BEFORE THE ADMINISTRATOR

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of the Okeelanta Sugar Mill and
Refinery/Okeelanta Cogeneration Plant

Permit No. 0990005–040–AV Petition No. V–2015–_____

Issued by the Florida Department of
Environmental Protection on May 12, 2015

PETITION REQUESTING THE ADMINISTRATOR TO OBJECT TO THE TITLE V OPERATING PERMIT RENEWAL FOR THE OKEELANTA SUGAR MILL AND REFINERY/OKEELANTA COGENERATION PLANT

Bradley Marshall
David Guest
Earthjustice
111 S. Martin Luther King Jr. Blvd.
Tallahassee, Florida 32301
dguest@earthjustice.org
bmarshall@earthjustice.org
Counsel for Petitioner Sierra Club

I. INTRODUCTION

Pursuant to 42 U.S.C. § 7661d(b)(2) and 40 C.F.R. § 70.8(d), the Sierra Club petitions the Administrator of the U.S. Environmental Protection Agency ("EPA") to object to the Title V air operation permit renewal for the Okeelanta Corporation's Sugar Mill and Refinery /Cogeneration Plant ("Okeelanta Facility"), which was issued by the Florida Department of Environmental Protection ("DEP") on May 12, 2015.[1] The final permit is not in compliance with the requirements of the Clean Air Act ("Act") and its implementing regulations for two reasons: first, the Okeelanta Corporation's application did not include all required information and was thus incomplete; second, as a result of Okeelanta's incomplete application, the permit itself does not contain all information required under the Act and is defective.

II. PROCEDURAL BACKGROUND

A. Permit Renewal History

The Okeelanta Corporation submitted an application for a renewal of the Title V air operation permit for the Okeelanta Facility in December 2014. *See* Attachment 1, Statement of Basis. DEP issued a draft/proposed renewal of the Title V permit for the Okeelanta Facility on February 26, 2015,[2] notice of which was published by Okeelanta on March 15, 2015. *See* Attachment 1, Final Determination. Pursuant to section 403.0872(4) of the Florida Statutes, DEP was required "accept public comment with respect to" the permit for 30 days following publication of notice of the permit's renewal; Earthjustice (on behalf of the Sierra Club)

[1] The final permit documents are located in Attachment 1. All attachments are provided on an included compact disc.

[2] The draft/proposed permit documents are located in Attachment 2.

submitted comments to DEP within the statutory time period.[3] The main thrust of these comments was that Okeelanta was required to list its pre-harvest sugarcane burning operations as hazardous air pollutant ("HAP") emissions units in its Title V permit renewal application and that DEP was required to list the same operations in the Okeelanta Facility's Title V permit. *See* Attachment 3. The comments also discussed at some length the adverse public health consequences of pre-harvest sugarcane burning and the economic feasibility of more environment-friendly alternatives. *See id.*

DEP issued a final permit renewal package on May 12, 2015. *See* Attachment 1. The final permit was substantially the same as the draft/proposed permit, with only "minor administrative changes." *See* Attachment 1, Final Determination. DEP rejected the Sierra Club's argument that the permit needed to include HAP emissions from Okeelanta's cane burning operations, and did not address the argument that the permit application needed to include such emissions in order to be considered complete. *See id.* The Sierra Club—through Earthjustice—now timely petitions the Administrator to object to the renewal of the Okeelanta Facility's Title V permit.[4]

B. EPA's Duty to Object

EPA has a duty to object to a Title V permit if a petitioner can demonstrate that "the permit is not in compliance with the requirements of" the Clean Air Act or its implementing regulations. 42 U.S.C. § 7661d(b)(2); *Sierra Club v. Johnson*, 436 F.3d 1269, 1280 (11th Cir. 2006) (explaining that EPA's "duty to object extends to the implementing regulations" of the Clean Air Act). This duty to object extends to both defects appearing on the face of a permit and defects in the procedures employed by a permitting agency in issuing a permit. *See Johnson*, 436

[3] The Sierra Club's comments are included in Attachment 3.

