

IN THE SUPREME COURT OF THE STATE OF GEORGIA

FRIENDS OF THE CHATTAHOOCHEE)
and SIERRA CLUB,)

Petitioners/Appellees,)

PETITION 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.)

AMICUS BRIEF OF
ALTAMAHA RIVERKEEPER, ALTAMAHA COASTKEEPER,
COOSA RIVER BASIN INITIATIVE, FLINT RIVERKEEPER,
OGEECHEE-CANOOCHEE RIVERKEEPER, SATILLA
RIVERKEEPER, SAVANNAH RIVERKEEPER
AND UPPER CHATTAHOOCHEE RIVERKEEPER
IN SUPPORT OF PETITION FOR CERTIORARI

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Riverkeeper, Satilla Riverkeeper, Savannah Riverkeeper and Upper
Chattahoochee Riverkeeper

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS

STATEMENT OF AMICI'S INTEREST

This brief is filed on behalf of:

Altamaha Riverkeeper

Altamaha Coastkeeper

Coosa River Basin Initiative

Flint Riverkeeper

Ogeechee-Canoochee Riverkeeper

Satilla Riverkeeper

Savannah Riverkeeper and

Upper Chattahoochee Riverkeeper

who together represent **all** of the Riverkeeper™ organizations in Georgia and thousands of Georgians. A Riverkeeper is a full-time advocate for a body of water and its surrounding community. Each Riverkeeper is an affiliate of the Waterkeeper Alliance, a grassroots advocacy organization founded by Robert F. Kennedy, Jr. Although most Waterkeepers are Riverkeepers, there are also Baykeepers, Harborkeepers, Coastkeepers and Lakekeepers. Internationally, there are a total of 162 non-profit Waterkeeper programs.

Altamaha Riverkeeper ("ARK") is a non-profit environmental organization dedicated to protecting and restoring the habitat, water quality, and flow of the Altamaha River from its headwaters in North Georgia to its terminus at the Atlantic Ocean near Darien. ARK represents over 1,200 members who live, work, and recreate in the Oconee, Ocmulgee, and Ochopee River Basins and their feeder streams that make up the Altamaha River Watershed. ARK also has a Coastkeeper, who is responsible for protecting Georgia's valuable coastal areas.

Coosa River Basin Initiative ("CRBI") is a nonprofit environmental advocacy organization with over 2,500 members in Georgia. CRBI's mission is to protect the Coosa River, its tributaries and watershed for the use and enjoyment of its members.

Flint Riverkeeper is the newest Riverkeeper in Georgia but already represents over 600 members. With 220 undammed river miles, the Flint is one of only 40 rivers left in the United States that flow for more than 200 miles unimpeded. Recent legislative efforts to dam a 50-mile stretch of the Flint to create a supply reservoir for Atlanta's burgeoning water crisis have earned the Flint River the #2 spot on the list of Top Ten Most Endangered Rivers, published by American Rivers. Revered as one of the most ecologically diverse river basins in the Southeast, the Flint River is also at risk from pollution; absorbing

stormwater, agricultural and industrial runoff as it flows south out of the heart of Atlanta.

Ogeechee-Canoochee Riverkeeper ("OCRK") was formed in 2005 through the merger of two existing watershed organizations, Canoochee Riverkeeper and Friends of the Ogeechee River. OCRK's mission is to ensure clean water throughout the entire Ogeechee watershed, and its membership includes more than 1,200 households from throughout the southeast who live, work and play on the Ogeechee, Canoochee, Altamaha and other area rivers and streams.

Satilla Riverkeeper, with over 1,200 members, works to protect the Satilla River, its tributaries, and its terrestrial watershed in order to support healthy fisheries, safe swimming, diverse wildlife populations, superb recreational opportunities, a stable water supply, and sustainable human economic activity throughout the basin. To reach that goal, Satilla Riverkeeper educates, informs, enforces, researches and litigates on issues in the Satilla River basin.

Savannah Riverkeeper ("SRK") is an advocacy group of over 500 members dedicated to preserving, protecting and restoring the Savannah River. The goal of SRK is to protect the water quality of the Savannah River, the integrity of its watershed, and to promote an enlightened stewardship of this unique heritage.

