compatible with the overall character of the existing and future development of the area." Policy A.1.9.3.A.4.e. of the Putnam County Comprehensive

Plan (Comprehensive Plan). In Agricultural II districts, a Type 2 community facility must be "directly related to Agricultural uses." Policy A.1.9.3.A.10.c. of the Comprehensive Plan. Industrial activities by their nature and classification are incompatible with residential uses, and a power plant is not directly related to Agricultural uses.

Furthermore, the pumps are not Type 2 community facilities as defined by the Comprehensive Plan's glossary because they are not "light infrastructure facilities" but are part and parcel of the heavy industrial activities associated with electrical production on the larger parcel. Also see definition of electrical power plant in § 403.503(12) of the Florida Statutes, which is recited in part below.

32. Unrebutted testimony demonstrated that there will be no physical changes to the pump house itself, but only replacement of the pumps inside with a larger one with more capacity, and that the additional underground water pipe and duct bank will not be visible, as the land will be restored to current conditions. Sierra Club offered no evidence contradicting Putnam County's interpretation of its own Comprehensive Plan land development regulations; offered no evidence as to how the community could be adversely affected by the continued use of the pump house, with larger pump, and the addition of underground water pipes and duct bank in the existing pipeline easement; and offered no evidence that these facilities for the pumping and conveyance of river water to the plant site constitute "industrial" uses under the land use plans and zoning regulations of Putnam County.

Argument. This finding misplaces the burden of proof and creates evidentiary requirements that do not exist. It is the applicant's burden to show "whether the proposed

site" for the plant "is consistent and in compliance with the applicable land use plan." See statement of the issue of this recommended order. Indeed, this was the sole issue for determination at this hearing. § 403.508(2) of the Florida Statutes.

Thus, Sierra Club had no evidentiary obligation to contradict Putnam County's interpretation of its own Comprehensive Plan or to show an adverse affect on the community. Moreover, since this is a *de novo* proceeding, the county's own interpretation of its comprehensive plan is merely evidence, not the final agency action and separate determination required by this proceeding.

The evidence showing whether the proposed larger pumps to be placed on Rural Residential designated land are industrial is another matter. For example, the water drawn from the St. Johns River is a raw material used for the production of electricity and the waste water discharged into the river is a byproduct of such production. Although Seminole readily conceded that "[i]ndustrial uses are not permitted in the Rural Residential future land use category," it did "not consider the pump house as an industrial facility." See pages 41 and 42 of the transcript of the hearing. Seminole's contention contradicts the statutory definition of an electrical power plant, which makes no such distinction and instead specifically "includes associated facilities which directly support the . . . operation of the . . . plant." § 403.503(12) of the Florida Statutes.

Exceptions to Proposed Conclusions of Law

40. Putnam County's Land Development Code's definition of "development" exempts from that definition "work by any utility and other persons engaged in the distribution or transmission of gas or water for the purpose of inspecting, repairing,

renewing or construction on established rights-of-way any sewers, mains, pipes, cables, utility tunnels, power lines, towers, poles, tracks or the like." That definition applies to both the Comprehensive Plan and the County's Land Development Code. Since the installation of the pipeline is not considered "development," it is not subject to the County's Comprehensive Plan or to the County's Land Development Code, which includes the County's zoning regulations.

42. Even if the pipeline and duct bank were concluded to be "development" subject to the County's Comprehensive Plan and Land Development Code, it would be a Type 2 community facility under the Comprehensive Plan which is allowed in all future land use categories in Putnam County, including lands designated for agricultural uses.

Argument on Paragraphs 40 and 42. Just because something may not be considered "development" does not mean that it is exempt from all regulation by comprehensive plans, which more broadly regulate all "uses of land." Section 163.3177(6)(a), Florida Statutes. Section 163.3164(6) provides that for purposes of comprehensive plans the term "development" has the meaning given it in section 380.04. Section 380.04's definition of "development" does indeed exclude the construction of pipelines and the like on established rights-of-way from the definition of "development," using the same language as that attributed to the Putnam County Land Development Code. Section 380.04(3)(b), Florida Statutes.