[4] The 60-day window within which to bring this petition ends on July 28, 2015. *See Florida Proposed Title V Permits*, EPA.GOV, http://www.epa.gov/region4/air/permits/florida.htm (July 8, 2015).

F.3d at 1279-80 (state permitting agency's failure to set up mailing list to notify public of comment period required EPA to object to permit *even though* petitioner was aware of comment period). Once these defects are demonstrated, EPA does not possess discretion; it must object. "When it comes to the Title V permitting process, EPA is not a board of pardons. Its duty is to enforce requirements, not to grant absolution to state agencies that have violated them." *Id.* at 1280.

III. GROUNDS FOR PETITION

A. Okeelanta's Permit Application Was Deficient Because It Failed to Include Any Mention of the Burning of Its Sugarcane Fields

1. Federal and State Regulations Require Title V Permit Applicants to Include Information On All Relevant Emissions Units at Their Major Sources of Hazardous Air Pollutants.

Under both federal and state law, applicants for Title V permits for major sources of HAPs—including applicants for renewals of Title V permits—must include information in their applications about *all* emissions units at their facilities, subject to narrow exceptions not applicable here. Federal regulations require that applications include information about "[a]ll emissions of pollutants for which the source is major," 40 C.F.R. § 70.5(c)(3)(i) (2014); an "[i]dentification and description of all points of emissions described in [§ 70.5(c)(3)(i)] in sufficient detail to establish the basis for fees and applicability of requirements of the [CAA]," *id.* § 70.5(c)(3)(ii); and information about "[f]uels, fuel use, raw materials, production rates, and operating schedules . . . to the extent . . . needed to determine or regulate emissions," *id.* § 70.5(c)(3)(iv). Under Florida's implementation of the Title V program, applications must "include information sufficient to determine all applicable requirements for the Title V source and each emissions unit." Fla. Admin. Code. R. 62-213.420(3). Specifically, a renewal

application requires an identification of those emissions units expected to emit more than 2,500 pounds per year of combined HAPs or 1,000 pounds per year of a single HAP. *Id.* R. 62-213.420(3)(c)4. Such emissions units must be identified even if they are not subject to any unit-specific applicable emissions control requirements. *See id.* R. 62-213.420(3).

While federal and state regulations do allow applicants to provide less information about so-called insignificant emissions units and activities at their facilities, there are strict procedures in place for designating emissions units as insignificant. The relevant Florida regulations (approved by EPA) require permit applications to include "[a] list of emissions units or activities for which a determination of insignificance is requested . . . because of size or production rate and any information needed to demonstrate that the units or activities qualify as insignificant." Fla. Admin. Code R. 62-213.420(3)(n). (Federal regulations require states implementing the Title V program to collect such information. *See* 40 C.F.R. § 70.5(c) (2014).) If this information is not included in a permit renewal application, the application is not complete and the permit cannot be renewed until the information is supplied. *See id.* § 70.7(a)(1); *see also* Fla. Admin. Code R. 62-213.430(1).

Simply put, both federal and Florida law require the owner or operator of a major source of HAPs to include emissions information on *all* emissions units or activities at their facility that emit HAPs for which the facility is major. Even if those emissions units or activities turn out to be insignificant—and that is not the case here[5]—information about them must be submitted along with the application so that their insignificance can be assessed by the permitting agency. *See* Fla. Admin. Code R. 62-213.420(6). When those emissions units or activities are clearly not

[5] The amount of HAPs emitted by Okeelanta's cane burning activities renders those activities "significant" under Florida law. *See infra* Table 1 (estimating HAP emissions from Okeelanta's sugarcane burning activities); Fla. Admin. Code R. 62-213.420(6)(b)(3) (setting out emissions limits for "insignificant" activities).

insignificant, as is the case here, information about them must be included in the permit application. *See* 40 C.F.R. § 70.5(c) (2014).

