



July 8, 2008

U.S. Environmental Protection Agency  
Clerk of the Board  
Environmental Appeals Board (1103B)  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460-0001

Re: Deseret Power Electric Cooperative  
PSD Permit No. PSD-OU-00002-04.00  
PSD Appeal No. 07-03

Dear Ms. Durr:

Enclosed is the Final Order in *Friends of the Chattahoochee, Inc. v. Georgia Dep't of Natural Res.*, No. 2008CV146398 (Ga Super. Ct. June 30, 2008), issued last week by the Superior Court of Fulton County, Georgia. This decision may be of interest to the Board in this case because it squarely addresses the question of whether the Clean Air Act's best available control technology (BACT) requirements apply to carbon dioxide emissions from a new coal-fired power plant.

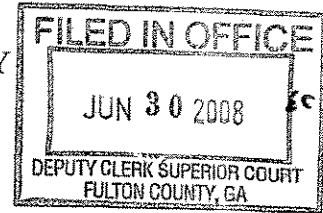
Sincerely,



Joanne Spalding

cc: Counsel of Record

IN THE SUPERIOR COURT OF FULTON COUNTY  
STATE OF GEORGIA



FRIENDS OF THE )  
CHATTAHOOCHEE, INC. and SIERRA )  
CLUB, )

Petitioners, )

v. )

) Docket No. 2008CV146398

DR. CAROL COUCH, DIRECTOR, )  
ENVIRONMENTAL PROTECTION )  
DIVISION, GEORGIA DEPARTMENT )  
OF NATURAL RESOURCES )

Respondent, )

and )

LONGLEAF ENERGY )  
ASSOCIATES, LLC, )

Respondent- )  
Intervenor. )

**FINAL ORDER**

This matter is before the Court on a Petition for Judicial Review of the final decision and other orders of the Administrative Law Judge (ALJ) regarding the issuance of a permit to Respondent Longleaf Energy Associates, LLC (Longleaf) to construct and operate a 1200 megawatt coal-fired power plant in Early County, Georgia. The plant as permitted would annually emit large amounts of air pollutants, including 8-9 million tons of carbon dioxide; thousands of tons of sulfur dioxide; nitrogen oxides; particulate matter; sulfuric acid mist; and other hazardous air pollutants, including mercury.

Petitioners challenged the permit and the matter was assigned to an ALJ for hearing and disposition.

Petitioners' First Amended Petition asserted 17 counts set out in great detail in 213 separate paragraphs. Some of those counts were ultimately withdrawn. The ALJ granted Respondents summary relief on others, and after receiving evidence and argument, the ALJ dismissed Petitioners' remaining counts and upheld the permit in all regards in a final decision dated January 11, 2008. The Petition for Judicial Review was timely filed in this Court. The parties submitted briefs and appeared and were heard through counsel on June 3, 2008.

#### **STANDARD OF REVIEW IN THIS COURT**

This Court's review of the ALJ's decision is appellate in nature. *Children's Hosp. v. Ga. Dep't of Med. Assistance*, 235 Ga. App. 697, 700 (Ga. App. 1998). The Petition for Judicial Review presents questions of law, and this Court reviews such questions de novo. *Davis v. Turpin*, 273 Ga. 244, 246 (2007). A de novo standard also governs this Court's review of the ALJ's grant of summary determination. *Children's Hosp.*, 235 Ga. App. at 700.

#### **RULINGS ON THE ISSUES**

The Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* (Act) includes a number of regulatory programs "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and productive capacity of its population . . . ." 42 U.S.C. § 7401(b)(1). The Act is federally administered by the United States

Environmental Protection Agency (EPA), which has promulgated regulations to carry out the Act and to regulate substances considered “air pollutants.” Some of those regulations prescribe National Ambient Air Quality Standards (NAAQS), which are national limits for a few particular pollutants. *See* 40 C.F.R. Pt. 50. Many of the regulations under the Act, however, regulate pollutants under different regimes.

