

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Administrative Law Judge

RECEIVED

JAN 31 2018

S.C. SUPREME COURT

Case No.: 13-ALJ-07-0056-CC
Appellate 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..... Petitioners,

vs.

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

J. Blanding Holman IV
Southern Environmental Law Center
463 King Street, Suite B
Charleston, SC 29401
Telephone: (843) 720-5270

Jefferson Leath
Leath, Bouch & Seekings, LLP
92 Broad Street
Charleston, SC 29401
Telephone: (843) 513-1076

Amy E. Armstrong
Jessie A. White
South Carolina Environmental Law Project
Post Office Box 1380
Pawleys Island, SC 29585
Telephone: (843) 527-0078

Attorneys for Petitioners

Bradley D. Churdar, Esq.
S.C. DHEC
Office of OCRM
1362 McMillan Avenue, Suite 400
North Charleston, SC 29405
Telephone: (843) 953-0200

*Attorney for Respondent South Carolina
Department of Health and Environmental
Control*

Randolph R. Lowell, Esq.
Tracey C. Green, Esq.
Chad N. Johnston, Esq.
Willoughby & Hoefer, PA
Post Office Box 8416
Columbia, SC 29202
Telephone: (803) 252-3300

*Attorneys for Respondent South Carolina
State Ports Authority*

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

INDEX

Dispositional Decision - Opinion.....App. 1
Filed October 18, 2017

Appellants' Petition for RehearingApp. 14
Filed November 2, 2017

Respondent's Return to Petition for RehearingApp. 39
Filed November 13, 2017

Appellants' Reply to Return to Petition for Rehearing.....App. 59
Filed December 18, 2017

Order Denying Appellants' Petition for RehearingApp. 75
Filed December 28, 2017

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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

v.

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

Appellate Case No. 2014-000847

Appeal From The Administrative Law Court
Ralph King Anderson, III, Administrative Law Judge

Unpublished Opinion No. 2017-UP-403
Heard February 15, 2017 – Filed October 18, 2017

AFFIRMED

W. Jefferson Leath, Jr., of Leath Bouch & Seekings,
LLP; and James Blanding Holman, IV, of Southern
Environmental Law Center; both of Charleston; Amy
Elizabeth Armstrong and Jessie Allison White, both of
S.C. Environmental Law Project, of Pawleys Island; and

Michael Gary Corley, of S.C. Environmental Law Project, of Greenville; all for Appellants.

Tracey Colton Green, Randolph Russell Lowell, and Chad Nicholas Johnston, all of Willoughby & Hoefler, PA, of Columbia; and Bradley David Churdar, of Charleston; all for Respondents.

PER CURIAM: This is an appeal of several orders issued in a contested case proceeding arising from a citizens' challenge to various permits issued by the South Carolina Department of Health and Environmental Control (DHEC) for a proposed cruise ship terminal in downtown Charleston. The Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, and Charleston Communities for Cruise Control (collectively Appellants) argue the Administrative Law Court (ALC) erred in (1) finding as a matter of law Appellants lacked standing to contest the permits at issue, (2) refusing to vacate certain DHEC authorizations, (3) refusing to expand discovery, and (4) sanctioning Appellants for requesting a remand to the DHEC Board for a final review conference in the matter. We affirm.

FACTS AND PROCEDURAL HISTORY

Union Pier Terminal (UPT) is a fully operational marine terminal located along the Cooper River near the downtown portion of the Charleston peninsula. It is now owned and operated by the South Carolina State Ports Authority (SPA). UPT has hosted passenger vessels every year since its dedication in 1973. Currently, UPT accommodates cargo ships at its northern end and passenger vessels at its southern end.

In 2010, after Carnival Cruise Lines began home-basing a 2,500-passenger ship in Charleston for year-round cruises and Celebrity Cruise Lines made plans for a new service from Charleston, SPA announced a capital improvement plan that includes a cruise ship terminal in Charleston's downtown historic district. Under the plan, SPA will transfer its cargo operations to other terminals and move cruise passenger operations from the southern end of UPT to the northern end. SPA also intends to adopt a traffic management plan that will reduce the periodic route congestion at the southern end without increasing traffic at the northern end.

Although renovating Building 325, the existing passenger terminal, is possible, SPA decided against this option because of the age of Building 325 and the upgrades necessary to provide adequate service and comply with federal homeland security requirements. Instead, SPA targeted Building 322, an abandoned warehouse at the northern end of UPT that is more than three times larger than Building 325, as the site for a new cruise passenger terminal.

A structural support system with 1,008 concrete pilings is already in place under Building 322, but the project requires five additional pilings to support three elevators and two escalators. In 2012, because of anticipated environmental impacts from the additional pilings, SPA submitted a joint application to the United States Army Corps of Engineers (the Corps) and DHEC for permission to engage in activities affecting the waters of the United States and critical areas of South Carolina. In the application, SPA sought (1) a federal permit from the Corps under Section 10 of the Rivers and Harbors Act (Section 10 authorization),¹ (2) a South Carolina Section 401 Water Quality Certification (401 certification),² and (3) a South Carolina Critical Area Permit (CAP)³ and a Coastal Zone Consistency Certification (CZCC).⁴

The Corps granted provisional Section 10 authorization pursuant to a nationwide permit (NWP 3) pending SPA's receipt of either a 401 certification or a CZCC. In April 2012, DHEC staff issued a 401 certification without conditions for all NWP 3 activities, thus eliminating the need for a separate 401 certification for the

¹ 33 U.S.C.A. §§ 401 and 403 (2016).

² The 401 certification from DHEC is a prerequisite to the Section 10 authorization from the Corps. *See* 33 U.S.C.A. § 1341(a)(1) (2016) (requiring an applicant for a federal permit for activity that may result in a discharge into navigable waters to provide the permitting agency with a certification from the State in which the discharge will originate that the discharge will comply with that State's water quality standards).

³ *See* S.C. Code Ann. § 48-39-10(J) (2008) (defining the term "critical area"); S.C. Code Ann. 48-39-130 (2008 & Supp. 2017) (setting forth permit requirements for utilization of critical areas).

⁴ *See* S.C. Code Ann. § 48-39-80 (2008) (requiring DHEC to "develop a comprehensive coastal management program" with consideration of "all lands and waters in the coastal zone for planning purposes" and specifically authorizing DHEC to "[d]evelop a system whereby [DHEC] shall have the authority to review all state and federal permit applications in the coastal zone[] and to certify that these do not contravene the management plan").

proposed project. In December 2012, DHEC approved SPA's application for a CAP and CZCC.

On January 2, 2013, Appellants requested a final review conference of DHEC's decision.⁵ The DHEC Board declined the request on January 11, 2013. On February 11, 2013, Appellants appealed this decision by requesting a contested case hearing with the ALC.⁶

The ninety-day period to complete all discovery in the matter commenced on February 19, 2013, when the clerk of the ALC issued a notice of assignment in the matter. Therefore, discovery in the matter was to be completed by May 20, 2013, absent either a motion for good cause shown or a motion initiated by the ALC to change the deadline.⁷

On February 27, 2013, while the contested case was pending, Appellants moved to remand the matter to the DHEC Board for a final review conference. Appellants contended a final review conference was mandated by section 44-1-60(F) of the South Carolina Code (2018). The ALC denied the motion on May 3, 2013.

On July 1, 2013, SPA filed two motions. First, SPA moved for dismissal of the proceeding on the ground that Appellants failed to establish standing to challenge the CAP and the CZCC. Second, SPA requested sanctions on Appellants for their motion to remand the matter to the DHEC Board for a final review conference. On September 6, 2013, the ALC held a hearing on SPA's motion to dismiss and took the matter under advisement.

On September 18, 2013, while SPA's motion to dismiss was pending, the United States District Court for the District of South Carolina voided the federal authorization granted by the Corps and remanded the project to the Corps for reconsideration under a broader scope of analysis. The order was issued in

⁵ See S.C. Code Ann. 44-1-60(F) (2018) (setting forth the procedure that follows a request for a final review conference).

⁶ See S.C. Code Ann. § 44-1-60(G)(1) (2018) (allowing certain parties to file a request with the ALC for a contested case hearing within thirty days after the mailing of the notice that the DHEC Board declined to hold a final review conference).

⁷ See SCALC Rule 21A ("All discovery shall be completed within 90 days of the date of the Notice of Assignment. Upon motion for good cause shown or upon [its] own motion, discovery may be expanded or curtailed by the [ALC].").

response to a motion by Preservation Society of Charleston and South Carolina Coastal Conservation League for a preliminary injunction against the installation of the pilings pending a full individual permit review that would include an environmental assessment or an environmental impact statement and consultation with the public. According to the District Court, "[t]he Army Corps' determination to limit the 'scope of analysis' to the impact of the five concrete pile clusters, rather than the new passenger terminal, dramatically and improperly constricted the assessment of the potential environmental and historic landmark impacts of the proposed activity." *Preservation Soc'y of Charleston v. U.S. Army Corps of Eng'rs*, Civil Action No. 2:12-2942-RMG, slip op. at 20 (D.S.C. Sept. 18, 2013). Based on this finding, the District Court found the Corps' authorization for the project was "unlawful and void" and remanded the matter to the Corps "to place within its 'scope of analysis' all activities within its jurisdiction . . . which the Court finds . . . must include, at a minimum, all activities concerning the Building 322 conversion project." *Id.* at 29.

Notably, in voiding the Corps' Section 10 authorization, the District Court also rejected an argument made by SPA, an intervenor-defendant in the proceeding, that the plaintiffs lacked standing to bring the action. The District Court found SPA advocated "an artificially narrow view of [the] controversy" by insisting that "the [District] Court limit its standing analysis to the installation of the five concrete pile clusters and ignore the renovation of Building 322 into a state-of-the-art cruise ship terminal." *Id.* at 27. Observing the plaintiffs included residents of the Ansonborough Neighborhood, which abutted the north side of UPT, where Building 322 is located, the District Court concluded its invalidation of the Corps' authorization "could potentially redress" "the alleged detrimental effects of the proposed new cruise ship terminal—including increased traffic congestion and airborne pollution from cruise ships." *Id.* at 27-28.⁸

Immediately after the District Court issued its opinion, Appellants filed a supplemental memorandum in response to SPA's motion to dismiss. Relying on the District Court's decision, Appellants argued the question of their standing had been fully litigated and decided in the federal court proceeding.

On November 1, 2013, Appellants moved to vacate the CAP and CZCC that DHEC issued to SPA. Appellants argued the District Court's voiding of the federal

⁸ The Fourth Circuit Court of Appeals dismissed an appeal of the District Court's decision. *Preservation Soc'y of Charleston v. v. U.S. Army Corps of Eng'rs*, No. 13-2280, slip. op. (4th Cir. Jan. 6, 2014).

authorization for the project "removed the predicate for exempting SPA from a separate individual 401 Water Quality Certification for the project."

On December 2, 2013, the ALC issued an order denying SPA's motion to dismiss. As to individual standing, the ALC found (1) Appellants alleged injuries in fact to their aesthetic, recreational, and property interests that would result from the proposed expansion of passenger operations at UPT; (2) Appellants' claim that SPA would not be able to relocate and expand the cruise terminal without the five additional pilings was an allegation of sufficient facts to show a causal connection; and (3) although withdrawal of the authorization for the pilings would not abate any injuries Appellants were currently suffering from the existing cruise ship operations, Appellants alleged it would prevent exacerbation of those injuries. As to organizational standing, the ALC ruled Appellants sufficiently alleged standing through their assertions that (1) their members would suffer individualized injuries and (2) protection of their members' interests was germane to their organizational objectives. The ALC further found the central issue in the case was whether "the discrete matter of whether the permit issued to [SPA] complie[d] with state law," and ruled this controversy was not a non-justiciable political question. In declining to dismiss the action, however, the ALC emphasized it was not converting SPA's motion into one for summary judgment.

On December 20, 2013, the ALC denied Appellants' motion to vacate the CAP and CZCC. Ultimately, the ALC ruled the motion "must be denied at this stage of the litigation" because "there [was] not sufficient evidence for [the ALC] to determine the extent of DHEC's review or the procedures that were followed in issuing the permit." The ALC further suggested Appellants could bring their motion again, at which time the ALC would "then determine based upon the facts of this case in keeping with its *de novo* review what is the appropriate scope of review for this project and whether the project complies with the standards of that review."

On December 23, 2013, Appellants moved to expand discovery in order to take additional depositions after the deadline for completion of all discovery in the matter. On December 27, 2013, SPA filed motions for (1) summary judgment based on Appellants' lack of standing and (2) partial summary judgment prohibiting Appellants from challenging the 401 certification issued by the DHEC staff.

On March 3, 2014, the ALC (1) ordered Appellants to pay SPA \$9,300.00 in attorney's fees as a sanction for their motion to remand the matter to the DHEC

Board for a final review conference⁹ and (2) denied Appellants' motion to expand discovery.

On April 11, 2014, the ALC issued an order granting summary judgment to SPA based on a finding that Appellants lacked standing to proceed with the contested case. The ALC found (1) in order to establish individual standing, Appellants had to satisfy the requirements set forth in *Lujan v. Defenders of Wildlife*,¹⁰ (2) Appellants did not satisfy any of the required elements of the *Lujan* test, (3) Appellants did not satisfy the requirements necessary for associational standing, and (4) Appellants failed to establish standing under the public importance exception.

Appellants filed a notice of appeal on April 23, 2014, challenging the ALC's (1) grant of summary judgment to SPA based on the finding Appellants lacked standing, (2) denial of their motion to vacate the CAP and CZCC, (3) refusal to expand discovery, and (4) imposition of sanctions.

LAW/ANALYSIS

Associational Standing

When, as in the present case, the complaining parties are associations, they "may possess standing by virtue of associational standing on behalf of [their] members." *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 75-76, 753 S.E.2d 846, 850 (2014). "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." *Id.* at 76, 783 S.E.2d at 851 (emphasis added).

