

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

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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.

APPELLANTS' FINAL INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iv
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE.....	1
INTRODUCTION	3
STANDARD OF REVIEW	6
BACKGROUND	7
I. Facts	7
A. The Purpose of SPA's Proposed New Cruise Terminal	7
B. The Impacts of Cruise Ship Home Basing Operations	9
II. Legal Framework and Procedural Background	14
A. Legal Framework – State and Federal Permitting Review	14
B. Procedural Background.....	18
ARGUMENT	20
I. Standing	20
A. The Community Groups Demonstrated Statutory Standing as "Affected Persons" Pursuant to S.C. Code § 44-1-60	21
1. The ALC Erred in Construing the Statutory Term "Affected Persons" to Exclude Neighbors Injured from Expanded Cruise Home Base Operations at a Proposed Terminal.....	24
2. The ALC Erred in Ordering Summary Judgment Where the Non- Movants' Evidence Showed Their Members Reasonably Feared Injuries from SPA's Unlawfully Permitted Project	29

B.	The Community Groups Demonstrated Article III “Constitutional” Standing	30
1.	An Article III Court Has Already Considered and Rejected SPA’s Article III Summary Judgment Argument – SPA Is Estopped from Relitigating the Issue Here.....	31
2.	The ALC Erred In Ordering Summary Judgment Against Citizens Who Produced Evidence that they Would be Injured by Pollution from Proposed Cruise Terminal and Administrative Review Could Reduce or Avoid their Injury	33
C.	Public Importance Standing Exists to Ensure Proper Application of the Law to A State Agency’s Major Project and Effectuate Remedies Endorsed by the General Assembly.....	38
D.	The ALC Erred in Applying a Dissenting Opinion Rather than Controlling Law in Determining if Community Groups Have Associational Standing.....	41
II.	The ALC Erred in Not Vacating A DHEC Authorization That Lacks an Important Required Certification Component.....	44
A.	The 401 Certification Requirement Under Federal and State Law.....	44
B.	A Federal Court Order Removed SPA’s 401 Certification.....	46
C.	The ALC Erred in Refusing to Vacate SPA’s Authorization, Which Lacks the Required 401 Certification.....	47
III.	The ALC Erred In Depriving the Community Groups of Discovery	49
A.	The ALC Erred in Deeming that Discovery Closed in May 2013 When the Parties and	

the ALC Understood Discovery to be Ongoing Well Past Then	50
B. Good Cause Supports Allowing Discovery Beyond May 20, 2013	52
IV. The ALC Committed an Abuse of Discretion in Sanctioning the Community Groups' Interpretation of an Ambiguous Statute	57
CONCLUSION	63

TABLE OF AUTHORITIES

Cases

<i>Allen v. Batchelder</i> , 17 Mass.App.Ct. 453, 459 N.E.2d 129 (1984)	60
<i>ATC South Inc. v. Charleston County</i> , 380 S.C. 191, 669 S.E.2d 337 (2008)	21, 38
<i>Baird v. Charleston County</i> , 333 S.C. 519, 511 S.E.2d 69 (1999)	38, 39
<i>Burgess v. Costco Wholesale Corp.</i> , CIV.A. 4:10-1678-RBH, 2012 WL 315638 (D.S.C. Jan. 31, 2012).....	55
<i>Carnival Cruise Lines v. Historic Ansonborough Neighborhood Association</i> , 407 S.C. 67, 753 S.E.2d 846 (2014)	37, 41, 43, 44
<i>Clarke v. Securities Industry Association</i> , 479 U.S. 388 (1987).....	28
<i>Collins v. Doe</i> , 352 S.C. 462, 574 S.E.2d 739 (2002)	59
<i>Columbia Pools, Inc. v. Galvin</i> , 288 S.C. 59, 339 S.E.2d 524 (Ct. App. 1986).....	54
<i>Crestwood Golf Club, Inc. v. Potter</i> , 328 S.C. 201, 493 S.E.2d 826 (1997)	32, 33
<i>Doe v. Howe</i> , 626 S.E.2d 25 (Ct. App. 2005).....	29
<i>Ex Parte Bon Secours-St. Francis Xavier Hospital Inc.</i> , 393 S.C. 590, 713 S.E.2d 624 (2011)	61
<i>Father v. South Carolina Dept. of Social Services</i> , 353 S.C. 254, 578 S.E.2d 11 (2003)	6, 7, 58
<i>FEC v. Akins</i> , 524 U.S. 11 (1988).....	36

<i>First American Bank & Trust v. First Guar. Bank,</i> 615 So. 2d 1060 (La. Ct. App. 1993).....	60
<i>Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,</i> 528 U.S. 167 (2000).....	30, 34, 37
<i>Hamm v. South Carolina Public Service Commission,</i> 312 S.C. 238, 439 S.E.2d 852 (1994)	54, 55
<i>Hitachi Data Systems Corp. v. Leatherman,</i> 309 S.C. 174, 420 S.E.2d 843 (1992)	25
<i>Holmes v. East Cooper Community Hospital Inc.,</i> 408 S.C. 138, 758 S.E.2d 483 (S.C. 2014)	6, 7
<i>Holmes v. Haynsworth, Sinkler & Boyd, P.A.,</i> 408 S.C. 620, 760 S.E.2d 399 (2014)	62, 63
<i>Home Health Services, Inc. v. South Carolina Dept. of Health and Envtl. Control,</i> 298 S.C. 258, 379 S.E.2d 734 (Ct. App. 1989).....	26
<i>Hunt v. Washington State Apple Advertising Commission</i> 432 U.S. 333 (1977).....	44
<i>Hunter v. Earthgrains Co. Bakery,</i> 281 F.3d 144 (4th Cir. 2002)	60
<i>In re Anonymous Member of S. Carolina Bar,</i> 346 S.C. 177, 552 S.E.2d 10 (2001)	55
<i>Judy v. Judy,</i> 383 S.C. 1, 677 S.E.2d 213 (Ct. App. 2009).....	32, 33
<i>Lujan v. Defenders of Wildlife,</i> 504 U.S. 555 (1992).....	22, 27, 31
<i>Maddox v. City of Costa Mesa,</i> 193 Cal. App. 4th 1098, 122 Cal. Rptr. 3d 629 (2011).....	60
<i>Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak,</i> ___ U.S. ___, 132 S. Ct. 2199 (2012)	27
<i>Mendoza v. Perez,</i> 754 F.3d 1002 (D.C. Cir. 2014).....	27