Upper Chattahoochee Riverkeeper, Inc. ("UCR") was established in 1994,

as an independent environmental organization that actively uses advocacy, education, research, communication, cooperation, monitoring and legal actions to protect and preserve the Chattahoochee River and its watershed on behalf of its 4,500 members. UCR's mission is to advocate and secure the protection and stewardship of the Chattahoochee River, its tributaries and watershed, in order to restore and conserve their ecological health for the people, fish and wildlife that depend on the river system.

In carrying out the mission to protect their respective rivers, tributaries, coastline and watersheds, these Riverkeeper and Coastkeeper groups have filed petitions challenging permits and/or the conditions, limitations or requirements included in permits issued by the Georgia Department of Natural Resources Environmental Protection Division (“EPD”) in the Office of State Administrative Hearings (“OSAH”). Because the Administrative Law Judge (“ALJ”), the Superior Court of Fulton County, and the Georgia Court of Appeals have interpreted a Department of Natural Resources (“DNR”) Rule that applies to all petitions for review in OSAH and not just the petition at issue in this case, each and every permit appeal that has been filed or will be filed by Riverkeepers—not to mention all of the citizen group and environmental group petitioners in Georgia-- will be affected by this Court’s decision to review the Court of Appeal’s Order on

this issue. Therefore, the rights of these organizations and their members to appeal EPD permitting decisions will be substantially impacted by this Court's decision to grant or deny the petition for the writ of certiorari in this case.

BACKGROUND

This case originally reached the Georgia courts when Friends of the Chattahoochee, Inc. and Sierra Club (collectively, "Petitioners") appealed the ALJ's decision upholding a permit issued by EPD. The permit would allow construction of the first coal-fired power plant in Georgia in over twenty years. The proposed plant would be known as the Longleaf Energy Station to be located in Early County, Georgia. Petitioners had challenged EPD's issuance of the permit on several bases and the challenge was assigned to an ALJ. (*See* Petition for Hearing, 1-R-284).¹ In consideration of Respondent's Motion to Dismiss, the ALJ dismissed Counts XIII and XIV of Petitioners' First Amended Petition, concluding that Petitioners were required to provide a specific proposed solution to the alleged defects in the permit. (Order on Respondent's Motion to Dismiss, at

¹ 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)."

5, 7-R-3488).²

Petitioners then filed a petition for judicial review of the ALJ's final decision. On June 30, 2008, the Superior Court of Georgia, Fulton County, entered a final order ruling in favor of Petitioners on all six counts of the petition. (Superior Court Order ("Sup. Ct. Order"), 39-R-19185). Longleaf appealed and on July 7, 2009, the Court of Appeals reversed the Superior Court's rulings on several issues, including the pleading requirements applicable to administrative permit appeals. (*See* Court of Appeals Order). The Court of Appeals concluded that the Superior Court erred by reversing the ALJ's order dismissing two counts of the original petition, concluding that the counts failed to comply with pleading rules set forth in the Procedures for Disposition of Contested Cases (Ga. Comp. R. & Regs., Chapter 391-1-2 *et seq.*).

ARGUMENT AND CITATION TO AUTHORITY

The decision of the Court of Appeals in this matter contravenes long standing and well-established rules of pleading that are essential to numerous environmental regulations that provide citizens (both individuals and other

² The First Amended Petition was filed in response to the ALJ's Order requiring Petitioners to file an amended petition which included "those permit conditions, limitations, or requirements which would bring Counts XIII and XIV into compliance with [DNR] Rule 391-1-2-.05(g) or (h)." Order on Respondent's Motion to Dismiss, at p. 2, 7-R-3485.

entities) with a voice to challenge the decisions of state agencies. It is the first and only case to impose these heightened pleading requirements upon administrative reviews and it gives unprecedented authority to state agencies to promulgate rules that repeal existing constitutional and statutory rights. Indeed, it is the quintessential example of the fox guarding the henhouse. If allowed to stand, the Court of Appeals' decision will allow any state agency to promulgate its own rules limiting the types of actions which may be filed to challenge its decisions irrespective of whether the legislature has guaranteed citizens the right to participation, comment and appeal such decisions. It is a usurpation of legislative enactments and constitutional guarantees by an administrative agency that cannot be defended without offending the most basic principles of checks and balances which have shaped this country from its start. Even if Ga. R. & Reg. § 391-1-2-.05(g) & (h) is constitutional or permissible on its face, the interpretation and application of that rule by EPD and the ALJ act as a functional bar to any citizen seeking to exercise the right provided by law to challenge a decision by EPD.

