THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Appellant Case No. 2014-000847

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control.. Appellants,

vs.

South Carolina State Ports Authority and South Carolina Department of Health and Environmental Control.. Respondents.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 2

I. The ALC Erred in Entering Summary Judgment on Standing 2

A. The ALC's Interpretation of "Affected Person" Was Clear Error 2

B. To The Extent Article III Constitutional Standing Is Required, an Article III Court Ruled that Community Groups Have Article III Standing 5

C. Record Evidence Demonstrated Community Groups' Standing Under Any Test 6

1. The Notion That SPA's $35 Million Cruise Terminal Will Change Nothing Is Facially Implausible, And Disputed 7

2. Arguments about the Weight of Evidence Are Not Grounds for Ignoring It 9

D. The Community Groups Have Established Associational Standing 11

E. The Community Groups Have Established Public Importance Standing 13

II. The ALC Erred in Failing to Vacate SPA's Facially Invalid Permit 15

A. The Lack of Required Water Quality Certification Is Legally Fatal 16

B. SPA's Mootness/Waiver Argument Is Baseless 19

C. The ALC Order Denying the Motion to Vacate is Reviewable 20

D. The Motion to Vacate Was Not a Motion for Summary Judgment 21

III. The Order Denying Discovery Was A Patent Abuse of Discretion 22

A. Respondents and the ALC Understood That Discovery Extended Beyond May 20, 2013 22

B. Respondents Offer No Grounds to Sustain the ALC's Abuse of Discretion....23

C. There is No Barrier to Reviewing the Discovery Order....24

IV. The ALC Abused Its Discretion in Sanctioning the Community Groups for Offering a Reasonable and Good Faith Interpretation of an Ambiguous Statute....27

CONCLUSION....31

TABLE OF AUTHORITIES

Federal Cases

AES Sparrows Point LNG v. Wilson,
589 F.3d 721 (4th Cir. 2009)

Allen v. Wright,
468 U.S. 737 (1984)

Bennett v. Spear,
520 U.S. 154 (1997)

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514 U.S. 122 (1995)

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840 F.2d 45 (D.C. Cir. 1988)

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477 U.S. 274 (1986)

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504 U.S. 555 (1992)

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933 F.2d 1246 (4th Cir. 1991)

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426 U.S. 26 (1976)

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412 U.S. 669 (1973)

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517 U.S. 544 (1996)

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422 U.S. 490 (1975)

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380 S.C. 191, 669 S.E.2d 337 (2008)

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398 S.C. 323, 730 S.E.2d 282 (2012)

Bailey v. S. C. Department of Health & Environmental Control,
388 S.C. 1, 693 S.E.2d 426 (Ct. App. 2010)

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333 S.C. 519, 511 S.E.2d 69 (1999)

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344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001)

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366 S.C. 354, 622 S.E.2d 533 (2005)

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407 S.C. 67, 742 S.E.2d 846 (2014)

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751 S.E.2d 555 (Ga. Ct. App. 2013)

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395 S.C. 67, 716 S.E.2d 877 (2011)

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119 Or. App. 375 (Or. Ct. App. 1993)

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09-ALJ-17-0458-CC, 2010 WL 6782564, at
*4-5 (SCALC June 2010)

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& Environmental Control*, 350 S.C. 39, 564 S.E.2d
341 (Ct. App. 2002)

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347 S.C. 460, 556 S.E.2d 397 (Ct.App.2001)

Dawkins v. Fields,
354 S.C 58, 580 S.E.2d 433 (2003)

Degenhart v. Knights of Columbus,
309 S.C. 114, 420 S.E.2d 495 (1992)

Edge v. State Farm Mutual Automobile Insurance Co.,
366 S.C. 511, 623 S.E.2d 387 (2005)

Empire Power Co. v. N.C. Dep't of Environment, Health & Natural Resources, Div. of Environmental Management,
447 S.E.2d 768 (N.C. 1994)

Ex parte Bon Secours-St. Francis Xavier Hospital, Inc.
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349 S.C. 558, 564 S.E.2d 94 (200)

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926 A.2d 1197 (Me. 2007)

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393 S.C. 350, 713 S.E.2d 287 (2011)

Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.,
385 S.C. 452, 684 S.E.2d 756 (2009)

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389 S.C. 1, 698 S.E.2d 612 (2010)

Hodges v. Rainey,
341 S.C. 79, 533 S.E.2d 578 (2000)

Hudson v. S.C. Department of Highways & Public Transp.,
324 S.C. 245, 478 S.E.2d 839 (1996)

Huntley v. Young,
319 S.C. 559, 462 S.E.2d 860 (1995)

In re Anonymous Member of South Carolina Bar,
346 S.C. 177, 552 S.E.2d 10 (2001)

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284 S.C. 162, 325 S.E.2d 550 (Ct. App. 1984) *opinion quashed* 286 S.C. 85, 332 S.E.2d 100 (1985)

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339 S.C. 492, 530 S.E.2d 127 (2000)

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349 S.C. 607, 564 S.E.2d 649 (2002)

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365 S.C. 391, 618 S.E.2d 903 (2005)

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293 S.C. 372, 360 S.E.2d 535 (Ct. App. 1987)

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388 S.C. 486, 697 S.E.2d 587 (2010)

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ALC No. 11-ALJ-07-0618-CC (May 31, 2012)

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403 S.C. 560, 743 S.E.2d 778 (2013)

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315 S.C. 51, 445 S.E.2d 651 (Ct. App. 1994)

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No. 2012-212791, 2014 WL 3734366, *at 20 (S.C. Ct. App. July 30, 2014)

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374 S.C. 326, 649 S.E.2d 31 (2007)

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380 S.C. 406, 669 S.E.2d 647 (Ct. App. 2008)

Sparks v. Palmetto Hardwood, Inc.
406 S.C. 124, 750 S.E.2d 61 (2013)

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400 S.C. 329, 733 S.E.2d 611 (Ct. App. 2012)

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380 S.C. 499, 671 S.E.2d 606 (2009)

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354 S.C. 574, 582 S.E.2d 405 (2003)

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No. 2012-UP-677, 2012 WL 10864567 (S.C. Ct. App. Dec. 19, 2012)

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372 S.C. 1, 640 S.E.2d 486 (Ct. App. 2006)

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402 S.C. 311, 741 S.E.2d 515 (2013)

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U.S. Constitution, Article III
S.C. Const. art. V, § 9

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16 U.S.C. § 1456
33 U.S.C. § 1341

Federal Regulations

33 C.F.R. § 325.2(b)(1)(ii)

State Statutes

S.C Acts No. 387 (June 9, 2006)
S.C. Code Ann. § 1-23-380(4)
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S.C. Code Ann. Regs. 30-6
S.C. Code Ann. Regs. 61-101

S.C. Code Ann. Regs. 61-101(A)(3)
S.C. Code Ann. Regs. 61-101(A)(4)
S.C. Code Ann. Regs. 61-101(A)(7)
S.C. Code Ann. Regs. 61-101(A)(8)
S.C. Code Ann. Regs. 61-101(D)(1)
S.C. Code Ann. Regs. 61-101(E)(2)
S.C. Code Ann. Regs. 61-101(F)(3)(a)(4)
S.C. Code Ann. Regs. 61-101(F)(5)(a)
S.C. Code Ann. Regs. 61-101(F)(5)(b)
S.C. Code Ann. Regs. 61-101(G)(1)

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Rule 217, SCACR

S.C. Administrative Law Court Rules

Rule 21, SCALCR
Rule 19, SCRALC
Rule 68, SCALCR
Rule 69, SCALCR

S.C. Rules of Civil Procedure

Rule 6(d), SCRCP
Rule 59(e), SCRCP
Rule 60(b), SCRCP

INTRODUCTION

The orders on appeal issued by the S.C. Administrative Law Court ("ALC") limit the rights of families, businesses, and property owners to challenge the legality of permits issued for a proposed industrial-scale shipping terminal in the most historic area of the most well-preserved historic city in America. In reaching that end, each of the orders follows a path riddled with plain error. The response briefs filed by the S.C. State Ports Authority ("SPA") and the Department of Health and Environmental Control ("DHEC") do not redeem the orders or avoid the need for this Court to reverse.