The ALC's ruling that Appellants lacked standing to proceed with the contested case was in response to SPA's summary judgment motion. Therefore, the burden was on SPA to demonstrate "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

⁹ On April 11, 2014, the ALC amended its order granting sanctions. The two orders differ only in their respective discussions of a position taken by one of the appellants in an appeal of another case. The sanction imposed against Appellants was the same in both orders.

¹⁰ 504 U.S. 555 (1992).

genuine issue as to any material fact and that [SPA was] entitled to a judgment as a matter of law." Rule 56(c), SCRPC. Nonetheless, elements of standing "are not mere pleading requirements but rather an indispensable part of the plaintiff's case." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Thus, "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.*

We agree with Appellants that section 44-1-60 of the South Carolina Code (2018), does not specifically define the term "affected persons"; therefore, we should interpret the term according to its usual and customary meaning. See *Travelscape, LLC v. S.C. Dep't of Rev.*, 391 S.C. 89, 99, 705 S.E.2d 28, 33 (2011) ("When faced with an undefined statutory term, the [c]ourt must interpret the term in accordance with its usual and customary meaning."). However, "[c]ourts should consider not merely the language of the particular clause being construed, but the undefined word and its meaning in conjunction with the whole purpose of the statute and the policy of the law." *Id.* Based on our review of relevant statutory, regulatory, and case law, we conclude the legislature, in allowing an "affected person" to request a contested case before the ALC pursuant to section 44-1-60, intended to limit the class of such persons to those who are not only adversely affected by the controversy but also able to establish standing under the test set forth in *Lujan*. See S.C. Code Ann. § 48-39-150(D) (2008) (granting "a person adversely affected by the granting of [a] permit . . . the right of direct appeal from the decision of the [ALC]"); S.C. Code Ann. § 48-39-180 (2008) (granting the right of judicial review of a permit determination to "any person adversely affected by the permit"); S.C. Code Ann. Regs. 30-6A (2011) (allowing "an affected person with standing pursuant to applicable law" to appeal a departmental decision involving the issuance of a permit); *Smiley v. S.C. Dep't of Health & Envtl. Control*, 374 S.C. 326, 329-30, 649 S.E.2d 31, 32-33 (2007) (interpreting the phrase "person adversely affected," as used in section 48-39-150, as language conferring standing but also referencing the factors set forth in *Lujan* as the three components of the "irreducible constitutional minimum of standing").

As set forth in *Lujan*, the three requirements for the "irreducible constitutional minimum of standing" are (1) an injury in fact that is concrete and particularized and not conjectural or hypothetical, (2) a causal connection between the injury and the conduct at issue, and (3) a showing that it is likely as opposed to merely speculative that the injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 560-61. The Supreme Court of South Carolina has viewed these criteria as components of a "'stringent' test for standing." *Jowers v. S.C. Dep't of Health &*

Envtl. Control, Op. No. 27725 (S.C. Sup. Ct. filed July 19, 2017) (Shearouse Adv. Sh. No. 27 at 28, 33) (quoting *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001)). Furthermore, "[t]he party seeking to establish standing carries the burden of demonstrating each of the three elements." *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291.

As the ALC observed, Appellants made numerous allegations to the effect that the authorizations granted by DHEC would adversely affect their quality of life because of pollution, traffic congestion, and the visual disruption of Charleston's historic integrity and aesthetic beauty. We hold these injuries, even if actually suffered by individual complainants, are "only generalized grievances suffered by the public as a whole which are insufficient to establish standing." *Carnival*, 407 S.C. at 76, 753 S.E.2d at 851; *see also Lujan*, 504 U.S. at 560 n.1 ("By particularized, we mean that the injury must affect the plaintiff in a personal and individual way.").

Appellants also presented affidavits from several individuals who expressed concern about the effect of the permitted activities on their property values and businesses. However, as the ALC observed, Appellants expressed only "[c]oncern[]" without evidence of declining property values and business reasonably attributed to granting the permit," which, the ALC correctly concluded "does not constitute actual or imminent harm." *See Sea Pines* 345 S.C. at 601, 550 S.E.2d at 291 (stating "[t]he party seeking to establish standing carries the burden of demonstrating each of the three elements" of "the irreducible constitutional minimum of standing," which include "a causal connection between the injury and the conduct complained of," i.e., "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'" (quoting *Lujan*, 504 U.S. at 560)). We agree with the ALC that Appellants presented only speculative claims that the proposed passenger terminal would adversely affect their property values and businesses.

Finally, Appellants cite an affidavit from a member of the Coastal Conservation League who asserted (1) smoke emitted from the existing passenger terminal already physically impacts her to the extent that she must retreat indoors when cruise ships are in town and (2) the proposed new terminal, which would be closer to her home than the existing terminal, would only increase these adverse impacts. Even if this evidence is sufficient to confer individual standing, we agree with the ALC's conclusion that the injuries allegedly suffered by this affiant do not satisfy the third required element of associational standing, namely that "neither the claim

asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977); *see also Warth v. Seldin*, 422 U.S. 490, 511 (1975) ("[S]o long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction."). Appellants have not explained how the claims they have asserted or the relief they have requested can be adjudicated without the affiant's participation in the lawsuit. *See id.* at 515-16 (concluding that because "whatever injury may have been suffered is peculiar to the individual member concerned, . . . both the fact and extent of injury would require individualized proof" and therefore, "to obtain relief . . . , each member of [the association] who claims injury as a result of respondents' practices m[u]st be a party to the suit and [the association] has no standing to claim damages on [the individual member's] behalf").

Standing Under the Public Importance Exception

We affirm the ALC's rejection of Appellants' claim of standing under the public importance exception. As evidence of public importance, Appellants cited a budget proviso passed by the General Assembly requiring shore power in Charleston for cruise ships; however, their discussion lacks an essential element of the public importance exception, namely, an explanation as to why resolution of the current controversy is necessary for future guidance so as to justify the invocation of a sparingly applied exception. *See S.C. Pub. Int. Found. v. S.C. Dep't of Transp.*, Op. No. 27738 (S.C. Sup. Ct. filed Sept. 14, 2017) (Shearouse Adv. Sh. No. 35 at 21, 25) (recognizing that because many issues may be of public interest or public importance, "[t]he key . . . is whether a resolution is needed for future guidance" (quoting *ATC S., Inc. v. Charleston Cty.*, 380 S.C. 191, 198-99, 669 S.E.2d 337, 341 (2008))); *Jowers v. S.C. Dep't of Health & Envtl. Control*, Op. No. 27725 (S.C. Sup. Ct. filed July 19, 2017) (Shearouse Adv. Sh. No. 27 at 28, 39) (acknowledging that a party may have standing when an issue is of such public importance that its resolution is necessary for future guidance but also stating courts must be cautious in applying this exception).

Issue Preclusion

We disagree with the ALC's rationale for declining to find the order issued by the South Carolina District Court barred SPA from challenging Appellants' standing to

proceed in the contested case proceeding.¹¹ Nevertheless, the doctrine of collateral estoppel should not be rigidly applied even if all the elements are present. *See Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 555, 684 S.E.2d 779, 782 (Ct. App. 2009) ("[E]ven if all the elements for collateral estoppel are met, when unfairness or injustice results or public policy requires it, courts may refuse to apply it."). Furthermore, we found no evidence in the record to support a finding that SPA "actually litigated" the issue of Appellants' standing within the expanded scope of analysis applied by the District Court in the federal court proceeding.¹² *See id.* at 554, 684 S.E.2d at 782 ("The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment."). Under these circumstances, we affirm as modified the ALC's rejection of Appellants' argument that SPA was collaterally estopped from raising the issue of standing in the contested case proceeding.

Motion to Vacate CAP and CZCC

Based on our determination that Appellants lacked standing to pursue the contested case proceeding, we decline to address their argument that the ALC erred in denying their motion to vacate the CAP and CZCC issued by DHEC. *See Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Comms., Inc.*, 397 S.C. 348, 377, 725 S.E.2d 112, 128 (Ct. App. 2012) (declining to address an issue because the resolution of another issue in the appeal was dispositive).

¹¹ In rejecting Appellants' argument that SPA was collaterally estopped from relitigating the issue of standing, the ALC reasoned the District Court order addressed only the federal process and "did not negate the critical area permit and coastal zone certification at issue" in the contested case proceeding. This reasoning, however, does not address Appellants' argument that the District Court actually decided the issue of their standing to challenge any government permits issued in connection with SPA's plan to relocate passenger services to the northern end of UPT.

¹² In their brief, Appellants asserted "[t]he elements of Article III Standing were briefed by both sides, with SPA contending that [Appellants] lacked any injury traceable to approval of the cruise terminal's federal permit" (emphasis added). This language indicates SPA limited its standing analysis to effects of the installation of the five additional pilings, which the District Court rejected as artificially narrow.

Motion to Expand Discovery

We further disagree with Appellants' argument that the ALC erred in declining to expand discovery beyond the ninety-day deadline set forth in SCALC Rule 21A. We do not dispute Appellants' references to correspondence among counsel of record and communications with the ALC that suggest the ALC as well as all parties may have proceeded as if discovery would continue after the ninety-day period following the notice of assignment; however, we find no abuse of discretion in the ALC's refusal to extend the time for discovery when the motion for the extension was not made until seven months after the deadline. *See Hollman v. Woolfson*, 384 S.C. 571, 577, 683 S.E.2d 495, 498 (2009) ("A trial judge's rulings on discovery matters will be not disturbed by an appellate court absent a clear abuse of discretion."). In so holding, we further note (1) although Rule 21 allows for discovery to be expanded by the ALC "[u]pon motion for good cause shown," Appellants failed to avail themselves of this means of having the deadline extended and (2) we found no evidence of an express assurance from SPA or DHEC that either would consent to discovery past the ninety-day deadline absent a timely motion for this relief.

Sanction

Finally, we affirm the order directing Appellants to pay SPA's attorney's fees incurred as a result of their motion to remand the matter to the DHEC Board for a final review conference. We hold the ALC did not abuse its discretion in imposing the sanction. *See Ex parte Gregory*, 378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008) ("[T]he abuse of discretion standard plays a role in the appellate review of a sanctions award.").

The DHEC Board had already declined to hold such a conference, and this decision prompted Appellants to seek relief in the ALC. Even if their motion for a remand to the DHEC Board was made in good faith, Appellants advocated a frivolous statutory interpretation "that a reasonable attorney would believe [was] not warranted under the existing law." S.C. Code Ann. § 15-36-10(A)(4)(c) (Supp. 2017); *see also* SCALC Rule 72 ("If the [ALC] determines that a . . . motion . . . is frivolous . . . , the [ALC] may impose such sanctions as the circumstances of the case and discouragement of like conduct in the future may require."); 2014 Revised Notes to SCALC Rule 72 ("In determining whether a case or defense is frivolous, the [ALC] may refer to S.C. Code Ann. § 15-36-10, the Frivolous Civil Proceedings Sanctions Act.").

Although Appellants correctly argue the statutory provision at issue here, section 44-1-60(F) of the South Carolina Code (2018), provides the DHEC Board "must" conduct a final review conference "[n]o later than sixty calendar days after the date of receipt of a request for final review," they disregard additional language in this section indicating the Board may "decline[] in writing to schedule a final review conference," in which case "the staff decision becomes the final agency decision." *See Beaufort Cty. v. S.C. State Election Comm'n*, 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011) ("[A] statute shall not be construed by concentrating on an isolated phrase."). Considering the clear language of section 44-1-60(F) and Appellants' apparent disregard of a settled rule of statutory construction, we find no abuse of discretion that would warrant reversal of the sanction imposed against them.

AFFIRMED.

HUFF, SHORT, and THOMAS, JJ., concur.

85028

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

RECEIVED

NOV 02 2017

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' PETITION FOR REHEARING

J. Blanding Holman IV
Southern Environmental Law Center
463 King Street, Suite B
Charleston, SC 29401
Telephone: (843) 720-5270
Fax: (843) 414-7039

Jefferson Leath
Leath, Bouch & Seekings, LLP
92 Broad Street
Charleston, SC 29401
Telephone: (843) 513-1076

Amy E. Armstrong
Jessie A. White
South Carolina Environmental Law
Project
Post Office Box 1380
Pawleys Island, SC 29585
Telephone: (843) 527-0078
Fax: (843) 527-0540

Attorneys for the Appellants

Pursuant to Rule 221(a), SCACR, Appellants (the “Community Groups”) respectfully petition for rehearing and reconsideration of this Court’s October 18, 2017 Opinion (“the Opinion”) affirming the separate decisions of the Administrative Law Court (“ALC”). The Opinion upheld the ALC’s grant of summary judgment for lack of standing, imposition of sanctions, and denial of expanded discovery. The Opinion declined to reach the issue of whether the ALC erred in denying the Community Groups’ motion to vacate the Permits after the related federal permits were voided by the federal district court.

INTRODUCTION

The Court’s Opinion deserves reconsideration because it adds several new reversible errors to the erroneous decision affirmed below.

At base, the Opinion holds that Community Groups lack standing because their injury is both too general *and* too particularized. The Opinion finds that neighbors of a proposed large industrial facility may not contest pollution permits unlawfully granted for it if the facility’s impacts are widespread. It also finds that those neighbors may not contest unlawfully granted permits for the facility if their pollution impacts are too direct and acute. The result – that no affected party can challenge state-issued pollution permits for major polluting facilities sited adjacent to neighborhoods – is clearly erroneous and runs afoul of Article 22 of the South Carolina Constitution, which ensures due process for those affected by administrative decisions:

No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.

While largely upholding the ALC decision, the Opinion provides new rationales and explanations for various holdings, and, in doing so, raises several issues *sua sponte* that were not

previously at issue before the ALC or this Court. The Opinion should be reconsidered for six primary reasons.