However, section 380.04(3)(e) similarly excludes all agricultural and forestry (silvicultural) uses from the definition of "development." The fact that agricultural and silvicultural uses are not classed as "development" certainly does not appear to exempt those

uses from being regulated by the Putnam County Comprehensive Plan, which in fact contains numerous provisions that do exactly that. For example, Comprehensive Plan Policy A.1.9.3.A.4, which regulates the "Rural Residential" future land use category, provides, in relevant part, as follows:

The types of land uses allowed in this future land use category, and guidelines and standards applicable to them are listed below.

a. Limited Agricultural Uses are permitted and are subject to further regulation in the land development code. New Intensive Agricultural Uses are prohibited. Property currently zoned for agriculture is considered a "holding" zone and may be used for Agricultural Uses other than Intensive Agricultural Uses. Rezoning to agricultural districts shall not be allowed without a future land use map amendment to an appropriate future land use designation. Agricultural activities must comply with best management practices provided for in Policy A.1.4.9 and identical Policy E.1.3.5.

See also Putnam County Comprehensive Plan Policies A.1.1.1.A.2.c&d, A.1.4.8, A.1.4.9, A.1.4.11.D&E, A.1.4.12.C.4&5, A.1.9.3.A.1.b, A.1.9.3.A.2.a, A.1.9.3.A.3.a, A.1.9.3.A.5.a, A.1.9.3.A.6.a, A.1.9.3.A.7.d, A.1.9.3.A.8.a, A.1.9.3.A.9, A.1.9.3.A.10, and A.1.9.3.A.11.a.

Just as the exclusion of agricultural and silvicultural uses from the definition of "development" does not exempt them from being regulated by Putnam County's comprehensive plan, it follows that exclusion of the pipeline construction from the definition of "development" would not exempt it from regulation, either.

In any event, these conclusions omit any reference to the pump house, presumably because it is not on an established right-of-way and therefore would not be exempt from the land development code. As to the "Type 2 community facility" issue, see pages 1 and 2 above.

43. Competent substantial evidence received at the hearing demonstrates that the

Site and the Unit 3 Project, including the pump house and additional underground water pipe and electrical duct bank, are consistent and in compliance with Putnam County's land use plans and are consistent and in compliance with applicable Putnam County zoning ordinances for the site, including the amended PUD zoning ordinance for the site.

Argument on Paragraph 43: The evidence shows on the contrary that the pumping and piping of water to and from the river are industrial activities conducted on land designated as Rural Residential or Agriculture II.

Such uses can only be consistent and in compliance with the Comprehensive Plan if they fall within the "development" exemption or are a Type 2 community facility. Neither applies. First, the pump house is not within an existing right-of-way and is not a Type 2 community facility because its location is not compatible with surrounding residential uses, nor is it, or are the pipelines, "directly related to" agriculture uses. Thus, the only logical and lawful conclusion from the evidence is that the site and project are not consistent or in compliance with Putnam County's Comprehensive Plan.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been filed by fax with the Clerk of the Department of Environmental Protection; and copies of the foregoing have been furnished by U.S. mail to the following:

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: SEMINOLE ELECTRIC)
COOPERATIVE SEMINOLE GENERATING)
STATION UNIT 3 POWER PLANT) Case No. 06-0929EPP
SITING APPLICATION NUMBER PA)
78-10A2)
_____)

RECOMMENDED ORDER
ON LAND USE AND ZONING

Pursuant to notice, the Division of Administrative Hearings (DOAH), by its designated Administrative Law Judge, J. Lawrence Johnston, held a land use hearing in the above-styled case on June 1, 2006, in Palatka, Florida.

