

IN THE SUPREME COURT OF GEORGIA

FRIENDS OF THE)
CHATTAHOOCHEE, INC. and)
SIERRA CLUB,)
)
PETITIONERS,)
)
v.) CASE NO: S09C1879
)
DR. CAROL COUCH, DIRECTOR,)
ENVIRONMENTAL PROTECTION)
DIVISION, GEORGIA.)
DEPARTMENT OF NATURAL)
RESOURCES)
)
RESPONDENTS.)

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS

Filed by

TALL TIMBERS RESEARCH STATION & LAND CONSERVANCY

And

THE GEORGIA WILDLIFE FEDERATION

James E. Butler, Jr.
Ga. State Bar No. 099625
Joel O. Wooten
Ga. State Bar No. 776350
BUTLER WOOTEN & FRYHOFER, LLP
105 13th Street (31901)
P.O. Box 2766
Columbus Georgia 31902
(706) 322-1990

I. INTRODUCTION

Amicus Curiae Tall Timbers Research Station & Land Conservancy (“Tall Timbers”) and the Georgia Wildlife Federation (“GWF”) respectfully submit the following brief in support of certain specific positions taken by the Petitioners, Friends of the Chattahoochee, Inc. and Sierra Club. For the reasons stated herein, Tall Timbers and GWF respectfully request that this Court reverse the decision of the Georgia Court of Appeals and remand to Georgia’s Office of State Administrative Hearings the Clean Air Act Prevention of Significant Deterioration permit issued by the Georgia Environmental Protection Division (“EPD”) to Longleaf Energy Associates, LLC (“Longleaf”) for construction of a 1,200 megawatt pulverized coal-fired power plant in Early County, Georgia, to be named the Longleaf Energy Station.

II. STATEMENT OF INTEREST

a. Tall Timbers Research Station & Land Conservancy

Tall Timbers Research Station & Land Conservancy celebrated its 50th anniversary in 2008. Tall Timbers began in 1958, the vision of Henry L. Beadel. Tall Timbers is a widely regarded information resource for the areas of fire ecology, forestry, game management and vertebrate ecology. Tall Timbers is recognized as the birthplace of the study of fire ecology and is an advocate to protect the right to use prescribed fire as an integral component of

forestry, farming and hunting land uses and conservation of the fire dependent southern pine ecosystem. The Tall Timbers Land Conservancy is recognized as one of the nation's leading regional land trusts, as it has protected traditional land uses in North Florida and South Georgia by conserving more than 110,000 acres of high quality, fire dependent habitat in the southeastern coastal plain through the use of permanent conservation easements. (For more information, please see www.talltimbers.org.) Tall Timbers has assisted in the formation of prescribed fire councils in a number of states in the southeast including Florida, Georgia, Alabama and South Carolina.

The Albany Quail Project, originally established by Auburn University in 1992, became part of the Tall Timbers Game Bird Program in 2008. The Game Bird Program performs research and provides landowners with land management information in Georgia, Alabama, and Florida.

The mission of Tall Timbers is to “foster exemplary land stewardship through research, conservation, and education.” Tall Timbers’ land ethic philosophy states:

- *We believe in* developing and maintaining long-term studies/research, including use of fire as a necessary land management tool.

- *We believe that* economic, social and ecological factors are interrelated components of good land stewardship.
- *We believe in* protecting outstanding examples of natural ecosystems and all of their components.
- *We believe in* respecting the rights and recognizing the responsibilities of private property ownership.

Tall Timbers endeavors to foster Exemplary Land Stewardship through research, conservation and education. This stewardship balances economic utility and ecological values within a framework of long-term conservation.

Prescribed burning is an essential and irreplaceable mechanism for forest management, farming and wildlife management in South Georgia and North Florida. *There is literally no substitute.* The economic impact of eliminating or impeding prescribed burning would be significant, and would be felt by all who own and manage farms, forestlands and/or seek to manage for game or other wildlife. Prescribed fire is critical for maintaining ecosystem health and plant and animal diversity on the landscape. Removing prescribed fire would result in significant changes to the landscape, including adverse effects to, and eventual elimination of, indigenous, fire dependent plant and animal populations, including a number of species protected by the federal Endangered Species Act. Prescribed fire

is also essential for removing excess flammable plant material from forests that can otherwise result in catastrophic wildfires which threaten lives and property and can cause air quality disasters.

Prescribed burning does contribute to the amount of particulate matter (“PM”) in the air. That is the reason Tall Timbers is *very concerned* about the potential particulate matter emissions of the proposed Longleaf plant and *the future impact* of those emissions on the *already existing* economic interests of individuals and businesses in South Georgia and North Florida. Those who depend upon prescribed fire – farmers, foresters, public land managers, and wildlife managers – share these concerns. The potential impact is clear. EPD has already reported that Dougherty County (Albany) is nearly exceeding the 24-hour PM_{2.5} standard. If, as Petitioners’ expert indicates, the Longleaf plant’s emissions push the region into non-attainment of the National Ambient Air Quality Standards (“NAAQS”) for PM_{2.5}, then, farmers, foresters and game managers could be forced to halt or limit their use of prescribed fire. That would seriously and adversely affect the economy, the environment and the rural land use traditions of the region.

