IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

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

PETITION FOR JUDICIAL REVIEW

COME NOW Petitioners Sierra Club and Friends of the Chattahoochee ("Petitioners"), and pursuant to O.C.G.A. §§ 12-2-2(c)(2), and 50-13-19(b), file this petition for judicial review of a Final Decision entered on January 11, 2008 (attached hereto as Exhibit A), by an Administrative Law Judge ("ALJ") with the Office of State Administrative Hearings ("OSAH"). In addition, Petitioners seek judicial review of the ALJ's Memorandum Opinion and Order on Motions for Summary Determination entered on December 18, 2007 (attached hereto as Exhibit B), the ALJ's Order on Respondent's Motion to Dismiss, entered on November 27, 2007 (attached hereto as Exhibit C), 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, entered on November 30, 2007, (attached hereto as Exhibit D), and the September 21, 2007 Oral Order denying Petitioners' Motion in Limine to Exclude All Expert

and Opinion Testimony on Engineering Matters By Those Not Licensed as Professional Engineers in Georgia, (relevant portions of transcript attached hereto as Exhibit E). As grounds for this Petition, Petitioners have been aggrieved and adversely affected by each of the Orders issued by the ALJ. The injuries caused by the ALJ's decisions will not be redressed except by an order of this Court reversing the ALJ's Orders.

Petitioners also file this action pursuant to O.C.G.A. §§ 50-13-10 and 9-4-1 to 8, seeking a declaratory judgment that Department of Natural Resources Rule ("DNR Rule"), 391-1-2-.05(1) Subsections (g) and (h) are invalid under the laws of the State of Georgia and the Constitutions of the State of Georgia and the United States. Application of this rule interferes with and impairs the legal rights of Petitioners.

PROCEDURAL BACKGROUND

1.

Longleaf Energy Associates, LLC ("Longleaf") submitted an application to Georgia's Air Protection Branch of the Environmental Protection Division ("EPD") on November 22, 2004, to receive a Prevention of Significant Deterioration Permit ("PSD Permit") to construct and operate a 1200 Megawatt ("MW") pulverized coal-fired electric power generation facility at a site to be called Longleaf Energy Station in Early County, Georgia. Longleaf Energy Associates, LLC is a subsidiary of LS Power Group, a privately held energy company based in New Jersey. In March, 2007, LS Power Group merged with Dynegy, Inc., based in Houston, Texas.

2.

On May 14th, 2007, Carol Couch, Director of EPD, issued a PSD Permit to Longleaf Energy Associates, LLC. On June 13, 2007, Petitioners filed a challenge of EPD's issuance of

the PSD Permit, which was then assigned to an Administrative Law Judge ("ALJ") at the Office of State Administrative Hearings ("OSAH").

3.

On June 26, 2007, Longleaf filed an unopposed Motion to Intervene as a Respondent. On that same day, the ALJ granted Longleaf's Motion to Intervene.

4.

On July 12, 2007, Intervenor Longleaf filed a motion challenging Petitioners' standing to bring this action. Respondent EPD did not join in the motion. On August 16, 2007, the ALJ held a hearing in which members of Sierra Club and Friends of the Chattahoochee testified regarding the injury that they would incur if the Longleaf Energy Station were built. The ALJ issued an oral ruling that Petitioners were aggrieved and adversely affected by EPD's decision to issue the permit and had standing to challenge that decision. The ALJ issued a written ruling setting forth the basis for her decision on November 6, 2007.

5.

On July 12, 2007, Respondent EPD filed a Motion for a More Definite Statement And Motion for Compliance with Ga. Comp. R. & Regs. r. 391-1-2-.05(1)(g) or (h) or, In the Alternative, Motion to Dismiss. The following day, Intervenor Longleaf filed a Motion to Dismiss and for a More Definite Statement. 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)." ALJ's Order on Respondent's Motion to Dismiss, at 2. Petitioners filed a First Amended Complaint. Respondent EPD renewed its Motion to Dismiss; Intervenor Longleaf did not join in the renewed motion.

6.

The ALJ issued an oral ruling on September 5, 2007, dismissing Counts XIII and XIV of the First Amended Petition. In its written ruling on the matter, issued on November 27, 2007, the ALJ concluded that Petitioners are 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." ALJ's Order on Respondent's Motion to Dismiss, at 5. The ALJ concluded that Petitioners failed to comply with this requirement and dismissed Counts XIII and XIV.

7.

On July 20, 2007, Respondent and Intervenor filed motions for summary determination on several counts of the Petition. Petitioners filed their response on August 13, 2007, and on August 16, 2007, the ALJ issued an oral ruling granting summary determination on Counts I, X, XI, and XV, and partial summary determination on Counts II, V, and VII. That ruling was memorialized in writing on December 18, 2007.

8.

Respondent 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; Intervenor Longleaf submitted its Prehearing Submission on August 29, 2007; Respondent EPD submitted its Prehearing Submission on August 30, 2007; and Longleaf filed a supplemental Prehearing Submission on September 2, 2007. 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.

9.

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 and issued a written order reflecting that decision, entered on November 30, 2007.

10.

On September 16, 2007, Petitioners filed a Motion in Limine to Exclude all Expert and Opinion Testimony on Engineering Matters By Those Not Licensed as Professional Engineers in Georgia. On September 21, 2007, the ALJ issued an oral ruling denying Petitioners' Motion in Limine.

JURISDICTION

11.

This Court has jurisdiction over appeals from final decisions of the Office of State Administrative Hearings pursuant to O.C.G.A. § 50-13-19(b), O.C.G.A. § 50-13-20.1 and O.C.G.A. § 12-2-1. The Court also has jurisdiction to consider the validity of rules promulgated by a state agency pursuant to O.C.G.A. § 50-13-10. Venue is proper herein as authorized by O.C.G.A. § 50-13-19(b) and O.C.G.A. § 50-13-20.1. This petition is filed within 30 days after service of the Final Decision issued by the ALJ and, as such, has been timely filed. O.C.G.A. § 50-13-19(b).

STATUTORY DEADLINE

12.

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. 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 will be considered affirmed by operation of law. Id. In addition, "[t]he court, upon request, shall hear oral argument and receive written briefs." O.C.G.A. § 50-13-19(g). Therefore, Petitioners respectfully request that the Court set dates for briefing and oral argument within 90 days of the filing of this Petition.

