

IN THE SUPREME COURT OF THE STATE OF GEORGIA

FRIENDS OF THE CHATTAHOOCHEE )  
and SIERRA CLUB, )

Petitioners/Appellees, )

DOCKET NO. S09C1879

LONGLEAF ENERGY ASSOCIATES, )  
LLC, and DR. CAROL COUCH, )  
DIRECTOR, ENVIRONMENTAL )  
PROTECTION DIVISION, GEORGIA )  
DEPARTMENT OF NATURAL )  
RESOURCES, )

COURT OF APPEALS CASE  
NOS. A09A087, A09A0388

Respondents/Appellants. )

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AMICUS BRIEF OF NATIONAL PARKS CONSERVATION  
ASSOCIATION IN SUPPORT OF  
PETITION FOR CERTIORARI

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**BRIEF OF *AMICUS CURIAE* IN SUPPORT OF  
PETITION FOR CERTIORARI**

*Amicus Curiae* National Parks Conservation Association (NPCA) respectfully submits the following brief in support of the Friends of the Chattahoochee Inc. and Sierra Club (“Appellees”) Petition for Certiorari and requests this Court to consider the enclosed *amicus* brief when issuing a decision in this matter. For the reasons identified in this brief and by Appellees, this case is of significant importance to the public, and in particular, NPCA’s 350,000 members, approximately 7,000 of whom reside in Georgia, and we believe, merits review by the Georgia Supreme Court.

On May 14, 2007, the Environmental Protection Division (“EPD”) of the Georgia Department of Natural Resources issued a Prevention of Significant Deterioration Permit (“PSD”) to Longleaf Energy Associates (“Energy Associates”) for construction of a 1200 MW pulverized coal-fired power plant in Early County, Georgia (“Longleaf”). Appellees filed a challenge to the Longleaf PSD permit on June 13, 2007. On January 11, 2008 the Administrative Law Judge (“ALJ”) at the Office of State Administrative Hearings affirmed the PSD permit. *Inter alia*, the ALJ found that carbon

dioxide (“CO2”) is not subject to a best available control technology (“BACT”) emissions limit in the Longleaf PSD permit.

On June 30, 2008, the Superior Court of Fulton County findings included a determination that the ALJ erred by failing to require EPD to exact emission limits for CO2, a pollutant subject to regulation under the Clean Air Act (“CAA”). The Superior Court correctly held that the CAA, agency regulations and recent jurisprudence require EPD to issue a BACT determination for CO2 and to set corresponding emission limits in the Longleaf PSD permit. *See* 42 U.S.C. § 7479(3), 42 U.S.C. 7651k, 40 C.F.R §52.21(j)(2), 40 C.F.R § 52.21 (b)(50), 40 C.F.R. § 75, Georgia SIP, 391-3-1-.02(2)(a)(1),(c) and (d), *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007). Unfortunately, on July 7, 2009 the Court of Appeals erroneously ruled that CO2 is not “subject to regulation” under the CAA. For reasons stated by Appellees and for the reasons stated below, NPCA respectfully requests the Georgia Supreme Court to review this matter and reverse the Court of Appeals ruling.

NPCA’s accompanying *amicus curiae* brief highlights some of the climate change impacts our national parks are currently experiencing, as well as

impacts that are predicted to occur in the near future if major sources of CO<sub>2</sub>, like the Longleaf facility, release greenhouse gasses without restriction.

### **STATEMENT OF INTEREST**

Since 1919, NPCA has been the leading voice of the American people in protecting and enhancing our National Park System. NPCA is a nonpartisan, nonprofit organization dedicated to protecting the park system and preserving our nation's natural, historical, and cultural heritage for future generations.

NPCA today has approximately 350,000 members nationwide including approximately 7,000 in Georgia.

One of NPCA's priorities is to protect the health and heritage that defines our national parks from the damaging impacts of air pollution and climate change. NPCA builds public support for policies that reduce both conventional and greenhouse gas emissions from coal-fired power plants – the largest sources of park pollution. By working to enforce laws that protect air quality in parks from degradation, NPCA seeks to restore healthy air, thriving ecosystems, and scenic values to the National Park System.

## DISCUSSION

### A. Climate Change Impacts to National Parks

The 2004 United States Geologic Survey (“USGS”) climate models predict a sea level rise of 48 centimeters by the year 2100 which could result in shoreline erosion, saltwater intrusion of groundwater aquifers, and a number of additional environmental, cultural and historic threats in coastal parks including Cumberland Island National Seashore (“Cumberland Island”) in Georgia.<sup>1</sup> These observed climate changes, in addition to the rising average global temperature, changing seasons, vanishing glaciers and snow packs, thinning and retreating arctic sea ice, increasing acidity of the ocean, and the increase in droughts, heat waves, floods, and intense hurricanes,<sup>2</sup> demonstrate the impact

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<sup>1</sup>United States Geological Survey, “Coastal Vulnerability Assessment of Cumberland Island National Seashore to Sea Level Rise.” Online at: <http://pubs.usgs.gov/of/2004/1196/>.