2. Okeelanta's Fields of Burning Sugarcane Constitute an Emissions Unit or Activity.

Clean Air Act regulations implementing Title V define a "stationary source" as "any building, structure, facility, or installation that emits or may emit any" listed HAP, and an emissions unit as "any part or activity of a stationary source that emits or has the potential to emit any" listed HAP. 40 C.F.R. § 70.2 (2014). EPA has rejected the position that this broad definition of stationary source excludes agricultural operations. *See Ass'n of Irritated Residents v. Fred Schakel Dairy*, 61 Env't Rep. Cas. (BNA) 1801 (E.D. Cal. Dec. 2, 2005) (noting, in a case regarding barns and manure lagoons for cattle that "it is the EPA's position that the CAA does not exempt major stationary agriculture sources"). Moreover, a stationary source does not require a smokestack, either literally or figuratively: EPA regulates municipal landfills as stationary sources, *see* 40 C.F.R. § 60.30c *et seq.* (2014), and concentrated animal feeding operations—whose emissions come in large part from animal waste found in open lagoons and ponds—"plainly fit the definition of stationary source[s]," according to EPA. 67 Fed. Reg. 63,551, 63,556-57 (Oct. 15, 2002). Sugarcane fields thus clearly comprise a stationary source or stationary sources of hazardous air pollutants, and the burning of those fields is an activity or part of that source that emits HAPs. *See* Attachment 3 (discussing at length the various HAPs emitted by the burning of sugarcane); Attachment 4 (containing the results of public records requests from the Florida Forest Service detailing requests for burning on Okeelanta lands). Okeelanta's burning sugarcane fields are thus an emissions unit or emissions units within the meaning of the Clean Air Act.

3. Okeelanta's Cane Fields Are Part of the Same Facility as Its Mill, Refinery, and Cogeneration Plant, and Together These Units Form a Single Major Source of Hazardous Air Pollutants.

Okeelanta's cane burning operations need only be included in the permit renewal application for the Okeelanta Facility if those operations are part of the same "major source" of HAPs as the Okeelanta Facility itself.[6] *See* 40 C.F.R. § 70.3(a)(1) (2014). In order for this to be the case, two conditions need to be satisfied: first, the cane fields and the Okeelanta Facility must be under common control; and second, the cane fields and the Okeelanta Facility must be "located on one or more contiguous or adjacent properties." *Nat'l Mining Ass'n v. EPA*, 59 F.3d 1351, 1355 (D.C. Cir. 1995). If these conditions exist, then HAP emissions from the Okeelanta Facility and the burning of sugarcane fields must be aggregated together, and Okeelanta's permit renewal application must include the burning cane fields as emissions units.[7]

Emissions units or stationary sources must be under "common control" in order to be aggregated for HAP purposes. "[P]roperties that are owned, leased, or operated by the same entity, parent entity, subsidiary, or any combination thereof" are considered to be under common

[6] Under applicable Florida law, a "Title V Source" includes "[a] facility containing an emissions unit, or any group of emissions units, . . . that emits or has the potential to emit, in the aggregate, 10 tons per year or more of any one [HAP] . . . or 25 tons per year or more of any combination of HAPs." Fla. Admin. Code R 62-210.200(173). An "emissions unit," in turn, is defined broadly as "[a]ny part or activity of a facility that emits or has the potential to emit any air pollutant," *id.* R. 62-210.200(113), while a "facility" is defined as "[a]ll of the emissions units which are located on one or more contiguous or adjacent properties, and which are under the control of the same person (or persons under common control)," *id.* R. 62-210.200(121). The fields in the EAA and surrounding areas from which Okeelanta obtains its sugarcane, together with the Okeelanta Facility, clearly meet the definition of a "Title V Source" of HAPs under Florida law.