1. The Community Groups Have Standing to Challenge the Permits.

To show associational standing, the Community Groups must show that: (1) individual members would otherwise have standing to sue in their own right, (2) the interests at stake are germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Beaufort Realty Co. v. Beaufort Cnty.*, 346 S.C. 298 301, 551 S.E.2d 588, 589 (Ct. App. 2001) (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). The Community Groups provided affidavits from numerous individual members, as well as numerous documents from SPA's own files demonstrating that these requirements for associational standing are met and indeed surpassed. *E.g.*, R.002576–78 (Affidavit of Christina Dodd); R.002581–85 (Affidavit of Virginia Lane), R.002587–91 (Affidavit of Tommie Robertson), R.002593–97 (Affidavit of Stephen F. Gates); R.002599–2606 (Affidavit of Katherine Zimmerman); R.002643–52 (Declaration of Evan Thompson); R.002751–52 (Affidavit of Marty Morganello); Appellants' Second Amended Initial Br. 30–37, 41–44; Appellant's Final Reply Br. 5–13. In rejecting the Community Groups' standing, the Opinion adopts some of the ALC's errors and introduces wholly new ones.

A. Particularized Injuries to Individuals Support Associational Standing Even When Those Injuries Are Experienced by More than One Person.

The Opinion concludes that testimony establishing particularized adverse effects to the individual members from “pollution, traffic congestion, and the visual disruption of Charleston's historic integrity and aesthetic beauty” were “only generalized grievances suffered by the public as a whole which are insufficient to establish standing.” Op. 9 (quoting *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 76 (2014)).

In fact, each of the individual members of the Community Groups that provided affidavits described concrete and particularized injuries that they would personally suffer. For example, Tommie Robertson testified to personal physical impacts from air pollution from the existing cruise terminal that would be exacerbated by construction and operation of a much larger terminal home-basing much larger polluting ships far closer to her home. Mrs. Robertson specifically testified to seeing “thick smoke move from the cruise ship toward [her] home,” such that “within seconds of breathing the emissions, [her] throat immediately began to hurt and [she] was forced to retreat indoors.” R.002589. She now refrains from opening her windows or using her home’s porch while cruise ships are at the existing terminal, and reasonably fears that her injuries will worsen if the new, much larger terminal is permitted and larger cruise ships – and their belching smokestacks – are moved to still closer, to within several hundred feet of her home. *Id*

Stephen Gates testified that he and the historic home that he owns have been directly affected by home-basing operations at the existing terminal, located about ten blocks from his domicile. He testified he found “heavier and more oily” soot deposited from the existing industrial cruise operation on his home, forcing him to scrub his home “more often and more vigorously” than ever before, and he reasonably fears that the much larger cruise terminal hosting much larger ships will result in more pollution fouling his home. R.002595–96. He testified that his daily life, including the “quiet walks and quick drives” that he previously enjoyed, have been significantly disrupted and degraded by existing cruise terminal operations, R.002595, while concentrated traffic in his neighborhood due to the Union Pier Terminal prevents him from accessing a nearby grocery store, instead forcing him to drive miles away to go get groceries. *Id*. Further, in light of the oily soot that quickly builds up on his property, Mr.

Gates testified that he had reasonable concerns regarding impacts to his personal health from air pollution from the new cruise terminal. R.002595. Mr. Gates also described how he reasonably fears all of these impacts will worsen if the new cruise terminal is permitted since the new terminal is engineered to handle larger cruise vessels and will lead to more frequent cruise ship calls. R.002594–96; *see* R.002438 (noting design objective for new terminal includes upgrades “necessary to support the resulting increases in passenger traffic loads”); R.002439 (anticipating home-basing a 3,500 passenger ship visiting twice a week); R.007493 (new terminal “designed to handle ships up to 3,500 passengers”).

Christina Dodd, another neighboring resident, testified that she also finds “oily soot” in and on her home, and that she is “obviously very concerned about that 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.”¹ R.002577. Marty Morganello testified that he personally swims and kayaks in area waterways and that increased pollution levels associated with the larger cruise terminal would cause him to alter his recreational activities. R.002751–52. Virginia Lane’s testified via affidavit detailing individualized negative effects from existing cruise operations, which she reasonably fears would be made worse by a much larger terminal hosting much larger vessels and causing much more vehicular traffic in the cramped confines of

¹ The Community Groups provided specific evidence documenting health risks associated with air pollution from cruise ships, demonstrating the reasonableness of individual concerns regarding cruise ship emissions. *See* R.2608–13 (Claudia Copeland, Cong. Research Serv., RL32450, Cruise Ship Pollution: Background, Laws and Regulations, and Key Issues 6 (2008) (indicating that 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)). For example, 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 (April 30, 2010) (describing the health and environmental impacts of marine diesel exhaust).

the lower Charleston peninsula. R002583–85. Mrs. Lane testified additionally to the degradation of her neighborhood’s historic and aesthetic character, which, as an architect working and living in the City’s historic center, injures her specifically and particularly. R.002583–84.

Each of these individual affiants has thus demonstrated injury from the cruise terminal “in a personal and individual way.” *Lujan*, 504 U.S. at 560 n.1. These individual injuries are grounded in the specific personal experiences and situations of the affiants, including residences in the small historic neighborhoods adjoining Union Pier, a geographically limited area. These injuries are not shared equally with the “general public,” or with residents in other Charleston neighborhoods.

The Opinion seems to take the view that because some of these injuries are shared by more than a handful of people, they are non-justiciable “generalized grievances.” Op. 9. That is clear error. “Standing has never required proof that the plaintiff is the *only* person injured by the defendant’s conduct.” *Nw. Envtl. Def. Ctr. v. Owens Corning Corp.*, 434 F. Supp. 2d 957, 965–66 (D. Or. 2006). While courts have denied standing “where the harm at issue is not only widely shared, but is also of an abstract and indefinite nature – for example, harm to the common concern for obedience to law,” *Fed. Election Comm’n v. Akins*, 524 U.S. 11, 23–25, 118 S. Ct. 1777, 1785 (1998) (internal quotations and citations omitted), it is “the abstract nature of the harm – for example, injury to the interest in seeing that the law is obeyed – [which] deprives the case of the concrete specificity” required to establish standing. *Id.* But “where a harm is concrete, though widely shared, the Court has found ‘injury in fact.’” *Id.* (quoting *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 449–50, 109 S. Ct. 2558, 2564–65 (1989)).

The Opinion’s reasoning implies the very opposite. It indicates that because impacts of a larger cruise terminal will be felt by more than a handful of people, the doors of the courthouse

must be closed to all. By extension, there could never be standing for any individual or citizen's group to challenge a permit for a large polluting project that impacts more than several people, be it a nuclear power plant or a toxic waste dump. This would be an absurd result that would provide the *most* standing for the *smallest* projects with the *least* amount of pollution. Indeed, under the Opinion, more people could challenge a corner store's liquor license application than could challenge an unlawful DHEC permit to spew toxins into a neighborhood's air and water. That is not the law, and the Court should grant rehearing and reconsideration to correct the Opinion's mistaken reasoning.

B. "Affected Persons" Need Not Prove Declining Future Property Values and Future Lost Business to Bring an Administrative Permit Challenge.

The Opinion holds that before South Carolina citizens can seek administrative review of an illegal DHEC pollution permit, they must produce "evidence of declining property values and business" attributable to the permit. Op. 9. But the permits at issue here, as with any DHEC environmental permit, are for *future* polluting activities. The Opinion thus requires persons seeking review to prove that their property or business has already declined due to future pollution enabled by a recently-issued permit. This is error on several levels.

As a practical matter, it will be difficult if not impossible for any property or business owner in South Carolina to "prove" – before any permitted activity has begun – that the activity has already resulted in "declining property values or business." This practical problem explains the legal one. In the Article III standing context (applied by the Court of Appeals here), the United States Supreme Court has squarely rejected the contention that "demonstrated proof of harm" to the environment" is needed to establish standing in environmental cases, finding that a plaintiff's "reasonable concern" of harm suffices. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181, 120 S. Ct. 693, 704 (2000) (finding standing where

organization member who lived twenty miles from discharge facility and limited use of river due to reasonable concern “that the water contained harmful pollutants”).

By contrast, the Opinion’s approach erects not just a practical proof barrier to any citizens ever have standing, it further requires that a citizen – to even *seek* administrative review – must prove their merits case even before discovery is complete. That squarely conflicts with uniform caselaw holding just the opposite. As just one example, in *Pitt County v. Hotels.com L.P.*, 553 F.3d 308, 312 (4th Cir. 2009), the Fourth Circuit reversed the lower court noting that “the district court’s analysis improperly conflated the threshold standing inquiry with the merits of the County’s claim.” *Id.* A plaintiff need not prove the merits of the case in order to prove an injury-in-fact sufficient to establish standing. *Id.* (citing *Am. Library Ass’n v. FCC*, 401 F.3d 489, 493 (D.C. Cir. 2005)).

Even if evidence of decreased property value or business were required, South Carolina courts permit a property owner to “give his estimate of its value or the damage inflicted upon it even though he is not an expert.” *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 43-44, 691 S.E.2d 135, 146 (2010) (quoting *Barton v. Superior Motors, Inc.*, 309 S.C. 491, 494, 424 S.E.2d 524, 526 (Ct. App. 1992)); see also *Abercrombie v. Abercrombie*, 372 S.C. 643, 647, 643 S.E.2d 697, 699 (Ct. App. 2007) (recognizing general rule in South Carolina that a property owner is competent to offer testimony as to the value of his property). Given that property owners are permitted to offer testimony as evidence to support an award of monetary damages in a tort action, there is no basis for requiring a much more onerous showing establish the owner’s status as an “affected person” entitled to administrative review of an unlawful Governmental authorization of pollution. S.C. Code Ann. § 44-1-60.

Mr. Gates testified that severe traffic and soot accumulation at his historic property will increase with the proposed much larger terminal and larger vessels, and that this would negatively affect the value of his residential property. R.002594. Ms. Robertson testified that development of a large cruise terminal immediately adjacent to her home will negatively affect her investment. R.002589–90. As for business impacts, Mrs. Lane testified directly to complaints from her clients, contractors, and others regarding difficulties accessing her business when cruise ships at the existing terminal, and her reasonable concern that these business barriers would increase with a new terminal hosting larger vessels with more passengers using more vehicles. R.002584. *See* R.007461 (SPA stating that indicating traffic counts at existing terminal are “considerably lower” than projected levels at new terminal).

This evidence is more than sufficient to show that these property-owning and business-operating South Carolinians “affected persons” the General Assembly intended to be able to invoke administrative review of errant DHEC pollution permits. There is no legal or practical basis to require further evidence of future “declining property values and business” attributed to granting the permit. Op. 9. The import of the Opinion is to strip property owners of existing constitutional rights to protect their property from unlawful administrative permits by the State without an opportunity to be heard, independent adjudication, and judicial review.²

C. An Affiant’s Particularized Injury is No Barrier to Associational Standing.

The Opinion acknowledges that Tommie Robertson’s standing affidavit states that “(1) smoke emitted from the existing passenger terminal already physically impacts her to the extent

² SC Const. Art I, § 22:

No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.

that she must retreat indoors when cruise ships are in town and (2) the proposed new terminal, which would be closer to her home than the existing terminal, would only increase these adverse impacts.” Op. 9. Rather than recognize this as particularized harm that shows standing, however, the Opinion postulates that this testimony defeats associational standing on the basis that the Community Groups “have not explained how the claims they have asserted or the relief they have requested can be adjudicated with the affiant’s participation in the lawsuit.” Op. 10.

In fact, the Community Groups squarely asserted and explained that the participation of the individual affiants is not required for the proper adjudication of the claims they have brought nor the relief they have sought. *See* R.002356–61 (CG Resp. to SPA Mot. Sum. J.) (reciting elements of associational standing and explaining that members participation not needed in substantive litigation); Appellants’ Final Reply Br. 12–13 (explaining that “where the organization seeks some other form of prospective relief than damages, like suits that seek to resolve a question of law, courts will find associational standing based on the standing of one member because the requested remedy – resolution of an issue of law – will benefit both the injured member and other injured members alike even though they don’t all participate” (internal quotations and citations omitted)). As recognized in the first sentence of the Opinion, this action is an administrative challenge to the validity of several DHEC authorizations given for a proposed cruise terminal. The claims asserted concern the unlawfulness of DHEC’s actions in issuing (and failing to issue) specific authorizations. *See* R.000237 (Community Groups prehearing statement filed with ALC) (identifying central issue as “whether DHEC properly applied the Critical Area Regulations, the Coastal Zone Management Act and Coastal Management Program in issuing a permit to construct a new cruise ship terminal by installing pilings in the critical area; building two covered staging areas and making structural changes to a

building located over the critical area”). For example, the Community Groups contend DHEC’s authorizations were unlawful because they did not include a Water Quality Certificate as directed by Section 401 of the federal Clean Water Act. *See* 33 U.S.C. § 3401. The requested remedy is vacatur of DHEC’s authorization. *See* R.000237 (Community Groups prehearing statement filed with ALC). No party has ever contended that adjudication of the *claims* or *relief* in this case requires participation of the Community Groups’ members.

Further, it is self-evident that claims concerning the validity of DHEC authorizations – i.e., whether they complied with applicable law – and the appropriate relief could be adjudicated without the participation of Mrs. Robertson. While her testimony does indeed bolster the importance of the Community Groups’ claim that DHEC’s authorization unlawfully failed to include air pollution controls, no party has claimed, or could claim, that her participation is *required* to show that the authorizations improperly failed to consider those options. The Community Groups are not seeking monetary damages in compensation for the injuries to Mrs. Robertson and the other individuals, but instead “prospective relief” in the form of setting aside unlawful DHEC authorizations. Appellants’ Reply Br. 13.

The Opinion’s citations to *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333 (1977), and *Warth v. Seldin*, 422 U.S. 490 (1975), only underscore the error of treating Mrs. Robertson’s testimony as a factor weighing against associational standing. While these cases establish that associational standing generally requires that “neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit,” *Warth*, 422 U.S. at 511, the decisions themselves show why, in the present case, Mrs. Robertson’s affidavit supports associated standing and does not defeat it.

