THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

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SC Court of Appeals

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.

APPELLANTS' FINAL INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. After finding that the Community Groups' had properly alleged standing, did the Administrative Law Court ("ALC") err in changing course and ordering summary judgment for lack of standing where affidavits and documentary evidence showed that the groups' members were "affected persons" entitled to request a Contested Case pursuant S.C. Code Ann. § 44-1-60(F)?

A. Did the ALC err in entering summary judgment that the Community Groups' members who live and work near a proposed $35 million cruise terminal in downtown Charleston were not "affected persons" entitled, under S.C. Code Ann. § 44-1060(F), to seek administrative review of DHEC's permitting decision authorizing the terminal?

B. Did the ALC err in entering summary judgment on the basis that the Community Groups' members were not entitled to request administrative review of DHEC's permitting decision authorizing the proposed cruise terminal because they lacked Article III Constitutional Standing?

C. Did the ALC err in entering summary judgment on the basis that the Community Groups lacked Public Importance Standing?

D. Did the ALC err in entering summary judgment on the basis that, even if the Community Groups had members with standing, the groups lacked Associational Standing?

II. Did the ALC err in refusing to vacate the Ports Authority's Critical Area Permit and Coastal Zone Certification that lacks a required Section 401 Water Quality Certification?

III. Did the ALC err in deeming discovery closed on May 20, 2013 and prohibiting Community Groups from conducting discovery after that date?

IV. Did the ALC err in sanctioning the Community Groups for filing a motion interpreting a provision that states that the DHEC Board "must" conduct a review conference within 60 days as setting forth a mandatory, not discretionary duty?

STATEMENT OF THE CASE

This appeal arises from the administrative review of a Critical Area Permit ("CAP") and Coastal Zone Consistency Certification ("CZCC") issued by the Department of Health and Environmental Control's ("DHEC") Office of Ocean and

Coastal Resource Management on December 18, 2012 to the South Carolina State Ports Authority ("SPA") for construction of a new cruise terminal in downtown Charleston. The Community Groups, Appellants here, requested a review of the CAP and CZCC before the DHEC Board on January 2, 2013, pursuant to S.C. Code Ann. § 44-1-60(F). On January 11, 2013, the Board sent written notice to the Community Groups that it was declining to review the permit and certification.

On February 11, 2013, the Community Groups petitioned for a contested case before the Administrative Law Court ("ALC") pursuant to S.C. Code Ann. § 44-1-60(F). On February 27, 2013, the Groups moved the ALC to remand the matter back to the DHEC Board to conduct Board review pursuant to S.C. Code Ann. § 44-1-60(F). The ALC denied the Community Groups motion to remand on May 3, 2013. On July 1, 2013, SPA moved the ALC to sanction the Community Groups for having filed the motion to remand.

Also on July 1, 2013, SPA also filed a motion to dismiss the contested case for lack of standing. The ALC denied SPA's motion to dismiss on December 2, 2013. SPA filed a motion for summary judgment on the same grounds on December 27, 2013.

On September 18, 2013, the United States District Court for the District of South Carolina voided a federal authorization granted by the U.S. Army Corps of Engineers for SPA's new cruise terminal. As a result, the Community Groups filed a motion with the ALC on November 1, 2013 to vacate SPA's state permit and certification as incomplete and inconsistent with state regulations. The ALC denied the Community Groups' Motion to Vacate on December 20, 2013.

On December 23, 2013, the Community Groups filed a motion to expand discovery, which was denied on March 3, 2014. The Community Groups filed a motion to reconsider the ALC's order denying expanded discovery on March 13, 2014.

On March 3, 2014, the ALC entered an order sanctioning the Community Groups for having filed their February, 2013 motion to remand. The Community Groups filed a motion to reconsider the ALC's grant of sanctions on March 13, 2014. On April 11, 2014, the ALC rejected that motion for reconsideration but issued an amended order on sanctions. On the same day, the ALC granted SPA's summary judgment motion on standing. The ALC's order granting summary judgment found all other pending motions, including the motions regarding discovery, moot. The Community Groups timely appealed to this Court on April 21, 2014.

INTRODUCTION

This is an appeal of several Administrative Law Court orders removing the rights of citizens to challenge the legality of permits issued for a proposed large cruise ship terminal in downtown Charleston. The $35 million, multi-acre terminal facility that the S.C. State Ports Authority proposes to construct is intended and engineered to service much larger cruise ships than have home-based in Charleston in the past. These larger ships, with over 4,000 persons aboard, pollute more than their predecessors and would each day funnel hundreds of vehicles including tractor trailers and thousands of passengers into a cramped area next to historic neighborhoods where traffic congestion and air pollution already pose problems.

The ALC found that neighbors who live directly adjacent to the proposed terminal lacked standing as "affected persons" entitled to participate in the administrative review

of permits issued for the terminal by the S.C. Department of Health and Environmental Control ("DHEC"). *See* S.C. Code Ann. § 44-1-60. The ALC made its ruling on summary judgment, even though the Community Groups had presented sworn testimony detailing significant negative effects to neighboring citizens – including a woman who has experienced difficulty breathing and sore throat due to diesel soot that flows from an idling cruise ship to her nearby residence. According to the ALC, such evidence was irrelevant to showing "affected person" standing because it was not accompanied by expert medical testimony and because a lone SPA affidavit – in conflict with numerous internal SPA documents ignored by the ALC – claimed that the proposed $35 million cruise terminal designed for much larger ships would not change anything over the status quo. The entry of summary judgment based on a movant's counter-intuitive and self-serving affidavit in the face of multiple countervailing affidavits and SPA's own documents showing that the new terminal was intended to host larger and more polluting cruise ships was clear, reversible error. The ALC's result runs contrary to the General Assembly's intent in providing that all "affected persons" can contest DHEC's permitting decisions administratively. Under the ALC's legal reasoning, citizens would have an easier time getting before the ALC to contest a corner store's liquor license than they would getting a hearing on a DHEC permit that allows their homes to be enveloped in pollution.

Prior to deciding that the Community Groups had no right to participate in the administrative process, the ALC refused to vacate and remand SPA's permit even though it lacks a major, legally-required component called a Section 401 Water Quality Certification. DHEC assumed that SPA's project needed no such certification review

because SPA had obtained a general federal permit for its project, and that general permit had previously received separate certification from DHEC. However, SPA's federal authorization was thrown out in federal court after several Community Groups challenged it as unlawful. Once this general permit's certification was removed, the ALC should have instructed DHEC to go back and consider whether SPA's project could be certified on an individual basis. Instead the ALC committed several legal errors on the path to upholding an authorization document issued on unlawful process and without proper consideration of the project's impacts and options for reducing them as required by South Carolina law.

Consistent with a theme, the ALC also improperly removed the Community Groups' discovery rights. Throughout 2013, the parties and the ALC itself acted with the understanding that discovery was ongoing. In early 2014, however, the ALC decided that discovery had "closed" back in May 2013, before the parties had even submitted witness lists or produced hardly any documents whatsoever. Refusing to allow depositions even though SPA had only begun to produce thousands and thousands of pages of documents *after* the retroactively imposed deadline worked an obvious injustice on the Community Groups, which had, like SPA and the ALC itself, carried on for months as though discovery were still open.

Finally, the ALC's treatment of citizens who questioned SPA's permit reached its apotheosis in a remarkable and unjustified sanctions order. At base, the ALC sanctioned the Community Groups for contending that S.C. Code § 44-1-60's requirement that the DHEC Board "must" hold Final Review Conferences when requested constitutes a mandatory requirement rather than a discretionary one. The statutory provision in

question is at best ambiguous and no court had ever fixed its meaning, one way or the other. The Community Groups were entitled to argue for the provision's mandatory nature and the ALC's ordering of sanctions for that contention was an abuse of discretion and should be reversed.

STANDARD OF REVIEW

The Court of Appeals will modify or reverse a finding of the Administrative Law Court if the finding is (a) in violation of constitutional or statutory provisions, (b) in excess of the statutory authority of the agency, (c) made upon unlawful procedure, (d) affected by other error of law, (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. S.C. Code Ann. § 1-23-610(B).

A judge's decision to apply sanctions under the South Carolina Frivolous Civil Proceedings Sanctions Act "sounds in equity and rather than at law." *Holmes v. East Cooper Community Hosp., Inc.*, 408 S.C. 138, 167, 758 S.E.2d 483, 499 (S.C. 2014) "Therefore, an appellate court must review the findings of fact with respect to the decision to grant sanctions under the [Act] by 'taking its own view of the evidence.'" *Id.* The appellate court reviews the decision to grant sanctions on "its own view of the preponderance of the evidence." *Father v. South Carolina Dept. of Social Services*, 353 S.C. 254, 261, 578 S.E.2d 11, 14 (2003). If the appellate court agrees with the sanctioning court's view of the evidence, the appellate court reviews the decision to grant sanctions and the terms of the sanctions for an abuse of discretion. *Holmes*, 408 S.C. at 167, 758 S.E.2d at 499; *Father*, 353 S.C. at 261, 578 S.E.2d at 14. "An abuse of

discretion occurs where the decision is controlled by an error of law or is based on unsupported factual conclusions." *Father*, 353 S.C. at 261, 578 S.E.2d at 14.

BACKGROUND

I. Facts

A. The Purpose of SPA's Proposed New Cruise Terminal

In late 2010, SPA announced plans to build a $35 million, 100,000 square foot cruise ship terminal in Charleston's downtown old and historic district. SPA sought to build a new terminal because its existing cruise terminal, built in 1973, was, in SPA's words, "desolate," "undistinguished," "out-of-date," and "unattractive." R.002481, R.002482. More importantly, with only 30,216 square feet total, the existing facility does not meet federal homeland security requirements for safely home-basing a vessels with 2,500 passengers or more aboard. R.002459.

Beyond enabling SPA to meet federal security requirements, upgrading to a brand new, larger terminal is intended to allow SPA to expand its cruise business. SPA informed cruise lines that it was "very very mindful of the practical operational opportunities [SPA] can unlock" with an updated terminal, R.002422, predicting that it would "remake" Charleston's cruise business, R.002463, provide "tremendous opportunity" to the Ports Authority's cruise clients, R.002434, and "accommodate the growing demands of the cruise industry," R.002438. *See also* R.002474 (SPA: Charleston is a "very attractive destination for cruise ships from all over the world"; updated terminal needed "to meet security requirements and cruise ship customer expectations").

The "growing demands of the cruise industry" had become more pressing in 2010, when SPA first began to home-base a large cruise ship – the 2,500 passenger Carnival *Fantasy* – at its terminal on a year-round basis. R.002438, R.002434. Home basing a vessel, rather than serving as a port of call, requires that thousands of passengers, as well as their luggage, supplies and waste, be loaded and unloaded at every home-base "turn." Given the existing terminal's small size and antiquated facilities, home basing the *Fantasy* there is "exceptionally cumbersome," R.002426, with operations taking place in tents due to a lack of indoor space, R.002436. SPA repeatedly touted the new terminal to Carnival in seeking a new contract for continued *Fantasy* home-basing. R.002424. The "urgent need to improve our passenger terminal facilities" was "very clear" to SPA. R.002470.

SPA targeted an abandoned warehouse, Building 322, as the site for its new cruise terminal. With 108,000 square feet under one roof, Building 322 is more than three times larger than the existing terminal, R.002458, and would "provide relief to the current security operational staffing requirements," R.002440. Making "necessary improvements" to the existing terminal was a "much less desirable option," R.002471, and SPA repeatedly emphasized that it "need[s] the new terminal for our cruise ship business," R.002416. Asked if its proposed terminal investments would lead to increased cruise activity, SPA responded: "you can be sure we wouldn't pursue the business if it didn't make economic sense." R.002488.

As noted earlier, the vessel home-based at SPA's existing terminal, the *Fantasy*, has 2,500 passengers aboard. SPA's proposed terminal, by contrast, is designed to home base a ship with 3,500 passengers visiting twice a week. R.002439; *see also* R.002468

(new terminal "designed to handle ships up to 3,500 passengers"), R.002462 (new terminal designed for 3,430 passenger-ship capacity). In fact, the proposed terminal is sized accommodate a vessel 1,100 feet length overall ("LOA"), with a 160-foot beam, R.002457, the dimensions of vessels with 4,100 passengers.[1] Existing mooring and bollard systems would be upgraded to accommodate the larger vessels, R.002451-52; R.002444. Each home base visit of a 3,450 passenger vessel would bring up to 1,600 cars, 16 trucks, 32 buses, 90 taxis, and 20 tractor-trailers into the historic downtown area. R.002460. The traffic count for the existing 2,500 passenger vessel that calls at SPA's existing terminal is, according to SPA, "considerably lower." R.002455.