<i>Micronics, Inc. v. South Carolina Dept. of Revenue</i> , 345 S.C. 506, 548 S.E.2d 223 (Ct. App. 2001).....	54
<i>Municipal Association of S.C. v. AT&T Communications of Southern States, Inc.</i> , 361 S.C. 576, 606 S.E.2d 468 (2004)	25
<i>Palmetto Alliance v. South Carolina Pub. Serv. Comm'n</i> , 282 S.C. 430, 319 S.E.2d 695 (1984)	55
<i>Preservation Society of Charleston v. U.S. Army Corps of Engineers</i> , No. 2:12-2942-RMG, 2013 WL 6488282 (D.S.C. September 18, 2013).....	31, 32
<i>Ricks v. Weinrauch</i> , 293 S.C. 372, 360 S.E.2d 535 (Ct. App. 1987).....	54
<i>Russell v. Wachovia Bank, N.A.</i> , 370 S.C. 5, 633 S.E.2d 722 (2006)	62
<i>Rutland v. Holler, Dennis, Corbett, Ormond & Garner (Law Firm)</i> , 371 S.C. 91, 637 S.E.2d 316 (Ct. App. 2006).....	62
<i>S. D. Warren Co. v. Maine Board of Env'tl. Protection, et. al</i> , 547 U.S. 370 (2006)	15
<i>Sea Pines Association for the Protection of Wildlife, Inc. v. S.C Dept. of Natural Resources</i> , 345 S.C. 594, 550 S.E. 2d 287 (2001)	22, 31, 44
<i>Seattle Times Co. v. Rhinehardt</i> , 467 U.S. 20, 104 S. Ct. 2199, 81 L.Ed.2d 17 (1984).....	54
<i>Sierra Club v. Morton</i> , 405 U.S. 727 (1972).....	36
<i>Sierra Club v. South Carolina Dept. of Health and Env'tl. Control</i> , __ S.E.2d __, No. 2012-212791, at *10 (Ct. App. July 30, 2014).....	57
<i>Sloan v. Sanford</i> , 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004)	38
<i>South Carolina Coastal Conservation League v. South Carolina Dept. Health and Env'tl. Control</i> , 390 S.C. 418, 702 S.E.2d 246 (2010)	26

<i>South Carolina Dept. of Social Services v. Lisa C.</i> , 380 S.C. 406, 669 S.E.2d 647 (Ct. App. 2008).....	59
<i>South Carolina Pub. Interest Found. v. South Carolina Transp. Infrastructure Bank</i> , 403 S.C. 640, 744 S.E.2d 521 (2013)	38
<i>Southeastern Site Prep, LLC v. Atl. Coast Builders and Contractors, LLC</i> , 394 S.C. 97, 713 S.E.2d 650 (Ct. App. 2011).....	57, 58
<i>Sparks v. Palmetto Hardwood, Inc.</i> , 406 S.C. 124, 750 S.E.2d 61 (2013)	60
<i>State v. Hewins</i> , 409 S.C. 93, 760 S.E.2d 814 (2014)	33
<i>State v. Landis</i> , 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004).....	25
<i>Youngblood v. South Carolina Dept. of Social Services</i> , 741 S.E.2d 515 (S.C. 2013)	21, 25
Federal Statutes and Regulations	
Clean Water Act § 401, 33 U.S.C. § 1341(a)	44
33 U.S.C. § 1341(a)(1).....	15, 44
33 U.S.C. § 1341(d)	15
Federal Coastal Zone Management Act 16 U.S.C. § 1455	
16 U.S.C. § 1455(b)(B)(2)	16
16 U.S.C. § 1455(b)(14)	16
16 U.S.C. § 1455(b)(15)	16
77 Fed. Reg. 10,184 (Feb. 21, 2012)	45
75 Fed. Reg. 22,896, 22,903-09 (April 30, 2010).....	9
State Statutes	
S.C. Code Ann. § 1-23-320.....	52
S.C. Code Ann. § 1-23-320(E).....	50
S.C. Code Ann. § 1-23-610(B)	6

S.C. Code Ann. § 6-29-950.....	37
S.C. Code Ann. § 15-36-10.....	57
S.C. Code Ann. § 15-36-10(4).....	57
S.C. Code Ann. § 15-36-10(A)(4)	58
S.C. Code Ann. § 15-36-10(A)(4)(a)(ii)	57
S.C. Code Ann. § 44-1-60.....	4, 5, 21, 22, 24, 26, 30
S.C. Code Ann. § 44-1-60(E)(1).....	22
S.C. Code Ann. § 44-1-60(E)(2).....	22
S.C. Code Ann. § 44-1-60(F).....	1, 2, 19, 22, 58, 59
S.C. Code Ann. § 44-1-60(G).....	22
S.C. Code Ann. § 48-39-10 <i>et seq</i>	16, 17
S.C. Code Ann. § 48-39-10(J)	17
S.C. Code Ann. § 48-39-20(E).....	28
S.C. Code Ann. § 48-39-30(B)(5).....	28
S.C. Code Ann. § 48-39-150(6).....	28
S.C. Code Ann. § 48-39-150(7).....	28
S.C. Code Ann. § 48-39-150(9).....	28
S.C. Code Ann. § 48-39-150(10).....	28
S.C. Code Ann. § 61-6-185(A).....	26
Appropriations Bill H. 4701, Pt. IB § 88.4 (S.C. 2014).....	40
Rules and Regulations	
S.C. Code Ann. Regs. 30-1 <i>et. seq.</i>	16, 17
S.C. Code Ann. Regs. 30-2(H)	48
S.C. Code Ann. Regs. 48-39-80(B)(4).....	16
S.C. Code Ann. Regs. 61-15(103)(1).....	26
S.C. Code Ann. Regs. 61-68.....	44, 49
S.C. Code Ann. Regs. 61-101	44, 46, 49