For these reasons, Tall Timbers respectfully submits that, on remand, the impact of Longleaf’s PM_{2.5} emissions on ambient air quality must be fully and exhaustively evaluated before any EPD permit is issued for the proposed

Longleaf plant. That has not been done – not by Longleaf and not by EPD. That evaluation must be done. If, but only if, the decision of the Court of Appeals is reversed, that evaluation can be done. Then, and only then, can the impact of the proposed Longleaf plant upon the economic interests, environment, and safety of those businesses and individuals *already resident* in the South Georgia and North Florida region be understood and considered. If operation of the Longleaf plant will or may lead to a violation of the PM2.5 NAAQS, the requested permit should, after remand, be denied.

b. The Georgia Wildlife Federation

The Georgia Wildlife Federation, having been established by traditional hunting and fishing clubs in 1936, remains the oldest and largest broad-based wildlife conservation organization with sportsmen at its core. The Georgia Wildlife Federation's Mission Statement is clear: To encourage the intelligent management of the life sustaining resources of the earth - its essential water resources - its protective forests and plant life - and its dependent wildlife - and to promote and encourage the knowledge and appreciation of these resources, their interrelationship and wise use, without which there can be little hope for continuing abundant life. Representing more than 50,000 active sportsmen and women and recreational interests, the Georgia Wildlife Federation joins this effort to secure the perpetual future of Georgia's most preferred, irreplaceable

and only natural tool for land, timber, agricultural and wildlife habitat management -- prescribed fire.

Georgia law supports private property landowners' stewardship rights through The Georgia Prescribed Burning Act, see OCGA §§ 12-6-145 and 12-6-146.

Benefits of prescribed fire include: sustaining native species of flora and fauna, maintaining and sustaining the biodiversity of Georgia's pine forest ecosystems, and supporting the fire dependent ecosystems and their inter-related-dependent wildlife. The continued use of prescribed fire is critical in preventing catastrophic wildfires which can result in potential loss of property, livelihoods and lives. Prescribed fire is the "ounce of prevention worth a pound of cure" for preventing the establishment of competing invasive species and the myriad of benefits it provides.

Agriculture is Georgia's largest industry and economic activity; it is dependent on fire use practices. Prescribed fire is a land based tool supporting both the cultural and ecological stewardship values of thousands of Georgia families, farms and businesses; resulting in billions of dollars of economic land utility through agriculture, wildlife and timber operations.

As a leader in prescribed fire education and awareness, the Georgia Wildlife Federation partners with many conservation organizations and

governmental agencies, along with the Georgia Prescribed Fire Council, to promote its use. Prescribed fire is one of the top five priorities for implementation of Georgia's State Wildlife Action Plan. The continued use of prescribed fire is a priority of the Georgia Wildlife Federation and is to be used by private landowners and public employees operating as advisors and practitioners.

The Georgia Wildlife Federation through its participation and leadership with other conservation groups, private industry and government, has worked diligently with stakeholders to draft a manageable state smoke management plan. The Georgia Wildlife Federation has advocated for and supports both state and federal funding to create a real-time permitting/reporting, weather monitoring and smoke modeling/prediction system to better serve the prescribed fire community addressing air quality concerns for all of Georgia.

Any governmental action, including point source permits like the Longleaf PSD Permit under appeal, that might negatively impact, reduce, suppress, curtail or limit the use of prescribed fire, should be scrutinized, remanded and immediately revisited using current modeling standards required by the EPA.

The Georgia Wildlife Federation joins Tall Timbers in requesting that the Court reverse the Court of Appeals on the issue of PM2.5 and remand the permit where, after remand, it should be denied.

III. ARGUMENT AND CITATION OF AUTHORITY

A. If the Longleaf Plant is Built, Essential Prescribed Burning in South Georgia May be Rendered Illegal or Be Limited, with Serious Economic and Environmental Impacts.

At the administrative hearing, the Petitioners submitted an uncontradicted expert affidavit which showed conclusively through precise modeling that the proposed Longleaf plant would emit levels of PM2.5 that would in turn cause much of South and Southwest Georgia to become so-called non-attainment areas. Once an area reaches non-attainment status, strict limits must be implemented to reduce pollution and to bring an area into attainment. This would likely result in prescribed burning being limited or banned because prescribed burning emits the same sized particles as the proposed plant. Thus, if the plant is built and its operation causes the area to be in non-attainment, prescribed burning practices may be gravely impacted.