As to standing, the Respondents do not dispute that the statutory term "affected person" includes those injured by a DHEC decision. Nor do they excuse the ALC's total disregard of internal SPA documents showing that the proposed terminal will host much larger cruise ships (3,500 passengers) than have ever home-based in Charleston. The Respondents contend that the ALC was right to disregard the sworn testimony clearly stating that a closer and larger terminal will worsen the noxious, dark toxic diesel soot that already envelopes nearby homes and forces inhabitants inside because the factual witnesses affiants were not experts, but precedent has universally approved lay testimony for standing. Finally, even assuming this case is governed by an "Article III" standing test, Respondents do not deny that an Article III court's 2013 determination that standing exists is *res judicata*.

The Respondents' approach to other issues on appeal consists largely of attempted avoidance. But the legal insufficiency of DHEC's terminal authorization document – which does not contain a necessary, federally-required certification – is an issue this Court can and should review. Likewise, there is no barrier to reviewing the ALC's

March 2014 order deeming that discovery "closed" in May 2013. The uncontested record shows that the parties and the ALC itself understood and explicitly recognized that discovery was ongoing in the intervening months, and the ALC's retroactive declaration otherwise was clear error.

Finally, the Respondents add nothing to rehabilitate the ALC's clear abuse of discretion in sanctioning parties for interpreting an ambiguous statute. The Community Groups' argument – that S.C. Code Ann. § 44-1-60(F)'s directive that the DHEC Board "must" hold a conference specified a mandatory duty – concerned a provision that had never been litigated or judicially construed. The sanctions order was a dramatic and disproportionate departure from precedent constraining a court's discretion to punish the litigants before them.

ARGUMENT

I. The ALC Erred in Entering Summary Judgment On Standing

A. The ALC's Interpretation of "Affected Person" Was Clear Error

The ALC erred in construing the term "affected person" inconsistently with the plain language of the statue, the context of other administrative review statutes, and judicial precedent regarding administrative review. The Community Groups have statutory standing as "affected persons" in this case.

"[A]ffected person" means a person who can demonstrate injury-in-fact, which, in the context of agency action, means someone who can show injury to a concrete interest

within the zone of interests protected by the statute. Appellants Second Amended Initial Br. at 25-28 (hereinafter "CG Br.").[1]

This accords with *Smiley v. S.C. DHEC*, where the Supreme Court discussed the "statutory requirement that a person be 'adversely affected' or 'aggrieved,'" and stated 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." 374 S.C. 326, 332, 649 S.E.2d 31, 34 (2007) (*quoting U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973)). *Smiley* does not hold that standing under Section 44-1-60 "should be determined by application of constitutional principles[.]" Br. of S.C. State Ports Auth. at 15 (hereinafter "SPA Br."). Section 44-1-60 was not before the Court in *Smiley*; the plaintiff in that case sought review under procedures predating enactment of Section 44-1-60. *See* 374 S.C. at 329, 649 S.E.2d at 32 n.2. Likewise, *Carnival Corp. v. Historic Ansonborough Neighborhood Association*, 407 S.C. 67, 742 S.E.2d 846 (2014), did not address the meaning of "affected person," SPA Br. at 23, but instead concerned standing for tort and zoning ordinance claims in a judicial forum. The present case centers on which "affected person[s]" can invoke an administrative procedure created by the General Assembly, and is determined by the statutory language and legislative intent rather than judicial principles of constitutional standing. *See State v. Moorer*, 152 S.C. 455, 150 S.E. 269, 274 (1929) (recognizing that the General

[1] *See, e.g., Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 126-27 (1995); *Empire Power Co. v. N.C. Dep't of Env't, Health & Natural Res., Div. of Envtl. Mgmt.*, 447 S.E.2d 768, 777, 780 (N.C. 1994); *Ctr. for a Sustainable Coast, Inc. v. Turner*, 751 S.E.2d 555, 558 (Ga. Ct. App. 2013).

Assembly may create "new right with its remedy" and "vest in some board or person power to adjudicate all matters arising under the statute.").

Respondents do not dispute that giving "affected person" its plain meaning harmonizes Section 44-1-60 with other statutes authorizing administrative review of DHEC permits. Nor do Respondents dispute that the imposition of judicial principles like "constitutional standing" on statutes that specify a universe of persons entitled to participate in the statutorily-created process – be it those within the same county or "five mile" radius contesting an alcohol license or an "affected person" invoking the same administrative process for a hazardous waste landfill – would be an improper judicial overstep into the legislative branch's authority. *See* CG Br. at 26.

Respondents only claim that interpreting "affected person" to mean an injured person renders the term surplusage. SPA Br. at 23-24.[2] But it is Respondents' position that reads the term out of the statute by superimposing a constitutional standing test that applies when "*no* statute confers standing." *Youngblood v. S.C. DSS*, 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013) (emphasis added). Giving "affected person" its plain meaning, by contrast, gives the phrase substance and respects the General Assembly's obvious intent in writing the statute – the opposite of making it surplusage.

Regulation 30-6's phrase "affected person with standing" does not limit which "affected person" can invoke § 44-1-60's administrative procedures. SPA Br. at 23. Regulation 30-6 requires "standing according to applicable law, including S.C. Code Title 44, Chapter 1," and Section 44-1-60 defines those entitled to invoke the procedure as "affected persons." *See Youngblood*, 402 S.C. at 317, 741 S.E.2d at 518 ("Statutory

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[2] DHEC agreed with and incorporated SPA's standing analysis, pages 15 through 32, in its initial brief. Initial Br. of Respondent S.C. DHEC at 3.

standing exists, as the name implies, when a statute confers a right to sue on a party"). Moreover, S.C. Code Ann. § 44-1-60 was enacted *after* Regulation 30-6 to establish a uniform system of administrative review for DHEC authorizations. *See* S.C. Act No. 387 § 53 (June 9, 2006). Respondents reading of the law and a preexisting regulation brings them into needless conflict, but they must be read to harmonize. *See Hodges v. Rainey*, 341 S.C. 79, 91, 533 S.E.2d 578, 584 (2000) ("The goal of statutory construction is to harmonize conflicting statutes whenever possible").

Finally, contrary to the Respondents' claim, SPA Br. at 25 n.24, the Community Groups' injury encompasses procedural injury as defined by federal courts, since DHEC's failure to conduct individualized Water Quality Certification review deprived them of robust public procedures intended to minimize environmental impacts. Respondents do not dispute the general principle that where a statute "gives cause of action to 'adversely affected or aggrieved' persons the need to show the causation and redressiblity elements of Article III standing are relaxed." *See* CG Br. at 27 (citing cases).

In summary, the term "affected person" under Section 44-1-60 means those injured by an agency's permitting decision, where such injury impacts interests protected by the underlying statute. The ALC's imposition of additional limitations to clear statutory text was clear error and must be reversed.

