IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

FRIENDS OF THE CHATTAHOOCHEE, INC. and SIERRA CLUB, Petitioners, v. DR. CAROL COUCH, DIRECTOR, ENVIRONMENTAL PROTECTION DIVISION, GEORGIA DEPARTMENT OF NATURAL RESOURCES Respondent, and LONGLEAF ENERGY ASSOCIATES, LLC, Respondent-Intervenor.	)	Docket No. 2008CV146398

PETITIONERS' BRIEF IN SUPPORT OF PETITION FOR JUDICIAL REVIEW

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INTRODUCTION

Petitioners appeal a permit that would allow the construction of a massive new source of air pollution, the first coal-fired power plant proposed for Georgia in over twenty years. The plant, known as the Longleaf Energy Station ("Longleaf") would, if built, be located in Early County, Georgia and annually emit 8 to 9 million tons of carbon dioxide ("CO_2"); thousands of tons of sulfur dioxide ("SO_2"); nitrogen oxides ("NO_x"); coarse particulate matter ("PM_{10}"); fine particulate matter ("$PM_{2.5}$"); sulfuric acid mist; and a number of other hazardous air pollutants, including mercury. These pollutants are known to cause many grave health and environmental impacts. For example:

SO_2 interacts with water (H_2O) to create sulphur based oxide acids. It is "'[a] highly reactive colorless gas smelling like rotten eggs' that 'at elevated concentrations in the ambient air . . . directly impairs human health.'" *LaFleur v. Whitman*, 300 F.3d 256, 270 (2nd Cir. 2002)(quoting *American Lung Ass'n v. EPA*, 134 F.3d 388, 389 (D.C. Cir. 1998). SO_2 is particularly dangerous to asthmatics, and it causes acid rain and degrades visibility. 61 Fed. Reg. 25,566 (May 22, 1996).

Nitrogen oxides ("NOx") are a key precursor to smog. In combination with water, NOx also form nitrogen based oxide acids. Furthermore, forms of NOx have long been linked to an increase of acute respiratory illness in young children and diminished pulmonary function changes in school-age children. 50 Fed. Reg. 25,532 (June 19, 1985).

Particulate matter, and especially fine particulate matter ($PM_{2.5}$) is associated with, among other things, premature death and reduced mortality; respiratory and cardiovascular disease; changes in lung function and increased respiratory symptoms;

changes to lung tissues and structure; and altered respiratory defense mechanisms. 62 Fed. Reg. 38,652, 38,656 (July 18, 1997). Particulate matter also contributes to the formation of harmful low-level ozone and diminished visibility. 62 Fed. Reg. 38, 679 (July 18, 1997).

CO_2: Science has established a connection between the "well-documented rise in global temperatures" and "a significant increase in the concentration of carbon dioxide in the atmosphere," as the Supreme Court noted last year when it held illegal certain actions, and inaction, of the U.S. Environmental Protection Agency (EPA). *Massachusetts v. EPA*, 127 S. Ct. 1438, 1446 (2007).[1] While some of the details of the impact of CO_2-caused global warming remain the subject of scientific discussion, the tremendous impact of global warming on life as we know it is no longer subject to such debate, even by the most ardent industry public relations champions. As the Supreme Court held in *Massachusetts v. EPA*, the undisputed facts are such that carbon dioxide must be deemed an "air pollutant" under the Clean Air Act. *Id*. at 1460-62. "[G]reenhouse gases fit well within the Clean Air Act's [broad] definition of 'air pollutant.'" *Id*. at 1462.

As was demonstrated in the proceeding below, the decision of the state Environmental Protection Division (EPD) to permit the plant was flawed because of a number of profound deficiencies in both the permit and the permitting process. The decision of the Administrative Law Judge (ALJ) from the Georgia Office of State

[1] The Court also noted that, while EPA policies had changed for the worse under the current President Bush – as politics replaced science – the "first President Bush [in 1992] . . . signed the United Nations Framework Convention on Climate Change (UNFCCC) . . . to reduce atmospheric concentrations of carbon dioxide and other greenhouse gases for the purpose of 'prevent[ing] dangerous [human-induced] interference with the [Earth's] climate system.'" *Id.* at 1448.

Administrative Hearings (OSAH) upholding the permit – which is the decision now before this Court – is equally flawed.

At the outset, the ALJ effectively abdicated the legal responsibility assigned to OSAH in this case by refusing to examine the evidence before it *de novo*. (*See* Final Decision, OSAH Docket No. 121 (Box 2)). Rather, the ALJ deferred to the factual assertions and conclusions of EPD, contrary to the legal standards that should have governed the proceeding. It was only through this misplaced, improperly deferential approach that the ALJ could allow the permit to issue, given the long list of deficiencies in both the permit and the process.

In addition to the ALJ's erroneous review of the facts and EPD's permit decision, the ALJ committed a series of erroneous rulings on motion for summary determination. First, the ALJ erred as a matter of law by improperly allowing the applicant/permittee and EPD to perform *no* assessment at all of the *fine* particulate matter the plant would emit, notwithstanding the known health hazards of fine particulate matter.[2] (*See* Memorandum Opinion and Order on Motion for Summary Determination, OSAH Docket No. 119 (Box 2)). Not only was there no evaluation at all by the permittee or EPD that was *specific* to fine particulate matter, the Petitioners' expert conducted an analysis of fine particular matter and that evidence stands uncontradicted. (Longleaf Energy Associates, LLC's Motion for Partial Summary Judgment at 18, OSAH Docket No. 15, (Box 1)); (Petitioners' Collective Response to the Motions for Summary Determination

[2] Fine particulate matter refers to material emitted into the atmosphere that is smaller – *i.e.*, "finer" – than 2.5 microns (a micron is one thousandth of a millimeter). Such fine particulate matter is designated as $PM_{2.5}$. *S. Camden Citizens in Action v. N.J Dep't of Envtl. Prot.*, 2006 U.S. Dist LEXIS 45765, *12 (D.N.J. 2006). "This fine particulate matter causes grave health hazards because they are so small that they can get deep into people's lungs and some may even get into people's bloodstreams." *Id*.

Filed by EPD and Longleaf, Tran Affidavit, ¶6, Petitioners' Exhibit 8, OSAH Docket No. 32 (Box 1)). It shows that the plant would violate the legal $PM_{2.5}$ standard if built as permitted. (Petitioners' Collective Response to the Motions for Summary Determination Filed by EPD and Longleaf, Tran Affidavit, ¶6, Petitioners' Exhibit 8, OSAH Docket No. 32 (Box 1)). The ALJ erred as a matter of law by improperly allowing the applicant/permittee and EPD to violate the $PM_{2.5}$ standard.

Second, the ALJ erred by not requiring EPD to impose any emission limit for carbon dioxide since the law dictates that such limits must be imposed for each "pollutant" that is subject to regulation under the Clean Air Act. CO_2 is such a pollutant. (*See Id.* at 6).

Third, though the law requires EPD to set emission limits for new facilities based on the maximum degree of reduction that is achievable from either pollution control equipment, alternative production processes, **or** innovative fuel combustion techniques, EPD refused to consider any alternative production processes or "innovative fuel combustion techniques." 42 U.S.C. § 7479(3). In fact, there is established technology that could have achieved better, more stringent emission levels, and EPD's failure to even assess the utility of that technology should be fatal to the permit. The ALJ erred in not requiring EPD to consider alternative production processes or innovative "fuel combustion techniques." (*See* Memorandum Opinion and Order on Motion for Summary Determination, at 7, OSAH Docket No. 119 (Box 2)).

Fourth, the ALJ dismissed some of Petitioners' claims in this case – without even hearing evidence on those claims – under the notion that a party cannot contest a permit limitation unless the challenger first asserts in its petition the specific emission limit that

a "proper" permit would have included. (*See* Order on Respondent's Motion to Dismiss, at 6-7, OSAH Docket No. 113 (Box 2)). As Petitioners were unable to do that on certain issues, the ALJ dismissed those claims that challenged those limits, no matter what the basis of the challenge and how specifically it was alleged. (*See Id.*)

Fifth, Georgia law prohibits EPD from issuing air permits that impose emission limits unless those limits derive from a case-by-case process based on a reasonable and sufficient analysis. 40 C.F.R. § 52.21(b)(12); Georgia SIP 391-3-1-.02(7)(a)(2). That requires the work of a professional engineer. O.C.G.A. § 43-15-7. Here, EPD did not have a professional engineer perform the engineering analyses or sign off on the permit. (*See* Search Results for Professional Licensure, Attachment 2 to Petitioners' Motion (1) For Leave to Amend the Petition, (2) For Leave to File a Motion for Summary Determination, and (3) For Summary Determination Based on Newly-Discovered Evidence, OSAH Docket No. 76 (Box 2)); (*see also* Hr'g Tr. 102, ln. 1-3 (Sept. 5, 2007) (Box. 3)); (*see also* Hr'g Tr. 573-575 (Sept. 14, 2007) (Box 3)).

THE PARTIES

Petitioners: Friends of the Chattahoochee and Sierra Club.

Friends of the Chattahoochee ("Friends") is a community organization comprised of regular citizens who live, work and recreate in and around Early County, Georgia, in close proximity to the proposed power plant. (Testimony of Carleen Logan, at ¶¶ 2, 6-7, OSAH Docket No. 33 (Box 1)); (Testimony of Robert McLendon, at ¶¶ 2, 4-5, OSAH Docket No. 33 (Box 1)); (Testimony of Harry S. Primm, Jr. at ¶¶ 2, 6, OSAH Docket No. 33 (Box 1)). These people are profoundly concerned about the impact that a mega-coal-fired power plant would have on their families' health, their environment, and their

community. (Testimony of Robert McLendon, at ¶¶ 8, 13, OSAH Docket No. 33 (Box 1)); (Testimony of Harry S. Primm, Jr. at ¶¶ 8, 17, 27 OSAH Docket No. 33 (Box 1)); (Testimony of Carleen Logan, at ¶¶ 14, 28, OSAH Docket No. 33 (Box 1)). Parents and grandparents testified about children and grandchildren who suffered asthma and allergies, and their fears that the plant would seriously endanger their health; (Testimony of Merritt Logan, at ¶¶ 12-18, OSAH Docket No. 33 (Box 1)); (Testimony of Carleen Logan, at ¶¶ 22-28, OSAH Docket No. 33 (Box 1)); (Testimony of Robert Mclendon, at ¶¶ 13, OSAH Docket No. 33 (Box 1)). Farmers testified about fears of how the coal plant would impact their crops. (Testimony of Carleen Logan, at ¶ 14, OSAH Docket No. 33 (Box 1)); (Testimony of Robert Mclendon, at ¶¶ 8-10, OSAH Docket No. 33 (Box 1)); (Testimony of Harry S. Primm, Jr., at ¶ 31, , OSAH Docket No. 33 (Box 1)). And other members of the community testified about their concerns regarding mercury pollution. (Testimony of Emmet Francis Stallings, at ¶ 10, OSAH Docket No. 33 (Box 1)), including the safety of eating fish from nearby ponds and rivers when those waterways absorbed mercury emitted from the power plant. (Testimony of Carleen Logan, at ¶ 24, OSAH Docket No. 33 (Box 1)); (Testimony of Emmet Francis Stallings, at ¶ 11, OSAH Docket No. 33 (Box 1)). Friends' members also testified about their heart-felt connection to the community that would be destroyed by the plant. (Testimony of Carleen Logan, at ¶ 7, OSAH Docket No. 33 (Box 1)); (Testimony of Robert McLendon, at ¶ 6, OSAH Docket No. 33 (Box 1)).

Like Friends, many of Sierra Club's members live in the areas that will be most gravely impacted by the coal-fired power plant. (Testimony of Patty Durand, at ¶ 18, OSAH Docket No. 33 (Box 1)). Sierra Club is the nation's largest membership

environmental organization, with over 750,000 members nationwide and 12,000 members in Georgia. (Testimony of Patty Durand, at ¶ 11, OSAH Docket No. 33 (Box 1)). Sierra Club members traveled to Atlanta and testified about their concerns of mercury contamination; the impact of pollutants from the plant on their friends and family; and the decreased air quality the plant would cause. (Testimony of Robert McLendon, at ¶ 11, OSAH Docket No. 33 (Box 1)); (Testimony of Emmet Francis Stallings, at ¶¶ 10-12, OSAH Docket No. 33 (Box 1)). Sierra Club Chapter Director Patty Durand also described Sierra Club's concerns about the millions of tons of carbon dioxide that would be emitted from this plant and contribute to global warming. (Testimony of Patty Durand, at ¶¶ 15-16, OSAH Docket No. 33 (Box 1)).

Respondent: The Environmental Protection Division.

The Environmental Protection Division (EPD) is a division of the Department of Natural Resources (DNR) for the State of Georgia. O.C.G.A. § 12-2-2(a). The Director of EPD is responsible for enforcing the environmental protection laws of Georgia. O.C.G.A. § 12-2-2(b)(1).

Intervenor: Longleaf Energy Associates.

Longleaf Energy Associates, LLC ("Energy Associates") is the creature of two other companies, Dynegy, Inc. and LS Power Group. (Response of Intervenor/Respondent Longleaf Energy Associates, LLC to Petition for Hearing, at ¶¶ 12-13, OSAH Docket No. 2 (Box 1)). Dynegy, Inc. is a publicly traded stock listed on the New York Stock Exchange.[3] It provides wholesale power and other services to utilities from its "portfolio" of fossil fuel power plants. (Petition for Hearing, at ¶ 13,

[3] *See* www.dynegy.com

OSAH Docket 1 (Box 1)); (Response of Intervenor to Petition for Hearing, at ¶ 13, OSAH Docket 2 (Box 1)). LS Power describes itself as a "development, investment and asset management group of companies" operating in the power industry.[4] (Response of Intervenor to Petition for Hearing, at ¶ 12, OSAH Docket No. 2 (Box 1)). Energy Associates was created by LS Power for the sole purpose of developing the Longleaf power plant. *Id*.

PROCEDURAL BACKGROUND

EPD's performance in issuing this permit can charitably be described as odd. This permit is known as a Prevention of Significant Deterioration Permit ("PSD Permit"), the legal nature of which is discussed below in the section of this brief giving an overview of the Clean Air Act. The PSD permit imposes air pollution emission limits that would apply if the facility is built.

One peculiar aspect of the permitting process is that, when Energy Associates first applied for this permit over six years ago, EPD rejected it based on many of the same deficiencies that Petitioners now assert. (*See* EPD File Exhibit 860 (Box 11)). For example, one of Petitioners' fundamental objections to the way EPD ultimately processed this permit, discussed in Section IV of this brief below, is that EPD failed, in setting emission limits for the proposed facility, to consider alternative, less polluting combustion methods. In 2002, EPD rejected Energy Associates' application precisely because the applicant had failed to analyze those very same alternative combustion methods. (*Id*. at LSEPD008161). While Energy Associates still refuses to assess those

[4] *See* www.lspower.com

alternative methodologies, EPD has now done an about-face, contending that such an analysis is not required.

Similarly, in 2002, EPD criticized Energy Associates' application for requesting emission limits that were insufficiently stringent. *Id*. Indeed, the limits EPD found appropriate at that time are even more stringent than the minimums Petitioners have shown to be necessary in this case. For example, EPD initially stated that emission levels for NO_x can be achieved as low as 0.016 lb/mmBtu.[5] *Id*. Petitioners, through this case, sought a somewhat less restrictive limit: 0.02 lb/mmBtu. (First Amended Petition for Hearing, at ¶ 177, OSAH Docket No. 53 (Box 1)). The emission limit EPD ultimately put in the permit is a much lesser .05 lb/mmBtu that would allow an annual average over three times higher than what EPD concluded was achievable six years ago. (*See* EPD File Exhibit 860 at LSEPD008161 (Box 11), as compared to EPD File Exhibit 104 (Box 10)).

Energy Associates resubmitted its application in 2005. This application was also deficient in its pollution modeling analyses, and several supplemental submissions were required. (*See* EPD File Exhibits 38, 39, 43, 44, 45, 46, 47, 48, 49, 50 (Box 10)). Throughout this time, the EPD supervisor who oversaw Energy Associates' permit applications was a professional engineer, Michelle Keith. (Hr'g. Tr. 60, ln. 23-24, and 101, ln. 18-21 (Sept. 5, 2007) (Box 3)). However, Ms. Keith was not involved in the final stages of the permitting process and was not involved in drafting the Final Determination challenged in these proceedings. (Hr'g Tr. 102, ln. 1-3 (Sept. 5, 2007) (Box. 3)). Ms. Keith is the only professional engineer at EPD to have worked on

[5] The unit "lb/mmBtu" means pounds per million Btu's; Btu is a measure of energy.

determining appropriate emission limits for this facility. (*See* Search Results for Professional Licensure, Attachment 2 to Petitioners' Motion For Leave to Amend Petition, OSAH Docket No. 76 (Box 2); (*see also* Hr'g Tr. 573-575 (Sept. 14, 2007) (Box 3)). After her role in the permitting process ended, no professional engineer oversaw the establishment of the emission limits for this facility. *Id*. Only then the instant permit issue to Energy Associates.[6]

The permit ultimately issued by EPD is also peculiar in comparison to permits for similar facilities in other states. (S*ee* EPD File Exhibit 104 (Box10)). The emission limits for the proposed Longleaf plant are more lax for almost every significant pollutant, than the limits imposed for other facilities. For example, EPA has proposed lower limits for SO_2, NOx, total particulate matter, and sulfuric acid mist for a facility in New Mexico. (*See* EPD File Exhibit 493 (Box 10)). The states of Nevada and Kentucky have proposed or permitted similar facilities with lower NOx limits. (Intervenor's Exhibit 70, at V-2 (Box 9), Petitioners' Exhibit 118, at 3 (Box 8)). The same is true for total particulate matter (eight states) and sulfuric acid mist (six states). (Hr'g Tr. 6-8 (Nov. 29, 2007) (Box 5)). Indeed, in an application for a similar proposed facility in Florida, Energy Associates' own testifying expert in this case proposed more stringent emission limits for SO_2, NO_x, and sulfuric acid mist than the limits imposed by EPD here. (Petitioners' Exhibit 253 (Box 12)).

EPD issued a draft permit for this facility in July 2006. (EPD File Exhibit 84 (Box 11)). Petitioners, troubled by many of the discrepancies pointed out above, filed extensive comments. (EPD File Exhibit 356 (Box 11)). EPA also filed critical

[6] The supervisor who replaced her was James Capp. (Hr'g. Tr. 2938-2939 (Oct. 24, 2007) (Box 5)).

comments. (EPD File Exhibit 347 (Box 11)). In response, EPD slightly modified the permit, but all of the discrepancies outlined above persisted in the final permit issued May 14th, 2007. (EPD File Exhibit 104 (Box 11)).

In issuing the final permit, EPD also issued a document responding to comments. (EPD File Exhibit 103 (Box 11)). Disturbingly, the evidence elicited at the subsequent administrative hearing showed that in many critical respects this document, rather than being the product of independent analysis by EPD, was actually written by Energy Associates itself and then passed off as EPD's work, without even attribution. (Hr'g Tr. 2349-2353 (Sept. 26, 2007) (Box 4)); (*see also* Petitioners' Exhibits 245, 246 (Box 12)). Indeed, EPD's unthinking adoption of the work of Energy Associates was so perverse that EPD actually issued one comment response, drafted by Energy Associates, that represented that EPD could not find information about the performance of a critical piece of SO_2 pollution control technology. But the purported "author" of EPD's response, Anna Aponte, was actually working on permits for another company using exactly the same technology. (Hr'g Tr. 2352-2359 (Sept. 26, 2007) (Box 4)).