Areas within the United States are categorized as either “attainment areas” or “non-attainment areas.” An attainment area is one in which the pollution levels are within all of the prescribed NAAQS limits. Early County is an attainment area. Because it is an attainment area, the Act’s Prevention of Significant Deterioration (PSD) limitations apply, and those require that any new “major emitting facility” receive a PSD permit and comply with the permit’s conditions. The administrative review of the PSD permit application is handled by the Environmental Protection Division (EPD) of the Georgia Department of Natural Resources.

There is no dispute that the proposed power plant would be a “major emitting facility” as defined by the Act because it is a “fossil-fuel fired steam electric plant” of a size far greater than the statutory threshold. 42 U.S.C. § 7479(1). The proposed plant would also emit far more air pollutants than the statutory threshold. *Id.* Because the proposed plant would be a “major emitting facility,” Longleaf must incorporate the “best available [pollution] control technology” (BACT), which is defined as follows:

The term “best available control technology” means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this Act emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy,

environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant.

42 U.S.C. § 7479(3).

For every “pollutant subject to regulation under the Act,” the BACT analysis requires a series of steps from identifying the appropriate technologies to evaluate; evaluating the comparative effectiveness of those technologies in controlling pollution emissions; the assessment of other specified considerations; and, ultimately, a decision concerning which technology is the “best available control technology.” The emission limitations in the facility’s permit must be set based on that “best available control technology.”

Petitioners claim that the permit and the ALJ rulings concerning the application of BACT to the Longleaf plant are legally erroneous. These contentions relate to three separate issues – carbon dioxide emissions; particulate matter emissions; and alternative combustion technology known as IGCC.

#### **I. THE ALJ’S STANDARD OF REVIEW**

Petitioners also raise several procedural issues that go to the ALJ’s substantive rulings. First, Petitioners assert that the ALJ erred across the board by failing to make de novo findings and decisions. The Court has carefully reviewed the final decision of the ALJ, and it is clear that the ALJ did not make de novo findings or decisions concerning emission limitations or other issues. The ALJ repeatedly rejected contentions of Petitioners not because the facts did not support the Petitioners’ position, but because the

ALJ concluded that EPD's decision was not "unreasonable."<sup>1</sup> If the law required the ALJ to make a de novo decision, the final decision is fatally flawed for failure to do so.

The Court concludes that a de novo decision should have been rendered. Under the statutory scheme that governs EPD actions like the permitting decision here, the ALJ sits in lieu of the Board of the Department of Natural Resources (DNR). While the DNR Board would have the plenary authority and responsibility to make a de novo decision, that authority was transferred by statute to the Office of State Administrative Hearings (OSAH) and the ALJs therein. Under the law as it pertains to this type of challenge, any person, such as Petitioners, who are "aggrieved or adversely affected by any order or action of the director [of EPD] shall, upon petition to the director within 30 days after the issuance of such order and the taking of such action, have a right to a hearing before an administrative law judge of the Office of State Administrative Hearings . . . *acting in place of the Board of Natural Resources.*" O.C.G.A. § 12-2-2(c)(2)(A)(italics added). The statute goes on to state that "the decision of the administrative law judge shall constitute the final decision of the board." O.C.G.A. § 12-2-2(c)(2)(B).

Not only was the ALJ acting as the DNR board in this case with authority to determine all aspects of the instant permit de novo, the specific rules of OSAH dictate that this proceeding should have been determined de novo. OSAH Rule 21(3) provides

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<sup>1</sup> Typical of the ALJ's reasoning is the statement that "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 law. This tribunal should not substitute its equally reasonable determination for the Director's reasonable determination." Final decision at 65. That is not a de novo decision.

that: “The hearing shall be de novo in nature . . . .” OSAH Rule 21(1) further states 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 is available to the [DNR].” 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 reasonably be construed otherwise.

The Court has reviewed the abundant authority on this issue cited by the parties. To the extent that any of those authorities suggest that a “reasonableness” standard has a place in administrative hearings, they pertain to different situations or statutes where “reasonableness” is, for example, a specific element of the matter at issue. It is clear from these authorities that the ALJ should have made a de novo decision in this case, and the final decision is erroneous in all of its findings and decisions for failure to do so.

## II. EMISSION LIMITATION FOR CARBON DIOXIDE

As to the first of these, carbon dioxide, it is undisputed that no BACT analysis was done. There was no effort to identify, evaluate, or apply available technologies that would control CO<sub>2</sub> emissions, and the permit contains no CO<sub>2</sub> emission limits.