The question of whether private citizens aggrieved by permitting decisions of EPD or other state agencies must henceforth have the resources and abilities to conduct lengthy and expensive scientific investigations in order to file a petition for review with OSAH (all within 30 days of the permit being issued) is one of

grave importance and significance. It is unlikely that any petitioner could ever start from scratch and undertake in a mere thirty (30) days the extensive studies necessary to suggest a new set of conditions for a permit when EPD itself spends months on the same task. The ruling of the Court of Appeals will serve as a serious impediment, if not the death knell, to the established right of the citizens of the State of Georgia to challenge permits that fail to comply with legal requirements and/or that impose substandard conditions to the detriment of public health and the environment.

The ALJ's decision to dismiss Counts XIII and XIV based upon Petitioners' failure to include a specific solution to the alleged permit defects that could be "inserted into the permit to make it valid" prejudiced Petitioners' substantial rights because the ALJ's application of DNR Rule 391-1-2-.05(g) and (h) violates both constitutional and statutory provisions and exceeds the agency's statutorily delegated authority.³

The ALJ interpreted a procedural rule promulgated by DNR to require Petitioners to plead the specific and detailed conditions, limits or requirements that

³ As more eloquently described in Petitioners' Brief in Support of Petition for Judicial Review (filed in the Superior Court), 36-37-R-18000-18091, Petitioners pled their claims with sufficient detail and particularity such that they met the pleading requirements set forth in DNR Rule 391-1-2-.05(g) and (h).

should have been included in the final permit that Petitioners believed would cure any alleged permit defects. (Order on Respondent's Motion to Dismiss, at pp. 6-7, 7-R-3489-90). Based on Petitioners' failure to identify with specificity such conditions, limits or requirements, the ALJ dismissed Claims XIII and XIV without consideration of any evidence. *Id.* DNR Rule 391-1-2-.05 entitled "Content of Petitions for Hearing," provides as follows in relevant part:

(1) A petition for hearing on the grant or denial of a permit or license shall contain: . . .

(g) In cases contesting the issuance of a license or permit, those suggested permit conditions or limitations which the petitioner believes required to implement the provisions of the law under which the permit or license was issued; and

(h) In cases contesting conditions, limitations or requirements placed on the issuance of a license or permit, specific reference to the conditions, limitations or requirements contested, as well as suggested revised or alternative permit conditions, limitations or requirements which the petitioner believes required to implement the provisions of the law under which the permit or license was issued.

Ga. Comp. R. & Regs. § 391-1-2-.05(1)(g), (h)(2007). The ALJ found that subsections (g) and (h) "place the onus on the petitioner to provide those conditions, limits or requirement which it believes would cure the alleged defects in the permit." (Order on Respondent's Motion to Dismiss, at p. 6, 7-R-3489). As interpreted by the ALJ, this requirement "effectively limits the types of challenges allowed" in OSAH. *Id.* As such, DNR Rule 391-1-2-.05(g) and (h) clearly

exceeds DNR's statutory authority and violates constitutional and statutory provisions governing permit appeals in OSAH. The Court of Appeals erred in reversing the Superior Court and upholding this extreme and erroneous conclusion of the ALJ.

A. DNR Rule 391-1-2-.05(g) and (h) Exceeds Statutory Authority.

The Georgia General Assembly has the power to delegate to an administrative agency the power to make rules and regulations necessary to effectuate the laws enacted by the Assembly. *Scroggins v. Whitfield Finance Co.*, 242 Ga. 416, 417 (1978). When lawfully promulgated "*within the scope of the legislative enactment*" the agency's rules have the same force and effect of a statute. *Johnson Realty v. Hand*, 189 Ga. App. 706, 708 (1989) (emphasis in original) (citations omitted). The General Assembly has delegated to all administrative agencies the power to make rules necessary to comply with the Georgia Administrative Procedure Act ("APA"). *See* O.C.G.A. § 50-13-22.

