

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

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S.C. Supreme Court

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.

**REPLY BRIEF OF AMICUS CURIAE
SOUTH CAROLINA WILDLIFE FEDERATION**

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INTRODUCTION

The responses filed by the Department of Health and Environmental Control (“DHEC”) and Roper Pond, LLC (“Roper”) fail to counter the straightforward reality that the General Assembly, in establishing uniform DHEC permitting review procedures in S.C. Code Ann. § 44-1-60, directed that any “affected person” may initiate a contested case procedure in the S.C. Administrative Law Court (“ALC”).

DHEC’s response conflicts with the agency’s own public declarations regarding Section 44-1-60, and its statements to the Petitioners in this case. Moreover, its claims about the General Assembly’s intent in enacting Section 44-1-60 conflicts with the statute’s explicit goal, recognized repeatedly by this Court, to create a uniform appeals procedure for all DHEC decisions and supersede the appeals procedures in individual DHEC regulations. DHEC’s bid to ignore the clear and unambiguous language of Section 44-1-60 and dramatically limit the statutory rights of citizens to seek review of unlawful DHEC authorizations is contrary to the law and deserves no deference.

Roper’s response suffers from a series of misunderstandings about the analysis in the *amicus* brief, Section 44-1-60, and standing doctrine in South Carolina and federal courts. As such, its arguments are not persuasive.

ARGUMENT

I. DHEC’s response is contrary to the law and DHEC practice, and its interpretations are entitled to no deference

A. DHEC’s interpretations are inconsistent with the agency’s public practice and statements regarding Section 44-1-60

DHEC affirmatively told the Petitioners in this case that they may seek a contested case before the Administrative Law Court (“ALC”) as “affected persons” pursuant to 44-1-60(F). For

example, in its letter notifying Petitioners that the Board had declined review of their case, DHEC explained that Petitioners' next step would be to seek review in the Administrative Law Court as "affected persons" pursuant to Section 44-1-60. R. at 35-36. This accords with other DHEC's public statements regarding Section 44-1-60 and review before the ALC generally, including, for example, DHEC's explanation of "contested cases" and "appeals" on its website,¹ its "Guide to Board Review,"² and its form letter sent to every person who receives notice of any DHEC decision—including 401 Water Quality Certifications and every other kind of environmental permit—that states in bold, at the very top of the page "Notice of Appeal Procedure, Pursuant to S.C. Code Section 44-1-60."³ In every public statement that the agency has made regarding who may seek review before the ALC and under what statute that "right to request a contested case before the Administrative Law Court" arises, DHEC has stated that "affected persons" may invoke review procedures pursuant to Section 44-1-60(F).

Counsel for the Federation are unaware of any case, regulation, ruling, or any statement at all where DHEC has previously offered the interpretations that it now offers before this Court. This Court's prior decisions in cases where DHEC was a party suggests that the agency maintained its general position that the language of Section 44-1-60 controls who may seek review before the Administrative Law Court. *See, e.g., Amisub of S.C., Inc. v. S.C. DHEC*, 403 S.C. 576, 585, 743 S.E.2d 786, 791 (2013) (describing 44-1-60(F)(2) as "allowing applicants, permittees, licensees, or affected persons to file a request for a contested case hearing with the ALC in accordance with the APA after receiving a written decision from DHEC").

¹ S.C. DHEC, "Contested Cases, Appeals," *available at* <http://www.scdhec.gov/Agency/BoardofDirectors/ContestedCases/>

² S.C. DHEC, "Guide to Board Review," *available at* <http://www.scdhec.gov/Agency/BoardofDirectors/GuidetoBoardReview/>

³ S.C. DHEC, "Notice of Appeals Procedure," *available at* https://www.scdhec.gov/HomeAndEnvironment/Docs/Notice_of_Appeal_Procedure.pdf

Because DHEC's response to the *amicus* brief asserts positions so directly contrary to both prior agency statements about Section 44-1-60 and specific statements made to Petitioners in the record of this case, its new position could potentially be judicially estopped. *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 597, 748 S.E.2d 781, 788 (2013) ("Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding.").

