STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No. 09-ALC-07-0069-CC

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Jr., Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown..... Petitioners/Appellants,

vs.

South Carolina Department of Health and Environmental Control and Roper Pond, LLC..... Respondents.

BRIEF OF AMICUS CURIAE SOUTH CAROLINA WILDLIFE FEDERATION IN SUPPORT OF PETITIONERS' STANDING

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INTRODUCTION

The South Carolina Wildlife Federation is a nonprofit membership organization with vital interests in protecting natural resources throughout the State of South Carolina. The Federation was founded in 1931 to advocate for wildlife, habitat and the environment, educate citizens in the conservation ethic, and support outdoor traditions. The Federation is actively engaged in proceedings involving the review of permitting decisions made by the South Carolina Department of Health and Environmental Control (DHEC), and has long-standing interests in its right to review DHEC decisions under S.C. Code Ann. § 44-1-60.

The Federation submits this Brief to assist the Court in clarifying the class of persons who qualify as "affected persons" entitled to invoke administrative review procedures set forth in S.C. Code Ann. § 44-1-60. The tools of statutory interpretation—the statute itself, this Court's precedent, and analogous cases from other jurisdictions—support construing the term "affected persons" to include persons injured by the challenged agency action, so long as those persons' interest is within the zone of interests protected by the statute. The Court should use this case to clarify the limited class of persons entitled to invoke administrative review of DHEC permitting decisions, which is a source of ongoing confusion in South Carolina tribunals.

The court below applied an incorrect standard in deciding whether the parties seeking administrative review were entitled to invoke the procedures of Section 44-1-60. Instead of focusing on whether those parties were "affected persons" entitled to review by the DHEC Board or the Administrative Law Court, the court answered a different question, whether those parties had "constitutional" standing, one of the standing tests

employed by South Carolina courts to determine if a party has sufficient stake to bring a *judicial* action. As discussed below, while the term "affected person" is best understood to share an element in common with constitutional standing – the requirement that a party be injured by the challenged action – the court below erred in imposing additional restrictive criteria, including property ownership and the need to show that the alleged agency failure would "cause" damage to the environment, such that the invoked review procedure would necessarily result in avoiding that damage altogether.

As a constitutional matter, a court may not alter the statutorily-defined category of citizens entitled to invoke a statutorily-created administrative review scheme. The administrative scheme here is available to all parties "affected" by a DHEC permitting decision. This Court's precedent, along with precedent from other jurisdictions, supports defining the term "affected" to mean a party injured by the DHEC decision, so long as that injured interest falls within the scope of interests protected by the statute that empowers DHEC to issue the particular approval in question. Requiring more – or less – of a party to invoke an administrative scheme created by statute is a decision left to the General Assembly. Whether a party would later have standing sufficient to invoke judicial review of the administrative procedure is a distinct, but related question; the court below erred in failing to distinguish those concepts, and in doing so, contravened clear legislative intent.

Because the distinction between administrative review by statute and judicial standing appears to be an area of ongoing confusion in South Carolina, the Court should take this opportunity to clarify for bench, bar, and public what the term "affected person" means in the context of administrative review of DHEC permitting decisions.

DISCUSSION

I. The statutory term "affected persons" means a party injured by a DHEC permitting decision, where that injury falls within the zone of interest protected by the underlying statute.

In South Carolina, it is well settled that the General Assembly can create a "new right with its remedy" and "vest in some board or person power to adjudicate all matters arising under the statute." *See State v. Moorer*, 152 S.C. 455, 150 S.E. 269, 274 (1929). Here the General Assembly did just that. It provided that any "affected person" can seek review of a DHEC staff permitting decision before the DHEC Board and the S.C. Administrative Law Court. S.C. Code Ann. § 44-1-60 (E), (F), (G). Judicial review occurs after the administrative procedure is exhausted. S.C. Code Ann. § 1-23-380.

The question in this case is whether the Petitioners were "affected persons" within the meaning of Section 44-1-60 entitled to invoke the administrative review procedure provided by that statute. The court below, in the course of finding that the Petitioners were not entitled to invoke the administrative review procedure, applied the wrong standard. Among other things, it failed to engage in the most fundamental task at hand: interpreting the term "affected person" to determine if the Petitioners qualified.