S.C. Code Ann. Regs. 61-101(A)(2).....	15
S.C. Code Ann. Regs. 61-101(A)(3).....	45
S.C. Code Ann. Regs. 61-101(A)(5).....	15
S.C. Code Ann. Regs. 61-101(A)(7).....	48
S.C. Code Ann. Regs. 61-101(A)(8).....	46, 47, 48
S.C. Code Ann. Regs. 61-101(D)(1).....	48
S.C. Code Ann. Regs. 61-101(E)(2).....	48
S.C. Code Ann. Regs. 61-101(F)(3)(c).....	15, 28
S.C. Code Ann. Regs. 61-101 (F)(5)(b).....	15, 28
Rule 28(D)(2), SCALCR	23
Rule 10, SCALCR	50
Rule 21, SCALCR	52, 53, 54
Rule 21(A), SCALCR.....	52, 54
Rule 72, SCALCR	57
Rule 26, SCRCP.....	50, 54
Rules 26-37, SCRCP.....	50
Rule 56(e), SCRCP	30
Other Authorities	
4 James W. Moore, et al., <i>Moore's Federal Practice</i> ¶ 26.75 (2nd ed. 1993)	55
A. Darby Dickerson, <i>The Law and Ethics of Civil Depositions</i> , 57 Md. L. Rev. 273, 277 (1998)	55
Black's Law Dictionary (6th Ed. 1990).....	25
<i>Decline Definition</i> , Merriam-Webster's Dictionary, http://www.merriam-webster.com/dictionary/decline	59
National Trust for Historic Preservation, 11 Most Endangered Historic Places, Watch Status: City of Charleston (<i>available at</i> http://www.preservationnation.org/issues/11-most- endangered/locations/watch-status-charleston-1.html)	12
U.S. Army Corps of Engineers, 2012 Nationwide Permits, Conditions, District Engineer's Decision, Further	

Information, and Definitions (with corrections)(<i>available at</i> <u>http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/</u> <u>2012/NWP2012_corrections_21-sep-2012.pdf</u>)	45
U.S. EPA Cruise Ship Discharge Assessment Report, EPA842-R-07-005 (Dec. 29, 2008)	12

STATEMENT OF ISSUES ON APPEAL

- I. After finding that the Community Groups' had properly alleged standing, did the Administrative Law Court ("ALC") err in changing course and ordering summary judgment for lack of standing where affidavits and documentary evidence showed that the groups' members were "affected persons" entitled to request a Contested Case pursuant S.C. Code Ann. § 44-1-60(F)?
 - A. Did the ALC err in entering summary judgment that the Community Groups' members who live and work near a proposed \$35 million cruise terminal in downtown Charleston were not "affected persons" entitled, under S.C. Code Ann. § 44-1060(F), to seek administrative review of DHEC's permitting decision authorizing the terminal?
 - B. Did the ALC err in entering summary judgment on the basis that the Community Groups' members were not entitled to request administrative review of DHEC's permitting decision authorizing the proposed cruise terminal because they lacked Article III Constitutional Standing?
 - C. Did the ALC err in entering summary judgment on the basis that the Community Groups lacked Public Importance Standing?
 - D. Did the ALC err in entering summary judgment on the basis that, even if the Community Groups had members with standing, the groups lacked Associational Standing?
- II. Did the ALC err in refusing to vacate the Ports Authority's Critical Area Permit and Coastal Zone Certification that lacks a required Section 401 Water Quality Certification?
- III. Did the ALC err in deeming discovery closed on May 20, 2013 and prohibiting Community Groups from conducting discovery after that date?
- IV. Did the ALC err in sanctioning the Community Groups for filing a motion interpreting a provision that states that the DHEC Board "must" conduct a review conference within 60 days as setting forth a mandatory, not discretionary duty?

STATEMENT OF THE CASE

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

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

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

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

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

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

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

INTRODUCTION

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

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

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

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

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

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

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

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

STANDARD OF REVIEW

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

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

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

BACKGROUND

I. Facts

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

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

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

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

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

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

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

B. The Impacts of Cruise Ship Home Basing Operations

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

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

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

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

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

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

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

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

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

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

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

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

II. Legal Framework and Procedural Background

A. Legal Framework – State and Federal Permitting Review

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

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

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

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

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

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

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

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

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

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

B. Procedural Background

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

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

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

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

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

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

ARGUMENT

I. Standing

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

“affected persons” are defined to include those residing within a geographic service area.³

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

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

³ See S.C. Code Ann. Regs. 61-15(103)(1)) (defining “affected persons” as those “residing in the geographic area to be served by the applicant” as well those in the area who provide similar services); *Home Health Services, Inc. v. South Carolina Dept. of Health and Env’tl. Control*, 298 S.C. 258, 263, 379 S.E.2d, 734, 736 n.2 (Ct. App. 1989).

⁴ See S.C. Code Ann. § 61-6-185(A) (providing that persons residing within the county in which a retail license requested or “within five miles” of the location may protest license and proceed to ALC).

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

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

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

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

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

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

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

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

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

B. The Community Groups Demonstrated Article III “Constitutional” Standing

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. The 401 Certification Requirement Under Federal and State Law

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

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

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

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

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

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

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

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

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

project's NWP authorization on September 18, 2013.¹¹ Removal of SPA's NWP 3 authorization operated to remove DHEC's 401 Certification for the project. The Community Groups therefore moved the ALC to vacate SPA's permit and remand it to DHEC to allow for the required individual 401 Certification evaluation that must occur in conjunction with and simultaneous to issuance of a Critical Area Permit and Coastal Zone Consistency Certification. *See* R.000761 (Pet'rs' Mot. to Vacate, Nov. 1, 2013).

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

The ALC gave several rationales for denying the motion to vacate. All were mistaken. First, the ALC reasoned that because the Corps could one day conceivably authorize SPA's project pursuant to NWP 3 again in the future, SPA might one day conceivably benefit again from the 401 Certification that would come with it. R.000061 (Order Den. Pet'rs' Mot. to Vacate, 6, Dec. 20, 2013 ("Mot. to Vacate Order")).

However, DHEC's regulations require that individual federal permits must receive individual 401 Certification evaluated by DHEC's Bureau of Water and processed in conjunction with OCRM's Critical Area Permit and Coastal Zone Consistency Certification evaluation. S.C. Code Ann. Regs. 61-101(A)(8). SPA's existing OCRM approvals, issued without any 401 Certification or Bureau of Water involvement, fail these requirements, were issued on unlawful procedure, and are facially illegal and invalid.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- SPA’s attorney proposes to “develop a scheduling order with deadlines for discovery, dispositive motions, exchange of evidence, etc.,” and stating SPA would “inform the Court that we are going to try and come up with a consent scheduling order and ask that the Court let us know what week it will set the hearing for inclusion in that order.” R.002939.
- Both Community Groups and DHEC agreed to proceed in this manner. *id.*

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

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

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

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

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

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

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

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

June 2013 – March 2014

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

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

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

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

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

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

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

¹⁴ ALC Rule 21(A) states that:

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

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

In the nearly fifteen years that I have been practicing before the ALC, discovery has always exceed the ninety day period provided for under ALC Rule 21. In many instances, the parties have only exchanged Prehearing Statements and are in the initial phases of discovery, i.e., document production, within the ninety day period following the Notice of Assignment.