The ruling of the ALJ can be upheld on this issue only if carbon dioxide is not an air “pollutant subject to regulation under the Act.” Otherwise, the statute requires a BACT emission limit for CO<sub>2</sub>. The argument had been advanced before the permit issued here that CO<sub>2</sub> was not an “air pollutant” under the Act, but that argument was rejected by the United States Supreme Court in *Massachusetts v. EPA*, 127 S.Ct. 1438

(2007). Faced with the ruling in *Massachusetts* that CO<sub>2</sub> is an “air pollutant” under the Act, Respondents are forced to argue that CO<sub>2</sub> is still not a “pollutant *subject to regulation* under the Act.” Respondents’ position is untenable. Putting aside the argument that any substance that falls within the statutory definition of “air pollutant” may be “subject to” regulation under the Act, there is no question that CO<sub>2</sub> is “subject to regulation under the Act.”

Respondents acknowledge, for example, that the regulatory regime under the Clean Air Act mandates monitoring of CO<sub>2</sub> emissions. The failure to conduct required monitoring under the Act’s regulations is subject to criminal sanction, and a person who knowingly submits false monitoring reports may be subject to a felony prosecution. *See, e.g.*, 42 U.S.C. § 7113(c)(2); 18 U.S.C. § 1001. Respondents do not dispute that the failure to comply with these CO<sub>2</sub> regulations is enforceable by criminal sanction.

In addition to the CO<sub>2</sub> monitoring regulations in Part 75 of Title 40 of the Code of Federal Regulations, Petitioners have provided the Court with many other examples of Clean Air Act regulations that address CO<sub>2</sub>. Respondents effectively ignore these regulatory structures by contending that BACT limits should apply to a pollutant only if it is also capped or controlled by some other general limit. Thus, Longleaf argues that CO<sub>2</sub> is not “controlled or limited” by the Clean Air Act as the basis for contending that BACT should not apply. (Longleaf Brief, p. 38). The BACT statute is plainly broader than that, however, encompassing all pollutants that are “subject to regulation” under the Act, whether or not they are independently subject to NAAQS or other general limits. The



ALJ clearly erred, in light of the regulatory schemes that in fact address CO<sub>2</sub>, in stating that “EPA has not promulgated a [NAAQS] for CO<sub>2</sub>, has not listed CO<sub>2</sub> as a regulated pollutant in any section of the CAA, *and has not established any other regulations for CO<sub>2</sub>.*” (Memorandum Opinion and Order of Dec. 18, 2007, p. 6)(italics added).

If the BACT requirement were limited as Respondents urge, Congress presumably would have used narrower language in the BACT provision, as it did elsewhere in the Act. *See, e.g.*, 42 U.S.C. § 7602(k)(addressing quantitative “emission limitations”). The regulatory definition of air pollutants that require BACT determinations is also inconsistent with Respondents’ position. The parties agree that a BACT analysis and emission limitation is required for all “regulated NSR<sup>2</sup> pollutants.” 40 C.F.R. § 52.21(j)(2). The parties also agree that a “regulated NSR pollutant” is defined in EPA’s regulations as follows:

(50) Regulated NSR pollutant, for purposes of this section, means the following:

(i) Any pollutant for which a national ambient air quality standard has been promulgated and any constituents or precursors for such pollutants identified by the Administrator (e.g., volatile organic compounds and NOX are precursors for ozone);

(ii) Any pollutant that is subject to any standard promulgated under section 111 of the Act;

(iii) Any Class I or II substance subject to a standard promulgated under or established by title VI of the Act; or

(iv) Any pollutant that otherwise is subject to regulation under the Act; except that any or all hazardous air pollutants either listed in section 112 of

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<sup>2</sup> “NSR” refers to “new source review.”

the Act or added to the list pursuant to section 112(b)(2) of the Act, which have not been delisted pursuant to section 112(b)(3) of the Act, are not regulated NSR pollutants unless the listed hazardous air pollutant is also regulated as a constituent or precursor of a general pollutant listed under section 108 of the Act.