<sup>2</sup> IPCC. 2007. Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change [Solomon, S., D., et al.] Cambridge University Press,

greenhouse gas emission are having on America's natural treasures. In our national parks these ecologic impacts are felt by animal and plant species that die off or relocate as they are unable to adapt quickly enough to these changes,

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Cambridge, United Kingdom and New York, NY, USA; Parmesan, C. 2006. Ecological and Evolutionary Responses to Recent Climate Change. *Annu. Rev. Ecol. Evol. Syst.* 2006, 37:637–69; Thompson, L.G., et al., 2002. Kilimanjaro ice core records: Evidence of Holocene climate change in tropical Africa. *Science* 298, 589-593; Burke, J. 2007. Snow's no-show in the Alps. *The Observer*, December 3. Accessed February 4, 2007 at <http://travel.guardian.co.uk/article/2006/dec/03/france.theobserver.skiing>; Hall MHP and DB Fagre. 2003. Modeled Climate-Induced Glacier Change in Glacier National Park, 1850–2100, *BioScience* 53:131–140; and Raven, J., K. Caldeira, et al., 2005: Ocean acidification due to increasing atmospheric carbon dioxide. Policy document 12/05, The Royal Society The Clyvedon Press Ltd, Cardiff, UK, 68pp. [Global; Ocean acidification] as cited in National Parks Conservation Association, “Unnatural Disaster: Global Warming and our National Parks” (2007).

by the trees and shrubs unable to withstand extreme fire and drought, and by the animals, plants and people who will suffer the effects of increased ozone pollution in our parks.

Nearly 100 years ago, the Organic Act created the National Park Service (“NPS”) and empowered it to “promote and regulate” existing and future parks and monuments. The CAA PSD program includes a number of provisions designed “to preserve, protect, and enhance the air quality in national parks [and] national wilderness areas.” CAA §160(2). Faced with existing and unfolding manifestations of climate change, the wellbeing of our national parks, and the wildlife within them, are in great peril. Therefore, the enforcement of these protections are most critical.

Approximately 40% of CO<sub>2</sub> emissions- the principal human created greenhouse gas responsible for climate change in the United States- comes from coal-fired power plants.<sup>3</sup> The prospect of potentially dozens of new

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<sup>3</sup> U.S. Environmental Protection Agency, "Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2005," April 2007. Based on calculation of CO<sub>2</sub> emissions from tables 3-1 and 3-3.

conventional coal-fired power plants, including the Longleaf Energy Station, poses a clear danger to climate stability and correspondingly to our national parks. To “prevent dangerous anthropogenic interference with the climate system”<sup>4</sup> we must limit climate change to 2°C to avoid the worst impacts of climate disruption.<sup>5</sup> In order to achieve this target, the rise in global greenhouse gas emissions must cease within ten years, and we must reduce such emissions (on an annual basis) to at least 50 percent below 2000 levels by mid-century.<sup>6</sup>

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4 United Nations Framework Convention on Climate Change (UNFCCC), 1992. Online at: <http://unfccc.int/resource/docs/convkp/conveng.pdf>.

5 International Climate Change Task Force (ICCT). 2005. Meeting the climate challenge. Online at: <http://www.ippr.org/publicationsandreports/publication.asp?id=246>.

6 IPCC, 2007: Summary for Policymakers. In: Climate Change 2007: Mitigation. Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change [Metz B, Davidson OR, Bosch PR, Dave R, Meyer LA (eds)], Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA. The U.S., which has contributed

Regulating new sources of greenhouse gas emissions responsible for climate change is the distinct responsibility of the EPD, a responsibility carved out by the CAA and recognized in *Massachusetts v. EPA*; a responsibility which must be executed to ensure the protection and enjoyment of our national parks.

### ***I. Climate Change Impacts to National Park Waters and Coastlines***

As water bodies are adversely impacted by climate change so to is the life they support, coasts they protect, and people who admire their natural beauty. The NPS manages approximately 12,000 kilometers of shorelines along the oceans and Great Lakes. A number of those coastal parks can be found in Georgia, including; Fort Pulaski National Monument in Savannah, Fort

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disproportionately to cumulative global greenhouse gas emissions must reduce its emissions to at least 80 percent below 2000 levels by 2050. See Baumert KA, Herzog T, and Pershing J. Chapter 6, Cumulative emissions, in *Navigating the Numbers: Greenhouse Gas Data and International Climate Policy*. World Resources Institute, 2005. Online at:

[http://www.wri.org/climate/pubs\\_description.cfm?pid=4093](http://www.wri.org/climate/pubs_description.cfm?pid=4093).

Frederica National Monument on St. Simon Island, and Cumberland Island National Park.