These cases typically take up to a year or more to prepare for trial with discovery unless the issue is extremely narrow, and depositions in particular routinely occur very close to the trial date and certainly many months beyond the ninety period in ALC Rule 21. In fact, in my practice, the parties have not operated under ALC Rule 21, instead cooperating to enable full discovery of a case with the implicit recognition that depositions and document production will necessarily extend well beyond the ninety day period of ALC Rule 21. In my experience, **completing discovery within 90 days following the filing of the Notice of Assignment is a practical impossibility**

R.002951.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

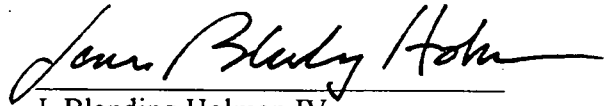
No such egregious behavior which infected *Holmes* and other cases in which sanctions have been awarded is present in this record. In each of these cases, an award of sanctions followed some form of egregious conduct or was deemed appropriate due to the particularly extraordinary facts and circumstances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

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

CONCLUSION

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

Respectfully Submitted,



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May 4, 2015

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
MAY 07 2015
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.

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May 4, 2015


J. Blanding Holman IV

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Surfrider Foundation, and Charleston
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v.

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

Final Brief of Respondent
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Table of Contents

Table of Authorities.....	iv
Statement of Issues	1
Statement of the Case	2
Statement of Facts	6
Summary of Argument.....	12
Argument.....	14
1. The ALC correctly entered summary judgment against Cruise Opponents because they failed to establish any genuine issue of material fact regarding their standing to challenge the license issued by DHEC	14
Standard of Review	15
Analysis.....	16
A. This Court should affirm the ALC's determination that Cruise Opponents lack standing because they failed to meet their burden to come forward with evidence showing that they meet the <i>Lujan-Sea Pines</i> factors	16
(1) <i>The ALC correctly found that none of the affidavits proffered by Cruise Opponents establishes a genuine issue of material fact regarding the existence of an injury-in-fact</i>	17
(2) <i>The ALC correctly found that none of the affidavits proffered by Cruise Opponents establishes a genuine dispute of material fact regarding a causal connection between their alleged injuries and the license</i>	19
(3) <i>The ALC correctly found that none of the affidavits proffered by Cruise Opponents establishes a genuine dispute of material fact regarding the inability of the ALC to redress their alleged injuries by denying or modifying the license</i>	22
B. Section 44-1-60 does not establish a lesser standing threshold than that required by the <i>Lujan-Sea Pines</i> analysis	23
C. The ALC correctly found that Cruise Opponents are not entitled to maintain this action through associational standing principles.....	27

D. The ALC correctly refused to apply the public importance exception.....	31
2. Cruise Opponents may not appeal from the denial of their motion to vacate, which was correctly denied by the ALC in any event.....	33
A. The Motion to Vacate Order is not properly before this Court because it is the equivalent of the denial of a motion for summary judgment and, as such, is never appealable.....	35
B. As a matter of law Cruise Opponents were not entitled to the relief they sought in the motion to vacate	38
3. Cruise Opponents are not entitled to relief from the ALC's denial of their Motion to Expand Discovery.....	40
Standard of Review	41
A. None of the ALC's discovery rulings are properly before this Court because the ALC vacated the Discovery Order and because Cruise Opponents failed to challenge the denial of their Motion to Expand Discovery as moot.....	41
B. Even if the issue is properly raised, the ALC did not abuse its discretion in denying the Motion to Expand Discovery in the Discovery Order for failing to comply with the ALC's rules of procedure	44
4. The ALC did not abuse its discretion in awarding sanctions against Cruise Opponents for filing a motion to remand the license to the DHEC Board on a basis unsupported by the pertinent statute.....	46
Standard of Review	47
Analysis.....	48
A. Cruise Opponents failed to appeal the Order denying the Motion to Remand.....	48
B. S.C. Code Ann. § 44-1-60(F) unambiguously establishes a discretionary standard for conducting final review conferences by the DHEC Board	49
C. Filing the Motion to Remand was unreasonable.....	51

D. There is no “bad faith” finding requirement to the imposition of sanctions under Rule 72, RPALC	52
E. Cruise Opponents fail to appeal the imposition and amount of attorneys’ fees as a reasonable sanction.....	53
Conclusion.....	54

TABLE OF AUTHORITIES

	Page(s)
Federal Cases	
<i>Allen v. Wright</i> , 468 U.S. 737 (1984)	21
<i>Bank of Am. Nat. Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship</i> , 526 U.S. 434 (1999)	50
<i>Derrick v. Johnson Controls, Inc.</i> , 3:10-CV-3295-CMC, 2012 WL 2072782 (D.S.C. June 8, 2012) (unpublished)	45
<i>Florida Audubon Soc. v. Bentsen</i> , 94 F.3d 658 (D.C. Cir. 1996)	21
<i>Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.</i> , 528 U.S. 167 (2000)	23
<i>Hunt v. Wash. State Apple Adver. Comm'n</i> , 432 U.S. 333 (1977)	27, 30, 31
<i>Md. Highways Contractors Ass'n, Inc. v. Md.</i> , 933 F.2d 1246 (4th Cir. 1991)	27
<i>Mendoza v. Perez</i> , 754 F.3d 1002 (D.C. Cir. 2014)	26
<i>Preservation Soc'y of Charleston v. U.S. Army Corps of Eng'rs</i> , 2013 WL 6488282 (D.S.C. Sept. 18, 2013)	4, 7
<i>Rivera Almodovar v. Instituto Socioeconomico Comunitario, Inc.</i> , 730 F.3d 23 (1st Cir. 2013)	45
<i>Simon v. Eastern Ky. Welfare Rights Org.</i> , 426 U.S. 26 (1976)	21
<i>Warth v. Seldin</i> , 422 U.S. 490 (1975)	17