B. To the Extent Article III Constitutional Standing Is Required, an Article III Court Ruled that Community Groups Have Article III Standing

Even if the Community Groups must show the three elements of standing used by Article III courts to be "affected persons" under § 44-1-60, an Article III court already rejected SPA's contention that the Community Groups' members lack Article III standing

to contest permits for SPA's cruise terminal. *Preservation Society of Charleston v. U.S. Army Corps of Engineers*, No. 2:12–2942–RMG, 2013 WL 6488282 at *14-*15 (D.S.C. Sept. 18. 2013). Respondents do not contest that this issue has been litigated and resolved in the Community Groups' favor, and that the ALC was collaterally estopped from ruling to contrary. *See* CG Br. at 30-33; *Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 497 (Ct. App. 2006) (position on appeal "not argued in the brief is deemed abandoned and will not be considered by the appellate court."). Because SPA's cursory denial, SPA Br. at 13 n.20, is neither articulated nor "supported by authority," it is ineffective to prevent conceding this argument. *State v. Howard*, 384 S.C. 212, 217, 682 S.E.2d 42, 45 (Ct. App. 2009). Respondents have conceded that the ALC was collaterally estopped and the ALC's decision must therefore be reversed.

C. Record Evidence Demonstrated Community Groups Standing Under Any Test

To survive SPA's motion for summary judgment below, the Community Groups needed only show a dispute as to whether a new cruise terminal and the operations enabled by it would injure legally protected interests of their members. *See Thomas v. Waters*, 315 S.C. 534, 445 S.E.2d 659 (Ct. App. 1994).

Given that the ALC was required to "view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable" to the Community Groups, *Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.*, 385 S.C. 452, 456, 684 S.E.2d 756, 758 (2009), the ALC clearly erred in finding that multiple sworn affidavits and numerous documents from Respondents' own files did not create a single issue of fact as to whether a 100,000 square foot cruise terminal intended to service much larger vessels than have home based in Charleston before could injure persons living

nearby and, indeed, next door. Mrs. Robertson lives near the existing cruise terminal and adjacent to the site of the proposed larger terminal. She complains of impacts from the "thick smoke" emitted from cruise vessels at the existing terminal traveling to and enveloping her home, and being "forced to retreat indoors" within seconds of breathing the emissions that caused her throat to "immediately beg[i]n to hurt." Robertson Affid. at ¶¶ 6, 7. She and other affiants testified that they feared negative health impacts, as well as property damage from the cruise ships' "unbearable" diesel exhaust "coating [their] home[s] in filth." Robertson Affid. at ¶¶ 6, 7, 9, 10; *see also* CG Br. at 22-24 (discussing other affiants testimony). They further testified that the injection of thousands of cars and trucks into the small, already congested neighborhoods where they live, as well as the looming, fifteen-story-tall, thousand-feet-long shapes of constantly docked cruise ships will injure their property, aesthetic and investment-backed historic-preservation interests. *See* CG Br. at 10-14, 22-24.

The injuries alleged are legally protected interests sufficient to support standing, particularly when viewed in the light most favorable to the Community Groups as the non-moving party. *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."). None of the arguments offered by Respondents can obscure the ALC's basic legal error of entering summary judgment in the face of multiple and obviously contested issues of fact.

1. The Notion that SPA's $35 Million Cruise Terminal Will Change Nothing Is Facially Implausible, And Disputed

Respondents' counter-intuitive assertion that the cruise terminal will not change or increase the cruise operations said to give rise to injury, SPA Br. at 9-12, 22, is

contradicted by SPA's and DHEC's own documents showing that the new terminal is engineered and intended to host larger ships (3,500 passengers) than the one currently home based nearby (2,500 passengers) and bring more traffic (over 1,700 vehicles per cruise visit) into Charleston's small, extremely congested historic district. CG Br. at 8-9; Pet'rs' Resp. to Mot. for Summ. J. for Lack of Standing at SCPA 007493. This evidence is not negated by SPA's lawyers calling it "wrong," SPA Br. at 22.[3] And those documents, along with multiple affidavits asserting that SPA's much larger terminal (100,000 square feet versus 35,000 square feet) will, as intended, host much larger vessels that generate more pollution, readily distinguish this case from *Bailey v. S.C. DHEC*, 388 S.C. 1, 693 S.E.2d 426 (Ct. App. 2010), where there was *no* evidence supporting the plaintiff's allegation that the permitted dock would be used as a marina rather than as a private dock, as the permittee claimed. CG Br. at 8-9; Pet'rs' Resp. to Mot. for Summ. J. for Lack of Standing at SCPA 007493. The Community Groups presented substantial record evidence showing that the challenged DHEC permits authorizing the proposed cruise terminal will allow pollution from existing cruise operations to greatly increase in a way that will injure the legally protected interests of the Groups and their members, and that these injuries could not otherwise legally occur

[3] Rather than respond to the voluminous evidence that cruise operations will *increase* at the new terminal as permitted, SPA touts the affidavit of Peter Lehman, but that affidavit creates, at most, an *issue* of fact when considered alongside conflicting documents from SPA's own files (including prior emails from Lehman himself). Coincidentally, the ALC's March 2014 declaration that discovery had "closed" in May 2013 prevented the Community Groups from deposing Lehman and confronting him with the tens of thousands of pages discovery that SPA dumped throughout the fall of 2013 and into 2014.

without DHEC's authorizations.[4] CG Br. at 10-14; 22-24. That evidence alone distinguishes this case from *Bailey.*

2. Arguments about the Weight of Evidence Are Not Grounds for Ignoring It

Although set forth as legal rules that supposedly *prohibit* consideration of the affidavits submitted by the Groups' members, SPA's attacks on the weight and credibility of the affidavits do not support summary judgment.

Dawkins v. Fields, cited by Respondents, actually holds that allegations contained in a complaint are insufficient to resist summary judgment because they are "*not* an appropriate *substitute* for an *affidavit.*" 354 S.C 58, 68, 580 S.E.2d 433, 438 (2003) (emphasis added). *Shupe v. Settle* similarly held that a party cannot resist summary judgment by "relying upon the mere allegations of his complaint," but must disclose facts the party "intends to rely on *by affidavit.*" 315 S.C. 51, 516-17, 445 S.E.2d 651, 655 (Ct. App. 1994) (emphasis added). In addition to producing numerous documents from Respondents' own files to show standing, disclosing facts by affidavit is precisely what the Community Groups did here.

Supporting affidavits need only be based on "personal knowledge," setting forth facts that would be admissible at trial; evidence is admissible if it is relevant, *i.e.*, if "it tends to establish or to make more or less probable some matter at issue," either "directly or indirectly." *Peterson v. Nat'l R.R. Passenger Corp.*, 365 S.C. 391, 399, 618 S.E.2d 903, 907 (2005). Affiants need not be experts; rather, "lay witnesses are permitted to offer testimony in the form of opinions or inferences if the opinions or inferences are

[4] SPA itself has conceded that the existing facility does not meet federal homeland security requirements, is outdated, desolate, and must be replaced. Response to Motion for Summary Judgment, Exhibit A (SCPA 007504).

rationally based on the witness' perception." *State v. Douglas*, 380 S.C. 499, 502, 671 S.E.2d 606, 608 (2009). The Groups' members testified based on their personal knowledge, experience, and "inferences rationally based on [their] perception" from living next to the existing, much smaller cruise terminal that the new, much larger cruise terminal designed for much larger vessels will intensify the impacts of SPA's cruise operation and injure their legally protected interests. CG Br. at 10-14.