A study conducted in 2005 by the NPS and the University of Georgia examined the effects that the back-to-back storms Hurricane Ophelia and Tropical Storm Tammy had on water quality in a sample of Cumberland Island's estuaries. The report stated that, "[e]stuarine habitats play a major role in the life cycle of several species, which are dependent upon specific ranges in salinity." Following Hurricane Ophelia and Tropical Storm Tammy salinity in the water of some of the island's estuarine habitats took between 28-39 days to readjust to normal salinity.<sup>7</sup> If predictions ring true and tropical storms and hurricanes are stronger and more frequent, important estuaries, like those at Cumberland Island, could be seriously damaged or destroyed.

The map generated from "Coastal Vulnerability Assessment of Cumberland Island to Sea Level Rise" details the areas expected to be most impacted by

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<sup>7</sup> Pendelton, Elizabeth A., *et al.* "Coastal Vulnerability Assessment of Cumberland Island National Seashore to Sea Level Rise." Online: <http://pubs.usgs.gov/of/2004/1196/>.

rising sea levels (*See* Appendix A). The map shows the relative coastal vulnerability of the Cumberland Island and demonstrates that the cumulative impact of geologic and aquatic variables will significantly alter the island from its current state. Some portions of the island will be impacted more than others, but it is clear that projected sea level rise will seriously change the geography of the Cumberland Island.

Climate change will also result in warmer stream temperatures, such as those predicted in the cold, rapid streams of found along the Appalachian Trail in Northern Georgia and the larger Chattahoochee River National Recreation Area. Rising stream temperatures, in addition to changes in the stream flow, could spell disaster for trout and other fish species. In fact, temperature increases are expected to decimate 80-90 percent of the trout habitat in Virginia and North Carolina, killing 37 percent of the trout population within this century.<sup>8</sup> The increase in extreme rainfall anticipated from more severe and

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<sup>8</sup>Flebbe PA, et al., 2006. Spatial Modeling to Project Southern Appalachian Trout Distribution in a Warmer Climate. *Transactions of the American Fisheries Society* 135:1371–1382 ; see also IPCC 2007 as cited in NPCA 2007.

more frequent storms linked to climate change will lead to increased floods which flush young trout downstream, killing many and forcing survivors to compete with other species.<sup>9</sup>

## ***2. Climate Change Impacts to National Park Lands***

The most recent report by the United Nations International Panel on Climate Change (IPCC) confirms that the frequency and duration of heat waves across the U.S. has increased over the last 50 years as a result of climate change. According to the IPCC, weather patterns are increasingly less predictable and more extreme.<sup>10</sup> The National Park System encompasses 391 natural, cultural and recreational areas covering more than 84 million acres in

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<sup>9</sup> National Parks Conservation Association, “Unnatural Disaster: Global Warming and Our National Parks” (2007), Online at [www.npca.org/globalwarming](http://www.npca.org/globalwarming).

<sup>10</sup> Intergovernmental Panel on Climate Change, “Climate Change 2007; Synthesis Report.” Online at [http://www.ipcc.ch/pdf/assessmentreport/ar4/syr/ar4\\_syr.pdf](http://www.ipcc.ch/pdf/assessmentreport/ar4/syr/ar4_syr.pdf).

49 States, the District of Columbia, American Samoa, Guam, Puerto Rico, Saipan, and the Virgin Islands.

By altering the course of ocean circulation and precipitation, global warming causes and exacerbates drought, experienced on many NPS lands. Drought is an issue of great concern in Georgia.<sup>11</sup> Georgia is currently in the midst of an ongoing and extreme drought. Since February of 2007 the drought in Georgia has been impacting ecological stability. In October 2007 the governor declared a state of drought emergency and requested federal assistance for the state. According to data presented graphically by the National Oceanic and Atmospheric Administration (NOAA), "...substantial long-term precipitation deficits (and thus hydrologic drought) remain entrenched..." (See Appendix B). The U.S. Seasonal Drought Outlook map shows that drought will continue in Georgia for the forecasted period.

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11 Woods Hole Oceanographic Institution, "Abrupt Climate Change: Should We Be Worried?" Presentation at the World Economic Forum (January 27, 2003). Online at <http://www.whoi.edu/page.do?cid=9986&pid=12455&tid=282>.

### *3. Climate Change Impacts to National Park Wildlife*

Wildlife is struggling to survive disease, rapid habitat changes, and diminished food supply brought on by new climate change patterns. For example, game species such as cold water trout, bonefish, yellowtail snapper and tarpon are at risk. <sup>12</sup> If no action is taken to limit the rate of sea level rise, studies show that Biscayne Bay could lose 79% of its tidal flats habitat and 54% of its salt marsh within a century. These habitats support some of the most enjoyed fish species in the Southeast.

Climate change may also devastate coral reefs within Biscayne National Park in Florida. Coral reefs not only filter toxins and nutrients from the water, they also provide a vital habitat for numerous animal and plant species. The only barrier reef system in the United States extends between Biscayne Bay and

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<sup>12</sup> National Wildlife Federation & Florida Wildlife Federation, 2006. An Unfavorable Tide: Global Warming, Coastal Habitats and Sportfishing in Florida.

<http://www.nwf.org/GlobalWarming/pdfs/AnUnfavorableTideReport.pdf> as cited in NPCA 2007 at 18.