40 C.F.R. § 52.21(b)(50).

The interpretation of this regulation urged by Respondents, and accepted by the ALJ, contradicts the plain meaning of the regulation. Limiting BACT determinations to those air pollutants for which there is a separate, general numerical limitation effectively ignores part (iv) of the regulation that sweeps in all pollutants that are “otherwise subject to regulation under the Act.” Since CO<sub>2</sub> is “otherwise subject to regulation under the Act,” a PSD permit cannot issue for Longleaf without CO<sub>2</sub> emission limitations based on a BACT analysis.

### **III. MODELING FOR FINE PARTICULATE MATTER**

Petitioners’ next contention concerns particulate matter. There are two distinct forms of particulate matter, each defined by particle size. PM<sub>10</sub> includes all particulate matter that is 10 microns or less in size. PM<sub>2.5</sub> includes all particulate matter that is 2.5 microns or less. *See* 40 C.F.R. §§ 50.6 & 50.7.

PM<sub>10</sub> has long been one of the pollutants for which there has been a national, or NAAQS, standard. Based on studies concerning the adverse health impacts of very small particulate matter, the EPA in 1997 also promulgated a separate NAAQS requirement for PM<sub>2.5</sub>. *See* 62 Fed. Reg. 38,652 (July 18, 1997). The EPA found the new PM<sub>2.5</sub> standard necessary because of health risks that included “premature mortality and increased

hospital admissions and emergency room visits . . . ; increased respiratory symptoms and disease, in children and individuals with cardiopulmonary disease such as asthma; decreased lung function, particularly in children and individuals with asthma; and alterations in lung tissue and structure and in respiratory tract defense mechanisms.” *Id.* The PM<sub>2.5</sub> NAAQS was made even more stringent in 2006 because of additional health-risk studies. 71 Fed. Reg. 61,143 (Oct. 17, 2006).

Because PM<sub>2.5</sub> is an air pollutant that is subject to NAAQS, Longleaf was required to prove that the national PM<sub>2.5</sub> standard would not be exceeded as a result of the plant’s construction.

No major emitting facility on which construction is commenced after August 7, 1977, may be constructed [in any attainment area] unless – . . .

(3) the owner or operator of such facility demonstrates, as required pursuant to section 7410(j) of this title, that emissions from . . . such facility will not cause, or contribute to, air pollution in excess of any . . . (B) national ambient air quality standard . . . .

(4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility; . . .

42 U.S.C. § 7475(a).

The dispute here arises over what has been called “surrogate” evaluation of PM<sub>2.5</sub> emissions. The so-called surrogate approach uses modeling for PM<sub>10</sub> emissions to examine PM<sub>2.5</sub> compliance. EPA “guidance” has been written that allows a surrogate approach in some circumstances. Petitioners do not contend that the use of a PM<sub>10</sub> surrogate evaluation is never appropriate. For example, Respondents rely upon an

administrative decision arising from Illinois, *In Re Prairie State Generating Company*, PSD Appeal Number 05-05 (EPA Environmental Appeals Board). In that case, PM<sub>10</sub> modeling was used as a surrogate for assessing PM<sub>2.5</sub> pollution by assuming a worst case scenario – *i.e.*, that all particulate matter included within the 10 micron or less range fell within the 0.0 to 2.5 micron range. Since that worst case analysis showed that the PM<sub>2.5</sub> NAAQS would not be exceeded as a matter of fact in *Prairie State*, the surrogate approach fully answered the legal issue concerning PM<sub>2.5</sub> compliance.

The circumstances here are very different than in *Prairie State*. Instead of employing PM<sub>10</sub> modeling as a useful worst-case approximation for PM<sub>2.5</sub> emissions, Longleaf made no effort at all to show that the PM<sub>2.5</sub> NAAQS would be satisfied. Had the worst-case approach of *Prairie State* been followed here, it predicted that the PM<sub>2.5</sub> NAAQS would be exceeded, in violation of the Clean Air Act. Moreover, Petitioners offered affirmative evidence from their expert who specifically modeled for and determined the actual PM<sub>2.5</sub> levels that would occur in the Early County attainment area if the Longleaf plant were built. He concluded that “modeling of PM<sub>2.5</sub> shows concentrations during normal operations will exceed the 24-hour NAAQS (National Ambient Air Quality Standards).” (Tran Affidavit). Nevertheless, the ALJ granted Respondents’ motion for summary determination on the PM<sub>2.5</sub> issue, concluding that the PM<sub>10</sub> modeling Longleaf performed was sufficient, as a matter of law.

