

IN THE COURT OF APPEALS  
STATE OF GEORGIA

DR. CAROL COUCH, DIRECTOR, )  
ENVIRONMENTAL PROTECTION )  
DIVISION, GEORGIA )  
DEPARTMENT OF NATURAL )  
RESOURCES, )  
 )  
Appellant, ) APPEAL NO. AO9A0388  
 )  
v. )  
 )  
FRIENDS OF THE )  
CHATTAHOOCHEE, INC. and )  
SIERRA CLUB, )  
 )  
Appellees. )

**BRIEF OF APPELLEES**

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## **PART ONE**

### **INTRODUCTION AND STATEMENT OF MATERIAL FACTS**

Appellees appealed 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”), if built, would be located in Early County, Georgia and annually emit 8 to 9 million tons of carbon dioxide (“CO<sub>2</sub>”); thousands of tons of sulfur dioxide (“SO<sub>2</sub>”); nitrogen oxides (“NO<sub>x</sub>”); coarse particulate matter (“PM<sub>10</sub>”); fine particulate matter (“PM<sub>2.5</sub>”); sulfuric acid mist; and a number of other hazardous air pollutants, including mercury. Sup. Ct. Order, 39-R-19185.<sup>1</sup> 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

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<sup>1</sup> Pursuant to Rule 25 of the Rules of the Court of Appeals, citations to the record are provided in the following format: “(volume number)-R-(page number),” and citations to transcripts in the record are provided in the following format: “(volume number)-T-(page number) (date of hearing).” When an Order is cited, such is indicated before the record citation.

process. As the Superior Court held, the decision of the Administrative Law Judge (ALJ) from the Georgia Office of State Administrative Hearings (OSAH) upholding the permit was equally flawed. Sup. Ct. Order, 39-R-19203.

First, the ALJ effectively abdicated the legal responsibility assigned to OSAH in this case by refusing to examine the evidence before it *de novo*. The Superior Court “carefully reviewed the final decision of the ALJ” and found that “it is clear that the ALJ did not make *de novo* findings or decisions concerning emission limitations or other issues.” *Id.* at 19188. The Superior Court further found the ALJ deferred to the factual assertions and conclusions of EPD, contrary to the legal standards that should have governed the proceeding. *Id.* at 19188-190. As such, the Superior Court properly remanded the matter back to the ALJ for a determination under the correct standard of review. *Id.* at 19203.

During the administrative proceedings, the ALJ also dismissed some of Appellees’ claims – without even hearing evidence on those claims – under the notion that a party must satisfy certain strict pleading requirements and 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* ALJ Order, 7-R-3489-90. Even though it was effectively impossible for Appellees to

do that on certain issues, the ALJ dismissed those claims. *See id.* at 3489-90. The Superior Court correctly held that a claim should not be dismissed for failure to comply with such “pleading contrivances.” Sup. Ct. Order, 39-R-19200.

The Superior Court also held that permit limits should be set by individuals who are qualified to make such determinations. *Id.* at 19203. The permit limits in this matter must be derived from a case-by-case process called a Best Available Control Technology or “BACT” determination. 40 C.F.R. § 52.21(b)(12); Georgia SIP 391-3-1-.02(7)(a)(2). That analysis 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 analysis or sign off on the permit. On remand, the Superior Court directed that the permit be issued utilizing “sufficient engineering assistance and direction to ensure that” the permit is issued in accordance with law. *Id.* at 19203. Otherwise, permit limits could endanger public health.

The Superior Court also ruled on three other legal issues that had been dismissed summarily by the ALJ that involved the proper application of the Clean Air Act. EPD did not brief those issues but instead incorporated by reference the brief filed in the companion case, *Longleaf Energy Associates v. Friends of the Chattahoochee, et al*, Appeal Number A09A0387. Appellees respond fully on

those three other issues in a brief filed in that companion case, and that brief is incorporated by reference here.

### **THE PARTIES**

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. 4-R-1831-32; 4-R-1861-62; 4-R-1852-53. These people are profoundly concerned about the impact that an enormous coal-fired power plant would have on their families’ health, their environment, and their community. 4-R-1863-64; 4-R-1853-54; 4-R-1835. Parents and grandparents testified about their fears that the plant would seriously endanger their health as well as the health of their children and grandchildren who suffer from asthma and allergies. 4-R-1848-49; 4-R-1854-56; 4-R-1864. Farmers testified about fears of how the coal plant would impact their crops. 4-R-1835; 4-R-1863; 4-R-1858. Other members of the community testified about their concerns regarding mercury pollution, 4-R-1879, including the safety of eating fish from nearby ponds and rivers after those waterways absorbed mercury emitted from the power plant. 4-R-1842; 4-R-1880. Joining Friends in their challenge is Sierra Club. Like Friends, many of Sierra Club’s members live

in the areas that will be most gravely impacted by the coal-fired power plant. 4-R-1872. 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. 4-R-1863; 4-R-1879-80.

The Environmental Protection Division (EPD) is a division of Georgia's Department of Natural Resources (DNR), O.C.G.A. § 12-2-2(a), and is responsible for enforcing environmental laws in Georgia. O.C.G.A. § 12-2-2(b)(1).

Longleaf Energy Associates, LLC ("Energy Associates") is the creature of two other companies, Dynegy, Inc. and LS Power Group. 1-R-355. Dynegy's stock is publicly traded on the New York Stock Exchange. Dynegy provides wholesale power and other services to utilities from its "portfolio" of fossil fuel fired power plants. *Id.*; 1-R-284. LS Power describes itself as a "development, investment and asset management group of companies" operating in the power industry. 1-R-355. Energy Associates was created by LS Power for the sole purpose of developing the Longleaf power plant. *Id.*

## **PART TWO**

### **Standard of Review.**

This Court conducts a *de novo* review of the Superior Court's decision. *Walker v. Department of Transportation*, 279 Ga. App. 287, 288 (2006). In conducting this review, the focus of this Court's analysis is on the decision of the Superior Court, not that of the administrative court. As stated by this Court, with respect to questions of law, the Court's "function is to determine whether the superior court has in its own final ruling committed an error of law." *Ga. Bd. of Natural Res. v. Ga. Emission Testing Co.*, 249 Ga. App. 817, 819-820 (Ga. Ct. App. 2001) (citing *DeWeese v. Georgia Real Estate Comm.*, 136 Ga. App. 154, 155 (1) (220 S.E.2d 458) (1975)). While this Court should look to the administrative record with respect to factual determinations, *id.*, the issues before this Court are questions of law.