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12 National Wildlife Federation & Florida Wildlife Federation. 2006. *An Unfavorable Tide: Global Warming, Coastal Habitats and Sportfishing in Florida.*

<http://www.nwf.org/GlobalWarming/pdfs/AnUnfavorableTideReport.pdf> as cited in NPCA 2007 at 18.

Dry Tortugas National Parks. The reef is at risk due to rising seas, warmer water temperatures (which cause bleaching), disease, and more intense hurricanes that may devastate the coastline and make it more vulnerable to storm-generated waves.<sup>13</sup>

The Chattahoochee River flows through the Chattahoochee National Recreation Area located just north of and extending into the City of Atlanta. It is home to a variety of fish species, reptiles, and amphibians. Species inside the designated Recreation Area and downstream in the Apalachicola Bay are dependent on continuous flow and temperature in the Chattahoochee River.<sup>14</sup> Three mussel species and a species of sturgeon are protected under the Endangered Species Act are dependent on the Apalachicola River flows. As

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<sup>13</sup> Supra note 9 at 17.

<sup>14</sup> National Park Service, Chattahoochee River, "Animals." Online at <http://www.nps.gov/chat/naturescience/animals.htm>

climate change continues to affect these ecosystems, the status of these endangered species may take a turn for the worse.<sup>15</sup>

#### *4. Climate Change Impacts to National Park Cultural and Historical Sites*

Cultural and historical sites protected by national parks are also at risk from climate change. Sites in coastal regions are most at risk from the impacts of warmer temperatures, rising sea levels, stronger storms and larger more frequently floods. The entire mid-Atlantic coast is at risk from sea level rise due to its gentle coastal slope, delicate sandy shores and gradually sinking land.<sup>16</sup> Many parks containing cultural resources are located within this region,

The USGS Coastal Vulnerability Assessment states, "Potential coastal impacts of sea-level rise include...threats to cultural and historical resources as well as infrastructure."<sup>17</sup> This study demonstrates that important historical and

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15 Congressional Research Services Report for Congress, "Apalachicola-Chattahoochee-Flint Drought: Species and Ecosystem Management" April 9, 2008.

16 See supra note 1.

17 Id.

cultural landmarks of Georgian and American history are threatened by rising sea levels. For example, Fort Fredrica National Monument, Fort Pulaski National Monument, and Cumberland Island, three of Georgia's historic and cultural sites are at risk.<sup>18</sup> Fort Fredrica, located at the tip of St. Simon Island on the central Georgia coast, is the historical site where the British defeated the Spanish in 1742. This was an important victory in the overall war and helped establish Georgia as a British protectorate. Fort Fredrica's adjacent historic village, and the battlefield gravesites are threatened by rising sea levels.<sup>19</sup>

Fort Pulaski National Monument in Savannah was the site of an important battle of the civil war and shares the Island with the Cockspur Lighthouse. The Lighthouse miraculously survived the Battle for Fort Pulaski as hundreds of explosives passed over its' guiding light. Fort Pulaski precariously sits on the island's edge which predictions show as being inundated by rising sea levels in the near future.<sup>20</sup>

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18 Id.

19 Id.

20 Id.

Cumberland Island is well known as home to an astonishing array of ecosystems and wildlife; the island is also home to a number of important historical landmarks. The island houses the ruins of mansions owned by Revolutionary War hero Nathaniel Greene, historical Carnegie Family mansions, and the First African Baptist Church, which was first established in 1893 and later reconstructed. Each of these important structures represents America's proud history and celebrated diversity. In fact, human history and artifacts on the island, dating back nearly 4,000 years, could be severely damaged if sea levels rise as predicted.

### *5. Climate Change Impacts to National Park Air*

Climate change will undermine efforts to improve air quality as rising temperatures accelerate ozone formation during summer months. A recent study published in the journal *Climatic Change* projects that across 50 U.S. cities, the number of unsafe air days – days when ozone levels exceed the U.S. Environmental Protection Agency's 8-hour air quality standard – will increase by 68 percent.<sup>21</sup> National Parks such as Chickamauga & Chattanooga National

Monuments, Chattahoochee River National Recreation Area, and Martin Luther King, Jr National Historic Site each have ozone levels higher than allowed by EPA health standards.<sup>22</sup> In fact, there are 150 national park units located in areas that fail to meet the 8-hour ozone and other national air quality standards.<sup>23</sup> As temperature and stagnant air conditions increase, particulate matter and ozone will be trapped closer to the ground where it will increase the danger to park visitors.<sup>24</sup>

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21 Bell M, Goldberg R, Hogrefe C, et al. Climate change, ambient ozone, and health in 50 US cities. 82 *Climatic Change* 61 (2007).

22 *Supra* note 9 at 28.

23 National Parks Conservation Association, "Turning Point" (2006). Online at [www.npca.org/turningpoint/Full-Report.pdf](http://www.npca.org/turningpoint/Full-Report.pdf).