In *Hunt*, the Washington State Apple Advertising Commission was found to have associational standing to challenge a North Carolina statute based on business impacts to individual apple growers in Washington State. 432 U.S. at 343-44. The complaint alleged harm to individual Washington apple growers and dealers – as needed to demonstrate injury-in-fact – but the merits claim was that the challenged statute violated the Commerce Clause. Further, the requested relief was not damages, but a declaratory judgment of unconstitutionality and an injunction against enforcement of the North Carolina statute. Therefore, beyond the need to demonstrate concrete and particularized injury to individual growers to establish associational standing, the participation of the individual members was not required, and the court affirmed the Commission’s associational standing. *Id.* at 345. Analogous facts require the same holding here.

In *Warth* by contrast, the Home Builders Association was denied associational standing because the association sought “relief in *damages* for alleged injuries to its members.” 422 U.S. at 515 (emphasis added). To establish damages, the Court found that “both the fact and extent of injury would require individualized proof,” thereby necessitating participation of the injured individual members. *Id.* at 515. The critical factor in *Warth* weighing against a finding of associational standing was that because the complaint sought monetary damages based on injury to individual members, the injured individuals would need to participate in the case. Hence, the Supreme Court concluded that the association had “no standing to *claim damages* on [the individual member’s] behalf.” *Id.* at 516 (emphasis added). As the Community Groups have previously explained, this lawsuit is not seeking economic damages based on the injuries to the individual members, but rather challenges the validity of the Permits with a remedy of vacatur or remand to OCRM for further analysis. Beyond the standing inquiry, there is no need for further participation of the individual members in the litigation.

2. The Community Groups' Article III Standing Was "Actually Litigated" and Determined by a Federal Court.

The Opinion recognizes that the ALC erred in failing to address the Community Groups' argument that the federal court "decided the issue of their standing to challenge *any* government permit issued in connection with SPA's plan" to construct a new expanded cruise terminal. Op. 10 n.11 (emphasis added). As the Opinion also recognizes, the proper question is whether an Article III court's holding that the Community Groups had Article III standing to challenge permits for SPA's cruise terminal acts as a bar to the ALC's subsequent holding that these groups did not have Article III standing to challenge permits for the same terminal. The Opinion presents two new rationales said to defeat collateral estoppel.

The Opinion contends, first, that no evidence shows that the issue of the Community Groups' standing was "actually litigated" in the federal proceeding. Op. 11. In fact, the record contains overwhelming evidence that the elements of Article III standing were directly litigated in federal court after SPA moved for summary judgment for lack of Article III standing. *See* R.002523–25 (Memorandum of State Ports Authority in Support of Motion for Summary Judgment, *Pres. Soc'y of Charleston v. U.S. Army Corps of Eng'rs*, No. 2:12-2942-RMG, (D.S.C. July 15, 2013) ("SPA MSJ – Federal") (arguing that the Community Groups failed to meet the three elements required for standing: injury-in-fact, causation, and redressability)); R.002540–42 (State Ports Authority Reply to Plaintiffs' Response to Defendants' Motions for Summary Judgment, *Pres. Soc'y of Charleston*, No. 2:12-2942-RMG (D.S.C. Aug. 5, 2013) (SPA arguments against redressability of Community Groups' injuries)). SPA's federal court briefs were provided to the ALC by the Community Groups and included in the Record on Appeal in support of the Community Groups' assertion that Article III standing was indeed litigated in an Article III court, and resolved against SPA.

The Opinion nevertheless posits that this issue was not “actually litigated” (for estoppel purposes) under the theory that SPA made a more limited standing argument in federal court than it did before the ALC. Op. 10 n.12 (surmising that SPA “limited its standing analysis” to the effects installation of piling clusters).

But “once an *issue* is raised and determined, it is the entire *issue* that is precluded, not just the particular arguments raised in support of it in the first case.” *Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992) (emphasis in original). Thus, as a matter of law, where a party *could have* made arguments on an issue that was actually litigated in the earlier proceeding but failed to make such argument, collateral estoppel nevertheless applies, and the party is barred from relitigating the same issue using the new argument. *Securities Indus. Ass'n v. Board of Governors*, 900 F.2d 360, 364 (D.C. Cir. 1990) (plaintiff may not raise new argument in second proceeding even though it was never made in first proceeding; so long as argument could have been made, it is precluded). Were it otherwise, the doctrine would be useless to prevent infinite bites at the same apple by a losing litigant, and fail to prevent the needless waste of judicial and litigant resources.

Even if collateral estoppel turned on whether the same *arguments* on an issue were litigated before, SPA did, in fact, make essentially the same standing argument in the federal case as it did in the ALC. For example, in the federal case, SPA claimed (incorrectly) that the affiant members could not show injury-in-fact “because the injuries alleged pertain to existing cruise operations generally and not the permitted activity to install five cluster piles.” R.002524–25 (SPA MSJ – Federal). SPA made the same incorrect claim in the ALC, contending that the “injuries alleged pertain to cruise operations generally, rather than the permitted activity.” R.001127 (Port Authority’s Motion for Summary Judgment for Lack of Standing) (“SPA MSJ –

State”) (emphasis in original). SPA likewise argued (incorrectly) in federal court that the Community Groups’ “alleged injuries impact all citizens and visitors to Charleston and are not unique to Plaintiffs’ members,” R.002525 (SPA MSJ – Federal), while in the ALC it contended likewise, i.e., that Community Groups “fail[ed] to articulate a harm any different from what may be suffered by the public generally.” R.001129–30 (SPA MSJ – State). Finally, in both the federal case and in the state proceeding, SPA (incorrectly) claimed that the Community Groups had failed to show that approval of the SPA’s permit application will cause the cruise business to increase at Union Pier Terminal, and that the injuries were therefore not redressable because cruise ship activities would continue at the existing cruise terminal if the federal permits were denied.³

In summary, not only was the same issue actually litigated in the federal forum, the same arguments concerning it were presented, litigated, and resolved against SPA. At base, in rejecting SPA’s summary judgment motion contending that the Community Groups lacked Article III standing to challenge the federal permits, an Article III court actually and necessarily decided that the Community Groups have Article III standing. That determination is binding in any subsequent state tribunal where the Article III standing of the Community Groups to challenge permits for the cruise terminal project is litigated, and the ALC’s determination was precluded. The ALC erred, and the Opinion errs, in allowing relitigation of the same issue and entering summary judgment against Community Groups for lack of standing.

³ Compare R.0025225 (SPA MSJ – Federal) (arguing against redressability because “SPA will continue to utilize the existing passenger terminal at Building 325 and to provide berthing for cruise ships as it has done for the past forty years, [and] the embarkation and debarkation of cruise passengers will be on-going regardless of whether the SPA is able to fulfill its plans of moving the terminal”) with R.001154-55 (SPA MSJ – State) (“[T]he ‘injuries’ alleged by [the Community Groups] would not be redressed even if the challenged Permit were denied, because cruise ships and other marine container vessels call on Charleston today and will continue to call on UPT under its current configuration going forward.”).

The Opinion also introduces a second error by indicating, *sua sponte*, that collateral estoppel should not apply here even though the elements *are* met, for reasons of unfairness or injustice. *See* Op. 10 (quoting *Carolina Renewal, Inc. v. SCDOT*, 385 S.C. 550, 555, 684 S.E.2d 779, 782 (Ct. App. 2009)).

The Opinion does not mention, much less explain, what “unfairness or injustice” would result from application of collateral estoppel or “public policy” that would justify ignoring it. SPA never invoked this exception or presented grounds for it in its briefs. Nevertheless, disregarding collateral estoppel here would be an arbitrary slap in the face to South Carolina citizens who are attempting to protect themselves, their property, and their family from illegal government action that will pollute and degrade their homes and health. There is no “unfairness or injustice” worked by giving South Carolinians the right to be considered “affected persons” entitled to an administrative process whereby they can contest the legality of government action that impacts them directly. The statute gives them that right, and the Constitution of South Carolina enshrines it. Stripping it from them here works no fairness or justice at all, and is contrary to the public policy of giving citizens the right to petition the State to correct what they contend – and seek to prove – is an unlawful and arbitrary government approval of a needlessly damaging facility in close proximity to densely packed homes and businesses.

Certainly the desire of the quasi-public ports authority to build a bigger leisure cruise terminal is not sufficient countervailing “public policy” to justify erasure of the right of citizens to insist on legal permits for a state-owned facility. In fact, the “best interests” of the Ports Authority are statutorily defined to include “consideration given to diminish or mitigate any negative effect port operations or expansion may have upon the *environment . . . and quality of life* of residents in communities located near existing or proposed port facilities.” S.C. Code

Ann. § 54-3-70(A)(3)(D) (emphasis added). Thus, by definition it is in the “best interests” of SPA to mitigate negative impacts on the environment and citizens, which the Community Groups contend SPA and DHEC failed to do. Preserving the right of citizens to challenge unlawful DHEC permits for a large polluting facility next to neighborhoods is not just good public policy, but also vindicates SPA’s purposes as the legislature has defined them.

3. Statutory Standing for “[A]ffected persons” in Section 44-1-60 is Broader than the Three-Part Test for Constitutional Standing Set Forth in *Lujan*.

The Opinion begins its analysis of statutory standing by agreeing that the term “affected persons” is not defined by statute and should be afforded its usual and accustomed meaning. Op. 8. However, the Opinion then fails to inquire into the usual and accustomed meaning of those words. It does not look to a dictionary, for example, or cases that have construed the term “affected” generally. Instead the Opinion string cites a number of statutes other than the statute at issue in this case, as well as prior court decisions that concern other statutes. For example, the Opinion cites S.C. Code Ann. Regs. 30-6A (2011), a regulation which specifies that only those “affected persons with standing” may contest a permit, presumably, for the proposition that legislature intended “affected persons” to implicitly include the elements of federal Article III standing. But that reading makes the explicit term “with standing” meaningless, and violates the canon that each word in a law must be given meaning, as well as the canon that where a term is included in one place, but not in another, that absence must be given meaning. *See Matter of Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) (citing 82 C.J.S. *Statutes* § 346) (“A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous....”); *McCullum v. Snipes*, 213 S.C. 254, 265, 49 S.E.2d 12, 16 (1948) (“Where there is no ambiguity, words must not be added to or taken from the statute.”); *cf. Bates v. United States*, 522 U.S. 23, 29–30, 118 S. Ct. 285, 290 (1997) (“Where Congress includes

particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”).

The statute in question in this case, S.C. Code Ann. § 44-1-60, provides for uniform 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. *Id.* § 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 (G). Thus, the legislature has given “affected persons” a right to invoke the ALC’s administrative review. Where such statutory standing exists, there is no need to inquire whether Article III (“constitutional”) standing also exists, or, for that matter, public importance standing. *ATC South Inc. v. Charleston Cnty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008) (“Standing may be acquired: (1) by statute; (2) through the rubric of ‘constitutional standing;’ or (3) under the ‘public importance’ exception.”).

Contrary to the Court’s erroneous interpretation, *Smiley* does not hold that the legislature intended the term “affected person” in S.C. Code § 44-1-60 to require that a constitutional test be overlaid over the plain meaning of the term. In fact, *Smiley* did not concern S.C. Code § 44-1-60 at all. *See Smiley v. S.C. Dep’t of Health & Envtl. Ctrl.*, 374 S.C. 326, 649 S.E.2d 31 (2007). Notably, when the Legislature subsequently enacted S.C. Code § 44-1-60, it did not include the term “with standing,” indicating that it did not intend to require that citizens of South Carolina seeking administrative review of unlawful DHEC permits that manifestly impact them also demonstrate federal Article III standing. *See Appellants’ Final Reply Br. 3.* The Opinion’s

construction of the South Carolina statutory term “affected person” to include multiple unstated elements of federal Article III standing doctrine is clear, reversible error.

4. The Community Groups Have Public Importance Standing.

In denying the Community Groups’ claim of public importance standing, the Court erroneously held that the Groups failed to provide “an explanation as to why resolution of the current controversy is necessary for future guidance. . . .” Op. 10. In fact, the Community Groups explained that “[t]his is a highly controversial and widely opposed public project that ‘transcend[s] a purely private matter,’ and ensuring that its impacts are minimized according to the law is of ‘wide concern.’” Appellants’ Final Reply Br., at 14 (quoting *S.C. Pub. Interest Found.*, 403 S.C. 640, 645-46, 744 S.E2d 521, 524 (2013)). More than a half-dozen different citizen groups representing thousands of citizens have brought this challenge to a massive cruise terminal in the heart of downtown Charleston. Further, this litigation challenges state-issued Permits for a public project that will involve a \$35 million expenditure of public funds by a state-owned entity, SPA. *Id.* As previously explained, future guidance is thus needed to ensure that significant amounts of public dollars are not spent without any opportunity for an evaluation of whether this publicly funded project meets the requirements of state law.

More broadly, future guidance is needed to clarify the extent of environmental review and analysis that DHEC is required to undertake in issuing Section 401 Water Quality Certifications, Critical Area Permits and Coastal Zone Consistency Certifications, an issue of widespread and ongoing relevance for state agencies, property owners, and citizens in South Carolina.

The Court denies public importance standing despite also holding the affiants have only suffered “generalized grievances suffered by the public as a whole.” Op. 9. If the impacts of the cruise terminal are so widely shared as to adversely affect the quality of life of “the public as a

whole” because of pollution, traffic congestion and visual disruption, then the matter is of sufficient public importance to support public importance standing.

5. Sanctions Are Unwarranted Against Litigants Who Contended that the Statutory Term “Must” Denotes a Mandatory, Not Discretionary Duty.

The ALC plainly abused its discretion by imposing sanctions upon the Community Groups for interpreting statutory language requiring that the DHEC Board “must” hold a Review Conference within sixty days of a request set forth a mandatory, not discretionary, duty to hold such a conference in such timeframe when requested. *See* S.C. Code Ann. § 44-1-60(F) (“No later than sixty calendar days after the 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 Opinion recognizes that the Community Groups “correctly argue” that the statute “provides that the DHEC Board ‘must’ conduct a final review conference ‘[n]o later than sixty calendar days after the date of receipt of a request for final review.’” Op 12 (quoting S.C. Code 44-1-60(F)). However, it faults the Community Groups for “disregard[ing]” additional language “indicating” that ALC review is available if the Board “declines” to hold said conference.