B. The Impacts of Cruise Ship Home Basing Operations

Cruise ships rely on marine engines that burn high sulfur diesel fuel and produce large amounts of sulfur dioxide, nitrogen oxide, and particulate matter, in addition to carbon monoxide, carbon dioxide, and hydrocarbons. R.002612 (Claudia Copeland, Cong. Research Serv., RL32450, Cruise Ship Pollution: Background, Laws and Regulations, and Key Issues 6 (2008)). Diesel exhaust is classified as a likely human carcinogen, and emissions from vessels contribute to adverse health effects associated with ambient concentrations of particulate matter and visibility, haze, and acid deposition. *Id.*; *see also* Control of Emissions From New Marine Compression-Ignition Engines at or Above 30 Liters per Cylinder, 75 Fed. Reg. 22,896, 22,903-09 (April 30, 2010) (describing the health and environmental impacts of marine diesel exhaust);

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[1] *Compare Conquest*-class cruise ship, http://en.wikipedia.org/wiki/Conquest-class_cruise_ship (last visited Oct. 13, 2014) (952 foot length overall, 116 foot beam, 2,974 passenger capacity) *with Norwegian Epic*, http://en.wikipedia.org/wiki/Norwegian_Epic (last visited Oct. 13, 2014) (1081 foot length overall, 133 foot beam, 4100 passenger capacity) .

R.002636 (James J. Corbett, Clearing the Air: Would Shoreside Power Reduce Air Pollution Emissions from Cruise Ships Calling on the Port of Charleston, SC? 9 (2013)) ("Marine engines combusting petroleum fuels emit air pollutants that may lead to, or exacerbate, health problems like asthma, bronchitis, and lung cancer."). Air pollution from cruise ships is not limited to what is produced by on-board engines, however. Air pollution is caused by the cars and trucks that take persons, supplies, and waste to and from the cruise home-basing operation, and the increased traffic they cause. R.002604 (Zimmerman Affid. ¶ 10).

Substantial evidence was submitted documenting the impacts of existing and expanded cruise ship pollution and operations on individual members of the Community Groups in this case. For example, Tommie Robertson, a member of the South Carolina Coastal Conservation League who lives near the existing terminal but even closer to where the proposed terminal would be built, submitted an affidavit documenting serious impacts from cruise operations. R.002587-88 (Robertson Affid. ¶¶ 1, 2). She has repeatedly observed thick smoke being emitted from the Carnival *Fantasy* docked at SPA's facility and watched that soot come towards her home; upon breathing the pollution, her "throat immediately began to hurt and [she] was forced to retreat indoors." R.002587 (Robertson Affid. ¶ 6). Ms. Robertson testified that her difficulty breathing and sore throat will only be exacerbated by prolonged exposure and increased activity, and that she reasonably fears the impacts of this pollution on her health. R.002589 (Robertson Affid. ¶ 8). Another neighbor, Stephen F. Gates, testified that he fears "the real and substantial risks posed by this soot and additional air emissions on my health, on the value of my property, and on the historic integrity of my neighborhood and the

historic district of Charleston on the whole, particularly if cruise ship operations are increased and expanded as a result of the permit at issue in this case." R.002595 (Gates Affid. ¶ 5). And Christina Dodd, another neighboring resident, testified that she finds "oily soot" in and on her home, and that she is "obviously very concerned about what this residue from burned sulphur-heavy fuel is doing to my lungs and overall health, as I am breathing this pollution both inside and outside of my home." R.002577 (Dodd Affid. ¶ 3).

Beyond air pollution impacts, Mr. Gates also testified that the traffic the Carnival *Fantasy* added to the already busy streets near the terminal has made it "impractical to go about [his] daily activities when the cruise ships are in town," because streets become gridlocked, causing what would normally be a five minute trip to take forty-five minutes. R.002594 (Gates Affid. ¶ 4). Mr. Gates also notes that the "Charlestowne Neighborhood contains much of the original walled city of Charleston, including numerous properties that are listed on the National Register and residential National Historic Landmarks," and that the oily soot deposits from the cruise ships, as well as their unprecedented and outsized modern forms, have degraded this area's historic integrity. R.002593-94 (Gates Affid. ¶ 2, 3).

Numerous residents testified about how cruise operations diminish downtown Charleston's historic integrity and value and their ability to enjoy it. Even the 2,500 passenger *Fantasy* looms over the historic downtown area, with smokestacks rising high above the city's height restrictions and eclipsing the colonial-era church steeples that have defined Charleston's skyline for over two hundred years. Homebasing very large cruise ships in the downtown Charleston conflicts with the city's carefully preserved

historic integrity and, along with accompanying vehicle and vehicular traffic, significantly impact those who live nearest the existing and proposed terminals. *See* R.002578 (Dodd Affid. ¶ 6); R.002583-84 (Lane Affid. ¶ 8). The advent of home-basing large cruise ships year-round in the historic district, and the prospect of larger vessels and unregulated cruise expansion led the National Trust for Historic Preservation to place Charleston on its national "watch list" in 2011. *See* National Trust for Historic Preservation, 11 Most Endangered Historic Places, Watch Status: City of Charleston (*available at* http://www.preservationnation.org/issues/11-most-endangered/locations/watch-status-charleston-1.html) ("In the case of Charleston, expanding cruise ship tourism could jeopardize the historic character of the city, historic downtown Charleston and its surrounding neighborhoods.").

Members also testified as to harm from cruise ships' water pollution discharges, which set cruise vessels – with thousands of persons, as well as toilets and baths aboard – apart from cargo vessels with limited crews. Discharges from cruise ships into surrounding waters can contain high levels of bacteria and other harmful pollutants. *See* R.002602-03 (Zimmerman Affid. ¶ 9); U.S. EPA Cruise Ship Discharge Assessment Report, EPA842-R-07-005, 2-8, 2-9 (Dec. 29, 2008) (cataloguing cruise ship discharges and failure of a majority of cruise ships with marine sanitation devices to meet fecal coliform and total suspended solids limits). SPA has admitted that supposed limits on the discharge of food waste, and sink and shower drain fluids are merely "voluntary," R.002467, and that this so-called "gray water" can be discharged within 3 miles if a vessel is moving, R.002423. Marty Morganello, President of the Charleston Chapter of the Surfrider Foundation, testified that he "regularly swim[s] and kayak[s] in our state's

waterways" and "enjoy[s] the aesthetic and recreational value that they add to my life on a daily basis." R.002751-52 (Morganello Affid. ¶ 2, 3). Based in his knowledge of cruise ship water impacts, Mr. Morganello explained that "[t]he potential for raw sewage and pollution to wash onshore or otherwise come into contact with me while I am using the waters is a real threat with increased cruise operations" such that his "use and enjoyment of the waterways surrounding my home if cruise ship operations at Union Pier are expanded will decrease because I fear how SPA's proposed project will exacerbate the dumping of contaminants into these waterways." R.002752 (Morganello Affid. ¶ 3).

The Community Groups' witnesses testified to the likelihood that SPA's terminal, designed to home base larger vessels than the one currently based at SPA's existing, much smaller terminal, would exacerbate their existing injuries and add new ones. The organizations of which they are members seek to limit those impacts. The Historic Ansonborough and Charlestowne Neighborhood Associations work to protect the well-being and property of those living and working in those respective neighborhoods, which neighbor SPA's proposed terminal. The Coastal Conservation League strives to protect the healthy natural resources enjoyed and relied on by its members, including members who live and work near the proposed terminal. The Historic Charleston Foundation and the Preservation Society of Charleston seek to conserve the integrity of Charleston's internationally-recognized historic downtown. Charleston Communities for Cruise Control advocates binding standards for cruise operations in Charleston to minimize disruptive impacts on downtown neighborhoods as well as air and water pollution. The Surfrider Foundation represents members who use area waterways including Charleston Harbor and the surrounding beaches and sounds for contact recreation.

These organizations and their members were active participants in the administrative process leading up to the DHEC staff decisions at issue in this case. They appeared and spoke at hearings. They submitted comment letters outlining the significant impacts of industrial cruise operations on air and water quality, traffic congestion and Charleston's historic fabric. They also participated actively in the very public debate surrounding SPA's proposal to increase cruise operations in Charleston going forward. The Community Groups proposed mitigating measures for DHEC's consideration, such as shore-based power to reduce the emission of harmful air pollutants while cruise ships dock at the propose terminal, as well as limits on the size, number and frequency of cruise vessel calls to reduce impacts overall. SPA has resisted any limits of any kind on its operations, and has taken the position that the DHEC authorizations in this case do not limit activities at the proposed cruise terminal.

II. Legal Framework and Procedural Background

A. Legal Framework – State and Federal Permitting Review

SPA needs to obtain four approvals before constructing and operating its proposed terminal: (1) a federal permit issued by the U.S. Army Corps of Engineers, (2) a South Carolina Section 401 Water Quality Certificate ("401 Certification"), (3) a South Carolina Coastal Zone Consistency Certification ("CZCC"), and (4) a South Carolina Critical Area Permit ("CAP"). These various reviews and authorizations are overlapping but have different legal sources and functions.

The **federal Rivers and Harbors Act permit**, issued by the Corps, ensures that a project complies with national environmental and navigational standards for projects built, as this one would be, adjacent to a busy, federally-authorized deep sea channel.

Section 401 Certifications are issued by DHEC's Bureau of Water to ensure that any federally permitted project complies with state water quality standards. DHEC's review arises under the federal Clean Water Act, which provides that a federal permit for discharges into jurisdictional waters cannot be issued unless state water quality officials "certify" that the project complies with applicable state regulations. *See* 33 U.S.C. 1341(a)(1) (Clean Water Act 401 Certification requirement); S.C. Code Ann. Regs. 61-101(A)(2) (South Carolina 401 Certification regulations). South Carolina's certification review of federally permitted projects is robust. DHEC must consider both the direct impacts of the project as well as any potential cumulative, future, and indirect impacts on water quality caused by the project or any "reasonably foreseeable activities of the applicant or others." S.C. Code Ann. Regs. 61-101(F)(3)(c). When conducting its review, DHEC must consider "any feasible alternative" to the project as proposed, and the water quality certification "will be denied" if "there is a reasonable alternative to the activity, which reduces adverse consequences on water quality." *Id.* at 61-101(F)(3)(c), (F)(5)(b). DHEC's Bureau of Water may modify or attach conditions through certification to the proposed permits in order to reduce adverse consequences on water quality. *Id.* at 61-101(A)(5). As summarized by the U.S. Supreme Court, § 401 Certifications are "essential in the scheme to preserve state authority to address the broad range of pollution" and provide States with the power to enforce any "appropriate requirement of State law" in reviewing a federally permitted project. *S. D. Warren Co. v. Maine Board of Environmental Protection et al,* 547 U.S. 370, 374, 386 (2006) (*quoting* 33 U.S.C. § 1341(d)).

Coastal Zone Consistency Certifications also have their roots in federal law. The Federal Coastal Zone Management Act requires states to develop comprehensive management plans to protect their coasts from damaging development, with specific requirements for guaranteeing "public participation in permitting processes and consistency determinations" and a "mechanism for ensuring that all State agencies will adhere to the program." 16 U.S.C. § 1455(b)(14), (15). DHEC's Office of Ocean and Coastal Resources Management ("OCRM") administers the S.C. Coastal Zone Management Plan ("SCCZMP") in compliance with the federal act and the S.C. Coastal Zone Management Act, S.C. Code Ann. § 48-39-10, *et seq.*, and uses its CZCC authority to ensure that projects comply with that plan, the S.C. Coastal Zone Management Act, and DHEC's Critical Area Regulations, S.C. Code Ann. Regs. 30-1 *et seq.*

CZCCs are required by federal law to take into account impacts of Geographic Areas of Particular Concern ("GAPCs"). 16 U.S.C. § 1455b(B)(2). Special protections are also authorized by section 48-39-80(B)(4) of the South Carolina Coastal Management Act. Under South Carolina's Coastal Zone Management Plan, "A project would be prohibited if it would permanently disrupt the uses of priority for the designated area. A project would be strongly discouraged or the permit conditioned if the project would interrupt, disturb or otherwise significantly impact the priority uses of the designated area." SCCZMP IV-2. As the Management Plan recognizes, the coastal zone of South Carolina is rich in historic and cultural features such as colonial settlements, and "residents and visitors, alike, perceive these resources as valuable assets and their preservation and protection as an important issue in the growth and development of the Lowcountry." SCCZMP IV-22. The Plan further observes that "[h]istoric societies are

very active throughout the area, and the value placed on the South Carolina heritage by its citizens cannot be overemphasized." SCCZMP IV-23. "On this basis, areas of specific historic, archeological and cultural significance are felt to be important as Geographic Areas of Particular Concern (GAPCs) in the coastal zone." *Id.* The Charleston Historic District, which includes the neighborhoods represented in this case and nearly all of downtown Charleston, is a Geographic Area of Particular Concern. SCCZMP IV-26.

