In the Matter of:	)	
	)	Docket No. 01-AFC-7C
Amendment to the application for certification	)	
the of Russell City Energy Center Project.	)	
	)	

Objection to Petition for Extension of Deadline for commencement of construction of Russell City Energy Center and any staff determination in favor of the extension.

1. Pursuant to 1720.3 "the applicant may request, and the commission may order, an extension of the deadline for good cause." Calpine has admittedly had "an" extension and exhausted this opportunity. 1720.3 makes no provision for multiple extensions. Calpine has had ample opportunity to complete its project between September 11, 2002 and September 10, 2007. The Commission has already shown great latitude by allowing "an extension." Calpine is abusing the resources of the California Energy Commission through repeated extensions and amendments.

2. Calpine's claim of circumstances outside its control are unsubstantiated. The Commission is requested to review the Environmental Appeals Board (EAB) of the U.S. Environmental Protection Agency appeal filings 08-01 Attached (Exhibit A)
3. including exhibits 1-26 and Declarations Rob Simpson, Alameda County Supervisor Gail Steele, Hayward Area Planning Association President Sherman Lewis, Michael Toth, Communities for a Better Environment Attorney Shana Lazerow, James Forsyth, Ernest Pacheco, Citizens Against Pollution (CAP) President Audrey LePell, Susan M. Silva, Cynthia Chavez, Clara Watters, Kimberly Finn, and Karen Krammer, (Exhibit B)Amicus Brief filed by the County of Alameda and make a determination of merit, control of circumstances and opine on Calpine's claim of "Vexatious litigation." The Commission is requested to make no decision prior to resolution of the Federal action.
4.
5.

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3. Calpine claims " As a result of the multiple appeals to the Commission, The Supreme Court, the BAAQMD and the EAB, the project owner has been prevented from completing financing." They have offered no evidence to support this claim. There is no demonstration of available financing contingent on or "subject to" resolution of Calpine's legal difficulties.

Extensive evidence is available to demonstrate that Calpine's financial difficulty is a direct result of its voluntary bankruptcy filing after the California Attorney General fined Calpine for manipulating the Energy market. Calpine has actively been liquidating Power plants and has already sold an interest in this plan.

Calpine has filed for an extension of its East Altamont Energy Center 01-AFC-4C and other projects based upon lack of demand for its product and financial difficulties. East Altamont could certainly satisfy the stated power purchase agreement for this project.

The 2007 Integrated Energy Policy Report (IEPR)best illustrates the lack of demand. California, and specifically the Bay area can and must meet future energy needs through conservation and renewable sources to meet AB 32 requirements and provide stability. An increase in Energy demands is not materializing in the present economy. The effects of the present recession on demand projections has not been considered. The growing list of projects that are canceled, expired, on hold, or extended is testament to the lack of need for additional fossil fuel fired facilities. Sutter and Metcalf now operate as giant peaker plants based upon diminished demand. **CALIFORNIA ENERGY DEMAND 2008-2018 STAFF REVISED FORECAST** also demonstrates a lower demand then previously projected.

The secret power purchase agreements of PG&E and guaranteed returns on investing in unnecessary power plants are undermining the CEC regulatory authority and are not in the public interest. Commissioner Byron clarified in the Eastshore Hearings that the CEC no longer participates in the negotiations. The IEPR demonstrates the inequity

PG&E capacity surcharges are assessed against ratepayers who choose renewable energy, forcing them to pay for unnecessary power plants. This fee undermines the value of renewable energy, the goals of AB32 and the

public trust. Request is hereby made for the CEC to request that the California Attorney General investigate this allegation prior to consideration of an extension.

SB 1368 There has been no publication of Carbon Dioxide emission projections from the plant. Calpine has not demonstrated an ability to comply.

The Phase I Environmental Site Assessment, for 3810 Depot Road, Hayward, California Dated **September 13, 2006** (CEC Docket) expired after 180 days. All environmental documents associated with the project should be considered expired. There are significant ongoing and planned restoration projects protecting endangered species and habitats immediately adjacent to the proposed project.

The extension is not in the public interest or vital. It is not a clean source. The CEC staff recommended superior "fast start" technology that would avoid most of the emissions. The turbines selected by the applicant are obsolete and no longer manufactured. Calpine claimed to have the older turbines in stock or in use in another location. Identical turbines were liquidated in Calpine's Bankruptcy proceeding. Calpine does not appear to possess the turbines identified to complete this project as they previously claimed. BAAQMD confirmed that Calpine may relocate used turbines retired from a southern California facility to the Hayward location. This could earn $40,000,000 in Emission Reduction Credits in Southern California and inherently not be a clean source of energy.

Natural gas fired facilities are no longer a reliable source for the state of California. We are overly dependent on this single fuel source and thereby extremely vulnerable to further market manipulations and supply interruptions.

