SIERRA CLUB
FOUNDED 1892

July 30, 2009

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 are originals of Sierra Club's Motion for Leave to File a Reply to EPA Region 4's Brief Regarding Reviewability of Permit and Sierra Club's Reply to EPA Region 4's Brief Regarding Reviewability of Permit 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 /MG

Joanne Spalding

Enclosures

cc. Sierra Club's Motion for Leave to File a Reply to EPA Region 4's Brief Regarding Reviewability of Permit and Sierra Club's Reply to EPA Region 4's Brief Regarding Reviewability of Permit

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

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

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

SIERRA CLUB'S MOTION FOR LEAVE TO FILE A REPLY TO EPA REGION 4's BRIEF REGARDING REVIEWABILITY OF PERMIT

By this motion, Sierra Club requests leave to file a reply to EPA Region 4's Brief Regarding Reviewability of Permit. In support of this motion, Sierra Club states:

1. EPA's brief provides important new perspectives on the reviewability and validity of Seminole's PSD permit.

2. Sierra Club's short reply explores the implications of EPA's arguments and provides the Board with an update on the parallel state court litigation. Sierra Club believes its reply will assist the Board in addressing this procedurally complex case.

Therefore, Sierra Club moves the Board for leave to file the attached reply.

Respectfully submitted,

Joanne Spalding /MA

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

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	)	
	)	

SIERRA CLUB'S REPLY TO EPA REGION 4's BRIEF REGARDING REVIEWABILITY OF PERMIT

EPA Region 4 recognizes that "the Seminole permit must be judicially reviewable by Sierra Club as a matter of federal law because Sierra Club did not waive administrative or judicial review under federal law." Region 4 Br. at 14. Accordingly, the Region concludes that the Seminole permit cannot be valid "unless Florida confirms that it has issued a public notice for this permit under federal law and also ensures that judicial review of FDEP's permitting decision . . . is available to Sierra Club." *Id.* at 28.

Sierra Club agrees that the permit is invalid if judicial review is not available or if public notice was not issued under federal law. While the question of whether Florida courts will provide judicial review is still open, it is undisputed that the public notice was not issued under federal law. To the extent that the Region is suggesting that Florida may cure its failure to follow the required procedures by either recasting its past actions or by reopening and revising portions of an invalid permit, Sierra Club respectfully disagrees and asks this Board not to condone such illusory remedies.

I. FDEP Cannot Fix Its Mistakes by Recharacterizing Its Prior Actions.

The Florida Department of Environmental Protection ("FDEP") inexplicably failed to use – or even mention – then-applicable federal procedures to process Seminole's draft PSD permit. FDEP admits that it "did not ever purport to process the permit pursuant to any federal rule." Region 4 Ex. 2 at 15. According to FDEP, "[t]he Seminole permit was processed pursuant to DEP permitting rules [in the] Florida Administrative Code [and] [p]ublic notice was provided pursuant to [the] Florida Administrative Code." *Id.* at 32. Indeed, FDEP's state court briefing repeatedly and emphatically denies that federal procedures ever applied to the Seminole permit. *See, e.g.,* Ex. 1 at 12-19. These statements are consistent with the position FDEP took shortly after it issued the draft permit, when it advised Sierra Club's counsel that the only way to seek review of the permit was to submit a petition for a state administrative hearing.[1]

Region 4 recognizes that "[t]he public notice for the Seminole PSD permit was flawed," noting that if FDEP did not process the permit under federal law, "no permitting authority would have issued a public notice for the Seminole permit satisfying the requirements of federal law." Region 4 Br. at 23. The Region seems to suggest, however, that FDEP can rectify this failure by now claiming that it was following federal procedures. Region 4 Br. at 23, 26. But FDEP cannot simply recant its position and profess that it was following federal law all along.

[1] Telephone conversation between Sierra Club attorney Joanne Spalding and FDEP staff Alvaro Linero, October 6, 2006. (This conversation occurred after the close of the fourteen-day period for requesting a state administrative hearing.)

"The short – and sufficient – answer" to that position is that "the courts may not accept appellate counsel's *post hoc* rationalizations for agency action." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 50 (1983). FDEP must be judged "on the basis articulated by the agency itself" at the time that it issued the draft permit. *See id.* (quoting *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 196 (1947)); *see also Sacks v. Office of Foreign Asset Control*, 466 F.3d 764, 780 (9th Cir. 2006) (observing that an agency's newly-adopted position "tells us nothing of the agency's interpretation during [the period when it acted]"). FDEP issued an illegal public notice. It cannot fix its mistake by recharacterizing it in a legal brief.