SPA's novel suggestion that injuries caused by a party whose actions are *authorized* by an agency cannot establish standing, SPA Br. at 20-21, is meritless, and contrary to the cases SPA cites. *Allen v. Wright* holds that injury need only "be 'fairly' traceable to the challenged [agency] action." 468 U.S. 737, 751(1984) (*citing Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976); *see also United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688 (1973). Standing is thus only defeated when the agency action is *unrelated* to the subsequent act that causes the party's alleged harm. For example, the agency action in *Simon* merely 'encouraged" hospitals to deny services to the plaintiffs and the requested relief could at most "discourage" hospitals from denying those services. 426 U.S. at 42.

Here, SPA legally cannot continue or expand its cruise operations without the challenged approvals. *See* S.C. Code Ann. § 48-39-130(A). The alleged injuries from continued and expanded cruise operation are not only "fairly traceable" to DHEC's approvals, those approvals were sought because they were necessary but-for prerequisites.[5]

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[5] Since the Community Groups specifically argued that they demonstrated standing "by showing injury-in-fact fairly traceable to DHEC's decisions," and assigned error to the ALC's "disregard[ing] evidence showing that a cruise terminal designed for larger vessels carrying more passengers would lead to the existence of larger vessels and

Florida Audubon Society v. Bentsen, 94 F.3d 658, 670 (D.C. Cir. 1996), addressed a claim of injury "far weaker than even the one alleged in *Simon*," where "the acts of not one, but several groups of third parties" needed to occur before any alleged injury could arise. Here, SPA sought DHEC's authorizations because SPA intends to build a larger cruise terminal to home base larger cruise ships, and this larger and more intensive operation will cause injury. DHEC's approval need not be the "last link in the chain" to be fairly traceable to injury. *Bennett v. Spear*, 520 U.S. 154, 168-69 (1997) (holding that a litigant "wrongly equates injury 'fairly traceable' to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation.").

The facts of *Smiley* confirm that SPA's argument is inconsistent with precedent. Mr. Smiley alleged that a DHEC permit allowed "Wild Dunes to periodically excavate sand from the public intertidal beach at the Isle of Palms," which in turn limited his beach jogging and injured his "aesthetic, conservational and recreational interest and values." 374 S.C. at 328, 330, 649 S.E.2d at 32, 33. Under Respondents' view, Mr. Smiley would have been unable to allege standing because the DHEC permit was not the last link in the causal chain.

D. The Community Groups Have Established Associational Standing

The three-part test for associational standing was recently summarized in *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 76, 753 S.E.2d 846, 851 (2014) (requiring injury to at least one member; that injury be within scope of organization's purpose; that participation of all members not required to maintain action). Respondents cite *Maryland Highways Contractors Ass'n, Inc. v. State*

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more passengers - and thus cause more pollution, more traffic, more damage and more disruption" that is the basis of the members' claimed injuries, CG Br. at 30, 33-34, SPA's claims that this is unpreserved, SPA Br. at 20-21, is wrong.

of Md., 933 F.2d 1246, 1251-52 (4th Cir. 1991), but that case simply found that an organization lacked associational standing because the only evidence of injury was inadmissible hearsay. *Id.* The members in this case provided voluminous evidence, based on their own personal knowledge, in affidavits and otherwise admissible evidence illustrating their individual standing.

Respondents offer no substantive argument as to why the numerous affidavits explaining how this case is germane to the purposes of the Community Groups do not satisfy the second requirement, which serves to prevent organizations from forcing "courts to resolve numerous issues as to which the organizations themselves enjoy little expertise and about which few of their members demonstrably care." *Humane Soc. of the U.S. v. Hodel*, 840 F.2d 45, 57 (D.C. Cir. 1988). The affidavits here explain how the case is germane to their Community Groups' purposes and expertise, and show that members demonstrably care.

The notion that an organization may only have standing if *every one* of its members shows injury is contrary to South Carolina law, and relies on a dissent in *Georgetown County League of Women Voters v. Smith Land*, 393 S.C. 350, 357-61, 713 S.E.2d 287, 291-93 (2011) (Hearn, J., dissenting). In the subsequent *Carnival* opinion, Justice Hearn, on behalf of a unanimous court, stated what Respondents concede is the "general rule": that "[a]n organization has associational standing 'if one or more of its members will suffer an individual injury by virtue of the contested act.'" 407 S.C. at 76, 753 S.E.2d at 850. Respondents did not seek leave to argue against binding precedent, *see* Rule 217, SCACR, and the Supreme Court's decision is binding. S.C. Const. art. V, § 9; *State v. Cheeks*, 400 S.C. 329, 342, 733 S.E.2d 611, 618 (Ct. App. 2012).

That rule applies with particular force in the permit-review context, where an organization does not "seek[] damages on behalf of its members" that would require the individual proof of each members' harm. *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 554 (1996).

Rather, where the organization seeks "some other form of prospective relief" than damages, like suits that seek to resolve a "question of law," *see Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Brock*, 477 U.S. 274, 287 (1986), courts will find associational standing based on the standing of one member because the requested remedy—resolution of an issue of law—will benefit both the injured member and other injured members alike even though they don't all participate. *Brown*, 517 U.S. at 553 (quoting *Warth*). Conferring standing to associations in those circumstances "recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others." *Brock*, 477 U.S. at 290.

E. The Community Groups Have Established Public Importance Standing

Respondents fail to distinguish cases like *Baird*, where the Supreme Court found allegations of unauthorized county-issued hospital bonds sufficient to establish public importance standing because "the issuance of the hospital bonds clearly impacts a profound public interest—the public health and welfare[,]" and those bringing the suit had "a significant interest in ensuring that their county acts within the legal parameters established by the legislature." 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999). Allegations of illegal government action are "the precise instance where the public importance exception should apply." *S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank*,

403 S.C. 640, 646, 744 S.E.2d 521, 524 (2013). The Community Groups allege that DHEC violated the law in issuing various authorizations permitting another state agency to build a large public works project that will cause legally prohibited impacts to residents as well as a federally protected and internationally celebrated historic district. *Carnival* is distinguishable because the plaintiffs in that case alleged that SPA's *existing* terminal was a nuisance and violated local zoning ordinances; here they challenge unlawful state agency permitting of a proposed state owned $35 million public terminal. *See* SPA Br. at 31.

The need for "future guidance" exists when an issue "transcends a purely private matter and rises to the level of public importance," *S.C. Pub. Interest Found.*, 403 S.C. 640, 645-46, 744 S.E.2d 521, 524 (2013) (*quoting ATC S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 198, 669 S.E.2d 337, 341 (2008)), as when the questions involved are of "wide concern, both to [government] personnel and to the public." *Baird*, 333 S.C. at 531, 511 S.E.2d at 75 (quoting *Thompson v. South Carolina Comm'n on Alcohol and Drug Abuse*, 267 S.C. 463, 229 S.E.2d 718 (1976)). This is a highly controversial and widely opposed public project that "transcend[s] a purely private matter," and ensuring that its impacts are minimized according to the law is of "wide concern." *See, e.g.*, 2014-2015 Appropriations Bill H. 4701, Pt. IB § 88.4 (providing funding for the terminal to use shorepower and in order to reduce its environmental impacts). The relief sought here includes a declaration that a permit term limiting the number and size of vessels that can call on the proposed terminal is indeed limited – which SPA has to date denied.

While SPA officials might prefer not to be challenged by families and businesses living next to its proposed industrial leisure cruise operation, SPA Br. at 32, it must

balance its development of the port with its mandate to protect the environment and the quality of life of citizens that live near its facilities. *See, e.g.*, S.C. Code Ann. § 54-3-80 (SPA must discharge its duties with "consideration given to diminish or mitigate any negative effect port operations or expansion may have upon the environment, transportation infrastructure, and quality of life of residents in communities located near existing or proposed port facilities."). And like DHEC, SPA is bound to follow the laws of this State.

