SIERRA CLUB
FOUNDED 1892

November 13, 2008

Via hand-delivery

Ms. Erika Durr, Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
Colorado Building
1341 G Street N.W. Suite 600
Washington D.C. 20005

Re: Seminole Electric Cooperative, Inc., PSD Permit Number PSD-FL-375, PSD Appeal Number 08-09

Dear Ms. Durr:

Enclosed for filing is one original of the Motion for Leave to File a Reply to Seminole Electric's Response to Sierra Club's Motion to Hold Proceedings in Abeyance and Sierra Club's Reply in Support of its Motion to Hold Proceedings in Abeyance for the above-referenced PSD Appeal Case. If you have any questions about this filing or if I can be of any further assistance please call me at 415-977-5725.

Sincerely,

Joanne Spalding

Enclosures

cc. Motion for Leave to File a Reply to Seminole Electric's Response to Sierra Club's Motion to Hold Proceedings in Abeyance and Sierra Club's Reply in Support of its Motion to Hold Proceedings in Abeyance

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

In the matter of:)	PSD Appeal No. 08-09
)	
In Re Seminole Electric Cooperative Inc.)	
)	
)	
PSD Permit Number PSD-FL-375)	
)	

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

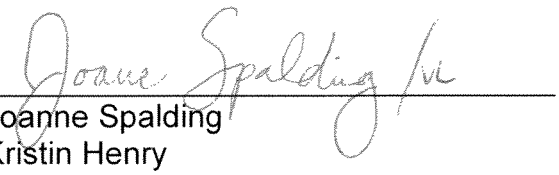
By this motion, Sierra Club requests leave to reply to Seminole Electric Cooperative, Inc.'s ("Seminole") response to Sierra Club's motion to hold proceedings in abeyance. In support of this motion, Sierra Club states:

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

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

Date: November 13, 2008

Respectfully submitted,



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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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In the matter of:	)	PSD Appeal No. 08-09
	)	
In Re Seminole Electric Cooperative Inc.	)	
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	)	

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

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

I. Sierra Club's Appeal is Justiciable

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Conclusion

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

Date: November 13, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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