[7] There is arguably an inconsistency between EPA's definitions of "major source" for purposes of the HAP program and for purposes of Title V. *See* 59 Fed. Reg. 44,460, 44,514 (Aug. 29, 1994) (discussing the fact that the 40 C.F.R. Part 63 definition of "major source" is not the same as the 40 C.F.R. Part 70 definition). However, if the Okeelanta Facility and Okeelanta's sugarcane fields comprise a "major source" under Part 63 and 42 U.S.C. § 7412(a), they *must* also be considered a "major source" of HAPs for Part 70 purposes. The plain text of § 7412(a) does not leave room for EPA to exclude some major sources of HAPs from Title V requirements, as even EPA appears to recognize. *See* 59 Fed. Reg. at 44,514 (stating that "there is no basis for a different definition" of major sources of HAPs under Title V and Part 63 regulations). It is worth noting in this regard that the sugar mill and refinery and the cogeneration plant are considered part of the same facility despite their different SIC codes. *See* Attachment 1.

control. *See, e.g.*, 60 Fed. Reg. 43,244, 43,265 (Aug. 18, 1995); 77 Fed. Reg. 22,848, 22,939 (April 17, 2012). Even when properties do not fit this description, however, common control exists when one entity has the "power to direct or cause the direction of the management and policies" of all relevant entities having ostensible property or source ownership, "whether through the ownership of voting shares, contract, or otherwise." *See* 45 Fed. Reg. 59,874, 59,878 (Sept. 11, 1980) (quoting 17 C.F.R. 210.1-02(g) (1980)).

In this case, Okeelanta exercises effective control over some 180,000 acres of sugarcane fields in and around the EAA. This effective control is proven by its outright ownership of land parcels in the EAA, ownership by one of its affiliates, or control as evidenced by permitting documents, most likely through lease agreements. These permitting documents, submitted by Okeelanta Corporation or its affiliates, are contained in Attachment 5. Attachment 5 also includes the annual reports for the companies affiliated with the Okeelanta Corporation. These companies share substantially the same board of directors, registered agent, and principal place of business as Okeelanta Corporation. Together, these documents demonstrate that the Okeelanta Corporation—which operates the Okeelanta Facility—also controls and operates the fields listed in Attachment 5.

In order for HAP emissions units or stationary sources to be aggregated together into a single source of HAPs, they must also be "located on one or more contiguous or adjacent properties" or "located within a contiguous area." 40 C.F.R. § 70.2 (2014). This does not mean that each property must be literally touching some other property in the aggregation; rather, two properties or sites may be aggregated if they are near one another. *See* 59 Fed. Reg. 12,408, 12,412 (Mar. 16, 1994). This interpretation of "contiguous or adjacent" takes into account the fact that railroads, highways, and similar features routinely cut across major sources, and that to