The Eastshore Energy Center proceeding disclosed subsequent significant additional evidence relevant to this proceeding. Request is made for the Commission to take administrative notice of the Eastshore proceeding for all objections relevant to this proceeding and for mailing lists of interested parties. The issues are similar to Calpine's plan having a much greater negative effect. The presiding members' proposed decision is applicable to both facilities.

"The Committee recommends that the Application for Certification be **Denied.** The proposed ***EASTSHORE ENERGY CENTER*** is inconsistent with applicable laws, ordinances, regulations, and standards and it creates unmitigable impacts under the California environmental Quality Act (CEQA)"..

"1) The facility would cause a significant cumulative public safety impact on
the operations of the nearby Hayward Executive Airport by further reducing already constrained air space and increasing pilot cockpit workload.

2) The thermal plumes from the facility would present a significant public safety risk to low flying aircraft during landing and takeoff maneuvers due to the close proximity of the Hayward Executive Airport.

3) The facility would be inconsistent with the City of Hayward's Municipal Zoning Ordinance requirements for a Conditional Use Permit (CUP) since the project "would not operate at a minimum of detriment to surrounding properties," and the Committee was not persuaded that the benefits of the facility were sufficient to recommend the Commission exercise its override authority.

4) The facility would be inconsistent with the City of Hayward's Airport Approach Zoning Regulations and incompatible with the Alameda County Airport Land Use Policy Plan (ALUPP), and the Committee was not persuaded that the benefits of the facility were sufficient to recommend the Commission exercise its override authority."

The project does not meet the current state NO2 standard. The project does not meet the current PM standard, in fact, the last amendment utilized outdated Federal PM standards.

The Public Notice method used by the CEC was discovered in the Eastshore Hearings to be flawed. Public Notice distances were measured from the center of the projects, not the edges. This greatly diminishes the notice radius. Under this logic a large enough project would need to notice

no one. The project should not be extended based upon this information.

The applicant has not demonstrated good cause for an extension and so request is made to reject the extension.

Objection is made, Pursuant to 1769 (I) (3) a)(2), **.. if a person objects to a staff determination that a modification does meet the criteria in subsection (a)(2), the petition must be processed as a Formal Amendment**

This modification requires a Formal Amendment. Calpine should be reasonably aware given the level of interest in this project that objection would be made. They did not bother to make a complete petition or file for extension in a time period that would allow an amendment to be processed prior to expiration. This timing and petition content are clearly within the scope of their control. Calpine has demonstrated contempt for the Commission's authority and disregard for the CEC staff. Staff should find that this application does not meet the required criteria and recommend against the extension.

The CEC should recognize all previous objections to this project as objections to its extension. There is no possibility that all parties that objected to this process over the last 8 years will be noticed and able to respond in the present venue. U.S. Fish and Wildlife Sercice must be consulted given the adjacent federally-protected habitats and endangered species. California Department Of Fish and Game Expressed Objections at the last Hearing. The effects of Nitrogen deposition, Acrolein and other pollutants on the adjacent endangered plant and animal species has not been studied. San Francisco Bay Conservation and development commission (BCDC) should be consulted.

The public cannot effectively comment on this proceeding because the application is incomplete Objection is made pursuant to 1769 (1) (A)-(I)

1769. Post Certification Amendments and Changes.(1) After the final decision is effective under section 1720.4, the applicant shall file with the commission a petition for any modifications it proposes to the project design, operation, or performance requirements. The petition must contain the following information:

(A) A complete description of the proposed modifications, including new language for any conditions that will be affected;

(B) A discussion of the necessity for the proposed modifications;

(C)If the modification is based on information that was known by the petitioner during the certification proceeding, an explanation why the issue was not raised at that time;
(CI)

(D) If the modification is based on new information that changes or undermines the assumptions, rationale, findings, or other bases of the final decision, an explanation of why the change should be permitted;

((E) An analysis of the impacts the modification may have on the environment and proposed measures to mitigate any significant adverse impacts;

(F) A discussion of the impact of the modification on the facility's ability to comply with applicable laws, ordinances, regulations, and standards;

(G) A discussion of how the modification affects the public;

(H) A list of property owners potentially affected by the modification; and

(I) A discussion of the potential effect on nearby property owners, the public and the parties in the application proceedings.