24 Cayan, D, Luers, *et al.*, 2006. Scenarios Of Climate Change In California: An Overview. Report for California Air Resources Board, available online at [http://www.climatechange.ca.gov/biennial\\_reports/2006report/index.html](http://www.climatechange.ca.gov/biennial_reports/2006report/index.html) as cited in NPCA 2007 at 29.

Georgia has a chronic ozone compliance problem. Twenty-one counties in the state are designated as having high ozone levels.<sup>25</sup> Ozone has damaging impacts to the human respiratory system and also weakens and can kill plants and trees. As the climate changes with the increase of CO<sub>2</sub> emissions, complex chemical reactions occur that lead to increased production in ozone.<sup>26</sup> The positive correlation between CO<sub>2</sub> and ozone will adversely impact air quality in national parks and exacerbate the ozone problems in Georgia if greenhouse gas emissions are not restricted.

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<sup>25</sup> Environmental Protection Agency, "The Green Book Nonattainment Areas for Criteria Pollutants." Online at

<http://epa.gov/oar/oaqps/greenbk/gncs.html#GEORGIA>.

<sup>26</sup> Sitch, S., Cox, P. and Huntingford, C., "Indirect Radiative Forcing of Climate Change Through Ozone Effects on the Land-Carbon Sink," *Nature*, Volume 448 No. 7155, pg. 791 (July 25, 2007). See also Allen, Jeannie, NASA Earth Observatory, "Ozone and Climate Change; Tango in the Atmosphere: Ozone and Climate Change," February 2004. Online at

<http://www.theozonehole.com/climate.htm>

Warmer summers and drought will make forest fires more common. Forest fires bring unhealthful particulate pollution into many national parks. If forest fires increase as predicted, smoke and dust particles will compound poor air quality reducing the number of days park visitors can safely breathe the air.<sup>27</sup>

B. The Court of Appeals Erred in Finding that a Carbon Dioxide Limit is Not Required in the Longleaf Plant's Air Permit

The documented impacts of climate change on the National Parks located in Georgia and throughout the Southeastern United States, and the implications for the future of our National Park System, demand that EPD take every reasonably available action to immediately reduce greenhouse gas emissions. Such action includes a BACT analysis, including accessible, applicable and economically feasible measures for reducing CO<sub>2</sub>. We believe that the Court of Appeals erred in finding that Longleaf is not required to limit its CO<sub>2</sub> emissions and that the Superior Court was correct in ruling EPD is required to regulate CO<sub>2</sub> under the CAA.

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<sup>27</sup> Supra note 9 at 28.

The Superior Court rightly held that the ALJ erred in affirming EPD's determination to forego the consideration of emissions of greenhouse gases, including CO<sub>2</sub>, in the PSD permitting process. EPD has simply failed to comply with the CAA requirements to evaluate available measures for reducing CO<sub>2</sub> emissions in the BACT process (this is especially clear in light of the recent Supreme Court decision in *Massachusetts v. EPA*).

The Superior Court rightly struck down the ALJ decision, finding CO<sub>2</sub> emission limits should be included in the Longleaf PSD permit and that EPD's failure to determine BACT for CO<sub>2</sub> and establish corresponding emission limits was contrary to the requirements of the CAA. In light of the important implications for our National Parks, the EPD's interpretation of the Act was unreasonable and unjustifiable.

Each state has a clear role to play in reducing domestic greenhouse gas emissions. Given EPD's authority to prescribe carbon dioxide to address greenhouse gas emissions, its failure to do so reflects an unreasonable abdication of its statutory responsibilities. As advocates seeking to protect the National Park System for present and future generations we are troubled by the

Court of Appeals faulty application of law and support the Superior Court's decision mandating a BACT emission limit for CO<sub>2</sub> in the Longleaf PSD permit.

1. *CO<sub>2</sub> is a Regulated Pollutant Under the Clean Air Act*

Carbon dioxide is a pollutant under Section 302(g) of the Clean Air Act. 42 U.S.C. §7602(g). Carbon dioxide has been regulated under the CAA since 1993, when EPA adopted regulations implementing section 821 that require monitoring, recordkeeping and reporting of CO<sub>2</sub> emissions by certain covered sources. See 42 U.S.C. § 7651k note; Pub. L. 101-549; 104 Stat. 2699; 40 C.F.R. § 75.1 *et seq.* The U.S. Supreme Court confirmed that CO<sub>2</sub> is a pollutant under the CAA in *Massachusetts v. EPA*, 127 S.Ct. 1438, holding that “greenhouse gases fit well within the Clean Air Act’s capacious definition of ‘air pollutant.’” *Id.* at 1462. The Superior Court references *Massachusetts v. EPA* pointing out that the Supreme Court has settled that CO<sub>2</sub> is an “air pollutant” under the act and states that the Appellants position that “CO<sub>2</sub> is not a pollutant subject to regulation under the act” is simply “untenable.” Sup. Ct. Order, 39-R-19190-94. Because CO<sub>2</sub> is a pollutant under the CAA, EPD can and must regulate its emissions.