DNR Rule 391-1-2-.05(g) and (h) was promulgated by the DNR Board pursuant to this statutory provision, and Amici do not challenge the General Assembly's ability to grant rulemaking power to the DNR Board. *Id.* However, O.C.G.A. § 50-13-22 specifically provides that "[n]othing in this chapter shall be held to diminish the constitutional rights of any person, to limit or repeal

additional requirements imposed by statute or otherwise recognized by law.”

Petitioners had a clear right to challenge EPD’s decision to issue the permit to Longleaf under O.C.G.A. § 12-2-2(c)(2)(A), which allows any person “aggrieved or adversely affected by any order or action of the director” the right to a hearing before an ALJ. The heightened pleading requirements imposed by Rule 391-1-2-.05(g) and (h) would invalidate the rights guaranteed under O.C.G.A. § 12-2-2(c)(2)(A). Furthermore, the requirements imposed by Rule 391-1-2-.05(g) and (h) are not authorized by the APA or any other applicable authority. Therefore, DNR exceeded the General Assembly’s delegation of rulemaking power in promulgating the Rule. Essentially, DNR overreached the scope of their rule making power in adopting this rule which impermissibly limits the rights of citizens guaranteed by statute and the constitution.

The General Assembly may grant an administrative agency the “power to adopt rules and regulations to carry out a particular purpose,” and moreover, such “rules and by-laws adopted by such [administrative agency] [have] the force and effect of laws, but must be reasonable, and not in conflict with the constitution, or opposed to the fundamental principles of justice, or inconsistent with the powers conferred upon the [administrative agency].” *Southern R. Co. v. Melton*, 133 Ga. 277, 288 (1909). Rules 391-1-2-.05(g) and (h), as applied by the ALJ to the

instant case, exceeds the scope of the DNR's rulemaking power as granted by the legislature. To adopt a policy endorsing such a drastic change in the scope of DNR's authority is clearly beyond the power of the Court of Appeals. As noted by the Superior Court, the basis of the dismissed counts "was not the limits in the permits, but the failure of the applicant to assess the public harm prior to establishing permit limitations," more akin to challenging a permit condition or requirement than a permit limitation. (Sup. Ct. Order, at pp. 15-16, 39-R-19199-19200). The Court of Appeals' holding would effectively prohibit similar permit challenges going forward. In this case, where EPD's decision was based on information provided by the applicant/permittee, the Court of Appeals holding enables permittees to go virtually unchecked in determining appropriate limitations for themselves.

While Petitioners may have had the burden of demonstrating that the health and visibility studies conducted by Longleaf were insufficient, it is certainly not their burden to undertake appropriate studies on Longleaf's behalf; "[n]o rule of pleading can reasonably impose such a burden on a litigant." (Sup. Ct. Order, at p. 16, 39-R-19200). As the party that will benefit from the grant of the permit, Longleaf is required to incur the time and expense to comply with the prerequisites for its issuance.

In keeping with established precedent, the Superior Court noted that Georgia is a “liberal pleading state, and especially so in administrative proceedings.” *Id.* Under the Civil Practice Act, “general allegations are sufficient to support a plaintiff’s claim for relief In most cases the same liberal rule will apply to the defendant’s pleadings.” *Davis v. Metzger*, 119 Ga. App. 750, 751 (1969). In cases of pleadings filed with an administrative agency, Georgia courts have extended an even more liberal rule, holding, “[t]echnical rules of pleadings such as govern civil or criminal actions are not applicable to applications or pleadings filed with an administrative agency and liberality is to be indulged as to their form and substance.” *Schaefer v. Clark*, 112 Ga. App. 806, 809 (1965).⁴ The *Schaefer* court construed the procedural rules governing leave to amend in an administrative context as “more liberal than in the courts - not less liberal.” *Id.* Requiring a party opposing a permit to plead the specific conditions, limits or requirements that should have been included in the final permit that would cure any alleged permit defects clearly contravenes the liberal pleading standards embraced by this Court in *Schaefer* and renders Rule 391-1-2-.05(g) and (h)

⁴ The Superior Court’s Final Order in this case cited *Schaefer* with approval, holding that “[n]o rule of pleading can reasonably impose such a burden on a litigant.” (Sup. Ct. Order, at p. 16, 39-R-19200).

unreasonable.⁵ The Court of Appeals' ruling therefore contradicts well-established pleading standards under Georgia law, including precedent established by the Court of Appeals itself.