APPEARANCES

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ATTACHMENT
PAGE 2
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For Sierra Club, Inc.:

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STATEMENT OF THE ISSUE

The issue to be resolved in this portion of this power plant site certification proceeding is whether the site for the proposed Seminole Generating Station Unit 3 Project is consistent and in compliance with the applicable land use plans and zoning ordinances of Putnam County, Florida, pursuant to Section 403.508(2), Florida Statutes.¹

PRELIMINARY STATEMENT

This proceeding was conducted pursuant to the Florida Electrical Power Plant Siting Act (PPSA), Chapter 403, Part II, Florida Statutes, and Florida Administrative Code Rule Chapter² 62-17, to consider the land use and zoning aspects of Seminole Electric Cooperative, Inc.'s (SECI's) application for power plant site certification of the Seminole Generating Station Unit 3 Project, which was filed with the Department of Environmental Protection (DEP) on March 9, 2006. By agreement among the parties, the land use hearing, held pursuant to Section 403.508(2), Florida Statutes, was scheduled to be held in Palatka, Florida, on June 1, 2006, and public notice was given by the Applicant and by DEP.

On May 16, 2006, SECI and Putnam County filed a Stipulation addressing land use and zoning issues. In the Stipulation, Putnam County acknowledged that its adoption of Ordinance 2006-02, which amended the Planned Unit Development (PUD) for the site and approved the Development Agreement referenced in the Ordinance, confirmed that the Seminole Generating Station site, including the proposed Unit 3 and the associated facilities (the Site), is consistent and in compliance with the County's land use plans and zoning ordinances as required under Section 403.508(2), Florida Statutes.

A Pre-hearing Stipulation among the parties was filed with DOAH on May 24, 2006. The Stipulation was signed by ten of the 14 agencies and other parties. The Stipulation indicated that no agency party contested the Project site's consistency and compliance with local land use plans and zoning ordinances. Sierra Club, Inc., took the position that the existing water intake pump house, with larger capacity pump inside, and a new underground water pipeline and electrical duct bank proposed to be added within an existing pipeline easement, constitute "industrial" facilities that are not consistent with the County's current land use plan.

Only the Applicant, DEP, and Sierra Club appeared and participated in the land use hearing on June 1, 2006. Only the Applicant presented witnesses or offered exhibits. The

Applicant's witnesses included: Bobby Payne, Manager for Projects and Administrative Services for SECI, who described the Project and its proposed site and presented SECI Exhibits 5, 6A, 7B, 8A, 8B, and 19; and Richard Zwolak, who was accepted as an expert in land use planning and zoning presented SECI Exhibits 18, 7A, 10A, 10B, 10C, 11, 12A, 12B, 13A, 13B, and 15. SECI also offered additional SECI Exhibits 1, 2, 16 and 17. All of the exhibits were admitted into evidence.

After the taking of evidence, Sierra Club requested 15 days from the filing of the Transcript to file proposed recommended orders, and the request was granted without objection. The Transcript (in two volumes) was filed with DOAH on July 11, 2006. Timely proposed recommended orders submitted by SECI and Sierra Club have been considered in the preparation of this Recommended Order on Land Use and Zoning.

FINDINGS OF FACT

1. SECI is a member-owned generation and transmission electric cooperative. SECI supplies power to ten electric cooperative members throughout Florida. These cooperatives primarily serve rural areas of the State. SECI's members currently serve approximately 1.6 million customers throughout the State. SECI's headquarters are in Tampa, Florida.

2. SECI first came into existence in 1948 under the Federal Rural Electrification Act to provide electric power to

rural areas. Initially, SECI purchased power from other utilities for its individual members. In the 1970s, in response to the oil embargo, SECI's member cooperatives determined it was in their best interest to build their own power supply. SECI then licensed, constructed, and commenced operation of the coal-fired power plant near Palatka, in Putnam County. SECI also has a power plant in Hardee County, Florida. These two power plants allow SECI to provide approximately 70 percent of the power for the member cooperatives, while purchasing 30 percent of the power needs of the member cooperatives from other utilities.