TRANSMITTAL OF THE RECORD

13.

The Administrative Procedures Act provides in O.C.G.A. § 50-13-19(e) that the agency shall transmit to this Court the original or a certified copy of the entire record of the proceeding under review within 30 days after service of the petition or within further time as allowed by the Court. Petitioners request that the Court direct that the record be filed in a time and manner that will permit the timely decision of this Petition.

PETITIONERS' INTEREST

14.

Petitioners Sierra Club and Friends of the Chattahoochee have direct and substantial interests in the outcome of this litigation and are aggrieved and adversely impacted by EPD's

decision to issue a permit for the Longleaf Energy Station. *See* ALJ's Order on Standing, November 6, 2007 (finding that Petitioners are "aggrieved and adversely affected" as defined by law).

15.

Petitioner Sierra Club is a national nonprofit organization with over 750,000 members nationwide. The Georgia chapter has 12,000 members in Georgia, some of whom live, work, and recreate in the vicinity of the proposed power plant and/or in areas that will be impacted by emissions from the plant. The offices of the Georgia Chapter of Sierra Club are located at 1401 Peachtree Street, Suite 345, Atlanta, Georgia, 30309. The offices of the national Sierra Club are located at 85 2nd Street, Second Floor, San Francisco, California, 94105. Sierra Club brings this action on behalf of itself and its members.

16.

The mission of Sierra Club is to explore, enjoy and protect the wild places of the earth, practice and promote the responsible use of the earth's ecosystems and resources, educate and enlist humanity to protect and restore the quality of the natural and human environment, and use all lawful means to carry out these objectives.

17.

Petitioner Friends of the Chattahoochee is a nonprofit membership organization committed to the protection of the land, water and air within the Chattahoochee River Basin. Friends of the Chattahoochee has members who live, work, and recreate in the vicinity of the proposed power plant. The offices of Friends of the Chattahoochee are located at 20181 SR 39, Blakely, Georgia, 39823. Friends of the Chattahoochee brings this action on behalf of itself and its members.

18.

The mission of Friends of the Chattahoochee is to educate and inform the citizens of Early County and surrounding areas about environmental and conservation issues affecting the community. The purpose of Friends of the Chattahoochee also includes protecting natural resources and public health in Early County and surrounding areas. Friends of the Chattahoochee is authorized to engage in education, advocacy, litigation, and any other activities allowed by law to achieve these goals.

19.

Both Sierra Club and Friends of the Chattahoochee actively participated in the public hearing and comment process for the proposed plant.

20.

EPD's decision to issue the PSD Permit to operate and construct the Longleaf power plant, in violation of state and federal law, adversely affects Petitioners' interests to protect Georgia's environment for the recreational, educational, scientific, aesthetic and other uses by Petitioners' members. In addition, Petitioners' members live, work, and recreate in the vicinity of the proposed power plant and will be adversely affected by pollution coming from the plant, pursuant to the Permit.

21.

For example, members of Sierra Club and Friends of the Chattahoochee own land either immediately adjacent to or in the vicinity of the proposed plant and spend their free time enjoying and preserving farm land, timberland, forests and wildlife on their property. These members fear that pollution from the plant will damage their pine trees, contaminate ponds and rivers in which they fish and swim, and otherwise pollute the air such that they cannot enjoy the outdoors.

22.

Petitioners' members have family members with respiratory illnesses that will be exacerbated by the pollution coming from the Longleaf Energy Station. Members also raise crops on land near the facility that will be damaged by the pollution coming from the power plant. For members whose livelihood and economic well-being depend upon the success of these crops, this pollution will cause significant economic injury. Air emissions from the facility will also reduce visibility in the area, thus impairing the recreational and aesthetic interests of members of Petitioner organizations. Members of Petitioner organizations also recreate and fish in the waters surrounding the facility. The air pollutants coming from the Longleaf Energy Station will make their way into the water and into the fish, injuring members' recreational interests and causing a danger to their health.

23.

The injuries caused by the Permit will not be redressed except by an order declaring the Permit unlawful.

LEGAL FRAMEWORK

24.

I. 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).

25.

Through the State Implementation Plan ("SIP"), which is a set of regulations, promulgated by the State of Georgia and approved by the United States Environmental

Protection Agency ("EPA"), Georgia and the federal government attempt to attain and maintain National Ambient Air Quality Standards ("NAAQS") in Georgia.

26.

The Act regulates air pollution through a series of connected permitting programs. In areas that have satisfied NAAQS, the Act's PSD program requires major sources of air pollution to obtain a permit prior to construction. 42 U.S.C. § 7475.

27.

II. State Air Quality Regulations

The Georgia General Assembly enacted the Georgia Air Quality Act to "preserve, protect, and improve air quality and to control emissions to prevent the significant deterioration of air quality and to attain and maintain ambient air quality standards so as to safeguard the public health, safety, and welfare . . . ." O.C.G.A. § 12-9-2. The Georgia Air Quality Act ("Georgia Act") and its implementing regulations carry forth the mandates of the federal Clean Air Act and grant the Director of EPD supervisory authority, to administer and enforce air quality regulations. O.C.G.A. §§ 12-9-6, *et seq*.

28.

Among the duties of the Director is the responsibility "[t]o prepare, develop, amend, modify, submit, and enforce a comprehensive plan or plans sufficient to comply with the federal act including emission control and limitation requirements, standards of performance, preconstruction review, and other requirements for the prevention, abatement, and control of air pollution in this state . . . ." O.C.G.A. § 12-9-6 (b)(13). This plan, known as the State Implementation Plan, is required under the federal Clean Air Act and must be approved by the EPA. 42 U.S.C. § 7410. The portion of Georgia's State Implementation Plan ("SIP") implementing the Prevention of Significant Deterioration 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).

29.

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).

30.

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 Energy Station will be a major source located in an area presently in attainment of NAAQS, it is subject to PSD regulations.

31.

III. Prevention of Significant Deterioration

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 to be reviewed to determine the potential emissions of all pollutants regulated under the Clean Air Act. 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).

32.