Because of the profound inadequacies of the Longleaf permit, Petitioners promptly filed a challenge to EPD's issuance of the PSD permit on June 13, 2007. Their challenge was assigned to an Administrative Law Judge ("ALJ") at the Office of State Administrative Hearings ("OSAH"). (Petition for Hearing, OSAH Docket No. 1, (Box 1)).

On July 12, 2007, Respondent EPD filed a Motion for a More Definite Statement And Motion for Compliance with [DNR Rule] 391-1-2-.05(1)(g) or (h) or, In the Alternative, Motion to Dismiss. (*See* Respondent's Motion for a More Definite

Statement And Motion for Compliance with [DNR Rule] 391-1-2-.05(1)(g) or (h) or, In the Alternative, Motion to Dismiss, OSAH Docket No. 12) (Box 1)). The following day, Intervenor Energy Associates filed a Motion to Dismiss and for a More Definite Statement. (*See* Longleaf Energy Associates, LLC's Motion to Dismiss and for a More Definite Statement, OSAH Docket No. 12 (Box 1)). On August 17, 2007, these motions were denied, but Petitioners were ordered to file an amended petition which included "those permit conditions, limitations or requirements which would bring Counts XIII and XIV into compliance with [DNR] Rule 391-1-2-.05(1)(g) or (h)." (Order on Respondent's Motion to Dismiss, at 2, OSAH Docket No. 113 (Box 2); (Order, Docket No. 62 (Box 2)). Petitioners filed a First Amended Complaint. (Petitioners' Notice of Filing of First Amended Complaint for Hearing, OSAH Docket No. 53, Box 1)). Respondent EPD renewed its Motion to Dismiss; (Respondent's Motion to Dismiss Counts II, III, IV, V, VII, VIII, XII, XIII, XIV and XVI of Petitioners' First Amended Petitioner for Hearing for Noncompliance with Order Granting Motions for More Definite Statement, OSAH Docket No. 58 (Box 1)), but Intervenor Energy Associates did not join in that renewed motion.

The ALJ dismissed Counts XIII and XIV of the First Amended Petition, concluding that Petitioners were required to include a specific and proposed solution to the alleged defects in the permit, and that such solutions must be in the form of something that could be "inserted into the permit to make it valid." (Order on Respondent's Motion to Dismiss, at 5, OSAH Docket No.113 (Box 2)). On August 16, 2007, the ALJ granted summary determination on Counts I, X, XI, and XV, and partial summary determination on Counts II, V, and VII. (Memorandum Opinion and Order on

Motions for Summary Determination, OSAH Docket No. 119 (Box 2)). EPD did not file an answer nor were depositions or other types of discovery conducted during the administrative process. Instead, pursuant to the ALJ's scheduling order, the parties filed prehearing submissions as follows: Petitioners submitted a Prehearing Submission on August 15, 2007, (Petitioners' Prehearing Submission, OSAH Docket No. 37 (Box 1)); Intervenor Energy Associates submitted its Prehearing Submission on August 30, 2007, (Longleaf Energy Associates, LLC's Prehearing Submission, OSAH Docket No. 60 (Box 2)); Respondent EPD submitted its Prehearing Submission on August 30, 2007, (Respondent's Prehearing Submission, OSAH Docket No. 59 (Box 1)); and Energy Associates filed a supplemental Prehearing Submission on September 4, 2007. (Longleaf Energy Associates, LLC's Notice of Filing of Supplemental Prehearing Submission, OSAH Docket No. 65 (Box 2)).

The hearing commenced shortly thereafter on September 5, 2007. Both dispositive motions and amendments to the Petition were due prior to the filing of Intervenor and Respondent's Prehearing Submissions. Based on information contained in the Prehearing Submissions and a stipulation made by Respondent EPD on September 14, 2007, Petitioners filed a Motion for Leave to Amend the Petition, for Leave to File a Motion for Summary Determination, and for Summary Determination Based on Newly-Discovered Evidence on this same day (September 14, 2007). The ALJ denied Petitioners' motion as untimely. (Order Denying Motion for Leave to Amend the Petition, for Leave to File a Motion for Summary Determination, and for Summary Determination Based on Newly Discovered Evidence, OSAH Docket No. 115 (Box 2)).

Following a twenty-two day hearing on the merits of Counts II, III, IV, V, VI, VII, IX and XVI, on January 11, 2008, the ALJ issued a ruling affirming the permit. (Final Decision, OSAH Docket No. 121 (Box 2)).

STANDARD OF REVIEW

Petitioners seek review of several legal errors committed by the ALJ. The Superior Court's review of the administrative law judge's decision is appellate in nature. *Children's Hosp. v. Ga. Dep't of Med. Assistance*, 235 Ga. App. 697, 700 (Ga. App. 1998). In reviewing questions of law such as are presented here, this Court applies a *de novo* standard of review. *Davis v. Turpin*, 273 Ga. 244, 246 (2007) (appellate courts review questions of law *de novo*). Thus, while Petitioners' enumerate as error the ALJ's failure to make *de novo* findings and the ALJ's improper deference to EPD, the ALJ's error is one of law – applying the incorrect legal standard – rather than one of fact.

Each of Petitioners' other enumerations of error similarly turn on *de novo* legal issues, whether a matter of substantive law or a procedural error by the ALJ. Thus, the ALJ's dismissal of two claims because of a purported lack of particularity is reviewed *de novo*. Moreover, in reviewing the ALJ's dismissal of claims, this Court must construe all allegations in favor of Petitioners.

> We review a grant [or denial] of a motion to dismiss to determine whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, and with all doubts resolved in the plaintiff's favor, disclose with certainty that the plaintiff would not be entitled to relief under any state of provable facts. A trial court's ruling on a motion to dismiss is subject to *de novo* review on appeal.

Penny, et al. v. McBride, et al., 282 Ga. App. 590 (2006); *see also Barnes v. Turner*, 278 Ga. 788, 789 (2004).

Petitioners also seek review of the ALJ's decision to grant summary determination as to certain Counts. A *de novo* standard governs this Court's review of those rulings, both as to the law and the factual record:

> It is well established that on appeal of a grant of summary judgment, the appellate court must determine whether the trial court erred in concluding that no genuine issue of material fact remains and that the party was entitled to judgment as a matter of law. This requires a *de novo* review of the evidence.

Children's Hospital, 235 Ga. App. at 700 (citing *Dumas v. Tripps &Co.*, 229 Ga. App. 814 (1997)).

After a review of the record and the law, the Superior Court may either affirm the agency decision below or remand the agency decision for further proceedings. O.C.G.A. § 50-13-19(h) (2004). The reviewing court should reverse or modify the decision below if the court finds that:

> . . . substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

O.C.G.A. § 50-13-19(h) (2004).

STATUTORY DEADLINE

In accordance with O.C.G.A. § 12-2-1(c), a petition for judicial review of an ALJ's final decision filed pursuant to the Georgia Administrative Procedure Act ("APA"), O.C.G.A. §§ 50-13-1, *et seq*., must be heard by the superior court within 90 days of filing the petition. *See* O.C.G.A. § 12-2-1(c). Further, **the superior court**

reviewing the petition must issue a dispositive order on the issues presented for review within 30 days of the hearing or the ALJ's final decision may be considered affirmed by operation of law under some circumstances. *Id.*

OVERVIEW OF THE CLEAN AIR ACT

The Clean Air Act ("CAA" or "Act") provides a comprehensive framework "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1). Through the State Implementation Plan ("SIP"), which is a set of regulations promulgated by the State of Georgia and approved by the EPA, Georgia and the federal government attempt to attain and maintain pollution levels in the atmosphere that provide an adequate margin of safety to protect public health and the environment. 42 U.S.C. § 7409. In part, EPA attempts to accomplish this goal by setting National Ambient Air Quality Standards in Georgia. *Id*. EPA has established such air quality standards for six pervasive pollutants, and Georgia constantly monitors to determine whether areas are attaining those standards. Areas currently meeting the standards, such as Early County, are called "attainment areas." Areas failing to meet the standards are called "non-attainment areas."[7]

Congress was particularly concerned that areas that meet air quality standards continue to do so. Thus, although new industrial facilities are allowed in these attainment areas, significant deterioration in air quality is not allowed. To achieve that goal, Congress created the Prevention of Significant Deterioration ("PSD") program, which, as

[7] For instance, the air quality in Atlanta does not meet the air quality standard for ozone, a precursor of smog, so it is considered non-attainment for that pollutant.

explained more fully below, requires developers of new major pollution sources (1) to predict how much pollution their new facility would produce and (2) to obtain a permit with stringent emission limits. 42 U.S.C. §§ 7470-79. PSD permits in Georgia are issued by EPD. Petitioners brought this action because the PSD permit issued for Longleaf neither protects adequately all air quality standards nor contains proper emission limits.

State Air Quality Regulations

In concert with the federal Clean Air Act, the Georgia Air Quality Act gives EPD the authority (1) to promulgate regulations that will go into the SIP and (2) to issue PSD permits. The portion of Georgia's SIP implementing the PSD program was first approved by the EPA on September 18, 1979, and it has been revised five times since then. *See* Georgia SIP, 391-3-1-.02(7) and 44 Fed. Reg. 54047 (Sept. 18, 1979), 47 Fed. Reg. 6017 (Feb. 10, 1982), 57 Fed. Reg. 24371 (June 9, 1992), 57 Fed. Reg. 58989 (Dec. 14, 1992), 1996 61 Fed. Reg. 3817 (Feb. 2, 1994), and 64 Fed. Reg. 67491 (Dec. 2, 1999).

Georgia's SIP imposes broad restrictions on proposed new pollution sources like the Longleaf plant. Pursuant to the Georgia SIP, "[n]o person shall construct or operate any facility from which air contaminants are or may be emitted in such a manner as to fail to comply with . . . [a]ny applicable increment, precondition for permit, or other requirement established for the Prevention of Significant Deterioration pursuant to Part C, Title I of the Federal Act." Georgia SIP, 391-3-1-.02 (1)(c).

A new major stationary source in an area of the state that, at the time of permitting, is in compliance with the federal ambient air quality standards must receive a PSD Permit from the EPD Director before construction on the facility begins. Ga. Comp.

R. & Regs. r. 391-3-1-.02 (7); 40 C.F.R. § 52.21; 42 U.S.C. § 7475. Because the Longleaf power plant, if built, would constitute a new "major source" of air pollution in an area presently in attainment of all air quality standards, it is subject to PSD regulations.

Prevention of Significant Deterioration (PSD)

The requirements for a PSD permit are found in the Georgia SIP, which incorporates by reference the federal PSD regulations. Georgia SIP, 391-3-1-.02 (7), 40 C.F.R. § 52.21. The PSD requirements call for every new major source[8] to be reviewed to determine the potential emissions of all pollutants regulated under the Clean Air Act.

Among other requirements, the Act imposes stringent restrictions on the technology utilized by such new major sources of air pollution. One of these dictates that the "best available control technology" be incorporated into the construction and design to limit air pollution. Specifically, "[a] new major stationary source shall apply best available control technology for each regulated NSR pollutant that it would have the potential to emit in significant amounts." 40 C.F.R § 52.21(j)(2); *see also* 42 U.S.C. § 7479(3). The Georgia SIP incorporates 40 C.F.R § 52.21(j) by reference. Georgia SIP, 391-3-1-.02 (7)(b)(7).

This requirement that the "best available control technology" be utilized gives rise to one of the more oft-used acronyms in air quality law – BACT, which is short for "Best

[8] The PSD review requirements apply for any new or modified source which belongs to one of 28 specific source categories having potential emissions of 100 tons per year or more of any regulated pollutant, or all other sources having potential emissions of 250 tons per year or more of any regulated pollutant; or a modification of a major stationary source that would itself qualify as a major stationary source. Georgia SIP, 391-3-1-.02 (7)(a)(1), 40 C.F.R. § 52.21(b)(1)(i)(a) – (c). Those thresholds are far below the amount of contaminants the proposed plant would spew into Early County's atmosphere.

Available Control Technology." That Best Available Control Technology, or BACT, is defined as follows:

> The term "best available control technology" means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this Act emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant.

42 U.S.C. § 7479(3).

While BACT in a particular case, in its final form, is an emissions limitation, the process by which that limitation is determined is of particular significance here. To determine the appropriate permit conditions, the permitting agency must first go through a process to determine what *technology* meets the statutory definition of BACT. Once that technology is chosen, the emissions limit is calculated based on that "best available" technology. A facility need not install the specific technology designated as the "best available," but if it does not, it must utilize technology that will meet the limitations that the best available control technology would achieve.

It is of the utmost importance that the agency makes appropriate determinations of the technology that meets the statutory definition of BACT, and that no effective technologies be arbitrarily excluded from consideration. If an available technology that has a greater capacity to remove pollutants is omitted from consideration, the final emissions limitation necessarily changes since it would be based on a less effective technology. Even a small change in permit emission limitations can mean a difference of thousands of tons of pollutants in the air. In addition, while failure to include appropriate

technology in a BACT determination may yield inappropriately lax emission limits, the failure to conduct any BACT determination for a particular pollutant would allow a permitted plant to emit that pollutant without any limitations whatsoever. These deficiencies are precisely what occurred in this instance.

In addition to the BACT requirements for a particular permit, an owner or operator of a proposed source must affirmatively demonstrate that the source will not cause or contribute to air pollution in violation of any national ambient air quality standard in any area. 40 C.F.R. § 52.21(k) ("The owner or operator of the proposed source or modification *shall* demonstrate . . . .) (emphasis added), Georgia Rules 391-3-1-.02(7)(b)(8) (incorporating 40 C.F.R. § 52.21(k) by reference).

ARGUMENT

I. The ALJ Committed A Fundamental Legal Error By Failing To Review The Facts *De Novo* And Make An Independent Determination *De Novo.*

Petitioners have contended throughout that the emission limits for several key pollutants that would be emitted by the Longleaf power plant are seriously deficient. In the evidentiary portion of the case, Petitioners, Energy Associates, and EPD all presented expert testimony on these issues. Because this was a *de novo* proceeding, the ALJ was required to evaluate the credibility of each of the witnesses, determine the facts, and then decide whether each of the emission limits were set correctly. The ALJ did not do that, however. Instead, the ALJ applied a highly deferential standard more typical of an appellate review on the ultimate factual issues.

Instead of determining whether the emission limits had been correctly set, the ALJ simply decided whether EPD had acted "reasonably" in setting them as it did. To show why this was such a critical error, it is helpful to look closely at the types of rulings

the ALJ was called upon to make in deciding this case. At the evidentiary hearing, Petitioners alleged that the emission limitations in the permit were improperly set for several separate pollutants – sulfur dioxide, nitrogen oxides, particulate matter, and sulfuric acid mist – because they were not reflective of "Best Available Control Technology" or "BACT." Georgia SIP 391-3-1-.02(7)(a)(2), 40 C.F.R. § 52.21(b)(12). As mentioned above in the Clean Air Act discussion, BACT is an emission limit that is derived through a process. The process used by EPD (and most permitting agencies around the country), is called the "top-down" process. (Final Decision, at 21, OSAH Docket No. 121, (Box 2)). That process, as outlined in the ALJ's final order, contains five steps:

> (1) Consideration of all available control technologies, both pre-construction and post-combustion; (2) elimination of technically infeasible technologies; (3) ranking of remaining control technologies by effectiveness; (4) evaluation of the energy, environmental, and economic impacts of top control technologies; and (5) selection of BACT.

Id. at 39.

Petitioners alleged in this case that in going through this BACT determination process, EPD erred in one or more steps. For example, in the SO_2 BACT determination, Petitioners alleged that, although EPD correctly assumed that a so-called "wet" scrubber can control SO_2 better than a "dry" scrubber, EPD underestimated the control efficiency of a wet scrubber. (*See* EPD File Exhibit 84, at LSEPD005912, Table X, EPD File Exhibit 84 at LSEPD005923, Table XIII (Box 10), *as compared to* EPD File Exhibit 356, at LSEPD013346 – LSEPD013347 (Box 10)). This one error can ripple through the entire analysis, causing errors in the cost, energy, and environmental impacts analysis. That is because the proposed facility is so massive that even a one percent change in

scrubber efficiency can mean the difference of **712 tons** of pollution being emitted or not. Thus, Petitioners asserted that had EPD required the best technology for SO_2, the plant would be expected to emit 1720 tons of pollution. (Hr'g Tr. 307, ln. 9 – 308, ln. 12 (Sept. 6, 2007) (Box 3)). Because EPD would allow Energy Associates to install inferior technology, Petitioners' evidence showed that the facility would emit 5636 tons of SO_2, *almost 4000 tons more each year*. (Hr'g Tr. 287, ln. 13-21 (Sept. 6, 2007) (Box 3)).

Petitioners' evidence was based on the fact that wet scrubbers can control 98% of the SO_2 produced (Hr'g Tr. 304, ln. 16-20, Hr'. Tr. 386-393 (Sept. 6, 2007) (Box 3)), whereas the less effective dry scrubber can control only 92.5%. (Hr'g. Tr. 306, ln. 20-21 (Sept. 6, 2007) (Box 3)). EPD, on the other hand, assumed that wet scrubbers can only control 95% of SO_2 produced. (*See* EPD File Exhibit 84, at LSEPD005912, Table X, EPD File Exhibit 84 at LSEPD005923, Table XIII (Box 10)). If EPD were correct, allowing the inferior technology would allow a little over five thousand tons per year more pollution, instead of roughly four thousand tons.

How does this example relate to the ALJ's standard of review? As a *de novo* proceeding, the ALJ should have decided what the true facts were concerning this issue and the emission limits. The ALJ did not do that, however. Instead, the ALJ put Petitioners to a much higher legal burden, proving that EPD's approach was *unreasonable*. Under that incorrect standard, the ALJ rejected this challenge to the permit, simply finding that Petitioners' failed to show that "EPD's selected control efficiencies were ***unreasonable."*** (Final Decision, at 81, OSAH Docket No. 121, (Box 2) (emphasis added)).

As shown below, the ALJ evaluated almost all of the evidence under this legally incorrect standard. The ALJ did not make independent findings as to the key conclusions reached by EPD. Instead, the ALJ judged the evidence under a very deferential "reasonableness" test. As the ALJ stated explicitly; "[s]o long as the Director's decision was consistent with law and within the reasonable bounds of her discretion, the permit should be upheld." (*Id.* at 107). As the review of the law below shows, the ALJ is prohibited from giving EPD this kind of deference in lieu of making *de novo* determinations on the issues. Consequently, this matter should be remanded so that the evidence on Petitioners' claims can be evaluated properly.

A. The ALJ Was Required to Make Independent Determination in Reviewing EPD's Decision to Issue the Permit.

When an ALJ reviews a challenge to a permit issued by EPD the ALJ conducts an evidentiary hearing, not an appellate review of the record. As in other such evidentiary proceedings, the law is clear that the ALJ must apply a *de novo* standard of review. OSAH Rule 21 (3) ("The hearing *shall be de novo* in nature[.]")(emphasis added). OSAH's rule reinforces and further elaborates on the ALJ's duty in subsection (1), which mandates that:

> the ALJ **shall** make **an independent determination** on the basis of the competent evidence presented at the hearing . . . [and] the ALJ may make any disposition of the matter as was available to the Agency.