The Community Groups did not disregard, and have never disregarded, the additional language. As set forth in our brief, the provisions read in concert indicate that the Board “must” have a conference, but also provides an avenue for redress if the Board “declines” its duty to hold the conference within the allotted 60 days. Appellants’ Second Amended Initial Br. 58–59. We showed, through reference to the dictionary, that the undefined term “declines” includes a failure to undertake a mandatory duty, *id.*, and no party or court has refuted – or even attempted to refute – that demonstration.

The statute, accordingly, can be read as giving the Board a mandatory duty to hold a conference within 60 days, and providing that, should the Board fail to undertake such mandatory duty, jurisdiction lies in the ALC.

Since that is a permissible reading of the statute, it cannot be sanctionable for a party to suggest that the ALC has the power to remand a matter to the Board. The Opinion's claim that Community Groups "disregard" the rest of the statute's additional language is incorrect.

The Opinion also baselessly faults the Community Groups for their "apparent disregard of a settled rule of statutory construction." Op. 12. As the Community Groups have pointed out, however, the question of whether the term "must" in Section 44-1-60(F) sets forth a mandatory or discretionary duty has never been litigated, and does not represent an area of settled statutory construction. In effect, the Opinion endorses sanctioning a party for putting forth a plausible statutory reading – contending the term "must" is mandatory – because lawyers can, and one court did, take the view that this reading is impermissible. This puts counsel in an untenable position. On the one hand, they must zealously represent their client, which includes good faith extensions of the law. *See* SCRPC 3.1 (indicating that the assertion of "a good faith argument for an extension, modification or reversal of existing law" is not "frivolous"). On the other hand, they must (apparently) avoid the ire of judges who side with opposing attorneys on an unsettled question of statutory interpretation. The sanctions order was an extreme and arbitrary abuse of discretion. It should be reversed.

6. The ALC Abused Its Discretion in Prematurely Closing Discovery.

The Opinion does not dispute that the ALC and all parties continued proceeded in this case if discovery would continue for months after the 90-day period following assignment. Op. 11. In fact, it is uncontroverted that discovery did so proceed, which is indisputably standard practice in these types of administrative proceedings. *See* Appellants' Second Amended Initial

Br. 52–53. Since the ALC and all parties were proceeding in good faith along an agreed-upon course of discovery, there was no practical reason for the Community Groups to file a formal motion to expand discovery as is freely allowed under the ALC Rules. SCALC R. 21.

Since SPA had itself suggested a discovery schedule that went beyond the 90-day period and propounded discovery beyond that period, the Community Groups were understandably surprised at SPA’s abrupt change in position and claim that discovery had closed months earlier pursuant to a deadline that it (and the ALC) had treated as not in effect. Indeed, the ALC had previously acknowledged “the parties were still conducting discovery” long after the 90-day purported deadline had passed. Appellants’ Second Amended Initial Br. 51 (citing December 2, 2013 order). Since SPA had itself requested that discovery be extended for nine months past the purported 90 day deadline, *see* Appellants’ Second Amended Initial Br. 50–51, the Opinion’s finding of no “consent” to discovery past the 90-day deadline is wrong. SPA did not just consent; it proposed an extension beyond 90 days and then availed itself of that extension.

Given the usual course of discovery practice in the ALC⁴ and the actual ongoing discovery in this case, it was reasonable for the Community Groups to proceed with discovery in the absence of a formal consent motion expanding discovery. Once SPA abruptly and retroactively changed its position in response to the Community Groups’ request for depositions, the Community Groups promptly sought a formal order expanding discovery. The Community Groups met the “good cause” standard by establishing (1) a particularized harm based on the inability to conduct the requested depositions, and (2) that depositions would allow access to relevant information and allow for the presentation of admissible evidence. The ALC abused its

⁴ The Community Groups submitted testimony from an experienced practitioner before the ALC demonstrated that the 90-day deadline is rarely observed in environmental permitting cases. *See* Appellants’ Second Amended Initial Br. 52–53.

discretion in denying the motion to expand discovery, and the Opinion errs in affirming the ALC's decision.

CONCLUSION

For the foregoing reasons, the Community Groups respectfully request that their petition for rehearing and reconsideration be allowed and that the Court reverse the ALC's decisions granting summary judgment on the basis of standing, denying the motion to expand discovery, and granting sanctions against the Community Groups. Further, the Court should reverse the ALC's decision to deny the Community Groups' motion to vacate the Permits.

Respectfully submitted,



J. Blanding Holman IV
Southern Environmental Law Center
463 King Street, Suite B
Charleston, SC 29401
Telephone: (843) 720-5270

Jefferson Leath
Leath, Bouch & Seekings, LLP
92 Broad Street
Charleston, SC 29401
Telephone: (843) 513-1076

Amy E. Armstrong
Jessie A. White
South Carolina Environmental Law Project
Post Office Box 1380
Pawleys Island, SC 29585
Telephone: (843) 527-0078

Attorneys for the Appellants

Charleston, SC
November 1, 2017

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

RECEIVED

NOV 02 2017

SC Court of Appeals

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 November 1, 2017, I caused to be served the foregoing *Petition for Rehearing* on all counsel of record by placing copies of same in the U.S. Mail addressed to:

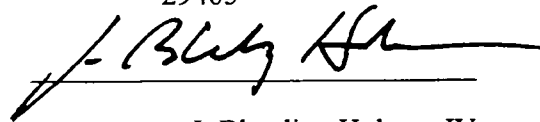
Randolph R. Lowell, Esq.
Tracey C. Green, Esq.
Chad N. Johnston, Esq.
Willoughby & Hoefer, PA
Post Office Box 8416
Columbia, SC 29202

Michael Gary Corley, Esq.
South Carolina
Environmental Law Project
430 Highmarket Street
Georgetown, SC 29440

Amy E. Armstrong
Jessie A. White
South Carolina
Environmental Law Project
Post Office Box 1380
Pawleys Island, SC 29585
Telephone: (843) 527-0078

Jefferson Leath, Esq.
Leath, Bouch, & Seekings,
LLP
92 Broad Street
Charleston, SC 29401

Bradley D. Churdar, Esq.
S.C. DHEC
Office of OCRM
1362 McMillan Avenue
Suite 400
North Charleston, SC
29405



J. Blanding Holman IV
November 1, 2017

SOUTHERN ENVIRONMENTAL LAW CENTER

Telephone 843-720-5270

463 KING STREET, SUITE B
CHARLESTON, SC 29403-7204

Facsimile 843-414-7039

November 1, 2017

VIA U.P.S. – PRIORITY OVERNIGHT

The Honorable Jenny Abbott Kitchings
The South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RECEIVED
NOV 02 2017
SC Court of Appeals

Re: Preservation Society of Charleston v. SCDHEC
Appellate Case No. 2014-000847

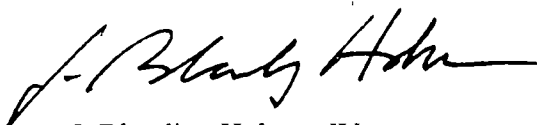
Dear Ms. Kitchings:

Enclosed for filing please find the original and seven (7) copies of Appellants' Petition for Rehearing and Proof of Service in the above-referenced matter. Also enclosed is a check for \$25.00 to cover the associated filing fee.

Please return a file-stamped copy to our office in the enclosed self-addressed, stamped envelope.

If you have any questions, please do not hesitate to contact me at 843-720-5270 or bholman@selcsc.org. Thank you for your assistance with this matter.

Sincerely,



J. Blanding Holman IV

JBH/arp
Enclosures

cc: All Counsel of Record

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph K. Anderson, III, Chief Administrative Law Judge

Case No. 2014-000847

RECEIVED

NOV 18 2017

SC Court of Appeals

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,

v.

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

Return to Petition for Rehearing

Appellants are not entitled to rehearing of Unpublished Opinion No. 2017-UP-403, because the Petition does not comport with the Court's standards for rehearing. Instead, all the points and issues argued in the Petition were raised and presented in the parties' briefs and the Record on Appeal. In order to prevail on a petition for rehearing, a party must state with particularity the points of its argument that the court is alleged to have

overlooked or misapprehended. Rule 221(a), SCACR. Because Appellants never identify anything the Court overlooked or misapprehended, and because their arguments do not in any even merit rehearing, the Court should deny the Petition.

I. Appellants have not shown any reason why rehearing should be granted regarding the standing determinations that have been decided against them by both this Court and the ALC.

This Court correctly held that Appellants cannot establish the elements of associational standing. *Beaufort Realty Co., Inc. v. Beaufort County*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001). (“An organization has standing to bring suit on behalf of its members when [1] its members would otherwise have standing to sue in their own right, [2] the interests at stake are germane to the organization’s purpose, and [3] neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.”). For the reasons set forth below, rehearing on this issue is not warranted.

A. The first associational standing element is not present because the associations’ individual members did not suffer any injury-in-fact.

The Court correctly held that the injuries alleged by Appellants, “even if actually suffered by individual complainants, are ‘only generalized grievances suffered by the public as a whole which are insufficient to establish standing.’” Op. at 9 (quoting *Carnival Corp. v. Historic Ansonborough Neighborhood Ass’n*, 407 S.C. 67, 76, 753 S.E.2d 846, 851 (2014)). Appellants incorrectly characterize the Opinion as holding that standing is not present

merely because alleged injuries are shared by “more than a handful of people.” Pet. at 5. To the contrary, the Opinion correctly holds that Appellants failed to allege or identify any particularized injury and, instead, alleged or identified only speculative claims incident to living in Charleston’s urban environment that do not amount to actual or imminent harm. Op. at 9. Appellants have repeatedly pointed to the affidavit of Tommy Robinson. Pet. at 3. However, her affidavit conveys nothing more than general grievances that allegedly exist today as a result of *current* cruise operations, but have no established connection to a future cruise terminal or cruise ships, or any activity licensed by DHEC.¹ See Op. at 3, Standing Order p. 10 (R. p. 000086); Rule 56(e), SCRCF; see also *Beaufort Realty*, 346 S.C. at 303, 551 S.E.2d at 590; *Sea Pines Assoc. for the Prot. of Wildlife, Inc. v. S.C. Dep’t of Natural Res.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001); *Bailey v. S.C. Department of Health & Environmental Control*, 388 S.C. 1, 693 S.E.2d 426 (Ct. App. 2010) (holding no causation because “potential of having boats mooring at the dock would still exist” regardless of the permitting decision). Ms. Robinson’s affidavit was considered by the Court and discussed in the Opinion; therefore, it provides no basis for rehearing on the issue of standing.

Nor do any of Appellants’ other affidavits establish standing. Stephen Gates’ affidavit, see Pet. at 3-4, consists of inadmissible personal opinion, legal

¹ As the Court notes, the activity licensed by DHEC is limited to the installation of five additional pilings

conclusions, unsupported speculations, and hearsay repetition of purported medical opinions on which he is not qualified to testify. Standing Order at 7-8, 10 & n.13, (R. pp. 000083-84; 000086). Christina Dodd, *see* Pet. at 4, complains that she is concerned about breathing pollution from cruise ships, but she is not qualified to opine as to any connection between her concerns about alleged present medical diagnoses and assumed injuries related to future cruise operations at Union Pier. *See* Christina Dodd Aff. at 2 (alleging current injuries with no admissible testimony connecting allegations to the license), (R. p. 000399); *see also* Standing Order at 8 n.9 & 9 n.12. Marty Morganello's complaints, *see* Pet. at 4, about cruise ship practices regarding waste are inadmissible personal opinion and unfounded speculation because there is nothing to show he is qualified to testify on these issues. Standing Order at 10-11 & n.15, (R. pp.000086-87). Virginia Lane's affidavit, *see* Pet. at 4-5, consists only of speculative harm to her and her business along with unfounded opinion testimony regarding traffic issues and property valuation. *See also* Standing Order at 8 n.9, 9 & n.11, (R. pp. 000084-85). This Court and the ALC correctly held that these affidavits do not establish an injury-in-fact and rehearing on this issue is not warranted.² *See also Carnival Corp.*, 407 S.C. at 76-77, 753

² It also should be noted that, without a single expert affidavit, Cruise Opponents tried to connect existing and future operations at Union Pier to their alleged present-day health issues through the submission of generalized information concerning health issues that were wholly unconnected to the Cruise Terminal. Contrary to Appellants' assertions, *see* Pet. at 4 & n.1, this was insufficient to meet their burden and is not a ground for rehearing.

S.E.2d at 851 (holding that identical generalized allegations as set forth by affiants are insufficient to establish standing).

Finally, the Petition incorrectly characterizes the Opinion as taking “the view that because some of these injuries are shared by more than a handful of people, they are non-justiciable ‘generalized grievances.’” Pet. at 5 (quoting Op. at 9). But the Court did no more than recognize, as did the ALC, that Appellants never alleged or established any cognizable injury beyond generalized grievances that might be shared by the general public. The simple fact is that Appellants never established a cognizable injury-in-fact that was actual and concrete, not conjectural or hypothetical as it relates to a proposed, but un-built, cruise terminal. *See Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291 (holding that an injury-in-fact is “an invasion of a legally protected interest [that] is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical”). Rehearing certainly is not warranted based on Appellants’ incorrect characterization of what the Opinion “implies.” Pet. at 5-6.

B. Rehearing is not warranted regarding this Court’s holdings concerning the showing required for “affected persons” because Appellants again misapprehend what the Opinion actually holds.

Contrary to what Appellants argue, the Court did not hold that it is necessary to “produce ‘evidence of declining property values and business’ attributable to the permit.” Pet. at 6 (quoting Op. at 9). Rather, the Court correctly held that Appellants’ assertions regarding alleged impacts to their

properties and businesses were nothing more than the expression of generalized concerns that were wholly unsupported by actual evidence supporting those concerns: “We agree with the ALC that Appellants presented only speculative claims that the proposed passenger terminal would adversely affect their property values and businesses.” Op. at 9. See discussion *supra* Part I.A.; see also *Carnival Corp.*, 407 S.C. at 76–77, 753 S.E.2d at 851; *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291. And this Court previously has held that unsubstantiated allegations of future harm are insufficient to meet the requirements for standing to maintain an action, even specifically rejecting application of the *Laidlaw* case now cited by Appellants. *Beaufort Realty*, 346 S.C. at 302–03, 551 S.E.2d at 590 (rejecting *Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167 (2000) when claimed harm allegedly will occur in the future).