To assist regulators in the issuance of PSD Permits, the EPA produced the *Draft New Source Review Workshop Manual* (October 1990) ("NSR Manual"), which has become the primary guidance document for PSD permitting. The NSR Manual provides that in order to obtain a PSD Permit, an applicant must:

1. apply the best available control technology ("BACT");
2. conduct an ambient air quality analysis;
3. analyze impacts to soils, vegetation, and visibility;
4. not adversely impact a Class I area; and
5. undergo adequate public participation.

NSR Manual, at 6-7.

33.

Likewise, CAA Section 52.21(j)(2) provides that: "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." The Georgia SIP incorporates 40 C.F.R § 52.21(j) by reference. Georgia SIP, 391-3-1-.02 (7)(b)(7).

34.

The definition of best available control technology ("BACT"), found at 40 C.F.R. § 52.21(b)(12), is incorporated by reference into the Georgia SIP. Georgia SIP, 391-3-1-.02 (7)(a)(2).

35.

In addition to BACT requirements, 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).

FACTUAL BACKGROUND

36.

Longleaf Energy Associates, LLC is a subsidiary of, and was created by the LS Power Group to support the development of the Longleaf Energy Facility. The LS Power Group is a privately held energy company based in New Jersey. In March 2007, LS Power Group merged with Dynegy, Inc., based in Houston, Texas.

37.

Longleaf Energy Associates, LLC submitted an application to EPD on November 22, 2004 (updated on July 12, 2005 and August 15, 2005), to receive a PSD Permit to construct and operate a pulverized coal-fired electric power generation facility at a site to be called the Longleaf Energy Station in Early County, Georgia. The final Permit was issued to Longleaf on May 14, 2007.

38.

The Longleaf Energy Station is the first coal-fired power plant to be permitted in Georgia since the 1980's. If built, the Plant would be one of the largest power plants in Georgia.

39.

The regulated pollutants that will be emitted in significant quantities from the facility are

carbon dioxide (CO_2), particulate matter (PM_{10} and $PM_{2.5}$), nitrogen oxides (NO_x), sulfur dioxide (SO_2), carbon monoxide (CO), volatile organic compounds (VOC), sulfuric acid mist (H_2SO_4), fluorides (HF), lead (Pb), and mercury (Hg).

40.

Toxic air pollutants that will be emitted include lead, sulfuric acid, hydrogen chloride, mercury, beryllium, vinyl chloride, and trace amounts of heavy metals.

41.

The Longleaf Energy Station is classified as a major source under federal and state air quality regulations, specifically, PSD regulations, because potential emissions of at least one PSD pollutant exceed 100 tons per year and it is one of the 28 named source categories (fossil fuel-fired steam electric plant of more than 250 million Btu per hour heat input).

42.

Integrated Gasification Combined Cycle ("IGCC") technology is a method that uses coal as fuel to produce electricity through gasification. It is a production process or fuel combustion technique whereby the fuel, coal, is treated to create gas, which is then combusted to produce energy. EPD did not consider IGCC in its BACT determination.

43.

Depending on the type of coal burned, the Longleaf Plant will emit between 8.7 to 9 million tons of carbon dioxide ("CO_2") each year. It would take between 1,400,000 and 1,600,000 average American cars, each driving 12,000 miles annually, to produce this much CO_2.

44.

The Permit does not contain a BACT limitation for CO_2.

45.

Neither Longleaf nor EPD conducted any modeling for $PM_{2.5}$ for the proposed coal-fired power plant.

46.

Modeling conducted for $PM_{2.5}$, based on EPA approved modeling techniques, affirmatively demonstrates that the permit limits contained in the Longleaf PSD Permit will result in a violation of NAAQS for $PM_{2.5}$.

47.

The permit was processed and reviewed by EPD employees who held themselves out as "environmental engineers" but are not registered as professional engineers with the State of Georgia. No registered professional engineer processed or supervised the issuance of the Longleaf PSD Permit.

LEGAL AND FACTUAL ISSUES PRESENTED
GROUNDS FOR REVIEW

48.

The Final Decision prejudices the substantial rights of Petitioners and their members because the ALJ's findings, inferences, conclusions and decisions are:

(a) In violation of constitutional and statutory provisions;

(b) In excess of statutory procedure;

(c) Made upon unlawful procedure;

(d) Affected by other error of law;

(e) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; and

(f) Arbitrary and capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

O.C.G.A. § 50-13-19(h).

In addition, application of DNR Rule 391-1-2-.05(1) Subsections (g) and (h) interferes with and impairs the legal rights of Petitioners. *See* O.C.G.A. §§ 50-13-10 and 9-4-1 to 8.

COUNT I
The ALJ Erred in Granting Summary Determination With Regards to Counts II and V of the Amended Petition Because EPD was Required to Consider IGCC in its BACT Determination.

49.

Paragraphs 1 through 48 are hereby incorporated by reference as if rewritten in their entirety.

50.

EPD must, as a matter of law, consider Integrated Gasification Combined Cycle ("IGCC") technology in establishing emissions limitations for coal-fired power plants as part of its BACT analysis. It is undisputed that EPD did not even consider this technology in establishing emissions limitations for the Longleaf plant.

51.

The plain language of the definition of BACT requires a straightforward analysis in determining emissions limitations for a source. The relevant provision at issue in this case is the definition of BACT, which is as follows:

> an emissions limitation (including a visible emission standard) based on the maximum degree of reduction for each pollutant subject to regulation under [the] Act which would be emitted from any proposed major stationary source or major modification which the Administrator, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems,

> and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant.

40 C.F.R. § 52.21(b)(12); Georgia SIP 391-3-1-.02(7)(a)(2). This provision mirrors almost verbatim the BACT definition in the Clean Air Act itself, which can be found at 42 U.S.C. § 7479(3) (using the term "major emitting facility" rather than "major stationary source").

52.

Based on the plain language of the statute, the permitting agency, in determining the appropriate emissions limitations for a major stationary source, has no discretion to avoid consideration of alternative production processes, methods, systems and techniques that include "fuel cleaning or treatment or innovative fuel combustion techniques" in its BACT analysis.

53.

It is undisputed that Longleaf is a major stationary source. As such, EPD is required to consider those techniques, methods, processes and systems that include fuel cleaning or treatment or innovative fuel combustion techniques in its analysis of emissions limits for Longleaf.