OSAH Rule 21(1)(emphasis added).

The requirement of OSAH's rules that the ALJ's review be independent and *de novo* follows the General Assembly's mandate that appeals of EPD actions, such as permitting decisions, be held before an ALJ in lieu of the Board of the Department of Natural Resources (DNR). *See* O.C.G.A. §12-2-2 (c)(2)(A) (A petitioner has "a right to a

hearing before an administrative law judge of the Office of State Administrative Hearings [that is] acting **in place of** the Board of Natural Resources.")(emphasis added)); *see also* O.C.G.A. § 12-2-2-(c)(2)(D) (*The decision of the ALJ "shall constitute the final decision of the board.*")(emphasis added). Some years ago, before the current provisions of law were enacted by the General Assembly, final permit decisions were made by the Board of Natural Resources. That responsibility was transferred under the current statutory scheme to the ALJ. Just as the Board of the DNR had plenary authority, and responsibility, to decide all of the matters at issue in this proceeding, that responsibility is now placed on the ALJ. The Board's prior jurisdiction to hear permit challenges is vested in OSAH. *See Dir. Env. Prot. Div. v. Leblanc*, 2003 Ga. ENV LEXIS 68, *3 (O.S.A.H. 2003) ("Once the decision is issued, the ALJ's decision becomes, by operation of law, the Final Decision of the Board of Natural Resources and consequently, the final agency decision"). Without these provisions, the DNR Board would still hear permit challenges itself and make its own independent determinations.

As the final decision-maker on a contested evidentiary record, the ALJ must "try the issue anew and pass original judgments on the questions involved as if there had been no previous trial." *Knowles v. Knowles*, 125 Ga. App. 642, 645 (1972) (quoting *Hall v. First Nat. Bank of Atlanta*, 85 Ga. App. 498 (1952)). It is axiomatic that, if the trier of fact merely determines whether one party's decision fell within the bounds of plausibility – *i.e.*, was "reasonable" – such a review is not *de novo*. Instead, a *de novo* review requires that the ALJ evaluate the evidence, make findings of fact based on the preponderance of the evidence, and then decide, based on those facts, whether the emission limits in the permit were "right" or "wrong." *See, e.g., In re Walker County*,

1990 Ga. Env. LEXIS 16, *32 (O.S.A.H.1990) (court should make independent review); *see also In re Coffee County Solid Waste Handling Permit*, 1987 Ga. ENV LEXIS 21, *3-4 (O.S.A.H.1987) (same).

Here, the ALJ plainly abdicated its responsibility to *independently* review *de novo* the evidence and the determinations made by EPD. The ALJ explicitly and repeatedly states as much in the final Order:

> even if this Tribunal concluded that reasonable persons could disagree as to what constitutes BACT for the [Longleaf Energy Associates] facility, the Director's determinations should be affirmed if they are within the scope of her authority, constitute a reasonable exercise of her discretion, and satisfy the requirements of the law. **This tribunal should not substitute its equally reasonable determination for the Director's reasonable determination.**

(Final Decision, at 65, OSAH Docket No. 121 (Box 2)(emphasis added)). Throughout the Order, the ALJ expressly – and erroneously – declined to make independent findings and determinations as to critical issues in the case. Instead, mere "reasonableness" or "adequacy" of the agency decision was the focus at every turn.

For example, with regard to Petitioners' contention that the margin of safety in the permit limits was insufficient to ensure that the limits satisfied health-based air quality standards, the ALJ refused to look at the evidence with the open mind of a *de novo* review. Instead, extra weight was given EPD's position for the stated reason that "EPD [had] used its judgment and experience." *Id.* at 70. Even more egregious, on the issue of whether the SO_2 BACT determination was legal, the ALJ stated that "Petitioners have failed to present sufficient evidence to provide that EPD's determination is ***not reasonable***." *Id.* at 79. Literally, weeks of testimony and dozens of exhibits were proffered on this issue, which was **the heart** of Petitioners' SO_2 claim, yet the ALJ stated

that EPD "established SO_2 emissions limitations which it believes" represents BACT and Petitioners failed to show that this belief was not "reasonable." *Id.*

There are numerous other examples that involved critical issues in the case. *Id.* at 87, ("EPD's reliance, in part, on disparate energy impacts ***was reasonable***[,]") (emphasis added); *id.* at 98, ("Under these circumstances, EPD's BACT determination ***was reasonable***.") (applying a reasonableness standard to the key issue of whether the BACT emission limitation for sulfuric acid mist was legal) (emphasis added). In another instance, the ALJ refused to make an independent determination as to whether information submitted by the applicant was even correct, holding that EPD can "reasonably" assume that the information submitted by the applicant "is true and correct." *Id.* at 72.[9]

In yet another instance, the ALJ again demonstrated the extent of its abdication of independent review in stating that "EPD was not comfortable setting a lower limit . . ." for sulfuric acid mist. *Id.* at 57. Of course, the relative "comfort" level of the agency is irrelevant to these proceedings, which were supposed to turn, by law, on (1) the facts fairly presented and determined by an *independent* ALJ and (2) the independent *de novo* determinations of the ALJ based on the evidence.

Later, the ALJ again misstates Petitioners' burden. Rather than demonstrating what the emission limits should be based on the evidence, the ALJ again put Petitioners to the much higher burden of proving that the EPD's decision was ***"unreasonable."*** *Id.* at 81. In this instance, the critical issue involved the choice of two technologies

[9] Similarly, instead of evaluating whether certain technical information submitted was complete and accurate, the ALJ merely stated that "EPD understands" that such information may have "limited value" in setting permit limits. *Id.* at 77.

mentioned above, the dry scrubber versus the wet scrubber. Instead of making an independent determination as to which technology *should have been chosen* in light of the evidence, the ALJ made no such finding and instead only stated that "EPD fully considered available regulatory decisions and performance data . . . ." *Id.* at 81-82.

In another instance, the ALJ stated that EPD's decision was not "improper," again making no independent determination on the matter. *Id.* at 82. With regard to the limits set for particulate matter or "PM," the ALJ stated that EPD reviewed "application materials" and "hundreds of public and agency comments" and then exercised its "judgment" with respect to the limit. *Id.* at 95. But the issue confronting the ALJ was not whether EPD had reviewed the appropriate documents, or whether it exercised its judgment. The issue was *whether the limit chosen for PM was correct and legal*. Yet again, the ALJ focused simply on EPD's actions and what EPD "took into account," instead of making findings concerning the actual facts regarding PM emissions and the propriety of the PM limits in the permit. *Id.* The ALJ again incorrectly decided the entire issue by concluding that Petitioners failed to prove that EPD's judgment was "unreasonable." *Id.*

Throughout the Order, the ALJ repeatedly just recites what EPD *did*, instead of what *should have been done*, and concludes that Petitioners failed to demonstrate that EPD's action was "inadequate" or "unreasonable." *See, e.g., id.* at 83; *id.* at 85, ("EPD reasonably relied"); *id.* at 87, ("EPD's reliance . . . is reasonable"); *id.* at 90 (Petitioners "failed to show . . . that EPD's . . . determination is "unreasonable"); *id.* at 95, ("EPD reasonably relied"); *id.* at 101, (Petitioners failed to demonstrate that "EPD's additional impacts analysis was inadequate.").

There is no requirement that Petitioners affirmatively prove that EPD's decision, or its view of the facts, was "unreasonable." To the contrary, the law required that the ALJ "**shall"** make an "**independent"** determination. OSAH Rule 21(1)(emphasis added). Applying this same rule, the Court of Appeals recently held as follows:

> As the superior court found, **the ALJ stated that she was required to afford great weight and deference to DHR's interpretations,** and also incorrectly that the law provided that she affirm administrative decisions that were not "clearly erroneous" or "arbitrary or capricious." **Those are the standards by which the superior court and this court review agency decisions as appellate courts,** OCGA § 50-13-19(h); *Commr. Of Ins. v. Stryker,* 218 Ga. App. 71, 717 (1) (463 SE2d 163) (1995**), not the standards of review for an ALJ, who must consider the facts and law of the case de novo.** Office of the State Administrative Hearings R. 616-1-2-.21(3).

Piedmont Healthcare, Inc. v. Ga. Dept. of Human Resources et al., 282 Ga. App. 302, 303-304 (2006) (emphasis added); *see also Dir., Env. Prot. Div. v. Leblanc*, 2003 Ga. Env LEXIS 68, *2 (O.S.A.H. 2003) (same).

In support of its decision to depart from the regulatory and statutorily mandated standard of review, the ALJ cited two cases, but both are wholly inapposite. (Final Decision, at 65, OSAH Docket No. 121 (Box 2)). One was a decision by the United States Environmental Protection Agency's Environmental Appeals Board ("EAB"), *In re: Indeck-Elwood, LLC,* 2006 EPA App. LEXIS 44 (Sept. 27, 2006); the other was an OSAH decision. *In Re: City of Cornelia,* 1996 Ga. Env. LEXIS 18, (O.S.A.H.1996). As an initial matter, it is fundamentally incorrect to rely upon an EAB decision for the standard of review in a Georgia administrative proceeding since the EAB and OSAH are subject to completely different and distinct statutory and regulatory mandates.

While Georgia law provides a person adversely affected by an EPD decision a "*right to a hearing* before an administrative law judge[,]" O.C.G.A. § 12-2-2(c)(2)(A),

there is no comparable right to a hearing before the EAB, 40 C.F.R. § 124.19; rather, the EAB's power of review is "sparingly used." 43 Fed. Reg. 33, 290, 33,412 (May 19, 1980). In order to bring an appeal of a PSD permit before the EAB, the petition must first demonstrate the claim in question is based on "a finding of fact or conclusion of law which is **clearly erroneous**," or "an exercise of discretion or an important policy consideration which the [EAB] should, in its discretion, review." 40 C.F.R. § 124.19(a) (emphasis added). Clearly, the EAB review standard is divorced from the legal standard applicable here.[10] Unlike the system created for the federal EAB, the Georgia legislature has created an intermediary step where the work of agency staff can be reviewed *de novo* in a contested case proceeding. While the EAB may review a record through an appellate "clearly erroneous" standard, *see* 40 C.F.R. § 124.19(a), that standard has nothing to do with the ALJ's *de novo* review here.

The second decision relied upon by the ALJ is likewise inapplicable and taken out of context. The ALJ relied upon *In Re: City of Cornelia*, 1996 Ga. Env. LEXIS 18 (O.S.A.H. 1996), for the proposition that its role in reviewing EPD's decision is merely to determine the "reasonableness" of that decision. (Final Decision, at 65, OSAH Docket No. 121 (Box 2)). However, in *City of Cornelia*, the ALJ discussed "reasonableness" not in the context of the appropriate standard of review, but in the context of the appropriate *remedy* that a petitioner can seek. The *City of Cornelia* ALJ was considering the validity of a consent order, not a permit, and petitioners had requested that the ALJ rewrite the

[10] The EAB, among other areas of its jurisdiction, reviews PSD permits issued by the United States Environmental Protection Agency and its delegatees. When the EAB undertakes this review, unlike OSAH, the EAB takes the role of an appellate tribunal. *See* 40 C.F.R. Part 124. The EAB does not hear evidence; rather, it reviews a cold administrative record.

consent order. *In Re: City of Cornelia*, 1996 Ga. Env. LEXIS, at *16-17. The ALJ acknowledged that it should review EPD's determination independently. *Id.* at *17. However, in response to the petitioners' request that the consent order be rewritten, the ALJ refused to substitute its judgment for what "might have been a better enforcement choice." *Id.* at *16-17. The ALJ was not there stating the standard of review, but simply its role in fashioning a remedy. *City of Cornelia* provides no support for the position adopted by the ALJ here.

Other OSAH decisions also contradict the instant ALJ's misapplication of the standard of review. For example, Judge Mark Dickerson, who also presided in *City of Cornelia*, stated elsewhere that:

> **The question to be decided is not the soundness of the Director's substantive decisions in issuing the permit, but whether the permit as issued, will more likely than not result in violations of the [Act].**
> . . .
>
> **This appeal is a *de novo* proceeding in which an ALJ is to render an independent decision based solely upon the competent evidence presented at the hearing. .** . . This appeal is not an examination of the evidence considered by the Director in issuing the Permit, nor is this appeal's purpose to determine whether the Director abused his discretion in issuing the Permit or properly followed guidelines for permitting . . . [.]

*In Re Mullis Tree Service***,** 1987 Ga. Env. LEXIS 20, *4-5, *10 (O.S.A.H. 1987) (emphasis added); *see also In re Daniel Tyndale,* 1987 Ga. Env. LEXIS 19, *5 (O.S.A.H. 1987) (In a permit challenge, "[t]he question is not whether the Director was correct" but whether there would be ground water contamination.). Other ALJ's – with the exception

of the one now on review before this Court – routinely apply a *de novo* standard without abdicating their responsibility to make the independent determinations required by law.[11]

Because the ALJ did not apply the correct standard of review, this matter should be remanded so that the Administrative Law Judge can enter findings of fact and final determinations *de novo*, independently, and without deferring to the EPD's actions.[12]

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[11] *See, e.g., After Dark Exhaust v. Dir., Env'tl Prot. Div., Ga. Dep't. of Natural Res.*, 2007 Ga. ENV LEXIS 9, *18 (O.S.A.H. 2007); *Winfield Partners v. Coastal Marshland Comm.*, 2006 Ga. ENV LEXIS 5, *7 (O.S.A.H. 2006) (same); *Center for a Sustainable Coast, et al. v. Coastal Marshlands Prot. Comm.*, 2006 Ga. LEXIS 2, *19-20 (O.S.A.H. 2006) (same); *Dir., Env'tl Prot. Div. v. Leblanc*, 2003 Ga. ENV LEXIS 68, *2-3 (O.S.A.H. 2003) (same); *Center for A Sustainable Coast, et al. v. Coastal Marshlands Prot. Comm.*, 2003 Ga. ENV LEXIS 16, *20 (O.S.A.H. 2003) (same); *Griffin Industries v. Reheis*, 2003 Ga. ENV LEXIS 71, *11 (O.S.A.H. 2003) (same); *Lake Lanier Assoc., et al. v. Env'tl Prot. Div., Ga. Dep't of Natural Res.*, 2002 Ga. ENV LEXIS 7, *61 (O.S.A.H. 2002) (same); *Forsyth County, et al. v. Reheis*, 2002 Ga. ENV LEXIS 4, *12 (O.S.A.H. 2002) (same); *Upper Chattahoochee Riverkeeper Fund, Inc., v. Reheis*, 2002 Ga. ENV LEXIS 17, *22 (O.S.A.H. 2002) (same); *City of Atlanta v. Reheis*, 2001 Ga. ENV LEXIS 5, *12-13 (O.S.A.H. 2001) (same); *Central of Ga. Railroad Co. v. Reheis*, 2000 Ga. ENV LEXIS 18, *10 (O.S.A.H. 2000) (same); *Wallace Pryor Industries, Inc., v. Dept. of Natural Res., Env'tl Prot. Div.*, 1999 Ga. ENV LEXIS 12, *8 (O.S.A.H. 1999) (same); *Reheis v. Colorcraft South, Inc.* et al., 1998 Ga. ENV LEXIS 22, *9 (O.S.A.H. 1998) (same); *In re Drexel Chemical Company*, 1998 Ga. ENV LEXIS 6, *14 (O.S.A.H. 1998) (same); *In re City of Loganville*, 1997 Ga. ENV LEXIS 8, *17 (O.S.A.H. 1997) (same); *In re AZS Corp.*, 1997 Ga. ENV LEXIS 2, 12 (O.S.A.H. 1997) (same); *In re James Campbell, III and Sydney Station Farms, Inc.*, 1996 Ga. ENV. LEXIS 13, *19-20 (O.S.A.H. 1996) (same); *In re The Colquitt*, 1996 ENV LEXIS 10, *7 (O.S.A.H. 1996) (same); *In re Austell Box Board Corp.*, 1995 Ga. ENV LEXIS 26, *9 (O.S.A.H. 1995) (same); *In re Paul K. Lusher*, 1992 Ga. ENV LEXIS 32, *1-4 (O.S.A.H. 1992) (same); *In re Coastal Water and Sewerage Co.*, 1992 Ga. ENV LEXIS 8, *28-30 (O.S.A.H. 1992) (same); *In re Safety-Kleen Corp.*, 1990 Ga. ENV LEXIS 23, *10-11 (O.S.A.H. 1990) (same); *In re Mike Davis*, 1988 Ga. ENV LEXIS 27, *1-2, 5 (1988) (same); *In re Escambia Treating Co.*, 1987 Ga. ENV LEXIS 29, *9-10 (O.S.A.H. 1987) (same); *In re The Branigar Org., Inc.*, 1976 Ga. ENV LEXIS 3, *22 (O.S.A.H. 1976) (same).

[12] This relief is precisely what was ordered recently by the Montana Supreme Court in a strikingly similar case. *See Montana Env'tl Info. Center v. Montana Dept. of Env'tl Quality*, 326 Mont. 502, 112 P.3d 964 (Mont. 2005). That case also involved an appeal of a PSD permit under a procedural scheme very similar to Georgia's. Like Georgia, Montana provides a contested case proceeding as the first step in a PSD permit appeal. In that case, the finder of fact (there, the Board itself) improperly applied appellate

II. The ALJ Erred In Granting Summary Determination On Count I Of The Amended Petition Since A BACT Analysis Was Not Performed For CO_2.

The proposed power plant would emit a staggering amount of carbon dioxide ("CO_2") into the atmosphere. If built, the facility, would emit between 8 to 9 **million tons** of CO_2 each year. (Petitioners' Collective Response to the Motions for Summary Determination Filed by EPD and Longleaf, Powers Declaration, at ¶ 4, Petitioners Exhibit 4,OSAH Docket No. 32 (Box 1)). It would take between 1,400,000 and 1,600,000 average American cars, each driving 12,000 miles annually, to produce as much CO_2. (*Id.* ¶ 5). Nevertheless, EPD failed to include *any* CO_2 limit in the Longleaf permit on the theory that a BACT analysis of CO_2 was not required. Count I of the First Amended Petition challenged the permit because (1) no BACT analysis of CO_2 emissions had been done, and (2) the permit included no BACT-determined CO_2 limits. The ALJ erred in summarily dismissing this Count.

The permit before the Court was issued on May 14, 2007. That permit was the culmination of several applications by Energy Associates for the Longleaf power plant, prior applications having been rejected by EPD. At no time during the administrative process did either EPD or the applicant consider CO_2 emissions; nor did they ever perform a BACT analysis to determine what technology might best limit CO_2 emissions; nor did EPD include any CO_2 limit in the ultimate permit issued. In one sense, this administrative history might not be surprising because EPD and Energy Associates might have been hopeful, particularly in light of the positions advocated by the EPA in recent

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review standards in evaluating the evidence, just as the ALJ did in this case. On remand, the ALJ can either reevaluate the evidence as is, or receive additional evidence, as may be appropriate.

years, that the courts would put CO_2 outside the ambit of the Clean Air Act as a wholly unregulated emission.