### **ARGUMENT AND CITATION OF AUTHORITIES**

#### **A. The Superior Court Correctly Held that the ALJ Committed Legal Error By Failing To Independently Review The Facts *De Novo* (Enumer. No. 1).**

Appellees 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, Appellees, Energy Associates, and EPD all presented expert testimony on these issues. Because the proceeding was *de novo*, 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 “reasonableness” standard more typical of an appellate review on the ultimate factual issues. ALJ Final Order, 8-R-3544-651. As found by the Superior Court, the ALJ “repeatedly rejected” Appellees’ factual claims, not because they were incorrect, but because the ALJ concluded that the position of EPD was not “unreasonable.” Sup. Ct. Order, 39-R-19188-89. 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 these factual issues. Consequently, the Superior Court properly remanded the matter so that the evidence on Appellees’ claims can be evaluated properly.

**1. The ALJ Was Required to Make Independent Determinations and Apply a *De Novo* Standard.**

The Superior Court held that “a *de novo* standard of review should have been rendered” because “the specific rules of OSAH dictate that [the] proceeding

should have been determined *de novo*.” Sup Ct. Order, 39-R-19189. In concluding that a *de novo* review is required under these circumstances, the Superior Court’s order tracks the applicable regulations which clearly provide that, as in other such evidentiary proceedings, the ALJ must apply a *de novo* standard of review. *Id.* at 19188-90; 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.**”<sup>2</sup> OSAH Rule 21(1)(emphasis added).

As the Superior Court Order makes clear, the requirement of OSAH’s rules that the ALJ’s review be independent and *de novo* also follows the General Assembly’s mandate that appeals of EPD actions, such as permitting decisions, be

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<sup>2</sup> EPD asserts that the issue of whether the ALJ rendered an “independent” review is not at issue on this appeal because the Superior Court somehow “agreed” that the ALJ conducted such a review. EPD Brief, at 11. The Superior Court’s order cannot possibly be read for that proposition, however.

heard by an “ALJ that sits in lieu of the Board of the Department of Natural Resources (DNR).” Sup. Ct. Order, 39-R-19189; *see also* 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**” DNR)(emphasis added); *see* 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). The Superior Court noted that, while DNR would have the “plenary authority and responsibility to make a de novo decision, that authority was transferred to” OSAH. Sup. Ct. Order, 39-R-19189; *see also 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.

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 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) (ALJ should make independent review).

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. *See eg. 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.). For example, one ALJ stated that

[t]he 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.

*In Re Mullis Tree Service*, 1987 Ga. Env. LEXIS 20, \*4-5, \*10 (O.S.A.H. 1987) (emphasis added). The ALJ in this case failed to apply this standard.

**2. The ALJ Failed to Make a *De Novo* Determination.**

The fact that the ALJ plainly abdicated its responsibility to *independently* review *de novo* the evidence and the determinations made by EPD cannot be honestly disputed. As the Superior Court held after “carefully review[ing] the final decision of the ALJ”:

It is clear that the ALJ did not make *de novo* findings or decisions concerning emissions limitations or other issues. The ALJ repeatedly rejected contentions of Petitioners not because the facts did not support Petitioners’ position, but because the ALJ concluded that EPD’s decision was not unreasonable.

Sup. Ct. Order, 39-R-19188-89.<sup>3</sup> The Court noted that the following language

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<sup>3</sup> EPD readily admits that the ALJ applied a deferential “reasonableness” standard.

Brief of Appellant, Dr. Carol Couch, Director, Environmental Protection Division

typified the ALJ's approach:

[T]he 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.**

Sup. Ct. Order, 39-R-19189, fn 1 (emphasis added). As the Superior Court held, such reasoning plainly did not constitute "a de novo decision." *Id.*

The Superior Court's conclusion that the ALJ misapplied the standard of review is amply supported by the record. Notably, the ALJ improperly relied upon

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Georgia Department of Natural Resources ("EPD Brief"), at 9 ("In this case the ALJ first reviewed the Permit decision to determine if EPD acted lawfully . . .

Indeed, EPD's complaint is not that the ALJ failed to apply this standard; on the contrary, EPD's complaint is that the Superior Court reversed the ALJ precisely because the ALJ did apply a reasonableness standard. *Id.* at 23 (citing error because the Superior Court reversed the ALJ's decision to "[afford] deference to EPD.").

a decision by the United States Environmental Protection Agency's Environmental Appeals Board ("EAB") concerning the EAB's standard of review and the fact that the EAB should not "substitute its equally reasonable determination for the Director's reasonable determination." *See, In re: Indeck-Elwood, LLC*, 2006 EPA App. LEXIS 44 (Sept. 27, 2006), cited at Order, 8-R-3608-09. It is fundamentally incorrect, however, 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 such comparable right to a hearing before the EAB, 40 C.F.R. § 124.19. Rather, the EAB's power of "review" is to be "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). The EAB may review a record through an appellate "clearly erroneous" standard, *see id.*, but that

standard has nothing to do with the *de novo* standard that should have been used by the ALJ in the case at bar.

The ALJ persistently evaluated the evidence under a legally incorrect standard. At the evidentiary hearing, for example, Appellees 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.” *See* Georgia SIP 391-3-1-.02(7)(a)(2), 40 C.F.R. § 52.21(b)(12). BACT is an emission limit derived by evaluating air pollution control techniques and then setting limits corresponding to the best technology’s capabilities. ALJ Final Order, 8-R-3564, 3582, 3615.

Appellees alleged that EPD made numerous errors in going through this BACT determination process. For example, in the Sulfur Dioxide (SO<sub>2</sub>) BACT determination, Appellees alleged that, although EPD correctly assumed that a so-called “wet” scrubber can control SO<sub>2</sub> better than a “dry” scrubber, EPD did not require the use of better technology because it erroneously assumed the two technologies have roughly the same control efficiency. *See* 24-R-11884, 24-R-11895, *as compared to* 26-R-12838-39. EPD’s underestimation of the efficiency

of wet scrubbers rippled through its entire BACT analysis, causing errors EPD's evaluation of the cost, energy, and environmental impacts of the two technologies. 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, Appellees asserted that, had EPD properly evaluated the capability of wet scrubbers, it would have realized that the facility, so equipped, would be expected to emit annually only 1,720 tons of the pollutant SO<sub>2</sub>, 11-T-5151-52 (Sept. 6, 2007), not 5,636 tons, a difference of *almost 4,000 tons*. 11-T-5131 and 5151-52 (Sept. 6, 2007). This error rendered EPD's comparison of the technologies on a cost-per-ton-removed basis useless.