54.

Congress created the definition of BACT in 1977, and in so doing, it amended its working definition of BACT to include the phrase "innovative fuel combustion techniques." In doing so, Congress was quite clear about the "mischief," that it sought to correct, namely the possibility that a permitting agency would not consider alternative processes or fuel cleaning or treatment such as gasification in its BACT analysis. The legislative history reveals that coal gasification, such as IGCC, is precisely the type of process or technique Congress had in mind when it added the phrase "innovative combustion techniques" to the BACT definition. Consider the following:

> 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 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.

123 Cong. Rec. S 9421, S 9434-35 (June 10, 1977).

55.

As this language shows, Congress amended its working definition of BACT to include the phrase "innovative combustion techniques" in order to prevent the very "misinterpretation" that the ALJ adopted. IGCC is specifically a type of process or fuel treatment that Congress wanted considered in BACT determinations when it amended the BACT definition to include "innovative fuel combustion techniques."

56.

It is undisputed that IGCC is a production process that utilizes innovative fuel combustion techniques as it is a gasification method that turns coal into energy. As such, the ALJ's finding that IGCC need not be considered in the BACT analysis is contrary to the plain meaning of relevant authority and an error of law.

57.

Accordingly, the ALJ's Order has prejudiced Petitioners' substantial rights and is in violation of statutory provisions, in excess of statutory authority, affected by error of law, clearly erroneous based on the evidence in the record, and arbitrary and capricious and characterized by abuse of discretion. O.C.G.A. § 50-13-19(h).

COUNT II
The ALJ Erred in Granting Summary Determination With Regards to Count I of the Amended Petition Because a BACT Analysis is Required for CO_2.

58.

Paragraphs 1 through 57 are hereby incorporated by reference as if rewritten in their entirety.

59.

It is undisputed that the Longleaf Energy Station will emit a staggering amount of carbon dioxide ("CO_2"). It is further undisputed that there is no emission limit for CO_2 contained in the permit. Because the definition of BACT requires that an emission limit be prescribed for each pollutant subject to regulation under the Clean Air Act ("CAA"), and because, contrary to the finding of the ALJ, CO_2 is a pollutant subject to regulation under the CAA, the ALJ erred as a matter of law in holding that no emission for CO_2 is required in the Longleaf PSD Permit.

60.

The ALJ misinterprets the term "subject to regulation" to mean "controlled by" and concludes that because neither EPA nor EPD have previously sought to control CO_2 emissions, that it is not subject to regulation under the CAA. However, such interpretation is rooted in an improper understanding of the term "subject to regulation."

61.

"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). CO_2 is (1) a pollutant (2) subject to (3) regulation under the Act, and as such, the CAA requires a BACT determination for this pollutant.

62.

Section 302(g) of the Clean Air Act defines "air pollutant" expansively to include "any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters into the ambient air." 42 U.S.C. § 7602(g).

63.

The Supreme Court has recently held that CO_2 is a "pollutant" under the Act. *See Massachusetts v. EPA,* 127 S. Ct. 1438, 1459-60 (2007) ("Because EPA believes that Congress did not intend it to regulate substances that contribute to climate change, the agency maintains that carbon dioxide is not an 'air pollutant' within the meaning of the provision. The statutory text forecloses EPA's reading. The Clean Air Act's sweeping definition of 'air pollutant' includes '*any* air pollution agent or combination of such agents, including *any* physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air . . . .' § 7602(g) (emphasis added). On its face, the definition embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word 'any.' Carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are without a doubt 'physical [and] chemical . . . substance[s] which [are] emitted into . . . the ambient air.' The statute is unambiguous.").

64.

Second, CO_2 is "subject to" regulation under the Act. "Subject to" means "governed or affected by." *Portland GE Co. v. Bonneville Power*, 501 F.3d 1009, 1028-29, 2007 U.S. App. LEXIS 10342 **50-52 (9th Cir. May 3, 2007). CO_2 is governed and affected by the Act.

65.

Finally, CO_2 is regulated under the Act, and Petitioners offer instances illustrating such regulation. For example, 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. In 1993, EPA promulgated the regulations mandated by Section 821, which are set forth at 40 C.F.R. Part 75. The 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.

66.

The Georgia SIP 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 in 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).

67.

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(c) and (d).

68.

"Air contaminants" include any gas. Thus, for the purposes of the Georgia SIP, "air pollution" means the presence in the atmosphere of any gas. Thus, the Georgia SIP, a regulation in effect under 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."

69.

The ALJ erred as a matter of law in holding that CO_2 is not a regulated pollutant as defined by 40 C.F.R. §52.21(b)(50) and that EPD is thereby not required by Georgia Rule 391-3-1-.02(7)(b)7 to include a BACT emission limitation for CO_2 in the Permit. The ALJ's Order has

prejudiced Petitioners' substantial rights and is in violation of statutory provisions, in excess of statutory authority, affected by error of law, clearly erroneous based on the evidence in the record, and arbitrary and capricious and characterized by abuse of discretion. O.C.G.A. § 50-13-19(h).

COUNT III
The ALJ Erred as Matter of Law in Granting Summary Determination on Count XI of the Amended Petition Because Longleaf is Required to Demonstrate that NAAQS Will not be Violated and the Undisputed Facts Show that They Will be Violated.

70.

Paragraphs 1 through 69 are hereby incorporated by reference as if rewritten in their entirety.

71.

Aside from the general legal duty to ensure that all permits are protective of public health and the environment, the Clean Air Act's implementing regulations and Georgia Rules for Air Quality Control impose a legal duty on EPD to require that the owner or operator of a proposed source demonstrate that emissions from 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).

72.

Ten years ago, EPA promulgated a national ambient air quality standard for $PM_{2.5}$ that is separate and distinct from the national ambient air quality standard for PM_{10}. *See* National Ambient Air Quality Standard for Particulate Matter, 62 Fed. Reg. 38652 (July 18, 1997), codified at 40 C.F.R. § 50.7. As such, by formal rulemaking, EPA has acknowledged that $PM_{2.5}$ is a separate pollutant from PM_{10}. Based on the plain language of the applicable regulations, a

permittee must therefore demonstrate that it will comply with national ambient air quality standards for $PM_{2.5}$.