The hopes of Energy Associates were dashed, however, with the Supreme Court's April 2, 2007 decision in *Massachusetts v. EPA*, that unequivocally determined that CO_2 is a "pollutant" within the coverage of the Clean Air Act. In the face of that decision, the applicant and EPD had a choice. They could either redo the administrative process by performing a proper BACT analysis in which CO_2 emissions were analyzed and then include CO_2 limits in the permit. Or they could proceed apace, as if *Massachusetts v. EPA* had come out otherwise and declared CO_2 outside the ambit of the Act. Possibly because they did not want to redo this part of the administrative process, Energy Associates and EPD chose the latter course. The permit issued just weeks after the Supreme Court's decision.

In choosing that course, however, EPD is now forced to advocate a construction of the law that is both implausible and in conflict with the plain wording of the governing statute and regulations. The law today clearly requires that CO_2 be subjected to a BACT analysis. Based on that BACT analysis, the plant permit must include limitations on CO_2 emissions.

A. All Of The Pertinent Statutory And Regulatory Provisions Confirm That CO_2 Is A "Pollutant Subject To Regulation Under The Clean Air Act," Thus Requiring A BACT Limitation In The Instant Permit.

With the law regarding CO_2 having made a sea change with the Supreme Court's rejection of the Bush administration's EPA position – that CO_2 was not a "pollutant" – it is now straightforward to determine that CO_2 must be subjected to a BACT determination as a "pollutant" in connection with new source permits like the one at issue here. As a

result, a CO_2 emission limitation, based on the BACT analysis, must be included in the permit.

One need look no further than the statutory language of the Clean Air Act that defines BACT: "The term 'best available control technology' means an emission limitation based on the maximum degree of reduction of each *pollutant subject to regulation under this Act . . . .*" 42 U.S.C. § 7479(3) (emphasis added). Even EPD should admit at this point that CO_2 is a statutory "pollutant" that is "subject to regulation under the Clean Air Act." That reading of the statute follows naturally from *Massachusetts v. EPA*, the defining holding of which is that CO_2 is a "pollutant subject to regulation" under the Clean Air Act.

Confronted with the adverse ruling of the Supreme Court, EPD has advanced an argument that ignores the BACT statutory language. But it is that argument that was adopted by the ALJ. Rather than addressing the broad, all-encompassing language of the Clean Air Act that all "*pollutants subject to regulation* under the Act" must be part of a BACT determination with emission limits for new pollution sources such as this one, EPD instead focused its attention on somewhat different language under the EPA's regulations. It is these regulations on which the ALJ's perfunctory dismissal of Count I is predicated, incorrectly. The ALJ's construction of the law not only departs from the language of the Clean Air Act itself, it ignores what the regulations say. (*See* Memorandum Opinion and Order on Motions for Summary Determination, at 5-6, OSAH Docket No. 119 (Box 2)).

The EPA's BACT regulation requires a BACT analysis and emission limitation for all "regulated NSR pollutants[.]" 40 C.F.R. § 52.21(j)(2). On that point, the ALJ

quoted the definition of "regulated NSR pollutant" that appears in 40 C.F.R. § 52-21(b)(50). (*See* Memorandum Opinion and Order on Motions for Summary Determination, at 5-6, OSAH Docket No. 119 (Box 2)). That regulation provides four separate and independent categories. A specific substance, like CO_2, need fall into only one of those categories to constitute a "regulated NSR pollutant" requiring a BACT analysis. The first of these four categories, subsection (i), includes all pollutants "for which a national ambient air quality standard has been promulgated." It is undisputed that there is not yet a "national ambient air quality standard" for CO_2, and CO_2 thus falls outside of subsection (i). Similarly, CO_2 is not encompassed within subsections (ii) or (iii).

Subsection (iv), however, is a broad catch-all, and CO_2 is most definitely included within it. Subsection (iv) encompasses as "regulated NSR pollutants "**[a]ny pollutant that otherwise is subject to regulation under the Act** . . . ."[13] 40 C.F.R. § 52.21(b)(50)(iv). After quoting this regulation, the ALJ's order goes on to plainly misapply that subsection and perfunctorily declare that CO_2 is not a pollutant subject to BACT. In effect, the ALJ's interpretation reads the all-encompassing subsection (iv) out of the regulations. That is exactly that kind of contorted misreading of the regulation that is required in order to adopt EPD's argument.

The key rationale for the ALJ's conclusion is that "EPA has not promulgated a national ambient air quality standard" for CO_2. (*See* Memorandum Opinion and Order on Motions for Summary Determination, at 5, OSAH Docket No. 119 (Box 2)).

[13] Subpart (iv) contains an exception for certain "hazardous air pollutants" that are irrelevant to determining whether CO_2 is included within the regulation. Those excepted hazardous pollutants include especially lethal substances that are heavily regulated elsewhere in the Act, such as mercury and benzene.

Immediately after that statement, the ALJ's Order again recites that, "likewise, EPD has not promulgated any regulations restricting or limiting the emissions of CO_2." *Id*. The fatal flaw in this analysis is that it includes no assessment of whether CO_2 is actually "subject to regulation," ***other than*** *through regulations that specifically prescribe or limit CO_2 levels.* By limiting its analysis to those kinds of regulations – *i.e*., regulations that generally impose quantitative limits – EPD and the ALJ completely ignore the broad sweep of subsection (iv). Subsection (iv) encompasses all "pollutants" that are "subject to regulation under the Clean Air Act," no matter what the form of that regulation may be. There is no requirement that the pollutant be subject to any kind of specific numerical limit in order to be "subject to regulation." While specific numerical limits on CO_2 in one context or another would obviously satisfy the regulatory definition of a "regulated NSR pollutant," not a single word in the definition supports the ALJ's view that only pollutants subject to such general numerical caps are "regulated NSR pollutants." Subsection (iv) says the opposite through its broad, unqualified sweep.

Again, there are not, today, national numerical CO_2 standards, but that fact only goes to whether CO_2 falls under subsection (i) of the regulation. There is no dispute on that. The critical legal issue here is a completely distinct one – namely, whether CO_2 is "subject to regulation" under subsection (iv). The ALJ's Order does nothing to address that question. In looking truthfully at the regulatory regime under the Clean Air Act, there can be no real question but that CO_2 is, indeed, "subject to regulation" under the Act. While general CO_2 numerical limits are not prescribed today, CO_2 is plainly within the Act's regulatory framework. As such, CO_2 constitutes an "NSR pollutant," as a

matter of law, and thus requires a BACT determination, and BACT-determined limits, for a massive new source of CO_2 like the proposed power plant.

First, CO_2 is "subject to regulation" under Section 821 of the Clean Air Act Amendments of 1990. This section directed EPA to promulgate regulations to require certain sources, including coal-fired power plants, to monitor CO_2 emissions and report monitoring data to EPA. Section 821 provides as follows:

> (a) Monitoring. The Administrator of the Environmental Protection Agency shall promulgate regulations within 18 months after the enactment of the Clean Air Act Amendments of 1990 to require that all affected sources subject to title V of the Clean Air Act shall also monitor carbon dioxide emissions according to the same timetable as in section 511(b) and (c). The regulations shall require that such data be reported to the Administrator. The provisions of section 511(e) of title V of the Clean Air Act shall apply for purposes of this section in the same manner and to the same extent as such provision applies to the monitoring and data referred to in section 511.
>
> (b) Public availability of carbon dioxide information. For each unit required to monitor and provide carbon dioxide data under subsection (a), the Administrator shall compute the unit's aggregate annual total carbon dioxide emissions, incorporate such data into a computer data base, and make such aggregate annual data available to the public.

In 1993, EPA promulgated the regulations mandated by Section 821, which are set forth at 40 C.F.R. Part 75. Those regulations generally require monitoring of CO_2 emissions through the installation, certification, operation and maintenance of a continuous emission monitoring system or an alternative method (40 C.F.R. §§ 75.1(b), 75.10(a)(3)); preparation and maintenance of a monitoring plan (40 C.F.R. § 75.33); maintenance of certain records (40 C.F.R. § 75.57); and reporting of certain information to EPA, including electronic quarterly reports of CO_2 emissions data (40 C.F.R. §§ 75.60 - 64). 40 C.F.R. § 75.5 prohibits operation of an affected source in the absence of

compliance with the substantive requirements of Part 75 and provides that a violation of any requirement of Part 75 is a violation of the Clean Air Act.

Beyond a shadow of a doubt, CO_2 is thus "**subject to regulation under the Act**."

Second, CO_2 is subject to regulation pursuant to the landfill emission regulations at 40 C.F.R. Part 60 Subparts CC and WWW. Under these regulations, EPA defines "municipal solid waste landfill emissions" or "MSW landfill emissions" as "gas generated by the decomposition of organic waste deposited in an MSW landfill or derived from the evolution of organic compounds in the waste." 40 CFR § 60.751. The pollutant regulated by these standards, "MSW landfill emissions, or LFG, is composed of methane, CO_2, and NMOC." (Petitioners' Collective Response to the Motions for Summary Determination Filed by EPD and Longleaf, *Air Emissions from Municipal Solid Waste Landfills – Background Information for Final Standards and Guidelines*, EPA-453/R-94-021, December 1995, Petitioners Exhibit 7,OSAH Docket No. 32 (Box 1)).[14] Municipal solid waste (MSW) landfills in some categories are required to monitor their emissions, and on the basis of that monitoring, to install a control and collection system. 40 C.F.R. § 60.752(b). "For most NSPS, emission reductions and costs are expressed in annual terms. In the case of the NSPS and EG for landfills, the final regulations require controls at a given landfill only after the increasing NMOC [nonmethane organic compounds] emission rate reaches the level of the regulatory cutoff. The controls are applied when the emissions exceed the threshold, and they must remain in place until the emissions drop below the cutoff." 61 Fed. Reg. 9905, 9908 (March 12, 1996). MSW landfills with a capacity of 2.5 million cubic meters are required to

[14] Available at http://www.epa.gov/ttn/atw/landfill/landflpg.html.

calculate emission rates for nonmethane organic carbon. 40 C.F.R § 60.752(b). For some landfills, the NMOC emission rates are calculated using data collected through sampling. 40 C.F.R § 60.754(a)(3),(4). Landfills with a calculated emission rate of greater than 50 megagrams per year of NMOC are required to install collection and control systems. 40 C.F.R § 60.754(b)(2). *For landfill gases then, including CO_2, monitoring regulations are thus directly tied* ***to emission limitations.***

Again, CO_2 is unquestionably "**subject to regulation under the Act**."

Third, the Georgia SIP – which is an integral part of the regulatory regime of the Clean Air Act – also regulates CO_2. The SIP, which EPA approved pursuant to 42 U.S.C. § 7410 of the Act, provides that:

> No person owning, leasing or controlling the operation of any *air contaminant* sources shall willfully, negligently or through failure to provide necessary equipment or facilities or to take necessary precautions, cause, permit, or allow the emission from said *air contamination* source or sources of such quantities of *air contaminants* as will cause, or tend to cause, by themselves or in conjunction with other *air contaminants* a condition of *air pollution* on quantities or characteristics or of a duration which is injurious or which unreasonably interferes with the enjoyment of life or use of property in such area of the State as is affected thereby. Complying with any of the other sections of these rules and regulations of any subdivisions thereof, shall in no way exempt a person from this provision.

Georgia SIP, 391-3-1-.02(2)(a)(1) (emphasis added).

The Georgia SIP defines the terms "air contaminant" and "air pollution" as follows:

> (c) "Air Contaminant" means solid or liquid particulate matter, dust, fumes, gas, mist, smoke, or vapor, or any matter or substance either physical, chemical, biological, or radioactive (including source material, special nuclear material, and by-product material); or any combination of any of the above.
>
> (d) "Air Pollution" means the presence in the outdoor atmosphere of one or more air contaminants.

Georgia SIP, 391-3-1-.01(2)(c) and (d).

From these definitions, the scope of the airborne substances governed or affected by the Georgia SIP could hardly be broader. "Air contaminants" include any gas. Thus, the Georgia SIP, a regulation adopted pursuant to the Act, covers any source that emits a gas in "such quantities . . . as will cause, or tend to cause, by themselves or in conjunction with other air contaminants a condition of air pollution on quantities or characteristics or of a duration which is injurious or which unreasonably interferes with the enjoyment of life or use of property in such area of the State as is affected thereby." Georgia SIP, 391-3-1-.02(2)(a)(1). That CO_2 is a gas whose presence in significant quantities will affect areas of the state of Georgia is beyond dispute. As the Supreme Court pointed out in *Massachusetts v. EPA*, the White House "sought assistance in identifying the areas in the science of climate change where there are the greatest certainties and uncertainties from the National Research Council." *Massachusetts*, 127 S. Ct. at 1449 (internal quotations omitted). The Council's report, which the Court noted the EPA had found an "objective and independent assessment of the relevant science," *id.* at 1455, identified a number of harms associated with climate change including an "accelerated rate of rise of sea levels during the 20th century relative to the past few thousand years." *Id.* at 1456. According to EPA, coastal areas of Georgia would be threatened by even a sea level rise of 1.5 meters. (Petitioners' Collective Response to the Motions for Summary Determination Filed by EPD and Longleaf, U.S. EPA Global Warming Report, Sea Level Rise, Petitioners Exhibit 8,OSAH Docket No. 32 (Box 1)).[15]

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[15] See http://yosemite.epa.gov/OAR/globalwarming.nsf/content/ResourceCenterPublicationsSLRMapsIndex.html. To view color maps of impact on Georgia's coastline, visit

Unsurprisingly, there is no decision from any jurisdiction accepting the position advocated by EPD here and accepted by the ALJ. No court – and no other ALJ – has ever held that CO_2 is exempted from BACT determinations, much less exempted because EPA has not yet enacted a regulation that dictates CO_2 limits generally. BACT determinations are required for major new sources, like Longleaf, for all pollutants that are "subject to regulation under the Act." Unquestionably, CO_2 is such a pollutant. Any other conclusion would require that sections of the controlling BACT regulations, and the Clean Air Act itself, be ignored. That is precisely what the ALJ erroneously did here at the behest of EPD.

III. The ALJ Erred In Summarily Dismissing Petitioners' Claim Regarding Fine Particulate Matter.

One of the fundamental functions of the EPA is to set air quality standards to protect the public from air pollution hazards, s*ee* 42 U.S.C. § 7409(b). EPD and EPA are to work together to ensure that those standards are met. One way this is done is through Georgia's PSD permitting process. Accordingly, when a company proposes to construct a new air-polluting power plant, it must demonstrate, using computer engineering models, that the plant will not cause air quality to deteriorate below these basic air quality standards. The Clean Air Act provides as follows:

> No major emitting facility on which construction is commenced after . . . [August 7, 1977] may be constructed in any area to which this part . . . applies unless ---
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> * * *
>
> (3) the owner or operator of such facility demonstrates, as required pursuant to section 7410(j) of this title, that emissions from construction or operation of such

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http://yosemite.epa.gov/OAR/globalwarming.nsf/content/ResourceCenterPublicationsSLRMapsSouthAtlantic.html

> facility will not cause, or contribute to, air pollution in excess of **any** . . . (B) national ambient air quality standard in any air quality control region. . . .

42 U.S.C. § 7475(a)(3)(emphasis added).[16] EPA's regulations provide in pertinent part that:

> Source impact analysis. The owner or operator of the proposed source or modification shall demonstrate that allowable emission increases from the proposed source or modification, in conjunction with all other applicable emissions increases or reductions (including secondary emissions), would not cause or contribute to air pollution in violation of: (1) **Any** national ambient air quality standard in any air quality control region . . . .

40 C.F.R. § 52.21(k) (emphasis added).[17] The use of the word "any" in both the statute and the regulation means a demonstration is required for each pollutant for which a national ambient air quality standard has been established.

The EPA has set such standards for the amount of particulate matter that can safely be present in the air. *National Ambient Air Quality Standards for Particulate Matter*, 62 Fed. Reg. 38652 (July 18, 1997). In setting these standards, EPA concluded that – because there are fundamental differences between fine ($PM_{2.5}$) and course (PM_{10}) particles,[18] *id*. at 38667 – it is necessary to set separate safety standards for each type of

[16] Section 7410(j) provides as follows: (j) Technological systems of continuous emission reduction on new or modified stationary sources; compliance with performance standards. As a condition for issuance of any permit required under this title, the owner or operator of each new or modified stationary source which is required to obtain such a permit must show to the satisfaction of the permitting authority that the technological system of continuous emission reduction which is to be used will enable such source to comply with the standards of performance which are to apply to such source and that the construction or modification and operation of such source will be in compliance with all other requirements of this Act.

[17] Georgia SIP, 391-3-1-.02 (7)(b)(8) incorporates 40 C.F.R. § 52.21(k) by reference.

[18] EPA defines "fine particles" as particulate matter less than or equal to 2.5 micrometers in diameter. It also refers to these particles as $PM_{2.5}$). (A micrometer is one-millionth of a meter; 2.5 micrometers is less than one-seventh the average width of a human hair.). 72

particle. *Id*. EPA noted that fine particles ($PM_{2.5}$) are associated, among other problems, with premature death and aggravation of heart and lung diseases. *Id*. at 38656. Asthmatics, and especially asthmatic children, are particularly susceptible to the adverse effects of these particles. *Id.*

After EPA set separate health standards for coarse and fine particles in 1997, scientists continued to study the impacts on health caused by fine particles. Based on their research, EPA concluded that it had understated, in 1997, the danger posed by $PM_{2.5}$. Consequently, in 2006, EPA tightened the air quality standard for fine particles ($PM_{2.5}$). *National Ambient Air Quality Standards for Particulate Matter, Part II*, 71 Fed. Reg. 61144 (Oct. 17, 2006).

Count XI of the First Amended Petition challenged the permit because of the deficient modeling for $PM_{2.5}$. EPD and Energy Associates moved for summary judgment on this issue. Remarkably, that motion was granted notwithstanding the fact that Petitioners themselves were the only party who actually performed any modeling on $PM_{2.5}$ itself, and *that pollutant-specific modeling demonstrated that the plant as permitted would indeed violate the mandatory national standards*. The ALJ rationalized its result by deferring to Energy Associates' analysis of a different pollutant, course particulate matter, PM_{10}. (Memorandum Opinion and Order on Motions for Summary Determination, at 17-21, OSAH Docket No. 119 (Box 2)).

Fed. Reg. 20587. Coarse particles are particulate matter between 2.5 and 10 micrometers in diameter. EPA also refers to these particles as PM_{10}.

A. The Undisputed Evidence In This Case Established That Appropriate $PM_{2.5}$ Limitations Had Not Been Included In The Permit.

Even though EPA has established separate air quality standards for coarse (PM_{10}) and fine particles ($PM_{2.5}$), and even though the regulations applicable here specify that a company seeking to build a new plant "shall demonstrate" that a new facility "would not cause or contribute to air pollution in violation of" *any one* of these health-based standards, Georgia Rules 391-3-1-.02(7)(b)(8) (incorporating 40 C.F.R. § 52.21(k) by reference), it is undisputed that Energy Associates never actually "modeled," or analyzed, whether the Longleaf facility would cause a violation of the standard for fine particles ($PM_{2.5}$). Instead, Energy Associates only analyzed whether the Longleaf facility would cause a violation of the **coarse** particle (PM_{10}) air quality standard. (*See* Memorandum Opinion and Order on Motion for Summary Determination, at 20, OSAH Docket No. 119 (Box 2)). Energy Associates *assumed* that the coarse particulate modeling would suffice for fine particulates as well. *Id.*

Based solely on Energy Associate's analysis that the Longleaf plant would not violate the air quality standard for *coarse* particulates, EPD concluded that Energy Associates need not perform a similar analysis for *fine* particles. *Id.* The ALJ uncritically deferred to EPD's assumption that Energy Associates' coarse particle analysis sufficed for fine particles as well. *Id.* at 17-21.

