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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Appeal from the Administrative Law Court
John D. McLeod, Administrative Law Judge

S.C. Supreme Court

Appellate Case No. 2013-001521

Town of Arcadia Lakes, Robert L. Jackson, Linda Z.
Jackson, Robert E. Williams, 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 Steve Brown,

Appellants,

vs.

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

Respondents.

RESPONDENT SOUTH CAROLINA DEPARTMENT
OF HEALTH AND ENVIRONMENTAL CONTROL'S
RESPONSE TO BRIEF OF AMICUS CURIAE

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vs.

South Carolina Department of Health and Environmental
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CERTIFICATE OF SERVICE

I, Donna K. Hellerman, for the South Carolina Department of Health and Environmental Control, hereby certify that I have on this **2nd day of March, 2015**, served a copy of ***Respondent South Carolina Department of Health and Environmental Control's Response to Brief of Amicus Curiae*** upon all parties and counsel of record in the above-captioned case, via United States Mail, First Class, postage prepaid, addressed as follows:

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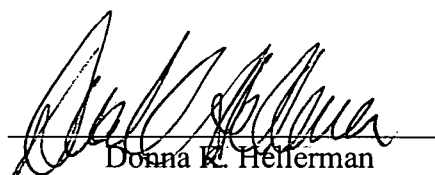

Donna K. Hellerman

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COUNTER STATEMENT OF ISSUES RAISED BY AMICUS CURIAE

1. Whether S.C. Code Ann. § 44-1-60 is a procedural statute that sets forth the method by which parties authorized by substantive requirements contained in other statutes and regulations administered by the Department may challenge decisions of the Department giving rise to a contested case hearing.
2. Whether Pollution Control Act or the water quality regulation confers statutory standing to Petitioners to challenge the Department's water quality certification decision.
3. Whether the Department's interpretation that S.C. Code Ann. § 44-1-60 is a procedural statute that does not confer standing is entitled to deference.

COUNTER STATEMENT OF THE CASE

Respondent South Carolina Department of Health and Environmental Control (“Department”) hereby respectfully submits this Response in accordance with the Court’s February 20, 2015 Order granting the motion of the South Carolina Wildlife Federation (“Federation”) to file its *amicus curiae* brief and granting Respondents ten days in which to file a response. In its *amicus curiae* brief, the Federation argues that the Administrative Law Court and the Court of Appeals incorrectly held that Petitioners lacked standing because they have standing pursuant to the statute governing appeals from Department permitting decisions since they are “affected parties.” Although the Department has declined to take a position on the issue of whether Petitioners have standing, as briefed by Petitioners, the Department feels compelled to respond to the Federation’s claim that the Department’s appellate procedure statute confers standing on parties given the sweeping breath of such an assertion.

ARGUMENT

I. THE INTREPETATION OF AMICUS CURIAE THAT THE TERM “AFFECTED PERSONS” IN THE DEPARTMENT’S APPELLATE PROCEDURE STATUTE, S.C. CODE ANN. § 44-1-60 IS INCOSNISTENT WITH THE RULES OF STATUTORY CONSTRUCTION AND THE PURPOSE OF THE STATUTE.

Amicus Curiae South Carolina Wildlife Federation (“Wildlife Federation”) claims in its brief that the Court of Appeals erroneously concluded that Petitioners lacked standing because that court failed to conclude that they had statutory standing because they were “affected persons” as set forth in S.C. Code Ann. § 44-1-60 (Supp. 2014). The Wildlife Federation also claims that Petitioners and all other “affected persons” under S.C. Code Ann. § 44-1-60 are within the “zone of interest of statute authorizing the Department’s action.” *Amicus Curiae Br.*

at p. 6. As set forth below, the Department believes that the Wildlife Federation's interpretations are without merit as they are unsupportable when properly reviewed under the rules of statutory construction.