Section 44-1-60 does not define "affected persons." Petitioners contend that they are "affected persons" because they establish "an individualized injury in the adverse effect of a specific [agency] decision . . . on their . . . use and enjoyment" of Roper Pond and its related environment. Br. of Pet'rs at 18-19 (*quoting S.C. Wildlife Fed'n v. S.C. Coastal Council*, 296 S.C. 187, 190, 371 S.E.2d 521, 523 (1988)). Respondent Roper Pond, LLC does not offer its own interpretation of what "affected persons" means or when someone may fit that statutory class, but argues that the Petitioners'

characterization of "affected persons" is too broad, contending that it would allow "any party" to challenge a DHEC decision "regardless of whether such party is personally affected by the decision or has recognized interest in that decision," so as to "completely eliminate any requirement to establish standing." Br. of Resp't. Roper Pond, LLC at 28-29.

The definition of "affected person" under Section 44-1-60 appears to be an issue of first impression before this Court. However, the ability of "affected" and "aggrieved" persons to challenge agency action has been exhaustively addressed by other jurisdictions. That case law and the statute itself support defining "affected persons" under Section 44-1-60 as a limited class of persons who can demonstrate that the challenged agency action injures their concrete interests, so long as those interests are within the zone of interests protected by the statute.

Both state and the federal courts interpret the phrase "affected" or "aggrieved" person as a term-of-art, embodying the general principle that a party make seek review of agency action if that action will injure the party's concrete interest protected by the statute that authorizes the agency action. For example, Justice Scalia, writing for the Supreme Court of United States, explained:

> The phrase 'person adversely affected or aggrieved' is a term of art used in many statutes to designate those who have standing to challenge or appeal an agency decision, within the agency or before the courts. The terms 'adversely affected' and 'aggrieved,' alone or in combination, have a long history in federal administrative law, dating back at least to the Federal Communications Act of 1934. They were already familiar terms in 1946, when they were embodied within the judicial review provision of the Administrative Procedure Act (APA), 5 U.S.C. § 702, which entitles '[a] person ... adversely affected or aggrieved by agency action within the meaning of a relevant statute' to judicial review. In that provision, the qualification 'within the meaning of a relevant statute' is not an addition to what 'adversely affected or aggrieved' alone conveys; but is rather an

> acknowledgment of the fact that what constitutes adverse effect or aggrievement varies from statute to statute. As the United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act put it, 'The determination of who is 'adversely affected or aggrieved . . . within the meaning of any relevant statute' has 'been marked out largely by the gradual judicial process of inclusion and exclusion, aided at times by the courts' judgment as to the probable legislative intent derived from the spirit of the statutory scheme.' We have thus interpreted § 702 as requiring a litigant to show, at the outset of the case, that he is injured in fact by agency action and that the interest he seeks to vindicate is arguably within the 'zone of interests to be protected or regulated by the statute' in question.

Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 126-27 (1995) (internal citations omitted). State courts have used similar principles to interpret their own statutes authorizing "affected" or "aggrieved" persons to seek review of state agency action before an administrative law judge or other administrative tribunal.[1]

Limiting review to those with injury prohibits parties from "raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that

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[1] *See, e.g.*, *Empire Power Co. v. N.C. Dep't of Env't, Health & Natural Res., Div. of Envtl. Mgmt.*, 337 N.C. 569, 584, 589, 447 S.E.2d 768, 777, 780 (N.C. 1994) (finding Petitioner is a "person aggrieved" pursuant to statute with "the right to commence an administrative hearing to resolve a dispute with an agency" because Petitioner "alleged sufficient injury in fact to interests within the zone of those to be protected and regulated by the statute, and rules and standards promulgated pursuant thereto, the substantive and procedural requirements of which he asserts the agency violated when it issued the permit."); *Ctr. for a Sustainable Coast, Inc. v. Turner*, 324 Ga. App. 762, 763-64, 751 S.E.2d 555, 558 (Ga. Ct. App. 2013) ("Any person who is aggrieved or adversely affected by any order or action of the director shall . . . have a right to a hearing before an administrative law judge" and "A party is 'aggrieved or adversely affected' if the challenged action has caused or will cause them injury in fact and where the injury is to an interest within the zone of interests to be protected or regulated by the statutes that the director is empowered to administer and enforce.") (*quoting* Ga. Code Ann. § 12–2–2(c)(2)(A), (3)(A)).

no more directly and tangibly benefits him than it does the public at large." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992).