II. FDEP's Permit Revision Process Cannot Rescue the Permit

Alternatively, Region 4 noted that FDEP recently issued a public notice for "'a minor revision of [Seminole's] original air construction permit,'" and suggests that "[t]his type of notice" could save the Seminole PSD permit by opening it to review. EPA Br. at 27 n. 10 (quoting Ex. 1 to Seminole's Motion to Dismiss Sierra Club's Appeal as Moot (EAB Docket Item #34.3) at 1). But FDEP cannot validly revise a permit that was illegally issued in the first place, and review of minor revisions does not substitute for review of the underlying permit. Instead, to properly restore Sierra Club's right of review, FDEP would have to re-issue and re-notice Seminole's PSD permit.

If FDEP were to do so, it would have to update its BACT determinations to reflect the latest control technologies and seek comments on those determinations. *See* Fla. Admin. Code 62-212.400 §§ (10) & (11) (requirements

for BACT and public notice). FDEP did not fulfill these requirements in the revision process Region 4 mentions. That revision cannot substitute for re-issuing the permit.

BACT analyses "should use the *most recent* regulatory decisions and performance data for identifying the emissions performance level(s) to be evaluated in all cases." *In re Steel Dynamics, Inc.*, 9 E.A.D. 740, 760 (EAB 2001) (quoting the NSR Manual at B.23-.24) (emphasis added). FDEP did not engage in any new "preconstruction review . . . for the Prevention of Significant Deterioration," leaving its "original BACT determinations . . . unchanged." Ex. 1 to Seminole's Motion to Dismiss Sierra Club's Appeal as Moot (EAB Docket Item #34.3) at 1. Those determinations, deeply flawed at the outset, are now three years old. They therefore ignore recent regulatory changes and they fail entirely to address fine particulate matter. A new permit could not rely on such stale determinations.

Nor does the revision's public notice comply with Florida notice requirements for a new PSD permit. The public had no indication that, by commenting on these minor revisions, it could correct the underlying permit. The notice also did not provide the information commenters needed to understand the entire project's impacts. Florida law requires PSD permit notices to state, among other things, "the nature and location of the proposed facility . . ., whether BACT . . . has been determined, [and] the degree of PSD increment consumption expected, if applicable." Fla. Admin. Code 62-210.350(2)(a)(3). Reflecting this requirement, the original public notice quantified Seminole's predicted emissions,

explained how the plant would function, and provided detailed information on the impacts FDEP anticipated. *See* Ex. A to Seminole's Motion to Intervene (EAB Docket # 24.1). The revision's public notice does not contain this detailed information, instead stating flatly that "PSD preconstruction review is not triggered." (Ex. 1 to Seminole's Motion to Dismiss Sierra Club's Appeal as Moot (EAB Docket Item #34.3) at 1).

In short, the revision process cannot cure the permit because it does not set out to correct any of the permit's flaws. FDEP stands by its original decisions, inviting no critiques and offering little information to the public. The possibility of engaging in this truncated process does not restore Sierra Club's right of review, nor preserve Seminole's permit.

III. Conclusion

FDEP has erred so thoroughly that the only way to fix its mistakes is to start over. Florida courts may yet order it do so; oral argument in Sierra Club's state court appeal is set for this September. *See* Ex. 2. In the meantime, Sierra Club respectfully urges this Board to recognize that FDEP's flawed process resulted in an invalid permit and to refuse to condone post-hoc rationalizations or half measures to save this defective permit.

Respectfully submitted,

Joanne Spalding /mo

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Sierra Club's Motion for Leave to File a Reply to EPA Region 4's Brief Regarding Reviewability of Permit and Sierra Club's Reply to EPA Region 4's Brief Regarding Reviewability of Permit were served by United States First Class Mail on the following persons this 30th of July, 2009:

Brian L. Doster Air and Radiation Law Office Office of General Counsel Environmental Protection Agency 1200 Pennsylvania Ave. N.W. Washington, DC 20460	Patricia E. Comer Senior Assistant General Counsel Florida Bar No. 224146 Florida Department of Environmental Protection 3900 Commonwealth Boulevard-MS 35 Tallahassee, FL 32399-3000
Trina Vielhauer Florida Department of Environmental Protection Bureau of Air Regulation 2600 Blair Stone Road, MS #5505 Tallahassee, FL 32399-2400	Vera Kornylak Mary J. Wilkes U.S. EPA, Region 4 61 Forsyth St., S.W. Atlanta, GA 30303-8960
James R. Frauen, Project Director Seminole Electric Cooperative, Inc. 1613 North Dale Mabry Highway Tampa, FL 33618	David G. Guest P.O. Box 1329 Tallahassee, FL 32302
James S. Alves David W. Childs Hopping Green & Sams, P.A. 119 South Monroe Street, Suite 300 Tallahassee, FL 32301	

Joanne Spalding /MG

Joanne Spalding
Sierra Club
85 Second Street, Second Floor
San Francisco, CA 94105