But at a minimum, DHEC's interpretations deserve no deference. The United States Supreme Court's decision in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), addressed deference to agency interpretations first advanced in litigation that are inconsistent with prior agency statements. *Bowen* concerned a federal agency's attempt to make certain Medicare regulations retroactive, and its request for judicial deference under *Chevron* and other cases to a litigation position interpreting a statutory clause—"clause (ii)." *Id* at 205-06. The Court declined:

We have never applied the principle of those cases to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice. To the contrary, we have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question, on the ground that "Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands." Even if we were to sanction departure from this principle in some cases, we would not do so here. Far from being a reasoned and consistent view of the scope of clause (ii), the Secretary's current interpretation of clause (ii) is contrary to the narrow view of that provision advocated in past cases Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate.

488 U.S. at 212-13.

This Court applied the principle of *Bowen* in *Gilstrap v. South Carolina Budget & Control Board*, 310 S.C. 210, 215, 423 S.E.2d 101, 104 (1992). In *Gilstrap*, the Board interpreted its authorizing statute to allow reductions in certain state agencies' budget

appropriations according to how much each specific agency's budget grew in the last year. This Court disagreed, finding that the statute mandated "across the board proportional cuts" rather than cuts based on budget growth. 310 S.C. at 214, 423 S.E.2d at 104. In declining to give the Board's interpretation deference, this Court explained that deference is only appropriate where an agency has "consistently applied a statute in a particular manner." 310 S.C. at 215, 423 S.E.2d at 104. The Court noted that the Board's prior cuts were all proportional rather than based on budget growth, that the Board's "current interpretation [was] in conflict with the legislative and administrative history of the Act," and that the agency's position was only developed during litigation. *Id.* Citing *Bowen*, this Court held that "[d]eferred to this interpretation would be inappropriate." *Id.*

Murphy v. S.C. DHEC, 396 S.C. 633, 640, 723 S.E.2d 191, 195 (2012), does not state a different principle. In *Murphy*, the Court deferred to DHEC's interpretation of the word "vicinity" in the agency's water quality regulations presented in testimony before the ALC. But DHEC's "interpretation" there was limited to the specific circumstances in *Murphy*—the staff member who processed the challenged authorization simply explained how she used her "best professional judgment" to apply the word "vicinity" in that context "to include more than just the 727 feet of stream," or even "many miles," since she "did not have an exact area" in mind. 396 S.C. at 640, 723 S.E.2d at 195. The Court found that particular application of the term reasonable, deeming it consistent with the plain language of the regulation and more reasonable than the challenger's contrary interpretation—which was so narrow that it "would render it impossible to ever obtain a certification to fill a portion of a stream." *Id.* In contrast to *Murphy*, DHEC's interpretations in this case are not supported by any agency practice prior to this appeal,

are contrary to the plain language of the statute, and involve interpretation of an important statutory right that will have impacts beyond this specific case.

As in *Gilstrap* and *Bowen*, DHEC's litigation position in this case is contrary to the agency's practice and statements and is entitled to no deference.

B. DHEC's interpretation contravenes the explicit intent and effect of Section 44-1-60 to create a uniform appeals procedure

As this Court has recognized, Section 44-1-60 "substantially reformed" how a person seeks review of DHEC decisions. *Chem-Nuclear Sys., LLC v. S.C. DHEC*, 374 S.C. 201, 204, 648 S.E.2d 601, 602 (2007). Prior to Section 44-1-60, individual DHEC regulations set out various competing and confusing appeals procedures specific to individual authorizations. Act 387 of 2006, which created Section 44-1-60, was explicitly "intended to provide a uniform procedure for contested cases and appeals" of DHEC decisions, and the General Assembly stated that "to the extent that a provision of this act conflicts with an existing statute or regulation, the provisions of this act are controlling." 2006 S.C. Acts 387, § 53.