## 2. *The Clean Air Act Requires BACT Limits for Regulated Pollutants*

In section 821 of the Clean Air Act Congress ordered EPA “to promulgate regulations” requiring that hundreds of facilities covered by Title IV monitor and report their CO<sub>2</sub> emissions. Section 165(a)(4) of the Clean Air Act requires BACT “for each pollutant subject to regulation under this chapter emitted from . . . such facility.” 42 U.S.C. § 7475(a)(4). EPA repeated this language in its implementing regulations: BACT is required for “any pollutant that otherwise is subject to regulation under the Act.” 40 C.F.R. § 52.21(b)(50)(iv). The combined effect of CAA Sections 821 and 165 mandates that BACT limits be established for emissions of CO<sub>2</sub>.

Affirming the meaning of these sections, recently the Environmental Appeals Board (“EAB”) ruled that the EPA possesses the authority to regulate CO<sub>2</sub>. See *In re Deseret Power Cooperative*, PSD Appeal No. 07-03, 2008 WL 4921265 (E.P.A.) (EAB Nov. 13, 2008). In addition, the EAB declared that an agency does not have the authority to create alternative definitions in its regulations that run counter to the underpinning statute. The EAB stated that “An agency does not acquire special authority to interpret its own words, when it has elected merely to paraphrase the statutory language.” *Id.* at 46, quoting

from *Gonzalez v. Oregon*, 546 U.S. 243, 257 (2006). The *Deseret Power* decision plainly means that a permitting agency is required to establish BACT limits for regulated pollutants, including CO<sub>2</sub>.

***3. BACT Emission Limitations are Critical to Enable Federal Land Managers to Accurately Assess New and Modified Source Impacts on National Parks***

The PSD program includes a number of provisions designed “to preserve, protect, and enhance the air quality in national parks [and] national wilderness areas.” CAA §160(2). A PSD permit applicant must establish that emissions from a proposed facility “will not cause, or contribute to, air pollution in excess of any... maximum allowable increase... for **any** pollutant.” CAA §165 (a)(3). In addition, the CAA gives Federal Land Managers (FLMs) an “affirmative responsibility to protect” the air quality-related values (AQRVs) of Class I Areas, CAA §165(d)(2)(B). There are 48 national parks with Class I status under the Clean Air Act, including Great Smoky Mountains National Park.

In order to ensure that the FLMs can fulfill these legal responsibilities, air permitting agencies<sup>28</sup> are required to provide FLMs with written notice of a proposed PSD permit if emissions from the proposed source may affect a Class I Area. CAA 165(d)(2)(A). Such written notice must include "all information relevant to the permit application," 40 C.F.R. 51.307(a)(1); *see also* 40 C.F.R. 52.21 (p)(1) & (3); 40 C.F.R. 51.166(p). Such information should consist of the complete permit application, BACT analyses and staff determinations, AQRV and Class I increment modeling analyses, and associated modeling files and emission inventories. The agency must provide the information to the FLM within 30 days of receipt and at least 60 days prior to any public hearing. 40 C.F.R. 51.307(a)(1).

The air permitting agency must consider the FLM's comments regarding the impacts of a proposed air pollution source on a Class I area, and may deny a PSD permit if the agency and FLM concur that the source will have an adverse impact on air quality in such Area. 40 C.F.R. 52.21(p)(4); O.A.C. 3745-31-19(C). If the agency disagrees with an FLM's adverse impact finding, the

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<sup>28</sup> The EPD is a delegated air permitting agency. See O.C.G.A. § 12-2-2.

agency must explain its reasons for rejecting the FLM's finding. 40 C.F.R. 51.307(a)(3). Such explanation must be provided in the notice of public hearing, *id.*, so that the public has the opportunity to comment on the findings of the FLM and the agency.

In order for the FLM to accurately determine whether a proposed source will have an adverse impact on a protected area and allow the FLM to fulfill its duty to protect Class 1 areas, it is imperative that the FLM is provided with accurate, complete and consistent PSD applications that include a BACT emission limit "for each pollutant subject to regulation under this chapter emitted from, or which results from" the facility (CAA §165 (a)(4)). The proposed emissions limits for each pollutant allow the FLM to project impacts a new source may have upon a Class I area, understand how those impacts will affect the health of a park and determine whether the source will have an adverse impact on the park.

The CAA's focus on resource protection is not limited to Class I areas. Congress designated all other "clean" air regions of the country "Class II." In fact, most of the units of the National Park System are "Class II" areas. The CAA designed both Class I and Class II designations as a floor, below which air

quality cannot sink. Class II areas include national monuments, national primitive areas, national preserves, national recreation areas, national wild and scenic rivers, national wildlife refuges, national lakeshores and seashores, as well as national parks and wilderness areas. Class II areas are protected by absolute ceilings on additional pollution over base-line concentrations. As part of the PSD permit application, new and modified sources with the potential to affect a Class II area must analyze their impacts on the area's ambient air quality, climate and meteorology, terrain, soils and vegetation, and visibility.