It is well established that “[t]he cardinal rule of statutory construction is to ascertain and effectuate the intention of the legislature.’ ‘When a statute’s terms are clear and unambiguous on their face, there is no room for statutory construct and a court must apply the statute according to its literal meaning.’ In interpreting a statute, ‘[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute’s operation.’ Further, ‘the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect.’” *Ranucci v. Crain*, 409 S.C. 493, 500, 763 S.E.2d 189, 192 (2014) (internal citations omitted).

Citing Black's Law Dictionary, the Wildlife Federation claims that “[t]he plain and ordinary meaning of a person who is “affected” by agency action is a person who is injured by agency action.” *Amicus Curiae Br.* at p. 7. According to the Wildlife Federation, this conclusion is suggested by the undefined term that suggests this interpretation. This interpretation is unsupported by the language of the statute with a complete application of the rules of statutory construction. In addition to giving words their plain and ordinary meaning, the rules of statutory construction require that meaning of words cannot lead to a “subtle or forced construction to limit or expand the statute’s operation.” *Ranucci*, 409 S.C. at 500, 763 S.E.2d at 192. When this rule is applied to the term “affected persons” in S.C. Code Ann. § 44-1-60 it is clear that the Wildlife Federation's interpretation is erroneous. The interpretation expands the operation of the statute beyond that which the legislature would have intended. Since S.C. Code Ann. § 44-1-40 is applicable to all Department decisions giving rise to a contested case hearing,

the interpretation articulated by the Wildlife Federation would mean all affected persons would have statutory standing in all situations. While the Wildlife Federation argues that this is the result that the legislature intended, this claim is achieved by overlooking the requirement that the interpretation of a statute must be considered in light of the purpose of the statute.

The purpose of a statute can be ascertained by its title and by its language. *Perry v. Bullock*, 409 S.C. 137, 142, 761 S.E.2d 251, 253-54 (2014) (citing *Garner v. Houck*, 312 S.C. 481, 486, 435 S.E.2d 847, 849 (1993) (holding the title of a statute and heading of a section can be used to clarify ambiguity or doubt in a statute provided the interpretation does not undo or limit the plain meaning of the text). Section 44-1-60 is entitled “Appeals from department decisions giving rise to contested case; procedures.” Procedural law is defined as “[t]he rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights of or duties themselves.” *Black’s Law Dictionary*, p. 1241 (Rev. 8th Ed. 1999).

Here, S.C. Code Ann. § 44-1-60 sets forth the when, where, and how a decision of the Department may be challenged. Specifically, in the pertinent sections, the statute provides as follows:

- 1) Section B mandates that the Department is required to “comply with all requirements for public notice, receipt of public comments and public hearings before making a [D]epartment decision;”
- 2) Section C states that the initial decision made the Department is the staff decision;
- 3) Section D mandates that the Department is to consider all information provided during the public comment period and that the Department’s administrative file is to include “the application and supporting exhibits, all public comments and submissions and other documents contained in the supporting file;”

- 4) Section E mandates how the Department is to provide notice to the parties to the decision, e.g., “the applicant, permittee, licensee, and affected parties who have requested in writing to notified” and establishes that the staff decision is the final agency decision unless a request for final review together with filing fee is filed with the Department within 15 days of the Department’s mailing of notice to the parties;
- 5) Section F establishes that if a properly filed request for final review is received the Board has 60 days to conduct a final review conference after which the Board will make the final agency decision or if a final review conference is not conducted within the 60 day time period or the Board does not act within the time period, the staff decision will become the final agency decision; and
- 6) Section G establishes the applicable situations and time periods in which a party can file a request of a contested case hearing with the Administrative Law Court regarding the final agency decision.

S.C. Code Ann. §§ 44-1-60(B) – (G). None of these Sections creates, defines, or regulates specific rights or duties that a contested case proceeding is the forum for vindicating. *See* S.C. Code Ann. § 44-1-60(A). Indeed, Section E, which the Wildlife Federations cites as creating a right is merely a notice provision which sets forth the when, where, and how that a particular class of party, who have been authorized by the substantive statute or regulation that establishes the criteria by which the Department’s action will be reviewed, may initiate such a challenge.