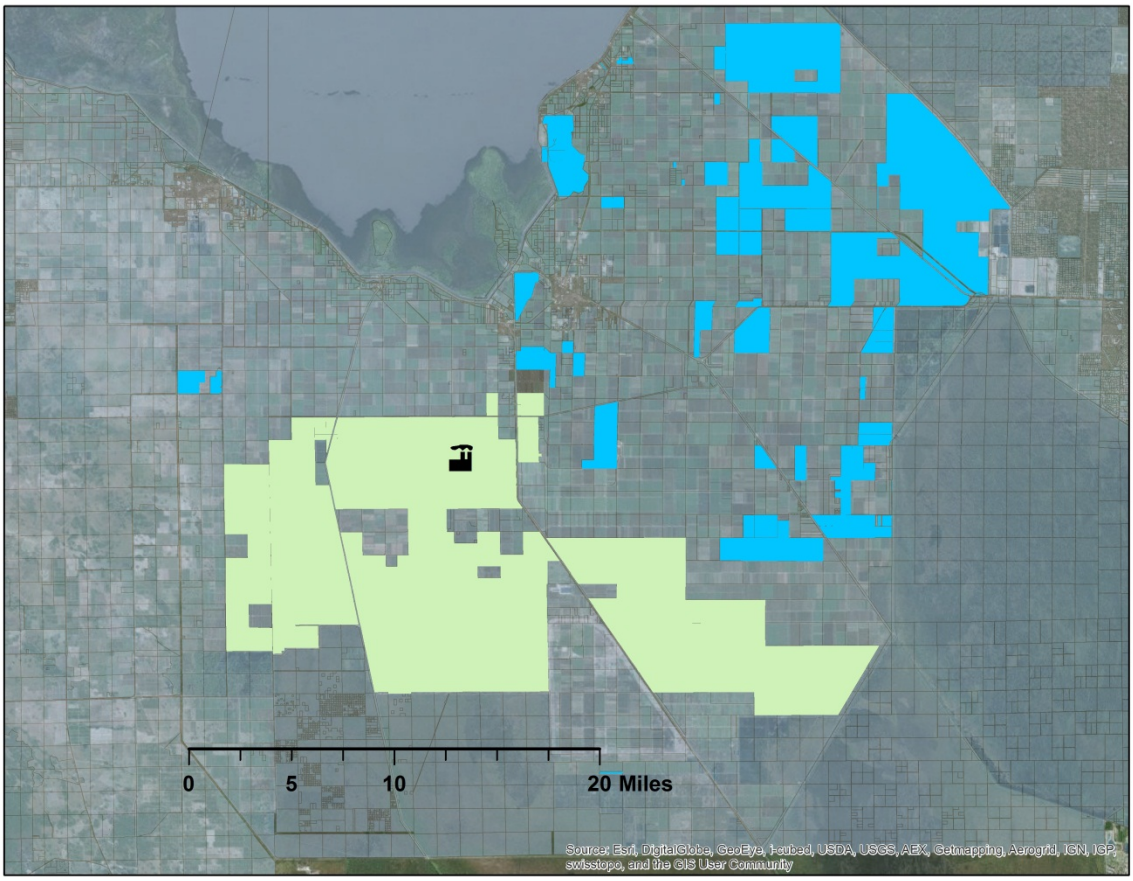
claim that such features should split major sources into multiple smaller sources "would be an artificial distinction, and . . . is contrary to the intent of the statutory definition of major source." *Id.*

In determining whether two sources or properties are sufficiently close to one another for aggregation purposes, EPA until recently considered the functional interrelatedness of the sources. *See Summit Petrol. Corp. v. EPA*, 690 F.3d 733, 739 (6th Cir. 2012). That is, EPA looked to the "nature of the relationship between the facilities" as well as their physical distance from each other in determining whether they could be aggregated together. *Id.* at 740. Pursuant to the Sixth Circuit Court of Appeals's decision in *Summit Petroleum*, EPA is currently obligated to consider only physical proximity in determining whether stationary sources are "adjacent" for purposes of Title V aggregation. *See Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, 752 F.3d 999, 1010 (D.C. Cir. 2014).

Summit Petroleum, however, has limited applicability to the question of whether Okeelanta's cane fields are "located on one or more contiguous or adjacent properties" or "located within a contiguous area" with its mill, refinery, and cogeneration plant. First, *Summit* dealt with the term "adjacent," not the term "contiguous." *Summit Petroleum*, 690 F.3d at 741. There is little doubt that emissions from sources located on contiguous properties—that is, properties that border one another—can be aggregated. Second, *Summit* does not foreclose the grouping of emissions from sources located on neighboring—but not contiguous—properties, but merely disallows the consideration of functional interrelatedness when conducting the adjacency analysis. *Id.* at 741-43. Under *Summit*, two sources may still be aggregated even if the properties on which they sit are not abutting so long as those properties are physically close.