Again, the Gates, Robertson, and Lane affidavits do not establish standing because, as referenced above, their claims are speculative, constitute inadmissible evidence, or both. Many of Appellants’ assertions and arguments in fact reflect their continued misapprehension of the evidentiary insufficiency of their response to the summary judgment motion. See Rule 56(e), SCRPC (“Supporting and opposing affidavits ... shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.”). Simply put, Appellants’ arguments on this issue are nothing more than a recapitulation of their

argument for a lower threshold of standing based on use of the statutory term “affected persons.” See Pet. at 8 (“This evidence is more than sufficient to show that these property-owning and business-operating South Carolinians [are] “affected persons’”). Rehearing on this issue should be denied because the Court fully considered and correctly rejected these arguments. See Op. at 8; see also discussion *infra* Part III.

C. Rehearing is not warranted with respect to the Court’s holdings regarding the need for participation in the lawsuit of the individual affiants.

This Court also correctly affirmed the ALC’s determination that Ms. Robertson’s affidavit did not establish associational standing because her alleged injuries, even if accepted, would require her individual participation in the lawsuit. Op. at 9-10. Critically, the Petition misstates a key holding of the Opinion on this issue. Pet. at 9 (misquoting the Opinion to state that “the Opinion postulates ... that the Community Groups ‘have not explained how the claims they have asserted or the relief they have requested can be adjudicated with the affiant’s participation in the lawsuit.”) (emphasis added). In fact, this Court held, “Appellants have not explained how the claims they have asserted or the relief they have requested can be adjudicated without the affiant’s participation in the lawsuit.” Op. at 10 (emphasis added). Appellants certainly cannot establish standing—which they alleged in their Contested Case Hearing request—without the direct participation of the individual members in the lawsuit. See Request for Contested Case Hearing, ¶2[7] (R. p. 000132).

More to the point, even assuming Appellants could surmount their standing problems, testimony of the individual members would be required to establish the case that Appellants formulated in their Contested Case Hearing request. Specifically, Appellants stated that “[e]xamples of cumulative impacts on the general character area *will be supported by testimony*, and include historic skyline obstruction, waterview obstructions, the gridlock on small neighborhood streets caused by massive cruise ship and harmful air emissions.” Request, ¶23 (emphasis added) (R. pp. 000127). They further stated that, with respect to their claims that DHEC did not comply with the Coastal Zone Management Act “[u]pon information and belief, *to be supported [by] testimony*, increased cruise ship operations will adversely affect property values.” Request, ¶24 (emphasis added) (R. pp. 000130). Appellants assert in the Petition that landowners can testify as to property values, Pet. at 7-8, and thus acknowledge the need for their individual members’ testimony and participation. Simply put, the nature of the claims as *framed by Appellants* will require participation of their individual members. See *Warth v. Seldin*, 422 U.S. 490 (1975) (denying associational standing because individualized proof was required); cf. *Hunt v. Washington State Apple Advert. Comm’n*, 432 U.S. 333, 344 (1977) (“Finally, neither the interstate commerce claim nor the request for declaratory and injunctive relief requires individualized proof and both are thus properly resolved in a group context.”).

Finally, but significantly, none of the alleged injuries identified by Appellants have anything to do with or derive from the respective affiants' membership in the organizations. See *Warth*, 422 U.S. at 511 ("[T]he association may assert the rights of its members, at least so long as the challenged infractions adversely affect its members' associational ties."). Standing Order at 16-17. (R. pp. 000092-93). Specifically, the allegations by Tommie Robertson, see Pet. at 9-10, even if accepted, involve personal injuries that do not assist Appellants in establishing standing for a matter germane to their organizational purposes. See Standing Order at 16-17 & nn.21-22. (R. pp. 000092-93). Nor do her alleged injuries derive from her voluntary membership in either the Coastal Conservation League or the Charleston Communities for Cruise Control.

In essence, Appellants are critical of the Court's application of the associational standing standard to their alleged injuries despite the fact that Appellants chose to bring this action as associations, rather than individually. But application of these principles does not deprive the affiants or anyone else of their rights to challenge a DHEC permitting decision because the affiants had the option of bringing this case along with or in lieu of the associations, or seeking intervention at a later stage of the proceedings. They never sought to avail themselves of any of these options and, thus, have no one to blame but themselves.

Finally, the Petition blurs the line and confuses the issues of what constitutes a particularized or generalized injury, with the standard for associational standing. Associational standing looks at the question of who is the proper party to bring an action; if the allegations are specific to the individual, rather than germane to or deriving from the organization, then the individual is the proper party. Here, the alleged injuries relied upon for standing, and repeated once more in the Petition, are specific to the affiant, not the association. The standard advanced by Appellants renders meaningless the third prong of the *Beaufort Realty-Hunt* analysis for associational standing and was correctly rejected by both this Court and the ALC. *See Beaufort Realty*, 346 S.C. at 301, 551 S.E.2d at 589; *see Hunt*, 432 U.S. at 343 (focusing on benefit to membership in discussion of associational standing and relief sought).

In sum, this Court and the ALC correctly assessed and adjudicated the pertinent issues regarding associational standing and individual participation. The Petition should be denied.

II. There is no basis for rehearing on this Court's holding that Appellant's standing regarding the state court issues was neither actually litigated nor determined by the federal district court.

This Court correctly determined that the doctrine of collateral estoppel did not preclude consideration of Appellants' ability to challenge a permit issued by DHEC—a state, not federal, regulatory entity—in the ALC—a state, not federal, judicial body. Because the district court determined standing

under a different statutory scheme using a different scope of analysis than that addressed by the SPA, this Court correctly held that there was no actual litigation of the same standing issue in the federal proceeding as required to apply the doctrine of collateral estoppel. And in any event, as the Court held, the “doctrine of collateral estoppel should not be rigidly applied.” Op. at 11; see *Carolina Renewal, Inc. v. S.C. Dep’t of Transp.*, 385 S.C. 550, 555, 684 S.E.2d 779, 782 (Ct. App. 2009) (“The doctrine of collateral estoppel should not be rigidly or mechanically applied.”). That determination is particularly applicable here because of the differing regulatory schemes and policies in place and the fact that, as this Court and the ALC both determined, Appellants fail to meet any of the standing requirements required by state law. See Op. at 11 (noting that collateral estoppel should not be applied if public policy requires otherwise). Moreover, as argued elsewhere, the Supreme Court already has rejected claims—brought by four of the same associations appearing in this case—of standing for generalized grievances lodged against the Cruise Terminal like those alleged in this matter. *Carnival Corp.*, 407 S.C. at 76–77, 753 S.E.2d at 851. Appellants are not entitled to rehearing on their collateral estoppel claims.

III. Rehearing is not warranted with respect to this Court’s holding that the term “affected persons” in S.C. Code Ann. § 44-1-60 is determined by applying the principles set forth in *Lujan v. Defenders of Wildlife*.

The Supreme Court already has applied the factors set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992), to determine whether a

petitioner was “adversely affected” for purposes of an environmental permitting statute. *Smiley v. S.C. Dep’t of Health & Env’tl. Control*, 374 S.C. 326, 329, 649 S.E.2d 31, 32 (2007). The only basis for distinguishing *Smiley* that Appellants can muster is that the case dealt with a different statute. Pet. at 17. But the pertinent phrase—found in another permitting statute—is the same and, thus, establishes the appropriate interpretive framework that this Court correctly applied. Appellants’ citation to S.C. Code Ann. Regs. 30-6A does not help them because addition of the language “with standing” simply clarifies the application of the statute. See *Young v. S.C. Dep’t of Highways & Pub. Transp.*, 287 S.C. 108, 112, 336 S.E.2d 879, 882 (Ct. App. 1985). Although they never say so clearly, Appellants argue for an interpretation of “affected person” that would include anyone who requests to be notified and to participate in the review process. See Pet. at 16-18; Br. of Appellant at 22. That interpretation would render the term “affected” meaningless and would determine standing based on a person’s simple interest in a matter, not his personal stake in a permit.³ See *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (“[W]e must read the statute so ‘that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.’”) (quoting *State v. Sweat*, 379 S.C. 367, 377, 665 S.E.2d 645, 651 (Ct. App. 2008)).

³ Moreover, the term “affected person” appears in the statute as a recognition of DHEC’s regulatory authority in the certificate of need program, in which an “affected person” is defined by statute. See S.C. Code Ann. § 44-7-130(1).

Viewed in this light, the Court correctly held that an “adversely affected” person must be ascertained by reference to the *Lujan* factors and rehearing on this issue should be denied.

IV. Rehearing is not warranted for this Court’s holding that Appellants did not establish a reason to afford them public importance standing.

This Court correctly held that Appellants never met their burden to show why a resolution of their challenges to a DHEC permit is required for future guidance “so as to justify the invocation of a sparingly applied exception.” Op. at 10;⁴ *see Carnival Corp.*, 407 S.C. at 79-81, 753 S.E.2d at 852-53. Because the only issue in this case is whether DHEC properly granted the permit based on the existing legal and regulatory framework, there is nothing that requires resolution for future guidance. Although Appellants point to the expenditure of public monies and the need to clarify “the extent of environmental review and analysis that DHEC is required to undertake,” Pet. at 18, as requiring future guidance, allowing public importance standing based on these contentions would allow the exception to swallow the rule. *See S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank*, 403 S.C. 640, 646, 744 S.E.2d 521, 524 (2013) (“[W]e are mindful that we must be cautious with this exception, lest it swallow the rule”). And the Supreme Court already

⁴ Appellants never address the budget proviso argument advanced in their briefs and actually addressed in the Opinion and, thus, never explain what this Court overlooked and misapprehended regarding the Public Interest issue. Rule 221(a), SCACR; *see* Op. at 10; *see also* Br. of Appellant at 39-40. Rehearing for this issue should be denied on that basis alone.

has rejected the claim that broadly generalized grievances support public interest standing with respect to the Cruise Terminal itself. *Carnival Corp.*, 407 S.C. at 77, 753 S.E.2d at 851.

In sum, this Court correctly recognized that, at bottom, Appellants challenge only whether the license was properly granted and, thus, there is no matter requiring resolution for future guidance. See *ATC South, Inc. v. Charleston Cnty.*, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008) (“For a court to relax general standing rules, the matter of importance must, in the context of the case, be inextricably connected to the public need for court resolution for future guidance.”). Rehearing on this issue is not warranted.

V. Rehearing is not warranted for this Court’s affirmance of the ALC’s imposition of sanctions against Appellants for filing a frivolous motion.

Try as they might, Appellants cannot satisfactorily explain their frivolous argument that the ALC was obligated to remand the case to DHEC because S.C. Code Ann. § 44-1-60(F) requires the DHEC Board to conduct a final review conference. As this Court recognized, even a cursory review of § 44-1-60(F) shows that DHEC is not required to hold a final review conference. Appellants’ attempt to escape this self-evident interpretation by reliance on a single word in a single sentence, taken wholly out of context, was frivolous, just as this Court and the ALC recognized. Appellants’ argument that the second sentence of § 44-1-60(F) “provide[s] an avenue for redress” is wholly at odds

with the statutory language.⁵ Either the statute is mandatory or it is not; Appellants would have it both ways, even though they previously had affirmatively represented in another case that the final review conference was discretionary.⁶

Appellants do not identify any credible reason for reconsideration of this Court's holding that the award of sanctions was not an abuse of discretion. The Petition should be denied.

VI. Rehearing is not warranted for this Court's holding that the ALC did not abuse its discretion in declining to expand discovery.

Appellants do not and cannot dispute that, as this Court held, they never filed a motion to extend the deadline for discovery before the standard 90-day deadline expired and that neither SPA nor DHEC ever expressly stated that they would consent to discovery after the deadline expired. There were many

⁵ Appellants incorrectly contend that they "did not disregard, and have never disregarded, the additional language" of § 44-1-60(F). Pet. at 19. However, a cursory review of Appellants motion to remand reveals this assertion to be wrong: Appellants' motion only cited the first sentence of § 44-1-60(F), while completely ignoring and purposefully omitting the remaining portion of statute which contains the operative discretionary language. See Appellants' Mot. to Remand, (R. pp. 000157-62).

⁶ Specifically, the League stated that the "*Board has the option of conducting a conference or not after a request for review is made.* If the Board does not conduct a conference within 60 days, the staff decision becomes the 'final agency decision'... S.C. Code Ann. § 44-1-60(F)." See SPA Resp. to Motion to Remand, Exh. C, League Pet. for Writ of Certiorari at 5 n.3, Case Nos. 07-ALJ-07-0107-CC, -0108-CC, dated Jan. 20, 2009 (emphasis added). (R. p. 000218).

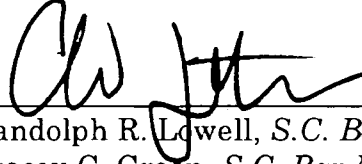
months in which Appellants could have but did not file a motion to expand or otherwise seek additional discovery even after the 90-day discovery period expired. *See* Discovery Order at 2. (**R. p. 000065**). Instead, they only sought additional discovery about one month before the original trial date and only after the SPA stated that a motion for summary judgment would be forthcoming.⁷ At bottom, the ALC's denial of Appellants' motion to expand discovery resulted from their failure to timely comply with the rules of procedure. *Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 253, 734 S.E.2d 161, 165 (2012) (holding that lower court properly denied motion for additional discovery filed two months after the deadline for discovery expired). Characterizing the ALC's rules of procedure as "rarely observed," Pet. at 21 n.4, and failing to act diligently under those rules does not constitute good cause, let alone excusable neglect for failing to comply with those rules. *See Hill v. Dotts*, 345 S.C. 304, 310, 547 S.E.2d 894, 897 (Ct. App. 2001) (a layperson's "failure to understand the legal process is not excusable neglect under Rule 60(b)"). The Court correctly held that the ALC did not abuse its discretion in denying Appellants' eve-of-trial motion and rehearing is not warranted on this issue.