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 Appellees to a much higher legal burden, requiring proof that EPD's approach was *unreasonable*. Sup. Ct. Order, 39-R-19189. Under that incorrect standard, instead of making a determination as to the facts, the ALJ rejected this challenge to the permit on the basis that Appellees' failed to show that "EPD's selected control efficiencies were *unreasonable*." ALJ Final Order, 8-R-3624.

The ALJ’s misunderstanding of the appropriate standard of review appears throughout its order as it continually, expressly – and erroneously – failed to make independent factual findings and determinations as to critical issues in the case. Instead, mere “reasonableness” or “adequacy” of the agency decision was the ALJ’s focus at every turn. *See, e.g., id.* at 3630, (“EPD’s reliance, in part, on disparate energy impacts *was reasonable*[,]”) (emphasis added). Throughout, 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.” ALJ Final Order, 8-R-3615. In one instance, the ALJ 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 3600. Of course, the relative “comfort” level of the agency is irrelevant to these proceedings, which were supposed to turn, by law, on (1) the evidence presented and (2) the independent *de novo* factual determinations of the ALJ based on that evidence.

Later, the ALJ again misstates Appellees’ burden. Rather than demonstrating what the emission limits should be based on the evidence, the ALJ put Appellees to the much higher burden of proving that the EPD’s decision was

*“unreasonable.”* *Id.* at 3624. In this instance, the critical issue involved the choice of two technologies 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 instead only stated that “EPD fully considered available regulatory decisions and performance data . . . .” *Id.* at 3624-25.

In another instance, the ALJ stated that EPD’s decision was not “improper,” again making no independent determination on the matter. ALJ Final Order, 8-R-3625. With regard to the emission 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 3638. The issue before 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*. 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. ALJ Final Order, 8-R-3638; *see also* 8-R-3626; 8-R-3628 (“EPD reasonably relied”); 8-R-3630 (“EPD’s reliance . . . is reasonable”); 8-R-3633 (Petitioners “failed to show . . . that EPD’s .

. . . determination is “unreasonable”); 8-R-3638 (“EPD reasonably relied”); 8-R-3644 (Petitioners failed to demonstrate that “EPD’s additional impacts analysis was inadequate.”). The ALJ’s Final Order makes it abundantly clear that an “unreasonableness” standard was followed. *Indeed, the ALJ uses the terms reasonable or unreasonable over 30 times in the Final Order in improperly rejecting Appellees’ challenge to the permit! See, e.g., id. at 3624.*

**3. The Superior Court was Correct in Holding that the Failure to Apply a *De Novo* Review was Clear Error.**

There is simply no requirement under controlling law that Appellees must affirmatively prove that EPD’s decision, or its view of the facts, was “unreasonable.” As held by the Superior Court:

The specific rules of OSAH dictate that this proceeding should have been de novo. OSAH Rule 21(3) provides that: “The hearing shall be de novo in nature . . .” OSAH Rule 21(1) further states that “the ALJ shall make an independent determination at the hearing . . . [.]” While the State Respondents contend that this rule pertains only to the ‘burden of proof,’ that is plainly incorrect. It requires a de novo hearing in clear and explicit language that cannot be reasonably construed otherwise.

Sup. Ct. Order, 39-R-19189-90. The Superior Court was correct in finding that the ALJ's failure to apply the correct standard of review was error that mandated that the matter be remanded back to the ALJ.

This is not the first time that the Court of Appeals has addressed this issue and come to the same conclusion as the Superior Court in this case. For example, in *Piedmont Healthcare, Inc. v. Ga. Dept. of Human Resources et al.*, 282 Ga. App. 302 (2006), this Court held:

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.**

*Id.* at 303-304 (emphasis added); *see also Dir., Env. Prot. Div. v. Leblanc*, 2003 Ga. Env LEXIS 68, \*2 (O.S.A.H. 2003) (same).

As shown above, and as held by the Superior Court, the ALJ evaluated almost all of the evidence under a 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 an improper and very deferential “reasonableness” test.

#### **4. Appellants’ Standard of Review Arguments.**

Energy Associates and EPD put forth several strained arguments in support of their claims that can be summarized as follows: 1) the use of the word “review” in “administrative review” somehow demonstrates that the ALJ can adopt a reasonableness standard, 2) EPD is entitled to deference and therefore that supports the use of a “reasonableness” standard, 3) Appellees somehow brought the ALJ’s error upon themselves by using the word “unreasonable” in their brief, and 4) the length of the record somehow demonstrates that the ALJ conducted a *de novo* review. None of these arguments have any merit.

First, EPD relies on the word “review,” as referred to in “administrative review” as somehow demonstrating that the ALJ’s role is limited. EPD Brief, at 17. If EPD were correct, then any judicial or administrative “review” would necessarily require that a judge depart from the clearly articulated “standard of

review,” which is, in this case, *de novo*. The use of the word “review” in this context simply cannot stand for that proposition. A member of the public, a permittee, or any other litigant may seek judicial or administrative “review” of any number of agency actions. Once that “review” has commenced, there is no plausible basis that would support the notion that the word “review,” in the context of “administrative review,” might modify an otherwise required *de novo* standard of review. Even more surprising, although it is a bit unclear, EPD also appears to argue that, since Appellees cited to a statute in its statement of jurisdiction that refers to the phrase “administrative review”, Appellees have implicitly acknowledged that the role of the ALJ is somehow limited. *Id.* at 18. Appellees are at a loss to respond to this strange argument, other than to state that the citation of any statute that may have used the phrase “administrative review” signified nothing remotely like what EPD claims.

Second, EPD does not even dispute at one point that the ALJ applied a reasonableness standard. Instead, EPD puts forth an argument that the application of a “reasonableness” standard is appropriate because of some “two part” test that it claims an ALJ should apply. EPD Brief, at 24. EPD appears to argue that the ALJ should apply a *de novo* standard, and second, the ALJ should conduct some

sort of reasonableness review. *Id.* at 9, 24. EPD cites no case that enunciates any such “two-part” test. *See id.* Instead, EPD equates “reasonableness” with “deference” and cites case law discussing deference to support its unprecedented theory. *Id.* at 24.