It appears that the majority of Okeelanta's cane fields in the EAA—including those located on land leased and operated by Okeelanta—comprise a single area adjacent to the Okeelanta Facility. These fields are shown in light green in Figure 1 and listed in Attachment 5. The HAP emissions from these properties can be aggregated together with the emissions from the Okeelanta Facility because these properties form a block; that is, the Okeelanta Facility could be reached from each property in this block by only traversing other properties in the block and small gaps between those properties.

FIGURE 1: Map of Okeelanta Lands in the EAA



The remainder of the Okeelanta lands (shown in blue in Figure 1 and listed in Attachment 5) should also be included in Okeelanta's Title V permit application as part of a single HAP-emitting major source. Although these properties are not as close to the core of Okeelanta's operation as the properties/sources discussed above, they are nonetheless sufficiently physically proximate to that core for aggregation purposes.[8]

While including Okeelanta's sugarcane fields as part of the Okeelanta Facility would not change the "major source" status of the Facility—it is already a major source of HAPs, *see* Attachment 1, Final Permit—it is worth pointing out that the fields are likely a much larger source of HAPs than the mill, refinery, and cogeneration plant combined. Table 1 shows low, medium, and high estimates for the total amount of HAPs emitted annually by Okeelanta's pre-harvest burning of sugarcane.[9] Okeelanta's cane burning operations are in all probability emitting over 1000 tons of HAPs into the atmosphere each year, which is likely more than the mill, refinery, and cogeneration plant combined.

TABLE 1: Estimated Yearly HAP Emissions from Okeelanta Cane Field Burning

	Low	**Medium**	**High**
Burns Near Mill (blue in Figure 1)	122 tons/year	709 tons/year	2751 tons/year
All Burns (blue and green in Figure 1)	181 tons/year	1051 tons/year	4077 tons/year

[8] It should be noted that the Sierra Club and Earthjustice have obtained and collated the information about Okeelanta's control of lands in the EAA—and about burns conducted on those lands—through a laborious process of public records requests and data processing. Such should not be the job of the public, nor of the permitting agency, but of the permit *applicant*, the entity in the best position to obtain accurate information about its emissions and properties. This is precisely why EPA must object to this permit—to compel the Florida DEP to compel Okeelanta to submit information about its sugarcane fields and the HAP emissions from those fields.

[9] The methodology used to compute these estimates is discussed in Attachment 6.

Because Okeelanta operates or controls a large number of fields on which it burns sugarcane resulting in the release of HAPs, and because those fields are "located on one or more contiguous or adjacent properties" or "located []in a contiguous area" with the Okeelanta Facility, the entire operation—mill, refinery, cogeneration plant, and burning sugarcane fields—comprises a major source of HAPs and thus a major source under Title V.

4. Okeelanta Was Required to List Its Cane Fields as Emissions Units in Its Permit Renewal Application

In its Final Determination, DEP did not actually dispute Sierra Club's contentions that Okeelanta's cane fields constitute emissions units or that they form a single major source of HAPs together with the company's mill, refinery, and cogeneration plant. Instead, DEP stated that there was "no requirement to include HAP emissions in the Title V permit for the broadcast burning of sugarcane fields [because] such activity is not a source category regulated under 42 U.S.C. § 7412(c)." Attachment 1, Final Determination. DEP's reasoning evinces a surprising misunderstanding of the Clean Air Act and its implementing regulations. Simply put, the fact that certain emissions units comprising part of a major source of HAPs are not subject to emissions controls and/or do not belong to source categories regulated under 42 U.S.C. § 7412(c) does not excuse the operator of that major source from providing information about those emissions units in an application for a Title V permit. *See supra* Part III.A.1. While it might be the case that a source comprised entirely of such units—or even a source whose "major source" status was dependent upon the inclusion of emissions from such units—would be exempt from seeking a Title V permit at all under a "no empty permits" theory, *see* 75 Fed. Reg. 31,514, 31,566 (June 3, 2010), that is not the case here: the Okeelanta Facility already has to obtain a Title V permit, and forcing it to list all of its emissions units in its application does not amount to an empty exercise in administrative fussiness. Rather, forcing Okeelanta to account for *all* of its

emissions at the Okeelanta Facility furthers Title V's purpose of "strengthen[ing] EPA's ability to implement the [Clean Air] Act and enhance air quality planning and control . . . by providing the basis for better emission inventories," 57 Fed. Reg. 32,250, 32,251 (July 21, 1992).