Indeed, contrary to the Wildlife Federation’s claim that S.C. Code Ann. § 44-7-130 (2008 & Supp. 2014) and S.C. Code Ann. § 61-6-185 (2009 & Supp. 2014) lend support to its arguments, the statutes, to the extent that they are applicable and illustrative of the fact that it is the substantive authority and not the procedural authority that confers statutory standing. *See Amicus Curiae Br.* at p. 7. The statute cited by the Wildlife Federation is S.C. Code Ann. § 44-7-130(1) sets forth a detailed definition for the term “affected person” for Certificate of Need

(“CON”) determinations by the Department, a fact acknowledged by the Wildlife Federation in its brief. *Amicus Curiae Br.* at p. 7. When the statute containing this statutory definition, which is entitled “Hospital, Tuberculosis Camps and Health Services Districts,” is read together with the appellate procedures statute, S.C. Code Ann. § 44-1-60, it is clear that S.C. Code Ann. § 44-7-130(1) is the substantive statute that identifies who has standing as “affected party” to challenge the Department’s CON decision. In contrast, S.C. Code Ann. § 44-1-60 is a procedural statute that sets forth how that affected party will receive notification of the Department’s CON decision, when and how that affected party can initiate and pursue an administrative appeal of the decision, and when and how that party can file a request for a contested case hearing with the Administrative Law Court. *See* S.C. Code Ann. § 44-1-60(B) – (G).

Similarly S.C Code Ann. § 61-6-185 illustrates the difference between substantive and procedural statutes, despite the fact that it is not a statute administered by the Department. *See Be Mi, Inc. v. South Carolina Department of Revenue*, 408 S.C. 290, 296, 758 S.E.2d 737, 740 (Ct. App. 2014) citing S.C. Code Ann. § 61-2-80 (2009 & Supp. 2014) (stating that “[t]he State through the [DOR], is the sole and exclusive authority empowered to regulate the operation of all locations authorized to sell beer, wine, or alcoholic liquors . . .”). The statute, which is entitled “Protest of issuance or renewal license; attendance of hearing; court costs and other penalties,” in pertinent part, confers statutory standing to challenge the issuance of a retail liquor license to persons residing in the county or within five miles of the location for which the license is being sought if they meet certain requirements. S.C. Code Ann. § 61-6-185(A). If the statute were administered by the Department, it would support the Department’s interpretation of S.C. Code Ann. § 44-1-60 because the statute merely sets forth how that affected party identified in the

alcohol control statute will receive notification of the Department's alcohol licensing decision, when and how that affected party can initiate and pursue an administrative appeal of the decision, and when and how that party can file a request for a contested case hearing with the Administrative Law Court. *See* S.C. Code Ann. § 44-1-60(B) – (G).

Nevertheless, the Wildlife Federation claims that the rules of statutory construction support their position that the term "affected person" confers a general grant of standing to all parties because any other conclusion would mean the word "affected" would be superfluous. *Amicus Curiae Br.* at p. 9. This conclusion overlooks the fact that under the rules of construction, "[i]t is well established that [the] Court will not construe a statute by concentrating on an isolated phrase. *Amisub of South Carolina, Inc. v. South Carolina Department of Health and Environmental Control*, 407 S.C. 583, 597, 757 S.E.2d 408, 416 (2014) (citing *Laurens County School Districts 55 & 56 v. Cox*, 308 S.C. 171, 174, 417 S.E.2d 560, 561 (1992) ("The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in the light of its manifested purpose. In applying the rule of strict construction the courts may not give to particular words a significance clearly repugnant to the meaning of the statute as a whole, or destructive of its obvious intent.")). The word "affected" in the statute is merely a modifier for the word person, identifying the person as one upon whom the applicable substantive statute has conferred the right to sue. Accordingly, the Wildlife Federation's claims are meritless.

II. AS A PROCEDURAL STATUTE, THE TERM "AFFECTED PERSON" IN S.C. CODE ANN. § 44-1-60 DOES NOT CONFER STANDING UPON PETITIONERS.