Moreover, an administrative agency “can have **only the administrative or policing powers expressly or by necessary implication conferred upon it.**”

Bentley v. State Bd. of Medical Examiners of Ga., 152 Ga. 836 (1922)(emphasis added). Thus, while O.C.G.A. § 50-13-22 authorizes DNR to create procedural rules governing permit appeals in OSAH, DNR has no authority to impose additional pleading requirements on petitioners that effectively prohibit certain permit challenges. As such, Rule 391-1-2-.05(g) and (h) must not be interpreted to limit permit appeals as it would exceed the statutory authority provided to DNR to make procedural rules “necessary to comply with the APA.” O.C.G.A. § 50-13-22. The mere fact that a pleading rule exists in the Administrative Court does not make it inviolate, it must still comply with the governing law. In this instance, the

⁵ Longleaf's contention, adopted by the Court of Appeals, that *Nix v. Long Mountain Resources, Inc.*, 262 Ga. 506 (1992) supports dismissal of Counts XIII and XIV is inapposite. In *Nix*, the plaintiff sought judicial review in the superior court of the EPD's issuance of air quality, surface mining, and water discharge permits to the defendant. *Id.* at 506. The *Nix* court held, “A state may terminate a litigant's claim or appeal for failure to comply with a procedural rule.” *Id.* at 509 (emphasis added). However, that rule had been imposed **by the legislature**, not the agency. Here, there is no legislative authority granted to EPD to terminate a litigant's right to appeal for any failure to plead the remedy with specificity.

DNR and ALJ's interpretation of Rule 391-1-2-.05(g) and (h) is merely an aberration awaiting the case to illuminate its incorrectness and inequity.

B. DNR Rule 391-1-2-.05(g) and (h) Limits Access to Courts in Violation of Due Process.

If the heightened pleading requirements condoned by the Court of Appeals are permitted to stand, the practical effect of its application would be to deny Petitioners and future petitioners access to the courts and deprive them of the constitutional guarantee of due process. The Constitution of Georgia provides in its Bill of Rights that “[n]o person shall be deprived of life, liberty or property except by due process.” Ga. Const. Art 1, § 1, Par. 1. Furthermore, “[n]o person shall be deprived of the right to prosecute or defend either in person or by an attorney that person’s own cause in any of the courts of this state.” Ga. Const. Art 1, § 1, Par. 12. The constitution of this state guarantees to all persons due process of law and unfettered access to the courts of this state. *Morrow v. Vineville United Methodist Church*, 227 Ga. App. 313, 316 (1997) (quoting *Hart v. Owens-Illinois, Inc.*, 165 Ga. App. 681, 682 (1983)) (holding that trial court’s order denying plaintiff her day in court infringes upon plaintiff’s due process right). These fundamental constitutional rights require that every party to a lawsuit be afforded the opportunity “to be heard and to present his claim or defense, i.e., to have his

day in court.” *Id.*; see also *Couch v. Parker*, 280 Ga. 580, 582 (“the right to be heard in matters affecting one’s life, liberty, or property is one of the essential elements of due process of law.”)(citations and quotations omitted));⁶ *Nix v. Long Mountain Resources, Inc.*, 262 Ga. 506, 508-09 (1992) (holding, in the context of plaintiff’s right to judicial review of EPD’s permit grant, “[a] party’s cause of action is a property interest that cannot be denied without due process”).