⁷ Appellants incorrectly assert that the "SPA abruptly and retroactively changes its position in response to the Community Groups' request for depositions," Petition at 21, but this assertion is unsupported by the record. Specifically, Appellants did not serve deposition notices until after the SPA filed its motion for summary judgment and Appellants did so while their motion to re-open discovery was pending before the ALC. (**R. pp. 02274, 2972**).

Conclusion

The Petition for Rehearing should be denied for all issues.

Respectfully submitted,



Randolph R. Lowell, S.C. Bar No. 16145

Tracey C. Green, S.C. Bar No. 9342

Chad N. Johnston, S.C. Bar No. 73751

WILLOUGHBY & HOEFER, P.A.

Post Office Box 8416

Columbia, South Carolina 29202-8416

rlowell@willoughbyhoefer.com

tgreen@willoughbyhoefer.com

cjohnston@willoughbyhoefer.com

*Attorneys for Respondent South Carolina
State Ports Authority*

November 13, 2017
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph K. Anderson, III, Chief Administrative Law Judge

Case No. 2014-000847

RECEIVED

NOV 13 2017

SC Court of Appeals

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,

v.

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

Return to Petition for Rehearing


This is to certify that I, Emma Coss, a Legal Assistant with the law firm Willoughby & Hoefler, P.A., have caused to be served this day one (1) copy of the Return to Petition for Rehearing by placing the same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

Amy Armstrong, Esquire
South Carolina Environmental Law Project
Post Office Box 1380
Pawley's Island, SC 29585

Bradley D. Churdar, Esquire
**South Carolina Department of Health
And Environmental Control**
1362 McMillan Ave, Suite 400
North Charleston, SC 29405

J. Blanding Holman IV, Esquire
Southern Environmental Law Center
43 Broad Street, Suite 300
Charleston, SC 29401

Jefferson Leath, Esquire
Leath, Bouch & Seekings, LLP
92 Broad Street
Charleston, SC 29401


Emma Coss

Columbia, South Carolina
This 13th day of November 2017

WILLOUGHBY & HOEFER, P.A.

ATTORNEYS & COUNSELORS AT LAW

MITCHELL M. WILLOUGHBY
JOHN M.S. HOEFER
RANDOLPH R. LOWELL**
TRACEY C. GREEN
BENJAMIN P. MUSTIAN**
ELIZABETH ZECK*
ELIZABETHANN LOADHOLT CARROLL
CHAD N. JOHNSTON
JOHN W. ROBERTS
R. WALKER HUMPHREY, II***
CHRISTOPHER M. CAMPBELL
ANDREW R. HAND****

ELIZABETH S. MABRY
JAMES PATRICK HUDSON
OF COUNSEL

JOSEPH H. FARRELL, III
SPECIAL COUNSEL

OFFICES:

COLUMBIA

930 RICHLAND STREET
P.O. BOX 8416
COLUMBIA, SC 29202-8416

AREA CODE 803
TELEPHONE 252-3300
FAX 256-8062

CHARLESTON

151 MEETING STREET
SUITE 325
P.O. Box 10
CHARLESTON, SC 29402

AREA CODE 843
TELEPHONE 619-4426
FAX 619-4430

RECEIVED
NOV 13 2017
SC Court of Appeals

November 13, 2017

*ALSO ADMITTED IN TEXAS

**ALSO ADMITTED IN WASHINGTON, D.C.

***ALSO ADMITTED IN CALIFORNIA

****ALSO ADMITTED IN NORTH CAROLINA

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court, Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: *Preservation Society of Charleston v. S.C. State Ports Authority & SCDHEC*;
Appellate Case No. 2014-000847

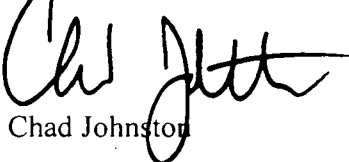
Dear Ms. Kitchings:

Enclosed for filing please find the original and seven (7) copies of the **Return to Appellants' Petition for Rehearing**, of Respondent South Carolina Ports Authority, along with a Certificate of Service. Please file-stamp the extra copy and return it via my courier.

If you have any questions or if you need any additional information, please do not hesitate to contact me.

Very truly yours,

WILLOUGHBY & HOEFER, P.A.



Chad Johnston

Enclosures

cc: Amy E. Armstrong, Esquire
Bradley D. Churdar, Esquire
J. Blanding Holman IV, Esquire
Jefferson Leath, Esquire

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

RECEIVED

DEC 18 2017

SC Court of Appeals

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.

REPLY TO RETURN TO PETITION FOR REHEARING

J. Blanding Holman IV
Southern Environmental Law Center
463 King Street, Suite B
Charleston, SC 29401
Telephone: (843) 720-5270
Fax: (843) 414-7039

Jefferson Leath
Leath, Bouch & Seekings, LLP
92 Broad Street
Charleston, SC 29401
Telephone: (843) 513-1076

Amy E. Armstrong
Jessie A. White
South Carolina Environmental Law
Project
Post Office Box 1380
Pawleys Island, SC 29585
Telephone: (843) 527-0078
Fax: (843) 527-0540

Attorneys for the Appellants

The Court's Opinion deserves reconsideration because it overlooks and misapprehends several critical points raised by the Community Groups, and introduces new errors to the erroneous decision below. SPA's Return does nothing to address the central issues raised in the Community Groups' Petition for Reconsideration.

I. Uncontroverted evidence shows that existing injuries to members of the Community Groups from existing cruise operations will be exacerbated by the larger cruise terminal that DHEC permitted.

The Community Groups' affidavits detail existing concrete and particularized injuries to the groups' members caused by current cruise ship operations. The affidavits and additional record information also demonstrate that these injuries would be *exacerbated* by construction and operation of the much larger proposed new cruise terminal.

As demonstrated in our Petition, these affidavits and other proof more than suffice to show concrete injury of the type needed to qualify for "affected person" status entitled to invoke administrative review of DHEC's unlawful authorizations. The Opinion, however, gives no credit to the evidence demonstrating increased harm to the recreational, aesthetic, property, and personal interests of the affiant members, injuries directly caused by the challenged permits. That was error. In its Return, SPA fails to offer any grounds to justify or correct the Opinion's holdings, instead just repeating conclusory statements that nowhere actually engage the facts of this case.

For example, SPA argues that Tommy Robinson's affidavit "conveys nothing more than general grievances that allegedly exist today as a result of *current* operations, but have no established connection to a future cruise terminal or cruise ships...." SPA Ret. at 3 (emphasis in original). In fact, Mrs. Robinson testified not just to current injuries, including seeing "thick smoke move from the cruise ship toward [her] home, such that "within seconds of breathing the emissions, [her] throat began to hurt and [she] was forced to retreat indoors," R.002589, but also

specifically to her reasonable fear and concern that a new cruise ship terminal “closer to [her] home” with “larger and more frequent ships” will “significantly increase[]” the adverse effects she already experiences. R.002589. In other words, she testified that not only has her use and enjoyment of her home and property been impacted by current cruise ship operations, such “interference with use and enjoyment of [her] property *will be increased if SPA is allowed to construct the new cruise ship terminal as permitted by DHEC starting with the pilings.*” R.02590 (emphasis added). This is injury-in-fact directly traceable to DHEC’s issuance of the challenged permit. *See Friends of the Earth v. Laidlaw Env’tl. Svcs.*, 528 U.S. 167, 180 (2000) (requiring injury to be “fairly traceable” to defendant’s action).

So too with the other affiant members of the Community Groups. They have already suffered injuries as a result of current cruise ship operations, but they are also reasonably concerned that a larger terminal bringing bigger ships, larger diesel engines, and much more traffic will worsen their injuries. Because that expansion and intensification is attributable to the challenged DHEC permits, the exacerbation of existing injuries constitutes a cognizable injury-in-fact sufficient to merit standing. *See* R.002594–96 (Affidavit of Stephen Gates, detailing reasonable concern that new cruise terminal will result in more severe traffic congestion and additional pollution deposited on his home close to the new terminal); R.002577–78 (Affidavit of Christina Dodd, testifying that challenged permit “will only make worse” cruise-related air pollution and soot deposition, traffic congestion, and negative visual impacts on her home in Ansonborough, which is adjacent to the proposed terminal); R. 002583–85 (Affidavit of Virginia Lane, testifying that new expanded terminal will worsen traffic congestion proximate to her downtown home and business, degrade Charleston’s historic integrity, and reduce property values); R.002752 (Affidavit of M. Morganello, testifying that “larger and more frequent cruise

ships” will “exacerbate the dumping of contaminants” into local waters that he routinely uses for recreation).

These are specific facts in evidence, offered by persons with first-hand knowledge and experience, and they show particularized harm from the proposed project. SPA’s attempts to give them conclusory labels does not remedy the Opinion’s error in entirely discounting their evidentiary value, or the additional evidence found in the record showing that these property owners and business people have a reasonable concern that a much larger terminal home basing much larger vessels spewing more air and water pollution and causing hundreds of more car trips a day will injure them.

II. The injuries to the members of the Community Groups are germane to the organizational purposes of these associations.

As shown in the Petition, the Opinion errs in holding that the Community Groups’ overwhelming demonstration of particularized injury *undercuts* associational standing. The Opinion clearly errs in finding that these demonstrated injuries are unrelated to the purposes of the Community Groups.

SPA’s Return does nothing to remedy the error. While SPA half-heartedly asserts that Tommie Robertson’s “personal injuries [] do not assist Appellants in establishing standing for a matter germane to their organizational purposes,” Ret. at 9, it tellingly fails to explain what those purposes are, or how the demonstrated cruise-related injuries are not germane to them. In reality, Mrs. Robertson’s injuries – like those of the other individual affiants – are directly relevant to the organizational purposes of the Coastal Conservation League and Charleston Communities for Cruise Control (C4). Air pollution generated by cruise ships has impacted Mrs. Robertson’s daily activities and overall quality of life, injured her throat, and made her reasonably concerned about other health consequences of breathing noxious smoke; unsurprisingly, and reasonably,

she is concerned that these injuries will worsen due to a much larger cruise terminal home-basing much larger and more frequent cruise ships *closer to her home*. Protecting folks like Mrs. Robertson from this type of pollution-related harm is central to the Coastal Conservation League's mission, which specifically includes "enhanc[ing] health and the quality of life in our communities" and "protect[ing] the natural environment." R.002600. Further, the organization "seeks to reduce all air pollution from and caused by cruise operations on behalf of itself and its members." 002604. C4's "primary purpose" is "finding a more appropriate location for cruise operations and establishing legally binding limitations on those operations." R.002588. Thus, Ms. Robertson's cruise-ship related injuries are also directly pertinent to the organizational mission of C4.

Members of the other Community Groups similarly have injuries directly related to their respective organizational missions. *See* R.00259–96 (Affidavit of Stephen Gates, impacts on quality of life, traffic congestion, and soot deposition on his historic home in the Charlestowne Neighborhood directly related to organizational mission of Charlestowne Neighborhood Association, which promotes the "well-being of the historic neighborhood" where he lives); R. 002583–85 (Affidavit of Virginia Lane, worsening traffic congestion, a decline in Charleston's architectural integrity and historic character, and falling property values, directly related to mission of the Historic Charleston Foundation, which is "to preserve and protect the historical, architectural and material culture that make up Charleston's rich and irreplaceable heritage;" and the Preservation Society of Charleston, whose mission is to "protect the material and cultural heritage of Charleston" using "whatever steps may be necessary" to prevent the destruction or degradation of Charleston's uniquely well-preserved historic resources, R.002644), R.002752 (Affidavit of M. Morganello, impacts on water quality and waterborne recreational activities

directly related to the mission of Surfrider, an organization dedicated to the protection of the world's oceans, beaches, and waves); R.002577-78 (Affidavit of Christina Dodd, air pollution and soot deposition, traffic congestion, and negative visual impacts on her historic home and neighborhood directly related to respective organizational missions of the Historic Ansonborough Neighborhood Association, created to address "matters of importance to this historic residential neighborhood," R.002356, the Preservation Society of Charleston, whose mission is to "protect the material and cultural heritage of Charleston," R.002644, and C4, whose "primary purpose" is "finding a more appropriate location for cruise operations and establishing legally binding limitations on those operations," R.002588.).

III. Members of the Community Groups need not participate in the litigation beyond the standing inquiry.

The Petition demonstrates that, in showing associational standing, the direct participation of the individual members in this litigation is *not* required:

In fact, the Community Groups squarely asserted and explained that the participation of the individual affiants is *not* required for the proper adjudication of the claims they have brought nor the relief they have sought." *Id.* (emphasis added).¹

That said, the Community Groups have never asserted that they can establish associational *standing* without the participation of the individual members, as SPA's Return implies. By definition, associational standing is representative, requiring the participation of individual members to establish individual standing for the organization. *See Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (U.S. 1977) (requiring an organization's members to "otherwise have standing to sue in their own right" as element of

¹ SPA's fevered attempt to cast an obvious scrivener's error as a critical misstatement, Ret. at 7, befits a party with nothing to say on the merits. As explained above, the Petitioners have consistently, and correctly, maintained that the merits of this case can be resolved *without* extensive participation of the Community Groups' members.

associational standing). Thus, the Community Groups have offered affidavits from individual members showing they have standing “in their own right,” as an element of associational standing.

SPA attempts to conflate participation by individual members in establishing standing with participation in adjudicating the substantive claims or relief in the litigation. Ret. 7–8. The standing affidavits could not be clearer in being directed towards showing standing. SPA’s attempt to pretend these were filed as evidence for adjudicating the *merits* is baseless.