The Wildlife Federation claims that S.C. Code Ann. § 44-1-60 confers standing upon Petitioners to contest the Department's issuance of the water quality certification at issue in this

case. Water quality certifications are reviewed by the Department pursuant to Regulation 61-101, which is codified at 8 S.C. Code Ann. Regs. 61-101 (2012 & Supp. 2014) and promulgated pursuant to the Pollution Control Act (“PCA”), S. C. Code Ann. §§ 48-1-10, *et seq.* (2008 & Supp. 2014), S.C. Code Ann. § 48-1-30 (2008); S.C. Code Ann. § 48-1-50(17) (2008 & Supp. 2014); 8 S.C. Code Ann. Regs. 61-101(A)(2). Specifically, the Wildlife Federation claims that because Petitioners are in the zone of interest of the water quality certification regulation, which was promulgated pursuant to the PCA, they are entitled to standing as affected persons under S.C. Code Ann. § 44-1-60. This claim is belied by the fact that the PCA expressly limiting enforcement of the statute to the Department by prohibiting private rights of action. S.C. Code Ann. § 48-1-250 (Supp. 2014) (“No private cause of action is created by or exists pursuant to this chapter. A determination by the department that pollution exists or a violation of a prohibition contained in this chapter has occurred, whether or not actionable by the State, creates no presumption of law or fact inuring to or for the benefit of a person other than the State.”).

Moreover, the water quality certification regulation expressly addresses standing and provides that “[p]ersons with legal standing to contest the certification shall have rights to appeal the [Department’s] decision.” 8 S.C. Code Ann. Regs. 61-101(G)(2). Although not expressly stated, it is implied and is the interpretation of the Department that the regulatory provision that constitutional standing will be determined during the appeals process. Limiting constitutional standing is appropriate when considered in light of the regulation’s notice requirement including notification of the Department’s decision to “those persons providing comments in response to the initial notice of application.” 8 S.C. Code Ann. Regs. 61-101(G)(1)(d). Requiring that standing be determined by the constitutional test during the appeals process is reasonable in light of the fact that persons providing comments can be anyone who happened to file a comment,

whether or not they live or own property in the vicinity of the project or have some other connection to the project. Accordingly, the Wildlife Federation's claims that the term "affected persons" in S.C. Code Ann. § 44-1-60 generally or with regard to Petitioners is without merit.

III. THE DEPARTMENT'S INTREPREATION THAT THE TERM "AFFECTED PERSONS" DOES NOT CREATE STATUTORY STANDING IS A REASONABLE INTREPRETATION OF AN UNDEFINED TERM AND IS ENTITLED TO DEFERENCE

Whether an agency's interpretation of a statute or regulation that it administers is entitled to deference is a two-step process. First, the language of the statute is reviewed to determine if speaks to the subject and its plain meaning is clear. If it is not, then the agency determination is entitled to deference if appropriate. *Kiawah Development Partners, II v. South Carolina Department of Health and Environmental Control*, 411 S.C. 16, 33-34, 766 S.E.2d 707, 717 (2014) (internal and external citations omitted). "As repeatedly stated in [this Court's] decisions, our deference doctrine provides that courts defer to an administrative agency's interpretations with respect to the statutes entrusted to its administration or its own regulations 'unless there is a compelling reason to differ.'" *Kiawah Development Partners, II*, 411 S.C. at 34, 766 S.E.2d at 718 (citations omitted). The "deference doctrine properly stated provides that where an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts including the ALC, will defer to the agency's interpretation absent compelling reasons. We defer to an agency interpretation unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'" *Id.* (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., et al.*, 467 U.S. 837, 843, 104 S.Ct. 2778 (1984)). In addition, the Department's interpretation may be articulated by staff and need not be formalized by the South Carolina Board of Health and Environmental Control. *Murphy v. South Carolina Department of Health and Environmental Control and District 5 of Lexington and Richland Counties*, 396 S.C. 633, 640-41, 723 S.E.2d

191, 195 (2012) (holding the interpretation of an undefined term in the water quality certification regulation by the Department's project manager that is reasonable and consistent with the plain language of the regulation is entitled to deference by the Court.).