In addition to special protections for historic areas, South Carolina's CZMP also contains specific requirements for port terminals and the significant impacts they have in the coastal zone. Among other things, proposed port developments must comply with air quality standards as regulated by the U.S. Environmental Protection Agency ("EPA") and DHEC and "must be sited, constructed and operated in a manner that is consistent with local and State development objectives as set forth in public documents such as comprehensive plans, zoning ordinances and performance standards." SCCZMP III-20.

Critical Area Permit, unlike the certifications, are solely a creature of state law. The critical area is defined as coastal waters, tidelands, beaches and beach/dune system. S.C. Code Ann. § 48-39-10(J). OCRM has direct permitting authority over the critical areas pursuant to statutory provisions in S.C. Code Ann. § 48-39-10, *et. seq.*, and DHEC's Critical Area Regulations, S.C. Code Ann. Regs. 30-1 *et. seq.* Any person wishing to alter a critical area must receive a permit from OCRM. These alterations can include building docks, bulkheads, boat ramps or other activities such as filling or dredging.

As noted, these three state level reviews are somewhat overlapping but legally and functionally distinct. Depending on where a project is located and the activities it

involves, a project may need one, two, or all three of the state reviews, or none of them. A major project like the cruise terminal proposed by SPA requires all three.

B. Procedural Background

SPA's initial application for state permits for its project failed to include details about the entire project and the cruise operations it would enable – SPA claimed that all work to convert Building 322 would occur within the existing four walls of the building. R.002477. To their credit, OCRM staffers appear to have required more information. *See* R.001219. SPA's revised submission to DHEC revealed complete scope of activities, including the driving of new pilings in the Cooper River; constructing a new passenger apron structure; constructing a new building mezzanine level between the existing building and the vessel; refurbishing and redesigning a multi-acre parking lot; building a stand-alone structure for generators; and constructing a stand-alone ship stores loading dock and covered storage area. R.001206, R.001208.

The Community Groups participated actively in the administrative process leading up to the OCRM staff decisions at issue in this case, speaking at hearings submitting numerous comment letters detailing and objecting to the significant impacts of industrial cruise operations in Charleston and suggesting mitigating measures to reduce them. On December 18, 2012, OCRM staff issued SPA a Critical Area Permit and Coastal Zone Consistency Certification ("CAP/CZCC") with special conditions. DHEC's authorization did not examine alternative locations for the new terminal, which could significantly lessen impacts on the historic area. Nor did DHEC independently examine use of shore power to decrease air pollution impacts on local citizens from the

new terminal. DHEC also failed to substantively evaluate placing limits on water pollution discharges from cruise ships to protect Charleston Harbor and area beaches.

DHEC did, however, condition SPA's permit on operations at the new terminal being "conducted in accordance" with an attached cruise management plan, and the permit provides that if any changes to the plan are proposed, DHEC must be included in the "notification process" outlined in it. R.000137 (DHEC Permit # OCRM-12-54-B at 1). The referenced cruise management plan was one agreed to by SPA and the City of Charleston and limits the number of cruise ships to no more than 104 calls per calendar year and prohibits the hosting of more than one ship at a time at the cruise terminal without advance notice and review. R.001306. A clarification of the plan, also incorporated in Special Condition 1, provides that SPA must provide 1-years notice concerning proposed changes to the plan to a number of parties including two of the Community Groups here, the Historic Charleston Foundation and the Preservation Society. R.001305. Although the permit's signature page states that SPA accepts and agrees "to comply with the terms and conditions of this permit," R.001292 (emphasis removed), SPA has taken the position that these limitations are in no way binding upon it. R.002433.

Because OCRM had not evaluated or imposed all practicable measures to reduce the impacts of SPA's project and had authorized SPA's project on unlawful procedure, the Community Groups timely requested that their objections be heard at a DHEC Board Review Conference pursuant to S.C. Code Ann. § 44-1-60(F). The Board declined to hold a review conference, and the Community Groups then requested a contested case hearing before the ALC, on February 11, 2013.

A number of orders from the ALC are on appeal. First is the ALC's summary judgment order, concluding that the Community Groups were not "affected persons" entitled to request Board Review or a Contested Case Hearing. Second is the ALC's failure to grant the Community Groups' motion to vacate the OCRM approvals and remand them to DHEC because they lack the required 401 Certificate and are thus facially invalid. Third, the Community Groups appeal the ALC's order denying them discovery at the request of SPA. Finally, they appeal the ALC's decision to sanction the Community Groups for contending that the requirement that the DHEC Board "must" hold a Review Conference sets forth a mandatory duty.

ARGUMENT

I. Standing

The ALC erred in finding that none of the Charleston Community Groups or their members impacted by SPA's proposed $35 million cruise terminal in downtown Charleston qualified as affected persons with standing to seek administrative review of DHEC's unlawful authorization. The path devised by the ALC to reach this result is riddled with manifest legal error. Among other things, the ALC concluded that a citizen who lives next to an industrial operation and testifies that she chokes on the visible soot emitted from operation cannot show "affected person" status with standing to challenge a permit to increase that pollution as unlawful unless she submits expert testimony proving medical damage from the increase. The ALC also concluded exacerbation of an existing injury does not give a citizen "affected person" standing to challenge a permit (only entirely new injury can possibly suffice) and that an injured citizen cannot have standing

to challenge a permit where the permitted activity injures more than one person or a large group of them.

More fundamentally the ALC simply abandoned proper procedure on summary judgment, ignoring a welter of documents and testimony establishing affected person standing but taking averments of the movant, SPA, at face-value. As discussed below, the Community Groups not only created an issue of fact as to each and every element of standing, they proved – as they need *not* do on summary judgment – their standing by an overwhelming preponderance of the evidence.

South Carolina courts recognize three types of standing: statutory standing, constitutional standing, and public importance standing. *ATC South Inc. v. Charleston County*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008). Before finding on summary judgment that the Community Groups lacked of standing, the ALC denied an SPA motion to dismissed alleging lack of standing. The ALC's first ruling recognized that the Community Groups had properly alleged statutory standing as "affected persons" entitled to request administrative review of DHEC decisions pursuant to S.C. Code Ann. § 44-1-60. The ALC committed clear error by reversing course on summary judgment, finding, despite hundreds of pages of disputed evidence, that no issue of fact existed as any of the Community Groups' standing.

A. The Community Groups Demonstrated Statutory Standing as "Affected Persons" Pursuant to S.C. Code § 44-1-60

"Statutory standing exists, as the name implies, when a statute confers a right to sue on a party, and determining whether a statute confers standing is an exercise in statutory interpretation." *Youngblood v. South Carolina Dept. of Soc. Servs.*, 741 S.E.2d 515, 518 (S.C. 2013). The statute in question in this case, S.C. Code Ann. § 44-1-60,

provides for administrative review of DHEC decisions, with specified parties given rights to participate in that process. After an initial DHEC staff permitting decision, notice must be sent to the permit applicants and "affected persons" who request notice. S.C. Code Ann. § 44-1-60(E)(1). An applicant or "affected person" then has 15 days to request review by DHEC's Board. *Id.* § 44-1-60(E)(2). An "affected person" can seek further administrative review via a contested case before the ALC. *Id.* § 44-1-60(F), (G).

It is uncontroverted that the Community Groups engaged in each step of this procedure: they participated in staff review; were notified of the staff decision to issue the permit and advised of their right to request Board review; requested such review; and when that review was declined, were so advised in writing and given notice of their right to request a contested case hearing in the ALC, which they timely did.

In denying an initial motion to dismiss based on standing, the ALC determined that the Community Groups had alleged standing as "affected persons" under the statute because their allegations met the three-part test governing constitutional standing in Article III federal court, *i.e.*, they had alleged injury traceable to the challenged action that could be redressed by administrative review.[2] SPA sought reconsideration but that request was deemed denied when the ALC failed to act on the motion within the time

[2] R.000042-43, 000048-49 (Order Den. Ports Authority's Mot. to Dismiss, 4-5, 10-14, Dec. 2, 2013 ("Mot. to Dismiss Order")). Throughout the Order Denying the Motion To Dismiss, the ALC acknowledged that the court must first look to determine whether there is a statute conferring standing. R.000042-43 (Mot. to Dismiss Order 4-5). That order cites to the case of *Sea Pines Association for the Protection of Wildlife, Inc. v. S.C Department of Natural Resources*, 345 S.C. 594, 550 S.E. 2d 287 (2001), in which the Supreme Court adopted the *Lujan* test for standing, even though the matter in *Sea Pines* was filed in Circuit Court, did not involve DHEC or the ALC, and was not filed pursuant to Section 44-1-60. R.000044-45 (Mot. to Dismiss Order 6-7).

frame provided by S.C. Administrative Law Court Rule 28(D)(2). Then SPA filed a motion for summary judgment along the same lines.

In responding to SPA's summary judgment motion, the Community Groups submitted voluminous evidence including numerous affidavits to support the allegations earlier found by the ALC sufficient to support their status as "affected persons" with standing. To take one example, Ms. Tommie Robertson, a member of the Coastal Conservation League, testified and that the new terminal will be closer to her home than SPA's existing terminal, which already impacts her when "thick black smoke [] emitted from the ship's smokestacks" envelopes her condominium patio, causing "pain in [her] throat" and forcing her to "retreat indoors" such that she can "no longer open any windows" or "enjoy [her] terrace while the cruise ships are in town." R.002589 (Robertson Affid. ¶ 6). Pollution from the existing cruise terminal had already coated her home in "filth" and "dirty soot," she testified, and those impacts "will be increased" if SPA "is allowed to construct the new terminal as permitted by DHEC" without "enforceable limits and protections in place, including operating in a less-dense historic residential area," particularly since the new terminal will be closer to her. R.002589-90 (Robertson Affid. ¶ 7, 9, 10).

Other affiants demonstrated similar affected person status, testifying that they live near the cruise terminal and have experienced significant degradation of air quality, traffic and historic integrity due to SPA's cruise operations, which the new terminal will only expand and intensify. *See, e.g.*, R.002594-96 (Gates Affid. ¶¶ 3-5, 8); R.002583-85 (Lane Affid. ¶¶ 7-11); R.002601-02 (Zimmerman Affid. ¶¶ 7,8). Marty Morganello testified that he "regularly swim[s] and kayak[s]" and "enjoy[s] the recreation and

aesthetic value" of the "waterways surrounding [his] home" and asserted that "expanded cruise shop operations at Union Pier" would "decrease [his] ability to use and enjoy the waterways for fear of health impacts" because "cruise ships dump raw merely three miles off the coast and into our waterways . . . expos[ing] members of the public like myself who use and enjoy those waterways to risks of disease and infection." R.002751-52 (Morganello Affid. ¶ 3-5). Morganello alleged that he will be personally harmed by "increased cruise operations . . . without any legally binding regulations in place" controlling this water pollution. R.002752 (Morganello Affid. ¶ 5). All of those harms would result if the project proceeds as authorized by DHEC.

The Community Groups also submitted extensive information from SPA's own files showing that the proposed terminal would allow – and is intended to facilitate – the continuation and expansion of its cruise operation in the historic district, and that such operations could *not* continue without the new terminal. Positive evidence thus showed that DHEC's permit approvals would allow cruise activity to continue and to expand, and that continuance and expansion would cause injury to the Community Groups' members. The ALC's conclusion on summary judgment that statutory "affected person" standing was nevertheless not present contained two fundamental errors, discussed below.