The Clean Air Act's purpose is "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). In part, the

U.S. Environmental Protection Agency (“EPA”) attempts to accomplish this goal by setting health-based air quality standards called National Ambient Air Quality Standards. 42 U.S.C. § 7409. EPA has established such air quality standards for six pollutants and Georgia monitors to determine whether areas are attaining those standards. Areas currently meeting the standards are called “attainment areas.” Areas failing to meet the standards are called “non-attainment areas.”

In order to achieve and maintain “attainment,” Georgia has an approved State Implementation Plan, which is a set of regulations promulgated by the State of Georgia and approved by the EPA. The State Implementation Plan contains regulations that are designed to facilitate Georgia’s attainment and maintenance of pollution levels in the atmosphere that provide an adequate margin of safety to protect public health and the environment. 42 U.S.C. § 7409.

Pollution limits vary depending on whether or not a facility is sited in an area of the State that is attaining the National Ambient Air Quality Standards. If an area is out of attainment for a given pollutant, strict limits must be in place to bring that area back into attainment. The Clean Air Act prohibits the issuance of a permit to a facility that will cause or contribute to a violation of any National Ambient Air Quality Standard, thereby putting an area in non-

attainment. *See* 42 U.S.C. § 7475(3)(b). Once an area is in non-attainment, the State must submit a plan to EPA prescribing measures to improve air quality so as to bring the area back into attainment. *See* 42 U.S.C. § 7502. Included in these plans would be stricter limits on activities that contribute to pollution in the airshed.

The practical effect of all this in terms of the Longleaf case is as follows: PM2.5 emissions from the Longleaf plant will cause the area to exceed NAAQS, thus putting the area into nonattainment. Other activities, including prescribed burning, must then be limited in order to bring the area back into attainment. That is a serious problem for Tall Timbers and its members, for GWF and its members, and for all those economic interests dependent upon prescribed burning – farmers, foresters and game managers. As stated above, Tall Timber’s members rely on prescribed burning for a variety of beneficial reasons, including economic and environmental reasons.¹

B. The Court of Appeals Failed to Apply the Proper Standard for Determining Summary Judgment and Ignored the Genuine Issue of Material Fact Regarding the PM2.5 Issue.

In a case in which the economic future of farming, forestry and hunting is at stake, the Court of Appeals made the basic mistake of ignoring the law

¹ The impact of limitations on prescribed burning on farming and forestry would be severe. The impact of such limitations on game management would be devastating. You cannot have a quail hunting industry without prescribed fire.

governing the standard for granting summary judgment. Under this Court's precedents, beginning with the seminal case of *Lau's Corp. v. Haskins*, it is well-established that summary judgment is not appropriate where the non-moving party comes forward with evidence that creates a genuine issue of material fact. *Lau's Corporation v. Haskins*, 261 Ga. 491, 405 S.E.2d 474 (1991). The burden is always on the moving party to show the *complete absence* of any genuine issue of material fact and that it is entitled to judgment as a matter of law. *Id.* Moreover, in ruling on a motion for summary judgment, the responding party should be given the benefit of all reasonable doubt, and the court should construe the evidence and all inferences and conclusions most favorably toward the party opposing the motion. *Moore v. Goldome Credit Corp.*, 187 Ga. App. 594, 595-596, 370 S.E.2d 843 (1988).

In Count XI of their Petition, the Petitioners alleged that Longleaf did not submit an adequate modeling demonstration for PM2.5, a miniscule particle whose size belies its danger. Under the applicable federal and Georgia regulations, Longleaf was required to demonstrate, by such modeling, that its proposed plant would not violate any NAAQS. Instead of actually modeling for PM2.5, Longleaf relied on modeling for another particle, PM10, which is a larger particle that is also emitted from coal plants, and Longleaf used that PM10 modeling as a proxy for PM2.5 modeling and analysis, even though it is

possible to do precise modeling for PM2.5. Longleaf and EPD filed motions for summary judgment below arguing that Petitioners could not assert a claim for Longleaf's failure to model for PM2.5, citing their PM10 modeling. *At no time did Longleaf or EPD cite to any modeling for the actual pollutant at issue – PM2.5.*

Under the *Lau's Corp.* decision, the burden shifted to Petitioners to produce evidence showing that the proposed plant would violate PM2.5 standards. The Petitioners did just that – in no uncertain terms. Petitioners submitted an affidavit from one of the most-qualified experts in the field of air modeling, Mr. Khanh Tran.² Mr. Tran, who has 30 years of experience in his specialty of air modeling and who has performed numerous emission analyses and dispersion models for power plants across the United States, used an EPA