Discarding Section 44-1-60 as "procedural," and relying on outdated regulations to *limit* who may invoke the review process established by that statute is contrary to the General Assembly's explicit intent in creating a uniform procedure that superseded the idiosyncratic regulations. S.C. DHEC's Resp. to Br. of *Amicus Curiae* at 2-8 (hereinafter "DHEC Br."). Indeed, the "substantive" provision relied on by DHEC, Regulation 61-101(G), contemplates review of DHEC staff decisions going straight to the ALC, which conflicts directly with Section 44-1-60's requirement that review first be sought before the DHEC Board, and *then* with the ALC.

The relationship between Section 44-1-60 and provisions of Regulation 61-101 was addressed in *South Carolina Coastal Conservation League v. SC DHEC*, 390 S.C. 418, 702

S.E.2d 246 (2010). This Court explained that if the provisions of Section 44-1-60 conflict with the provisions of Regulation 61-101, Section 44-1-60 controls. 390 S.C. at 429, 702 S.E.2d at 252. Nevertheless, courts will read regulations to avoid conflict if possible to encourage DHEC's "responsib[ility] for managing the welfare of our public health systems and environment" and "further DHEC's policy goals including providing notice to the public, fostering openness, and keeping the public informed about important environmental decisions." 390 S.C. at 430, 702 S.E.2d at 252-53. In effect, the Court reasoned that Section 44-1-60 sets a floor for providing review of DHEC decisions that DHEC may expand through regulation but not restrict. *Id.* Because Regulation 61-101 provided for more generous notice provisions than Section 44-1-60, this Court harmonized the two and found no conflict. *Id.* In contrast, DHEC here is attempting to use Regulation 61-101 to restrict the class of persons that can avail themselves of the process the General Assembly established in Section 44-1-60. DHEC reads the two laws as conflicting and contrary to its policy goals of encouraging public participation; in such a circumstance, as explained by this Court in the *League* case, the language of Section 44-1-60 prevails.

As DHEC admits, the "cardinal rule" of statutory interpretation is to effectuate the intent of the legislature. *See, e.g., Ranucci v. Crain*, 409 S.C. 493, 500, 763 S.E.2d 189, 192 (2014); DHEC Br. at 2. The fact that the title of the statute includes the word "procedure," does not specifically enumerate specific DHEC authorizations, and does not define "affected persons" with greater specificity hardly means that the statute should be ignored. *See* DHEC Br. at 3-8. To the contrary, these characteristics reflect the General Assembly's clear and explicit intent in adopting Section 44-1-60 to reform the appeals procedure for all DHEC decisions and authoritatively state who may invoke that procedure and how.

In arguing that Section 44-1-60 doesn't adequately specify which DHEC authorizations it applies to, see DHEC Br. at 4, DHEC conspicuously overlooks Section 44-1-60(A), which specifies that the statute applies to “[a]ll department decisions involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other actions of the department which may give rise to a contested case.” Likewise, its complaint that Section 44-1-60 does not adequately define who “affected persons” ignores the term’s common sense meaning reflected in a long line of judicial precedent – that “affected persons” are those who DHEC’s decision will injure that assert an interest within the zone of interests protected by the statute authorizing DHEC’s action.⁴ See *Amicus* Br. at 4-6. DHEC does not contest the *amicus* brief’s citation of legal authority applicable to the term “affected persons,”⁵ or contest that this interpretation of