The Court concludes that the ALJ erred. The issue here is not whether PM<sub>10</sub> surrogate modeling may or may not be relevant, or even sufficient in some

circumstances.<sup>3</sup> Rather, the issue in this case is whether the decision-maker can ignore relevant evidence on the issue of whether or not the NAAQS for PM<sub>2.5</sub> will actually be violated. The only actual modeling evidence of PM<sub>2.5</sub> in this record shows that the proposed facility would exceed the NAAQS for PM<sub>2.5</sub> in violation of 42 U.S.C. § 7475(a)(3). The ALJ refused to even consider that evidence, and that was error. While the surrogate approach permits consideration of PM<sub>10</sub> modeling evidence, it does not allow the ALJ to ignore other relevant evidence.

The approach advocated by Respondents and adopted by the ALJ has no support in the law. Under that approach, the evidence could show conclusively that the PM<sub>2.5</sub> NAAQS would be violated by a proposed facility, but the ALJ would be constrained to “find” otherwise whenever the PM<sub>10</sub> limit is satisfied. In effect, that rationale would repeal the PM<sub>2.5</sub> limit. Nothing in either the guidance or the recent EPA publication allows or requires that result. Ignoring relevant evidence is inconsistent with conducting a hearing and making findings. It is also inconsistent with the Act’s provision that renders the permit illegal if the plant would cause the NAAQS for PM<sub>2.5</sub> to be exceeded.

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<sup>3</sup> The parties dispute certain specifics concerning the meaning of the EPA guidance, and whether that guidance is consistent with the Act itself. Neither guidance nor regulations, of course, can contradict the federal statute. Respondents also cite a recent Federal Register publication of a new EPA rule – which would appear to raise the earlier “guidance” to something like “rule status” – although it appears that the new rule will not go into effect until after this Court’s decision. Given this Court’s ruling concerning the PM<sub>2.5</sub> issue, it need not resolve the nuances of the parties’ arguments concerning when the surrogate approach may satisfy the Act as a general matter in the absence of other evidence.

#### **IV. INTEGRATED GASIFICATION COMBINED CYCLE**

Petitioners' final argument concerning BACT requirements involves an alternative "fuel combustion technique." The Longleaf plant as proposed would consume coal to generate electricity. Under Longleaf's proposed design, the coal would be burned in a boiler; the heat from the boiler would generate steam; and that steam would drive a turbine, which, in turn, would drive a generator to generate electricity. The IGCC technology (integrated gasification combined cycle) is a different way of using the coal to generate heat to drive the turbines. 40 C.F.R. § 60.41Da. IGCC works by first converting the coal to a gas – called "gasification" – and then burning the gas to drive turbines both directly from the hot gas and from steam, which again is created by the heat of combustion. And once again, the turbines drive the generator to create electricity.

Respondents argue that they are not required by the BACT statute and regulations to do a full analysis of IGCC combustion technology, and that the permit limitations need not incorporate lower pollution limits that would occur if IGCC were used. Longleaf advances this argument, which was accepted by the ALJ, by focusing not on the overall proposed plant, but on just one aspect of the facility. At the hearing, Longleaf argued that the legal analysis here should focus only on the proposed "boiler," not on the "facility," which is a much broader term.

Respondents' approach is too narrow and cannot be squared with the provisions of the law that control the Court's decision on this issue. The BACT statute is explicit in this regard. It requires a BACT analysis and permit emission limitations based on the

“emitting facility” as a whole. 42 U.S.C. § 7479(3). In addition, the statute was amended in 1977 to require, as part of the BACT analysis, consideration of “innovative fuel combustion techniques.” IGCC is an “innovative fuel combustion technique.”