3. The Site is located in the unincorporated area of the county. It is approximately five miles north of the city of Palatka. The St. Johns River is located to the south and to the east of the power plant site.

4. The Site is a 1,300 megawatt facility located on a site comprised of two parcels of land totalling approximately 2,000 acres in size. The larger parcel of the site, which contains the existing coal-fired Units 1 and 2 and almost all related facilities, began operation in 1984. Other existing facilities on the larger parcel include: two boiler buildings and the turbine generator buildings; precipitators, scrubber modules, and a combined flue stack; two natural draft cooling towers; a coal yard for unloading and storage of coal; an A-frame storage building for limestone used in the scrubber process; a rail spur

and rail loop used to bring coal into the Plant site; and a coal conveyor to bring the coal from the coal yard to the boilers. The new Unit 3 will be constructed on this larger parcel.

5. The balance of the larger parcel of the Site is in pine flat woods. North and northwest of the power plant is the Lafarge wallboard facility, where combustion by-products from the existing units are converted into synthetic gypsum for the manufacture of wallboard.

6. The Site also includes a smaller parcel of approximately 4.5 acres located approximately 1,000 feet to the south along the St. Johns River. An intake pump house is located on this parcel to pump water from the river for use by the existing units. Currently, there are four underground pipes (one of which is not in use) and an underground duct bank with electrical conduit. The underground pipes and duct bank continue from the smaller parcel to the larger parcel through an existing privately-granted easement.

7. The Site and the existing two steam electric generating units, Units 1 and 2, were certified in proceedings under the PPSA that took place in 1978 and 1979. In 1978, when the Site initially was being developed and certified under the PPSA, Putnam County was in the process of developing its Comprehensive Plan and its Future Land Use Map (FLUM). However, the County had zoning regulations in place, and it and rezoned the larger

and smaller parcels as a PUD for the purpose of an electrical generating facility.

8. During the 1978 land use hearing, which also addressed the pipeline easement which provides access to the St. Johns River, the Hearing Officer concluded that the Site was consistent and in compliance with the land use plans and zoning regulations in effect at that time. The Siting Board subsequently adopted the Hearing Officer's conclusions regarding land use and zoning issues. In its Order Relating to Land Use and Zoning, entered on March 21, 1979, the Siting Board determined that the Site, including the intake pump house and pipeline easement, was consistent and in compliance with the land use plans and zoning ordinances of Putnam County. In the Order Relating to Land Use and Zoning, the Siting Board also ordered the "responsible zoning and planning authorities . . . to refrain from hereafter changing such land use plans or zoning ordinances so as to affect the proposed site." IN RE: Seminole Electric Cooperative, Inc., Application for Power Plant Site Certification, Putnam County, DOAH Case No. 78-1388, 1979 Fla. ENV LEXIS 10 (Siting Board Mar. 21, 1979).

9. Sierra Club was a party to the original site certification proceeding and is bound by its determinations on consistency with land use and zoning.

10. SECI is proposing to construct a new Unit 3 at the Site designed for a capacity of 750 megawatts. The new unit and related facilities are much like the existing facilities and will utilize many of the existing onsite facilities. Like the two existing units, the new Unit 3 will burn coal as its primary fuel with up to 30 percent petroleum coke. The new unit will consist of a turbine generator building, a new boiler building, precipitators, scrubber modules, and a wet electrostatic precipitator. A single flue gas stack will serve the new unit. A new mechanical draft cooling tower will also be constructed on the site to serve the new Unit 3. The new cooling tower will have a lower profile than the existing natural draft cooling towers. The existing coal yard will be expanded for the new unit and additional facilities will be added in the limestone scrubber area to handle the additional gypsum that will be created. Construction for the new Unit 3 is planned to begin in late 2008. As planned, the new unit is expected to start up in May 2012.