⁴ Both DHEC and Roper misstate the analysis in the *amicus* brief a number of times. DHEC is incorrect in stating that the *amicus* brief only identifies 44-1-60(E) as “creating a right” to seek review before the Administrative Law Court. DHEC Br. at 4. The *amicus* brief generally cites to the provisions Section 44-1-60 that mention “affected persons”—sections (E), (F), and (G)—and discusses the right of “affected persons” to seek review before the DHEC Board and Administrative Law Court as provided by sections (F) and (G). *Amicus* Br. at 3. Further, both DHEC and Roper misstate that the *amicus* brief’s analysis of “affected persons” requires a showing that the *person* is within the zone of interests of protected by the statute that authorizes the challenged agency action. DHEC Br. at 2, 7; Roper Pond, LLC’s Reply Br. to *Amicus Curiae* Br. at 8 (hereinafter “Roper Br.”). That is not correct; the *amicus* brief states that an “affected person’s” allegedly injured *interest* must be within the zone of interests protected by the statute that authorizes the agency action. This misunderstanding clarifies why the Pollution Control Act’s general statement that the Act does not create a private right of action is irrelevant to the analysis in the *amicus* brief. DHEC Br. at 7. The Federation does not contend that the Pollution Control Act creates a private right of action to appeal agency permitting decisions to the ALC; Section 44-1-60 provides that right to “affected persons,” whose ability to challenge permits issued pursuant to the Pollution Control Act is limited to alleging injuries based on the conservational, aesthetic, and recreational interests protected by the Pollution Control Act. See *Amicus* Br. at 10-11.

⁵ DHEC erroneously characterizes the analysis of the *amicus* brief as claiming that Section 44-1-60 “confers a general grant of standing on all parties.” See, e.g., DHEC Br. at 6. This is incorrect, as the *amicus* brief explains at length that “affected persons” is a limited class of persons who can illustrate injury-in-fact sufficient to distinguish them from a person alleging only a generalized grievance or no personalized interest in the agency action and establish standing. *Amicus* Br. at 4-6 (discussing *Smiley v. S.C. DHEC*, 374 S.C. 326, 332, 649 S.E.2d 31, 34 (2007) and *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992)). For further

“affected persons” is generally accepted in other jurisdictions interpreting similar statutes. This analysis shows that the scope of the right granted by Section 44-1-60 is not ambiguous, but deliberately general in accord with the General Assembly’s stated purpose to create a generally applicable statute establishing a uniform procedure.

The specific definitions of “affected person” in the Certificate of Need (“CON”) and alcohol licensing statutes only confirm that the undefined term in Section 44-1-60 must be given the common sense meaning supported by case law. Unlike the uniform procedure in Section 44-1-60, which applies to a diverse variety of DHEC actions under many statutes, the CON and alcohol licensing provisions only apply to specific agency actions under those individual statutes. To expect the same specificity in a statute that is intended to apply to a wide variety of actions pursuant to a wide variety of statutes that each protect a different class of interests and people is to ignore the General Assembly’s purpose of creating a general, uniform statute. The *amicus* brief discusses these statutes for another principle: that applying the limitations of “constitutional” standing to deprive a statutorily defined class of persons their right to invoke statutorily-created procedures is an unreasonable overstep into the General Assembly’s power to create a right and its remedy. *Amicus* Br. at 7-9. Just as it would be unreasonable to say that a person who lives within five miles of an alcohol licensee cannot seek review before the ALC pursuant to S.C. Code Ann. § 61-6-185 because they do not show “redressibility,” so too would it be unreasonable to apply principles of constitutional standing to restrict the procedures afforded to “affected persons” under Section 44-1-60. See *Freemantle v. Preston*, 398 S.C. 186, 194, 728 S.E.2d 40, 44 (2012) (“The traditional concepts of constitutional standing are inapplicable when standing is conferred by statute.”). The take away is that “affected persons”

discussion of this point, see *infra* at note 7 and relevant text, responding to Roper’s similar claim that, under the analysis of the *amicus* brief, “there would be no person in the state who was not entitled to the purported statutory standing.” Roper Br. at 8.

has a clear and defined meaning relevant to this statute and its purpose, such that neither this Court nor the agency should take the phrase's general scope as license to change its meaning as intended by the General Assembly. DHEC does not contest this analysis, either.