The proposed “major emitting facility” is still the same kind of statutorily defined “facility” under the Clean Air Act whether the coal is burned directly in a boiler or is first converted to gas and then burned to create the heat of combustion that drives the turbines. The ALJ erred in ruling that IGCC would “redefine the air pollution source” so that it need not be part of the BACT analyses. (Final Decision, pp. 8-9). Under the statutory definition, one kind of “major emitting facility” is a “fossil-fuel fired steam electric plant.” 42 U.S.C. § 7479(1). With or without IGCC technology, the Longleaf plant thus falls under the same “facility” definition – a “fossil-fuel fired steam electric plant.” The regulatory definition supports this conclusion. It provides:

Integrated gasification combined cycle electric utility steam generating unit or IGCC electric utility steam generating unit means a coal-fired electric utility steam generating unit that burns a synthetic gas derived from coal in a combined-cycle gas turbine.

40 C.F.R. § 60.41Da.

While the statute and regulation are clear on their face, the Court would also note that the proponent of the 1977 amendment that added the BACT language at issue addressed this specific question on the Senate floor. In his explanation to the Senate concerning the amendment, Senator Huddleston explained that, while he believed BACT already included “such technologies as . . . gasification,” the amendment was added

nevertheless “to be more explicit, to make sure there is no chance of misinterpretation.”  
123 Cong. Rec. S. 9434-35 (June 10, 1977).

V. THE ALJ’S SUMMARY DISMISSAL OF COUNTS XIII AND XIV

Petitioners next appeal from the ALJ’s summary dismissal of Counts XIII and XIV of their Amended Petition, which challenged as inadequate Longleaf’s assessment of the impact of known carcinogens and other toxic emissions on public health and its assessment of visibility impairments. First Amended Petition, ¶¶ 177, 179, 194. The ALJ dismissed these claims without hearing evidence because the petition did not include an allegation of specific emissions limitations that should have been included in the final permit if the health and visibility studies had been performed appropriately. However, as alleged in detail and asserted in Petitioners’ offer of proof based on the Affidavit of K. Tran, ¶ 22, an appropriate health impact assessment of a plant like Longleaf requires consideration of many factors, and only after such a study, could appropriate permit limits be determined. First Amended Petition, ¶¶ 177, 179. Petitioners’ complaint concerning the lack of visibility impact studies included a litany of specific omissions and inadequacies, and specific allegations concerning the appropriate studies that needed to be performed as a prerequisite to the issuance of a permit. *Id.* ¶¶ 181-83, 185-86, 189-94.

The ALJ’s summary dismissal of these counts for failure to include specific permit limitations was erroneous as a matter of law. The basis of these counts was not the limits in the permits, but the failure of the applicant to assess the public harm prior to



establishing permit limitations. 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 then determine emission levels that would properly protect the public. No rule of pleading can reasonably impose such a burden on a litigant. Where a petitioner alleges that the applicant 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. If the DNR rule the ALJ relied upon can be construed and applied in this fashion, it is plainly not authorized by law.

An aggrieved person's right to review EPD's decision is guaranteed by statute. O.C.G.A. § 12-2-2(c)(2)(A). To allow for important issues to be precluded by such pleading contrivances would violate both the spirit and letter of the law that grants citizens the right to meaningful review. In Georgia, there is a strong presumption of judicial review of administrative actions. *Nix v. Long Mountain Resources, Inc.*, 262 Ga. 506, 509 (1992). Georgia is a liberal pleading state, and especially so in administrative proceedings. *Schaefer v. Clark*, 112 Ga. App. 806 (1965). Requiring a litigant to identify a precise permit limitation as a precondition to judicial review is contrary to these well-established pleading standards. Moreover, procedural questions arising at any stage of the proceeding which are not addressed in the Administrative Procedures Act or any other applicable law shall be resolved at the discretion of the ALJ, who may consult

and utilize the Civil Procedure Act and the Uniform Superior Court Rules in the exercise of this discretion. Ga. Comp. R. & Regs. 616-1-2-.02(3).

