

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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S.C. Supreme Court

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

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

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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.

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**REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE**

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South Carolina Wildlife Federation (“SCWF”) respectfully submits this reply in support of its motion for leave to file an amicus brief in this matter. As discussed below, Roper Pond, LLC (“Roper Pond”) does not raise any serious barrier to considering an amicus brief on a pure legal issue that lies at the heart of this case. The amicus brief should assist the Court in resolving the proper legal test for determining who can challenge decisions by the S.C. Department of Health and Environmental Control (“DHEC”). That currently-muddled legal issue has state-wide importance; proper resolution would benefit not just the bench and bar, but also DHEC and the public.

**I. SCWF'S Motion Is Timely, and Creates No Prejudice**

As Roper Pond admits, this Court's rules do not require that leave to file an amicus brief be filed within a specified period. Roper Resp. 2. Roper Pond also concedes that this distinguishes South Carolina appellate amicus procedure from that in other tribunals, including federal courts, which contain specific rules concerning timing. *Id.* 2-3. Roper Pond nonetheless submits that leave should be denied because an amicus brief would leave it "unduly burdened." *Id.* at 3.

Roper Pond does not specify any actual conflict or difficulty that would prevent it from responding to an amicus brief. Given that Roper Pond has already devoted 15 pages to standing in its brief generally and addressed its interpretation of "affected person" under S.C. Code Ann. § 44-1-60, Roper Pond Br. 27-42, responding to an amicus addressing the same overall subject should not be burdensome. Roper Pond does not claim the instant brief raises complex or extraneous matters that would make additional briefing difficult to complete, nor cite any specific obligations that would prevent counsel from filing a response. Roper Pond does note the timing of oral argument, but the hearing argument remains weeks away and other states allow amicus briefs within similar time periods, or even later. *E.g.* Kan. Sup. Ct. R. 6.06(b)(1) (requiring filing within thirty days before oral argument); Neb. Ct. R. 2-109(A)(4) (requiring filing within twenty days before oral argument); Wash. R. App. P. 10.2(f) (requiring filing within forty-five days before oral argument).

The amicus brief addresses a core legal issue in this case in context of the governing statute and judicial precedent. As this issue is and will be one of central

importance to other litigants in South Carolina, clarification of applicable law would benefit the public and the agency, as well as bench and bar.

**II. Standing to Bring a Contested Case Has Been Litigated and Preserved for Review**

Roper Pond contends that standing as an “affected person” was not raised below and cannot be raised here, relying upon this Court’s decision in *James v. Anne’s Inc.*, 390 S.C. 188, 193, 701 S.E.2d 730, 732 (2010).

In *James*, amici attempted to inject standing and justiciability into a case even though “justiciability and standing were not raised by the parties.” 390 S.C. at 193, 701 S.E.2d at 732. Here, standing to request administrative review was extensively briefed by the parties, and the courts below held that the Petitioners lacked standing to request administrative review of DHEC’s permit decision. *See Town of Arcadia Lakes v. S.C. Dep’t of Health & Env’tl. Control*, 404 S.C. 515, 537, 745 S.E.2d 385, 396 (Ct. App. 2013) (“We agree with the ALC that none of the Appellants had standing to maintain their challenge to the authorization”). S.C. Code § 44-1-60 itself is cited on the first page of the ALC’s order, and page sixteen of the order cites to Section 44-1-60(F)(2), which provides jurisdiction in the ALC for an “affected person desiring to contest the final [DHEC] action.” Where the general legal question of standing to bring a contested case was litigated and preserved, a reviewing court is “required to interpret the applicable statutes correctly.” *Burke v. Oxford House of Oregon Chapter V*, 103 P.3d 1184, 1191 (Ct. App. Or. 2004) (*en banc*) *rev’d on other grounds* 137 P.3d 1278 (Or. 2006). *See also Youngblood v. S. Carolina Dep’t of Soc. Servs.*, 402 S.C. 311, 320, 741 S.E.2d 515, 519-20 (2013) (reviewing statutes for basis for standing where parties had cited no provisions).