EPD’s position fails for many reasons. First, even assuming that a “reasonableness” standard could be extracted from cases that discuss deference, the ALJ here repeatedly refused to fulfill its role as the ultimate **trier-of-fact**. As such, the issue **in this case** is whether the ALJ could apply a reasonableness standard to its **factual** determinations. EPD does not cite, nor could it cite any case that factual determinations made by an agency are entitled to deference under *any* circumstances in administrative proceedings.

Even assuming that the determinations by the ALJ could be described as anything other than factual determinations, EPD’s claim must still fail. As discussed above, under the statutory scheme that governs EPD permitting decisions, the ALJ “sits in lieu of the Board of the Department of Natural Resources (“DNR”).” O.C.G.A. § 12-5-283(b). The DNR Board’s former authority to make a *de novo* final decision regarding a permit issued by one of the agency’s regulatory divisions is thus vested now in the ALJ. O.C.G.A. § 12-2-

2(c)(2)(A)); *see also* OSAH Rule 21(2) (“The hearing shall be *de novo* in nature...”); OSAH Rule 21(1) (“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 is available to the [DNR].” (emphasis added)). *See Piedmont Healthcare, Inc. v. Georgia Dept. of Human*, 282 Ga.App. 302, 638 S.E.2d 447, 449 (2006) (affirming trial court’s determination that the ALJ had erred by affording “great weight and deference” to agency interpretations”). The cases relied upon by EPD simply do not stand for the proposition that deference should be applied by an ALJ – standing in lieu of the agency board – to factual determinations made by the agency.<sup>4</sup> *See City of Atlanta v. Sumlin*, 258 Ga. App. 643, 645-46 (2002) (Court of Appeals applying deference on statutory interpretation to State Board of Worker’s Compensation); *Hosp. Auth. Of Gwinnett*

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<sup>4</sup> Ironically, in asserting that EPD should be granted deference, EPD argues that such deference should be granted because the “ALJ’s lack technical expertise.” EPD Brief, at 28. One can only hope that EPD is not also saying that the Superior Court should have given deference to the ALJ when, by its own admission, the ALJ lacks experience in permitting! *Id.*

*County v. State Health Planning Agency*, 211 Ga. App. 407, 408 (1993) (Court of Appeals applying deference to State Health Planning Review Board's interpretation of a statute); *Kelly v. Lloyd's of London*, 255 Ga. 291, 293 (1985) (Supreme Court applying deference on statutory interpretation to State Insurance Commissioner); *Environmental Waste Reductions, Inc. v. L.E.A.F., Inc.*, 216 Ga. App. 699, 702 (1995) (Court of Appeals applying deference on statutory interpretation to ALJ).

To the extent deference is ever appropriate in an ALJ proceeding, the Supreme Court has strictly limited the circumstances where deference may arise. In *Pruitt Corp. v. Ga. Dep't of Cmty. Health*, 284 Ga. 158, 160 (Ga. 2008), the Court explicitly circumscribed agency deference, *if it is to be applied at all*, only to agency interpretations that have been afforded “the adoption process through which all rules and regulations must pass.” In the present case, the decisions made by EPD involve BACT determinations, and it is undisputed that EPD made its BACT permitting decisions utilizing EPA's “Draft NSR Manual,” a *draft* manual that has never been through any of the public scrutiny required by the *Pruitt* court. ALJ Final Order, 8-R-3615.

In addition to the permitting process that EPD followed, its interpretation of the applicable laws and regulations are also not entitled to deference. The permit, EPD, and Longleaf must comply with applicable **federal law** in its entirety, including the Clean Air Act and its implementing federal regulations. That follows directly from the fact that, in the State of Georgia as well as the rest of the country, federal law is supreme and must be complied with, even if state law were otherwise satisfied. *See* Supremacy Clause, U.S. Const., Art VI, § 2. States are not permitted to follow their own individual, rogue paths contrary to the substantive provisions of the Clean Air Act and its implementing regulations. Furthermore, while Georgia is a SIP-approved state and EPA has thus delegated to Georgia the authority to *administer* the PSD program, that fact certainly does not render federal substantive law under the Act any less controlling. Quite to the contrary, once approved by EPA, the SIP actually becomes federal law. 42 U.S.C. § 7413. As such, in issuing PSD permits, EPD is specifically supposed to be implementing and following federal law. *See Concerned Citizens of Bridesburg v. Philadelphia Water Dept.*, 843 F.2d 679, 680 (3d Cir. 1988) (stating that the EPA-approved Pennsylvania SIP is a "federal regulation promulgated pursuant to the Clean Air Act."); *see also, Trustees for Alaska v. Fink*, 17 F.3d 1209, 1210 n.3 (9th

Cir. 1994) ("Having 'the force and effect of federal law,' the EPA-approved and promulgated Alaska SIP is enforceable in federal courts."); *Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332, 335 (6th Cir. 1989) ("If a state implementation plan ... is approved by the EPA, its requirements become federal law and are fully enforceable in federal court.")

Further, the SIP provisions at issue in this case simply incorporate by reference federal regulations. As such, EPD is not entitled to any deference in its "interpretation" of its regulations or the laws at issue here. As held by the Eleventh Circuit and other courts, "[a] state agency's interpretation of federal law is generally not entitled to deference by the courts."<sup>5</sup> *Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist.*, 280 F.3d 1364, 1368 (11th Cir. 2002) (citing *GTE South, Inc. v. Morrison*, 199 F.3d 733, 745 (4th Cir. 1999)), *vacated on other grounds*, 541 U.S. 95 (2004); *see also Orthopaedic Hosp. v. Belshe*, 103 F.3d

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<sup>5</sup> In permitting, EPD makes a BACT determination that is a creature of federal law, 42 U.S.C. § 7479(3); 40 C.F.R. §52.21 (b)(12), that has merely been incorporated into state regulations *verbatim*. Ga Comp. R. & Regs. r. 391-3-1-.02(7(a)(2).

1491, 1495 (9th Cir. 1997) (“We review de novo a state agency's interpretation of a federal statute”) (citing cases); *AMISUB (PSL), Inc. v. Colorado Dep't of Social Serv.*, 879 F.2d 789, 795-96 (10th Cir. 1989) (state agency's determination of procedural and substantive compliance with federal law reviewed *de novo*), *cert. denied*, 496 U.S. 935 (1990).