1. The ALC Erred in Construing the Statutory Term "Affected Persons" to Exclude Neighbors Injured from Expanded Cruise Home Base Operations at a Proposed Terminal

The ALC recognized that S.C. Code Ann. § 44-1-60 gives an "affected person" the right to file a contested case in the ALC and that the General Assembly did not define the term "affected party." R.000081 (Order Granting Summ. J. for Lack of Standing, 5, April 11, 2014 ("Summ. J. Order")). Rather than undertaking any analysis of that term,

however, the ALC found that the Community Groups must prove the three elements of Article III standing in order to be "affected persons" entitled to participate in administrative review of a DHEC permitting decision. *Id.* The ALC erred in not attempting to define the term using its ordinary meaning within the context of the statute it is used. The statute allows "affected persons" to request DHEC Board review of staff decisions and then to request a contested case hearing with the ALC. Determining the scope of "affected persons" entitled to participate is an exercise in statutory interpretation. *Youngblood.*, 741 S.E.2d at 518. The legislature's intent should be ascertained primarily from the plain language of the statute, *State v. Landis,* 362 S.C. 97, 102, 606 S.E.2d 503, 505 (Ct. App. 2004), and the language used must be read in a sense that harmonizes with its subject matter and accords with its general purpose. *Mun. Ass'n of S.C. v. AT&T Commc'ns of S. States, Inc.,* 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004); *Hitachi Data Sys. Corp. v. Leatherman,* 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992).

The ordinary meaning of "affected" denotes one who is acted upon, influenced or injured. *E.g.,* Black's Law Dictionary, 6th Ed. (1990) (defining "affect" as "[t]o act upon; influence; change . . . often used in the sense of acting injuriously upon persons and things."). Thus the statute's obvious intent is to allow those acted upon, influenced or injured by a DHEC decision to participate in the administrative process. In other contexts, the General Assembly has defined the universe of persons entitled participate in the administrative procedures differently. In the Certificate of Need ("CON") arena,

"affected persons" are defined to include those residing within a geographic service area.[3] The statute governing alcohol licensing defines those entitled to contest licenses in the ALC as being those within the same county or a "five mile" radius.[4] Here, by contrast, "affected persons" is not defined by the statute, and should be construed in its ordinary meaning to include those injured by DHEC's unlawful permitting of a new cruise terminal project next to their neighborhood.

The evidence produced by the Community Groups more than demonstrated that they are among the "affected" entitled to participate in the legislatively established administrative process They participated in that process at every turn, making their interest in and objections to the terminal as proposed by SPA known to all parties, submitting information documenting how impacts on them could and should be reduced, and, after receiving written notice of OCRM's staff decision, seeking review before the DHEC Board. *See South Carolina Coastal Conservation League v. South Carolina Dept. Health and Envtl. Control*, 390 S.C. 418, 428, 702 S.E.2d 246, 252 (2010) (finding the League was an "affected person" for purposes of S.C. Code Ann. § 44-1-60 because DHEC sent notice to the League of staff decision and "[t]he record clearly establishes that throughout the permit application process in this matter, the League was not an obscure or unknown party"). When the Community Groups' status was challenged on summary judgment, they submitted multiple affidavits from members negatively

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[3] *See* S.C. Code Ann. Regs. 61-15(103)(1)) (defining "affected persons" as those "residing in the geographic area to be served by the applicant" as well those in the area who provide similar services); *Home Health Services, Inc. v. South Carolina Dept. of Health and Envtl. Control*, 298 S.C. 258, 263, 379 S.E.2d, 734, 736 n.2 (Ct. App. 1989).
[4] See S.C. Code Ann. § 61-6-185(A) (providing that persons residing within the county in which a retail license requested or "within five miles" of the location may protest license and proceed to ALC).

impacted by the proposed terminal's increased air and water pollution, by property damaged and diminished in its use and enjoyment, by increased and intolerable traffic in a concentrated area near their homes, and by degradation of the scenic and historic characteristics of homes and historic neighborhoods in the immediate vicinity of the terminal. The ALC nevertheless failed to examine whether the members of these organizations qualified as "affected" in the ordinary sense of that word. Instead, the ALC skipped to the question of Article III constitutional standing, focusing on whether administrative review would "redress" the Community Groups' injuries.

That was error. Whether the administrative process that the General Assembly established for "affected persons" will redress those person's injuries is a question that the General Assembly has already answered in the affirmative. Its provision of participatory administrative rights to "affected persons" reflects a legislative determination that such participation should be available to them if they want to invoke it to protect their rights. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, __ U.S. __, 132 S.Ct. 2199, 2211 (2012) (existence of the administrative remedy demonstrates the legislature's "evident intent" to make agency action reviewable); *Mendoza v. Perez*, 754 F.3d 1002, 1110 (D.C. Cir. 2014) (*citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992)) (where federal statute gives cause of action to "adversely affected or aggrieved" persons the need to show causation and redressiblity elements of Article III standing are relaxed).

It is important to understand that "affected persons" is a limited universe of citizens. To be an "affected person," a party must show injury within the zone of interests protected by the substantive statute underlying the administrative claims, thus

foreclosing review where a party's "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed" that the legislature intended to permit the action. *Match-E-Be-Nash-She-Wish Band*, 132 S.Ct. at 2211 (*quoting Clarke v. Securities Industry Ass'n.*, 479 U.S. 388, 399 (1987)). Here, the Community Groups alleged, and showed, that they have injuries which fall squarely within in the zone of interests protected by the laws at issue: the Coastal Zone Management Act, the Pollution Control Act, the federal Clean Water Act, and their implementing regulations and standards. Those laws explicitly seek to minimize impacts to water quality, air quality, human health, neighborhood integrity and historic heritage – the very same rights that the Community Groups and their members seek to vindicate here.[5]

[5] For example, the General Assembly enacted the Coastal Zone Management Act because "[i]mportant ecological, cultural, natural, geological and scenic characteristics, industrial, economic and historical values in the coastal zone are being irretrievably damaged or lost by ill-planned development that threatens to destroy these values." S.C. Code Ann. § 48-39-20(E). The Act aims to "develop[] and implement[] comprehensive programs to achieve wise use of coastal resources giving full consideration to ecological, cultural and historic values." S.C. Code Ann. § 48-39-30(B)(5). Pursuant to this goal, the statute requires OCRM to consider "[t]he extent to which the development could affect . . . irreplaceable historic and archeological sites of South Carolina's coastal zone" as well as the effect of the proposed use on "the value and enjoyment of adjacent owners," to ensure that "all feasible safeguards are taken to avoid adverse environmental impact resulting from a project," and to compare the economic benefits of the project "with the benefits from preservation of an area in its unaltered state." S.C. Code Ann. §§ 48-39-150(6), (7), (9), (10). South Carolina's obligations under the federal Clean Water Act require DHEC to assess "reasonably foreseeable activities of the applicant or others" on water quality, R.61-101(F)(3)(c), consider "any feasible alternative" to the project as proposed, and must deny the 401 certification if "there is a reasonable alternative to the activity, which reduces adverse consequences on water quality." R.61-101(F)(3)(c), (F)(5)(b).

2. The ALC Erred in Ordering Summary Judgment Where the Non-Movants' Evidence Showed Their Members Reasonably Feared Injuries from SPA's Unlawfully Permitted Project

Even if the ALC's decision could be read to answer the proper question – whether the Community Groups are "affected person" irrespective of Article III standing – the ALC erred on summary judgment by ignoring evidence showing that the Community Groups would be "affected" if SPA is allowed to build and operate the terminal needed for SPA to continue and expand its cruise operation. The ALC was obliged on summary judgment to view the non-movants' evidence in a light most favorable to them. *See Doe v. Howe*, 626 S.E.2d 25, 27 (Ct. App. 2005). The ALC cited the proper evidentiary standard, but then interposed spurious reasons to ignore that evidence entirely. For example, the ALC disregarded Tommie Robertson's testimony that the air pollution from the cruise ship hurt her throat and caused her to seek shelter because she provided no medical expert testimony establishing her injury. R.000086 (Summ J. Order 10). The ALC likewise disregarded the testimony of Christina Dodd, Virginia Lane, and Stephen Gates' aesthetic and property injuries because they did not provide expert evidence of their injuries. R.000085 (Summ. J. Order 9). And the ALC disregarded Marty Morganello's testimony of his injuries from the water pollution caused by cruise operations as "conjecture" and "unsubstantiated speculations" because there was supposedly no evidence showing that the permit would increase cruise activities and thus increase water pollution. R.000086-87 (Summ. J. Order 10-11).

South Carolina courts do not require a party to provide expert testimony to bolster lay testimony concerning reasonably perceived injury on summary judgment. On the contrary, the rule governing summary judgment requires only that opposing affidavits "be

made on personal knowledge." SCRCP 56(e). All of the affidavits submitted to the ALC were sworn and speak to matters of personal knowledge and reasonable belief, and are similar to affidavits found sufficient throughout environmental case law. In *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,* for example, the U.S. Supreme Court found injury where plaintiffs asserted that "Laidlaw's discharges, and the affiant members' reasonable concerns about the effects of those discharges, directly affected those affiants' recreational, aesthetic, and economic interests." 528 U.S. 167, 183-184 (2000). How the ALC might ultimately choose to weigh such testimony is irrelevant; neither conclusive evidence nor expert testimony is required to provide a foundation for an affiant's assertion of injury on summary judgment.

B. The Community Groups Demonstrated Article III "Constitutional" Standing

As "affected persons," the Community Groups were entitled to participate in the administrative process directed by S.C. Code Ann. § 44-1-60. To the extent federal Article III "constitutional standing" is required, however, they have met that test as well by showing injury-in-fact fairly traceable to DHEC's decisions that could be redressed by administrative review. The ALC's order erroneously granted summary judgment by ignoring the non-movants' evidence and interposing erroneous evidentiary standards just mentioned. The ALC also erred in failing to find that SPA's challenge to the Community Groups' Article III standing *had already been litigated in an Article III court and resolved against SPA*, such that relitigation of the same issue before the ALC was collaterally estopped.

1. An Article III Court Has Already Considered and Rejected SPA's Article III Summary Judgment Argument – SPA Is Estopped from Relitigating the Issue Here

SPA voluntarily intervened in a lawsuit that several of the Community Groups filed challenging the Corps of Engineers federal permit for SPA's proposed cruise terminal – the same terminal at issue in this case. SPA filed a motion for summary judgment in that case alleging that the Community Groups lacked Article III standing. *See Preservation Society of Charleston v. U.S. Army Corps of Engineers*, No. 2:12-2942-RMG, 2013 WL 6488282 at *1 (D.S.C. September 18, 2013) (slip copy). The basic Article III standing test was laid out in *Lujan v. Defenders of Wildlife*:

> First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not "conjectural" or "hypothetical". Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

504 U.S. at 560-61 (internal citations omitted). *See Sea Pines Association for the Protection of Wildlife, Inc. v. S.C Department of Natural Resources*, 345 S.C. 594, 550 S.E. 2d 287 (2001) (adopting *Lujan*'s Article III framework in determining standing to bring declaratory action in Circuit Court).

The elements of Article III Standing were briefed by both sides, with SPA contending that the Community Groups lacked any injury traceable to approval of the cruise terminal's federal permit and the Community Groups submitting affidavits demonstrating otherwise. 2013 WL 6488282. at *14-*15. After a hearing, and in a

written opinion, the federal court rejected SPA's motion for summary judgment on Article III standing, and found the Community Groups could proceed with their challenge to SPA's permit. *Id.* at *15.

When SPA presented the same summary judgment arguments to the ALC, the Community Groups asked the ALC to find the motion estopped. R.000079 (Summ. J. Order 3 n. 2). The ALC rejected that argument in a footnote with no substantive analysis.[6]

"Collateral estoppel, or issue preclusion, prohibits a court from adjudicating an issue that was 'actually litigated and determined by a valid and final judgment' in a prior suit." *Judy v. Judy*, 383 S.C. 1, 6-7, 677 S.E.2d 213, 217 (Ct. App. 2009). The doctrine "applies to specific issues, regardless of whether the claims in the first and subsequent suits are the same," where "the precluded party has had a full and fair opportunity to litigate the issue in the first action." *id.* (internal quotation marks omitted). Prior litigation of an issue in federal court may prevent relitigation of that same issue in state court. *See, e.g.*, *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 216-17, 493 S.E.2d 826, 835 (1997).

Because the Article III standing issue was actually litigated and resolved against SPA in the prior federal court decision, SPA was, and is, precluded from relitigating it in a later state proceeding such as the ALC or this Court. *Crestwood Golf Club*, 328 S.C. at

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[6] The only ink spilled was non-sequitur: according to the ALC, while "the federal court order addressed the federal process," that order "did not negate the critical area permit and coastal zone certification at issue in [the contested case]." R.000079 (Summ. J. Order 3 n.2). The Community Groups never contended that the federal court order "negated" anything – it *resolved* the standing issue, and prevented the issue's relitigation in the ALC.