II. The ALC Erred in Failing to Vacate SPA's Facially Invalid Permit

All parties agree that SPA's $35 million terminal project requires three major state permits. The first two – a Section 401 Water Quality Certification ("WQC") pursuant to the federal Clean Water Act, 33 U.S.C. § 1341 and a Coastal Zone Consistency Certification ("CZCC") required by the Coastal Zone Management Act, 16 U.S.C. § 1456 – are required by federal law. The third state authorization needed is a Critical Area Permit ("CAP"), which state law requires for projects that occur in tidelands. S.C. Code Ann. § 48-39-10(J). *See* CG Br. at 15-17.

DHEC's regulations specify that, where all three approvals are required for a project, they must be issued together. SPA's authorization, which contains only a CAP and CZCC, is facially invalid because it lacks a necessary WQC. SPA had unlawfully proceeded under a general federal permit (Nationwide Permit 3 – "NPW" or "NWP 3") that had its own WQC; when that coverage was struck down as illegal by a U.S. District Court, SPA lost the NWP's attendant WQC. *See Preservation Society*, 2013 WL 6488282 at *11-*12.

A. The Lack of a Required Water Quality Certification Is Legally Fatal

DHEC's regulations require that 401 Water Quality Certifications be evaluated and authorized by DHEC's Bureau of Water and issued simultaneously with the Critical Area Permit and Coastal Zone Consistency Certification ("CAP/CZCC"). S.C. Code Ann. Regs. 61-101(A)(7) ("For Federal permits that require both a water quality certification and a coastal zone consistency certification, the coastal zone consistency certification determination shall be issued as a component of, and **concurrently** with, the water quality certification,") (emphasis added); S.C. Code Ann. Regs. 61-101(A)(8) (DHEC "will process permit applications" that require CAP and WQC "with coordination and input" from Bureau of Water "staff regarding water quality impacts" and issue decisions in a permit document that "serve[s] as the 401 water quality certification"). These procedural requirements – along with every other requirement for noticing, taking comment on, and issuing an individual WQC[6] – were bypassed because SPA was proceeding under color of a NWP 3 authorization, which was removed by operation of a September 2013 federal court order.

DHEC does not dispute that: (1) a WQC is necessary for SPA's project; (2) that the law requires affirmative Bureau of Water review of SPA's project; (3) that Bureau of Water involvement, when it occurs, is manifest and visible; and (4) that Bureau of Water

[6] DHEC failed to give notice of an individual 401 Certification, S.C. Code Ann. Regs. 61-101(D)(1); failed to prepare a required written water quality assessment, S.C. Code Ann. Regs. 61-101(E)(2); and made no mention of a WQC at all in the permit, in contrast with decisions that actually contain WQCs. *See* Exhibit F to Pet'rs' Resp. to SPA's Mot. for Partial Summ. J. and Cross-Mot. for Summ. J. (Charleston Navy Base DHEC approvals, including CAP, CZCC and "Water Quality Certification" in title, and separate Bureau of Water Technical Support Document). Further, the space for documenting Bureau of Water involvement is marked "N/A," showing a complete lack of BOW involvement. Exhibit D to Pet'rs' Resp. to SPA's Mot. for Partial Summ. J. and Cross Mot. for Summ. J.

review did not occur here. Accordingly, the facial invalidity of the CAP/CZCC is uncontested by the agency that issued it, and the Community Groups were entitled to vacatur and remand to DHEC. *See* S.C. Code Ann. § 44-1-60(B) (DHEC must "comply with all requirements for public notice, receipt of public comments and public hearings before making a department decision"); S.C. Code Ann. § 1-23-380(4) (providing that in "cases of alleged irregularities in procedure before the agency" matter can be "remanded to the agency" for appropriate action).[7]

SPA recognizes this issue as "a matter of law," but contends that a CAP/CZCC always includes an invisible WQC, SPA Br. at 37-38, theorizing that a CAP serves as a WQC, which serves as a CZCC, such that DHEC need only consider and issue a CAP. DHEC does not embrace that circular theory, with good reason: it would *remove* federally required review procedures altogether. In reality, where all three reviews are required, DHEC staff – the Office of Coastal Resources Management ("OCRM") and the Bureau of Water – work in coordination to issue a joint decision document containing the

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[7] *See also Sierra Club v. S. C. Dep't of Health & Envtl. Control*, No. 2012-212791, 2014 WL 3734366, at *20 (S.C. Ct. App. July 30, 2014) (declaring importance of having DHEC, "the administrative agency mandated by law to enforce the regulations[,] require adherence to its own standard for compliance. To allow otherwise would impede the purpose for which DHEC was created—to act in the public interest—and risk the health and safety of our citizens") *citing* S.C. Code Ann. § 48–1–20 (2008) ("It is declared to be the public policy of the State to maintain reasonable standards of purity of the air and water resources of the State, consistent with the public health, safety and welfare of its citizens, ... [and] that to secure these purposes and the enforcement of the provisions of this chapter, [DHEC] shall have authority to abate, control and prevent pollution."); *Converse Power Corp. v. S. C. Dep't of Health & Envtl. Control*, 350 S.C. 39, 54-55, 564 S.E.2d 341, 350 (Ct. App. 2002) ("Generally, the delegation of authority to an administrative agency is construed liberally when the agency is concerned with the protection of the health and welfare of the public. However, this delegation does not go unchecked. DHEC must follow its own regulations and the provisions of the Administrative Procedures Act in carrying out the legitimate purposes of the agency. Thus, any action taken by DHEC outside of its statutory and regulatory authority is null and void.").

three component approvals. Where a CZCC and WQC are needed, the reviews occur in parallel and a joint document is issued that contains both "component" decisions "concurrently." S.C. Code Ann. Regs. 61-101(A)(7). Where a CAP and WQC are needed, "coordination and input" from Bureau of Water "staff regarding water quality impacts" is required before the joint document can serve as the WQC.

The rules do not specify what occurs when *all three* approvals are needed, but SPA's interpretation – removing substantive water quality certification review altogether – renders the requirement for "component" and "concurrent[]" WQC and CZCC decisions and the requirement for Bureau of Water "coordination and input" on "water quality impacts" for a CAP meaningless. SPA's reading would also eviscerate federally required WQC evaluation procedures and risk the loss of federal approval for South Carolina's water quality program.[8] *See* 33 U.S.C. § 1341. Finally, SPA's reading runs counter to DHEC's long-standing practice of conducting the distinct evaluations in parallel and issuing a joint document that explicitly reflects the component authorizations. *See* Exhibit F to Pet'rs' Resp. to SPA's Mot. for Partial Summ. J. and Cross-Mot. for Summ. J.

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[8] Unlike the Critical Area Permit rules, the WQC regulations require the Department to comply with specific provisions of the federal Clean Water Act, requiring (1) for the use of "best practicable control technology," (2) for special permits for activity that releases into a water body "toxic pollutants" specified by the statute, and (3) for conformance with the Charleston Harbor Total Maximum Daily Load (TMDL). S.C. Code Ann. Regs. § 61-101(A)(4). The WQC regulations further require the Department to "consider reasonable foreseeable similar activities of the applicant," S.C. Code Ann. Regs. 61-101(F)(3)(a)(4), and to go beyond mere consideration of the impacts to water quality, listed species, and aquatic ecosystems with expressed authority to deny a permit for a purposed activity based on any harm to these entities. S.C. Code Ann. Regs. 61-101(F)(5)(a)-(b). Additionally, the WQC regulations require the Department to follow different procedures prior to the issuance of a permit for public notice and informational hearings, S.C. Code Ann. Regs. 61-101(D)(1), (E)(2) & (G)(1), and require the Department to "prepare a written assessment on the purposed activity requiring a Federal [] permit." S.C. Code Ann. Regs. 61-101(E)(2).