This Court has acknowledged that "'a concrete and particularized invasion' of a legally protected interest . . . distinguish[es] a person with a direct stake in the outcome of a litigation - even though small - from a person with a mere interest in the problem." *Smiley v. S.C. Dep't of Health & Envtl. Control*, 374 S.C. 326, 332, 649 S.E.2d 31, 34 (2007) (*quoting U.S. v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973)). For this reason, this Court has stated that "'[i]njury in fact' reflects the statutory requirement that a person be 'adversely affected' or 'aggrieved.'" *Id.* Thus, the relationship between the terms is this: "affected persons" are those who can show "injury-in-fact," which in the context of agency action is "injury to a concrete interest protected by the statute that authorizes the agency action."

The statute itself suggests the same interpretation. "Determining whether a statute confers standing is an exercise in statutory interpretation," *Youngblood v. S.C. Dept. of Soc. Servs.*, 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013), and "[t]he cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature," *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011).[2]

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[2] Because the issue in this case is whether a party qualifies to invoke and participate in an administrative review procedure, the term "standing" may be a misnomer, since it typically refers to a party's entitlement to judicial review. To the extent the term applies, however, this case concerns "statutory standing" under South Carolina precedent, rather than the other sources of standing. In this state, a party may establish standing in any one of three ways: statutory standing, constitutional standing, or public importance standing. *ATC South Inc. v. Charleston Cnty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008). "Statutory standing exists, as the name implies, when a statute confers a right to sue on a party, and determining whether a statute confers standing is an exercise in statutory interpretation." *Youngblood*, 402 S.C. at 317, 741 S.E.2d at 518. Statutory standing is an independently sufficient means of establishing standing, separate and distinct from the

This Court effectuates the intent of the legislature by giving "the words found in the statute their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Id.* The plain and ordinary meaning of a person who is "affected" by agency action is a person who is injured by agency action. *E.g.*, Black's Law Dictionary 57 (6th Ed. 1990) (defining "affect" as "[t]o act upon; influence; change . . . often used in the sense of acting injuriously upon persons and things.").

Related administrative review provisions in South Carolina law support this interpretation as well. *See Bryant v. State*, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009) ("statutes which are part of the same legislative scheme should be read together."). With regard to DHEC Certificates of Need for medical facilities, S.C. Code Ann. § 44-7-130 defines the class of "affected persons" able to seek invoke Administrative Law Court review to include any "person residing within the geographic area served or to be served by the applicant" as well as "persons who pay for health services in the health service area in which the project is to be located." The statute governing liquor licensing, S.C. Code Ann. § 61-6-185, authorizes persons residing within the county or "within five miles" of the location requesting the liquor license to seek review of the licensing decision before the Administrative Law Court.

Whereas in those statutes the General Assembly defined the class of persons entitled to administrative review of agency decisions using functional and geographic proxies for injury within the statute's zone of interest, in the case of Section 44-1-60 the General Assembly allowed any "affected" person to participate. Where the General

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elements of constitutional standing. *See id.* ("When no statute confers standing, the elements of constitutional standing must be met."). As discussed above, whether this case involves standing or not, it hinges on the statutory term "affected person."