There is no new evidence to compel Staff to override their previous assessment recommending against the siting:
"• **Based on information received to date, it appears that the thermal plumes generated by the RCEC project have the potential to endanger the maneuverability of aircraft within the Hayward Airport Approach Zoning Plan boundaries;** Hazard Protection Zone (HPZ); proposed Airport Influence Area (AIA), and transitional airspace for the Hayward Executive Airport. Therefore, siting of this project at the proposed location would be inconsistent with HMC §10-6.35, the current ALUPP, and proposed draft ALUCP.
• Generation of thermal plumes that could jeopardize the safety of aircraft

operating within this airspace or persons living or working in the vicinity of the airport is considered by Energy Commission staff to be more objectionable than other uses within the Industrial District that do not create a similar hazard. Therefore, based on information available to date, siting of the project at the proposed location is inconsistent with HMC §10-1.140."(CEC staff report)

Objection is also made to the CEC Notice, comment, and hearing schedule. The shear volume of interested parties to this action could not conceivably form objections in the given time period. A minimum of 30 days to object to the extension should be offered so that the Boards of interested groups can comment. It is well known that the new Hayward City Council will be installed on July 8, 2008 and that they have an interest in this development.

It is also vital that the public be offered an opportunity to comment on Staff's recommendation. The NOTICE OF RECEIPT is not consistent with the NOTICE OF RECEIPT for East Altamont or 1769 (2) "Any person may file an objection to staff's determination within 14 days of service on the grounds that the modification does not meet the criteria in this subsection." No opportunity to review, comment or object to the staff determination has been provided.

East Altamont notice states:
Energy Commission staff is currently analyzing the request and will publish an analysis in the next several weeks. A public hearing for the purpose of approving or denying the amendment proposal will subsequently be held"... "The staff analysis (when published), will also be posted on the website."

RCEC Notice states:
Energy Commission staff will review the petition and schedule it for a decision at a regularly scheduled Business Meeting.

Post-Certification Mailing list.
There has been no publication of this mailing list. When creating the Post Certification Mailing List please add all parties included on all mailing lists presently maintained regarding Calpine's proposal Also Please provide Notice to the thousands of commenters and Attached (Exhibit D)objectors

1-909. Each signature is a separate objection. Please duly provide written Notice to them and all members of the public that have commented through CEC or BAAQMD Hayward power plant venues. All members of the public who have expressed an interest in these projects should be given the opportunity to be added to the mailing list. Please notice nearby property owners (from a current ownership survey) and tenants measuring from the edges of the project.

Members of the public have experienced an inability to subscribe to the CEC web notice function. It is requested that the CEC provide data on the incidence of attempts to subscribe compared to successes, repair the deficiency and notice members of the public who unsuccessfully attempted to gain notice through the Web function. Decl. Pacheco

This project is causing the relocation of adjacent communication towers. It has been attempted to process these actions separately. They are directly related and should receive cumulative consideration.
Attached(Exhibit C)East Bay Regional Park Departments Attorney Shut Mihaly & Weinberger LLP letter regarding the environmental effects of the new proposed towers. The issues presented can equally be applied to the power plant siting itself and are incorporated into this objection.

The attached (Exhibit E)CD contains **U.S. Fish and Wildlife Service records** to be incorporated into this objection. They are from the formal biological opinion begun in 2001 and never completed. The first document identified as 1-1-01-I-2899 States that:

"Based upon the information provided, the service has determined the project is likely to adversely affect the Salt marsh harvest mouse, California clapper rail, California least tern and Western snowy plover:"
This information still holds true and has not been addressed in the licensing of this project.

Attached (Exhibit F) June 24, 2008 Audubon Society objection to the project.

Objection is made to the Name "Russell City Energy Center" The name

is inherently deceptive and has misled the public. The project is planned in the City of Hayward. Should the Commission decide to allow the Russell City name to be used, all notices should display the actual city Name Hayward prior to, and in larger print. than the alias.

The attached Petition for Intervention is incorporated into this objection.

It is requested that this objection including all attachments be posted on the Commissions website so that it can be viewed by interested parties. There seems to be a tendency to post documents that are favorable to siting power plants and bury evidence against them in the docket log where they can not be viewed. Docketed information has not been forthcoming after repeated requests. (note email exchanges between Monasmith/Simpson) included in the EAB Appeal.

Rob Simpson

Attached (Exhibit A) "EAB filings 08-01
Attached (Exhibit B)Amicus Brief filed by the County of Alameda
Attached (Exhibit C)East Bay Regional Park Departments Attorney Shut Mihaly & Weinberger LLP letter
Attached (Exhibit D)objectors 1-909.
Attached (Exhibit E) CD contains U.S. Fish and Wildlife Service records
Attached (Exhibit F) June 24, 2008 Audubon Society objection to the project.
Attached (Exhibit G) June 25, 2008 Declaration of Ernest Pacheco

Petitioners position and interest in the proceeding:

I am a resident of Hayward California. I serve on the Board of Directors of The Hayward Area Planning Association (HAPA). I have been authorized by HAPA to intervene in Calpine's Hayward Shoreline facility 07-AFC-7C on HAPA's behalf. I am a member of Citizens Against Pollution (CAP) I have been authorized by CAP to intervene in the above referenced matter on their behalf. I also serve on the City of Hayward's Keep Hayward Clean and Green Task Force.