Whatever may be the "logic" of the ALJ's and EPD's approach in some cases, it necessarily fails here because the ***undisputed evidence*** establishes that – while Energy Associates' emissions will not violate the standard for **coarse** particulates (PM_{10}) – *the plant **will** cause a violation of the standard for **fine** particulate ($PM_{2.5}$).* (Petitioners' Collective Response to the Motions for Summary Determination Filed by EPD and

Longleaf, Tran Affidavit, at ¶ 5, Petitioners' Exhibit 8, OSAH Docket No. 32 (Box 1));(*see also* Offer of Proof – Testimony of Khanh T. Tran, at ¶ 18, OSAH Docket No. 100 (Box 2)). Based on the data provided by EPD pursuant to an ALJ order directing that the meteorological data be released, Petitioners' expert conducted modeling based on $PM_{2.5}$. Using EPA approved modeling techniques in place at the time the Longleaf permit was issued, he concluded that "modeling of $PM_{2.5}$ shows concentrations during normal operations will exceed the 24-hour [National Ambient Air Quality Standards] NAAQS". (Petitioners' Collective Response to the Motions for Summary Determination Filed by EPD and Longleaf, Tran Affidavit, ¶ 5, Petitioners' Exhibit 8, OSAH Docket No. 32 (Box 1)). ***Mr. Tran's testimony***, submitted in response to Respondents' motion for summary determination, ***was never challenged or disputed*** in any way. Notwithstanding the undisputed fact on this record that the proposed power plant would violate air quality standards for this specific pollutant – fine particulate matter, $PM_{2.5}$ – the ALJ simply assumed conclusively the opposite based on modeling of a <u>different</u> pollutant – coarse particulate, PM_{10}. The ALJ did so summarily, without even holding an evidentiary hearing on the issue to inquire into what the actual $PM_{2.5}$ emissions would be.

The ALJ justified its refusal to address the *facts* concerning fine particulate pollution by relying on two "guidance" memoranda from the EPA. (*See* Memorandum Opinion and Order on Motion for Summary Determination, at 18-19, OSAH Docket No. 119 (Box 2)). Neither of the EPD guidance memoranda justifies the result reached by the ALJ. In these guidance documents, the first issued in 1997, EPA recommended that "sources should continue to meet PSD and NSR program requirements for controlling PM10 emissions . . . and for analyzing impact on PM10 air quality." (Longleaf Energy

Associates, LLC's Motion for Partial Summary Determination as to Counts II, V and VII of the Petition, Seitz Memo, Exhibit G, at 2, OSAH Docket No. 19 (Box 1)). In 2005, EPA again recommended that states continue to follow the 1997 guidance. (*Id.*, Page $PM_{2.5}$ Memo, Exhibit I, at 4, OSAH Docket No. 19 (Box 1)).

The ALJ erred by allowing this supposed "guidance" to trump the undisputed facts of record, as well as the law. At the outset, it is fundamental that informal guidance – which has never gone through notice and comment rule making – cannot overturn regulations that have been properly enacted and that have the force of law. As any number of cases hold, "the power of an agency to interpret its own regulations 'must not be confused with the power to rewrite.'" *Rhodes v. Johnson*, 153 F.3d 785, 789 (7th Cir. 1998) (quoting *Pettibone Corp. v. United States*, 34 F.3d 536, 541 (7th Cir. 1994); *see also Bahramizadeh v. INS*, 717 F.2d 1170, 1773 (7th Cir. 1983) ("An agency may not interpret its regulations in a manner so as to nullify the effective intent or wording of a regulation."). Indeed, the authors of the very memoranda relied upon by the ALJ here acknowledged that their statements lack legal force: "The statements do not bind State and local governments as a matter of law." (Longleaf Energy Associates, LLC's Motion for Partial Summary Determination as to Counts II, V and VII of the Petition, Seitz Memo, Exhibit G, at 2; Page $PM_{2.5}$ Memo, Exhibit I, at 4, OSAH Docket No. 19 (Box 1)).

The ALJ also erred in assuming – contrary to the evidence in the record – that some sort of "technical difficulties" impeded modeling for $PM_{2.5}$. If such difficulties were alleged to exist, that would be a factual issue for a hearing, especially since the affirmative evidence showed, without contradiction, that the technical capability existed

to model for $PM_{2.5}$ in this particular case. (*See* Petitioners' Collective Response to the Motions for Summary Determination Filed by EPD and Longleaf, Tran Affidavit, ¶ 5, Petitioners' Exhibit 8, OSAH Docket No. 32 (Box 1)) (testimony that $PM_{2.5}$ modeling was conducted). Indeed, contrary to the ALJ's unsubstantiated assumption, EPA has long identified available models to analyze the impacts of $PM_{2.5}$.[19] Two models have been approved at different points in time for $PM_{2.5}$ modeling. First, the very model that Energy Associates used to analyze impacts of other pollutants, the "ISC model," can be used for $PM_{2.5}$ modeling. *See* 61 Fed. Reg. 41838, 41850. In addition, a model known as AERMOD can be used to model for $PM_{2.5}$. *See* 70 Fed. Reg. 68218 (adopting AERMOD as the "preferred model"). Thus, established models for analyzing $PM_{2.5}$ impacts clearly exist, making it fully practical for a permittee to comply with these requirements. *See* 70 Fed. Reg. 68218, 68253, Appendix A of Appendix W of 40 CFR § 51. Energy Associates' reliance on the "surrogate" approach (*i.e.*, the PM_{10} calculations) for modeling $PM_{2.5}$ impacts is not supported by the available science; by modeling protocols capable of modeling for $PM_{2.5}$; or most importantly, by the undisputed evidence of record.

[19] Appendix W of 40 C.F.R. § 51, the "Guideline on Air Quality Models," proscribes modeling requirements for small particles ($PM_{2.5}$). *See* 40 C.F.R. § 52.21(l); *see* 61 Fed. Reg. 41838, 41850 , 40 C.F.R. § 51, App W, 7.2.2(c) (August 1996) (showing that historically, "ISC [was] recommended for point sources of small particles . . . "); *see also* 70 FR 68218, 68234, 40 C.F.R. § 51, App W, 5.1 (e),(f),(h) (December 2005). Appendix W "addresses the regulatory application of air quality models for assessing criteria pollutants under the Clean Air Act." 70 Fed. Reg. 68218, *Revision to the Guideline on Air Quality Models: Adoption of a Preferred General Purpose (Flat and Complex Terrain) Dispersion Model and Other Revisions*, Appendix W of 40 C.F.R. § 51 ("The Modeling Guideline"), Summary. The Modeling Guideline has undergone several revisions since its inception.

Accordingly, the ALJ should have either entered findings consistent with Petitioners' evidence that the permit was defective in its failure to include appropriate $PM_{2.5}$ limitations. Or at the very least, the ALJ should have denied Respondents' motion for summary judgment and, if Energy Associates chose to actually model $PM_{2.5}$, permit Intervenor to do so and introduce $PM_{2.5}$ evidence. Energy Associates likely chose not to follow that path, of course, because it realized full well that modeling of $PM_{2.5}$ would have yielded the same results as those testified to by Mr. Tran, confirming that the permit was defective in its failure to properly limit $PM_{2.5}$ plant emissions.[20]

B. The Limited Precedent In Other Jurisdictions Pertaining To This Issue Provide No Basis For The ALJ's Decision Here.

Two administrative decisions in other jurisdictions have addressed this issue. First, in *In re: Prairie State Generating Company*, PSD Appeal No. 05-05 (cited in Longleaf Energy Associates, LLC's Motion for Partial Summary Determination as to Counts II, V and VII of the Petition, Exhibit J, OSAH Docket No. 19 (Box 1)), EPA's Environmental Appeals Board, the "EAB," ruled that an approach used by the Illinois permitting authority ("IEPA") to analyze $PM_{2.5}$ impacts satisfied controlling law. That case differs in two key respects from the case at bar. First, while IEPA only modeled for PM_{10} impacts as part of the air analysis, the IEPA made "worst case" modeling assumptions that made it impossible for its modeling of PM_{10} impacts alone to understate the level of fine particulate matter, $PM_{2.5}$. The IEPA did this by making the worst case

[20] The Clean Air Act's implementing regulations and Georgia Rules *require* that if a preferred model is not used – *i.e.*, if a surrogate model is used for a pollutant – written approval by the EPA Administrator must be obtained and the decision *must* be subject to prior public notice and comment. 40 C.F.R. § 52.21(l)(2), Georgia SIP 391-3-1-.02(7)(b)(9) (incorporating 40 C.F.R. § 52.21(l) by reference). There is no evidence that any such determination, notice, or comment occurred here that might have allowed an exception to the usual modeling procedures for $PM_{2.5}$.

assumption that *all particulate matter* that was less than 10 microns was *also* less than 2.5 microns – *i.e.*, IEPA ran the model on the assumption that all particulate matter was fine particulate matter when it made its fine matter determination. By necessity, that approach could only *overstate* the true $PM_{2.5}$ emission rate. As the administrative decision states, the IEPA "conservatively assum[ed] that all the particulate matter emitted from the boilers [will be] $PM_{2.5}$." *Prairie State,* PSD Appeal No. 05-05, at 128.

Instead of *ignoring* $PM_{2.5}$ impacts all together – as Energy Associates did here – the IEPA accounted for $PM_{2.5}$ impacts by assuming that <u>all</u> particulate matter coming from the facility was $PM_{2.5}$, and based on that analysis found that Prairie State would not violate national ambient air quality standards for **$PM_{2.5}$, not PM_{10}**. *In the current case, if EPD had adopted the approach used in Prairie State, and explicitly approved by the EAB, the results would show that air quality standards for $PM_{2.5}$ would, indeed, be violated.* (Petitioners' Collective Response to the Motions for Summary Determination Filed by EPD and Longleaf, Tran Affidavit, at ¶ 6, Petitioners Exhibit 8 ("If modeling had been done based on $PM_{10,}$ and if one assumed that all of the particulate emissions were $PM_{2.5}$, the results would have shown a violation of NAAQS."), OSAH Docket No. 32 (Box 1)). Thus, if the ALJ here had followed *Prairie State*, it is undisputed that, as a matter of fact, the ALJ would have been forced to come to the exact opposite conclusion than it did concerning the adequacy of the Longleaf permit's $PM_{2.5}$ limitation.[21]

[21] Nevertheless, this approach is a less accurate estimate of the facility's $PM_{2.5}$ emissions because it fails to use an up-to-date model and fails to quantify the amount of $PM_{2.5}$ contained in the PM_{10} estimate. *Id.* Petitioners are not advocating that the *Prairie State* approach would have been appropriate here because that approach is a less accurate estimate of Energy Associates' $PM_{2.5}$ emissions since it fails to use an up-to-date model and fails to quantify the amount of $PM_{2.5}$ contained in the PM_{10} estimate. (Petitioners'

Appendix W of 40 C.F.R. Part 51 states that the determination of the appropriate model is an EPA Regional Office responsibility and that, if the Regional Administrator determines that an alternative method is more suitable to a given project than the preferred model, the alternative model may be used, subject to certain conditions. 40 C.F.R. Part 51, App W § 3.2.2(a), 65 FR 21506 § 3.2.2(a). The current case again differs from *Prairie State*, in this regard, as there is no indication that EPA's Atlanta regional office approved the decision not to model for $PM_{2.5}$ in accordance with existing federal regulations.

The second administrative decision addressing this issue was made by the Wisconsin Division of Hearings and Appeals regarding the Elm Road Generating Station. *See In the Matter of an Air Pollution Control Construction Permit Issued to Wisconsin Power Electric Co. for the Elm Road Generating Station*, Case No. IH-04-03, Order to Define the Scope of the Proceeding, 3-5 (Wis. Div. of Hearings and Appeals Aug. 3, 2004) (cited in Longleaf Energy Associates, LLC's Motion for Partial Summary Determination as to Counts II, V and VII of the Petition, Exhibit K, OSAH Docket No. 19 (Box 1)). The Hearing Officer there recited the following facts:

> To date, no attainment or nonattainment areas for $PM_{2.5}$ have been designated. The current state implementation plan (SIP) for Wisconsin does not address $PM_{2.5}$ emissions. The EPA has not amended its PSD regulations to establish a $PM_{2.5}$ significant emissions rate or other appropriate regulatory measures pertinent to $PM_{2.5}$ and its precursors. . . . In the absence of federal or state standards on the

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Collective Response to the Motions for Summary Determination Filed by EPD and Longleaf, Tran Affidavit, ¶6, Petitioners' Exhibit 8, OSAH Docket No. 32 (Box 1)).

It should also be noted that, in *Prairie State*, the permitting authority relied on guidance from EPA's Chicago Office, in accord with Appendix W of 40 C.F.R. Part 51. In *Prairie State*, the EAB often referenced the guidance received by the permitting authority from the EPA, approving of the modeling methods for $PM_{2.5}$ used in that case. *See Prairie State*, PSD Appeal No. 05-05, at 129-131.

> regulation of $PM_{2.5}$ emissions, the DNR does not separately evaluate $PM_{2.5}$ in its permitting decisions. Cf. Wis. Stat. §§ 285.21(1)(a) & (2) and 285.27(1) (prohibiting the DNR from promulgating ambient air quality standards, ambient air increments, or emissions standards that are "more restrictive" than federal standards or increments . . . .)

Id. at 4. Several of these facts distinguish *Elm Road* from the case at bar.

First, the Wisconsin Hearing Officer relied on the fact that attainment and nonattainment areas had not yet been designated for $PM_{2.5}$, but that is no longer the case. Shortly after the *Elm Road* decision on December 17, 2004, attainment and nonattainment areas were designated for $PM_{2.5}$. EPA designated nonattainment areas for $PM_{2.5}$.[22] *See Air Quality Designations and Classifications for the Fine Particles ($PM_{2.5}$) National Ambient Air Quality Standards*, 70 Fed. Reg. 944 (Jan. 5, 2005) (to be codified at 40 C.F.R. Part 81).

Further, while the Wisconsin SIP did not address $PM_{2.5}$, *Elm Road*, Case No. IH-04-03, Order to Define the Scope of the Proceeding, at 4, the Georgia SIP does indeed address $PM_{2.5}$ emissions by incorporating by reference 40 C.F.R. 52.21(k), which requires facilities to demonstrate that emissions will not violate national ambient air quality standards. Georgia SIP 391-3-1-.02(7)(b)(8) (incorporating 40 C.F.R. § 52.21(k) by reference). As discussed above, because there is an air quality standard for $PM_{2.5}$, and because the Georgia Rule requires that facilities demonstrate that the $PM_{2.5}$ ambient air quality standard would not be violated by new source emissions, the result in *Elm Road* is of no precedential value here. Unlike the Wisconsin SIP, the Georgia SIP does, by incorporation, address $PM_{2.5}$ emissions.

[22] Early County is not listed as a nonattainment area for $PM_{2.5}$. *See* 40 C.F.R. § 81.311.

Finally, while the Wisconsin SIP prohibits emission limits more stringent than federal standards, the Georgia SIP calls upon the Director to impose more stringent emission limits than the law requires when such limits are necessary to protect the public health, safety and welfare. Georgia SIP 391-3-1-.02(2)(a)(3)(ii). Unlike Wisconsin, the Georgia Director is thus not constrained by existing federal regulations in establishing air quality standards. Even if the Director were so constrained, since the Georgia Rules require a demonstration that national ambient air quality standards will not be violated, and since there exists a national ambient air quality standard for $PM_{2.5}$, there must be a demonstration from any proposed source that the $PM_{2.5}$ national ambient air quality standard will not be violated by emissions from such proposed source. *Elm Road* is a very different case from the present in regard to all of these material issues.

Accordingly, this matter should be remanded to OSAH so that Petitioners have an opportunity to show that Energy Associates could have estimated its impact on fine particle concentrations in the air and that Energy Associates never made an estimate of its own. Those facts, in turn, will require the ALJ to remand the permit so that Energy Associates can rework its proposed plant to ensure that it will not threaten the health of Petitioners in the vicinity of the plant pursuant to the command of the Clean Air Act.

IV. The ALJ Erred in Summarily Dismissing Counts II, V and VII of the Amended Petition Because EPD Failed to Consider Alternative Technologies Required to Make its BACT Determination.

One of EPD's most basic tasks in reviewing the Longleaf permit was to establish emission limits for each pollutant that the facility would emit in significant amounts. In setting those limits, the Clean Air Act and the implementing BACT regulations required EPD to review technology; pick the best performing technology considering cost,

environmental, and energy impacts; and then set emission limits based on the capability of that technology. What separates the parties on this issue is the question of whether EPD, in reviewing technology, can arbitrarily ignore important technology processes that would lower air pollution simply because: (1) the technology at issue is different than Energy Associates' proposed design; or (2) the alternative technology applies to the fuel combustion process, rather than to the post-combustion process.

At a coal fueled electric generating plant like that proposed here, the pollutants are the product of the combustion process. The amount of pollutants generated by the combustion process itself will depend on how the combustion process is designed and what technology is used. The combustion products are then subjected to various processes in order to reduce the pollutants generated by the combustion process. The remaining combustion products are then released into the atmosphere.

The actual amount of emissions from a particular plant is thus determined by a combination of (1) the design and technology used in the combustion process and (2) the design and technology used in the post-combustion process. It is those final emissions that constitute the air pollution that is targeted by the Clean Air Act.

The legal dispute between the parties here centers on whether BACT technology that *must* be considered in the permit process includes alternative design and equipment technology that is part of the combustion process, or whether BACT-mandated alternative technology is limited to post-combustion technology that reduces emissions *after* the combustion process itself. Because EPD did not evaluate the "best available" technology to reduce emissions from the fuel combustion process, Petitioners alleged in Count II of their First Amended Petition that the permit was defective:

> In setting the emission limitations for SO_2, EPD erred by failing to consider all available production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of SO_2. The alternatives EPD failed to consider include but are not limited to Integrated Gasification Combined Cycle (IGCC) technology. The technologies not considered may include [specific technologies alleged are omitted here]. 40 C.F.R. § 52.21(b)(12).

(First Amended Petition ¶ 41, OSAH Docket No. 53 (Box 1)). Petitioners further alleged that, *if* such combustion technology had been considered, it would have resulted in much lower pollution emissions and, hence, lower limits would have been required in the permit as a matter of law. Count II specifically addressed the limits for SO_2, which is the immediate precursor of sulphurous acid:

> Had EPD properly considered all available production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of SO_2, it would have imposed a more restrictive emission limitation for this pollutant. . . .
>
> Because the permit does not contain a more restrictive emission limitation for SO_2, as discussed above, the permit is invalid.

Id. at ¶¶ 45-46. Similar allegations concerning EPD's failure to consider alternative combustion technologies were made in Counts V and VII regarding NO_X and particulate matter emissions, respectively. *Id.* at ¶¶ 133-38, 142-57.