In this instance, the interpretation of Rule 391-1-2-.05(g) and (h) espoused by DNR and Longleaf creates an unconstitutional bar to access to the courts by imposing impermissible and often impossible pleading requirements. Petitioners argued in Counts XIII and XIV of their Amended Petition that Longleaf failed to adequately assess both (i) the plant’s impact on health of those who breathe air and (ii) how emissions from the plant would impact visibility. (Amended Petition

⁶ To the extent Longleaf contends that *Couch* stands for the proposition that interested citizens do not have an unconditional right of access to the courts, this case is distinguishable. The *Couch* court recognized the power of the legislature to enact statutes concerning standing. 580 Ga. at 582 (“The authority of the General Assembly to establish the permissible parameters of the due process right to be heard in matters affecting life, liberty or property extends to standing to maintain a claim.”). Petitioners’ standing to challenge the permit is not at issue in this case; Petitioners have established their right to sue. However, in this case DNR exceeded its rulemaking authority granted by the legislature by imposing its own parameters on Petitioners’ due process right to be heard. The DNR’s pleading rules at issue in this case violate Petitioners’ constitutional due process right to pursue this claim.

¶¶177, 179, 194, 4-R-1592-93, 1597). Consistent with the federal Clean Air Act requirements in the Georgia State Implementation Plan § 391-3-1-.02(2)(uu)(7), Petitioners argued that the proposed permittee's failure to properly assess impacts on visibility prior to calculation of the proposed permit limitations violates that section's mandate of ensuring visibility and repairing visibility problems. (See Amended Petition ¶¶180-194, 4-R-1593-97). The analysis submitted with the permit application failed to account for numerous pollutants and utilized an incorrect modeling methodology. (*Id.* at ¶194, 4-R-1597). However, without such data regarding proposed emissions from the plant (which may not be available to Petitioners in the thirty (30) days they are allowed to bring a challenge) Petitioners suggested that the process should be redone correctly. To this extent, Petitioners have suggested a permit condition that allows compliance with the law as suggested by Rule 391-1-2-.05(g) and (h).

Similarly, consistent with the Georgia Guideline for Ambient Impact Assessment of Toxic Air Pollutant Emissions, Petitioners argued that the proposed permittee was required to perform a full health assessment of the impacts of the plant's operations and discharges before permit limits, which are intended to protect the public from negative health impacts from such discharges, are determined. (*Id.* at ¶174, 177, 4-R-1591-92). Again without such an assessment,

any permit limitation set by DNR would be unjustified. However, undertaking such an assessment is a significant task costing as much as several hundred thousand dollars. (*See* Offer of Proof - Testimony of Khanh T. Tran, 6-R-2622). Moreover, an appropriate assessment would take anywhere from several weeks to a several months. *Id.* Thus, while a permit applicant can spend years collecting and processing this data before and during the application process as part of its normal business operations, under Georgia law the Petitioners would only be afforded thirty (30) days to undertake all of this work and to devise appropriate permit conditions based on such data to include in any challenge to the permit. *See* O.C.G.A. §§ 12-2-2(c)(2)(A), 12-9-15(a)(1) & Ga. Comp. R. & Regs. § 391-1-3-.02(1).

Even though it was incumbent upon Longleaf to either undertake these assessments or to require that they be performed before any permit limitations were set, Longleaf and the Court of Appeals would instead require that Petitioners perform these lengthy and expensive assessments merely to have the right challenge DNR's inadequate decision making process (which appears to rely on insufficient data and to simply pick permit limitations out of the thin air). Neither the Georgia Constitution nor the relevant statutes require any party to spend hundreds of thousands of dollars simply to challenge an administrative decision.

The industries who are to be the beneficiaries of the permits are clearly the proper parties to undertake those assessments and they are in fact required to do so in seeking the permit.

Those regulations and restrictions which bar adequate, effective and meaningful access to the courts are unconstitutional. *Howard v. Sharpe*, 266 Ga. 771, 772 (1996). When a fundamental right is allegedly infringed upon by government action, substantive due process requires that the infringement be narrowly tailored to serve a compelling state interest. *State of Georgia v. Jackson*, 269 Ga. 308, 310-11 (1998). The ALJ's interpretation of Rule 391-1-2-.05(g) and (h) in this case precluded Petitioners' substantive permit challenges in Counts XIII and XIV from consideration in OSAH. Similarly, the application of Rule 391-1-2-.05(g) and (h) would require this Court to deny Petitioners the right to seek redress for the deficiencies in the proposed permit even though Petitioners have been unquestionably injured by the actions of Longleaf, and otherwise have standing under O.C.G.A. § 12-2-2(c)(3)(A). Without a compelling state interest, such an infringement on Petitioners' fundamental right to access the courts is an unconstitutional violation of due process. *Jackson*, 269 Ga. at 311.