EPD cites general statutory provisions in support of the ALJ's order, such as O.C.G.A. § 50-13-3(a)(2). That statute allows the department to adopt "rules of practice," but nothing in it or any other statute authorizes the kind of rule the DNR relies on here. The Court of Appeals has addressed the sufficiency of pleadings under this statute, *Georgia PSC v. Alltel Georgia Communications Corp.*, 244 Ga. App. 645, 648 (2000), and that case demonstrates the error of the ALJ's ruling. *Alltel* upheld the sufficiency of a notice that was much less detailed than what was set forth in Counts XIII and XIV of the First Amended Petition here. Petitioners' pleadings were clearly sufficient.

**VI. MOTION TO AMEND PETITION TO ADDRESS THE  
PROFESSIONAL ENGINEERING LICENSURE STATUS OF EPD  
PERSONNEL**

Finally, Petitioners challenge the permit because the underlying BACT analyses by the EPD were not performed by a professional engineer. The ALJ initially ruled that Petitioners were late in raising this challenge, but went on to rule against Petitioners on the merits regardless, holding that the absence of a professional engineer did not invalidate the permit. Since the ALJ determined the issue on the merits, this Court will do so as well.

The scope of work that falls within "professional engineering" is specified by statute, O.C.G.A. § 43-15-2(11), and it includes the kind of work involved in the BACT

analyses here. The purpose of limiting such work to professional engineers is to “safeguard life, health, and property and to promote the public welfare.” O.C.G.A. § 43-15-1. There are some exceptions where persons may perform engineering responsibilities where they are not a licensed professional engineer. O.C.G.A. § 43-15-29. There is no such exemption, however, for employees of the EPD doing the kind of work involved in reviewing the permit at issue here. The Georgia Board of Engineers, which is charged with enforcing the professional engineering statutes, has ruled that determinations like those in BACT analyses constitute the practice of engineering.

The parties have provided the Court with no direct authority as to whether an EPD permit should be invalidated if those persons who made engineering determinations were not in fact licensed engineers. By analogy, however, there is authority that requires the invalidation of certain actions taken in the absence of a licensed professional where one was required. Courts have invalidated contracts where the party performing under the contract was not a licensed professional, but should have been. *See, Food Management, Inc. v. Blue Ribbon Beef Pack, Inc.*, 413 F.2d 716, 724-25 (8<sup>th</sup> Cir. 1969)(surveying decisions). In Georgia, the failure to comply with licensing requirements where they are imposed not just for revenue purposes, but for public protection, renders a contract void. *Culverhouse v. Atlanta Association for Convalescent Aged Persons, Inc.*, 127 Ga. App. 574, 576-77 (1972).

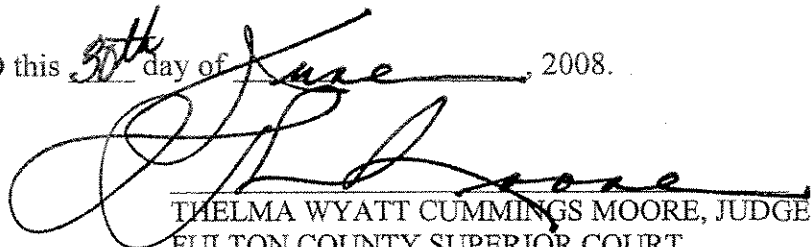
It is important that BACT analyses be performed by competent individuals who are familiar with the technology. Otherwise, the permit limits may be wrong,

endangering public health. On remand the EPD must utilize sufficient engineering assistance and direction to ensure that all BACT determinations are done properly and professionally.

### CONCLUSION

Based on this Court's review of the entire record, the briefs of the parties, and the hearing of June 3, 2008, the final decision of the ALJ entered on January 11, 2008 is hereby REVERSED insofar as it is inconsistent with the rulings of the Court herein, and it is VACATED in its entirety and REMANDED for further proceedings consistent with this Order, including a de novo determination of all facts and issues based upon the record that may ultimately be developed when the omissions and errors specified herein have been corrected. The ALJ's Order on Respondent's Motion to Dismiss and the Memorandum Opinion and Order on Motions for Summary Judgment entered on November 27 and December 18, 2007, respectively, are hereby REVERSED. 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, is also REVERSED.

So ORDERED this 30<sup>th</sup> day of June, 2008.

  
THELMA WYATT CUMMINGS MOORE, JUDGE  
FULTON COUNTY SUPERIOR COURT  
ATLANTA JUDICIAL CIRCUIT

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