Among other technologies, Petitioners specifically complained of EPD's failure to consider a combustion technology process popularly known as coal gasification, or IGCC.[23] This technology substantially reduces pollutant products of combustion, thereby reducing the ultimate emissions from a coal-fueled plant. At the Longleaf plant, Energy Associates proposes to burn fuel by first grinding coal into dust and then burning it in a device called a "pulverized coal boiler." In an IGCC facility, the same fossil fuel – coal –

[23] IGCC stands for Integrated Gasification Combined Cycle. *Id.* at ¶ 44.

is used as the source of energy, but rather than just pulverizing and burning it, the coal goes through a different process. It is first converted at the plant site into a gas under high temperature and pressure. That gas product is then burned to drive the plant's turbines. (Memorandum Opinion and Order on Motions for Summary Determination Order, at 11-12, OSAH Docket No. 119 (Box 2)).

The ALJ summarily dismissed each of Petitioners' Counts II, V and VII, ruling that, while such alternative technology *could* have been considered by EPD in its BACT determination for setting emission limits, EPD could ignore such alternatives as well. *Id.* at 14. The ALJ's ruling was based largely on the view that alternative combustion techniques need not be considered simply because they aren't included in the design proposed by the applicant. The ALJ drew an arbitrary line between alternative technologies in the combustion process, and those in the post-combustion process. Consideration of the former are not required because the applicant's proposed "combustion design" supposedly constitutes an inviolable "given" for BACT review. Ignoring less polluting alternative combustion technologies was thus justified on the theory that such alternatives would be "redefining the air pollution source." As the ALJ's order states:

> Longleaf listed its proposed source as a "pulverized coal-fired electric power generation facility" that would include two pulverized coal-fired boilers and two steam turbine engines. . . . Accordingly, EPD included [only] those processes, methods, systems and techniques that could be applied to facilities consisting of coal-fired boilers and steam generators.
>
> Because BACT is a source-specific inquiry, analysis of alternative processes that, if applied, would redefine the air pollution source that a PSD Permit applicant has proposed is not required.

Id. at 8-9. This restrictive interpretation of BACT requirements reads alternative combustion technologies out of the statute. That position makes no sense as a practical matter since the exclusion of alternative combustion process technology eliminates from consideration and analysis the very essence of the pollution creating process. As will be shown below, this extremely narrow view of BACT alternatives also contradicts the plain wording of the statute.

The ALJ also disregarded the fact that EPD took the exact same position Petitioners advance today when EPD rejected the earlier permit application for the Longleaf plant in 2002:

> Your application is for a pulverized coal-fired steam-electric plant. The application does not discuss any other methods for generating electricity from the combustion of coal, such as pressurized fluidized bed combustion or integrated gasification combined cycle. You should discuss these technologies and explain why you elected to propose a pulverized coal-fired steam-electric power plant instead.

(EPD File Ex. 860, at LSEPD008161 (Box 11)). The ALJ's justification for its conclusion also tortures reason, by deeming the applicant's stipulated combustion process to constitute the "proposed major stationary source" subject to BACT, as opposed to the entire electric generating plant itself from A to Z. That restrictive interpretation of the law not only excludes from BACT analysis half of the pollution creating process, which makes no sense, it also runs directly into the controlling law that mandates a broad interpretation of BACT requirements and specifically includes *combustion processes*.

A. The Legal Requirements For A BACT Analysis Do Not Allow An Applicant Or The EPD To Exclude From Consideration Alternative Technologies Because They Apply To The Combustion Process.

The statute itself here explicitly addresses the very issue before this Court. The BACT definition from the Clean Air Act itself is as follows:

> The term *"best available control technology" means an emission limitation based on the* ***maximum degree of reduction of each pollutant*** subject to regulation under this Act emitted from or which results ***from any major emitting facility***, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is ***achievable for such facility through*** *application of production processes* and available methods, systems, and techniques, *including* fuel cleaning, clean fuels, or treatment or ***innovative fuel combustion techniques*** for control of each such pollutant.

42 U.S.C. § 7479(3)(emphasis added).

This Court, of course, determines this legal issue *de novo*. There is no deference to the ALJ's legal theory, which conflicts with the explicit language of the statute in any event. The **stationary source** under consideration is not just the applicant's proposed "combustion process," but the entire "**emitting facility**." And the permitting agency must consider alternative "production processes," methods, systems and techniques including "*innovative fuel combustion techniques*," in doing the BACT analysis to set emission limits for that "facility."

There is no room under the plain words of the statute for the restrictive interpretation of "alternatives" that the ALJ adopted, whereby the "source" at issue is limited to the one proposed by the applicant. Indeed, while the ALJ justifies its ruling by focusing exclusively on the word "source" and then reasoning that consideration of an alternative combustion processes, like IGCC, would be "redefining the source," that argument is untenable. First, it is completely circular since it assumes the conclusion by defining combustion alternatives out of the picture at the outset. But more importantly, it ignores the statutory BACT language which does not mention "source." The statute

focuses on the "emitting facility," not the "source." Clearly, the "facility" here includes the entire proposed plant, from "fuel in" to "air pollution out."[24]

It is fundamental to statutory construction that a court should go no further when the language of the statute is plain on its face, as it is here, *Georgia Power Co. v. Monroe County*, 284 Ga. App. 707, 709 (2007), but it is nevertheless worth noting that the specific legislative history on the coal gasification alternative is four square on Petitioners' side. Senator Huddleston of Kentucky was the proponent of the amendment that added the "innovative fuel combustion techniques" language to the BACT law. When he addressed the Senate on this amendment, he made it as clear as possible that his amendment was designed to "leave no doubt that . . . all actions taken by the fuel user are to be taken into account," *specifically* including coal "**gasification."** Senator Huddleston's explanation to the Senate of his amendment reads as follows:

> Mr. HUDDLESTON. Mr. President, the proposed provisions for application of best available control technology to all new major emission sources, although having the admirable intent of achieving consistently clean air through the required use of best controls, if not properly interpreted may deter the use of some of the most effective pollution controls.
>
> The definition in the committee bill of best available control technology indicates a consideration for various control strategies by including the phrase "through application of production processes and available methods systems, and techniques, including fuel cleaning or treatment." And I believe it is likely that the concept of BACT is intended to include such technologies as low Btu **gasification** and fluidized bed combustion. But, this intention is not explicitly spelled out, and I am concerned that without clarification, the possibility of misinterpretation would remain.
>
> It is the purpose of this amendment to leave no doubt that in determining best available control technology, all actions taken by the fuel user are to be taken into account — be they the purchasing or production of fuels which may have been

[24] While EPA's BACT regulation does use the term "source," 40 C.F.R. § 52,21(b)(12), the regulation obviously must mean the same thing as the statute – *i.e.*, "source" must mean "facility" – since the regulation cannot change the meaning of the statute.

> cleaned or up-graded through chemical treatment, **gasification**, or liquefaction; use of combustion systems such as fluidized bed combustion which specifically reduce emissions and/or the post-combustion treatment of emissions with cleanup equipment like stack scrubbers.
>
> The purpose, as I say, is just to be more explicit, to make sure there is no chance of misinterpretation.[25]

The ALJ's view of the law – and EPD's latest position – cannot be square with the language of the statute; what constitutes a "facility" that is subject to BACT; or the explicit, unequivocal purpose behind the Clean Air Act amendment that added the "innovative fuel combustion techniques" language to the Act.

In reaching its decision, the ALJ purported to rely on EPA "guidance," which are documents from the EPA that have never been published for comment or rule-making under the Administrative Procedures Act. (Memorandum Opinion and Order on Motions for Summary Determination Order, at 9-13, OSAH Docket No. 119 (Box 2)). Resort to such attenuated secondary sources, however, might be allowed only if the language of the statute is unclear.[26] If "Congress has directly spoken to the precise question at issue . . . that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). "Where a . . . statute is plain and susceptible of but one natural and reasonable construction, the court has no

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[25] A Legislative History of the Clean Air Act Amendments of 1977, A Continuation of the Clean Air Act Amendments of 1970 Together with a Section-by-section Index Prepared by the Environmental Policy Division of the Congressional Research Service of the Library of Congress for the Committee on Environment and Public Works, U.s. Senate, Volume 3 , August 1978, Serial No. 95-16 1979, at 1054, Westlaw Cite: A&P CAA77 COMM. PRINT 1977 (248C) (Part 9 OF 13) at *1054. This legislative history also appears at 123 Cong. Rec. S9434-35 (June 10, 1977) (debate on P.L. 95-95, the 1977 Amendments to the Clean Air Act).

[26] It is noteworthy that the Supreme Court has recently rejected another effort of the EPA to "parsimoniously construe" the Clean Air Act. *Massachusetts v. EPA, supra.*

authority to place a different construction upon it, but must construe it according to its terms." *Brandywine Townhouses, Inc. v. Joint City-County Bd. of Tax Assessors,* 231 Ga. 585, 588 (1974). Reading the BACT definition to exclude consideration of alternative combustion processes cannot be rationally squared with the statutory words themselves.

Moreover, the secondary "guidance" cited by the ALJ in its opinion does not, on its face, actually grapple with all of the language in the BACT definition. In other words, the guidance docs do not explain why the statute should be interpreted such that alternative processes other than the one proposed by the applicant should not be considered. Indeed, as shown above, the language mandates precisely the opposite result.

To be sure, the ALJ's decision is consistent with EPA guidance, which does indeed say that permitting authorities such as EPD have the "discretion" to require consideration of alternative processes. (Memorandum Opinion and Order on Motions for Summary Determination Order, at 13, OSAH Docket No. 119 (Box 2)); *see also In re Kendall New Century Development*, PSD Appeal No. 03-01, 11 E.A.D. 40, 52 n. 14 (2003)(stating that a permitting agency has the discretion to require a facility to redefine the source). In this instance, however, EPA's guidance is inconsequential because it is neither consistent with the statutory language nor congressional intent. Nothing in the definition of BACT, quoted above, indicates that EPD had a choice whether to consider alternative processes. The requirement is mandatory. Accordingly, the guidance upon which the ALJ relies (and upon which the *Kendall* case is based) is invalid. An agency's interpretation must "'sensibly conform[] to the purpose and wording of the regulations.'" *Martin v. Occupational Safety and Health Review Commission*, 499 U.S. 144, 151, 111 S. Ct. 1171, 1176 (1991) (quoting *Northern Indiana Pub. Serv. Co. v. Porter County*

Chapter of Izaak Walton League of America, Inc., 423 U.S. 12, 15, 96 S. Ct. 172, 174, (1975)). *See also S.A. Storer & Sons Co. v. Sec'y of Labor*, 360 F.3d 1363, 1369 (D.C. Cir. 2004)(Court refused to defer to Labor Department interpretation because it was "incompatible with the [regulation's] plain language"); *Frank Diehl Farms v. Secretary of Labor*, 696 F.2d 1325, 1331 (11th Cir. 1983) ("In the absence of clearly expressed contrary legislative intention, the plain language of the statute controls its construction."); *PPG Industries, Inc. v. Harrison*, 660 F.2d 628, 633 (5th Cir. 1981) (refusing to defer to EPA interpretation of its own regulations because EPA reading was unsupported either by the "language" or the "intent" of those regulations).

V. By Dismissing Counts XIII and XIV of the Amended Petition, the ALJ Allowed EPD To Insulate a Category of Decisions from Judicial Review in Violation of Established Pleading Standards.

Petitioners submitted a seventeen-count, seventy-page Amended Petition that listed in exacting detail the bases for their claims. (*See* First Amended Petition for Hearing, OSAH Docket No. 53 (Box 1)). Each of the seventeen counts detailed the factual bases for the claims, the legal errors made by EPD, and the appropriate remedy that should be imposed by the ALJ. *Id.* With respect to the remedy, where possible, Petitioners provided a specific limitation that they believed should be included in the Permit. *Id.* at ¶¶ 38, 45, 128, 131, 137, 140, 155, 161, 204, 211.

In Counts XIII and XIV, Petitioners challenged as inadequate Energy Associates' assessment of the impact of known carcinogens and other toxic emissions on public health. *Id.* at ¶¶ 179, 194. The fundamental complaint made by Petitioners here was not with respect to specific permit limits set by EPD, rather with Energy Associates' failure to adequately study (1) how the plant would impact the health of those who would

breathe the air, *id.* at ¶ 177, and (2) how visibility would deteriorate as a result of emissions from the plant. *Id.* at ¶ 194. Petitioners contend that the *applicant* must complete the requisite analysis in accordance with law, and only then can emissions limitations be legally set. *Id.* at ¶¶ 179, 194.

The ALJ dismissed these claims – without receiving any evidence – on the theory that Petitioners had failed to plead a specific limitation that should have been included in a final permit *if* the process had occurred in accordance with law. (Order on Respondent's Motion to Dismiss, at 6-7, OSAH Docket No. 113 (Box 2)). *In doing so, the ALJ made no finding of prejudice to any party, nor that the opposing parties would be hindered in their ability to defend themselves as a result of the supposed failure to "more particularly" plead a specific, hypothetical numerical emission limitation.*

The ALJ also made no finding that identifying a specific limit would be reasonable, practicable, or even helpful to the review process. Rather, in addressing the burden on the Petitioners, the ALJ simply stated that every count of a petition must contain a proposed permit limitation in order to be heard. There are apparently no exceptions to this supposed pleading requirement, even if the requirements makes no sense under the circumstances. *Id.* at 6. As a result of this hyper-technical and erroneous ruling, there has been no adjudication in this case of the danger to the public presented by the failure of Energy Associates to properly evaluate the impact of its emissions.

A. Petitioners Provided Appropriately Specific and Detailed Bases for Its Claims.

As alleged in Count XIII, the coal-fired power plant in this case will emit several toxic chemicals known to be carcinogens and cause other acute and chronic health problems. (First Amended Petition for Hearing, at ¶ 175, OSAH Docket No. 53 (Box 1)).

As set forth in that Count, because of the potential health impact of a coal-fired power plant, a permittee must conduct a full health risk assessment that considers a number of factors including "what the local citizens eat, where they get their water, whether they eat fish, and other information that must be collected and analyzed" before a permit is issued. (Offer of Proof, Testimony of Khanh T. Tran, at ¶ 22, OSAH Docket No. 100 (Box 2)) An adequate assessment must be performed to ensure that the public health is not endangered by the plant. (First Amended Petition for Hearing, at ¶ 177, OSAH Docket No. 53 (Box 1)). Only after that assessment has been properly conducted can appropriate permit limits (if any) be set. *Id.* at ¶ 179.

Petitioners' pled their claims with a level of detail and particularity that should satisfy anyone's notion of proper procedure and appropriate notice, and did so with a degree of specificity that ensured that every issue was squarely framed. If anything, an even more extensive, detailed and elaborate petition might have been subject to complaints that it was "too detailed." With regard to the specific Counts at issue here, the Petition alleged, *inter alia*, the following:

> Rule 391-3-1-.02(2)(a)(3)(ii) of the Georgia Rules for Air Quality Control provides that the Director may impose additional emission limitations to safeguard the public health, safety and welfare of the people of the State of Georgia.
>
> To implement this provision, EPD requires applicants for PSD Permits to assess the impacts from emissions of hazardous air pollutants. See Georgia Guideline for Ambient Impact Assessment of Toxic Air Pollutant Emissions (the "Guideline").
>
> The assessment by the applicant was flawed because it discounted the health risks from non-inhalation pathways for multipathway pollutants such as arsenic and mercury. A coal-fired power plant such as Longleaf will emit several toxic chemicals that are known to be carcinogens and/or to cause noncancer acute and chronic health effects. Table 3.1 of the November 2004 PSD Permit Application

shows that the project will emit significant emissions of lead (0.65 tpy),[27] fluorides (159 tpy) and mercury (0.11 tpy). The project emissions will largely exceed the corresponding PSD significant emission rates as defined in 40 C.F.R. § 52.21 (PSD Regulations). For example, the PSD significant emission level for fluorides is 3 tpy, and this level is largely exceeded by the project emissions of 159 tpy.

Appendix I of the November 2004 PSD Permit Application claimed to follow the EPD toxic assessment guideline. The EPD guideline only recommends the comparison of maximum 24-hour and annual concentrations against acceptable ambient concentrations for noncancer health effects but no analysis for cancer health effects. The applicant's analysis not only underestimates the impacts of mercury, the analysis also does not consider health risks from non-inhalation pathways. It also did not quantify the cancer risks for carcinogens and noncancer acute and chronic hazard indices for noncancer health effects.

EPD's guideline is fundamentally flawed. The Guideline was prepared in June 1998. Since that time, much has been learned about air toxics, especially their toxicity and health effects. Since 1998, procedures for assessing risk from these pollutants have been greatly refined. For multipathway pollutants such as arsenic and mercury, health risks from non-inhalation pathways are more important than those from inhalation exposure alone. For screening risk assessment, California's South Coast Air Quality Management District has recommended that inhalation risks should be multiplied by adjustment factors (for example, 10 for arsenic and 1.86 for mercury) to account for their multipathway exposure. Longleaf's screening analysis in Appendix I of the PSD Application has shown that the total impact of Longleaf is 0.91, of which the contribution of arsenic is 0.654 (Column 14 of Appendix I). Since the EPD guideline only considers inhalation risks, if EPD applies the multipathway adjustment factor of 10 as recommended by the South Coast AQMD, screening risks from arsenic alone would amount to 6.54 and would greatly exceed the threshold value of 1. Thus, Longleaf's analysis underestimates potential health risks from the proposed facility. EPD should have required Longleaf to perform a full health risk assessment to ensure the facility will not endanger the public.

As discussed in preceding paragraph, proper analysis of the risks from multipathway pollutants shows that emissions from the Longleaf Energy Station exceed the threshold value of 1.

Given the risks associated with the emission of multipathway pollutants from the planned Longleaf Energy Station, EPD should not have issued the Permit without imposing emission limitations to impose an adequate margin of safety from these pollutants. **Until EPD includes these limits, the Permit should not be issued, yet EPD cannot reasonably set these limits until either it, or the applicant,**

[27] TPY is shorthand for "tons per year." (Footnote not in original).

> **performs a full health risk assessment.** Consequently, the permit should be remanded back to EPD with instructions to require the applicant to perform the full health risk assessment.

(First Amended Petition for Hearing, at ¶¶ 173-179, OSAH Docket No. 53 (Box 1)(emphasis added)). Notwithstanding the level of specificity that was provided in the Petition, this Count was dismissed based on the pleadings alone. (Order on Respondent's Motion to Dismiss, at 6-7, OSAH Docket No. 113 (Box 2)). *As such, none of these substantive allegations raised in this count were addressed in any respect on the merits.* What is particularly striking about the ALJ's ruling is that central to the claim is the contention that limitations could not be set until either EPD or Energy Associates performed a full health risk assessment. In the absence of that assessment, Count XIII alleges that any emission limits are, necessarily arbitrary, premature, and consequently illegal. The essential defect complained of is a *predicate* to determining appropriate limits. Absent the required analysis, Petitioners were in no better position to "pick" emission limits than was EPD.

Similarly, in Count XIV, Petitioners described in detail yet another problem with the permittee's analysis of the impacts that its coal-fired power plant would have, this time on visibility in the area. (First Amended Petition for Hearing, at ¶¶ 180-194, OSAH Docket No. 53 (Box 1)). The law provides that a permit cannot issue that violates the federally-mandated goal of ensuring visibility and repairing visibility problems caused by manmade air pollution. *Id.* at ¶ 181 (citing Georgia SIP 391-3-1-.02(2)(uu)(7). It is self-evident this goal cannot be met unless the impact of the plant is properly assessed prior to calculating a permit limitation. *Id.* at ¶ 194. However, in this case, the necessary steps to determine a permit limit were not completed, as the permittee used insufficient data;

failed to take into account emissions of such pollutants as sulfur dioxide; nitrogen oxides and particulate matter; and conducted inappropriate modeling. *Id.* Given the number of flaws contained in the analysis, Petitioners could not stipulate particular permit limits but instead sought an order that the permit be remanded with instructions that a proper analysis be performed. *Id.* Once such an analysis has been performed, appropriate permit limits could be determined. Once again, the ALJ dismissed these claims out of hand because of the purported absence of ultimate, specific emission limits in Petitioners' pleading.