Clarification of the legal universe of those entitled to seek ALC review of DHEC decisions is needed to guide the public, bench, and bar in this and other cases, and would justify examination even if the ALC had not cited Section 44-1-60(F). *Apex Elecs. Corp. v. Gee*, 577 N.W.2d 23, 26 (Wis. 1998) (“When an issue involves a question of law rather than of fact, when the question of law has been briefed by the parties, and when the question of law is of sufficient public interest to merit a decision, a court can address the issue.”).<sup>1</sup> Lower courts have been inconsistent in defining who has standing as “affected persons” to seek administrative review of DHEC permit decisions. *Contrast Grand Strand Reg’l Med. Ctr., Petitioner*, 05-ALJ-07-0344-CC, 2007 WL 1365864, at \*18 (Mar. 30, 2007) (“affected person” status sufficient for contested case hearing), *City of Denmark v. DHEC*, 06-ALJ-07-0926-CC, 2007 WL 2707695, at \*2-3 (Aug. 8, 2007) (“affected person” class distinguished from statute’s additional “with standing” requirement), *Julius Murray v. DHEC*, 97-ALJ-07-0262-CC, 1997 WL 586859, at \*5 (Aug. 28, 1997) (parsing different statutory “affected person” definitions to determine who could bring contested case) *with Preservation Society of Charleston v. S.C. DHEC*, 13-ALJ-07-0056-CC (April 11, 2014) (construing “affected person” to mean constitutional standing), on appeal, *Preservation Society of Charleston v. S.C. DHEC*, No. 2014-000847 (Ct. App. filed April 21, 2014).<sup>2</sup> This case presents an opportunity for the Court to clarify who can seek administrative review of DHEC decisions, and the

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<sup>1</sup> See *Marotz v. Hallman*, 734 N.W.2d 411, 417 (Wis. 2007) (applying *Apex*); *Smith v. Foerster-Bolser Constr., Inc.*, 711 N.W.2d 421, 423 (Mich. Ct. App. 2006) (“this Court may overlook preservation requirements if . . . the issue involves a question of law and the facts necessary for its resolution have been presented”); *State v. Smith*, 55 P.3d 553, 555 (Ct. App. Or. 2002) (ordinary rules of preservation are somewhat relaxed “when the case turns on the applicability and construction of a statute”).

<sup>2</sup> Undersigned counsel represents the Petitioners in that case, which is currently being briefed to the S.C. Court of Appeals.

proposed amicus brief would assist the Court in examining that question in the light of its own precedent and the statutory context.

*James* is thus distinguishable. Whereas the amici there sought to inject a new issue into the case, the amicus here addresses the statutory framework cited by the ALC as jurisdictional and integrates it with this Court's prior decisions. Statutory construction is a pure legal issue, entitled to *de novo* review, and the parties have addressed standing extensively in their briefs including the scope of "affected persons" entitled to seek administrative review. By addressing this issue now, the Court would resolve a persistent point of confusion and reduce appellate litigation going forward.

#### CONCLUSION

The motion for leave to file an amicus brief should be granted.

Respectfully Submitted,

  
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*Attorney for Amici Curiae*

Charleston, SC

February 17, 2015

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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

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vs.

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

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**CERTIFICATE OF SERVICE**

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I hereby certify that on this date I served copies of the Reply In Support of Motion for Leave to File 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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February 17, 2015

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February 17, 2015

VIA U.S. MAIL

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

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**S.C. Supreme Court**

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 Reply in Support of Motion for Leave to File Brief as *Amicus Curiae* on behalf of the South Carolina Wildlife Federation.

Pease file-stamp the additional copy and return it 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*  
*wygho*  
*w/permission*

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

Enclosures

cc: All Counsel of Record

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