Climate change impacts observed at national parks have been dramatic. If agencies including EPD fail to comply with PSD permitting requirements designed to protect air quality in Federal Class I and Class II areas, FLMs will be unable to fulfill their CAA duty to assess the impact of new and modified sources to national parks. In short, the absence of a BACT limit for CO<sub>2</sub> will impede the ability of FLMs to conduct an accurate impact analysis. The legal shortcomings of EPD's decision to omit a BACT limitation from the Longleaf permit is all the more problematic because it opens the floodgates for future agency actions to exclude the most basic CAA requirement of incorporating BACT emissions limitations into a PSD permit for all regulated pollutants.

In order to ensure that AQRVs are fully protected in Federal Class I areas, and that neither Class I or Class II areas sink below their air quality floor, the permitting agency must establish CO2 BACT emissions limitations for each new and modified source.

***4. Omitting CO2 BACT Limits Deprives the Public of Their Right to Know the Full Extent of Impacts from a New or Modified Source***

Section 165(a)(2) of the CAA requires a public hearing allowing interested persons “to appear and submit written and oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements and other appropriate considerations.” In implementing this provision, Agency regulations require the reviewing authority to “[n]otify the public... in each region in which the proposed source would be constructed, of the application, the preliminary determination, the degree of increment consumption that is expected from the source or modification, and the opportunity for comment at a public hearing as well as written public comment.” 40 CFR § 51.166(q)(2)(iii). The agency is required to inform the public of a FLM’s finding of adverse impact and provide the public with the opportunity to comment on such finding. If the agency disagrees with a FLM’s

adverse impact finding, the agency must explain its reasons for rejecting the FLM's finding. 40 C.F.R. 51.307(a)(3). Such explanation must be provided in the notice of public hearing, *id.*, so that the public has the opportunity to comment on the findings of the FLM and the agency.

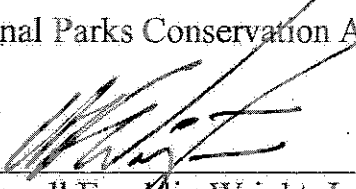
Without knowledge of BACT emissions limits for CO<sub>2</sub> in a PSD permit, FLMs are unable accurately assess the full impact of a new or modified source thereby depriving the public of a full and fair air quality impact determination and accordingly their right to know about such impact. Without accurate and complete information regarding a proposed source's impacts, the public is unable to meaningfully review a PSD permit, and provide useful comments to the permitting agency.

### CONCLUSION

EPD's assertion that it lacks authority to address greenhouse gas emissions categorically under the CAA's PSD program is simply untenable, especially for the largest sources of such emissions – coal-fired power plants. CO<sub>2</sub> is an "air pollutant" regulated under the CAA. Accordingly, the Georgia Supreme Court should reverse the Court of Appeals decision.

Respectfully submitted, this 25<sup>th</sup> day of August, 2009.