11. SECI's Unit 3 project will integrate the new unit into the existing plant facilities. The existing administration building and parking lot will support the new unit. SECI will continue to use the existing rail spur, including for the delivery of coal and construction materials. The existing switchyard and transmission area will be utilized for the new

unit. There will be no new off-site electrical transmission lines for the Unit 3 Project. The existing plant access off Highway 17 will be improved to enhance access for turning vehicles into the site.

12. As indicated, the existing units are supplied with cooling and other service water from the St. Johns River. SECI proposes to utilize the existing pump house and to install an additional water pipeline and duct bank within the easement to supply primarily cooling water and also other service water (primarily for bottom ash handling and for the scrubber system) to the proposed Unit 3. There will be some enhancements to the pumps and motors inside the pump house to increase the capacity of water withdrawals. Otherwise, there will be no changes to the existing pump house for the new Unit 3 project.

13. The cooling and other service water for Unit 3 will be conveyed to the main power plant site by an additional 36-inch pipeline to be placed underground and within the existing private easement. As indicated, the existing easement was created in 1978 and the existing pipelines were installed as part of the development of Units 1 and 2. A second duct bank will also be placed in the existing easement. There will be no facilities constructed above the ground surface within that easement. The easement will be restored to its existing condition after the new water pipeline is installed.

14. The existing land uses adjacent to the Site are primarily undeveloped land. Residential areas along the St. Johns River are the closest development to the Site, with the exception of the Lafarge gypsum plant located adjacent to the larger parcel of the Site. The closest communities are Bridgeport, which is located approximately 3.5 miles to the east, and Bostwick, which is located 2.5 miles to the north.

15. The pattern of development in the area since the existing Units 1 and 2 began operation in 1984 has been single family residential development located along the river and the construction of the Lafarge wallboard plant. With the exception of the wallboard plant, the areas between that residential corridor and the Site, as well as in all four directions around the site, continue to be undeveloped land.

16. There are two existing homes located near the Site. One home is located approximately one mile south of the proposed Unit 3 stack, and another home is approximately one mile west of the Plant site. There is existing power plant infrastructure between the Unit 3 site and those two nearest residences, including the large natural draft cooling towers, wastewater treatment equipment, and other associated facilities.

17. The addition of the proposed Unit 3 would be compatible with the existing land uses at and near the Site. The new Unit 3 will have very similar operating characteristics

to the existing units, but will use additional air emissions controls. The residential development along the St. Johns River has continued while Units 1 and 2 have operated. The new Unit 3 will be able to co-exist with existing land uses in that the new Unit 3 is not expected to have a significant adverse impact to nearby residential development.

18. When its Comprehensive Plan with FLUM was adopted (after the Siting Board's March 1979 Order Relating to Land Use and Zoning), the County designated the larger parcel in the Industrial Future Land Use category to recognize the existing Units 1 and 2 at the site. Electrical power plants are an allowed use in the Industrial future land use category.

19. Approximately two-thirds of the smaller parcel of the site fronting on the St. Johns River was designated Agricultural II and approximately one-third (the part contiguous to the river) was designated Rural Residential under the County's Comprehensive Plan and FLUM. The existing pump house is located on the Rural Residential part of the parcel. The underground water pipes and electrical duct bank lead from the pump house towards the larger parcel of the Site, which is designated Industrial. The existing pump house and underground water pipes and electrical duct bank are allowed uses in both the Agricultural II and in the Rural Residential future land use districts, as a Type 2 Community Facility.

20. The underground water pipes and electrical duct bank proceed from the smaller parcel to the larger parcel of the Site through a privately-granted easement across property designated Agricultural II on the County's FLUM. The County's Comprehensive Plan does not prohibit such facilities in that land use designation. The lands in the pipeline easement are zoned Agricultural. Such facilities also are not precluded in that zoning district.