EPD and Energy Associates put forth other equally unpersuasive arguments. For example, they argue that Appellees somehow brought this “unreasonableness” standard upon themselves by using the word “reasonable” in their Proposed Findings of Fact and Conclusions of Law. Brief of Appellant Longleaf Energy Associates (“Energy Assoc. Brf.”), at 28-31; EPD Brief, at 23. That is absurd. In its briefing to the ALJ, Appellees contended that EPD’s decisions were unlawful under any standard, including an arbitrary and capricious standard. *See* 6-R-2715, 2737, 2741, 2752, 2757. Appellees certainly did not advocate the use of a “reasonableness standard” in any way. Nor did Appellees ever suggest that the ALJ should, or could, avoid making *de novo* determinations based on the evidentiary record. In fact, Appellees went into *considerable* detail articulating the correct standard of review in their final brief. *Id.* at 2714-2719.

Both Energy Associates and EPD spend significant time describing the

length of the record, the hearing, the number of exhibits and, in their words, the “exhaustive” review undertaken by the ALJ. Apparently, Energy Associates and EPD see such factors as the length of the ALJ’s opinion as evidence of the standard of review applied! In truth, such factors are irrelevant to whether the ALJ applied the correct standard of review. Indeed, the complexity of the case only underscores why it is so important that the correct standard of review be applied.

Where, as is the case here, an administrative body so clearly misapplies the standard of review, the Superior Court was entirely correct in remanding the case back to the ALJ with instructions to consider the evidence under the correct standard of review.<sup>6</sup> Contrary to EPD’s assertion that Appellees have not been prejudiced or that they failed to meet their burden of proof, the record is replete with evidence and contentions of the harm that would result from the construction of this plant based upon an improperly issued permit. Even were that not the case,

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<sup>6</sup> EPD also claims that the Superior Court ignored the “any evidence rule” in making its ruling. EPD Brief, at 26. The question before the Superior Court was a question of law and, as such, the “any evidence” rule was inapplicable. *Walker*, 279 Ga. App. at 288 (2006).

harm is inherent and remand is required whenever a trial court has applied an erroneous standard of review or legal theory. *E.g.*, *Smith v. Andrews*, 139 Ga. App. 380, 382 (1976) (“[T]he judgment denying confirmation must be reversed and the case be retried under the correct legal theory of law, since we cannot determine whether the judge would have weighed the evidence as he did if he had been relying on the correct theory.”); *Williams v. Citizens & Southern Nat’l Bank*, 142 Ga. App. 346, 350 (1977) (same); *Ayers v. Yancey Bros Co.*, 141 Ga. App. 358, 360 (1977) (same); *Watson v. Elberton-Elbert County Hospital Authority*, 229 Ga. 26, 27 (1972).

**B. The Superior Court Correctly Held that the ALJ’s Dismissal of Counts XIII and XIV of the Amended Petition Was Improper. (Enumer. Nos. 2 & 3).**

Appellees submitted a seventeen-count, seventy-page Amended Petition that set out their claims in exacting detail. *See* 4-R-1537. 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*, Appellees provided specific emissions limitations that they believed should be included in the Permit. *Id.* at 1548, 1549, 1581, 1582, 1584, 1591, 1593, 1606, 1809.

In Counts XIII and XIV, Appellees challenged as inadequate Energy Associates' assessment of the impact of known carcinogens and other toxic emissions on public health. *Id.* at 1598, 1602. The fundamental defect alleged by Appellees in these two counts was not the specific permit limits set by EPD, but Energy Associates' failure to adequately study (1) how the proposed facility would impact human health, *id.* at 1597, and (2) how visibility would deteriorate as a result of emissions. *Id.* at 1602. Appellees contended that the *applicant* must complete the requisite analysis in accordance with law, and only then could legal emissions limitations be set. *Id.* at 1598, 1602.

The ALJ dismissed these counts without receiving any evidence, on the theory that Appellees had failed to plead a specific limitation that should have been included in a final permit, if the Count XIII and XIV claims were well founded. Sup. Ct. Order, 39-R-19199; ALJ Order, 7-R-3489-90. The ALJ so ruled even in the absence of any finding that the lack of such specific emission limits prejudiced the opposing parties or hindered their ability to defend themselves in any way. ALJ Order, 7-R-3489-90.

**1. Appellees Provided Abundantly Specific, Detailed Bases for Their Claims.**

While EPD claims that Appellees' pleadings should not be "vague or general," EPD Brief, at 39-40, Appellees 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 precisely framed. For example, with respect to Count XIII – which challenged Energy Associates' health risk assessment as flawed – the following are a few illustrative excerpts from the exhaustive, detailed allegations in Appellees' Petition:

- “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”
- The “Permit Application shows that the project will emit significant emissions of lead (0.65 tpy),<sup>7</sup> fluorides (159 tpy) and mercury (0.11 tpy) [which] will largely exceed the corresponding PSD significant emission rates as defined in 40 C.F.R. § 52.21 (PSD Regulations). . . .

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<sup>7</sup> TPY is shorthand for “tons per year.” (Footnote not in original).

- “The . . . analysis . . . underestimates the impacts of mercury [and] . . . does not consider health risks from non-inhalation pathways.”
- The assessment “did not quantify the cancer risks for carcinogens and noncancer acute and chronic hazard indices for noncancer health effects.”
- “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.”
- “[P]roper analysis of the risks from multipathway pollutants shows that emissions from the Longleaf Energy Station exceed the threshold value of 1.”

4-R-1596-97. Count XIII concludes that, “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, performs a full health risk**

**assessment.**” *Id.* at 1598 (emphasis added).

Thus, central to Appellees’ claim is the contention that limitations could not be set *until* either EPD or Energy Associates performed a full health risk assessment. Absent the required analysis, Appellees were in no better position to “pick” emission limits than was EPD.

Similarly, in Count XIV, Appellees’ claim is based on the law that provides that a permit cannot issue that violates the federally-mandated goal of ensuring visibility and repairing visibility problems caused by manmade air pollution. 4-R-1598 (citing Georgia SIP 391-3-1-.02(2)(uu)(7)). It is self-evident that this goal cannot be met unless the impact of the plant is properly assessed prior to calculating a permit limitation. *Id.* at 1602. Appellees alleged the following errors, among others, in the applicant’s assessment:

- It “relied upon CALPUFF modeling that used outdated and inappropriate meteorological data. . . . 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. “

- “Only a regional haze impact assessment has been performed for project-only emissions.”
- “[I]t relied on modeling that did not include facility emissions from points other than the main boilers.”
- “[I]t relied on modeling that made inappropriate modifications to the FLAG procedure. EPD should have used the FLAG screening Level I procedure.”
- “[I]t failed to take into account cumulative visibility impacts at the St. Marks Wilderness Area.”