Assembly defines the class of citizens entitled to invoke the legislatively established administrative procedure, it would be inappropriate for a court to alter those qualifications. As noted earlier, the General Assembly may create a "new right with its remedy" and "vest in some board or person power to adjudicate all matters arising under the statute." *See State v. Moorer*, 152 S.C. 455, 150 S.E. 269, 274 (1929). Accordingly, where the General Assembly has said that a person living within five miles of a proposed liquor store can invoke a legislatively-prescribed administrative remedy, a court could not limit that remedy to only those living within four miles, or two. Likewise, a court could not deprive a person who qualifies to invoke a procedure of his or her right to invoke that procedure because the court views the procedure itself as futile or otherwise objectionable as a policy matter. *See Hampton v. Haley*, 403 S.C. 395, 403, 743 S.E.2d 258, 262 (2013) ("In our division of powers, the General Assembly has plenary power over all legislative matters unless limited by some constitutional provision. Included within the legislative power is the sole prerogative to make policy decisions; to exercise discretion as to what the law will be.") (Internal citations omitted). The only question is whether a party satisfies the statutory requirement to invoke the statutorily-provided administrative process.

With respect to Section 44-1-60, the General Assembly provided administrative procedures to "affected persons." It would be improper to circumscribe the universe of qualifying persons further with additional qualifications, such as the "causation" or "redressability" elements of federal Article III standing, which have been used by South

Carolina courts in determining whether a party has "constitutional" standing.[3] Imposing those requirements would be akin to limiting administrative review for alcohol licenses to those who live four miles away rather than five miles, effectively rendering the statutory definition surplusage.

The "General Assembly obviously intended the statute to have some efficacy, or the legislature would not have enacted it into law," and courts are to interpret statutes so "that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." *CFRE*, 395 S.C. at 74, 716 S.E.2d at 881. If a person must show the elements of constitutional standing when "no statute confers standing," *Youngblood*, 402 S.C. at 317, 741 S.E.2d at 518, but must also still show constitutional standing to be an "affected person" under Section 44-1-60, then the word "affected" is superfluous. The better reading – given the text, context, purpose, and generally accepted approach to language such as this in other jurisdictions – is that "affected persons" under Section 44-1-60 is a limited class of persons who would be injured by the challenged agency action, and whose injury is within the zone of interests protected by statute. The statutory scheme that creates an administrative remedy for such persons presumes that remedy is worthwhile for them; superimposing separate "constitutional" standing requirements, like a requirement to show that the procedure will in fact result in the outcome desired by the party, would oppose legislative intent and overstep the judicial branch's constitutional role.

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[3] The term constitutional standing can be a confusing one, since it is used by South Carolina courts, organized under the South Carolina Constitution, to incorporate standards employed by *federal* courts in determining the scope of their uniquely limited authority under the "Case and Controversy Clause" of the United States Constitution. U.S. Const. art. III, § 2, cl. 1.

II. Defining "affected persons" as persons injured by the challenged agency action fits with this Court's precedent.

A straightforward reading of "affected persons" under S.C. Code Ann. § 44-1-60 as persons who would be injured by the challenged agency action, and whose injury is within the zone of interests protected by statute, is consistent with this Court's prior decisions.

In *South Carolina Wildlife Federation v. South Carolina Coastal Council*, environmental groups challenged a decision of the Coastal Council certifying that a federal permit allowing a residential developer to dredge wetlands was consistent with South Carolina's water protection laws. 296 S.C. 187, 189, 371 S.E.2d 521, 522 (1988). The groups alleged that the Council had not properly followed its own procedures in issuing the certification. *Id.* The builder of the residential development argued that the environmental groups did not have standing to challenge the Coastal Council's certification. *Id.*, 296 S.C. at 190, 371 S.E.2d at 523.

This Court held that the environmental groups had standing because the groups "ha[d] alleged an individualized injury in the adverse effect of a specific decision of the Coastal Council on their members' use and enjoyment of the fish and wildlife of the wetlands." *Id.* This holding fits with the general approach of focusing on injury to a specific interest within the zone of interests protected by statute. The environmental groups in that case illustrated injury to a concrete interest specific to their members: their use and enjoyment of the fish and wildlife of the wetlands. *Id.*, 296 S.C.at 189, 371 S.E.2d at 522. That aesthetic and recreational interest was protected by the Coastal Council's Coastal Management Plan, which prohibited "permanent alteration of valuable wetlands habitats" without following specific procedures that the groups alleged the

Council had not followed. *Id.* "These allegations," this Court found, "are sufficient to show standing." *Id.*, 296 S.C. at 190, 371 S.E.2d at 523.