73.

It is undisputed that EPD did not require Longleaf to conduct any modeling for $PM_{2.5}$.

74.

It is also undisputed that the modeling conducted by Petitioners for $PM_{2.5}$, based on EPA approved modeling techniques in place at the time the Longleaf PSD Permit was issued, affirmatively demonstrates that the permit limits contained in the Longleaf PSD Permit will result in a violation of national ambient air quality standards for $PM_{2.5}$.

The ALJ Erred in Concluding that Longleaf Could Rely Upon Alternative Modeling for $PM_{2.5}$.

75.

Instead of modeling for $PM_{2.5}$, EPD allowed Longleaf to substitute modeling for PM_{10}. In holding that Longleaf need not model for $PM_{2.5}$ impacts, the ALJ determined that the facility's use of PM_{10} as a surrogate for $PM_{2.5}$ was consistent with official guidance. However, the approach employed by Longleaf did not adequately account for $PM_{2.5}$ impacts, and was also contrary to law and EPA guidance documents.

76.

In addition, the Clean Air Act's implementing regulations and Georgia Rules require that if a preferred model is not used, written approval by the EPA Administrator must be obtained and the decision must be subject to 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). The decision not to model for $PM_{2.5}$ impacts was not subject to public notice and opportunity for comment and was therefore violative of controlling regulations.

77.

Accordingly, the ALJ's Order has prejudiced Petitioners' substantial rights and is in violation of statutory provisions, in excess of statutory authority, made upon unlawful procedure, affected by error of law, clearly erroneous based on the evidence in the record, and arbitrary and capricious and characterized by abuse of discretion. O.C.G.A. § 50-13-19 (h).

COUNT IV
The ALJ Erred in Dismissing Counts XIII and XIV of the Amended Petition Pursuant to DNR Rule 391-1-2-.05(1)(g) and (h)

78.

Paragraphs 1 through 77 are hereby incorporated by reference as if rewritten in their entirety.

The ALJ Exceeded Its Statutory Authority and Committed Other Errors of Law In Dismissing Counts XIII and XIV of the Petition.

79.

Georgia law expressly provides Petitioners the right to challenge EPD's decision to issue a permit. O.C.G.A. §§ 12-2-2(c)(2), O.C.G.A. § 12-9-15, 50-13-13, and Department of Natural Resources Rule ("DNR Rule"), 391-1-3-.02(1).

80.

There is no statute that limits this right to only those circumstances where a party can identify alternative conditions, limitations or requirements that would render a permit legal.

81.

Pursuant to their rights provided by law, Petitioners challenged the Longleaf PSD Permit. Respondent EPD moved to dismiss Counts XIII and XIV of the Petition pursuant to DNR Rule, 391-1-2 .05(1) which states:

(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) was promulgated by the Department of Natural Resources ("DNR") to govern legal challenges of actions taken by DNR and its divisions, such as EPD.

82.

The ALJ interpreted DNR Rule 391-1-2-.05(1)(g) and (h) to require that Petitioners could not challenge a permit unless the Petition contained a specific statement of a condition, limitation or requirement that could be inserted into the permit to make it valid. Using this reasoning, the ALJ granted Respondent's Motion to Dismiss with regards to Counts XIII and XIV. In doing so, the ALJ misconstrued DNR Rule 391-1-2-.05(1)(g) and (h) to extend beyond its statutory and constitutional authority.

83.

The ALJ does not have the authority to impose limits on Petitioners' challenge of the permit. It is well settled that an administrative body "possesses only the jurisdiction, power, and authority granted to it by the legislature." *McGinty v. Alfred Simpson & Co.,* 188 Ga. App. 718, 719-720 (1988) (quoting *Robinson v. Zurich Ins. Co.*, 131 Ga. App. 795, 796 (1974)). The legislature has explicitly granted Petitioners the right to review the issuance of the Longleaf PSD permit, and has not limited such review to only those circumstances where a petitioner can identify the precise permit condition to make the challenged permit valid. As such, the ALJ does not have the authority to impose such a requirement.

84.

The ALJ's interpretation of DNR Rule 391-1-2-.05(1)(g) and (h) violates basic notions of due process. The United States Constitution and the Georgia Constitution prohibit depriving any person of life, liberty or property, without due process of law. U.S. Const Amend. V, U.S. Const Amend. XIV, § 1; Ga. Const., Art. I. § I, ¶ I. "A party's cause of action is a property interest that cannot be denied without due process. . . . There is a strong presumption of judicial review of administrative actions." *NIX v. Long Mountain Resources*, 262 Ga. 506, 509 (1992) (citations omitted). As stated above, Petitioners have a cause of action to seek denial of the permit. O.C.G.A. §§ 12-2-2(c), 50-13-13. As such, Petitioners have a property interest that cannot be denied without due process. The ALJ refused to allow consideration of Petitioners' substantive claims, thus violating Petitioners' right to due process.

The ALJ Applied the Incorrect Standard of Review for a Motion to Dismiss.

85.

In dismissing Petitioners' substantive claims, the ALJ failed to apply or misapplied the standard of review for motions to dismiss. Motions to dismiss are not favored under Georgia law. A motion to dismiss should not be granted unless the petition "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).

86.

The ALJ did not apply this standard in reaching its decision. On the contrary, 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.

The ALJ Failed to Apply the Liberal Pleading Standard that Applies to Administrative Proceedings.

87.

Under the Civil Practice Act, Georgia has adopted notice pleadings and has expressly rejected issue pleading. *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).

88.

Pleading requirements are more lenient in the administrative process than under the Civil Practice Act. In fact, it is well established that "technical rules of pleadings such as govern civil or criminal actions are not applicable to applications or pleadings filed 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) (quoting *Community of Woodston v. State Corp. Commission*, 86 Kan. 747, 333 P2d 206 (1960)).

89.

"The key to pleading in the administrative process is adequate opportunity to prepare. When an original notice or pleading is inadequate, it is normally supplemented by informal communication, . . . by prehearing conferences, or by ample continuances at the hearing. And the question on review is not the adequacy of the original notice or pleading but is the fairness of the whole procedure." *Id.* at 808 (quoting Davis on Administrative Law (1951) § 80, pp. 279-80).