Also baseless is SPA’s attempt to use Community Groups’ statement that “testimony” would be used to support their merits case as a concession that the Community Groups would be relying solely on testimony *by the individual affiant members* in proving their merits case. To the contrary, such testimony could come from a variety of sources, including experts, DHEC officials, and indeed the agents and employees of SPA itself, which has misleadingly claimed that its new \$35 million terminal will change nothing at all with regards to SPA’s cruise operations, when in fact materials from its own files show otherwise.²

SPA attempts to twist our assertion that “landowners *can* testify as to property values” into an acknowledgment of “the *need* for their individual members’ testimony and participation” in the litigation. Ret. at 8 (emphasis added). But again, this evidence was submitted in support of standing, and SPA apparently has no response to our showing that landowners can indeed testify as to their property values, as these affiants did in expressing their reasonable fears that the proposed much larger cruise terminal would reduce them. That fact is undisputed. As discussed above, Community Groups’ *merits* challenge to the DHEC permit does not rest on “individualized proof” of harm to these particular members, *Hunt*, 432 U.S. at 344, and beyond

² SPA desperately seeks to avoid having to make such testimony – which is why it sought the ALC’s retroactive closure of discovery before depositions could commence.

the standing inquiry, there is no basis for believing that participation of the individual members would be required in the litigation to resolve whether DHEC's authorizations were lawful or not.

IV. SPA's assertion that no one can have standing to challenge permits for an unbuilt facility is wrong.

To make the threshold showing of standing, SPA demands that the Community Groups provide "actual evidence" of injuries from an unbuilt facility, deeming "speculative" any allegations of harm which has not yet occurred. Ret. at 6. Such a standard would raise an impossible bar for any plaintiff challenging a permit needed for new development, and is not the law.

While SPA contends that this Court rejected application of the U.S. Supreme Court's *Laidlaw* standing test, 528 U.S. 167, "when claimed harm allegedly will occur in the future," Ret. at 6, in fact this Court merely found a lack of standing in in *Beaufort Realty* where the plaintiffs had shown "only the *potential* for future harm," as opposed to the likelihood of such harm. *Beaufort Realty Co. v. Beaufort Cty.*, 346 S.C. 298, 303 (Ct. App. 2001) (emphasis added). *Beaufort Realty* affirmed that "actual or imminent" harm qualifies for standing under Article III, and that standard is easily met here. Construction of a new cruise terminal will increase in the size and frequency of cruise ships docking in Charleston, increasing pollution, traffic, and historic degradation in a small, concentrated area. Forcing neighboring property owners to wait until *after* the facility has been constructed and is operational before they may challenge the unlawful authorizations for the project would in fact guarantee that no one could challenge any DHEC permit anywhere for any project, since challenges must typically be filed *within 15 days of issuance*. S.C. Code Ann. 66-1-60.

V. The Opinion ignores clear evidence and SPA admissions demonstrating that the challenged permits will lead to an expansion and intensification of cruise ship operations in Charleston.

The Opinion seems to embrace the ALC's erroneous finding that the Community Groups failed to provide "evidence conclusively demonstrating (1) cruise activities will increase if the permit is granted" and (2) "reliable expert testimony" regarding the impacts of increased cruise activities. R.000085. This is error on several levels. The ALC's invention and application of a "conclusive evidence" standard for a threshold standing determination has no basis in law and is reversible error. Second, the holding completely overlooks record evidence demonstrating, overwhelmingly, that the new terminal is *intended and engineered* to handle larger and more numerous cruise ships than current facilities can accommodate. *See* Pet. at 4 (citing R.002438, R.002439, R.007493).

In its Return, SPA follows the Opinion's lead and completely ignores this argument and evidence. SPA completely fails to engage its own internal documents which show that the new terminal is engineered to not merely allow cruise operations to continue when they otherwise may have to cease due to security concerns, but to accommodate and facilitate the home-basing of larger and more polluting cruise ships in Charleston than have previously been based in the city. Thus, record evidence shows the new terminal will dramatically alter the impact of the cruise industry on downtown residents and the character of the historic city. Because SPA has offered no correction to the Opinion's failure to engage record facts on this point, the Court should grant rehearing on this point.

SPA's attempt to confuse the issue by intimating that the only action at issue for standing purposes is installation of five large piling clusters in Charleston Harbor, Ret. 3 n.1, is legally mistaken and also ignores SPA's *stated reason* for seeking this permit and installing these piling clusters: to enable construction of a new cruise ship terminal that home-bases much larger cruise

ships. The undisputed record shows the new terminal will generate more air pollution, more traffic, and more disruption than the limited cruise operations currently taking place at a terminal one-third the size of the proposed facility. The new terminal cannot be developed without this permit, so any injuries attributable to the new terminal are directly traceable to DHEC's issuance of the challenged permit. *See Laidlaw*, 528 U.S. 180 (requiring "fairly traceable" injury for standing).

VI. Because Article III standing was actually litigated by, and decided against SPA, collateral estoppel barred the ALC and the Opinion's finding of no Article III standing.

SPA has no meaningful response to our showing that collateral estoppel applies on the standing issue, and that the Opinion errs in resolving Article III standing against the Community Groups when an Article III court has already ruled they have standing.

To recap: (1) SPA filed a summary judgment motion in an Article III court; (2) in that motion, SPA asserted that the Community Groups' members lacked Article III standing to challenge authorizations for the exact same activities and project at issue here; and (3) the Article III court considered and rejected SPA's arguments and held that Article III standing was present.

All the elements of collateral estoppel are present. The Opinion's *sua sponte* holding that the Community Groups' standing was not "actually litigated" below, Op. at 11, is clear error. The Community Groups have repeatedly submitted, quoted, and cited to pleadings and the order from the federal court case showing that the same issue was actually raised by SPA, actually contested by the Community Groups, and actually decided squarely against SPA in Article III litigation.

SPA feebly contends that different "regulatory schemes" were at issue in the federal case. Ret. at 11. That conclusory assertion, backed up with zero explanation, deserves zero weight. At any rate, estoppel was not asserted regarding individual *elements* of the regulatory

approvals at issue, but to bar SPA from relitigating the Community Groups' *Article III standing* to contest approvals regarding the exact same project at issue in the prior federal litigation. Perhaps this is why SPA does not even attempt to explain how differing underlying "regulatory schemes" could possibly affect the Article III standing inquiry, since that inquiry was the same in both cases. At base, the same operative facts, issues, and law related to standing were presented to an Article III court, which rejected SPA's claim that the Community Groups and their members lacked Article III standing. This determination bars a contrary finding by the ALC and the Court of Appeals.

SPA also fails to remedy the Opinion's other *sua sponte* holding that, assuming the elements of estoppel are present, the narrow exception to that bar to prevent "unfairness or injustice" applies. The Community Groups have offered several reasons why fairness and justice weigh in favor of estoppel, not against it, including the fairness and justice of enabling citizens to avail themselves of available administrative review procedures – as directed by the General Assembly – to protect their property rights and health from unjust and unlawful government action. They have also shown how such review, and the underlying relief sought, are consonant with concerns of fairness and justice and indeed SPA's own organic statute, which directs the agency to consider environmental stewardship as part of its mission. S.C. Code Ann. § 54-3-70(A)(3)(D). To this, SPA has no answer at all.

VII. SPA provides no basis to deny rehearing on clearly erroneous holdings regarding sanctions and discovery.

The ALC abused its discretion when it sanctioned the Community Groups for interpreting the term "must" in S.C. Code Section § 44-1-60(f) as establishing a mandatory, rather than discretionary, duty. The Opinion should be reconsidered because the sanctions order was obviously unjustified. The best SPA can do to bolster the sanctions decision is to contend

(in a footnote) that counsel for one of the Community Groups, in a brief filed *years ago in a case where the mandatory versus discretionary nature of the term “must” was not at issue*, summarized the statute as giving the DHEC “the option” of conducting a review conference. Ret. at 15 n.6.

SPA fails to inform the Court, however, that the DHEC Board in that matter *did* conduct a review conference, and further that the South Carolina Supreme Court rejected SPA’s attempt to deny a subsequent administrative hearing to the Conservation League. If anything, its citation of that case shows that, alone among state agencies, SPA never passes up a chance to constrain and limit citizen rights and involvement, first in the ALC, then in the Court of Appeals, and then in the South Carolina Supreme Court. As with the present matter, SPA succeeded initially in shutting citizens out of the administrative process. But it did so on the basis of legal errors that were eventually corrected. *See S.C. Coastal Conservation League v. DHEC*, 390 SC 418 (2010) (reversing ALC and Court of Appeals decisions that deprived Coastal Conservation League of access to administrative review).

As noted above, the meaning of the term “must” in S.C. Code Section 44-1-60 was *not* at issue in that case. Even if it were, attorneys and parties are not precluded from evolving their understanding of the law, especially where they provide a reasoned basis for a new interpretation of ambiguous statutory language. Here, the Community Groups raised the meaning of the statutory term “must” for the first time; no court had ever previously resolved arguments over its meaning. The Community Groups contended that the term provided a mandatory duty to the DHEC Board and also provided jurisdiction in the ALC should the Board “decline” to undertake that duty – lest the Board’s failure to undertake its duty leave a party in jurisdictional limbo. To this day, SPA has offered no response to the Community Groups’

demonstration that their reading has a reasonable basis given the dictionary meanings of the relevant statutory terms. The Opinion likewise fails to engage or respond to that demonstration, and summarily affirms the sanctions order. Rehearing should be granted to allow for an actual inquiry into what the text at issue means, which if conducted would show that the sanctions order was a patent abuse of discretion.

Finally, rehearing should also be granted on the Opinion's affirmance of the ALC's retroactive closing of discovery in this case. The Opinion overlooks and otherwise fails to engage in the facts presented showing that all parties and the ALC understood discovery to extend well beyond the 90-day period that the ALC later announced had closed discovery. This was not a failure by the Community Groups to "timely comply" with the rules of procedure, Ret. at 16, but was, instead, a situation where all parties (including SPA) as well as the ALC acted with the understanding that discovery extended well beyond the 90-day period. SPA's motion to retroactively impose a deadline that expired before SPA itself had propounded discovery was nothing but deceitful tactical gamesmanship. The ALC clearly abused its discretion in going along for that ride, and the Opinion's affirmance should be reconsidered.

CONCLUSION

For the foregoing reasons, the Community Groups respectfully request that their petition for rehearing and reconsideration be allowed and that the Court reverse the ALC's decisions on standing, sanctions, and discovery.

Respectfully submitted,



J. Blanding Holman IV
Southern Environmental Law Center
463 King Street, Suite B
Charleston, SC 29401
Telephone: (843) 720-5270

Jefferson Leath
Leath, Bouch & Seekings, LLP
92 Broad Street
Charleston, SC 29401
Telephone: (843) 513-1076

Amy E. Armstrong
Jessie A. White
South Carolina Environmental Law Project
Post Office Box 1380
Pawleys Island, SC 29585
Telephone: (843) 527-0078

Attorneys for the Appellants

Charleston, SC
December 15, 2017

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

RECEIVED

DEC 18 2017

SC 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 December 15, 2017, I caused to be served the foregoing *Reply to Return to Petition for Rehearing* on all counsel of record by placing copies of same in the U.S. Mail addressed to:

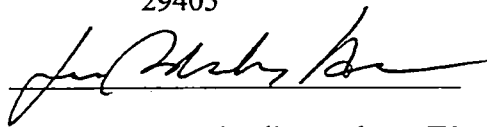
Randolph R. Lowell, Esq.
Tracey C. Green, Esq.
Chad N. Johnston, Esq.
Willoughby & Hoefler, PA
Post Office Box 8416
Columbia, SC 29202

Michael Gary Corley, Esq.
South Carolina
Environmental Law Project
430 Highmarket Street
Georgetown, SC 29440

Amy E. Armstrong
Jessie A. White
South Carolina
Environmental Law Project
Post Office Box 1380
Pawleys Island, SC 29585
Telephone: (843) 527-0078

Jefferson Leath, Esq.
Leath, Bouch, & Seekings,
LLP
92 Broad Street
Charleston, SC 29401

Bradley D. Churdar, Esq.
S.C. DHEC
Office of OCRM
1362 McMillan Avenue
Suite 400
North Charleston, SC
29405



J. Blanding Holman IV
December 15, 2017

SOUTHERN ENVIRONMENTAL LAW CENTER

Telephone 843-720-5270

463 KING STREET, SUITE B
CHARLESTON, SC 29403-7204

Facsimile 843-414-7039

December 15, 2017

Via Certified Mail

The Honorable Jenny Abbott Kitchings
The South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RECEIVED

DEC 18 2017

SC Court of Appeals

**Re: Preservation Society of Charleston v. SCDHEC
Appellate Case No. 2014-000847**

Dear Ms. Kitchings:

Enclosed for filing are the original and seven (7) copies of Appellants' Reply in Support of Petition for Rehearing and Proof of Service in the above-referenced matter. Also enclosed are the original and seven (7) copies of Appellants' Precautionary Motion to File Out of Time and a check for \$25.00 to cover the associated filing fee.

Please return file-stamped copies of the Reply and the Motion to our office in the enclosed self-addressed, stamped envelope.

By copy of this correspondence, I am serving the same upon all counsel of record. If you have any questions, please do not hesitate to contact me at 843-720-5270 or bholman@selcsc.org. Thank you for your assistance with this matter.

Sincerely,



J. Blanding Holman IV

JBH/arp
Enclosures

cc: All Counsel of Record (via First Class Mail)

The South Carolina Court of Appeals

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

v.

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

Appellate Case No. 2014-000847

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas C. Huff

J.

Paul E. Shortz, Jr.

J.

Paul W. Herman

J.

Columbia, South Carolina

FILED

Dec. 28, 2017

cc:

Amy Elizabeth Armstrong, Esquire

Michael Gary Corley, Esquire

Jessie Allison White, Esquire

W. Jefferson Leath, Jr., Esquire

James Blanding Holman, IV, Esquire

Bradley David Churdar, Esquire

Tracey Colton Green, Esquire

Randolph Russell Lowell, Esquire

Chad Nicholas Johnston, Esquire

The Honorable Ralph King Anderson, III