4-R-1599-1602 (emphasis added). Appellees then concluded that, in order “**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 SO<sub>2</sub> and particulate matter if it is more stringent than the proper BACT emission limitation for those pollutants included above.**” *Id.* at 1602-03 (emphasis added). Given the persuasive flaws in the applicant’s analysis, Appellees could not stipulate

particular permit limits, but instead sought an order that the permit be remanded with instructions that a proper analysis be performed. *See id.* at 1595-1603. Once such an analysis has been performed, appropriate permit limits could be determined.

The ALJ refused to hear either of these counts on the ground that, in order to even have a matter *considered*, Appellees must have first identified with specificity the *precise* permit limitation that would make the challenged permit lawful. ALJ Order, 7-R-3489. However, as the Superior Court explained:

The basis for [Appellees' claims] was not the limits in the permits, but the failure of the applicant to assess the public harm prior to establishing permit limits. Under the ALJ's approach, a person complaining about the failure of an applicant to perform an assessment would be required – as a prerequisite to challenging that failure – to fully perform the required studies and determine emission levels that would properly protect the public. No rule of pleading can reasonably impose such a burden on a litigant. Where a petition alleges that the application completely failed to do appropriate studies, neither the applicant nor EPD can claim “harm” by having those

allegations heard and determined simply because petitioners themselves did not first do the studies the respondents failed to do.

Sup. Ct. Order, 39-R-19200. While EPD and Energy Associates characterize Appellees' position as a deliberate "refusal" to provide the emissions limitations at issue, conducting the predicate analyses is no small task, aside from the fact that it is the applicant's legal responsibility to perform the required analyses at the outset. For example, "a full health risk assessment for a coal plant can cost several hundred thousand dollars." 6-R-2622. Moreover, "a fairly reasonable assessment" can take "several weeks" and "a thorough assessment" can take at least "a couple of months." *Id.* However, a petitioner has only 30 days to file a petition once a permit has been issued, O.C.G.A. §§ 12-2-2(c)(2)(A) and 12-9-15(a)(1), and the entire administrative proceeding must, by law, 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). Moreover, despite the time-consuming nature of health assessments and modeling, at 4 p.m. on Friday August 31<sup>st</sup>, the ALJ ordered Appellees to show cause by noon on the following Monday (a legal holiday) why Counts XIII and XIV should not be dismissed. ALJ Order, 5-R-2197.

When the ALJ considered the matter just two days later, Energy Associates stated in open court that it was “comfortable” with the substance of Appellees’ Amended Petition – i.e., they had no “notice” problem at all.<sup>8</sup> And most bizarrely, even assuming that Appellees could have identified a specific permit limitation, it would not have been relevant to the determination of these Counts. EPD *repeatedly* has taken the position that the ALJ has *no* authority to impose any permit limitations or conditions proposed by a party that challenges a permit issued by EPD. EPD Brief, at 28. Thus, even assuming that Appellees would have permit limitations identified in Counts XIII and XIV, those limits would have been mere surplusage in the Petition.

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<sup>8</sup> When asked by the ALJ why it did not join EPD’s motion to dismiss Counts XIII and XIV, Energy Associates’ counsel stated “we didn't pursue the motion to dismiss because we are comfortable with the substance, [of the Amended Petition] . . . I think it's certainly a significant legal question is presented as to whether or not it's sufficient.” 9-T-4374 (Sept. 5, 2007).

**2. The Superior Court Correctly Held that Appellees Complied with All Applicable Pleading Requirements.**

In reversing the ALJ, the Superior Court found that Appellees had complied with applicable pleading requirements. Sup. Ct. Order, 39-R-19201. The pertinent Rule reads 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). It is clear that Appellees complied with the rule under subsection (h).<sup>9</sup> 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.” ALJ Order, 7-R-3488. Rather, under subsection (h), Appellees need only identify a condition, requirement or limitation that a “petitioner **believes**” would be necessary to properly implement the law. Appellees 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 fair reading of the rules and the Amended Petition shows that requiring that applicant perform health and visibility analyses is a “requirement.” Requiring such analyses also falls easily under the definition of “conditions,” as it is Appellees’ belief that performing the health and visibility analyses is a condition precedent to the permit’s issuance. That is all that is required for compliance with subsection (h).

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<sup>9</sup> The ALJ concluded that subsection (h) of the rule was inapplicable. ALJ Order, 7-R-3489. However, the result is the same, namely that Appellees complied with the rule, regardless of which subsection is applicable.

Appellees' allegations also complied with subsection (g). The significant difference between the two subsections is that (g) does not contain the word "requirement" and 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 Appellees' **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, Appellees "believe" in good faith that the law would be satisfied if and only if the proper assessments were completed before issued.

Pleading requirements in Georgia are not intended to serve as mere procedural barriers. *Roberts v. Farmer*, 127 Ga. App. 237, 241 (1972). Instead, consistent with Georgia's notice pleading practice, *Byrd v. Ford Motor Company*, 118 Ga. App. 333, 333 (1968), pleadings must only comply with the task of general notice-giving. *Reynolds v. Reynolds*, 217 Ga. 234, 246 (1961). In addition, the DNR rules (if valid) must be applied consistent with the standard applicable to a motion to dismiss, which requires that the facts be construed in the

light most favorable to Appellees, “even if contrary inferences are also possible.”

*Reiner v. David’s Supermarket Inc.*, 118 Ga. App. 10, 10 (1968).

Neither the applicant nor EPD can claim “harm” by having those allegations heard and determined simply because [Appellees] themselves did not first do the studies the respondents failed to do. If the DNR rule relied upon can be construed and applied in this fashion, it is plainly not authorized by law.

Sup. Ct. Order, 39-R-19200. It was grossly improper to prevent Appellees from presenting evidence on Counts XIII and XIV based on a technicality (1) that could not reasonably be met, (2) which was irrelevant to the matters at issue, and (3) caused no prejudice to EPD or the applicant.

**3. The Superior Court Correctly Ruled that the Special Pleading Requirement that Insulates EPD from Judicial Review is Unlawful.**

Both EPD and Energy Associates claim that the Department of Natural Resources (DNR) has the authority to promulgate procedural rules even if those rules unfairly prevent citizens from raising valid claims in the administrative process. They are wrong. 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 review of that decision. O.C.G.A. § 12-2-2(c)(2)(A); *see also Nix v. Long Mountain Resources, Inc.*, 262 Ga. 506, 509 (1992) (holding that there is a strong presumption of judicial review in administrative actions). The legislature has not, either explicitly or implicitly, limited such review to those circumstances where a petitioner can identify with specificity a limitation that should have been contained in the permit.