State Cases

<i>ATC South, Inc. v. Charleston Cnty.</i> , 380 S.C. 191, 669 S.E.2d 337 (2008)	32
<i>Atl. Coast Builders & Contractors, LLC v. Lewis</i> , 398 S.C. 323, 730 S.E.2d 282 (2012).....	48, 54
<i>Bailey v. S.C. Dep't of Health & Envtl. Control</i> , 388 S.C. 1, 693 S.E.2d 426 (Ct. App. 2010)	20, 23
<i>Baird v. Charleston County</i> , 333 S.C. 519, 511 S.E.2d 69 (1999).....	14
<i>Ballenger v. Bowen</i> , 313 S.C. 476, 443 S.E.2d 379 (1994).....	37, 38
<i>Balloon Plantation v. Head Balloons</i> , 303 S.C. 152, 399 S.E.2d 439 (Ct. App. 1990)	54
<i>Bayle v. S.C. Dep't of Transp.</i> , 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001)	43
<i>Beaufort Realty Co., Inc. v. Beaufort County</i> , 346 S.C. 298, 551 S.E.2d 588 (Ct. App. 2001)	14, 20, 27
<i>Bennett v. Investors Title Ins. Co.</i> , 370 S.C. 578, 635 S.E.2d 649 (Ct. App. 2006)	15
<i>Bodman v. State</i> , 403 S.C. 60, 742 S.E.2d 363 (2013).....	14
<i>Brennan's, Inc. v. Colbert</i> , 125 So. 3d 537, <i>on reh'g</i> (Ct. App. La. Nov. 15, 2013)	42
<i>Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n</i> , 407 S.C. 67, 753 S.E.2d 846 (2014).....	<i>passim</i>
<i>CFRE, LLC v. Greenville Cnty. Assessor</i> , 395 S.C. 67, 716 S.E.2d 877 (2011).....	24
<i>Cothran v. Brown</i> , 357 S.C. 210, 592 S.E.2d 629 (2003).....	43
<i>Dawkins v. Fields</i> , 354 S.C. 58, 580 S.E.2d 433 (2003).....	15, 53

<i>Degenhart v. Knights of Columbus</i> , 309 S.C. 114, 420 S.E.2d 495 (1992).....	43
<i>Dunn v. Dunn</i> , 298 S.C. 499, 381 S.E.2d 734 (1989).....	41
<i>Ferguson v. Charleston Lincoln Mercury, Inc.</i> , 349 S.C. 558, 564 S.E.2d 94, 98 (2002).....	48
<i>Fields v. Melrose Ltd. P'ship</i> , 312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993).....	42
<i>Fields v. Reg'l Med. Ctr. of Orangeburg</i> , 363 S.C. 19, 608 S.E.2d 506 (2005).....	35
<i>Futch v. McAllister Towing of Georgetown, Inc.</i> , 335 S.C. 598, 518 S.E.2d 591 (1999).....	40
<i>Georgetown County League of Women Voters v. Smith Land Co.</i> , 393 S.C. 350, 713 S.E.2d 287 (2011).....	14, 27, 29, 30
<i>Georgia-Carolina Bail Bonds, Inc. v. County of Aiken</i> , 354 S.C. 18, 579 S.E.2d 334 (Ct. App. 2003).....	50
<i>State v. Gordon</i> , 356 S.C. 143, 588 S.E.2d 105 (2003).....	49
<i>Ex parte Gregory</i> , 378 S.C. 430, 663 S.E.2d 46 (2008).....	47
<i>Hansson v. Scalise Builders of S.C.</i> , 374 S.C. 352, 650 S.E.2d 68 (2007).....	15
<i>Hayne Federal Credit Union v. Bailey</i> , 327 S.C. 242, 489 S.E.2d 472 (1997).....	43
<i>Hedgepath v. Am. Tel. & Tel. Co.</i> , 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001).....	41, 43
<i>Hill v. Dotts</i> , 345 S.C. 304, 547 S.E.2d 894 (Ct. App. 2001).....	46
<i>Hudson v. S.C. Dep't of Highways & Pub. Transp.</i> , 324 S.C. 245, 478 S.E.2d 839 (1996).....	42
<i>Langley v. Boyter</i> , 284 S.C. 162, 325 S.E.2d 550 (Ct. App. 1984).....	49

<i>Leviner v. Sonoco Products Co.</i> , 339 S.C. 492, 530 S.E.2d 127 (2000).....	42
<i>Lucey v. Meyer</i> , 401 S.C. 122, 736 S.E.2d 274 (Ct. App. 2012)	35
<i>Mauro v. Clabaugh</i> , 299 S.C. 184, 383 S.E.2d 244 (Ct. App. 1989)	46
<i>Olson v. Faculty House of Carolina, Inc.</i> , 354 S.C. 161, 580 S.E.2d 440 (2003).....	37
<i>Oncology & Hematology Assocs. of S.C., LLC v. S.C. Dep't of Health & Env'tl. Control</i> , 387 S.C. 380, 692 S.E.2d 920 (2010).....	41
<i>Richland County v. Kaiser</i> , 351 S.C. 89, 567 S.E.2d 260 (2002).....	35, 36
<i>Runyon v. Wright</i> , 322 S.C. 15, 471 S.E.2d 160 (1996).....	47
<i>S.C. Coastal Conservation League v. S.C. Dep't of Health & Env'tl. Control</i> , 390 S.C. 418, 702 S.E.2d 246 (2010).....	25
<i>Sanford v. S.C. State Ethics Comm'n</i> , 385 S.C. 483, 685 S.E.2d 600 (2002).....	37
<i>Savannah Bank, N.A. v. Stalliard</i> , 400 S.C. 246, 734 S.E.2d 161 (2012).....	45
<i>Sea Pines Assoc. for the Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res.</i> , 345 S.C. 594, 550 S.E.2d 287 (2001).....	<i>passim</i>
<i>Shupe v. Settle</i> , 315 S.C. 510, 445 S.E.2d 651 (Ct. App. 1994)	15
<i>Smiley v. S.C. Dep't of Health & Env'tl. Control</i> , 374 S.C. 326, 649 S.E.2d 31 (2007).....	16, 23, 25
<i>Sundown Operating Co. v. Intedge Indus., Inc.</i> , 383 S.C. 601, 681 S.E.2d 885 (2009).....	45
<i>Webster v. Clanton</i> , 259 S.C. 387, 192 S.E.2d 214 (1972).....	41