90.

Petitioners' Petition provided adequate notice of the general nature of Petitioners' legal and factual claims. In fact, Petitioners provided an extensive description of the precise bases for

each of its claims that rendered the permit invalid. The Petition afforded Longleaf and EPD ample opportunity to prepare**,** insured a fair procedure and met with all the requirements for pleading in the administrative process.

91.

Despite the detailed information provided to Respondents regarding Petitioners' claims, the ALJ failed to apply the liberal standard of pleading applicable in administrative proceedings and instead held Petitioners to a heightened pleading standard. However, only the legislature can impose such requirements. *Lee v. State*, 225 Ga. App. 733, 735 (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 . . ."); *see also Dorsey v. Dept. of Transportation*, 248 Ga. 34 (1981) (same). Thus, the ALJ erred in dismissing Petitioners' claims.

Petitioners' Amended Petition Complied with DNR Rule 391-1-2-.05(1)(g) and (h).

92.

Petitioners filed an amended Petition that complied with DNR Rule 391-1-2-.05(1)(g) and (h) as it contained a detailed description of the conditions under which the permit could be issued.

93.

Accordingly, the ALJ's Order granting the Respondents' Motion to Dismiss has prejudiced Petitioners' substantial rights and is in violation of constitutional and statutory provisions, in excess of statutory authority, made upon unlawful procedure, affected by error of law, clearly erroneous based on the evidence in the record, and arbitrary and capricious and characterized by abuse of discretion. O.C.G.A. § 50-13-19 (h).

COUNT V
DNR Rule 391-1-2-.05 Subsections (g) and (h) are Invalid as They Exceed Statutory Authority and Violate the Georgia and U.S. Constitutions.

94.

Paragraphs 1 through 93 are hereby incorporated by reference as if rewritten in their entirety.

95.

DNR Rule 391-1-2-.05(1) Subsections (g) and (h) are invalid as exceeding statutory authority. These rules effectively limit the types of challenges that may be brought. No statute allows for such limitations on a petitioner's right to challenge DNR and/or EPD decision. In addition, DNR Rule 391-1-2-.05(1) Subsections (g) and (h) require that a petitioner comply with a heightened pleading standard, without the statutory authority to do so. Accordingly, DNR Rule 391-1-2-.05(1) Subsections (g) and (h) are invalid as exceeding statutory authority.

96.

Likewise, DNR Rule 391-1-2-.05(1) Subsections (g) and (h) are unconstitutional pursuant to the Georgia and United States Constitutions because they deprive Petitioners of their right to due process as it limits Petitioners' right to challenge a permit. The United States Constitution and the Georgia Constitution prohibit depriving any person of life, liberty or property, without due process of law. U.S. Const Amend. V, U.S. Const Amend. XIV, § 1; Ga. Const., Art. I. § I, ¶ I. "A party's cause of action is a property interest that cannot be denied without due process. . . There is a strong presumption of judicial review of administrative actions." *NIX v. Long Mountain Resources*, 262 Ga. 506, 509 (1992) (citations omitted). Petitioners have a cause of action to seek denial of the permit. O.C.G.A. §§ 12-2-2(c), 50-13-13. As such, Petitioners have a property interest that cannot be denied without due process. Accordingly, DNR Rule 391-1-2-

.05(1) Subsections (g) and (h) are invalid as unconstitutional.

97.

Accordingly, the ALJ's Order granting the Respondents' Motion to Dismiss has interfered with impairs the legal rights of Petitioners. It has further prejudiced Petitioners' substantial rights and is in violation of constitutional and statutory provisions, in excess of statutory authority, made upon unlawful procedure, affected by error of law, clearly erroneous based on the evidence in the record, and arbitrary and capricious and characterized by abuse of discretion. O.C.G.A. § 50-13-19(h).

COUNT VI
The Permit is Invalid Because No Professional Engineer Supervised or Prepared the Permit.

98.

Paragraphs 1 through 97 are hereby incorporated by reference as if rewritten in their entirety.

99.

In Georgia, "it shall be unlawful for any person other than a professional engineer to practice or to offer to practice professional engineering in this state." O.C.G.A. § 43-15-7. The terms "professional engineer" and "professional engineering" are defined by statute. O.C.G.A. § 43-15-2.

100.

The term "Professional engineering" means:

> [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, structures, buildings, machines, equipment, processes, works,

> or projects, wherein the public welfare or the safeguarding of life, health, or property is concerned or involved, when such professional service requires the application of engineering principles and data and training in the application of mathematical and physical sciences. 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. Nothing contained in this chapter shall include the work ordinarily performed by persons who operate or maintain machinery or equipment.

O.C.G.A. § 43-15-2(11) (emphasis added).

101.

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.

O.C.G.A. § 43-15-2(10) (emphasis added). The term "the board" as used in the above definition means "the State Board of Registration for Professional Engineers and Land Surveyors." O.C.G.A. § 43-15-2(1).

102.

Thus, in order to lawfully practice professional engineering in the State of Georgia, one must be a professional engineer as defined by Georgia law. In order to be considered a professional engineer in Georgia, one must receive certification from the Georgia Board of Registration for Professional Engineers and Land Surveyors.

103.

Absent this certification, it is unlawful to practice professional engineering. As stated in the Georgia Code, it is "unlawful for any person other than a professional engineer to practice or to offer to practice professional engineering" in Georgia. O.C.G.A. § 43-15-7.

104.

The stated purpose for the requirements contained within Title 45, Chapter 15 of the Georgia Code, which contains the requirements for professional engineering, is "to safeguard life, health, and property and to promote the public welfare." O.C.G.A. § 43-15-1. Pursuant to "the police power vested in the Georgia Board of Registration for Professional Engineers and Land Surveyors by virtue of the acts of the legislature," Rules of State Board of Registration for Professional Engineers and Land Surveyors ("Professional Engineers Rule"), 180-6-.01 (2), the Board has required that engineers "maintain a high standard of integrity, skills, and practice." *Id.* at (1). The Board has also recognized that the practice of engineering is a "privilege" and not a right. *Id.* at (3). The prohibition on engineering activity conducted by individuals who are not professional engineers has wide implications. Indeed, the rules repeatedly discuss the importance of protecting public safety and health. *See e.g. Id.* (1), Professional Engineers Rule, 180-6-01.(1), 180-6-.02. Thus, failure to comply with the requirements of such a statute renders contracts made by those unauthorized to practice such profession void and unenforceable. *See Flatauer Fixture & Sales Corp. v. Garcia & Assocs.,* 99 Ga. App. 685, 687 (1959) (decided under former Code 1933, § 84-2102).