21. The installation of the existing underground water pipes and electrical duct bank within the easement was approved by Putnam County at the time of the original site certification proceeding for the Site. In October 1978, the Putnam County Code Administrator stated that the County's zoning for the lands covered by the easement to the St. Johns River did not preclude the use of the easement for the pipeline installation.

22. On January 10, 2006, the Putnam County Commission adopted Ordinance 2006-02, which amended the original PUD zoning approval for the Site. The amended PUD zoning ordinance covers both parcels of the Site. This amended PUD zoning ordinance allows the placement of Unit 3 and its related facilities within both parcels of the Site. The PUD zoning ordinance incorporates a Development Agreement between Putnam County and SECI, which addresses the Unit 3 facilities proposed to be constructed by SECI.

23. As part of the PUD zoning amendments, the Putnam County Board of County Commissioners reviewed SECI's Unit 3 Project for consistency with the County's Comprehensive Plan. The Commission found the Project to be consistent with the County's Comprehensive Plan. More specifically, Ordinance No. 2006-02 found that SECI's proposed amendment to the PUD zoning was "consistent with the Comprehensive Plan," would "not adversely affect . . . orderly development," met "the requirements of the Land Development Code," and "will not be placed in agricultural lands." (SECI Exs. 12B, 13A, and 13B)

24. The Development Agreement incorporated into Ordinance No. 2006-02 acknowledges that the existing pipeline easement "is not a part of the PUD." The Development Agreement clearly differentiated between underground pipelines and other aspects of the Unit 3 Project:

The existing pipeline easement, which is not a part of the PUD, runs across property zoned for agricultural uses and falling [sic] within the Agricultural II future land use category. Neither the County Comprehensive Plan nor the Land Development Code precludes the repair, replacement or addition of underground water pipes necessary to plant operations. The underground pipes, and the pipeline easement, were part of the original certification and any modifications required to accommodate Unit 3 will be reviewed as part of the site certification process.

Subject to site certification under the PPSA, Unit 3 will be constructed primarily

east of, but integrated with, existing Units 1 and 2 such that any new development activity will fall within that portion of Parcel 1 designated under the Industrial future land use category. But for the existing pump house, Parcel 2, which is part of the PUD, will remain undeveloped. Pumps within the existing pump house will be replaced or upgraded and existing underground water pipes may be replaced or upgraded, and new underground pipes may be added, but no new uses or structures are intended for Parcel 2. The pipeline easement - which is not part of the PUD - will remain undeveloped although pipes may be repaired, replaced (or additional pipes installed) underground between Parcels 1 and 2.

Although no new uses or above-ground structures are anticipated on Parcel 2 or the pipeline easement, both are considered to be part of the electrical power plant to be certified under the PPSA and will be reviewed along with Parcel 1 throughout the State site certification process to which the COUNTY shall be a party.

(SECI Ex. 13B, pp. 5-6)

25. Sierra Club participated in the Putnam County January 2006 zoning hearing on the amended PUD zoning for the Site. The Sierra Club did not object to the adoption of the amended PUD zoning ordinance at that hearing. No party has appealed the Putnam County Commission's amended PUD zoning ordinance for SECI's Unit 3 Project. Sierra Club is now bound by the determinations of land use and zoning consistency in these prior proceedings, as well as in the original site certification proceeding.

26. Putnam County entered into a Stipulation with SECI which addresses land use and zoning issues. In the Stipulation, Putnam County acknowledged that the adoption of Putnam County Ordinance 2006-02, which amended the PUD zoning for the Site, and the approval of the Development Agreement referenced in that Ordinance by the Putnam County Board of County Commissioners, both confirm that the Site, including the proposed Unit 3 and the associated facilities, are consistent and in compliance with applicable land use plans and zoning ordinances as required under Section 403.508(2), Florida Statutes.