FOR: National Parks Conservation Association

  
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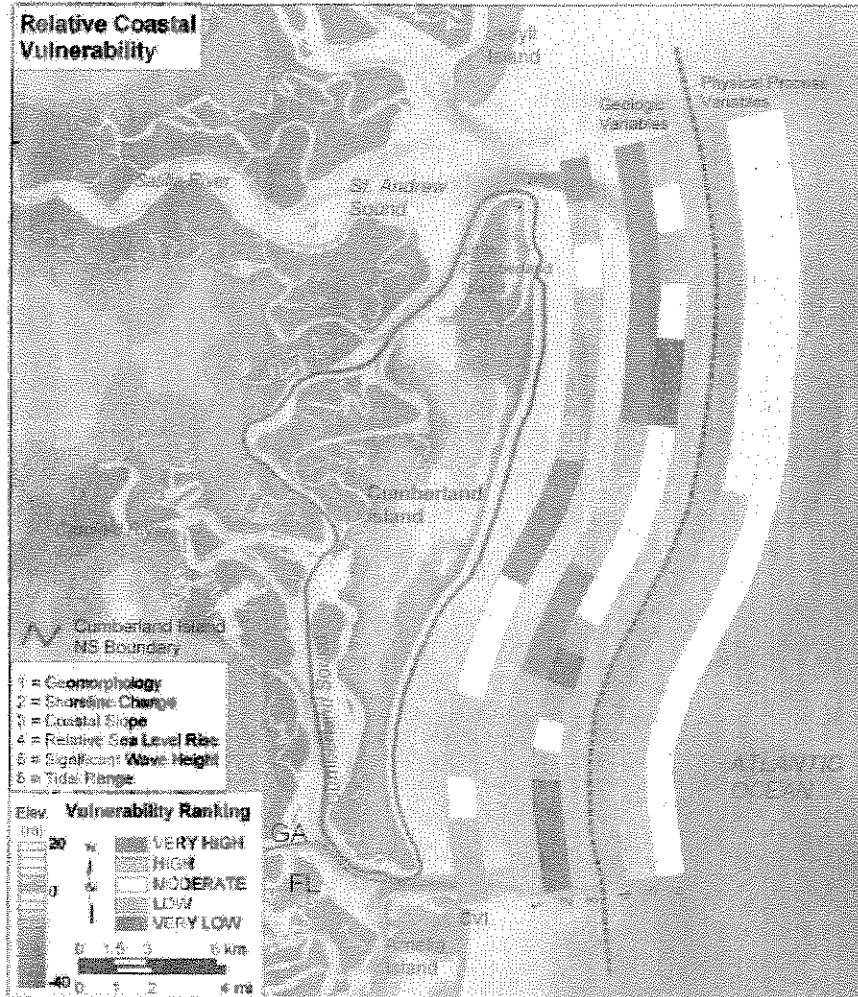
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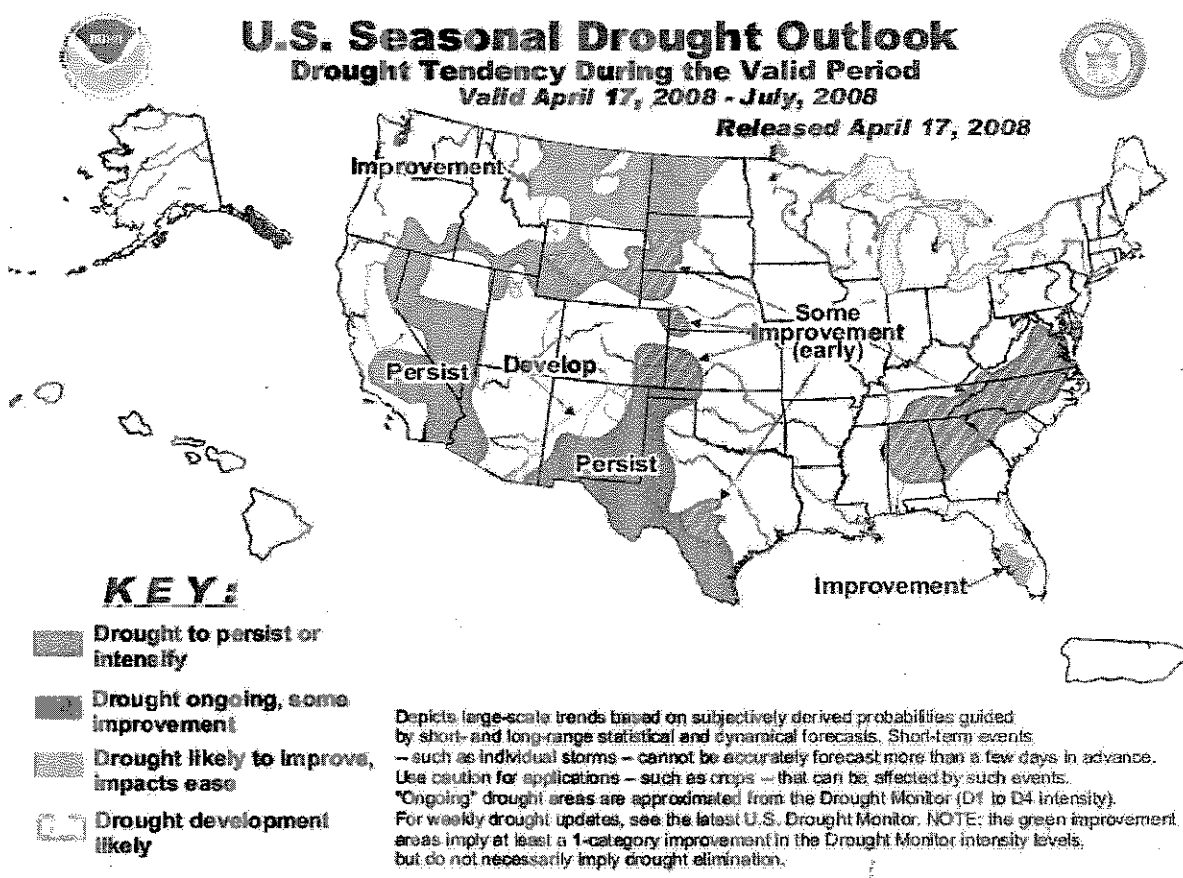
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## APPENDIX A



Relative Coastal Vulnerability Assessment of Cumberland Island National  
 Seashore to Sea Level Rise, United States Geological Survey (2004)

APPENDIX B



U.S. Seasonal Drought Outlook, Drought Tendency During the Valid Period  
 April 17, 2008-July 2008, Climate Prediction Center, National Weather Service

Forecast Office

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served a copy of the Amicus Brief of National Parks Conservation Association in Support of Petition for Certiorari depositing a copy thereof, postage prepaid, in the United States Mail, first class, properly addressed upon:

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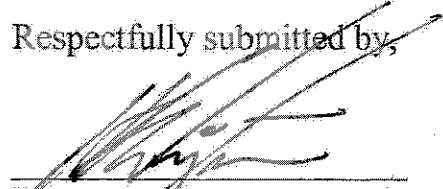
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