Like the petitioners in *South Carolina Wildlife Federation*, Petitioners in this case appear to "have alleged an individualized injury in the adverse effect of a specific decision of [DHEC] on their . . . use and enjoyment of . . . the wetlands . . . sufficient to show standing." *Id.* Petitioners allege that their ability to participate in administrative review stems from their concrete interest in the aesthetic and recreational enjoyment of Roper Pond and Cary Lake, which they say they routinely use and enjoy. *See* Pet'rs Br. at 23-27. Petitioners are said to include individuals who live adjacent to Roper Pond and Cary Lake, who regularly enjoy the flora and aesthetic value of Roper Pond as a healthy wetland ecosystem and regularly swim, fish, and appreciate the waters of Cary Lake, which flow from Roper Pond.

These interests fall within the zone of interests protected by the South Carolina Pollution Control Act ("PCA"), which authorizes the 401 Certification procedure challenged by the Petitioners in this case.[4] The PCA declares the "public policy of the State to maintain reasonable standards of purity of the air and water resources of the State" for the benefit of the "public health, safety and welfare of its citizens." S.C. Code

[4] DHEC promulgated its 401 Certification regulations, numbered Regulation 61-101, under the statutory authority of "Sections 48-1-30 and 48-1-50 of the" South Carolina Pollution Control Act, which generally authorize DHEC to "promulgate regulations to implement this [Act]," to "develop a general comprehensive program for the abatement, control and prevention of air and water pollution," and "[t]ake all action necessary or appropriate to secure to this State the benefits of the Federal Water Pollution Control Act [better known as the Clean Water Act] and any and all other Federal and State acts concerning air and water pollution control." The 401 Certification procedure and the water quality standards are also mandated by the federal Clean Water Act. *See* 33 U.S.C. § 1341. The Clean Water Act was enacted "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

Ann. § 48-1-20. The PCA directs DHEC to "adopt standards and determine what qualities and properties of water and air shall indicate a polluted condition," and to promulgate those standards as "part of the rules and regulations of the Department." S.C. Code Ann. § 48-1-40. Pursuant to this command, DHEC promulgated water quality standards "to maintain and improve all surface waters to a level to provide for the survival and propagation of a balanced indigenous aquatic community of flora and fauna and to provide for recreation in and on the water." S.C. Code Ann. Regs. § 61-68.A(4). Also under the authority of the PCA, DHEC promulgated the 401 Certification procedure to protect those standards by ensuring that any activity receiving a federal permit "will be conducted in a manner which will not violate applicable water quality standards regulations." S.C. Code Ann. Regs. § 61-101.A(4). The right to administrative review in Section 44-1-60 applies to "[a]ll department decisions involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other actions of the department," which includes the 401 Certification and all other DHEC authorizations at issue in this case. S.C. Code Ann. § 44-1-60(A).

Thus, the PCA encompasses the interests put forth by the Petitioners in enjoying and recreating in and around Roper Pond and Cary Lake. The Act intends DHEC's 401 Certification procedure to guard those interests, which hinge on protection of the state's valuable water resources. Petitioners' interest appears to separate their interest from a disinterested party's generalized grievance because, unlike a disinterested party, Petitioners apparently live next to, enjoy, and use the waters of Roper Pond and Cary Lake. Thus, Petitioners appear to have shown that they are "injured in fact by agency action and that the interest [t]he[y] seek[] to vindicate is arguably within the 'zone of

interests to be protected or regulated by the statute' in question." *Newport News Shipbuilding*, 514 U.S. at 127. Petitioners need show no more to qualify as "affected persons" under Section 44-1-60. *Cf. S.C. Wildlife Fed'n*, 296 S.C. at 190, 371 S.E.2d at 523.

III. The Court of Appeals erred in failing to construe the term "affected persons" and applying a standard inconsistent with this Court's precedent.