216-17, 493 S.E.2d at 835; *Judy*, 383 S.C. at 7, 677 S.E.2d at 217. Public policy or fairness does not require the doctrine be ignored in this case. *See State v. Hewins*, 409 S.C. 93, 106, 760 S.E.2d 814, 821 (2014). To the contrary, the ALC's utter disregard for a published federal opinion resolving the exact issue embodied a lack of judicial comity and respect, and worked a distinct, direct injustice on the Community Groups by depriving them of their right to challenge unlawful authorizations that cause them and their property damage. The ALC erred in not finding this issue precluded.

2. The ALC Erred In Ordering Summary Judgment Against Citizens Who Produced Evidence that they Would be Injured by Pollution from Proposed Cruise Terminal and Administrative Review Could Reduce or Avoid their Injury

Even if the issue was not estopped, the ALC made four errors in applying Article III standing law. First, as noted in the "affected person" discussion, the ALC committed obvious error by requiring the Community Groups to come forth not merely with evidence of injury from the Ports Authority's proposed terminal, but to prove all elements of standing on summary judgment by a preponderance of the evidence backed by expert testimony. The ALC created a new standard that the Groups must present "expert medical testimony" or "reliable expert testimony" to present a "foundation for affiants' claims" that the project will impact them, their families, their health, and their quality of life. R.000085-89, 92 (Summ. J. Order 9-13, 16 n.20). That is not and has never been the law.

Just as it dismissed Ms. Robertson's testimony about choking on cruise ship pollution due to the lack of an expert affidavit proving medical damage from the same, R.000086 (Summ. J. Order 10), the ALC disregarded evidence showing that a cruise terminal designed for larger vessels carrying more passengers would lead to their being

larger vessels and more passengers – and thus cause more pollution, more traffic, more damage and more disruption – because the Community Groups did not present testimony of port experts, making their concern about larger ships, more people and more pollution purely "speculative." R.00085-89 (Summ. J. Order 9-13). As with the "affected person" standard, the ALC's faulty evidentiary standard requires reversal of the ALC's finding of no Article III standing. There is no requirement for a party to bolster admissions by an opposing party – here, SPA, via its own documents showing that the terminal is designed to host larger ships with more passengers and its admission that impacts will be greater than the existing terminal – with independent expert testimony merely to survive a motion for summary judgment on standing. Testimony setting forth the Community Groups' reasonable concerns that SPA's continued and expanded cruise ship operations would harm their health and property, degrade the air they breathe, pollute the waters where they recreate, and erode the tranquility and historic integrity of the neighborhoods where they work and live was sufficient to demonstrate standing. *See Friends of the Earth,* 528 U.S. at 183-84 (finding "affiant members' reasonable concerns" about the effects of discharges on affiants' recreational, aesthetic, and economic interests sufficient to establish injury in fact).

The ALC further erred in granting summary judgment on the basis of a single SPA affidavit claiming that the proposed terminal would have no change on cruise operations or their impacts in Charleston. *See* R.000087-89 (Summ. J. Order 11, 12 n.17, 13). Putting aside the apparent irrationality of building a $35 million dollar terminal to change nothing, on summary judgment the ALC was obligated to view the evidence in a light most favorable to the Community Groups, and not accept SPA's self-serving (and

non-credible) affidavit as dispositive. Instead the ALC ignored evidence from SPA's own files showing that:

- the proposed terminal is designed to host much larger cruise vessels (3,500-passenger) than the vessel currently hosted at SPA's existing terminal (2,500 passengers), R.002439, R.002468, R.002462;
- the new terminal is three times larger (100,000 square feet) than the existing terminal (30,000 square feet), R.002458;
- the existing terminal does not meet U.S. Customs and Border Patrol ("CBP") minimum security requirements, R.002459;
- the existing terminal is outdated and, in SPA's own words "desolate," "undistinguished," "out-of-date," and "unattractive," R.002481, R.002482;
- SPA touted Charleston's cruise market as very attractive and told cruise lines that it was "very, very" aware of the opportunities a new larger terminal could unlock, R.002422, R.002474, R.002463, R.002434.

The ALC's crediting of a single self-serving affidavit while ignoring, completely, extensive evidence showing that SPA needs a new cruise terminal to continue and increase the scale of its cruise ship home basing operation was manifest error.[7]

Third, the ALC erred in concluding that persons living next to a proposed shipping terminal and who allege that pollution and congestion from the terminal will directly impact them, their families, their homes and their neighborhoods have insufficiently "particularized" injuries to support standing. R.000083-87, 90 (Summ. J.

[7] The analysis in *Bailey v. S.C. Dept. of Health and Envtl. Control*, is thus distinguishable from this case. 388 S.C. 1, 693 S.E.2d 426 (Ct. App. 2010). There, the ALC found no standing after a full contested case hearing rather than on summary judgment, and the evidence showed that the uses that Bailey feared would not occur or already could occur within the same dock footprint. *id.* at 7-8, 429-30. Here the Community Groups have produced affidavits and documents from SPA's own files showing that the proposed terminal is needed for SPA's polluting cruise operation to continue when it otherwise could not and is intended to accommodate larger, more polluting vessels with many more persons aboard than the Carnival *Fantasy*, which already causes traffic and pollution impacts at SPA's existing terminal.

Order 7-11, 14). For example, the ALC dismissed the testimony of Mr. Gates and Ms. Robertson because, in its view, everyone in downtown Charleston will experience similar harms from cruise ship air pollution and severe traffic congestion. R.000084-88 (Summ. J. Order. 8-12). But there is no evidence in the record supporting that counter-intuitive theory. Even if there were, the fact that a plaintiff has a personal stake is not negated by the reality that others may have similar interests or rights at risk. The point is to ensure that the plaintiff is among the injured and has a stake in the outcome. Where an injury is sufficiently personal to an individual to support standing, it is not defeated because others are harmed as well. *FEC v. Akins*, 524 U.S. 11, 24 (1988). "Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process." *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972).

At the most basic level, it is hard to conceive of more particularized harm than a woman living next to a smokestack who sees diesel soot being emitted from the stack, watches it flow towards her, and then, when it reaches her, experiences difficulty breathing so that she must go inside and remain there. *See* R.002588-89 (Robertson Affid. ¶¶ 6, 7). Such testimony and that of other citizens who live and work near the proposed terminal and already experience the pollution, traffic and disruptive impacts of SPA's existing cruise facility, was more than enough to distinguish them from just any citizen who might seek to challenge an SPA permit based on a "generalized grievance" with that state agency's management. At a minimum, the evidence submitted added to and substantiated those harms that the ALC earlier found sufficient to deny SPA's motion

to dismiss for lack of standing, and the ALC's departure from its own earlier conclusion was plainly erroneous.[8]

Fourth and finally, the ALC erred in finding that "exacerbation" of an existing injury cannot support standing. R.000084-87 (Summ. J. Order 8-11). There is no support for that concept, and a moment's reflection reveals why: it would remove the right of citizens in polluted areas to challenge unlawful activities that make that pollution, and its harmful effects on human health and the environment, even worse. The law does not condone such blatant environmental injustice. Rather, even plaintiffs who use an affected area and have their "aesthetic and recreational values. . . *lessened*' by the challenged activity" have sufficient injury to support Article III standing. *Friends of The Earth*, 528 U.S. at 183 (emphasis added). The testimony in this case includes multiple statements from witnesses that their use and enjoyment of their homes and the local historic and natural environment will be *significantly diminished* if SPA's cruise operation continues and expands. Nothing more is needed for standing.

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[8] To the extent the ALC relied upon the S.C. Supreme Court's decision in *Carnival Cruise Lines v. Historic Ansonborough Neighborhood Association,* 407 S.C. 67, 753 S.E.2d 846 (2014), as an intervening change in law to explain its change from holding that the Community Groups had properly alleged standing to finding they had failed to create an issue of fact as to its elements, that too was error. *Carnival* focused on the special pleading requirements for nuisance and ordinances enforcement claims: the requirement that a plaintiff have "special injury" and allege "special damages" to property, respectively, *see id.* at 852 (*quoting* S.C. Code Ann. § 6-29-950). Here, the General Assembly gave "affected persons" recourse to an administrative process, and the Community Groups submitted multiple affidavits and voluminous evidence showing that they so qualified. No such evidence was considered in *Carnival,* which was decided on a motion to dismiss.

C. Public Importance Standing Exists to Ensure Proper Application of the Law to A State Agency's Major Project and Effectuate Remedies Endorsed by the General Assembly

Even if the Community Groups do not have standing under either the statutory or constitutional tests, the ALC erred in finding that they do not have public importance standing. Public importance standing recognizes that "the rule of standing is not inflexible and standing may be conferred where the issue is one of public importance." *South Carolina Public Interest Foundation v. South Carolina Transp. Infrastructure Bank*, 403 S.C. 640, 645-46, 744 S.E.2d 521, 524 (2013). "The public importance exception grants standing to a party who has not suffered a particularized injury where the issue involved is of such public importance that its resolution is required for future guidance." *id.* "Whether an issue of public importance exists necessitates a cautious balancing of . . . competing policy concerns underlying the issue of standing." *ATC* 380 S.C. at 198-200, 669 S.E.2d at 341 (2008) (quoting *Sloan v. Sanford*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004)). "The key to public importance analysis is whether a resolution is needed for future guidance . . . [y]et the very nature" of the doctrine "resists a formulaic approach, as each case must turn on 'the competing policy concerns'" of standing. *Id.*

In *Baird v. Charleston County,* doctors alleged that the Charleston County government had committed an illegal act by issuing hospital bonds beyond the County's statutory authority. 333 S.C. 519, 524-26, 511 S.E.2d 69, 72 (1999). The Court found that this allegation was sufficient to establish public importance standing because allegations of illegal government action are of public importance. *Id.* at 531, 75. The relevance of illegal government action for public importance standing has been

repeatedly emphasized by the Court. *See e.g., South Carolina Public Interest Foundation*, 744 S.E.2d at 524 (finding an allegation of unconstitutional government action "the precise instance where the public importance exception should apply"). *Baird* also found that the alleged illegal government action harmed a "profound public interest." *Baird*, 333 S.C. at 531, 511 S.E.2d at 75. There the issuance of illegal hospital bonds was of public importance because it affected public health and welfare. *Id.* To determine the public interests at stake, the Court looked to the overall public policy embodied by the allegedly violated statute—the Hospital Bonds Act—and its stated purpose "to promote the public health and welfare." *Id.* The Court found that alleged illegal government action which implicated widely applicable public interests was sufficient to establish public importance standing.

This case is analogous. The Community Groups allege illegal government action that impacts a "profound public interest." The groups in this case argue that DHEC failed to comply with South Carolina law—specifically, the Coastal Zone Management Act, the Coastal Management Plan, and DHEC's own regulations—in authorizing a very controversial and disruptive state-owned project. To the extent that the ALC found that the harms were not particularized because they would be shared by all of Charleston's residents and visitors (in other words that the harms would be shared by a very large number of people) the public importance exception is warranted.

Further evidence of public importance was provided by action by the General Assembly concerning SPA's proposed terminal and a central remedy sought by the Community Groups. This year, the S.C. General Assembly passed a budget proviso requiring shorepower in Charleston for cruise ships. 2014-2015 Appropriations Bill H.

4701, Pt. IB § 88.4 (ratified by the General Assembly on June 5, 2014 and enacted on July 1, 2014) ("The State Ports Authority shall include shore electrical power capability in the design and construction of any new terminal or facility servicing passenger cruise ships in Charleston County.") For several years now, the Community Groups have urged the installation of shore-side power to reduce the significant amounts of pollutants such as sulfur dioxide and nitrogen oxides that cruise vessels emit – even when at berth. Cruise vessels must burn large amounts of fuel to power what is in essence a floating town.[9] Shoreside power reduces air pollution by allowing the vessel to shut off its engines and plug into the grid. R.002634, R.002636 (James J. Corbett, Clearing the Air: Would Shoreside Power Reduce Air Pollution Emissions from Cruise Ships Calling on the Port of Charleston, SC? 7, 9 (2013)) (showing that shoreside power would reduce air pollution from Carnival *Fantasy* while docked in Charleston, and reduce emissions from 3,500 passenger vessel even more). Other ports have adopted shore side power for cruise vessels – including Brooklyn and Halifax as well as numerous ports on the west coast – and the Community Groups contended to OCRM that Charleston deserved the same.