Although the legislature did not grant 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. “Requiring the petitioner to provide the suggested solution effectively limits the types of challenges allowed.” ALJ Order, 7-R-3489.

In so ruling, the ALJ did not pass on the validity of the rule itself, nor did it have the authority to do so. *See id.* The Superior Court, did, however, and found that “[r]equiring a litigant to identify a precise permit limitation as a precondition to judicial review is contrary to . . . well-established pleading standards.” Sup. Ct. Order, 39-R-19200. Those standards, particularly in administrative proceedings,

are light and cannot bar otherwise meritorious claims. As this Court 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).

Georgia follows a notice pleading practice. *Byrd v. Ford Motor Company*, 118 Ga. App. 333, 333 (1968); *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 responsive pleading thereto.” *Allen v. Bergman*, 201 Ga. App. 781, 783 (1991). While notice pleading in a superior court is a notably light standard, pleading requirements are even *more lenient* in the administrative process. In *Schaefer v. Clark*, 112 Ga. App. 806 (1965), the Georgia Supreme Court held that (1) “technical rules of pleading” should not be applied to administrative proceedings, and (2) administrative

pleading rules must be “**more liberal than in the court – not less liberal.**” *Id.* at 809 (emphasis added).<sup>10</sup>

In an effort to buttress its position, EPD relies upon general statutory provisions, such as O.C.G.A. § 50-13-3(a)(2), which simply allow DNR to adopt “rules of practice.” While the legislature allows DNR to adopt procedural rules, “nothing in [that law] or any other statute authorizes the kind of rule the DNR relied on here.” Sup. Ct. Order, 39-R-19201. Indeed, if EPD’s argument were correct, DNR could simply pass any rule it pleased to restrict review of decisions by DNR or its divisions.

While DNR may have the authority to establish reasonable rules to govern proceedings, there is no authority whatsoever for the proposition that those rules can impose **special** pleading requirements. Of course, on occasion, a party must go beyond notice pleading and plead certain subjects more specifically. *See, e.g.,*

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<sup>10</sup> EPD claims that *Schaeffer* is inapplicable because it applies to the notice given by a governmental agency. However, the case is clear that it applies to pleadings “with” an administrative agency, not just “by” such an agency. 112 Ga. App. at 809.

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. But there is no such special pleading requirement that would support the ALJ’s ruling here. ***Only the legislature can impose special pleading requirements, Francis v. State, 225 Ga. App. 195, 195 (1997)*** (“It is well established that the legislature may impose pleading requirements in special statutory proceedings in addition to those found in the Civil Practice Act . . .”), ***and the legislature has not given DNR the right to create such special pleading standards.***

Indeed, in the very provision cited by EPD, EPD Brief, at 38, the legislature has provided explicit statutory guidance regarding its expectations as to pleadings – namely, that a litigant must provide “[a] short and plain statement of the matters asserted.” O.C.G.A. § 50-13-13 (a)(2)). This Court has addressed the sufficiency of pleadings under this section, holding that “[u]nder the APA, a notice must state the issues involved.” *Ga. PSC v. Alltel Ga. Communs. Corp.*, 244 Ga. App. 645,

648 (2000) (citing O.C.G.A. § 50-13-13 (a)(2)(D)).<sup>11</sup> *Alltel* went on to find pleadings there sufficiently specific. In so holding, this Court rejected the argument that the notice was insufficient “because it did not include a detailed statement of facts and analyses[.]” *Id.* at 649. The notice held sufficient by the Court in *Alltel* is drastically less detailed than that provided by Appellees in this case.

The procedural rule promulgated by DNR and applicable to reviews of **its own** decisions serves only one purpose – to impede proper adjudication of valid claims. While no prejudice was shown here, EPD also ignores the fact that a petitioner may be required to submit prehearing submissions that amplify their

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<sup>11</sup> As with *Schaffer*, *see supra* footnote 10, EPD claims that *Alltel* is not applicable because it applies only to notice given by the government. It is nonsensical that a government agency would be held to a lower pleading standard when communicating to the public than a member of the public seeking redress before a government agency. Moreover, in the same paragraph, EPD relies upon the very subsection of O.C.G.A. § 50-13-13 interpreted by the *Alltel* Court to describe the pleading standards it believes applies to Appellees.

Petition. That procedure ensures that a litigant will not be prejudiced by surprise. In this case, for example, Appellees submitted a 98-page, single-spaced prehearing submission at the direction of the ALJ. It included, among other things, expert witness disclosures and detailed descriptions of the bases for each claim. 3-R-1233. Appellees were also required to provide Energy Associates and EPD with all of the documents upon which they intended to rely at the hearing. Had Appellees been allowed to adjudicate Counts XIII and XIV, similarly detailed documents would have been provided prior to the hearing.

**C. The Superior Court Properly Directed That EPD Utilize Sufficient Engineering Assistance in Making Permit Determinations (Enumer. Nos. 4, 5).**

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 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 be performed or supervised by professional engineers. *See* O.C.G.A. § 43-15-1(11); 6-R-2547-48; 6-R-2527. As stated by the Superior Court, “[i]t is important that BACT analyses be performed by competent individuals who are familiar with the technology. Otherwise, the permit limits may be wrong, endangering public health.” Sup. Ct. Order, 39-R-19202-03. It is undisputed in this case that no professional engineer either prepared or supervised the BACT analyses for Energy Associates’ permit. *See* 5-R-2323; *see also* 12-T-5570-72 (Sept. 14, 2007). As such, the Superior Court properly instructed EPD to “utilize sufficient engineering assistance and direction to ensure that all BACT determinations are done properly and professionally,” when those determinations were made on remand. Sup. Ct. Order, 39-R-19203.

**1. Georgia Law Requires that a Professional Engineer Either Supervise or Prepare 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. 6-R-2547-48; 6-R-2527. Nevertheless, no licensed professional engineers were involved with the supervision or preparation of Energy Associates' PSD permit. *See* 5-R-2323; *see also* 12-T-5570-72 (Sept. 14, 2007).

Georgia law prohibits 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. 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 apply 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 EPD involved in PSD permit determinations. The inclusion of an exemption for employees of the Department of Transportation establishes 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 enacted.