C. DHEC's interpretations conflict with the clear meaning of "affected persons" in Section 44-1-60 and deserve no deference

Even if DHEC's interpretations are not disregarded as litigating positions contrary to prior agency practice, whether to defer to an agency interpretation is a "is a two-step process," that reflects the United States Supreme Court's doctrine in *Chevron*: "First, a court must determine whether the language of a statute or regulation directly speaks to the issue. If so, the court must utilize the clear meaning of the statute or regulation. If the statute or regulation is silent or ambiguous with respect to the specific issue, the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference." *Kiawah Dev. Partners, II v. S.C. DHEC*, 411 S.C. 16, 32-33, 766 S.E.2d 707, 717 (2014) (internal citations and quotations omitted) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)). This Court has likewise stated that it will respect an agency's interpretation unless there are "cogent" or "compelling" reasons not to, like when the agency's interpretation is "manifestly contrary to the statute." 411 S.C. at 33-35, 766 S.E.2d at 718. Here, the meaning of "affected persons" in Section 44-1-60 is clear given the phrase's generally accepted use as a term of art that comports with the General Assembly's intent in enacting the statute; DHEC's interpretation limiting that meaning is "manifestly contrary" to the clear language of the statute—it is contrary to the law and deserves no deference.

II. Roper Pond LLC's arguments are not persuasive

A. The Federation is not precluded from discussing Section 44-1-60 in the *amicus* brief

Roper's argument that Section 44-1-60 is not at issue in this appeal by distinguishing between "jurisdiction" and "standing" overly complicates the administrative review provided by Section 44-1-60. Roper Pond, LLC's Reply Br. to *Amicus Curiae* Br. at 2 (hereinafter "Roper Br."). Section 44-1-60 creates an appeals process that vests mandatory authority in the ALC. If a person satisfies the statutory criteria, then the ALC "shall" hear the challenge, "which is consistent with the legislative purpose" of Section 44-1-60. *Berry v. S.C. DHEC*, 402 S.C. 358, 364, 742 S.E.2d 2, 5 (2013). Likewise, standing exists where a statute confers a right on a person to sue. *Youngblood v. S.C. DSS*, 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013). Thus, an "affected person's" ability to bring a contested case before the ALC and the ALC's obligation to hear that challenge are related. Roper's attempt to dismiss the ALC's invocation of Section 44-1-60 as concerning "jurisdiction" rather than "standing" is simply an attempt to confuse demonstrable evidence that Petitioners' right to bring a contested case under Section 44-1-60 has always been at issue in this case and is properly before this Court. As a question of law and essential element of the statute that enables the administrative review in this case, both Petitioners and *amicus* may properly discuss the meaning of the phrase "affected persons" in Section 44-1-60.

Because standing to seek an administrative appeal before the ALC under Section 44-1-60 has been raised and argued at every stage of this proceeding, Roper's reliance on *MRI at Belfair, LLC v. S.C. DHEC*, 394 S.C. 567, 576, 716 S.E.2d 111, 115 (Ct. App. 2011), and *James v. Anne's Incorporated*, 390 S.C. 188, 193-94, 701 S.E.2d 730, 733 (2010), for its argument that *amicus*

may not discuss Section 44-1-60 because the issue was not preserved by Petitioners on appeal, see Roper Br. at 2, is misplaced.

B. No principle or case cited by Roper supports interpreting “affected person” in Section 44-1-60 to require constitutional standing

First, Roper is simply incorrect to claim that *Smiley* or *Bailey* “clearly and definitively addressed” whether an “affected person” under Section 44-1-60 must show “constitutional standing.” Roper Br. at 3. Roper cannot dispute that Section 44-1-60 was not before this Court in *Smiley*. See 374 S.C. at 329, 649 S.E.2d at 32 n.2. Nor can Roper dispute, as highlighted at page 6 of the *amicus* brief, this Court’s adoption in *Smiley* of the principle that “‘a concrete and particularized invasion’ of a legally protected interest” is what distinguishes “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,” such that “[i]njury in fact’ reflects the statutory requirement that a person be ‘adversely affected’ or ‘aggrieved.’” 374 S.C. at 332, 649 S.E.2d at 34. Roper also fails to distinguish *South Carolina Wildlife Federation v. South Carolina Coastal Council*, 296 S.C. 187, 190, 371 S.E.2d 521, 523 (1988), discussed at page 10 of the *amicus* brief, where this Court held that the Federation and other groups had standing because they “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.”