Legislative support for the remedy sought by Community Groups makes OCRM's dismissal of that option – with no independent analysis – appropriate for public interest standing and review. That public interest importance is increased more still by the fact that the project proponent is a state agency, seeking to build a large and disruptive public facility in the heart of historic Charleston, which is protected as a Geographic Area of Special Concern under the permitting laws applicable here. *See* SCCZMP IV-26. The

[9] In this way and others, cruise ships – with thousands of persons (and toilets and showers) aboard – are distinguishable from cargo vessels, which typically have crews of less than fifty aboard.

groups' allegations that DHEC violated the law by failing to give proper consideration to ecological, cultural, and historic values that would be irretrievably damaged or lost by ill-planned development of a new cruise terminal is an allegation of illegal government action that impacts a profound public interest. Thus, this Court should find that the Community Groups have public importance standing.

D. The ALC Erred in Applying a Dissenting Opinion Rather than Controlling Law in Determining if Community Groups Have Associational Standing

The ALC found that, even if the individual members had standing, the Community Groups lacked associational standing. This holding too warrants reversal. The ALC erroneously relied on a *dissenting* opinion in a case where associational standing was, in fact, found.

"The three part test for associational standing requires that an association's members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Carnival*, 407 S.C. at 75-76, 753 S.E.2d at 850-51. Members of the Community Groups testified as to their individual injury and also explained how those injuries, and efforts to redress them, motivated and are vindicated by their membership in the respective groups. The Petitioners also submitted affidavits from officers of the organizations themselves, establishing how the interests at stake in this litigation are germane to the purposes of their organizations. For example, Stephen Gates, of the Charlestowne Neighborhood Association, testified that members of that group "have suffered a real and substantial diminution in the quality of their lives" such that the "membership by overwhelming vote

adopted resolutions expressing concern over congestion, pollution, scale and other quality of life issues related to SPA's proposed cruise ship expansions at Union Pier" and the group "established [a] Cruise Ship Task Force to pursue a study of alternative cruise terminal sites" and "pursue legal limitations on cruise ship activity in Charleston" because "the founding principles [of the group] in preserving the historic quality of our neighborhood will continue to be directly threated by" the proposed terminal. R.002595-96 (Gates Affid. at ¶¶ 6, 7).

Katherine Zimmerman, Program Manager of the Coastal Conservation League, testified that the League "has been involved with community work on the issue of the cruise industry's environmental impacts in Charleston since 2009" and includes over 1,400 members "who[] have requested updates on the issue of cruise regulation and reasonable limits," and "hundreds of members" who "have written letters . . . and comments to [DHEC] regarding existing cruise operations and SPA's planned new terminal" and have also attended public meetings and hearings to express their concerns regarding the impacts that cruise operations have on . . . the . . . historic resources, neighborhoods, and environment" of Charleston. R.002600-01 (Zimmerman Affid. at ¶ 6). Zimmerman testified that the League "has also sought to protect the legal rights of it and its members through the courts" and "has been involved with two other lawsuits addressing the impact of cruise operations on the environment, historical resources, human health, and livability in Charleston" including the federal case where "[t]he court declared the Corps' authorization of the new terminal project void." R.002602 (Zimmerman. Affid. at ¶ 8).

Evan Thompson, Executive Director of the Preservation Society of Charleston, testified that "[t]he purpose of the Society is to cultivate and encourage interest in the preservation of building, sites and structures of historical or aesthetic significant and to take whatever steps may be necessary and feasible to prevent the destruction or defacement of any such building sit or structure" and that "[t]he Society has been engaged with the issue of the cruise industry's impacts and potential impacts to Charleston's historic properties and neighborhoods since 2003." R.002644-45 (Thompson Affid. at ¶¶ 3, 5). Thompson testified that the Society's Board of Directors adopted a position statement calling for "reasonable, written and enforceable regulations" limiting the impacts of cruise operations and a "reconsideration for the final location of a new cruise terminal." R.002547 (Thompson Affid. at ¶ 9). Thompson further testified that the Society submitted comments to DHEC that "explained the intense impacts that the proposed cruise terminal would have on the surrounding historic neighborhoods and property," and that "[t]he Corps' failure to undertake a public process of consultation and evaluation concerning the proposed cruise terminal's impacts on federally protected historic structures injured the Society and its members." R.002651 (Thompson Affid. at ¶ 21).

The ALC cited two rationales in finding these and other Groups lacked associational standing. First, the ALC found that "injury as to one member of an organization does not extend to the rest of the organization." R.000093 (Summ. J. Order 17). That is not the law in South Carolina. As stated by the full Supreme Court earlier this year, an "organization has associational standing 'if *one or more* of its members will suffer an individual injury by virtue of the contested act.'" *Carnival*, 407 S.C. 76, 753

S.E.2d at 850 (quoting *Sea Pines*, 345 S.C. at 600-01, 550 S.E. 2d at 291) (emphasis added). The ALC also found insufficient evidence that the interests at stake in this case are germane to the groups' organizational purposes (with the exception of Charleston Communities for Cruise Control.) R.000090-92 (Summ. J. Order 14-16). This is one more example of the ALC improperly viewing the non-movant Community Groups' evidence *against them* on summary judgment: multiple affidavits explained that concern with unregulated pollution and disturbance from SPA's cruise operation fits well within the Groups' missions to protect wellbeing of their neighborhoods, property values and the natural, human and historic environment that makes downtown Charleston a unique and delicately balanced place to work and live. As the remedy sought here would, if granted, "inure to the benefit of those members of the association actually injured," *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977), associational standing is present.

II. The ALC Erred in Not Vacating A DHEC Authorization That Lacks an Important Required Certification Component

A. The 401 Certification Requirement Under Federal and State Law

Because a federal permit is required for SPA's project, the federal Clean Water Act requires that SPA obtain a 401 Certification from DHEC evaluating whether the project complies with state water quality regulations and standards. 33 U.S.C. § 1341(a). Specifically, any application for a federal permit to construct and operate a facility that "may result in any discharge into" navigable waters triggers the need for certification that the projects complies with DHEC Bureau of Water regulations, promulgated at Regulation 61-101 and Regulation 61-68. 33 U.S.C. 1341(a)(1). Without this "401

Certification," the federal agency – here, the U.S. Army Corps of Engineers – cannot grant the permit. *Id.*

The kind of federal permit that SPA originally sought and temporarily obtained for its new terminal was "Nationwide Permit 3" ("NWP 3"), a general permit issued by the Corps for routine maintenance. As the name indicates, nationwide permits are issued by the Corps at the national level to provide coverage for classes of projects with minimal enough impacts to avoid needing an individual Corps permit. NWP 3 is available for maintenance projects with minimal impacts that do not change a facility's "use."[10]

Each type of NWP must be given 401 Certification at the state-wide level by the respective state agencies *before* projects in that state can be authorized under that NWP. Once a particular NWP is certified by a state as complying with its water quality regulations, individual projects qualifying for the NWP typically do not have to obtain separate certifications – the state has already evaluated the class of qualifying projects in advance and certified them. Accordingly, the DHEC Bureau of Water's Water Quality Certification regulations empower it to issue "general certifications for categories of activities or for activities specified in Federal nationwide or general dredge and fill permits pursuant to Federal law or regulations." S.C. Code Ann. Regs. 61-101(A)(3). Here, however, SPA obtained its NWP 3 coverage from the Corps *before* DHEC had completed its certification of the NWP 3 maintenance permit for South Carolina. The

[10] U.S. Army Corps of Engineers, 2012 Nationwide Permits, Conditions, District Engineer's Decision, Further Information, and Definitions (with corrections) at 4, (3)(a) (*available at* http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2012/NWP2012_corrections_21-sep-2012.pdf); *see also* 77 Fed. Reg. 10,184, 10,191-93 (Feb. 21, 2012) (promulgating the 2012 Nationwide Permits).

Corps therefore issued "provisional" NWP 3 authorization for SPA's project on April 20, 2012, and the authorization became effective on April 23, 2012, when DHEC issued a statewide 401 Certification for NWP 3. DHEC separately issued a Critical Area Permit and Coastal Zone Consistency Certification for SPA's project on December 18, 2012. Those authorizations made no mention of an individual 401 Certification for SPA's project, which at the time was proceeding under the separately-certified Corps NWP 3 authorization

B. A Federal Court Order Removed SPA's 401 Certification

In general, DHEC's regulations require coordinated evaluation of coastal authorizations issued by the Office of Coastal Resources Management under its authorities with evaluation and issuance of 401 Certifications by DHEC's Bureau of Water pursuant to its water quality certification regulations at Regulation 61-101. OCRM's Critical Area Permit and Coastal Zone Consistency Certification evaluation is to occur in tandem with the Bureau of Water's evaluation, with a jointly issued Critical Area Permit document serving as the 401 Certification. S.C. Code Ann. Regs. 61-101(A)(8). Where NWP coverage is present, a different procedure is followed, as noted above. Also as noted above, SPA's individual OCRM CAP/CZCC issued in late 2012 contained no 401 Certification because SPA was proceeding under color of NWP 3, which had its own 401 Certification.

After a number of the Community Groups challenged SPA's NWP 3 coverage as unlawful, the United States District Court for the District of South Carolina voided the

project's NWP authorization on September 18, 2013.[11] Removal of SPA's NWP 3 authorization operated to remove DHEC's 401 Certification for the project. The Community Groups therefore moved the ALC to vacate SPA's permit and remand it to DHEC to allow for the required individual 401 Certification evaluation that must occur in conjunction with and simultaneous to issuance of a Critical Area Permit and Coastal Zone Consistency Certification. *See* R.000761 (Pet'rs' Mot. to Vacate, Nov. 1, 2013).

C. The ALC Erred in Refusing to Vacate SPA's Authorization, Which Lacks the Required 401 Certification

The ALC gave several rationales for denying the motion to vacate. All were mistaken. First, the ALC reasoned that because the Corps could one day conceivably authorize SPA's project pursuant to NWP 3 again in the future, SPA might one day conceivably benefit again from the 401 Certification that would come with it. R.000061 (Order Den. Pet'rs' Mot. to Vacate, 6, Dec. 20, 2013 ("Mot. to Vacate Order")). However, DHEC's regulations require that individual federal permits must receive individual 401 Certification evaluated by DHEC's Bureau of Water and processed in conjunction with OCRM's Critical Area Permit and Coastal Zone Consistency Certification evaluation. S.C. Code Ann. Regs. 61-101(A)(8). SPA's existing OCRM approvals, issued without any 401 Certification or Bureau of Water involvement, fail these requirements, were issued on unlawful procedure, and are facially illegal and invalid.

Second, the ALC theorized that even if SPA's NWP 3 Certification has been removed, its Critical Area Permit and Coastal Zone Consistency Certification included a

[11] SPA and the Corps noted appeals to the Fourth Circuit, but then abandoned them in January 2014.

latent 401 Certification that could one day spring forth as a substitute for the removed NWP's 401 Certification. R.000061 (Mot. to Vacate Order 6). Here the ALC erred in treating the Water Quality Certification evaluation required by federal and state law as a paperwork game. The law requires that the Bureau of Water actually be involved in the analysis and evaluation of whether a project complies with the water quality regulation, and a CAP/CZCC issued with no coordination with Bureau of Water staff at all cannot just ignore that requirement. S.C. Code Ann. Regs. 30-2(H), 61-101(A)(7)-(8). In fact, when DHEC actually does issue authorizations that include all three authorizations – a CAP, a CZCC *and* a 401 Certification – it identifies these *separately* in the title and includes evidence of Bureau of Water involvement, due in part to DHEC's obligation to identify the program under which a project approval is sought to comply with public notice requirements for agency decisions. *See* R.0002315. As it relates to the 401 Certification, public notice is required of all applications for certification of Federal licenses or permits, and that notice "shall provide a reasonable period of time, normally thirty (30) days from the date of notice within which interested persons may submit their views and information concerning the certification application to the Department." S.C. Code Ann. Regs. 61-101(D)(1). That was not done here, where DHEC provided no notice that SPA's project was seeking an individual 401 Certification.

DHEC must also prepare a written assessment on each proposed activity requiring a Federal license or permit. S.C. Code Ann. Regs. 61-101(E)(2). This written assessment must address the water quality impacts of the project; make conclusions concerning compliance with water quality standards, protection of classified uses, and related water quality impacts; and must be available to the applicant and to the public

upon request. *Id.* OCRM's "Administrative Summary of Review" for projects contains an entry for documenting Bureau of Water involvement in 401 Certification evaluations. SPA's project had such a summary, but the space for noting Bureau of Water involvement is marked "N/A," indicating that no such review occurred. R.002301.