I have been personally named by Calpine in their Petition for Extension as a reason for their extension. As such I should be afforded the opportunity to file a response, present evidence, testify and cross-examine. To effectively do so it is necessary for me to become an intervener.

I incorporate by reference Environmental Appeals Board (EAB) of the U.S. Environmental Protection Agency Appeal NO. 08-01 into this position. Calpine has intervened in my EAB Appeal.

I incorporate by reference my objections filed concurrently with the compliance project manager for this proceeding.

Rob Simpson

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

FILED IN OFFICE
JUN 30 2008
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

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.

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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

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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,

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> 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

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ALJ concluded that EPD's decision was not "unreasonable."[1] 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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[1] 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.

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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_2 emissions, and the permit contains no CO_2 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_2. The argument had been advanced before the permit issued here that CO_2 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

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(2007). Faced with the ruling in *Massachusetts* that CO_2 is an "air pollutant" under the Act, Respondents are forced to argue that CO_2 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_2 is "subject to regulation under the Act."

Respondents acknowledge, for example, that the regulatory regime under the Clean Air Act mandates monitoring of CO_2 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_2 regulations is enforceable by criminal sanction.

In addition to the CO_2 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_2. Respondents effectively ignore these regulatory structures by contending that BACT limits should apply to a pollutant only if it is <u>also</u> capped or controlled by some other general limit. Thus, Longleaf argues that CO_2 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

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ALJ clearly erred, in light of the regulatory schemes that in fact address CO_2, in stating that "EPA has not promulgated a [NAAQS] for CO_2, has not listed CO_2 as a regulated pollutant in any section of the CAA, *and has not established any other regulations for CO_2*." (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[2] 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

[2] "NSR" refers to "new source review."

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> 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_2 is "otherwise subject to regulation under the Act," a PSD permit cannot issue for Longleaf without CO_2 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_{10} includes all particulate matter that is 10 microns or less in size. $PM_{2.5}$ includes all particulate matter that is 2.5 microns or less. *See* 40 C.F.R. §§ 50.6 & 50.7.

PM_{10} 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 $PM_{2.5}$. *See* 62 Fed. Reg. 38,652 (July 18, 1997). The EPA found the new $PM_{2.5}$ standard necessary because of health risks that included "premature mortality and increased

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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 $PM_{2.5}$ NAAQS was made even more stringent in 2006 because of additional health-risk studies. 71 Fed. Reg. 61,143 (Oct. 17, 2006).

Because $PM_{2.5}$ is an air pollutant that is subject to NAAQS, Longleaf was required to prove that the national $PM_{2.5}$ 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 $PM_{2.5}$ emissions. The so-called surrogate approach uses modeling for PM_{10} emissions to examine $PM_{2.5}$ compliance. EPA "guidance" has been written that allows a surrogate approach in some circumstances. Petitioners do not contend that the use of a PM_{10} surrogate evaluation is never appropriate. For example, Respondents rely upon an

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administrative decision arising from Illinois, *In Re Prairie State Generating Company*, PSD Appeal Number 05-05 (EPA Environmental Appeals Board). In that case, PM_{10} modeling was used as a surrogate for assessing $PM_{2.5}$ 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 $PM_{2.5}$ NAAQS would not be exceeded as a matter if fact in *Prairie State*, the surrogate approach fully answered the legal issue concerning $PM_{2.5}$ compliance.

The circumstances here are very different than in *Prairie State*. Instead of employing PM_{10} modeling as a useful worst-case approximation for $PM_{2.5}$ emissions, Longleaf made no effort at all to show that the $PM_{2.5}$ NAAQS would be satisfied. Had the worst-case approach of *Prairie State* been followed here, it predicted that the $PM_{2.5}$ 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 $PM_{2.5}$ levels that would occur in the Early County attainment area if the Longleaf plant were built. He concluded that "modeling of $PM_{2.5}$ 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 $PM_{2.5}$ issue, concluding that the PM_{10} modeling Longleaf performed was sufficient, as a matter of law.

The Court concludes that the ALJ erred. The issue here is not whether PM_{10} surrogate modeling may or may not be relevant, or even sufficient in some

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circumstances.[3] 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 $PM_{2.5}$ will actually be violated. The only actual modeling evidence of $PM_{2.5}$ in this record shows that the proposed facility would exceed the NAAQS for $PM_{2.5}$ 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_{10} 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 $PM_{2.5}$ NAAQS would be violated by a proposed facility, but the ALJ would be constrained to "find" otherwise whenever the PM_{10} limit is satisfied. In effect, that rationale would repeal the $PM_{2.5}$ 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 $PM_{2.5}$ to be exceeded.

[3] 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 $PM_{2.5}$ 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.

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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

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"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

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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

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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

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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

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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 (8th 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,

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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 9th day of June, 2008.

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

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