Petitioners alleged the following, *inter alia*, in Count XIV of their Amended Petition.

> Georgia SIP 391-3-1-.02(2)(uu)(7) provides that "[p]rior to the issuance of any permit, the Director shall ensure that the source's emissions will be consistent with making reasonable progress towards the national visibility goal of preventing any future, and remedying any existing, impairment of visibility in mandatory Class I areas which impairment results from manmade air pollution."
>
> EPD's issuance of this Permit violated this requirement because EPD has not ensured that the facility's emissions will be consistent with making reasonable progress towards the national visibility goal of preventing any future, and remedying any existing, impairment of visibility at the St. Marks Wilderness Area and other Class I areas.
>
> EPD has violated this requirement because it relied upon CALPUFF modeling that used outdated and inappropriate meteorological data. . . . These data, especially the 1992 data, are too coarse for an accurate simulation of pollutant transport as well as other micrometeorological processes such as fog and clouds.
>
> . . . . .
>
> The CALPUFF modeling used outdated and inappropriate meteorological data (the 1992 and 1996 data) and these datasets should have been replaced with the more recent 2001 and 2002 MM5 data.
>
> In the CALPUFF modeling of air quality and visibility impacts for the St. Marks Wilderness Area, emissions from the auxiliary boilers and other low-level sources (materials handling, emergency generators and firewater pumps) were not

included in the modeling. As a result, air quality and visibility impacts are understated.

. . . . .

Since the FLAG-recommended Level I screening procedure predicted significant impacts by Longleaf on regional haze at the St. Marks PSD Class I area, and the ad hoc modifications will be shown to be inappropriate, advanced visibility modeling procedures should have been used, such as the Level II and Level III procedures recently recommended by the National Park Service. These advanced procedures are based on more refined dispersion and visibility modeling to simulate the instantaneous degradation of visual air quality indexes along idealized sight paths under various ambient lighting conditions.

Only a regional haze impact assessment has been performed for project-only emissions. In addition to Longleaf, there are several facilities in the cumulative SO2 inventory that have large emissions of SO2, larger than Longleaf Energy Station, including AB Hopkins, Miller Brewing and Stone Container. These facilities and others in the cumulative inventory not only emit SO2, but also large amounts of NOx and PM10 that can cause visibility impairment. Cumulative visibility impacts at the St Marks PSD Class I area need to be performed.

EPD also violated this requirement because it relied on modeling that did not include facility emissions from points other than the main boilers.

EPD also violated this requirement because it relied on modeling that made inappropriate modifications to the FLAG procedure. EPD should have used the FLAG screening Level I procedure. This screening procedure shows that the facility will cause significant impacts on regional haze at the St. Marks Wilderness Area.

EPD also violated this requirement because it failed to take into account cumulative visibility impacts at the St. Marks Wilderness Area.

Because of the errors laid out in this count, EPD has violated Georgia SIP Rule 391-3-1-.02(2)(uu) because it did not, prior to issuing this Permit, ensure that the emissions from the Longleaf Energy Station will be consistent with making reasonable progress towards the national visibility goal of preventing any future, and remedying any existing, impairment of visibility in mandatory Class I areas, particularly the St. Marks Wilderness Area, which impairment results from manmade air pollution. Consequently, the Permit is invalid**. To make the permit valid, this matter needs to be remanded back to EPD with instructions to require the applicant to perform Calpuff modeling at an emission level that will not impair visibility at the St. Marks Wilderness and use that emission level as the emission limitation for SO2 and particulate matter if it is more stringent than the proper BACT emission limitation for those pollutants included above.**

(First Amended Petition for Hearing, at ¶¶ 181-183, 185-186, 189-194, OSAH Docket No. 53 (Box 1)).

The ALJ refused to hear either of these counts on the ground that, in order to even have a matter *considered* by an administrative court, Petitioners must first identify with specificity the precise permit limitation that would make the challenged permit lawful. (Order on Respondent's Motion to Dismiss, at 6, OSAH Docket No. 113 (Box 2)). Under the facts pertinent to these claims, it was unreasonable to require Petitioners to identify such specific numeric conditions. The bases of Petitioners' claims were *not* the limits in the Permit, but rather the failure of the applicant to adequately assess the risks to the public *prior* to establishing permit limitations. (First Amended Petition for Hearing, at ¶¶ 177, 179, 194, OSAH Docket No. 53 (Box 1)).

Apparently, the ALJ believed that Petitioners should be required to conduct a full health assessment and other analyses simply in order to bring a claim. However, Petitioners' claim, which must be construed in their favor, *Penny, et al. v. McBride, et al.*, 282 Ga. App. 590, 592 (2006), is that the *applicant*, in this case Longleaf Energy Associates, was required to perform that assessment. Unsurprisingly, it is the *applicant's* responsibility to conduct that health assessment, according to EPD's own guidelines. . (First Amended Petition for Hearing, at ¶ 174, OSAH Docket No. 53 (Box 1)(citing Georgia Guideline for Ambient Impact Assessment of Toxic Air Pollutant Emissions)).

It is also significant that conducting the analyses at issue is no small task. For example, "a full health risk assessment for a coal plant can cost several hundred thousand dollars." (Offer of Proof – Testimony of Khanh T. Tran, at ¶ 22, OSAH Docket No. 100 Box 2)). Not only are health risk assessments expensive, they are very time-consuming.

"[A] fairly reasonable assessment" can take "several weeks" and "a thorough assessment" can take at least "a couple of months." *Id.* While it may take a permittee several years to conduct the necessary modeling and assessments, a petitioner has only 30 days to file a petition once a permit has been issued. *See* O.C.G.A. §§ 12-2-2(c)(2)(A) and 12-9-15(a)(1), and Ga. Comp. R. & Regs. r. 391-1-3-.02(1). Moreover, the applicable statute requires that the entire administrative proceeding be completed within 90 days, unless extended for good cause for an additional 60 days, or by consent of the parties. O.C.G.A. § 12-2-2 (c)(2)(B). In this case, the time frame was notably difficult for all of the parties**,** with 22 days of hearings and hundreds of exhibits.

On August 30, 2007, EPD moved to dismiss Counts XIII and XIV of the Petition[28] on the grounds that those Counts did not contain specific permit limitations. (Respondent's Motion to Dismiss Counts II, III, IV, V, VII, VIII, XII, XIII, XIV and XVI of Petitioners' First Amended Petitioner for Hearing for Noncompliance with Order Granting Motions for More Definite Statement, OSAH Docket No. 58 (Box 1)). Despite the time-consuming nature of health assessments and modeling, at 4 p.m. on Friday August 31st, the ALJ ordered Petitioners to show cause by noon on the following Monday (a legal holiday) why Counts XIII and XIV should not be dismissed. (Order, OSAH Docket No. 62 (Box 1)).

When the ALJ considered the matter just two days later, Intervenor Energy Associates stated in open court that it was "comfortable" with the substance of Petitioners' Amended Petition – i.e., they had no "notice" problem at all.

7 JUDGE HOWELLS: Let me ask counsel for the

[28] Respondent EPD filed a similar motion on July 12, 2007, which was denied, and Petitioners were allowed to file an Amended Petition.

Intervener, as I understand it, you all have not joined in EPD's motion to dismiss, the more recent filing. Do you understand that both of you all initially filed motions to dismiss, and I denied those at that time. What is the Intervener's position?

MS. BARMEYER: **The Intervener's position is, I think it's, frankly, a very close question, I think, and we didn't pursue the motion to dismiss because we are comfortable with the substance,** [of the Amended Petition] but I there's -- I think it's -- it's certainly a significant legal question is presented as to whether or not it's sufficient.

JUDGE HOWELLS: Okay.

(Hr'g Tr. 11, ln. 13-16 (Sept. 5, 2007) (Box 3) (emphasis added)). Plainly, the absence of specific proposed emission limits for Counts XIII and XIV did not prejudice any party at all. And most bizarrely, even assuming that Petitioners could have identified a specific permit limitation, it would not have been relevant to the determination of those Counts which challenged the inadequacy of the process.

Moreover, while EPD sought identification of the precise permit limit that should be imposed in the Permit, EPD has taken the position that the ALJ is without *any* authority to impose any permit limitations or conditions proposed by a party that challenges a permit issued by EPD. (*See* Respondent's Motion for a More Definite Statement And Motion for Compliance with [DNR Rule], 391-1-2-.05(1)(g) or (h) or, In the Alternative, Motion to Dismiss, at13, OSAH Docket No. 12) (Box 1)). As such, even assuming that permit limitations could have been identified under Counts XIII and XIV, those limits could not even be part of a final order by the ALJ, according to EPD. *Id.* They would have been surplusage in the Petition.

B. Petitioners Complied with All Pleading Requirements, Including DNR Rule 391-1-2-.05(1)(g) and (h).

The Rule relied upon by the ALJ in dismissing Petitioners' claims is as follows:

> (g) In cases contesting the issuance of a license or permit, those suggested permit conditions or limitations which the petitioner believes required to implement the provisions of the law under which the permit or license was issued; and
>
> (h) In cases contesting conditions, limitations or requirements placed on the issuance of a license or permit, specific reference to the conditions, limitations or requirements contested, as well as suggested revised or alternative permit conditions, limitations or requirements which the petitioner believes required to implement the provisions of the law under which the permit or license was issued.

DNR Rule 391-1-2-.05(1)(g) and (h). As an initial matter, the ALJ concluded that subsection (h) of the rule was inapplicable because, according to the ALJ, Petitioners were only challenging the issuance of a permit, and not "conditions, limitations or requirements" placed on the issuance of a permit. (Order on Respondent's Motion to Dismiss, at 3-4, OSAH Docket No. 113 (Box 2)). This interpretation is incorrect. Subsection (g) addresses cases "contesting the issuance of a license or permit" whereas subsection (h) addresses cases "contesting conditions, limitations or requirements placed on the issuance of a license or permit." In Counts XIII and XIV, Petitioner did not challenge the permit as a whole, but the fact that the permit for this coal plant was issued without the applicant conducting a proper analysis of the impact its emissions would have on public health and visibility. Petitioners sought an order from the ALJ requiring that the proper analyses be conducted *prior* to the issuance of the permit; as that is a condition precedent to the issuance of a permit, subsection (h) is applicable.

Analyzing Petitioners' compliance with the rule under subsection (h), it is clear that Petitioners complied. The rule simply does not require the inclusion of a specific numeric (or similarly specific) condition that would, in the words of the ALJ, "be inserted

into the permit to make it valid." (Order on Respondent's Motion to Dismiss, at 5, OSAH Docket No. 113 (Box 2)). Rather, under subsection (h), Petitioners need only identify a condition, requirement or limitation that "Petitioner believes" would be necessary to properly implement the law. Petitioners did just that by specifically detailing how analyses of the public health and visibility impacts should be assessed, and that such assessments should occur *prior* to the issuance of the permit. A plain reading of the rules and the Amended Petition dictates that requiring that the applicant perform health and visibility analyses is a "requirement." Requiring such analyses also falls easily under the definitions of "conditions" as it is Petitioners' belief that performing the health and visibility analyses is a condition precedent to the permit's issuance. And it is Petitioners belief that these conditions are necessary under the law. That is all that is required for compliance with subsection (h).

Petitioners' allegations also comply with subsection (g), the provision relied upon by the ALJ. The significant difference between the two subsections is that subsection (g) does not contain the word "requirement" and that the word "permit" appears prior to the word "conditions." These differences, however, do not change the result. Again, subsection (g) does not require that a petitioner identify a specific numeric limit, but instead allows for the identification of a "condition or limitation." And again, it is Petitioners' **belief** that controls what the "condition" must be in order to comply with the law. *See* DNR Rule 391-1-2-.05(1)(g)(only requiring a petitioner to state what it "believes" to be the condition or limitation that would make the permit legal). In this case, Petitioners believe that the law would be satisfied if and only if the proper assessments are completed. Only then, could the permit be issued.

C. EPD Cannot Insulate Itself From Judicial Review By Imposing Special Pleading Requirements.

The General Assembly has delegated the role of issuing permits to EPD, but that delegation is not without limitation. Rather, the legislature has created a system of checks and balances whereby a citizen who is aggrieved by a decision of EPD has the right to judicial review of that decision. O.C.G.A. § 12-2-2(c)(2)(A). Not only is that right mandated by statute, there is a strong presumption of judicial review in administrative actions. *Nix v. Long Mountain Resources, Inc.*, 262 Ga. 506, 509 (1992). The legislature has in no way, either explicitly or implicitly, limited that review to only those circumstances where a petitioner can identify with specificity a permit limitation that should have been placed in the permit. On the contrary, pleading requirements are very light in Georgia, and the lightest of all in administrative proceedings.

Although the legislature did not grant Department of Natural Resources (DNR) the authority to preclude review of its own actions by invoking extra-technical pleading rules – much less rules that serve no purpose – that is precisely what occurred here. The ALJ predicated its ruling on a purported pleading requirement of DNR that limits judicial review of its own decisions and the decisions of its divisions, such as EPD. (Order on Respondent's Motion to Dismiss, at 6, OSAH Docket No. 113 (Box 2)(finding that "[r]equiring the petitioner to provide the suggested solution effectively limits the types of challenges allowed.")). For the reasons stated herein, such a limitation cannot stand.

1. DNR Rule 391-1-2-.05(1) (G) And/Or (H) Is Invalid As It Conflicts With Well-Established Pleading Requirements And Exceeds DNR's Statutory Authority.

The ALJ interpreted DNR Rule 391-1-2-.05(1)(g)[29] to preclude Counts XIII and XIV absent the specification of the emission limits discussed above. (*See* Order on Respondent's Motion to Dismiss, OSAH Docket No. 113 (Box 2)). In doing so, the ALJ did not rule on the validity of the rule itself. (*See Id.)* In fact, the validity of this rule has never been adjudicated by any Court.

The validity (and application) of this rule must be construed in light of existing pleading standards. Pleading standards in Georgia, particularly in administrative proceedings, are very light and cannot be used to bar otherwise meritorious claims. As the Georgia Court of Appeals has often stated, pleadings are "intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent the achievement of that end." *Roberts v. Farmer*, 127 Ga. App. 237, 241 (1972) (quoting *Maty v. Grasselli Chemical Co.*, 303 U.S. 197 (1938)) The fact that one of the litigants may be a governmental agency certainly does not change that result. "The people's right to litigate with governmental bodies should not be decided on technicalities any more than one citizen's right to litigate against another citizen." *City of Atlanta v. Int'l Society for Krishna Consciousness of Atlanta*, 240 Ga. 96, 97 (1977).

Georgia follows a notice pleading practice. *Byrd v. Ford Motor Company*, 118 Ga. App. 333 (1968). Pleadings must only comply with the task of general notice-giving. *Reynolds v. Reynolds*, 217 Ga. 234, 246 (1961). Under notice pleading in Georgia, a plaintiff or petitioner need only provide a "short plain statement of the claim" that gives the defendant "notice of the claim in terms sufficiently clear to enable him to frame a

[29] The ALJ found subsection (h) to be inapplicable. (Order on Respondent's Motion to Dismiss, at 3-4, OSAH Docket 113 (Box 2)).

responsive pleading thereto." *Allen v. Bergman*, 201 Ga. App. 781, 783 (1991) (citing *Bazemore v. Burnet*, 117 Ga. App. 849, 852 (1968)).

While notice pleading in this Court is a notably light standard, pleading requirements are even *more lenient* in the administrative process. "Technical rules of pleadings such as govern civil or criminal actions are not applicable to applications or pleadings with an administrative agency . . . and liberality is to be indulged as to their form and substance." *Schaeffer v. Clark*, 112 Ga. App. 806, 809 (1965) (internal citations omitted). The relevant inquiry is not the form of the pleadings, but "the fairness of the whole procedure." *Id.* at 808 (quoting Davis on Administrative Law (1951) § 80, p.p. 279-80); *see also Bearden v. City of Austell*, 212 Ga. App. 398, 399 (1994).

Occasionally, a party must go beyond notice pleading and plead certain subjects more specifically. *See, e.g.*, O.C.G.A. § 9-11-9(b) (fraud stated with particularity). Similarly, in professional malpractice actions, O.C.G.A. § 9-11-9.1 requires an affidavit with the complaint setting forth certain facts and an opinion of negligence. Certain defenses, such as jurisdiction and service of process, must be asserted in an Answer or they are waived under O.C.G.A. § 9-11-12. It is telling that the detail contained in Petitioners' Counts XIII and XIV far exceeds what would be required in any of these "special pleading" requirements imposed by the General Assembly. But more importantly, there is no such special pleading requirement under Georgia's statute that would support the ALJ's ruling here. It is not only unfair but illegal to impose such a requirement under the circumstances pertinent to these claims.

2. Even If Such A Rule Could Have Any Validity, It Could Not Be Applied As It Was In This Case.

Even assuming DNR Rule 391-1-2-.05(1)(g) and/or (h) could be validly applied as construed by the ALJ in some instance, the ALJ's application of the rule was plainly improper here. As an administrative body, the ALJ "possesses only the jurisdiction, power, and authority granted to it by the legislature." *McGinty v. Alfred Simpson & Co.*, 188 Ga. App. 718, 720 (1988). Where there is a regulation under which the ALJ operates, the ALJ must always apply it such that it squares with legislative intent. *Blalock v. State*, 166 Ga. 465, 470 (1928) ("the courts must look diligently for the intention of the General Assembly [which] must be carried into effect."); *see also Pope v. U.S. Fidelity & Guaranty Co.*, 198 Ga. 304, 307 (1944).

The General Assembly has granted Petitioners the right to an evidentiary hearing to challenge the permit. But that right would be abrogated by applying DNR's special pleading requirements where there is a conflict between a statute and a regulation, the ALJ should have followed the statute, OSAH Rule 2, (4) ("In the event any requirement of these Rules conflicts with or is supplemented by an applicable state statute . . . , the requirement of the conflicting or supplementing state statute or federal statute or federal rule shall be applied by the ALJ . . . .), or have avoided an interpretation that would require a finding of unconstitutionality. As in the statutory context, "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

Moreover, the ALJ must apply any applicable rules consistent with the standard applicable to a motion to dismiss. A motion to dismiss should not be granted unless the

petition shows "with certainty" that the plaintiff would not be entitled to relief under *any* state of facts which could be proved in support of his claim. *See Sulejuman v. Marinello,* 217 Ga. App. 319, 320 (1995); *see also LaSonde v. Chase Mortgage Co.*, 259 Ga. App. 772, 774 (2003). Thus, the ALJ must construe all of the facts in the light most favorable to Petitioners, "even if contrary inferences are also possible." *Reiner v. David's Supermarket Inc.,*118 Ga. App. 10, 10 (1968). Here, not only did the ALJ fail to apply this standard, the ALJ shifted the burden to Petitioners to prove *with certainty* that it is entitled to a hearing on the permit. (Order on Respondent's Motion to Dismiss, at 6, OSAH Docket No. 113 (Box 2)) (holding that putting the "onus" on the petitioner to provide the solution "limits the types of challenges allowed."). Pleading requirements in Georgia are not intended to serve as mere procedural barriers, *Roberts v. Farmer*, 127 Ga. App. 237, 241 (1972). It was grossly unfair to disallow Petitioners the opportunity to present evidence based on a technicality that could not reasonably be met and which was irrelevant to the matters at issue.