27. Despite its participation in both the 1979 site certification proceeding and the 2006 re-zoning process, Sierra Club nonetheless takes the position in this case that the pump house and cooling water pipeline are "industrial" facilities which are not consistent with the future land use designations for the lands occupied by those facilities.

28. Putnam County has adopted a definition of "development" that provides in pertinent part:

The following operations or uses shall not be taken for the purposes of this act [the County's land development code] to involve 'development':

(b) Work by any utility and other persons engaged in the distribution or transmission of gas or water, for the purpose of inspecting, repairing, redoing, or constructing on established

rights-of-way any sewers, mains,
pipes, tables, utility tunnels,
power lines, towers, poles, tracks
or the like.

Putnam County's Land Development Code, Article 12, Section 12.01.01.a.2. This definition of "development" also applies to actions "seeking legislative action to amend this Code and the Comprehensive Plan" of Putnam County. Id. The County's definition of "development" therefore excludes the additional cooling water pipeline and duct bank within the established easement containing similar pipelines and duct bank between the principal power plant site and the riverside pump house. No Comprehensive Plan amendments or other zoning approvals would be required for those pipelines and duct banks as they are not "development" subject to the plan or the local land development code.

29. Underground pipelines and electrical duct banks such as those proposed for SECI's Unit 3 project are not typically regulated as a land use. All developed areas have water and sewer pipelines that radiate through different zoning districts and that serve the users that subscribe to such water and sewer service. The practical effect of regulating such facilities as "development" could result in a spider web of land use and zoning classifications running wherever those facilities are placed.

30. Even if it were to be concluded that the underground water pipes and electrical duct banks were "development" subject to Putnam County's Comprehensive Plan, SECI's expert land planner testified without contradiction that they would be considered a Type 2 community facility as defined in the Comprehensive Plan: "Type 2 [Community Facilities and Services] are light infrastructure facilities, including but not limited to, water wells, water tanks, sewage pump stations, electrical substations, and water and wastewater treatment plants with a capacity of less than 500,000 gallons per day." Type 2 community facilities are allowed in all eleven of Putnam County's Future Land Use categories.

31. As indicated, the smaller parcel of the Site is zoned as a PUD that allows the activities proposed. The easement for the underground water pipes and electrical duct banks is zoned for Agriculture zoning. As indicated, use of the easement for the underground facilities has been approved by the County since 1978.

32. Unrebutted testimony demonstrated that there will be no physical changes to the pump house itself, but only replacement of the pump inside with a larger one with more capacity, and that the additional underground water pipe and duct bank will not be visible, as the land will be restored to current conditions. Sierra Club offered no evidence

contradicting Putnam County's interpretation of its own Comprehensive Plan land development regulations; offered no evidence as to how the community could be adversely affected by the continued use of the pump house, with larger pump, and the addition of underground water pipes and duct bank in the existing pipeline easement; and offered no evidence that these facilities for the pumping and conveyance of river water to the plant site constitute "industrial" uses under the land use plans and zoning regulations of Putnam County.

CONCLUSIONS OF LAW

33. This proceeding was conducted in accordance with Section 403.508(2), Florida Statutes. See also § 403.5065, Fla. Stat. The Division of Administrative Hearings, therefore, has jurisdiction of the parties to and the subject matter of this proceeding.

34. In accordance with Chapter 403, Part II, Florida Statutes, and Rule Chapter 62-17, proper public 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 land use hearing.

35. The applicable land use plans and zoning ordinances for SECI's Unit 3 Project and the Site are those adopted by Putnam County. For purposes of the land use hearing, under

Section 403.508(2), Florida Statutes, the applicable "land use plan" is the Future Land Use Element of the Putnam County Comprehensive Plan and the accompanying FLUM. The applicable zoning ordinance for the Project and the Site is contained in the Putnam County Land Development Code. The site-specific amended PUD zoning ordinance for the Site, dated January 10, 2006, also constitutes a zoning regulation of Putnam County that is directly applicable to the Project and the Site.