² Mr. Tran has an M.S. in Mechanical Engineering from the University of California, Santa Barbara and a B.S. in Mechanical Engineering from the University of California, Santa Barbara, and has performed a Ph.D. research project called "Development of a Predictive Dispersion Modeling System for Real Time Emergency Applications," that was presented at the Fifth Symposium on Turbulence, Dispersion and Air Pollution at the American Meteorological Society in Atlanta, Georgia in 1981. His specialty is air quality modeling. He has extensive experience in the development, evaluation and applications of air quality simulation models, from simple Gaussian dispersion models to complex photochemical grid models. For the last 30 years, he has successfully managed over 200 air quality studies conducted on behalf of mostly government agencies and large Fortune 500 concerns including utilities and oil companies. He has performed numerous emission analyses and dispersion modeling for power plants across the United States. (*See Offer of Proof, Testimony of Khanh T. Tran, 6-R-2622.*)

authorized air model to evaluate PM2.5 for the proposed Longleaf facility. (Offer of Proof, Testimony of Khanh T. Tran, pp. 1, 4, 6-R-2622, 2625.)³ The results of this model showed that PM2.5 concentrations would exceed the 24-hour NAAQS and thus the proposed Longleaf facility would violate federal and state regulations. His affidavit explained why his modeling, which measures the exact particulate at issue – PM2.5 is a more precise indicator than the estimate provided by Longleaf which, as noted, was based on extrapolations from a different sized particle. (See Tran affidavit, submitted in Petitioners' Response to Motion for Summary Adjudication; See also Offer of Proof, Testimony of Khanh T. Tran, p. 2, 6-R-2623.)

The Administrative Law Judge (“ALJ”) therefore was confronted by a clear genuine issue of material fact. Longleaf and EPD argued that PM10 surrogate modeling was sufficient to predict the impact of PM2.5 emissions from the Longleaf facility in the relevant geographic area. Petitioners submitted uncontradicted expert testimony, from an expert whose credibility and qualifications were never the subject of an attack by a *Daubert* motion or a motion to strike, that Longleaf and EPD were wrong, *and* that based upon precise modeling of PM2.5 the Longleaf facility *would in fact violate* NAAQS

³ Citations to the record as maintained by the Court of Appeals are provided in the following format: “Title of Pleading, page number, (volume number)-R-(page number).”

and thus a permit would not be legal. It seems inexplicable that the ALJ failed to even mention either the disputed issue of material fact or the affidavit testimony of Mr. Tran in her Order. A court cannot eliminate a crucial factual issue merely by ignoring it. Under *Lau's Corp.* and other decisions of this Court and the Court of Appeals, the ALJ was clearly required to deny summary judgment and try the issue of whether the Longleaf facility met PM2.5 NAAQS.

In reversing the ALJ on that point, the Superior Court recognized that the ALJ had failed to apply Georgia's summary judgment standard in dismissing Petitioners' PM2.5 claim:

Moreover, Petitioners offered affirmative evidence from their expert who specifically modeled for and determined the actual PM2.5 levels that would occur in the Early County attainment area if the Longleaf plant were built. He concluded that "modeling of PM2.5 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 PM2.5 issue, concluding that the PM10 modeling Longleaf performed was sufficient, as a matter of law. (Superior Court Order, at p. 11, 39-R-19210.)

The Superior Court ruled that it was error for the ALJ to ignore relevant evidence submitted by a responding party at the summary judgment stage that directly rebuts the moving party's claim, and thus the Superior Court reversed the ALJ's dismissal of Petitioners' PM2.5 claim.

In reversing that ruling by the Superior Court, the Court of Appeals totally failed to recognize or address the fact that the PM2.5 claim had been dismissed at the summary judgment stage. Instead, the Court of Appeals adopted Respondents' arguments that (a) Respondents' PM10 modeling could serve as a surrogate for actual PM2.5 analysis and (b) that Respondents' PM10 modeling was sufficient to suggest there would be no PM2.5 problem. The Court of Appeals ignored Petitioners' *uncontradicted evidence* that Respondents' arguments were wrong as a matter of fact *and* that the Longleaf plant would cause PM2.5 concentrations to put the region into non-attainment.

To reverse the Superior Court, the Court of Appeals had to ignore the standard governing grant of summary judgment under Georgia law, as exemplified by the *Lau's Corp.* decision and many others. The Court of Appeals' decision simply ignores the fact that to win summary judgment, Longleaf and EPD had to establish the absence of any genuine issue of material fact. The Tran Affidavit submitted by Petitioners killed any possibility of summary judgment on the PM2.5 issue. That is clear under Georgia law. In short, it is apparent that the Court of Appeals simply failed to undertake the legal analysis that this Court has held must apply to all cases at the summary judgment stage.

C. The Court of Appeals Incorrectly Focused on PM10 as a Surrogate for PM2.5 and Reached the Wrong Conclusion on That Issue.