Because these claims were properly pled according to well established pleading standards, the ALJ's decision to dismiss these counts should be reversed and the matter remanded for an evidentiary hearing on Counts XIII and XIV.

VI. The Permit is Invalid Because No Professional Engineer Supervised or Prepared the Permit, And The ALJ Erred in Not Allowing Petitioners to Amend their Petition to Assert that Claim.

Permitting a new coal-fired power plant is highly complex and technical, requiring specialized expertise. To establish proper emissions limits one must perform a BACT analysis, which requires the expertise of professional chemical or environmental engineers as one must have a thorough understanding of the performance of pollution

control equipment, the chemical and physical properties of the pollutants and exhaust gases, how the control of one pollutant may necessarily affect the control of other pollutants, how different pollutants interact, and a host of other technical considerations. Because of the complexity of these permits and because their role is so important, both the State Board of Engineers and the State Legislature require that the analysis necessary to develop these permits must be performed or supervised by professional engineers. Nevertheless, no licensed engineers performed the permitting for the Longleaf Facility.

Petitioners learned that no professional engineer was involved in establishing the permit limits during the course of the OSAH proceeding. They promptly filed a motion to amend their Petition to assert the claim that the permit was invalid because of this deficiency. The ALJ denied the motion on the ostensible ground that it was filed too late. (*See* Order Denying Motion For Leave to Amend the Petition, For Leave to File a Motion For Summary Determination, and For Summary Determination Based on Newly-Discovered Evidence, OSAH Docket No. 115 (Box 2)). Still, the claim was decided by the ALJ on the merits, ruling that the permit was valid even though a licensed engineer had not been involved in establishing the emission limits for the facility. *Id*. at 7-9. The substantive claim is thus ripe for this Court's review.

A. No Professional Engineer Supervised or Prepared the Permit.

When EPD reviewed and issued the PSD permit to Energy Associates, it engaged in "professional engineering," as defined by Georgia law, which includes consulting, investigating, evaluating, planning, designing, and supervising the construction and operation of a public or private utility. O.C.G.A. § 43-15-1(11). Indeed, in recognition of the complex engineering activities involved here, the State Board of Engineers has

specifically determined that the analysis required for the issuance of a PSD permit requires professional engineering. (Engineering Board Minutes, December 6, 1994, at ¶ 6.1, Attached as Exhibit 3 to Petitioners' Reply to Respondent's , OSAH Docket No. 95 (Box 2)); (Affidavit of Drew Peake, P.E., at ¶ 9, Attached as Exhibit 1 to Petitioners' Reply to Intervenor and Respondent's Response to Petitioners' Motion for (1) Leave to Amend the Petition and (2) For Leave to File a Motion for Summary Determination, and (3) For Summary Determination Based on Newly-Discovered Evidence, OSAH Docket No. 95 (Box 2)). Nevertheless, no State licensed professional engineers were involved with the supervision or preparation of Energy Associates' PSD permit. (*See* Search Results for Professional Licensure, Attachment 2 to Petitioners' Motion for (1) Leave to Amend the Petition and (2) For Leave to File a Motion for Summary Determination, and (3) For Summary Determination Based on Newly-Discovered Evidence, OSAH Docket No. 76 (Box 2); (*see also* Hr'g Tr. 573-575 (Sept. 14, 2007) (Box 3)).

The Georgia legislature has explicitly prohibited the practice of engineering by individuals who lack the proper qualifications. O.C.G.A. § 43-15-7 ("it shall be unlawful for any person other than a professional engineer to practice or to offer to practice professional engineering in this state."). The purpose of these prohibitions is "to safeguard life, health, and property and to promote the public welfare." O.C.G.A. § 43-15-1. The term "Professional Engineering" is defined by statute as follows:

> [T]he practice of the art and sciences, known as engineering, by which mechanical properties of matter are made useful to man in structures and machines and **shall include any professional service, such as consultation, investigation, evaluation, planning, designing, or responsible supervision of construction or operation, in connection with any public or private utilities** . . . . A person shall be construed to practice or offer to practice professional engineering, within the meaning of this chapter who by verbal claim, sign, advertisement, letterhead, card, or in any other way represents or holds himself

> out as a professional engineer or engineer or as able or qualified to perform engineering services or who does perform any of the services set out in this paragraph.

O.C.G.A. § 43-15-2(11) (emphasis added). The term "professional engineer" means:

> [A]n individual who is qualified, by reason of knowledge of mathematics, the physical sciences, and the principles by which mechanical properties of matter are made useful to man in structures and machines, acquired by professional education and practical experience, to engage in the practice of professional engineering and who possesses a current certificate of registration as a professional engineer issued by the [Board of Professional Engineers].

O.C.G.A. § 43-15-2(10) (emphasis added).[30]

There are some listed exceptions to the requirement that one be a professional engineer in order to perform engineering responsibilities, but none of those exceptions are applicable here. O.C.G.A. § 43-15-29. For example, an architect can perform engineering that may be incident to his work. O.C.G.A. § 43-15-29(a). One who is "working as an employee or a subordinate" of a professional engineer is also excepted. O.C.G.A. § 43-15-29(b)(1). There are also exemptions for officers and employees of the federal government and the Department of Transportation. O.C.G.A. § 43-15-29(b)(4); O.C.G.A. § 43-15-29(b)(2). There is also an exemption for "all elective officers of the political subdivisions of the State while in the practice of professional engineering." O.C.G.A. § 43-15-29(3). There is **not** however, an exemption for employees of the Environmental Protection Division of the Department of Natural Resources. The inclusion of an exemption for employees of the Department of Transportation establishes

[30] Obtaining the qualifications of a professional engineer is arduous. One must serve as an "engineer-in-training," and to qualify for that hurdle, one must pass an exam, among other things. O.C.G.A. § 43-15-8. One must then work under the supervision of a professional engineer for at least four years and then pass the professional engineer's exam. *See* O.C.G.A. § 43-15-8 and O.C.G.A. § 43-15-9.

that, had the legislature intended for such an exemption to apply to EPD staff, the legislature would have explicitly included them in the list of exceptions it did enact.

In a series of decisions, the State's Board of Engineers ("the Board"), which is charged with enforcing the professional engineering statutes, ruled specifically that determinations like BACT determinations constitute the practice of engineering. In 1991, for example, the Board unanimously concluded that the required elements of a Reasonably Available Control Technology (RACT) evaluation – which is almost identical to a BACT determination – constitute "engineering" under Georgia law. (Engineering Board Minutes, December 10, 1991, ¶ 7.4, Attached as Exhibit 2 to Petitioners' Reply to Intervenor and Respondent's Response to Petitioners' Motion for (1) Leave to Amend the Petition and (2) For Leave to File a Motion for Summary Determination, and (3) For Summary Determination Based on Newly-Discovered Evidence, OSAH Docket No. 95 (Box 2)). In 1994, the Board addressed proposed EPD rules to govern Maximum Achievable Control Technology (MACT), another process like a BACT evaluation. (Engineering Board Minutes, December 6, 1994, ¶ 6.1, Attached as Exhibit 3 to Petitioners' Reply to Intervenor and Respondent's Response to Petitioners' Motion for (1) Leave to Amend the Petition and (2) For Leave to File a Motion for Summary Determination, and (3) For Summary Determination Based on Newly-Discovered Evidence; Affidavit of Drew Peake, P.E., ¶ 9, Attached as Exhibit 1 to Petitioners' Reply, OSAH Docket No. 95 (Box 2)). Again, the Board unanimously determined that **any activities requiring control technology determinations are**

considered the practice of engineering." *Id.*[31]

In order to fulfill its BACT responsibility, EPD employees must exercise engineering judgment. While the Permit's chief author, Anna Aponte, describes herself as an "environmental engineer," as does her supervisor James Capp, neither of them are licensed professional engineers. (Respondent's Prehearing Submission, at 5, OSAH Docket No. 59 (Box 1)); (*see also* Search Results for Professional Licensure, Attachment 2 to Petitioners' Motion for (1) Leave to Amend the Petition and (2) For Leave to File a Motion for Summary Determination, and (3) For Summary Determination Based on Newly-Discovered Evidence, OSAH Docket No. 76 (Box 2).

The permit is invalid because no licensed professional engineers were involved in establishing the emission limits. While the parties have not identified a specific case addressing the remedial issue here, where the process has been shown to be illegal in such a fundamental fashion – the lack of legal qualifications of the persons responsible for the analyses and decisions – common sense dictates that such important public decisions should be invalidated and the process should conducted in compliance with legal requirements. By analogy, courts routinely invalidate contracts where the party performing under the contract was not a licensed professional, but should have been.

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[31] A BACT determination requires that "determinations be made regarding pollution control technology." EPA, New Source Review Workshop Manual, p. B.2 (Oct. 1990) available online at www.epa.gov/region7/programs/artd/air/nsr/nsrmemos/1990wman.pdf. Under this process, all available control technologies must be identified and ranked in descending order of control effectiveness. *Id.* Next, technically infeasible options are eliminated and the technical difficulties that preclude the eliminated technology from being used must be thoroughly documented. *Id.* at *B.7.* The most stringent alternative must be selected as the Best Available Control Technology, unless the applicant demonstrates, and EPD agrees, that technical considerations, or energy, environmental, or economic impacts, justify a conclusion that the chosen technology is not "achievable" in that case. *Id.* at B. 8-9.

See, e.g, Food Management, Inc. v. Blue Ribbon Beef Pack, Inc., 413 F.2d 716, 724-25 (8th Cir. 1969) (surveying decisions of other courts and concluding that contracts are routinely invalidated on account of a failure to comply with licensing requirements).

This is the law in Georgia as well:

> It is uniformly held in this State, and elsewhere, that "where the license required by the statute is not imposed only for revenue purposes, but requires registration or licensing primarily for the purpose of protecting the public from the acts mala in se, or detrimental to good morals, or from improper, incompetent, or irresponsible persons . . . a contract made without a compliance with and in violation of the statute, and by implication renders such a contract void."

Culverhouse v. Atlanta Ass'n for Convalescent Aged Persons, Inc., 127 Ga. App. 574, 576-77 (1972).

These principles apply in the context of permits as well. The Court of Appeals has applied contract law and invalidated a special use permit that was issued "beyond the power or competence" of a local governmental entity. *Enviro Pro, Inc. v. Emanuel County*, 265 Ga. App. 309, 313 (2004). The permit that is based on an act that is "beyond the power or competence" of the government, as in this case, and therefore unlawful, renders the permit void. *Id.* Indeed, Georgia Courts have repeatedly held that a party does not have a right to a permit unless the permit is "valid in every respect, and has been validly issued." *Id.*; *Netherland v. Nelson*, 261 Ga. App. 765, 768 (2003).

B. The ALJ Erred In Refusing To Allow Petitioners To Amend Their Petition To Assert This Engineering Claim, But That Ruling Is No Bar To This Court Addressing The Issue On The Merits.

The ALJ's order denying the Petitioners' motion to amend was primarily a discussion of whether the motion was timely. (*See* Order Denying Motion For Leave to Amend the Petition, For Leave to File a Motion For Summary Determination, and For Summary Determination Based on Newly-Discovered Evidence, at 2-7, OSAH Docket

No. 115 (Box 2)). The ALJ ultimately concluded that the motion was untimely and denied the motion to amend. (*Id*. at 7). That ruling is no bar to this Court considering this issue on the merits, however, since the ALJ went on and ruled on the merits regardless of its "timeliness" ruling. (*Id*. at 7-9).

For completeness, however, Petitioners would also note that the ALJ's ruling on timeliness was erroneous and an abuse of discretion. The OSAH rule on amending petitions is as follows:

> In the event any pleading is required by an ALJ or Referring Agency statute or rule, any party may amend such a pleading without leave of the ALJ until the tenth day prior to the date set for hearing on the matter or until the entry of a prehearing order pursuant to Rule 14(3), whichever occurs first. Thereafter a party may amend his pleadings only by written consent of the adverse party or by leave of the ALJ for good cause shown.

OSAH Rule 8. Good cause is defined in OSAH Rule 14 as "including excusable neglect" and adding "newly discovered evidence or witnesses [and] rebuttal evidence or witnesses when the need for such could not have been reasonably foreseen prior to the entry of the prehearing order." OSAH Rule (14)(3). Based on this rule, Petitioners should have been allowed to amend their petition. While the ALJ relied instead on the Civil Practice Act ("CPA"), that Act also required that the motion to amend be allowed here. The power to amend a pleading is extremely broad and liberally granted in Georgia. *E.g.*, *Mincey v. Stamper*, 253 Ga. 301, 302 (Ga. 1984). As the Georgia courts have often and poetically stated, "[T]he right to amend is as broad as the Atlantic Ocean and as saving as the power of salvation." *MCG Development Corp. v. Bick Realty Co.*, 140 Ga. App. 41 (1976); *see also McRae v. Britton*, 144 Ga. App. 340, 345 (1977) ("Clearly, the right to amend is exceedingly broad. . . . If an amendment is germane to the original cause of action, it should be allowed.") (citations omitted).

The most important factor in determining whether a late amendment should be permitted is whether doing so would prejudice a party or impair the progress of the proceedings. Here, there clearly would have been no such prejudice. That is indisputable since the ALJ addressed the issue on the merits.

Finally, the ALJ's conclusion that Petitioners should have raised the issue earlier is inconsistent with the record. The procedural history of this issue is detailed in the record, (Petitioners' Motion for (1) Leave to Amend the Petition and (2) For Leave to File a Motion for Summary Determination, and (3) For Summary Determination Based on Newly-Discovered Evidence, OSAH Docket No. 76 (Box 2)); (Longleaf Energy Associates, LLC's Response to Petitioners' Motion for (1) Leave to Amend the Petition and (2) For Leave to File a Motion for Summary Determination, and (3) For Summary Determination Based on Newly-Discovered Evidence, OSAH Docket No. 87 (Box 2)); Respondents' Response to Petitioners' Motion for (1) Leave to Amend the Petition and (2) For Leave to File a Motion for Summary Determination, and (3) For Summary Determination Based on Newly-Discovered Evidence, OSAH Docket No. 122[32] (Box 2)); Petitioners' Reply to Respondent's Response to Petitioners' Motion for (1) Leave to Amend the Petition and (2) For Leave to File a Motion for Summary Determination, and (3) For Summary Determination Based on Newly-Discovered Evidence, OSAH Docket No. 95 (Box 2)); (Petitioners' Motion for Reconsideration of the Court's Finding That Motion to Amend and for Summary Determination Were Not Timely, OSAH Docket No. 99 (Box 2)), and that will not be reiterated here, but rather incorporated by reference. In brief, Petitioners had no "inside knowledge" of the inner machinations of EPD, and they

[32] The OSAH Docket sheet does not contain this pleading. The parties have agreed to identify this pleading as Docket Number 122.

did not know that no EPD engineer had performed the engineering determinations at issue. EPD's Final Determination implies otherwise, in fact. If Petitioners could be faulted for anything, it would be relying upon the written representations of EPD, which were not known to be misleading until well into the OSAH proceeding. EPD's Final Determination explicitly states that a Mr. Peter Courtney – who *is* a licensed professional engineer – was one of the two individuals who had *prepared* the determination.[33] (EPD File Box 103 (Box 10)).

It was not until August 30, 2007, less than 10 days before the commencement of the evidentiary hearing and after the date in which Petitioners could amend as a matter of right, that Petitioners learned *for the first time* that Mr. Courtney might not have been involved in preparing the permit and determining the emission limits. That possibility arose initially from EPD's Prehearing Submission, which is the first responsive pleading by EPD that provided any insight into the role of individual EPD employees in the administrative process.[34] Petitioners requested from EPD counsel a written statement of whether Mr. Courtney was or was not involved in the permitting process beyond mere modeling, (Petitioners' Reply to Intervenor and Respondent's Response to Petitioners' Motion for (1) Leave to Amend the Petition and (2) For Leave to File a Motion for Summary Determination, and (3) For Summary Determination Based on Newly-Discovered Evidence, at 2, OSAH Docket No. 95 Box 2)), but EPD refused to provide a yay or nay response. (*Id.*) During the hearing on September 14, 2007, Petitioners again sought a response to this inquiry, but EPD's counsel again refused to answer the question.

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[33] The other person listed, Ms. Anna Aponte, is not an engineer.

[34] Discovery depositions are not available in OSAH proceedings, which greatly impaired and delayed the ability of Petitioners to learn the truth about these events.

(Hr'g Tr. 575-575 (Sept. 14, 2007) (Box 3)). Only after prodding from the ALJ did EPD's counsel finally respond, and then, for the first time, confirmed that Mr. Courtney's role was limited to "modeling" and he did not supervise other members of EPD staff who – though not engineers – had performed the engineering functions at issue. (*Id.*) Petitioners filed their motion immediately after that disclosure.

Under all of these circumstances, leave to amend should have been granted, particularly since there was no possible prejudice to any party, nor any possible delay in the proceedings.

CONCLUSION

For the reasons set forth herein, in their Petition for Judicial Review filed February 11, 2008, and based on the entire record before the Court, Petitioners respectfully request that the final decision and other orders of the ALJ that are on appeal before this Court be reversed or, in the alternative, that they be vacated and remanded for further proceedings consistent with this Court's Order.

Respectfully submitted, this 9th day of April, 2008.

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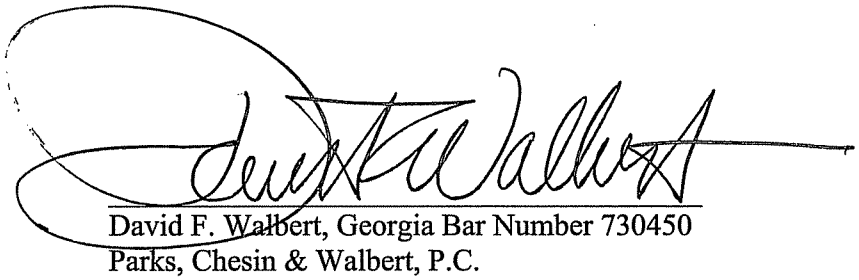
Signatures Continued on Page 88



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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served a copy of the **Petitioners' Brief in Support of Petition for Judicial Review** by depositing a copy thereof, postage prepaid, in the United States Mail, first class, properly addressed upon:

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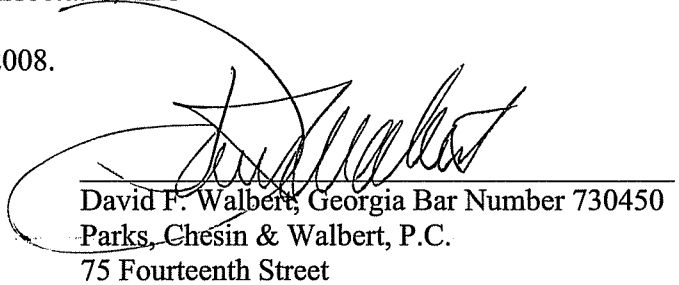

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