Longleaf cannot show a compelling state interest that is furthered by Rule 391-1-2-.05(g) and (h) or that the Rule is narrowly tailored to serve the purposes

of the APA. In the proceeding before the ALJ, Petitioners' alleged failure to abide by the Rule did not prejudice any party. Further, the EPD Director sought identification of the precise permit condition, limit or requirement that should be imposed in the permit while inconsistently arguing that the ALJ is without any authority to impose any permit conditions, limits or requirements proposed by a party challenging a permit, making this heightened pleading requirement not only ineffectual, but meaningless. Moreover, the heightened pleading requirement is an unnecessary means of achieving the goal of efficient resolution. For example, despite the lack of a discovery period, if a reviewing court finds an insufficient factual record upon which to base a decision, statutory mechanisms already in place allow the court to remand the case to the agency for further proceedings. O.C.G.A. § 50-13-19(h). As such, Rule 391-1-2-.05(g) and (h) is not narrowly tailored to achieve its intended purpose and should be held invalid.

C. DNR Rule 391-1-2-.05(g) and (h) Creates an Unconstitutional Interpretation of O.C.G.A. § 50-13-22.

Furthermore, the Rule may not be interpreted to prohibit Claims XIII and XIV as the effect of such interpretation would render the statutory provision authorizing the agency to create procedural rules unconstitutional as an unauthorized delegation of legislative power. *HCA Health Services of Georgia v.*

Roach, et al, 265 Ga. 501 (1995) (finding State Health Planning Agency rule invalid as it provided the agency with authority to exempt facilities from compliance that the General Assembly had left unexempted, thereby rendering the applicable statutory provision an unconstitutional delegation of legislative power). “Where the language of an act is susceptible of a construction that is constitutional and another that would be unconstitutional, that meaning or construction will be applied which will sustain the act.” *Glustrom v. State*, 206 Ga. 734, 739-40 (1950) (refusing to apply a rule promulgated by administrative agency that went beyond the General Assembly’s enacted legislation and would render statute unconstitutional). Accordingly, if Rule 391-1-2-.05(g) and (h) is imposed to prohibit certain types of permit challenges in OSAH, then O.C.G.A. § 50-13-22 would be an unconstitutional delegation of rulemaking power to DNR. This Court may not presume that the General Assembly intended to enact an unconstitutional law. *Glustrom*, 206 Ga. at 739. Therefore, O.C.G.A. § 50-13-22 must be interpreted to allow Petitioners to bring Claims XIII and XIV before OSAH, as those claims are clearly authorized by O.C.G.A. § 12-2-2(c)(2)(A).

The Supreme Court’s review of this matter is one of great concern and importance to all citizens of Georgia. Absent a definitive resolution of the pleading requirements to be imposed upon aggrieved parties wishing to challenge

permitting decisions, the administrative review system in Georgia shall be left at best in flux and at worst completely inaccessible. The Court of Appeals' ruling drastically and fundamentally changes an important element of environmental regulation in Georgia; citizen challenges to agency permitting decisions.

Allowing aggrieved parties to file administrative petitions in order to enforce environmental laws is an essential check on state agencies and a fundamental element of environmental regulation.

CONCLUSION

Accordingly, Altamaha Riverkeeper, Altamaha Coastkeeper, Coosa River Basin Initiative, Flint Riverkeeper, Ogeechee Canoochee Riverkeeper, Satilla Riverkeeper, Savannah Riverkeeper and Upper Chattahoochee Riverkeeper, appearing as *amici curiae*, hereby request this Court to grant the Petition for Writ of Certiorari submitted by Friends of the Chattahoochee, Inc. and Sierra Club, hear argument, and reverse the Court of Appeals on the issues raised.

[Signature on following page]

Respectfully submitted this 26th day of August, 2009.

A handwritten signature in black ink, appearing to read "Martin A. Shelton", written over a horizontal line.

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CERTIFICATE OF SERVICE

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

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