The Court of Appeals' fundamental error was misapprehending the procedural posture in which the PM2.5 issue presented itself. Its failure to apply the proper standard for summary judgment caused the Court of Appeals to ignore the evidence that was presented on this factual dispute. There is unquestionably a fact issue, at this stage in this litigation, whether the Longleaf plant will violate the PM2.5 standard. That sort of dispute can only be resolved by trial.

The Court of Appeals was apparently misled into concluding that the issue was whether PM10 could be a proxy for PM 2.5. Respondents, relying on outdated agency guidance memoranda, contended that it could be and that Respondents had therefore submitted evidence contrary to Petitioners' PM2.5 claim. The Tran affidavit, however, was *direct evidence* of both an actual PM2.5 analysis and that the Longleaf plant would cause a violation of PM2.5 standards. At the very least, that conflict created a factual dispute that must be resolved at trial. Under Georgia law, that factual dispute could not be adjudicated on summary judgment by the ALJ or on appeal by the Court of Appeals.

It is important for this Court to understand that a big reason this case is so important is because the PM2.5 issue is a critical issue nationwide. Without

saying so, and perhaps unwittingly, the Court of Appeals has adopted Respondents' argument as policy, a result that is contrary to Georgia summary judgment law, contrary to federal law, and contradicted by the governing agency's own standards.

The law is clear. *See* 42 U.S.C. § 7475. There are separate and distinct air quality standards for PM10 and PM2.5, and a facility must show that *neither* of those standards will be violated by its operation. *Id.*⁴ Recent pronouncements made by the EPA suggest that where there is evidence that the PM2.5 NAAQS may be violated by a proposed facility, that evidence must not be ignored. *See* EPA's Memorandum in Opposition to Petitioner's Motion for Stay, pp.13-14, filed Sept. 29, 2008, *NRDC v. EPA*, Case No. 08-1250 (D.C. Cir.) (“[T]he adequacy of using PM10 as a surrogate for PM2.5 is still subject to reevaluation – and, if challenged, to judicial review – on a case-by-case basis whenever evidence is presented indicating that PM10 may not be a reliable surrogate for PM2.5 for purposes of a particular permit application.” *Id.* (Emphasis added) (citing the Fulton Superior Court's ruling in this case as an example of this approach. *Id.* at 14.))

⁴ To support its conclusion, the Court of Appeals cited out-of-date guidance memoranda issued by the EPA that supposedly suggested that an assessment of PM10 impacts may serve as a surrogate approach to analyzing PM2.5 impacts.

The EPA has endorsed the case-by-case approach adopted by the Fulton Superior Court which requires scrutiny of the adequacy of PM₁₀ as a proxy for PM_{2.5}. Recently, EPA released the following statement:

We emphasize that the continued use of the PM₁₀ surrogate policy is not mandatory, and case-by-case evaluation of the use of PM₁₀ in individual permits is allowed to determine its adequacy as a surrogate for PM_{2.5}. If, under a particular permitting situation, it is known that a source's emissions would cause or contribute to a violation of the PM_{2.5} NAAQS, we do not believe that it is acceptable to apply the PM₁₀ surrogate policy in the face of such predicted violation. Accordingly, each permit that relies on the PM₁₀ surrogate policy to satisfy the new PM_{2.5} requirements is subject to review as to the adequacy of such presumption.

EPA's Denial of Petition for Reconsideration and Request for a Stay on-Behalf of NRDC and Sierra Club Related to the EPA Final Rule "Implementation of the NSR Program for particulate matter less than 2.5 Micrometers" published in the Federal Register on May 16, 2008, and effective on July 15, 2008, p.3, filed Jan. 14, 2009 (attached as Exhibit 1)(emphasis added).

While current EPA Guidance is not legally controlling on this issue, it is informative and should be persuasive. It is clear from EPA's recent statements that when there is evidence that the PM_{2.5} NAAQS will be violated, one cannot rely alone on the PM₁₀ surrogate policy, as Longleaf and EPD have contended. EPA's recent statements on this issue are in accord with the controlling provisions of the Clean Air Act and with the order of the Superior Court in this case.

IV. CONCLUSION

Tall Timbers and GWF emphasize that the importance of this case cannot be overstated. Prescribed burning has been used for generations by farmers, foresters and game managers. The Longleaf plant is a very real potential threat to the continued use of prescribed burning. Tall Timbers and GWF strongly believe that the impact of the proposed Longleaf facility upon air quality and the use of prescribed fire in the region must be comprehensively studied and evaluated to protect the traditional fire dependent rural land uses of forestry, farming and hunting, which are vital to the economy of Southwest Georgia and North Florida; to protect the ecological function and biodiversity of the fire dependent southern pine ecosystem; and to reduce the threat to lives, human health and property from catastrophic wildfire. Accordingly, Amicus Curiae Tall Timbers and Georgia Wildlife Federation respectfully pray that this Court grant certiorari in this matter and reverse the ruling of the Court of Appeals as to the PM2.5 issue.