The Department's interpretation that S.C. Code Ann. § 44-1-60 is a procedural statute that does not confer standing to a party is entitled to deference. As explained above, the term in question "affected person" is undefined and the Wildlife Federation has interpreted the term as conferring standing on all such parties including Petitioners. The Department interprets the term as merely identifying persons that has been granted rights under applicable substantive statutes or regulations. This interpretation is neither arbitrary nor capricious since it conforms to the rules of statutory construction by considering the plain language of the statute in conjunction with the title and purpose of the statute, without giving undue weight to a particular word or phrase. In addition, the Department's interpretation conforms to the intent of the of the statute by treating the statute as a procedural statute as it is entitled and by giving effect to its language requires, in contrast to the interpretation articulated by the Wildlife Federation, which would turn the statute into a substantive statute.

Similarly, the Department's interpretation that Regulation 61-101(G)(2) limits standing to contest water quality certification decision of the Department to parties that can meet the constitutional test for standing is entitled to deference. The regulation does not provide how legal standing is to be determined. Since the regulation is silent on this issue the Department interprets the regulation as requiring review under the constitutional test standard. This interpretation is neither arbitrary nor capricious since it conforms to the rules of statutory construction by considering the plain language of the statute in conjunction with the title and


purpose of the regulation, without giving undue weight to a particular word or phrase. Accordingly, the Court should defer to the Department's interpretation.

CONCLUSION

Based on the foregoing arguments, Respondent South Carolina Department of Health and Environmental Control respectfully requests that this Court defer to the Department's interpretations of S.C. Code Ann. § 44-1-60 and 8 S.C. Code Ann. Regs. 61-101(G)(2), and reject the arguments contained in the Amicus Curiae Brief filed by the South Carolina Wildlife Federation.

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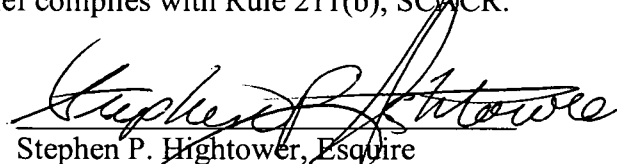
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Respondents.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.



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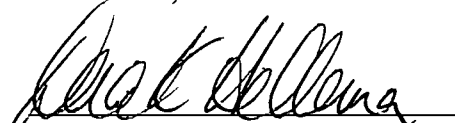
Respondents.

CERTIFICATE OF SERVICE

I, Donna K. Hellerman, for the South Carolina Department of Health and Environmental Control, hereby certify that I have on this **2nd day of March, 2015**, served a copy of ***Respondent South Carolina Department of Health and Environmental Control's Response to Brief of Amicus Curiae*** upon all parties and counsel of record in the above-captioned case, via United States Mail, First Class, postage prepaid, addressed as follows:

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Donna K. Hellerman

March 2nd, 2015
Columbia, South Carolina



W. Marshall Taylor Jr., Acting Director

Promoting and protecting the health of the public and the environment

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MAR - 2 2015

S.C. Supreme Court

March 2, 2015

Honorable Daniel E. Shearouse
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RE: Town of Arcadia Lakes, et al. v. SCDHEC & Roper Pond
Appellate Case No.: 2013-001521; OGC# 21395

Dear Mr. Shearouse:

Enclosed for filing please find the original and sixteen (16) copies of the Respondent South Carolina Department of Health and Environmental Control's Response to Brief of Amicus Curiae. By copy of this letter, I am serving all counsel of record.

If you have any questions, or if I can provide any additional assistance, please do not hesitate to contact our office.

Very truly yours,

Stephen P. Hightower
Assistant General Counsel

SPH/dkh
Enclosures as stated

cc: W. Thomas Lavender, Jr., Esquire
Joan Hartley, Esquire
Amy Armstrong
J. Blanding Hallman, IV, Esquire