At base, there is no indication whatsoever that OCRM coordinated with the Bureau of Water in evaluating SPA's individual project pursuant to DHEC's federally required, federally approved regulations at 61-101 and 61-68. OCRM evidently believed no 401 Certification was required because SPA had NWP 3 authorization. However reasonable that belief was when made, after SPA's NWP authorization was removed by a federal court, the accompanying 401 Certification went with it, and OCRM's position became untenable. SPA's permit lacks the required Water Quality Certification as evaluated by the Bureau of Water pursuant to the standards of Regulation 61-101 and Regulation 61-68. The ALC erred in not recognizing this obvious legal infirmity and in condoning a facially unlawful permit. The permit must be vacated and remanded to DHEC for proper and lawful 401 Certification evaluation.

III. The ALC Erred In Depriving the Community Groups of Discovery

Prompted by SPA, the ALC rejected the Community Groups' attempt to take depositions in early 2014 because SPA contended that discovery had supposedly closed months earlier, on May 20, 2013. The ALC therefore denied the Community Groups' request to take depositions and found no good cause to allow them to occur. Both rulings were erroneous.

A. The ALC Erred in Deeming that Discovery Closed in May 2013 When the Parties and the ALC Understood Discovery to be Ongoing Well Past Then

Correspondence among the counsel and communications with the ALC before the ALC's retroactive declaration that discovery closed in May 2013 show that the parties and the ALC itself understood discovery to be ongoing *well after* that date, as shown in the following timeline:

May 6, 2013 (two weeks before ALC deemed discovery "closed")

- ALC order for Prehearing Statements with witness lists etc., to be filed by May 21, 2013.

May 20, 2013 (the day the ALC later deemed discovery "closed")

- SPA's prehearing statement proposes up to nine months of discovery and "an expanded number of depositions"[12]

May 21, 2013 (one day after discovery deemed "closed")

- Community Groups inform ALC that "that more discovery will be needed to adequately prepare this matter for hearing" in their Prehearing Statement, just like SPA, which made no objection. R.000241 (Prehearing Statement of Pet'rs 6).

May 31, 2013 (ten days after discovery deemed "closed")

- ALC recognizes discovery is ongoing; states that its proposed November hearing date would provide "over four months for discovery" and states it is "hopeful the parties could complete discovery within the time period."[13] R.002934.

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[12] R.0000706 (First Amended Prehearing Statement of South Carolina Ports Authority, 14). SPA also urged the Court to allow "discovery . . . to proceed in accordance with the Rules 26-37, SCRCP," rules which contain no limitations on the number of depositions nor the time-frame within which discovery must be completed. *id.*

[13] Section 1-23-320(E) states that "Opportunity must be afforded all parties to respond and present evidence and argument on all issues involved." ALC Rule 10 guides the procedure that will allow the parties the opportunity to respond and present evidence in compliance with Section 1-23-320(E). Rule 10 requires the ALC to "determine the procedure appropriate to the complexity of the issues presented and the types of proof likely to be introduced so that the matter may be fully and fairly presented without unnecessary burden on either the agency or individuals involved in the hearing. The administrative law judge may . . . take such reasonable measures so that the burdens of procedure do not unfairly prevent the presentation of the facts." In a complex case such as this, the ALC recognized that expanded discovery is necessary.

June 10, 2013 (three weeks after discovery deemed "closed")

- SPA's attorney proposes to "develop a scheduling order with deadlines for discovery, dispositive motions, exchange of evidence, etc.," and stating SPA would "inform the Court that we are going to try and come up with a consent scheduling order and ask that the Court let us know what week it will set the hearing for inclusion in that order." R.002939.

- Both Community Groups and DHEC agreed to proceed in this manner. *id.*

June 14, 2013 (almost one month after discovery deemed "closed")

- SPA counsel writes ALC informing it that "the parties are working on a proposed scheduling order with deadlines on discovery, dispositive motions, exhibit exchange, and other deadlines as well as a proposed confidentiality order for discovery matters" and stating that that proposed orders would be submitted for the Court's consideration in the near term. R.002941.

August 19, 2013 (two months after discovery deemed "closed")

- SPA issues document subpoena to Charleston real estate firm. R.000543.

December 2, 2013 (over five months after discovery deemed "closed")

- ALC order denies SPA motion to dismiss, noting that "at the time of the hearing [September 6, 2013], the parties were still conducting discovery." R.000041 (Mot. to Dismiss Order 3).

December 18, 2013 (six months after discovery deemed "closed")

- Anticipating depositions by the Community Groups SPA announces its view that discovery had closed on May 20, 2013.

June 2013 – March 2014

- SPA produces 18 cds of discovery comprising tens of thousands of pages over the course of 11 months started after "close" of discovery.

This timeline shows that none of the parties or the ALC treated the May 20 deadline as effective and binding. SPA's reversal in late 2013 was nothing but tactical revisionism made to avoid deposition of witnesses like Mr. Lehner as SPA continued to slowly produce the thousands of pages that the Community Groups would need for making such depositions meaningful.

As soon as SPA announced its feigned view that discovery had closed months before, the Community Groups filed a motion to expand discovery to guarantee their right to

depositions that all parties had understood would occur until SPA's abrupt unilateral change of position. Based on the conduct of the parties and the ALC, discovery had not in fact closed, and the Groups' motion was not required, but the Community Groups believed clarity was in the interest of all parties. On March 3, 2014, the ALC issued its order denying the motion to expand discovery and concluding that discovery had closed on May 20, 2013, pursuant to ALC Rule 21(A).[14] R.000065 (Order Den. Pet'rs' Mot. to Expand Disc. And Granting Pet'rs' Mot. to File Surreply, 2, March 3, 2014 ("Discovery Order")).

That was reversible error. The ALC's finding that the Appellants had "ample opportunity to conduct discovery" prior to May 20, 2013 is ludicrous: no party had disclosed their witnesses, proposed exhibits or their claims before then. The ALC's finding is also contradicted by timeline that it adopted for trial – June 13, 2014 – which clearly suggests that discovery did not close over a year earlier. The record overwhelmingly shows that the parties and the ALC understood that discovery would occur and did occur well beyond May 20, 2013.

B. Good Cause Supports Allowing Discovery Beyond May 20, 2013

Not only did the parties and the ALC itself all proceed as if discovery for this large and complex case would proceed beyond the default 90-day period prescribed by ALC Rule 21, the understanding that discovery would extend beyond the 90-day period

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[14] ALC Rule 21(A) states that:

> Discovery shall be available as provided in S.C. Code Ann. § 1-23-320 (2005) (as amended), and as provided under these rules. . . . All discovery shall be completed within 90 days of the receipt of the Notice of Assignment and Request for Information. Upon motion for good cause shown or in his own motion, discovery may be expanded or curtailed by the administrative law judge.

of Rule 21 is in keeping with how attorneys with a history of practice before the ALC – including undersigned counsel – have operated. To support their view that prevailing practice is for discovery in general, and depositions in particular, to extend well past the ninety day period in ALC Rule 21, the Community Groups presented the affidavit Leslie S. Riley, a long-standing practitioner before the ALC, who testified that she and other attorneys have consistently understood Rule 21 to be observed mainly in the breach since the timelines provided for under that rule do not provide for adequate preparation of cases such as this one. R.00295-51. Ms. Riley explains "that allowing for discovery is critical to properly prepare and present contested cases before the ALC." R.002951. Ms. Riley explains from a practitioners standpoint how parties conduct themselves in the ALC:

> In the nearly fifteen years that I have been practicing before the ALC, discovery has always exceed the ninety day period provided for under ALC Rule 21. In many instances, the parties have only exchanged Prehearing Statements and are in the initial phases of discovery, i.e., document production, within the ninety day period following the Notice of Assignment.
>
> These cases typically take up to a year or more to prepare for trial with discovery unless the issue is extremely narrow, and depositions in particular routinely occur very close to the trial date and certainly many months beyond the ninety period in ALC Rule 21. In fact, in my practice, the parties have not operated under ALC Rule 21, instead cooperating to enable full discovery of a case with the implicit recognition that depositions and document production will necessarily extend well beyond the ninety day period of ALC Rule 21. In my experience, **completing discovery within 90 days following the filing of the Notice of Assignment is a practical impossibility** . . . .

R.002951.

Appellants' reliance on standard discovery practice in ALC environmental permitting cases, combined with practical considerations that document production must be completed prior to taking depositions and that depositions are essential to proper case

presentation, further support the conclusion that the ALC erred in declaring discovery closed and in refusing to grant the Community Groups' request to allow depositions. In addition to providing that discovery be completed within ninety (90) days of receipt of the Notice of Assignment, ALC Rule 21(A) provides that the ALC may expand or curtail discovery "upon motion for good cause shown or upon his own motion."

In determining whether "good cause" is present, courts seek to ensure that "justice is promoted," and "strive for disposition of cases on their merits." *Ricks v. Weinrauch*, 293 S.C. 372, 375, 360 S.E.2d 535, 536 (Ct. App. 1987). Public policy generally supports disposition of cases "on their merits rather than on technicalities." *Mictronics, Inc. v. South Carolina Department of Revenue,* 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001) (*citing Columbia Pools, Inc. v. Galvin,* 288 S.C. 59, 339 S.E.2d 524 (Ct. App. 1986)). The Supreme Court elucidated the "good cause" standard under the Rules of Civil Procedure Discovery Rule 26 in *Hamm v. South Carolina Public Service Commission*, 312 S.C. 238, 439 S.E.2d 852 (1994). Rule 26, SCRCP, provides "[u]pon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court ... may make any order which justice requires to protect a party or person[...]."

The *Hamm* court noted that "[w]hen the discovery process threatens to . . . create a particularized harm to a litigant or third party, the Rules allow the trial judge broad latitude in limiting the scope of discovery."[15] 312 S.C. at 241-42, 439 S.E.2d at 854

[15] Although the Court in *Hamm* was considering a limitation on discovery, the Court also noted that SCRCP 26 allows for very broad discovery ("the Rules often allow extensive intrusion into the affairs of both litigants and third parties" (*citing Seattle Times Co. v. Rhinehardt,* 467 U.S. 20, 30, 104 S.Ct. 2199, 2206, 81 L.Ed.2d 17, 25 (1984)). *Hamm v. S. Carolina Pub. Serv. Comm'n*, 312 S.C. 238, 241, 439 S.E.2d 852, 853-54 (1994). Alternatively, ALC Rule 21 is designed to allow very limited discovery, yet this Court's

(*citing Palmetto Alliance v. South Carolina Pub. Serv. Comm'n,* 282 S.C. 430, 434, 319 S.E.2d 695, 698 (1984) (scope and conduct within sound discretion of trial judge)). The party seeking relief "must initially show good cause by alleging a particularized harm" resulting from the discovery issue at hand. *Id. citing* 4 James W. Moore, et al., Moore's Federal Practice ¶ 26.75 (2nd ed. 1993)). The reviewing court must weigh the competing interest of the parties in the material sought. *Id* The *Hamm* Court upheld the Commissioner's discovery order because it "protected the Consumer Advocate's rights to secure access to relevant information in discovery, to seek broader disclosure of information and present admissible evidence." *Id.* at 242, 854.

The Community Groups have met the "good cause" standard by establishing (1) a particularized harm if they are unable to conduct the requested depositions and (2) that depositions would allow access to relevant information and allow for the presentation of admissible evidence. "Depositions are widely recognized as one of the 'most powerful and productive' devices used in discovery." *In re Anonymous Member of S. Carolina Bar,* 346 S.C. 177, 193, 552 S.E.2d 10, 18 (2001) (*quoting* A. Darby Dickerson, *The Law and Ethics of Civil Depositions*, 57 Md. L. Rev. 273, 277 (1998)); *see also Burgess v. Costco Wholesale Corp.*, CIV.A. 4:10-1678-RBH, 2012 WL 315638 (D.S.C. Jan. 31, 2012) ("The deposition of a plaintiff is an essential part of the discovery process.")[16]

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focus should still be on achieving justice and protecting the Appellants from harm. Appellants assert that the ALC has the same broad latitude to enlarge the scope of discovery, and the 90-day rule in particular, where failure to do so would work a particularized harm on the party seeking discovery.

[16] The typical and most efficient course is for all parties to take depositions *after* responsive documents have been exchanged.

Depriving the Community Groups of their right to depose key witnesses undermines substantive justice by inhibiting their ability to prepare for the contested case hearing. Among other things, depositions are needed to enable the Community Groups to understand the significance and full meaning of the voluminous evidence produced and prepare a proper, professional and efficient presentation to the ALC, should this Court determine that the ALC erroneously granted summary judgment. The Community Groups have demonstrated that they would suffer particularized harm necessary to show good cause if they are not able to conduct depositions of any witnesses in this case.