Respectfully submitted, this 26th day of August, 2009.

A handwritten signature in black ink, appearing to read "James E. Butler, Jr.", written over a horizontal line.

James E. Butler, Jr.

Ga. State Bar No. 099625

Joel O. Wooten

Ga. State Bar No. 776350

BUTLER WOOTEN & FRYHOFFER, LLP

105 13th Street (31901)

P.O. Box 2766

Columbus Georgia 31902

(706) 322-1990

Exhibit “1”

To

Amicus Curiae Brief in Support of Petitioners

Filed by

Tall Timbers Research Station & Land Conservancy

and

The Georgia Wildlife Federation



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

THE ADMINISTRATOR

JAN 14 2009

Mr. Paul R. Cort
Earthjustice
426 17th Street, 5th Floor
Oakland, California 94612

Dear Mr. Cort:

This letter is in response to your July 15, 2008, Petition for Reconsideration and request for a stay on behalf of the Natural Resources Defense Council (NRDC) and Sierra Club (SC) related to the U.S. Environmental Protection Agency's (EPA's) final rule titled "Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers (PM_{2.5})," which was published in the *Federal Register* on May 16, 2008, and effective on July 15, 2008. The specific provisions for which you requested reconsideration include: (1) EPA's transition schedule and requirements for Prevention of Significant Deterioration (PSD) programs in State Implementation Plan (SIP)-approved states; (2) EPA's grandfathering provisions concerning use of the Particulate Matter Less Than 10 Micrometers (PM₁₀) surrogate policy contained in the regulations governing the federal PSD permitting program; (3) EPA's transition period for condensable particulate matter (CPM) emissions; and (4) EPA's preferred interpollutant trading ratios under the nonattainment NSR program. Due to the limited resources of the Agency, and for the reasons stated previously in support of the rule and as explained further below, EPA denies this petition for reconsideration and request for a stay.

The NRDC and SC petition requires EPA to consider the staff time and other resources that would be expended to reconsider this final rule in light of the many responsibilities of the Agency and the limited resources available to the Agency. EPA's conclusion is that the resources that would be required to complete the reconsideration process if the Agency granted your petition are more appropriately used on other matters.

Having considered your arguments with respect to each of the provisions for which you request reconsideration, EPA concludes that they do not demonstrate a need for reconsideration, for the reasons stated previously in support of the rule and as explained further below.

Transition Period for PSD Programs in SIP-approved States

In its petition, NRDC and SC claim that in our final rule we included new requirements governing the way in which states with SIP-approved PSD programs will come into compliance with the new PSD rules for PM_{2.5} that are unlawful and arbitrary. The new PSD rules require

states to submit revised programs within three years from the publication of amended requirements in the *Federal Register* in accordance with 40 CFR 51.166(a)(6)(i). During the interim period prior to EPA approval of the revised rules, states may continue to implement the PM₁₀ surrogate policy as a means of satisfying the new requirements for PM_{2.5}.

Consistent with past practice, we believe that it is reasonable to allow states up to three years to revise and submit SIP revisions containing the new requirements for the PM_{2.5} PSD program, while allowing states the opportunity to rely on the PM₁₀ surrogate policy in the interim if it is necessary to do so. Reconsideration is not warranted because the public had notice of the potential that EPA would give states this amount of time to submit SIP revisions. The three-year period within which states must adopt the new PM_{2.5} requirements into SIP-approved programs is provided by the pre-existing PSD rules to allow states to revise their own regulations to reflect newly amended requirements. As stated in the May 16, 2008, preamble, "This rule follows our established approach for determining when States must adopt and submit revised SIPs following changes to the NSR regulations, but does not revise otherwise applicable SIP submittal deadlines." 73 FR 28321, 28341. The May 16, 2008, rule requires revision to the initial "infrastructure" SIPs that EPA required states to submit within three years of the promulgation of the PM_{2.5} National Ambient Air Quality Standards (NAAQS). Thus, the deadline in section 110(a)(1) of the Act does not apply to the SIP revisions submitted in response to the May 16, 2008, rule. The Act does not specifically address the timeframe by which states must submit SIP revisions. Nevertheless, we looked to section 110(a)(1) of the Act to guide our development of the previous rule that allows up to a 3-year SIP development period for states to incorporate new or amended PSD program requirements.

Petitioners' recommendation that upon reconsideration EPA should impose new PM_{2.5} requirements under the existing federal PSD program (40 CFR 52.21) for all states until adequate SIP revisions have been approved fails to account for the time required to legally act to disapprove all affected state programs and undertake the necessary rulemaking to begin implementation of federal PSD for PM_{2.5}. Many states have already indicated that they have the general authority to regulate PM_{2.5} under their existing SIPs even though specific regulatory changes are needed to fully implement the program in accordance with EPA's newly amended rules.