36. The Siting Board has previously determined that the Site for the Unit 3 Project is consistent and in compliance with the land use plans and zoning ordinances of Putnam County. This conclusion was reached in the Siting Board's March 21, 1979 Order Relating to Land Use and Zoning.

37. In accordance with Section 403.508(2), Florida Statutes (1977), the Siting Board's Order Relating to Land Use and Zoning directed that the "responsible zoning and planning officials are ordered to refrain from hereafter changing such land use plans and zoning ordinances so as to affect the proposed site." As found, Putnam County has not taken any subsequent land use or zoning actions which affect the continued use of the Site for electrical generating facilities.

38. Subsequent to the Siting Board's Final Order Relating to Land Use and Zoning, Putnam County adopted a Comprehensive Plan that conforms to the Siting Board's initial findings and

conclusions on land use and zoning consistency and compliance for the Site. On its FLUM, Putnam County has assigned future land use categories to all of the properties occupied by SECI's facilities, including the electrical generating Units 1 and 2, the pump house and the pipeline easement, that are consistent with the Siting Board's Order Relating to Land Use and Zoning and do not affect the use of those properties for such uses.

39. In January 2006, the Putnam County Board of County Commissioners amended its existing PUD zoning ordinance for the Site to recognize the proposed Unit 3 project, including the proposed cooling water pipeline and duct bank. This action does not affect the site in a manner contrary to the Siting Board's Order Relating to Land Use and Zoning of March 21, 1979.

40. Putnam County's Land Development Code's definition of "development" exempts from that definition "work by any utility and other persons engaged in the distribution or transmission of gas or water for the purpose of inspecting, repairing, renewing or constructing on established rights-of-way any sewers, mains, pipes, cables, utility tunnels, power lines, towers, poles, tracks or the like." That definition applies to both the Comprehensive Plan and the County's Land Development Code. Since the installation of the pipeline is not considered "development," it is not subject to the County's Comprehensive

Plan or to the County's Land Development Code, which includes the County's zoning regulations.

41. The County's amended PUD zoning for the site also addresses the installation of the pipeline and duct bank within that portion of the Site. No evidence was offered that the pipeline within the larger parcel of the site would be located in the areas designated or zoned for agricultural uses. The installation of the pipeline and duct bank in areas designated and zoned for agricultural uses would not be "development" subject to regulation under the County's Comprehensive Plan and Land Development Code since the additional pipeline and duct bank would be within an established utility right-of-way.

42. Even if the pipeline and duct bank were concluded to be "development" subject to the County's Comprehensive Plan and Land Development Code, it would be a Type 2 community facility under the Comprehensive Plan which is allowed in all future land use categories in Putnam County, including lands designated for agricultural uses.

43. Competent substantial evidence received at the hearing demonstrates that the Site and the Unit 3 Project, including the pump house and additional underground water pipe and electrical duct bank, are consistent and in compliance with Putnam County's land use plans and are consistent and in compliance with

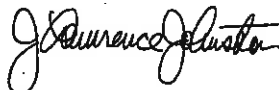
applicable Putnam County zoning ordinances for the site,
including the amended PUD zoning ordinance for the site.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions
of Law, it is

RECOMMENDED that the Siting Board find, pursuant to Section
403.508(2), Florida Statutes, that the site for SECI's Unit 3
and its related facilities, to be located in Putnam County
Florida, as described by the evidence presented at the hearing,
are consistent and in compliance with existing land use plans
and zoning ordinances and site-specific zoning approvals of
Putnam County.

DONE AND ENTERED this 31st day of August, 2006, in
Tallahassee, Leon County, Florida.



J. LAWRENCE JOHNSTON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of August, 2006.

ENDNOTES

- 1/ Except where otherwise indicated, statute references are to the 2005 codification of the Florida Statutes.
- 2/ All rule references are to the current codification of the Florida Administrative Code.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.