<i>White Oak Manor, Inc. v. Lexington Ins. Co.</i> , 407 S.C. 1, 753 S.E.2d 537 (2014).....	46
--	----

<i>Youngblood v. S.C. Dep't of Soc. Servs.</i> , 402 S.C. 311, 741 S.E.2d 515 (2013).....	16
--	----

Federal Statutes

33 U.S.C.A. § 401.....	2
33 U.S.C.A. § 403.....	2
33 U.S.C.A. § 1341.....	2, 34, 38, 40
33 U.S.C.A. § 1341(a)(1)	34
33 U.S.C.A. § 1344(f)	3

State Statutes

S.C. Code Ann. § 15-36-10.....	52
S.C. Code Ann. § 44-1-60.....	<i>passim</i>
S.C. Code Ann. § 44-1-60(F)	<i>passim</i>
S.C. Code Ann. § 44-1-60(G)(1)	50
S.C. Code Ann. § 44-7-130(1)	24
S.C. Code Ann. §§ 48-19-10, <i>et seq.</i>	4
S.C. Code Ann. § 48-39-10(B).....	3
S.C. Code Ann. §§ 48-39-10 <i>et seq.</i>	3
S.C. Code Ann. § 48-39-10(F)	3
S.C. Code Ann. § 48-39-10(G).....	3
S.C. Code Ann. § 48-39-10(J)	3
S.C. Code Ann. § 48-39-80.....	38
S.C. Code Ann. § 48-39-80(B)(11)	3
S.C. Code Ann. § 48-39-130(A).....	38

S.C. Code Ann. § 48-39-150.....	23
S.C. Code Ann. § 53-3-130.....	8
Regulations	
33 C.F.R. § 320.2(b)	2
I R. pp.003785-3795.....	32
S.C. Code Ann. Regs. 30-1 <i>et seq.</i>	3, 4
S.C. Code Ann. Regs. 30-2(H)	34, 39
S.C. Code Ann. Regs. 30-6.A	24
S.C. Code Ann. Regs. 61-101.....	2, 34
S.C. Code Ann. Regs. 61-101.A.7	39
S.C. Code Ann. Regs. 61-101.A.8	34, 39
Other Authorities	
<i>Bailey v. S.C. Dep't of Health & Envtl. Control,</i> No. 07-ALJ-07-0583-CC (July 23, 2008) (Geathers, J.)	21
BLACK'S LAW DICTIONARY (9th ed. 2009)	42
RPALC Rule 21.A	4, 5, 40
RPALC Rule 72.....	51, 52
SCACR Rule 208(b)(1)(B)	42
SCRCP Rule 56(b)	36
SCRCP Rule 56(c).....	15
SCRCP Rule 56(e).....	17, 18
SCRCP Rule 6(d)	44

Statement of the Issues

This appeal presents four main issues:

1. Standing requires a concrete, particularized, and imminent injury that is causally connected to the challenged conduct and that likely will be redressed by a favorable decision. There were no specific, admissible facts showing that Appellants' alleged injuries differed from those suffered by the general public, were causally connected to the license issued by DHEC, or would be redressed by denial of the license. Did the ALC err in determining Appellants lacked standing?
2. Appellants moved to vacate the license, essentially seeking summary judgment that DHEC did not make a required water quality certification. The ALC denied that motion even before finding a lack of standing, determining that the disputed water quality certification could be considered in a later hearing. May Appellants appeal from the denial of this order and, if so, did the ALC properly deny the motion?
3. Absent court approval, the ALC rules require completing discovery within 90 days after an ALJ is assigned. The ALC denied Appellants' Motion to Expand Discovery filed well after the 90-day period, but subsequently vacated the order and denied the motion as moot. May Appellants appeal from this discovery order and, if so, did the ALC abuse its discretion in denying the motion?
4. Appellants moved to remand the license, arguing that the DHEC Board was required to hold a final review conference even though S.C. Code Ann. § 44-1-60 recognizes that a conference is discretionary by specifying what happens if a conference is declined in writing or not held. After denying that motion, the ALC granted the Ports Authority's subsequent motion for sanctions, finding the motion frivolous. Did the ALC abuse its discretion?

Statement of the Case

This administrative matter began when the South Carolina State Ports Authority submitted a joint application to the United States Army Corps of Engineers and the South Carolina Department of Health and Environmental Control¹ in January 2012 for a license to engage in activities affecting the waters of the United States and critical areas of South Carolina. (R. pp. 001240-1257). The Ports Authority sought approval to install five additional pile clusters in the waters underneath Building 322, a warehouse located on the northern end of Union Pier Terminal, as part of a plan to relocate passenger cruise operations to that location from the southern end of the terminal. (R. pp. 001182; 001184)

A federal permit is required because, under Section 10 of the Rivers and Harbors Act, the Corps must approve any obstruction or alteration of a navigable water of the United States.² *See* 33 U.S.C.A. §§ 401, 403; *see also* 33 C.F.R. § 320.2(b). This federal permit also requires a water quality certification from DHEC or a waiver pursuant to section 401 of the Clean Water Act, 33 U.S.C.A. § 1341. *See* S.C. Code Ann. Regs. 61-101. A critical area permit and coastal zone consistency determination from DHEC arguably were required because the proposed relocation will take place in the “critical

¹ The Application was submitted to DHEC through its Office of Ocean and Coastal Resource Management (OCRM). (R. pp. 001249-1257)

² While the wharf has existed for over a century, it extends over the river's natural bank and thus is still considered work in a federal navigable water.

area”³ of the coastal zone⁴ of South Carolina. *See* Coastal Zone Management Act, S.C. Code Ann. §§ 48-39-10 to -360; S.C. Code Ann. Regs. 30-1 to -21; *see also* S.C. Code Ann. § 48-39-80(B)(11).

The Corps granted Section 10 authorization pursuant to Nationwide Permit 3 (NWP 3) on April 20, 2012.⁵ (R. pp. 000872-875) The state provided a general water quality certification when DHEC staff issued such a certification without conditions for all NWP 3 activities on April 23, 2012. (R. pp. 000877-880) On December 18, 2012, DHEC issued a license for the project authorizing installation of the five pilings (License). (R. pp. 000256-277)

On January 2, 2013, the Preservation Society of Charleston, Charleston Communities for Cruise Control, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Historic Charleston Foundation (Cruise Opponents) filed Requests for a

³ “Critical area” is defined as coastal waters, tidelands, beaches, and the beach/dune system. *See* S.C. Code Ann. § 48-39-10(J). “Coastal waters” are “the navigable waters of the United States subject to the ebb and flood of the tide and which are saline waters, shoreward to their mean high-water mark.” S.C. Code Ann. § 48-39-10(F). “Tidelands” are defined to include “all areas at or below mean high tide....” S.C. Code Ann. § 48-39-10(G).