Roper relies solely on the Court of Appeals decision in *Bailey* to claim that South Carolina courts have settled that constitutional principles apply to the phrase “affected person” in Section 44-1-60. Roper Br. at 3 (discussing *Bailey v. S.C. DHEC*, 388 S.C. 1, 693 S.E.2d 426 (Ct. App. 2010)). But the court in *Bailey* did not specifically address Section 44-1-60 either, or the precedent cited above where the Supreme Court did not apply constitutional standing principles to determine whether a person had standing to seek administrative review of a DHEC

decision. Thus, *Bailey* no more settles the meaning of “affected persons” in Section 44-1-60 than any of the other cases cited by the parties’ in this proceeding. At best, *Bailey* is an example of the ongoing confusion regarding the difference between administrative review by statute and judicial standing that demands resolution by this Court.⁶

Second, Roper ignores important differences between South Carolina and federal courts in citing federal cases for the proposition that the right to appeal as an “affected person” under Section 44-1-60 is “not a substitute for constitutional standing.” Roper Br. at 4. In federal courts, every case must satisfy the principles of Article III of the United States Constitution. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992) (“standing is an essential and unchanging part of the case-or-controversy requirement of Article III.”). South Carolina courts are not bound Article III of the United States Constitution, and do not apply the principles of “constitutional standing” in every case. *See Freemantle*, 398 S.C. at 194, 728 S.E.2d at 44 (“The traditional concepts of constitutional standing are inapplicable when standing is conferred by statute.”); *S.C. Pub. Interest Found. v. S. Carolina Transp. Infrastructure Bank*, 403 S.C. 640, 645, 744 S.E.2d 521, 524 (2013) (explaining that “the rule of standing is not inflexible” and “[t]he public importance exception grants standing to a party who has not suffered a particularized injury.”). As such, federal court doctrine rationalizing the principles of Article III standing with statutory grant of standing under the federal Administrative Procedures Act does not make sense in South Carolina. This is particularly true where, as here, the issue is whether a party was entitled to participate in an administrative process created by statute, not whether the party could invoke judicial review.

⁶ Petitioners’ arguments that they have standing even under constitutional principles do not foreclose the Federation from discussing the generally accepted interpretation of “affected persons” in its *amicus* brief. Petitioners’ ability to seek review of a DHEC decision before the ALC pursuant to Section 44-1-60 is at issue in this case, *see supra* Part I.A. *See also* Rule 213, SCACR.

Roper also ignores the fact that federal courts “relax” the standards of Article III to honor Congress’ intent in providing judicial review of an administrative decision. *See, e.g., Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012) (“We apply the test in keeping with Congress’s “evident intent” when enacting the APA “to make agency action presumptively reviewable” and “foreclose[] suit only when . . . it cannot reasonably be assumed that Congress intended to permit the suit.”); *Mendoza v. Perez*, 754 F.3d 1002, 1010 (D.C. Cir. 2014) (“When plaintiffs challenge an action taken without required procedural safeguards, they must establish the agency action threatens their concrete interest. . . . Once that threshold is satisfied, the normal standards for immediacy and redressability are relaxed.”). Thus, to the extent that federal cases encourage rationalizing the statutory grant of administrative review with constitutional standing principles, those cases encourage relaxing constitutional standing principles to honor a more general legislative grant of review. Roper’s claim that federal cases teach the opposite—that more general grants of administrative review should be limited by constitutional standing principles—is incorrect.