SPA is right that this is a "matter of law," but wrong on the law. SPA's authorization document, procedurally invalid on its face, should be vacated and remanded to DHEC.

B. SPA's Mootness/ Waiver Argument Is Baseless

SPA seeks to avoid review on grounds that the ALC's order is moot, theorizing that DHEC "waived" its Section 401 authority such that remand to DHEC would be pointless. SPA Br. at 39 n.35. But there is no dispute that DHEC timely issued a general 401 Certification for federal NWP 3 on April 23, 2012, and this was the attendant WQC that initially for SPA's project, which was authorized pursuant to NWP 3 on April 20, 2013. Because DHEC acted within the one-year period, subsequent revocation of SPA's certification through judicial action could not cause waiver. *See, e.g., Savannah Riverkeeper et al. v. S.C. DHEC*, ALC No. 11-ALJ-07-0618-CC, at 10 n.11 (May 31, 2012) (citing and quoting *FPL Energy Me. Hydro LLC v. Dep't Envtl. Prot.*, 926 A.2d 1197, 1203 (Me. 2007) (no waiver where agency acted within year but appeals extended beyond it)); *City of Klammath Falls v. Envtl. Quality Comm'n*, 119 Or. App. 375, 377-378 (Or. Ct. App. 1993) (no waiver where agency acted within year but applicant instigated case that extended beyond), *aff'd on other grounds*, 870 P.2d 825 (Or. 1994)).[9]

[9] Not only did DHEC act to prevent waiver, the prerequisites for effective waiver are missing. To protect against inadvertent waiver, federal regulations require that "the district engineer verify that the certifying agency has received a valid request for certification." 33 C.F.R. § 325.2(b)(1)(ii). That is typically done through a joint public notice stating that the state environmental agency has one year from the date of publication to issue its certification. *AES Sparrows Point LNG v. Wilson*, 589 F.3d 721, 729 (4th Cir. 2009). Here, the public notice did not include a request that DHEC issue a 401 certification, and DHEC did not purport to consider one. Thus, the prerequisites for effective waiver were not present.

C. The ALC Order Denying the Motion to Vacate is Reviewable

As a threshold matter, Respondents are precluded from arguing that the Order Denying the Motion to Vacate is not appealable by this Court's Order of September 11, 2014 denying SPA's Motion to Dismiss Appeal on the same grounds.[10]

Even if the ALC's order were not directly appealable, it could be considered in conjunction with other appealable issues before the court, *see Briggs v. Richardson,* 273 S.C. 376, 256 S.E.2d 544 (1979), and to avoid unreasonably narrowing issues for trial or future needless appeals, *Edge v. State Farm Mut. Auto. Ins. Co.*, 366 S.C. 511, 517, 623 S.E.2d 387, 390 (2005) (reviewing order denying motion to dismiss where cross-appeal was before court). *Brown v. Cnty. of Berkeley*, 366 S.C. 354 n.4, 362, 622 S.E.2d 533, 538 (2005); *Pitts v. Jackson Nat'l Life Ins. Co.,* 352 S.C. 319, 338, 574 S.E.2d 502, 511–12 (Ct. App. 2002) (reviewing denial of summary judgment where issues closely connected to final order on appeal).

Review of the ALC's Vacatur Order would conserve resources by potentially removing the need for a contested case altogether, and ensuring, if one occurs, that all issues concerning SPA's terminal are before the ALC and any appellate tribunal in a single action. This order also directly relates to the Final Order on standing, which turns on the ALC's view that following lawful procedures for SPA's proposed cruise terminal would *not* alter the Community Groups' claimed injuries or redress them. That holding

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[10] *Compare* SPA Br. at 34 and DHEC Br. at 4 *with* Respondent SPA's Mot. to Dismiss Appeal, at 8-12. While a denial of a motion to dismiss does not typically "does not finally decide any issue," *Huntley v. Young*, 319 S.C. 559, 560 462 S.E.2d 860, 861 (1995), law of the case doctrine applies to orders that "finally determine[]" an issue, either implicitly or explicitly, *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013); *Ross v. MUSC*, 328 S.C. 51, 492 S.E.2d 621 (1997). The Court's Order denying SPA's Motion to Dismiss Appeal finally determined whether the Order Denying the Motion to Vacate is appealable, and established law of the case.

begs the question of what the proper review procedure *is.* Determining whether the robust public notice and comment requirements and an expansive scope of review of DHEC's WQC regulations apply to SPA's project would inform the standing analysis as conceived by the ALC, since the WQC requirements – *e.g.*, a duty to minimize impacts on local inhabitants and the environment – would increase the likelihood that lawful permitting would reduce injury to the Community Groups and their members.

D. The Motion to Vacate Was Not a Motion for Summary Judgment

This Court should exercise review even if the underlying motion were reclassified as a motion for summary judgment. *See Pitts,* 352 S.C. at 338, 574 S.E.2d at 511–12. But as SPA observes, the Motion to Vacate presents a "matter of law" and turns on straight legal interpretation, a reality confirmed by the Respondents' merits arguments. DHEC contends that vacatur would be improper because the law allows DHEC to issue a "future" certification for SPA's individual federal permit. Initial Br. of Respondent S.C. DHEC at 5 n.5 (hereinafter "DHEC Br."). The law prohibits that very thing. S.C. Code Ann. Regs. 61-101(A)(8) ("[t]he Department ***will not issue*** a separate 401 water quality certification for an activity which requires a direct permit for alteration of the critical area of the coastal zone") (emphasis added). Moreover, DHEC concedes that the WQC "issued in conjunction with NWP3 was based on the parameters established in that general permit" and rather than an anticipated new *individual* federal authorization. DHEC Br. at 5 n.5.

SPA is right that this is a question of law. If the Community Groups are correct, SPA's authorization is legally void and must be vacated and remanded.[11]

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[11] SPA's half-hearted issue preservation claim (SPA Br. at 39 n.35) is meritless. Even a superficial glance at the Motion to Vacate shows that the Community Groups raised the

III. The Order Denying Discovery Was A Patent Abuse of Discretion

A. Respondents and the ALC Understood That Discovery Extended Beyond May 20, 2013

DHEC and SPA do not dispute the timeline set forth in the Community Groups' opening brief, which shows that the parties and the ALC all understood discovery to be ongoing well after May 20, 2013, the date the ALC retroactively posited (six months later) that discovery closed. CG Br. at 49-51. The timeline began with the ALC ordering prehearing statements – including expectations for discovery – due on May 21, a day *after* discovery later was deemed to have "closed." SPA's prehearing statement, submitted May 20, proposed up to nine months of discovery, or until February 20th, 2014. Two weeks after receiving the prehearing statements, the ALC set a merits hearing date in 2014, intending to provide "over four months for discovery" and expressing hope that "the parties could complete discovery within the time period." Pet'rs' Mot. for Recon. 3 n.1, March 13, 2014. SPA counsel then promised to "develop a scheduling order with deadlines for discovery" and informed the ALC that "the parties are working on a proposed scheduling order with deadlines on discovery." Exhibits A, B to to Pet'rs' Mot. for Recon. In August, SPA issued third party subpoenas that SPA counsel have characterized as "discovery."[12] Finally, in late 2013, the ALC acknowledged that discovery was ongoing as of September 2013, four months *after* discovery had

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lack of a WQC directly to the ALC after a federal court vitiated SPA's federal permit and attendant certification. The Community Groups were not required to "challenge" a WQC that did not, and does not, exist.