Use of the PM₁₀ surrogate policy does not "waive" or "exempt" sources from complying with the statutory requirements; states with existing authority to implement the new PM_{2.5} program will not need to continue implementing the PM₁₀ surrogate policy. The surrogate policy remains in place to provide states lacking clear authority in state law to directly regulate PM_{2.5} with the ability to issue permits satisfying the PM_{2.5} requirements without unnecessary delay. As we explained in the May 16, 2008, preamble, "PM₁₀ will act as an adequate surrogate for PM_{2.5} in most respects, because all new major sources and major modification that would trigger PSD requirements for PM_{2.5} would also trigger PM₁₀ requirements because PM_{2.5} is a subset of PM₁₀." 73 FR 28321, 28341. Nevertheless, we disagree with your contention that "The new transition scheme purports to allow source [sic] to be constructed or expanded even if they result in long-term contributions to violations of the PM_{2.5} NAAQS."

We emphasize that the continued use of the PM₁₀ surrogate policy is not mandatory, and case-by-case evaluation of the use of PM₁₀ in individual permits is allowed to determine its adequacy of as a surrogate for PM_{2.5}. If, under a particular permitting situation, it is known that a source's emissions would cause or contribute to a violation of the PM_{2.5} NAAQS, we do not believe that it is acceptable to apply the PM₁₀ surrogate policy in the face of such predicted violation. Accordingly, each permit that relies on the PM₁₀ surrogate policy to satisfy the new PM_{2.5} requirements is subject to review as to the adequacy of such presumption.

Continuation of PM₁₀ Surrogate Policy for Certain Pending Permit Applications Under the Federal PSD Program ("Grandfathering Provision")

NRDC and SC contend that our policy of allowing sources with complete applications submitted prior to the July 15, 2008, effective date of the federal PSD regulations at 40 CFR 52.21 to continue relying upon the PM₁₀ surrogate policy is unlawful and arbitrary. Your contention was in part that we failed to present this grandfathering provision and accompanying rationale to the public for comment, and also that the Clean Air Act (Act) provides no authority for EPA to ground the grandfathering provision on the date of a source's permit application. You stated that upon reconsideration we "must require that PM_{2.5} be addressed in all permits for sources that did not commence construction before the effective date of the PM_{2.5} NAAQS." Your approach would require that we retroactively review all permits issued since the effective date of the PM_{2.5} NAAQS, i.e., either July 18, 1997 – the date of the original PM_{2.5} NAAQS, or October 17, 2006 – the date we revised the original PM_{2.5} NAAQS. We do not consider this the best use of limited agency resources.

With regard to the petition's premise that the Act does not authorize EPA to grandfather sources on the basis of a complete application, we disagree. Section 168(b) of the Act provides for certain grandfathering based on a commence construction date, but says nothing – either explicitly or implicitly – about whether other grandfathering may occur or what criteria should be applied in allowing for additional grandfathering by regulation. Moreover, we believe that a decision to re-evaluate sources already grandfathered would unnecessarily disrupt state permitting programs by requiring such permits to be re-evaluated for impacts on the PM_{2.5} NAAQS.

Even if we were to consider eliminating the new grandfathering provision that became effective on July 15, 2008, it could be of little consequence because we have determined that only nine sources actually submitted applications relying on the PM₁₀ surrogate policy prior to July 15, 2008, such that they fall within the grandfather provision. Of these, interested persons submitted comments on the use of the surrogate policy with respect to only six of these applications. Moreover, we believe that control technologies qualifying as Best Available Control Technology (BACT) for PM₁₀ are likely in many cases to serve as BACT for PM_{2.5} as well.

Finally, as we noted above, the use of the surrogate policy for the sources grandfathered under the federal PSD program does not "waive" or "exempt" sources from complying with statutory requirements; rather, it presumes that assessing control technologies and modeling air

quality impacts for PM₁₀ is an effective means of fulfilling those statutory requirements for PM_{2.5} as well as for PM₁₀ during the transition period being allowed.

Condensable Particulate Matter Emissions

NRDC and SC claim that our decision in the final NSR rule to allow states to exclude CPM from NSR applicability determinations and emissions control requirements until January 1, 2011, is unlawful and arbitrary. You further note that we did not propose such exclusion for public review and comment.

The final provisions on condensable particulate matter emissions were not adopted without notice, as you have claimed. As discussed in the notice of proposed rulemaking, the states and EPA have not consistently applied the NSR program to CPM. The final rule merely deferred the effective date of the proposed action and preserved the status quo in the interim—requiring continued enforcement of those SIPs and permits that clearly address CPM. Our decision in the final rules to allow states that have not previously addressed CPM to continue to exclude CPM during a transition period is the direct response to comments we received questioning whether available test methods and modeling techniques were reliable enough to support a requirement that all states immediately begin addressing CPM as originally proposed. See 73 FR at 28,335 (discussing comments and EPA's response).