Third, the potential that an “affected person” may seek review before the ALC but not have standing before the Court of Appeals does not require this Court to ignore the clear language and intent of Section 44-1-60. Roper Br. at 5. Roper’s argument that a more permissive review provision authored by the General Assembly should be limited based on a court’s interest in judicial economy disregards of this Court’s obligation to honor the General Assembly’s intent in enacting a statute. Take, for example, the alcohol licensing statute. S.C. Code Ann. § 61-6-185 authorizes any “person residing in the county in which a retail liquor license is requested” to protest the issuance of the license in a contested case hearing before the ALC, the result of which may be appealed to the Court of Appeals pursuant to the South

Carolina Administrative Procedures Act. *See, e.g., S.C. Dep't of Revenue v. Sandalwood Soc. Club*, 399 S.C. 267, 277, 731 S.E.2d 330, 335 (Ct. App. 2012). It is not difficult to imagine that person challenging a liquor license, although properly before the ALC as a resident of the same county, would not satisfy the elements of constitutional standing. But it would be improper for a court to modify the clear statutory text authorizing that person within the same county to seek review of the liquor license in the ALC because of this result. Similarly, a court cannot ignore the clear language and legislative intent of Section 44-1-60 because the statute grants the right to seek review of DHEC decisions before the ALC to a larger class of people than may be able to show constitutional standing.

Fourth, the CON statute's unique definition of "affected person" does not show that the General Assembly lacked "manifest intent" to provide a right of administrative review to "affected persons" under Section 44-1-60. *Roper Br.* at 6. Like DHEC, *Roper Pond* contends that Section 44-1-60's failure to identify "affected persons" with any greater specificity is reason to ignore the General Assembly's plain language stating that "affected persons" may petition the ALC for review of DHEC decisions. But the General Assembly's explicit intent was to create a general statute that established a uniform procedure superseding other, more specific appeals procedures controlled by individual DHEC regulations. *See supra* Part I.B. The generally accepted definition of "affected person" discussed in the *amicus* brief comports with the General Assembly's intent to create one statute that authoritatively stated how to appeal DHEC decisions and who may do so in general rather than specific terms. *See supra* Part I.B.

Neither the CON statute nor *Taylor v. Aiken County Assessor*, 402 S.C. 559, 741 S.E.2d 31 (Ct. App. 2013), illustrates otherwise. The CON statute is a specific statute designed for a specific authorization, and is distinguishable from the generally applicable Section 44-1-60. *See*

supra Part I.B. Similarly, the court in *Taylor* interpreted a specific provision of the South Carolina Revenue Procedure Act that stated only “property taxpayers” may appeal county tax assessments to an intermediate body whose sole purpose is reviewing appeals of property tax assessments, subject to the review ALC. 402 S.C. at 561-63 741 S.E.2d 32-33. Like the CON statute, the statutory scheme in *Taylor* and the necessity of its specific language is fundamentally distinguishable from the general language used by the General Assembly to create a uniform statute controlling appeals of all DHEC decisions. *See supra* Part I.B.

Fifth, the standard explained in the amicus brief is not a generalized grant of standing to any and all persons. Roper Br. at 8. Both DHEC and Roper make the mistake of ignoring the requirement that an “affected person” must show injury.⁷ *See Amicus* Br. at 3-6. As this Court explained in *Smiley*, injury identifies an “affected person” as someone with sufficient interest in the outcome of the litigation to support standing, and distinguishes an affected person from any other person asserting a generalized grievance. *Amicus* Br. at 6 (discussing *Smiley v. S.C. DHEC*, 374 S.C. 326, 332, 649 S.E.2d 31, 34 (2007)). In the context of agency action, a person shows injury-in-fact by showing that the agency action will injure their concrete interest that it is within the zone of interests protected by the statute that authorizes the agency action. *Amicus* Br. at 6.

Contrary to both DHEC and Roper’s characterization, it is the *interest* and not the *person* that must be within the zone of interests protected by the agency’s statute.⁸ This ensures that the challenger is alleging an issue relevant to the agency’s delegated authority; for example, that someone challenging an authorization issued pursuant to the Pollution Control Act is asserting an interest that is within the conservational, aesthetic, and recreational interests protected by that

⁷ *See supra* note 5.

⁸ *See supra* note 4.