[12] Ex. B, Reply in Support of Mot. Recons. 3. SPA offers no explanation for having engaged in discovery after the date it says discovery "closed." Its conduct should bar it from insisting on closing discovery to prejudice the Community Groups. *Cf. Wells Fargo Bank, Nat. Ass'n v. EGIS 521, LLC*, No. 2012-UP-677, 2012 WL 10864567, at *1 (Ct. App. Dec. 19, 2012) (estopping party that engaged in lengthy discovery to other party's prejudice from then changing course and seeking arbitration).

supposedly closed. Order Denying Mot. to Dismiss 3. As 2013 came to an end and 2014 began, SPA continued its dump of 30,000 pages of discovery on the Community Groups.

All parties and the ALC understood that discovery did not close on May 20. The March 2014 order, retroactively announcing that discovery closed in May of 2013, was a palpable abuse of discretion, and should be reversed.

B. Respondents Offer No Grounds to Sustain the ALC's Abuse of Discretion

While Respondents fault the Community Groups for not realizing that discovery "closed" sooner, they fail to contest our demonstration that *no one* understood discovery to have closed on May 20, 2013.

The Community Groups were not bound by the Rules of Civil Procedure to file a motion prior to May 20, SPA Br. at 43-45[13] because *all* the parties *and* the ALC understood that discovery extended beyond that date, as evidenced by the fact that the ALC required prehearing statements to be filed that day with discovery plans (which projected discovery extending well beyond May 20). As for ALC Rule 21, Respondents have no substantive response to the testimony of a seasoned ALC practitioner who testified that she had never experienced, or heard of, strict insistence on that unrealistic 90-day limit on discovery – as confirmed by the ALC's conduct of this case. Exhibit D to Pet'rs' Mot. for Recons., March 13, 2014; *see also* CG Br. at 53.[14]

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[13] DHEC agreed with and incorporated SPA's analysis on the discovery issue, pages 39 through 45. DHEC Br. at 7.

[14] The attempt to prevent consideration of the Riley Affidavit on the basis of Rule 6(d), SCRCP, SPA Br. at 43 n.39, is baseless, since the ALC rules contain different requirements concerning motions generally and discovery motions practice in particular. *See* Rule 19, SCRALC (ALC rules governing motions practice); Rule 68 (SCRCP allowed to apply only if no conflict with ALC rules and court consents); Rule 69 ("the ALC Rules shall govern all procedural aspects of the matter, notwithstanding any other procedural statute, agency regulation or rule").

The Community Groups' motion seeking to protect its discovery rights should have been granted for "good cause," ALC Rule 21, to ensure that "justice is promoted" and allow "disposition of cases on their merits." *Ricks v. Weinrauch,* 293 S.C. 372, 374-75, 360 S.E.2d 535, 536 (Ct. App. 1987).

C. There is No Barrier to Reviewing the Discovery Order

Respondents claim the discovery order is unreviewable because the ALC, in a footnote in the Final Order, *sua sponte* vacated the Discovery Order and then denied it as moot "in light of the disposition of the summary judgment motion." Order Granting Summ. J. for Standing, 19 n.23. This transparent maneuver to insulate an palpably unfair discovery order from review fails for two reasons.

First, this Court has already rejected SPA's argument in denying a motion to dismiss filed on the same basis.[15] Respondents are precluded from re-arguing that the Discovery Order is not appealable. *See supra* Part II.C. Even if the Discovery Order was not directly appealable itself, it may be considered because the final order granting summary judgment is properly before this court. *See supra* Part II.C.

Second, there *is* no rule prohibits this Court from substantively reviewing a vacated order. *Webster v. Clanton*, 259 S.C. 387, 391, 192 S.E.2d 214, 216 (1972), reviewed a procedural mess that resulted in a father appealing two child support orders, but failing to appeal the underlying order that granted custody of his son to his deceased wife's sister. *Id.* The Supreme Court ignored the procedural oddities of the case and addressed the

[15] *Compare* SPA Br. at 40 ("None of the ALC's discovery rulings are properly before this Court because the ALC vacated the Discovery order and because Cruise Opponents failed to challenge the denial of their motion to expand discovery as moot.") *with* Respondent SPA's Mot. to Dismiss Appeal at 12-17 ("The Discovery Order is not properly before this Court because the ALC vacated the order. . . . Cruise opponents also may not challenge the ALC's final ruling denying their discovery motion as moot").

substantive issues, voiding the unappealed custody order because "no appeal therefrom was necessary to protect the rights of the father," and only declining to decide the issue underlying that order – whether the father was entitled to custody – because "the record [was] entirely insufficient," not because the order had been voided. 259 S.C. at 392, 192 S.E.2d at 216. The record here is replete, and shows a clear abuse of discretion.

Leviner v. Sonoco Products Company, 339 S.C. 492, 493, 530 S.E.2d 127, 127 (2000), also does not declare a rule prohibiting review of voided orders. In that case, a circuit court issued two competing orders: one order reversing a state commission's award of disability and remanding the issue back to the commission, and a second order issued more than a month later "purporting to vacate the commission [award]." The Court ultimately described the second order as "void" because it was untimely under Rule 59(e) SCRCP, and found that the Court of Appeals should have dismissed the appeal of the second order because "though final, the [first] order was not directly appealable since it remanded the matter to the single commissioner for further proceedings." The Court said nothing about the appealability of the "void" second order.

Brennan's, Inc. v. Colbert, 125 So. 3d 537, 540 (La. Ct. App. 2013), concerned a trial court order dismissing a client's claims against a law firm as "*absolutely* null and void" because a prior related appeal was still pending. 125 So. 3d at 540-41 (emphasis in original). No other appeal is pending here.

And finally, *Hudson v. S.C. Dep't of Highways & Pub. Transp.*, 324 S.C. 245, 246, 478 S.E.2d 839, 840 (1996), involved a party's attempt to appeal a trial court's order granting a new trial under Rule 60(b), SCRCP, while appeal of the original trial was still pending. 324 S.C. at 246, 478 S.E.2d at 840. Because the rules in such circumstances

require that leave from an appellate court before a trial court can grant a Rule 60(b) motion, and no leave was granted, the Court dismissed the appeal because "the trial court lacked jurisdiction to entertain respondent's motion" for new trial and the appeal was a waste of time. *Id.* No one contends the ALC lacked jurisdiction to enter its discovery order.

Respondents' claims of waiver, estoppel and abandonment, SPA Br. at 42-43, are likewise meritless. Community Groups need not formally appeal each subsequent procedural action – denial, then vacatur, then declaration of mootness – for this court to review the ALC's error in denying the Groups motion to expand discovery. *Fields v. Melrose Limited Partnership*, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993), merely restates the general principle that an appellate court will not address a substantive issue that was raised in the statement of the issues but not argued in the party's brief. Here, the Community Groups raised their challenge to the ALC's order denying their motion to expand discovery in the issues on appeal and argued the point in their initial brief. *Fields* requires nothing more.

Likewise, *Degenhart v. Knights of Columbus*, 309 S.C. 114, 118, 420 S.E.2d 495, 497 (1992), ruled only that a party's motion to compel discovery was not properly before the appeals court because summary judgment was granted before a ruling on the motion. Here the ALJ ruled on the Groups motion before ruling summary judgment, via a written order that finally determined the Groups ability to seek discovery. *Bayle v. S. C. Dep't of Transp.*, 344 S.C. 115, 128, 542 S.E.2d 736, 742-43 (Ct. App. 2001), is inapposite for the same reason.