The transition period is temporary, and the total time allowed could be shortened in conjunction with a faster-than-anticipated rulemaking for new or revised CPM test methods. Also, as discussed above, states with SIP provisions requiring CPM to be addressed are not allowed to exclude CPM, and other states at their discretion have opted to include CPM in their permit processes. In addition, some sources have elected to include CPM in their estimates of potential emissions in order to avoid possible delays (resulting from adverse public comment) in the issuance of needed permits.

Even where sources are not being required to address CPM, control technologies being selected as BACT for PM₁₀ and PM_{2.5} are capable of controlling CPM.

Interpollutant Trading Ratios

Finally, NRDC and SC claim that our decision to include preferred interpollutant trading ratios to facilitate the interpollutant trading of emissions offsets under the NSR program is unlawful and arbitrary. NRDC and SC assert that such ratios were developed and finalized without public input. Moreover, you claim that the Act does not permit interpollutant offset trading.

We believe the Act contains the necessary authority for us to regulate precursor emissions, including allowing offset trading of such precursors. As defined under section 302(g) of the Act, the term "air pollutant" "includes any precursors to the formation of any air pollutant, to the extent that the Administrator has identified such precursor or precursors for the particular purpose for which the term 'air pollutant' is used."

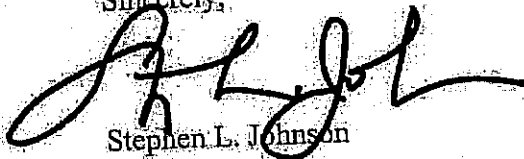
The rule does not require use of the preferred ratios, and public notice and comment is built into the process through which the interpollutant trading program is incorporated into the state NSR program. That is, each SIP revision containing an interpollutant trading program, including the preferred offset ratios or any other ratios independently adopted by the state, must be subjected to public notice and comment as part of the EPA approval process for the SIP (in addition to the public process required as part of the state's adoption of such provisions in their own rules.) Under 40 CFR part 51 appendix S, the interim authority for issuance of major permits in nonattainment areas by states, states may allow PM_{2.5} precursor offsets "if such offsets comply with an interprecursor trading hierarchy and ratio approved by the Administrator." See new section IV.G.5 of appendix S. Moreover, each permit which relies on the interpollutant trading program to allow precursor emissions to offset new PM_{2.5} emissions must undergo public review prior to approval and issuance.

Request for Stay of Implementation

NRDC and SC also request that EPA stay implementation of the final rule pending reconsideration of the rule. Because EPA is denying the petition for reconsideration in its entirety, a stay pending reconsideration is unnecessary.

We appreciate your comments and interest in this important matter.

Sincerely,



Stephen L. Johnson

cc: Mr. David S. Baron, Earthjustice
Mr. Timothy J. Ballo, Earthjustice

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served a copy of Tall Timbers Research Station & Land Conservancy and Georgia Wildlife Federation Amicus Curiae Brief in Support of Petitioners, by depositing a copy thereof, postage prepaid, in the United States Mail, first class, properly addressed upon:

Diane L. Deshazo
Margaret K. Eckrote
State of Georgia
Department of Law
40 Capitol Square SW
Atlanta, Georgia 30334

Counsel for Carol Couch and The Georgia Environmental Protection Division, Georgia Department of Natural Resources

Patricia T. Barmeyer
Leslie A. Oakes
Ray Persons
John Bottini
King & Spalding
1180 Peachtree Street, N.E.
Atlanta, Georgia 30309

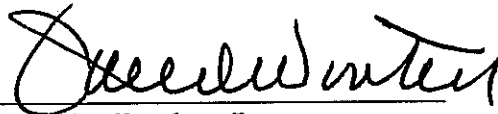
Counsel for Longleaf Energy Associates, LLC

Justine Thompson
Pamela Orenstein
GreenLaw
State Bar of Georgia Building
104 Marietta Street, NW, Suite 430
Atlanta, Georgia 30303

David Walbert
Parks, Chesin & Walbert
26th Floor
75 Fourteenth Street
Atlanta, Georgia 30309

George Hays
GreenLaw
236 West Portal Avenue, # 110
San Francisco, California 94127
Counsel for Friends of the Chattahoochee and Sierra Club

This 26th day of August, 2009.



James E. Butler, Jr.
Ga. State Bar No. 099625
Joel O. Wooten
Ga. State Bar No. 776350
BUTLER WOOTEN & FRYHOFFER, LLP
105 13th Street (31901)
P.O. Box 2766
Columbus Georgia 31902
(706) 322-1990