Act.⁹ *Amicus* Br. at 11-12. The universe of interests protected by the Pollution Control Act is broad, but it defines the universe within which a person must illustrate their own personal and concrete injury. Neither Roper nor DHEC seem to grasp this concept, which is generally accepted by every jurisdiction interpreting a statute authorizing “affected” or “aggrieved” persons to challenge agency action before an administrative tribunal. *Amicus* Br. at 5 n.1.

Roper’s misunderstanding illustrates why *Carnival Corp. v. Historic Ansonborough Neighborhood Association*, 407 S.C. 67, 742 S.E.2d 846 (2014), is not relevant to this issue. Roper Br. at 9-10. The Court in *Carnival* applied constitutional standing principles in the context of tort and zoning claims in a judicial forum, whereas the present case concerns a statutorily created administrative procedure that the General Assembly intended to make available to “affected persons.” See *Carnival*, 407 S.C. at 73, 742 S.E.2d at 849. Compare with *State v. Moorer*, 152 S.C. 455, 150 S.E. 269, 274 (1929) (recognizing that the General Assembly may create “new right with its remedy” and “vest in some board or person power to adjudicate all matters arising under the statute.”). Because *Carnival* addressed a zoning statute that implicated different rights, remedies, and claims of injury in an altogether different judicial context, Roper’s analogy to this Court’s analysis in that case is misplaced.

Sixth and finally, Roper’s claim that private ownership of land is required for standing is incorrect. No South Carolina court has limited a person’s ability to assert aesthetic, environmental, recreational interests because of a lack of property interest, and nothing in *Smiley*

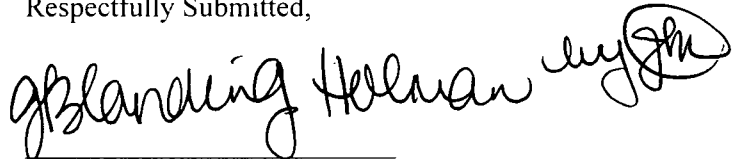
⁹ The analysis presented in the *amicus* brief does not, as Roper claims, open the administrative review process to those that allege nonjusticiable injuries based on “view alone.” Roper Br. at 10. The Supreme Court has made clear that personalized aesthetic injuries are sufficient to confer standing. See, e.g., *Hill v. S.C. DHEC*, 389 S.C. 1, 22, 698 S.E.2d 612, 623 (2010) (“South Carolina case law has specifically recognized an injury to one’s aesthetic and recreational interests [are] judicially cognizable injur[ies] in fact.”). As described above, the analysis articulated in the *amicus* brief distinguishes a person with sufficient personalized interest, aesthetic or otherwise, from a person with a generalized grievance.

limits its analysis to use of public land. Roper fails to distinguish the other cases cited in the *amicus* brief that make this point, illustrating that this Court and the Courts of Appeal have routinely found that a person may establish standing based upon an aesthetic or recreational interests in land that they do not own. *See Amicus Br.* at 14-16 (citing, e.g., *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. DNR*, 345 S.C. 594, 601-02, 550 S.E.2d 287, 291-92 (2001); *S.C. Wildlife Federation*, 296 S.C. at 189, 371 S.E.2d at 522; *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. DHEC*, 348 S.C. 507, 560 S.E.2d 410 (2002)).

CONCLUSION

As stated in the *amicus* brief, this case presents an opportunity for this Court to clarify the requirements to be an "affected person" under Section 44-1-60. The General Assembly's intent as well as the statutory text and structure, combined with precedent from this Court and others, support defining that term to include persons injured by agency action where their injury falls within the zone of interests protected by the statute that authorizes the agency action

Respectfully Submitted,



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Attorney for Amicus Curiae

Charleston, SC
March 12, 2015

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.

CERTIFICATE OF SERVICE

I hereby certify that on this date I served copies of the Reply 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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March 12, 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
Appellate Case No. 2013-001521

Dear Mr. Shearouse:

Please find enclosed the original and fifteen (15) copies of the Reply Brief of *Amicus Curiae* filed on behalf of the South Carolina Wildlife Federation.

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 (with enclosures)

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MAR 16 2015

S.C. SUPREME COURT