105.

When EPD issues PSD permits, it engages in "professional engineering" as defined by Georgia law. O.C.G.A. § 43-15-2(11). In order to issue a PSD Permit, EPD must make a BACT determination. The Georgia Board of Registration for Professional Engineers and Land Surveyors has ruled that BACT determinations constitute the practice of engineering. Minutes, Meeting of the Georgia Board of Registration for Professional Engineers and Land Surveyors, December 6, 1994; Minutes, Meeting of the Georgia Board of Registration for Professional Engineers and Land Surveyors, December 10, 1991.

106.

No licensed Georgia professional engineer reviewed, approved or was otherwise involved in the preparation of the Longleaf PSD Permit.

107.

Under Georgia's definition of "professional engineering," anyone who holds themselves out as an "engineer" must be construed as practicing engineering. O.C.G.A. § 43-15-2(11). Further, anyone involved in the "consultation, investigation, evaluation, planning, designing, or responsible supervision of construction or operation, in connection with any public or private utilities, structures, . . . equipment, processes, works, or projects, wherein the public welfare or the safeguarding of life, health, or property is concerned" is engaged in professional engineering according to Georgia law. *Id.*

108.

EPD employees who prepared the Longleaf PSD Permit held themselves out as engineers. EPD employees who prepared the Longleaf PSD Permit consulted, investigated, evaluated, planned, designed, and/or supervised decisions directly relating to the construction and operation of an electric generating station.

109.

As such, these employees engaged in the practice of professional engineering. However, they do not hold certification from the Georgia Board of Registration for Professional Engineers and Land Surveyors. As such, they are not professional engineers under Georgia Law and are thereby unlawfully practicing engineering in this State.

110.

Given that EPD unlawfully engaged in engineering in the issuance of the Longleaf PSD Permit, because no one from EPD involved in the drafting of the conditions or limitations

contained within the Permit, setting the emissions limits, or selecting the Best Available Control Technology, was a professional engineer as defined by controlling law, the permit is void.

111.

Accordingly, the ALJ's Order has prejudiced Petitioners' substantial rights and is in violation of statutory provisions, in excess of statutory authority, made upon unlawful procedure, affected by error of law, clearly erroneous based on the evidence in the record, and arbitrary and capricious and characterized by abuse of discretion. O.C.G.A. § 50-13-19 (h).

COUNT VII
The ALJ Erred in Refusing to Allow Petitioners To Amend the Petition.

112.

Paragraphs 1 through 111 are hereby incorporated by reference as if rewritten in their entirety.

113.

As described above, in Georgia, "it shall be unlawful for any person other than a professional engineer to practice or to offer to practice professional engineering in this state." O.C.G.A. § 43-15-7(a). When EPD issues PSD permits, it engages in "professional engineering" activity as defined by Georgia law. O.C.G.A. § 43-15-2(11).

114.

It is undisputed that no professional engineers either supervised or prepared the Longleaf PSD Permit. However, the Final Determination, issued on May 13, 2007, in conjunction with the Longleaf PSD Permit, states that the permit was "prepared by" Peter Courtney, who is a Georgia licensed Professional Engineer, and Anna Aponte, who is not a licensed professional

engineer. As such, Petitioners reasonably concluded that the Permit was prepared by a licensed professional engineer.

115.

Petitioners first learned that Peter Courtney may not have been involved in the actual preparation of the Longleaf PSD Permit when Respondent EPD filed its Prehearing Submission on August 30, 2007. The Prehearing Submission was filed after the deadline for filing dispositive motions and for amending the petition. On September 14, 2007, Petitioners received confirmation that no licensed professional engineers prepared the permit when Respondent stipulated that Peter Courtney was not involved in the preparation of the permit. That same day, Petitioners filed a request for leave to file an amended petition to include a claim that the permit is invalid as it was not prepared by a licensed professional engineer. Petitioners also filed a motion for summary determination seeking a ruling from the ALJ that the permit is invalid as a matter of law.

116.

Respondent EPD and Intervenor Longleaf submitted briefs on both the issue of whether the motions were timely filed, and the substantive claims raised by Petitioners.

117.

Petitioners could not, in good faith, file a claim on the issue of whether the permit was prepared by a licensed professional engineer until it had a reasonable basis for concluding that no engineers were involved in the permitting process. In this case, that information was not available until Petitioners knew that Peter Courtney, the only licensed professional engineer involved in the EPD approval process, was not involved in the preparation of the permit. In issuing its ruling, the ALJ erroneously concluded that Petitioners should have known to include a

claim that no engineers were involved in the preparation of the permit at the time the petition was filed.

118.

The ALJ erroneously concluded that allowing Petitioners to amend their petition would unduly prejudice Intervenor and Respondent. Indeed, Intervenor and Respondent would suffer no prejudice whatsoever as the claims had been fully briefed, and the ALJ ruled, in the alternative, that Petitioners' claim should be dismissed as a matter of law.

119.

Accordingly, the ALJ's Order has prejudiced Petitioners' substantial rights and is in violation of constitutional and statutory provisions, in excess of statutory authority, made upon unlawful procedure, affected by error of law, clearly erroneous based on the evidence in the record, and arbitrary and capricious and characterized by abuse of discretion. O.C.G.A. § 50-13-19(h).

COUNT VIII
The ALJ Erred in Denying Petitioners' Motion in Limine to Exclude All Expert and Opinion Testimony on Engineering Matters By Those Not Licensed as Professional Engineers in Georgia.

120.

Paragraphs 1 through 119 are hereby incorporated by reference as if rewritten in their entirety.

121.

Professional engineering, as Georgia law defines it, includes "consultation, investigation, [and] evaluation . . . of construction or operation, in connection with any public or private utilities, structures, buildings, machines, equipment, processes, works, or projects, wherein the public welfare or the safeguarding of life, health, or property is concerned or involved."