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, the Board concluded that performing Reasonably Available Control Technology (RACT) evaluations – which are almost identical to BACT determinations – constitutes “engineering” under Georgia law. 6-R-2540. In 1994, the Board addressed proposed EPD rules to govern Maximum Achievable Control Technology (MACT), another process like a BACT evaluation. 6-R-2547-48; 6-R-2527. Again, the Board unanimously determined that **any activities**

**requiring control technology determinations are considered the practice of engineering.” *Id.***

While the parties have not identified a specific case addressing the remedial issue here, where the process has been tainted by the lack of legal qualifications of the persons responsible for the analyses and decisions, common sense dictates that the remedy should be commensurate with the wrong. By analogy, courts routinely invalidate contracts where the party performing under the contract was not a licensed professional, but should have been. *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). Further, 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 acts mala in se, or detrimental to good morals, or from improper, incompetent, or irresponsible persons . . . a contract made without compliance with and in violation of the statute, by implication renders such a contract void.

*Culverhouse v. Atlanta Ass'n for Convalescent Aged Persons, Inc.*, 127 Ga. App. 574, 576-77 (1972) (quoting *McLamb v. Phillips*, 34 Ga. App. 210 (1925)).

These principles apply equally to the issuance of permits. For example, this Court 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). A permit that is based on an act that is “beyond the power or competence” of the government, 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).

**2. The ALJ Erred In Refusing To Allow Appellees 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 Superior Court addressed the merits of Appellees’ claim that the permit was issued without the supervision of a licensed professional engineer. However, in the administrative proceedings, the ALJ denied Appellees’ motion to amend to add this very claim and based its ruling on whether the motion was timely. *See* ALJ Order, 7- 8-R-3500-3505. While the ALJ denied the motion to amend,

because the issue had been fully briefed, it proceeded to determine the issue on the merits. Sup. Ct. Order, 39-R-19201. Likewise, “since the ALJ determined the issue on the merits,” the Superior court did so as well. *Id.* Although the Superior Court did not reach the question of the ALJ’s ruling on timeliness, that decision was erroneous and an abuse of discretion. The ALJ’s conclusion that Appellees should have raised the issue earlier is inconsistent with the record. Appellees had no “inside knowledge” of the inner machinations of EPD, and they did not learn that no EPD engineer had performed the engineering determinations at issue. EPD’s Final Determination implies otherwise, in fact. If Appellees 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. While EPD notes that there was a website that states who has a professional engineering degree to support its position that Appellees should have known to raise their claim earlier, there is no way for Appellees to have known whether those individuals actually worked on the permit!

In fact, 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.<sup>12</sup> 25-R-12169. It was not until August 30, 2007, less than 10 days before the commencement of the evidentiary hearing and after the date in which Appellees could amend as a matter of right, that Appellees 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.<sup>13</sup> Appellees requested from EPD counsel a written statement of whether Mr. Courtney was or was not involved in the permitting process beyond mere modeling, 6-R-2510, but EPD refused to provide a yay or nay response. *Id.* During the hearing on September 14, 2007, Appellees again sought a response to this inquiry, but EPD's counsel again refused to answer the question. 12-T-5572 (Sept. 14, 2007). Only after prodding from the ALJ did EPD's counsel finally respond, and then, for the first time, confirmed that

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<sup>12</sup> The other person listed, Ms. Anna Aponte, is not an engineer.

<sup>13</sup> Discovery depositions are not available in OSAH proceedings, which greatly impaired the ability of Appellees to learn the truth about these events.

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.* Appellees filed their motion to amend immediately after that disclosure.

EPD and Energy Associates also contend that Appellees should have asserted the engineering claim prior to the hearing. This argument fails because it assumes that Appellees should have known something that, in fact, was only available to them through a subpoena at trial, there being no discovery. Before trial, Appellees could not determine whether Mr. Courtney had any role in the BACT determination because nowhere in the EPD file did EPD define the roles of Mr. Courtney or the other EPD employees in the permitting process. Further, since this matter was in litigation, counsel for Appellees were precluded from contacting him. Under these circumstances, the ALJ abused its discretion in refusing the requested amendment.

**D. The Superior Court Correctly Held that the Clean Air Act Requires that the CO<sub>2</sub> Emissions from the Proposed Plant Be Evaluated and That the PSD Permit Include Appropriate CO<sub>2</sub> Limits (Enumer. No. 6).**

For this enumeration and argument, EPD simply incorporates by reference the argument made by Longleaf on this point. Appellees do the same here,

incorporating the Brief of Appellees in Appeal No. A09A0387, including Argument A in particular.

**E. The Superior Court Correctly Ruled That Federal Law Required a Full BACT Analysis for the Alternative Fuel Combustion Technique That Uses an Integrated Gassification Combined Cycle (IGCC) (Enumer. No. 7).**

For this enumeration and argument, EPD simply incorporates by reference the argument made by Longleaf on this point. Appellees do the same here, incorporating the Brief of Appellees in Appeal No. A09A0387, including Argument B in particular.

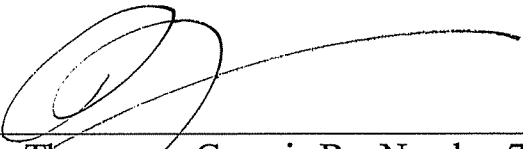
**F. The Superior Court Correctly Held That the ALJ Erred by Refusing to Consider Relevant Evidence on the Issue of Particulate Matter, Pm<sub>2.5</sub> (Enumer. No. 8).**

For this enumeration and argument, EPD simply incorporates by reference the argument made by Longleaf on this point. Appellees do the same here, incorporating the Brief of Appellees in Appeal No. A09A0387, including Argument C in particular.

**CONCLUSION**

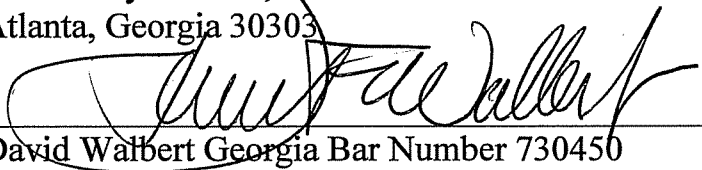
For the foregoing reasons, Appellees respectfully request that this Court affirm the Order and Judgment of the Fulton County Superior Court.

Respectfully submitted, this 24<sup>th</sup> day of November, 2008.



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**CERTIFICATE OF SERVICE**

I do hereby certify that I have this day served a copy of the foregoing by depositing a copy thereof, postage prepaid, in the United States Mail, first class, properly addressed upon:

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