One example is SPA's litigation claim that its plan to spend $35 million of public money on a new cruise terminal that will, according to SPA affiant Peter Lehman, change nothing. Lehman's dubious claims are facially at odds with numerous documents that SPA conveniently produced after discovery supposedly "closed." One includes a statement by Mr. Lehman himself touting the "practical operational *opportunities that we can unlock* with the new facility" to Carnival Cruise Lines, R.002422 (emphasis added). Indeed, SPA's documents show Lehman and his colleague Jim Newsome repeatedly emphasizing the significant practical, operational, security, and aesthetic shortcomings of SPA's existing operation. *See, e.g.*, R.002482 (stating existing facility is clearly "out-of-date"); R.002470 ("we have an urgent need to improve our passenger terminal facilities").

Another example of harm is related to a substantive issue in this appeal surrounding the nature of any communication between staff at OCRM and the Bureau of Water concerning the propriety of issuing a 401 Certification for SPA's project. There is no evidence in the record that the Bureau of Water was ever consulted concerning SPA's

project, which presents more than sufficient grounds for vacating SPA's Critical Area Permit and Coastal Zone Consistency Certification. *See Sierra Club v. South Carolina Dept. of Health and Envtl. Control*, __ S.E.2d __, No. 2012-212791, at *10 (Ct. App. July 30, 2014) (slip op.) (reversing an administrative law judge because "the record is devoid of any evidence to support the [judge's] conclusion"). However, should that motion be held over on remand at the ALC, the Community Groups believe that depositions would confirm that OCRM did not consult with Bureau of Water staff as the law requires. *See* Discussion at Section II. The inability to depose DHEC witnesses on this point would prevent the Community Groups from presenting the issue and hampers their ability to prepare and present this case for hearing.

IV. The ALC Committed an Abuse of Discretion in Sanctioning the Community Groups' Interpretation of an Ambiguous Statute

Under South Carolina Administrative Law Court Rule 72, an ALC "may impose such sanctions as the circumstances of the case and discouragement of like conduct in the future may require" upon determining that a case, appeal, motion or defense is "frivolous" or "solely for purposes of delay." In reaching a determination of frivolity, the ALC may refer to S.C. Code Ann. § 15-36-10, the Frivolous Civil Proceedings Sanctions Act ("FCPSA"), and should also be guided by relevant case law and principles of equity. SCALC Rule 72, 2009 Revised Notes; *Southeastern Site Prep, LLC v. Atl. Coast Builders and Contractors, LLC*, 394 S.C. 97, 104, 713 S.E.2d 650, 653 (Ct. App. 2011). The FCPSA empowers administrative law courts to sanction attorneys for making frivolous or harassing pleadings. S.C. Code Ann. § 15-36-10(4). However, sanctions are not available where the attorney presents "a good faith or reasonable argument . . . for the extension, modification, or reversal of existing law." § 15-36-10(A)(4)(a)(ii); *See Southeastern Site*

Prep, 394 S.C. at 105, 713 S.E.2d at 654 (applying "reasonable attorney" standard to determine whether sanctions are warranted).

The application of the "reasonable attorney" standard under the FCPSA calls for an objective assessment of whether or not a reasonable attorney presented with the same facts and circumstances would believe the claim or filing to possess some good faith basis in law and therefore not be raised or made merely for purposes of delay or harassment. S.C. Code Ann. § 15-36-10(A)(4). South Carolina courts have generally recognized that the bar is set high for a claim to rise to the level of "frivolous" and distinguish between claims which may ultimately be denied or deemed unpersuasive and those constituting frivolity. *Father* 353 S.C. at 259, 578 S.E.2d at 13 ("A party who makes a 'frivolous' claim or raises a 'frivolous' defense has committed a more egregious act than one who merely acts 'without substantial justification.'").

In this case, the ALC sanctioned the Community Groups for contending that a statute directing that the DHEC Board "must" hold a Review Conference within sixty days of a request set forth a mandatory, not discretionary duty to hold conference when timely requested, as happened here. *See* S.C. Code Ann. § 44-1-60(F) ("[n]o later than sixty calendar days after the date of receipt of a request for final review, a *final review conference must be conducted by the board*, its designee, or a committee of three members of the board appointed by the chair.") (emphasis added).

The statute is at best ambiguous. It requires that the Board "must" have a conference, and then provides an avenue for redress if the Board "declines" its duty to hold the conference within the allotted 60 days. "Under the rules of statutory interpretation, use of words such as 'shall' or 'must' indicates the legislature's intent to

enact a mandatory requirement." *Collins v. Doe*, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002). The term "decline" can denote rejection of a voluntary invitation, but can also mean failure to carry out a mandatory duty. *See* Merriam-Webster's Dictionary, http://www.merriam-webster.com/dictionary/decline (last visited Oct. 9, 2014) (defining "decline" as "to refuse to undertake, undergo, engage in or comply with" an obligation.). The statute can thus be read to make conferences mandatory with recourse where that duty is not undertaken, or it can be read to require that any conference be held within 60 days if at all, and if one is not, to provide recourse to the ALC.

Here, after the Community Groups timely requested a Board Review Conference, the Board failed to hold one. The Community Groups then requested a contested case hearing with the ALC pursuant to S.C. Code § 44-1-60(F), which allows such recourse where the Board "declines" to hold a requested conference. Once at the ALC, the Community Groups moved to remand the matter to the Board to hold the mandatory Conference. The ALC found this request sanctionable because the term "declines" makes the Board's duty to hold a conference completely discretionary rather than arguably mandatory. R.000100 (Am. Order Granting Sanctions, 4, April 11, 2014 ("Sanctions Order")).

Obviously, the ALC read the statute differently than did the Community Groups. But this does not mean that the Community Groups acted frivolously or in bad faith. "If a statute is susceptible to two reasonable interpretations, it is ambiguous." *South Carolina Dept. of Social Services v. Lisa C.*, 380 S.C. 406, 414, 669 S.E.2d 647, 651 (Ct. App. 2008). The undersigned have found no cases where an attorney was sanctioned for arguing one interpretation of an ambiguous law over another, and courts are generally

wary of imposing sanctions for more creative arguments. *See First Am. Bank & Trust v. First Guar. Bank*, 615 So. 2d 1060, 1063 (La. Ct. App. 1993) ("The mere fact that a legal argument or theory is creative or novel is not a basis for sanctions."); *Hunter v. Earthgrains*, 281 F.3d at 153-54 (4th Cir. 2002) (overturning sanctions order, noting that "[c]reative claims . . . may merit dismissal, but not punishment") (internal quotations and citations omitted); *Maddox v. City of Costa Mesa*, 193 Cal. App. 4th 1098, 1109, 122 Cal. Rptr. 3d 629, 637 (2011) (rejecting sanctions where appeal merely raised a "novel issue of statutory interpretation"); *Allen v. Batchelder*, 17 Mass.App.Ct. 453, 458, 459 N.E.2d 129 (1984) (finding an appeal that "presents an argument that is novel, unusual or ingenious, or urges adoption of a new principle of law or revision of an old one" not frivolous). Nor have the undersigned found any cases in which a party was sanctioned for arguing that the use of the word "must" in a statute actually meant "must."

The ALC nevertheless found that the Community Groups acted unreasonably because they have been involved in other cases where the Board's decision to decline a requested review went unchallenged, and further asserted that the attorneys involved should have been "on notice that the discretionary nature of conducting a review is well established." R.000100-02 (Sanctions Order, 4-6). The first point is answered by the presumption against sanctioning new interpretations of the law that may have eluded counsel in prior cases. Nor does the fact that an agency has assumed a certain interpretation of the law mean that litigants and courts must accept it. *See, e.g., Sparks v. Palmetto Hardwood, Inc.*, 406 S.C. 124, 128, 750 S.E.2d 61, 63 (2013) (noting that agency interpretations deserve "respectful consideration" but "must be rejected" if contrary to the language of the statute).

But even then, the ALC had no basis for concluding that the Community Groups acted unreasonably. The Groups submitted the only two "reasonable attorney" affidavits from members of the bar with many years of experience and demonstrable expertise with the Rules of Professional Conduct, testifying that the Groups' motion was reasonable and did not rise to the level requiring sanctions. R.000428-29 (Linton Affid. ¶¶ 6-8); R.000433-34 (Bouch Affid. ¶¶ 10-12). Both affiants testified, and the Community Groups argued, that the Groups' motion to remand was not the "rare" and "extreme" circumstance where the Groups "could not have formed the good faith belief" that their motion was appropriate. The ALC summarily disregarded both the affidavits and this argument as inconsistent with his erroneous reading of the statute. R.000102 (Sanctions Order 6). Missing from the record are any affidavits supporting the imposition of sanctions.

A summary review of South Carolina cases in which sanctions were awarded demonstrates how far from the mark the ALC's Order falls. Cases in which sanctions have been awarded smack of bad faith behavior, conduct missing from this record. In *Ex Parte Bon Secours-St. Francis Xavier Hospital Inc.*, the S.C. Supreme Court upheld sanctions against lawyers who filed a motion to remove their case to federal court hours before their state court trial and after a previous motion to remove based on the same theory had failed. 393 S.C. 590, 593-96, 713 S.E.2d 624, 625-26 (2011). The Court cautioned that sanctioning a pleading as vexatious "should be rare," but found that the lawyers actions in that case provided the "extreme" case where their "behavior goes far beyond" the conduct of a reasonable attorney because the lawyers "could not have

formed a good faith belief that the second removal was appropriate." *Id.* at 598-600, 628-29.

In *Rutland v. Holler, Dennis, Corbett, Ormond & Garner (Law Firm)*, 371 S.C. 91, 637 S.E.2d 316 (Ct. App. 2006), Rutland sued his former counsel despite having obtained a judgment in the Rutland's favor. Rutland filed three consecutive malpractice suits against counsel, each of which alleged the same complaints, amounting to mere dissatisfaction with counsel and his firm, and each for a primary purpose other than securing the proper adjudication of civil proceedings. *Id.* at 98, 320. Accordingly, the Court determined that it was "***inconceivable*** that Rutland reasonably believed that his claims against Respondents were valid" and affirmed the imposition of sanctions against him. *Id.* (emphasis added).

In *Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 633 S.E.2d 722 (2006), the South Carolina Supreme Court upheld sanctions against a party who should have realized that continuing to pursue an action to set aside a will and trusts on the ground of undue influence was improper after receiving numerous affidavits directly refuting and demonstrating that the facts did not support her argument. *Id.* at 17, 728. In this case there were no "reasonable attorney" affidavits refuting the Groups' arguments.

Most recently, in *Holmes v. Haynsworth, Sinkler & Boyd, P.A.*, 408 S.C. 620, 760 S.E.2d 399 (2014), the Supreme Court approved a sanctions award of $200,000 against a lawyer who brought a pro se malpractice case against her former attorneys. The trial court order granting sanctions found: "Any reasonable attorney would conclude that [Appellant's] entire case was completely frivolous and was brought, and continued for

seven years, without any reasonable basis." *Id.* at 643-44, 411. The case reeked of bad faith behavior by the plaintiff.

No such egregious behavior which infected *Holmes* and other cases in which sanctions have been awarded is present in this record. In each of these cases, an award of sanctions followed some form of egregious conduct or was deemed appropriate due to the particularly extraordinary facts and circumstances of the case. Here, the Community Groups' conduct in filing the motion to remand does not rise to this level and the ALC abused its discretion by failing to consider SPA's motion for sanctions according to the applicable South Carolina case law.

The ALC's final error was to imply that this statutory provision's meaning has been litigated or resolved by a court. It is true that earlier cases have summarized the statutory language and quoted it, but this is the first case where the precise language was at issue. In sum, the ALC took the extraordinary step of sanctioning parties simply because they articulated a new theory of statutory interpretation with which the ALC did not agree, and abused its discretion in doing so.

CONCLUSION

For the aforementioned reasons, this Court should reverse the ALC's orders holding that the Community Groups lacked standing, refusing to vacate SPA's authorizations, disallowing discovery, and imposing sanctions. The Court should immediately vacate the December 18, 2013 Critical Area Permit and Coastal Zone Consistency Certification, and remand this matter to the ALC for further action consistent with those reversals.

Respectfully Submitted,

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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.

CERTIFICATE OF SERVICE

I hereby certify that on this date I served the foregoing Plaintiffs Final Initial Brief on Respondents S.C. State Ports Authority and SC DHEC by placing copies of same in the U.S. Mail addressed to:

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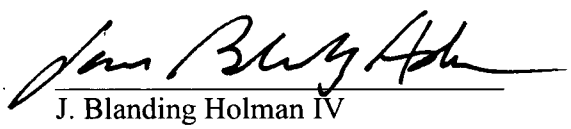

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