O.C.G.A. § 43-15-2(11). In order to testify regarding engineering matters in this case, one must consult, investigate, and evaluate the operation of what is to be the Longleaf Energy Station, the construction and operation of which will most certainly impact public welfare, life, health, and property as it is well established that pollutants coming from such a facility may pose serious danger to public health as well as crops and vegetation.

122.

Five of the expert witnesses listed by Respondent and Intervenor were not licensed professional engineers in Georgia. These witnesses were Anna Aponte, James Capp, Kathy French, Kennard F. Kosky, and Robert C. McCann, Jr. (By contrast, Petitioners' expert witness, Dr. Phyllis Fox, is a licensed professional engineer in Georgia.)

123.

Because none of these individuals are licensed to practice professional engineering in Georgia, they should not have been permitted to offer opinion or expert testimony relating to engineering matters in this case.

124.

However, the ALJ erroneously denied Petitioners' Motion in Limine on this subject.

125.

Accordingly, the ALJ's Order has prejudiced Petitioners' substantial rights and is in excess of statutory authority, made upon unlawful procedure, affected by error of law, clearly erroneous based on the evidence in the record, and characterized by abuse of discretion. O.C.G.A. § 50-13-19(h).

COUNT IX
The ALJ Applied the Incorrect Standard of Review.

126.

Paragraphs 1 through 125 are hereby incorporated by reference as if rewritten in their entirety**.**

127.

At the evidentiary hearing in this matter, Petitioners alleged that the emission limitations in the Longleaf PSD Permit were improperly set for the following pollutants: sulfur dioxide, nitrogen oxides, particulate matter, and sulfuric acid mist because they were not reflective of "Best Available Control Technology" or "BACT."

128.

As described above, the term BACT refers to an emission limitation:

> based on the maximum degree of reduction for each pollutant subject to regulation under Act which would be emitted from any proposed major stationary source or major modification which the Administrator, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant.

Georgia SIP 391-3-1-.02(7)(a)(2), 40 CFR § 52.21(b)(12).

129.

In evaluating the evidence regarding whether EPD set the emission limits in the Longleaf PSD Permit in a manner inconsistent with the requirements imposed by the definition of BACT, the ALJ failed to comply with OSAH Rule 21. Subsection (1) of this rule required the ALJ to make an "independent determination on the basis of the competent evidence presented at the hearing." Subsection (3) of this rule also required that the review of the ALJ was to be "de novo in nature."

130.

In Georgia, in a *de novo* proceeding, the court is to "'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)).

131.

Moreover, in evaluating Petitioners' claims at the hearing, the ALJ was acting as the representative of the agency itself. *See* O.C.G.A. § 12-2-2(c)(2)(A) (stating that hearings are to be conducted by administrative law judges that are "acting in the place of the Board of Natural Resources").

132.

Accordingly, in evaluating Petitioners' claims and the evidence offered regarding those claims, O.C.G.A. § 12-2-2(c)(2)(A) and OSAH Rule 21 prohibited the ALJ from deferring to EPD's judgment in setting the emission limits in the permit. Rather, these provisions required the ALJ to evaluate the evidence *de novo*, make findings of fact based on the preponderance of the evidence, and then decide, based on those facts, whether EPD's actions in setting the emission limits in the permit were "right" or "wrong." *See e.g. In re Walker County*, Record No. DNR-EPD-HW-AH 2-89, 1990 Ga. Env. LEXIS 16, 32 (1990) (court should make independent review); *see also In re Coffee County Solid Waste Handling Permit*, Record No. DNR-EPD-SW-AH 4-86, 1987 Ga. ENV LEXIS 21, 3-4 (1987) (same); *see also Ga. Dep't of Educ. v. Niemeier*, 274 Ga. App. 111 (2005).

133.

The ALJ, in reaching her decision regarding Petitioners' claims regarding BACT, erred as a matter of law by applying an appellate, deferential standard. For example, on page 65 of the

Final Decision, the ALJ states that Petitioners' obligation was to show that EPD's actions were "unreasonable." She goes on to state: "even if this Tribunal concluded that reasonable persons could disagree as to what constitutes BACT for the Longleaf 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. Nor should it substitute another expert's reasonable determination for the Director's reasonable determination." Final Decision, at 65.

134.

The ALJ improperly applied this deferential, appellate standard in evaluating all of Petitioners' claims regarding the inadequacy of the permit's emission limitations. The standard applied by the ALJ has no basis in statute or regulation, and is, in fact, contrary to the standard of review established by OSAH Rule 21 and O.C.G.A. § 12-2-2(c)(2)(A).

135.

Accordingly, the ALJ's Order has prejudiced Petitioners' substantial rights and is in violation of statutory and constitutional provisions, in excess of statutory authority, made upon unlawful procedure, affected by error of law, clearly erroneous based on the evidence in the record, and arbitrary and capricious and characterized by abuse of discretion. O.C.G.A. § 50-13-19(h). Accordingly, this matter must be remanded back to the ALJ so that the evidence can be evaluated in light of the appropriate standard of review.

WHEREFORE, for all the above reasons and others, Petitioners requests that the ALJ's Final Decision entered on January 11, 2008, the ALJ's Memorandum Opinion and Order on Motions for Summary Determination entered on December 18, 2007, the ALJ's Order on Respondent's Motion to Dismiss, entered on November 27, 2007, the ALJ's 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 entered on November 30, 2007, and the September 21, 2007 oral Order denying Petitioners' Motion in Limine to Exclude All Expert and Opinion Testimony on Engineering Matters By Those Not Licensed as Professional Engineers in Georgia, be reversed.

AND WHEREFORE, for all the above reasons and others, Petitioners request that this Court declare DNR Rule 391-1-2-.05(1)(g) and (h) to be invalid under the laws of the State of Georgia, and the Constitutions of the State of Georgia and United States.

AND WHEREFORE, for all the above reasons and others, this Court grant Petitioners such other and further relief as the Court may find just and appropriate.

Respectfully submitted, this 11th day of February, 2008.

_____

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CERTIFICATE OF SERVICE

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

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Counsel for Longleaf Energy Associates, LLC

This 11th day of February, 2008.

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Justine Thompson