⁴ The “coastal zone” is defined as all coastal waters and submerged lands seaward to the State’s jurisdictional limits and includes all lands and waters in Charleston County. *See* S.C. Code Ann. § 48-39-10(B).

⁵ The Clean Water Act generally exempts maintenance activities from the requirement that a permit be obtained to discharge dredged or fill material. 33 U.S.C.A. § 1344(f). To this end, the Corps has issued a series of nationwide permits for these types of activities, among which is NWP 3.

Final Review Conference of the DHEC staff decision. (R. pp. 000106-118) The DHEC Board unanimously denied those requests on January 10, 2013. (R. pp. 000006-7)

Cruise Opponents filed a request for contested case hearing with the S.C. Administrative Law Court (ALC) on February 11, 2013,⁶ contending that DHEC's issuance of the License was "made in violation of applicable statutes, regulations and rules contained in the S.C. Coastal Zone Management Act, S.C. Code Ann. §§ 48-19-10, *et seq.*, OCRM Regulations 30-1, *et seq.*, and the Coastal Management Program." (R. p.000126) (Req. for Contested Case Hrg., p.8 ¶22). On February 27, 2013, Cruise Opponents filed a Motion to Remand to DHEC Board, arguing that the Board was required to hold a final review conference. (R. pp.000157-181) The ALC denied the motion to remand by order dated May 3, 2013. (R. pp.000008-14) Meanwhile, the parties engaged in discovery during the time periods provided in Rule 21.A, RPALC (allowing 90 days for discovery absent an order from the ALC).

On July 1, 2013, the Ports Authority filed two separate motions: a motion to dismiss for lack of standing and a motion for sanctions seeking dismissal and/or an award of attorneys' fees and costs expended in responding to Cruise Opponents' frivolous motion to remand. (R. pp.000247-362) In the motion for

⁶ On September 18, 2013, the Corps' authorization for the project to proceed under NWP 3 was remanded to the agency for reconsideration using a broader scope of analysis. Order, *Preservation Soc'y of Charleston v. U.S. Army Corps of Eng'rs*, 2013 WL 6488282 (D.S.C. Sept. 18, 2013).

sanctions, the Ports Authority argued that Cruise Opponents' February 27, 2013 motion to remand was frivolous because the final review conference was not mandatory and that this principle was well-established in the law and known to counsel for the Cruise Opponents. (R. pp.000247-326) After briefing by the parties and oral argument on September 6, 2013, the ALC granted the motion for sanctions by Order dated March 3, 2014 and awarded sanctions against Cruise Opponents in the amount of \$9,300.⁷ (R. pp.000069-76) The ALC denied the Ports Authority's request for fees and costs for the sanctions motion in the amount of \$11,672.50, but nevertheless found "that the requested amount is reasonable." *Id.* The Cruise Opponents moved to reconsider that Order and the ALC affirmed its original imposition of sanctions in an Amended Order Granting Sanctions dated and filed April 11, 2014 (Sanctions Order), which is the order challenged on appeal. (R. pp.000097-105)

The parties filed several other pretrial motions with the ALC. Pertinent to this appeal, Cruise Opponents filed a Motion to Vacate dated November 1, 2013, again seeking to remand the matter to DHEC based on a different argument. (R. pp.000761-801) They also filed a Motion to Expand Discovery dated December 23, 2013, long after expiration of the 90-day period provided by Rule 21.A, RPALC. (R. pp.001041-1045) The Ports Authority filed a

⁷ The ALC denied the Ports Authority's motion to dismiss for lack of standing, by Order dated December 2, 2013.

Motion for Summary Judgment for Lack of Standing on December 27, 2013. (R. pp. 001102-2229)

The ALC denied the Motion to Vacate by order dated December 20, 2013 (Motion to Vacate Order) (R. pp.000056-63), and denied the Motion to Expand Discovery by order dated March 3, 2014 (Discovery Order). (R. pp.000064-68) The ALC granted the Ports Authority's Motion for Summary Judgment for Lack of Standing (Mot. Summ. J. Standing) by order dated April 11, 2014 (Standing Order).

On April 21, 2014, Cruise Opponents served a Notice of Appeal to this Court, challenging the Standing Order, the Sanctions Order, the Motion to Vacate Order, and the Discovery Order. The Ports Authority moved on July 3, 2014 to dismiss the appeal from the Motion to Vacate Order and the Discovery Order, contending that neither order is appealable and, moreover, that Cruise Opponents may not appeal from any of the ALC's discovery rulings. This Court denied the motion to dismiss by Order filed September 11, 2014, simply stating that, "[a]fter careful consideration, the motion to dismiss is denied."

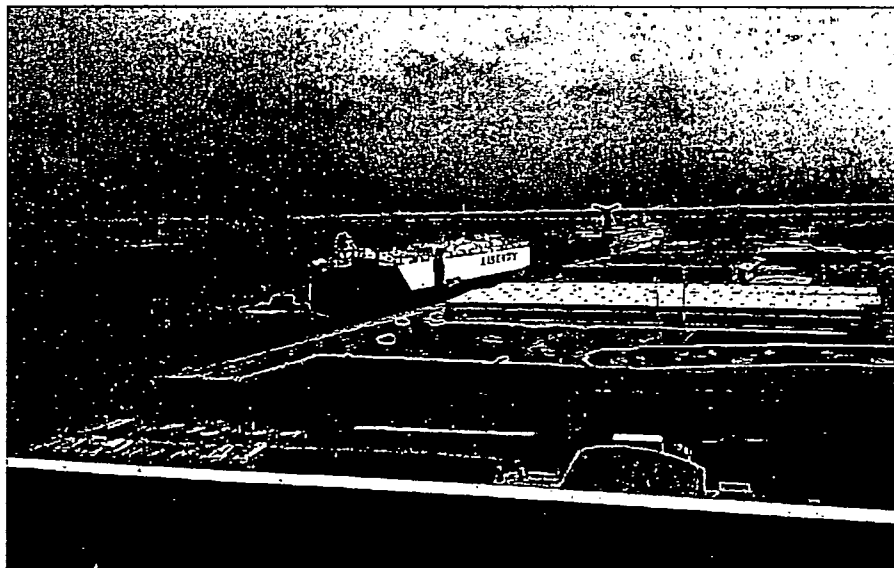
Statement of Facts

Union Pier Terminal, depicted in the accompanying photograph,⁸ is a 63-acre property located along the Cooper River on the Charleston peninsula