The Court of Appeals' standing analysis is incompatible with the statute and this Court's major decisions giving citizens with injuries within the zone of interests protected by statute a right to challenge environmental permits. In *South Carolina Wildlife Federation*, for example, this Court did not require the environmental groups in that case to prove with any certainty that requiring the Coastal Council to follow its procedures would result in stopping the residential development or protecting the wetlands. Here, however, the Court of Appeals required the Petitioners to prove that seeking review of DHEC's water quality procedures will result in better water quality in Roper Pond and Cary Lake. *Town of Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control*, 404 S.C. 515, 531-33, 745 S.E.2d 385, 393-95 (Ct. App. 2013). While that may be ultimately what Petitioners want, that is not what they need to show to qualify as "affected" persons who may invoke the review procedures provided by Section 44-1-60. If they qualify as affected persons, they may seek to enforce the procedures that protect the water quality of Roper Pond and Cary Lake regardless of whether, in judicial eyes, the administrative procedure is likely to result in better water quality. As with the liquor licensing example, a court must apply the criteria set forth by the General Assembly for invoking the procedure enacted by the General Assembly; it may not question the efficacy or project

the outcome of the enacted procedural remedy in determining whether a statutorily entitled party may invoke it.

The Court of Appeals also erred in requiring the Petitioners to show some type of property interest in order to show an interest sufficient for standing. *Id.*, 404 S.C. at 531-33, 745 S.E.2d at 393-95. Neither this Court nor any other courts require a property interest to illustrate a concrete interest and establish injury-in-fact, even outside the constitutional standing context. "The injury in fact requirement is designed to ensure that the litigant has a concrete and particularized interest distinct from the interest held by the public at large. That the litigant's interest must be greater than that of the public at large does not imply that the interest must be a substantive right sounding in property or contract." *Cantrell v. City of Long Beach*, 241 F.3d 674, 681 (9th Cir. 2001). Even courts applying the Article III standing test have "never required a plaintiff to show that he has a right of access to the site on which the challenged activity is occurring, or that he has an absolute right to enjoy the aesthetic or recreational activities that form the basis of his concrete interest." *Id.*

This is true in South Carolina as well, where courts have consistently found that a plaintiff's aesthetic or recreational enjoyment in property that plaintiff has no property right is sufficient to establish a concrete interest and injury-in-fact. For example, in *South Carolina Wildlife Federation*, this Court did not require the environmental groups to show a property interest in the wetlands in order to show a concrete interest sufficient for standing to challenge the agency's decision. 296 S.C. at 190, 371 S.E.2d at 523. This Court and the Court of Appeals have reached the same result in numerous other cases. *See Smiley*, 374 S.C. at 333, 649 S.E.2d at 34 (finding standing based upon a plaintiff's

alleged aesthetic and recreational enjoyment of a public beach); *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 601-02, 550 S.E.2d 287, 291-92 (2001) (finding that individual residents of a "5,280 acre private, suburban community" established a concrete interest in the aesthetic and recreational enjoyment of viewing deer beyond their own property). *See also, e.g., Ogburn-Matthews v. Loblolly Partners (Ricefields Subdivision)*, 332 S.C. 551, 565, 505 S.E.2d 598, 605 (Ct. App. 1998) (aff'd in part and rev'd on other grounds by *Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 560 S.E.2d 410 (2002)) ("Matthews claims an individual injury in the adverse effect of this specific decision of the Agency on her use and enjoyment of the Wetland, which lies adjacent to her residence. Our supreme court has found this interest to be sufficient to provide standing. . . . Matthews is not the owner of the Wetland. She has no economic interest which is directly affected by the issuance of a consistency certificate. Matthews' individual interest is her enjoyment of the wildlife and habitat.") (internal citation omitted).

Just as a property interest is not needed to show injury in the constitutional standing context, there is no basis for requiring it for a party to qualify as an "affected" person under Section 44-1-60. As earlier discussed, the zone of interests protected by the underlying law here are not property interests alone, as the PCA and water quality standards encompass injury to environmental, aesthetic, and health concerns. *See also* S.C. Const. art. I, § 22.