5. EPA Must Object to the Permit Because Okeelanta's Application Was Incomplete

As discussed above, Okeelanta's application for a renewal of its Title V permit was incomplete because it lacked any mention of its sugarcane field burning operations. Because a permit renewal may be issued only upon receipt of a complete application, 40 C.F.R. § 70.7(a)(1)(i) (2014), DEP's issuance of a permit renewal to Okeelanta was procedurally defective. EPA must therefore object to the issuance of the permit and require DEP to obtain from Okeelanta information about its pre-harvest burning of sugarcane.

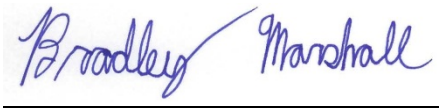
B. The Title V Permit Issued by DEP Is Deficient Because It Fails to Include Okeelanta's Cane Fields as Emissions Units

As discussed *supra* Part III.A, Okeelanta's application for a Title V permit renewal for the Okeelanta Facility was incomplete, and DEP's failure to rectify that error renders the permit defective. However, even if Okeelanta had submitted information about its burning of cane fields, the permit would be defective on its face for failing to include those emissions and for failing to include any requirements applicable to those emissions. Given the incompleteness of Okeelanta's application—the omission of activities whose HAP emissions dwarf those of the sugar mill, refinery, and cogeneration plant—it would be shocking if the resultant permit itself were not lacking essential features required under 40 C.F.R. § 70.6.

IV. CONCLUSION

To impose the burdens of Title V on Okeelanta's sugar mill, refinery, and cogeneration plant while completely exempting its sugarcane burning operations from any scrutiny whatsoever makes no sense, does not serve the purposes of Title V, and runs contrary to the Clean Air Act and its implementing regulations. Nonetheless, this is what DEP has done; EPA has a duty to see that DEP fixes its mistake.

Respectfully submitted this 27th day of July, 2015.



Bradley Marshall
David Guest
Earthjustice
111 S. Martin Luther King Jr. Blvd.
Tallahassee, Florida 32301
dguest@earthjustice.org
bmarshall@earthjustice.org
Counsel for Petitioner Sierra Club

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing petition was served upon the following persons via overnight federal express with attachments provided electronically in PDF format in an enclosed compact-disc, and via electronic mail without attachments:

Administrator Gina McCarthy
U.S. Environmental Protection Agency
Mail Code 1101A
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
McCarthy.Gina@epa.gov

Regional Administrator Heather McTeer Toney
U.S. Environmental Protection Agency, Region 4
61 Forsyth Street, S.W.
Atlanta, GA 30303-8960
McTeerToney.Heather@epa.gov

David Read
Florida Department of Environmental Protection
Division of Air Resource Management
2600 Blair Stone Road MS 5500
Tallahassee, FL 32399-2400
David.Read@dep.state.fl.us

And served upon the following person via overnight federal express with attachments provided electronically in PDF format in an enclosed compact-disc:

Mr. Jose Gonzalez
Okeelanta Corporation
8001 U.S. Highway 27 South
South Bay, FL 33493

And served via electronic mail upon the following persons, without attachments:

Vera Kornylak
Kornylak.Vera@epa.gov

Ana Oquendo-Vazquez
Oquendo.Ana@epa.gov

Keri Powell
Powell.Keri@epa.gov

Bradley Marshall, Attorney