As should go without saying, a decision by this Court to reverse the ALC's summary order on standing would remove any mootness concerns as to discovery, since the case would be remanded to the ALC for further proceedings. Judicial economy would best be served by reversing the ALC's discovery prohibition now rather than waiting for an appeal following remand.[16]

IV. The ALC Abused Its Discretion in Sanctioning the Community Groups for Offering a Reasonable and Good Faith Interpretation of an Ambiguous Statute

The central issue with regard to the ALC's sanctions decision is whether counsel for the Community Groups acted reasonably in offering an interpretation of an ambiguous statute. Generally, the standard for imposing sanctions is whether counsel acted reasonably, sufficient to "illustrate a good faith belief in [the] propriety" of counsel's action. *Ex parte Bon Secours-St. Francis Xavier Hosp., Inc.*, 393 S.C. 590, 598, 713 S.E.2d 624, 628 (2011). The South Carolina Frivolous Civil Proceedings Sanctions Act provides that sanctions are not appropriate where an attorney presents "a good faith or reasonable argument . . . for the extension, modification, or reversal of existing law." S.C. Code Ann. § 15-36-10(A)(4)(a)(ii).

In this case, counsel offered a good faith and reasonable argument interpreting ambiguous language in S.C. Code Ann. § 44-1-60(F), which sets forth the DHEC Board's duty to conduct final review conferences. A statute is ambiguous if it "is susceptible to two reasonable interpretations," *S.C. DSS v. Lisa C.*, 380 S.C. 406, 414, 669 S.E.2d 647,

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[16] The notion that discovery is irrelevant to resolution of the summary judgment motion is not correct. While additional discovery was not needed for *proper* disposition of the summary judgment motion – multiple obvious issues of fact were evident on the record – the ALC did not resolve the summary judgment motion properly. Deposing SPA's witnesses could have been useful in that misguided summary judgment context, and the Community Groups never conceded otherwise.

651 (Ct. App. 2008), and Section 44-1-60(F) contains conflicting provisions stating that the Board "must" hold a final review conference no later than sixty days after a request, but also providing for appeal to the ALC if the Board "decline[s] in writing to schedule" review or simply does "not conduct[ ]" final review. The statute can be read two ways. No court has ruled on whether board review is mandatory, as the issue had not been raised or ruled upon up until this case. The Community Groups contended to the ALC that Board review was mandatory to ensure that that the agency generates an explanation of its decision, develops a record of the procedures it followed, and ensures that the staff decision is consistent with overall agency policy, prior to review before the ALC.

Respondents do not challenge the showing that Appellants' interpretation of the statute accorded with the ordinary meaning of "decline" as a "failure to carry out a mandatory duty." *See* CG Br. at 58-59. Respondents also fail to distinguish the numerous cases cited by the Community Groups initial brief illustrating that, under the well-accepted reasonableness standard, sanctions "should be rare" and only applied in the "extreme" case where their "behavior goes far beyond" the conduct of a reasonable attorney, like where the attorney "could not have formed a good faith belief that the [argument] was appropriate." *Bon Secours*, 393 S.C. at 593-96, 713 S.E.2d 624, 625-26; *see generally* CG Br. at 60-63.

In sum, there is no evidence of extreme behavior in proposing one of two possible interpretations of an ambiguous statute. No court had construed the Board review provisions of 44-1-60(F), and agency practice cannot change a statute's meaning. *See, e.g., Sparks v. Palmetto Hardwood, Inc.*, 406 S.C. 124, 128, 750 S.E.2d 61, 63 (2013). Even if contrary precedent existed, the Sanctions Act permits an attorney to make "a

good faith or reasonable argument . . . for the extension, modification, or reversal of existing law." S.C. Code Ann. § 15-36-10(A)(4)(a)(ii).[17] The Community Groups cannot find and Respondents do not offer any case, in South Carolina or any other jurisdiction, where a lawyer was sanctioned for offering an interpretation of a statute that was rejected by a court. *See* CG Br. at 59-60 (collecting cases).

At base, Respondents argument appears to be that counsel's interpretation was unreasonable because it did not prevail, citing as support the Community Groups' decision to not appeal the ALC's order denying the motion for remand that gave rise to SPA's sanction motion. SPA Br. at 47.[18] But Respondents confuse the difference between a winning argument and "a good faith or reasonable argument" permitted by the Sanctions Act. Making an argument based on a reasonable interpretation of a statute is not sanctionable conduct. *See S.C. Department of Motor Vehicles v. Michael W. Tighe*, 06-ALJ-21-0132-AP, 2006 WL 2224705, at *11 (June 20, 2006) (declining to give sanctions and fees in a case where parties argued over statutory construction); *Clarendon County v. TYKAT, Inc.*, Docket No.: 09-ALJ-17-0458-CC, 2010 WL 6782564, at *4-5 (June 2010) (denying attorney's fees and costs pursuant to § 15-36-10 against litigant who proposed statutory construction that would require a "coerced reading, rejecting established canons of construction"). Attorneys are only sanctioned if their conduct was so unreasonable to be considered bad faith—winning or losing has nothing to do with it. *See In re Anonymous Member of S. C. Bar*, 346 S.C. 177, 194, 552 S.E.2d 10, 18 (2001)

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[17] For this reason alone, SPA's citation to a background discussion in a brief years filed years ago, in a case where the meaning of this provision *was not litigated*, is pointless. Community Groups concede the language of the statute is ambiguous and can be read as mandatory or not.

[18] DHEC agreed with and incorporated SPA's sanctions analysis, pages 45 through 53, in its initial brief

(affirming sanctions against a law firm for "achieving success through abuse of the discovery rules rather than by the rule of law.").

The difference between the success of an argument and the reasonableness of an argument underscores why the Community Groups are not required to challenge the ALC's order denying the motion to remand in order to appeal the ALC's grant of sanctions. SPA Br. at 46-47. The ALC's decision on the motion to remand and its decision on SPA's sanctions motion are distinct, based on different legal standards applied to different facts.

SPA's attempts to prevent review of this issue are hypertechnical and meritless. *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 564 S.E.2d 94 (2002), held that a deceased man's spouse may not bring an action based on fraud against her dead husband; the case has nothing to do with what decisions a party must appeal in order to challenge sanctions. While *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282 (2012), held that where liability cannot be reversed where an independent ground for liability is not appealed, here the only ground for the ALC's sanctions - its finding that the Community Groups acted unreasonably - was appealed. *Langley v. Boyter*, 284 S.C. 162, 325 S.E.2d 550 (Ct. App. 1984) *opinion quashed*, 286 S.C. 85, 332 S.E.2d 100 (1985), simply states the general rule that an appeals court cannot address an issue that has not been appealed. Here, the Community Groups appealed the ALC's order granting of sanctions, which is the only legal decision that the Groups needed to appeal to put the issue before this Court.

There is simply no requirement that both orders be appealed, and the Respondents cite no authority to the contrary. The Groups chose to not appeal the denial of the motion

to remand to focus limited resources on other issues. Their willingness to accept the ALC's plausible interpretation of an ambiguous statute hardly means that they abandoned an issue at the heart of the sanctions order that was litigated below and briefed on appeal: whether putting forth one of two possible interpretations of an ambiguous statute that had never been interpreted by any court was sanctionable conduct.

CONCLUSION

For the foregoing reasons, the Administrative Law Court Orders granting summary judgment, denying the motion to vacate, denying the motion to expand discovery and granting sanctions against the Appellants should be reversed.

Respectfully Submitted,

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