Similarly, the Court of Appeals' decision does not square with *Smiley v. South Carolina Department of Health & Environmental Control*, which focused on the injury element of constitutional standing. 374 S.C. 326, 333, 649 S.E.2d 31, 34 (2007). Like

this case, *Smiley* is a permit appeal case. The plaintiff sought to appeal a permit issued by DHEC that allowed excavation of a public beach. *Id.*, 374 S.C. at 328-30, 649 S.E.2d at 32-34. Both DHEC and the developer argued that the plaintiff did not have standing to challenge the permit before the Administrative Law Court. *Id.* at 374 S.C. at 329, 649 S.E.2d at 32. The Administrative Law Court, the Coastal Zone Management Appellate Panel, the Circuit Court, and the Court of Appeals all agreed, finding that the plaintiff could not establish injury sufficient for standing. *Id.* at 374 S.C. at 329-30, 649 S.E.2d at 33.

This Court reversed the Court of Appeals, holding that the plaintiff had adequately established injury to his "use and enjoyment" of the beach, specifically "jogging on the flat hard public beach." *Id.* at 374 S.C. at 332-33, 649 S.E.2d at 34. Relying on the principle that "'[i]njury in fact' reflects the statutory requirement that a person be 'adversely affected' or 'aggrieved,' and . . . serves to distinguish a person with a direct stake in the outcome of a litigation - even though small - from a person with a mere interest in the problem," this Court held that "[t]he averments in [plaintiff's] affidavit that he recreates and views nature on the beach on an almost daily basis is a sufficient allegation of" a "'concrete and particularized invasion' of a legally protected interest" sufficient to establish injury for standing to appeal the DHEC permit to the Administrative Law Court. *Id.*

The General Assembly enacted the Section 44-1-60 in 2006. Although this Court heard *Smiley* in 2007, that case was governed by law as it existed prior to the legislative change, so Section 44-1-60 was not before the Court. *See Smiley*, 374 S.C. at 329, 649 S.E.2d at 32 n.2. Since then, this Court has not addressed the statutory right to

administrative review under Section 44-1-60. However, both *Smiley* and *South Carolina Wildlife Federation* support finding that Petitioners in this case are "affected persons" under Section 44-1-60 because they are among the limited class of persons who can demonstrate that the challenged agency action will injure their interest within the zone of interests protected by statute.

CONCLUSION

This case presents an opportunity for this Court to clarify the requirements to be an "affected person" under Section 44-1-60. Statutory text and structure, combined with precedent from this Court and others, support defining that term to encompass persons injured by agency action where their injury falls within the compass of interests protected by the statute that authorizes the agency action, here the S.C. Pollution Control Act.

For these reasons, and for the reasons stated in Petitioners' Brief, this Court should reverse the decisions of the Court of Appeals and the Administrative Law Court, and find that Petitioners were entitled to invoke administrative review of DHEC's authorizations as "affected persons" under S.C. Code Ann. § 44-1-60.

[SIGNATURE PAGE FOLLOWS]

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CERTIFICATE OF SERVICE

I hereby certify that on this date I served copies of the Brief of *Amicus Curiae* South Carolina Wildlife Federation In Support of Petitioners' Standing upon counsel for Respondents and Petitioners by placing same in the United States Mail, First Class Postage Prepaid, addressed as follows:

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January 29th, 2015

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January 29, 2015

VIA U.S. MAIL

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

Re: *Town of Arcadia Lakes, et al., v. S.C. Dep't of Health & Envtl. Control, et al.*
Case No. 09-ALC-07-0069-CC

Dear Mr. Shearouse:

Please find enclosed the original and 7 (seven) copies of a Motion for Leave to File Brief as *Amicus Curiae* on behalf of the South Carolina Wildlife Federation, as well as the required filing fee.

The original and 16 copies of the Brief of *Amicus Curiae* are included for filing conditionally, pursuant to Rule 213 SCACR, and in accordance with Rule 208(b) and Rule 267 SCACR.

Pease file-stamp the additional copies of each and return them to me in the enclosed self-addressed, stamped envelope.

If I can provide any further information, please do not hesitate to let me know.

Very truly yours,

J. Blanding Holman IV
Attorney for *Amicus Curiae* South Carolina Wildlife Federation

Enclosures
cc: All Counsel of Record