⁸ Mot. Summ. J. Standing, Exh. 3. (R. p. 001192) The ship in the foreground is a car carrier and the ship in the background is a cruise ship.

and is owned and operated by the Ports Authority as a fully operational marine terminal. In addition to accommodating more than 200 cargo ships annually in its present configuration, plus train and truck service to those ships, Union Pier is where cruise ships embark and disembark passengers in Charleston.⁹

The terminal
has
accommodated
passenger
vessel calls for
almost 100
years, with



cruise vessels calling on the Union Pier cruise passenger terminal facility every year since its dedication in 1973.¹⁰

The demand for passenger cruises in Charleston has increased in recent years. Charleston serves as the home port for the passenger ships of some cruise lines, with Carnival Cruise Lines most recently designating Charleston as the Carnival Fantasy's home port. As reflected in the above photograph, and contrary to the Cruise Opponents' claim, the cruise ships that call at the Union Pier terminal are not disproportionate in size or scale

⁹ Mot. Summ. J. Standing, Exh. 12, James I. Newsome, III Aff. ¶7 (Aug. 22, 2011). (R. p. 001495)

¹⁰ *Id.*

to the cargo ships (such as car carriers) that have regularly called there for many years. The increase in maritime commerce through cruise vessel calls has, in turn, contributed beneficially to the City of Charleston and the State of South Carolina in numerous ways, including increased local revenue.¹¹

The Ports Authority has endeavored to promote and accommodate this demand for cruise passenger services at Union Pier as part of its continuing statutory mission to foster, stimulate, and increase water-borne commerce in South Carolina.¹² To this end, it has undertaken a capital improvement plan for Union Pier that involves transferring cargo operations to other terminals and moving cruise passenger operations to the northern end of the Union Pier terminal. The Ports Authority has presented a general concept plan to renovate existing buildings on Union Pier, demolish older structures, redevelop much of the existing terminal acreage (including public green spaces), restore areas of the natural waterfront, and undertake other public and private development, all subject to further study and validation at the appropriate time.¹³ The plan for relocation and renovation of terminal

¹¹ See Mot. Summ. J. Standing, Exh. 13, Joseph P. Riley, Jr. Aff. ¶4 (Aug. 22, 2011) (noting that cruise industry has generated approximately \$35 million and over 400 jobs). (R. p. 001501)

¹² See S.C. Code Ann. § 53-3-130.

¹³ See Mot. Summ. J. Standing: Exh. 14, UPT Presentation of Riley and Newsome, SCPA 001213-248, (R. pp.001504-1540); Exh. 15, Existing v. Proposed Drawing Comparison, SCPA 001217, (R. pp. 001541-1542); Exh. 16, Peter Lehman Aff. Exh. B, SCPA 001253-366 (Concept Plan for Union Pier Waterfront dated Sep. 2010), (R. pp. 001549-1663).

facilities at UPT will ensure ongoing compliance with current terminal security features required by federal law.¹⁴ But perhaps most important to the majority of residents and visitors in Charleston, relocating cruise passenger services to the northern end of Union Pier will, in conjunction with the voluntary adoption of a traffic management plan, reduce the periodic route congestion currently experienced by residents, visitors, and passengers near the southern end of Union Pier with no increase in traffic at the northern end. Moreover, these changes will decrease air emissions at and around Union Pier, including areas represented by Cruise Opponents.¹⁵

The Ports Authority applied for administrative approval of the capital improvement

plan only

because

installing

additional

structural

support



¹⁴ See Mot. Summ. J. Standing, Exh. 17, Ports Authority-U.S. Customs and Border Protection MOU (June 20, 2006), as amended. (R. pp. 001664-1704)

¹⁵ See Mot. Summ. J. Standing, Exh. 18, OCRM Technical Review at 8, (R. pp. 001705-1715); Exh. 19, Trinity Consultants Study: Historical, Current and Future Criteria Pollutant Emissions at Union Pier Terminal (Dec. 23, 2013), (R. pp. 001716-1724).

underneath Building 322 involves the navigable waters of the United States and a critical area of the coastal zone in South Carolina. But as shown in the above photograph of the existing pilings under Building 322,¹⁶ the capital improvement plan does not involve the first-time installation of structural support where none previously existed. Rather, it involves driving five additional pile clusters—amongst the approximately 1,008 pile clusters already there¹⁷—into the marl beneath Building 322 to support the installation of three elevators and two escalators. All remaining work for the capital improvement plan will take place on Union Pier Terminal itself.

The Ports Authority's capital improvement plan for Union Pier Terminal, therefore, is a positive development because it will aid economic development in Charleston, as well as improve the city's environment, with minimal impact on either the navigable waters of the United States or a critical area of South Carolina. Some of these benefits are being experienced now because, in anticipation of implementing the plan, the Ports Authority has already transferred most of its existing cargo operations from Union Pier to another Ports Authority terminal.¹⁸ Despite all this, Cruise Opponents seek not only

¹⁶ Mot. Summ. J. Standing, Exhibit 3. (R. pp. 001185-1238)

¹⁷ See Mot. Summ. J. Standing, Exh. 2, Map of Pile Clusters. (R. pp. 001183-1184)

¹⁸ The Ports Authority also adopted the Voluntary Cruise Management Plan limiting cruise vessel calls to 104 per calendar year. See Mot. Summ. J. Standing, Exh. 20, Voluntary Cruise Management Plan. (R. pp. 001725-1727) Adoption of the proposed plan will lead to a net reduction of large, ocean-going vessel traffic at Union Pier.

to eliminate the beneficial aspects of the capital improvement plan, but also to ultimately roll back the existing cruise passenger operations at Union Pier. One of the many problems with their misguided attack upon the capital improvement plan is that, if the planned renovations to the northern portion of Union Pier do not come to fruition, it will return to being used for cargo operations as part of the Ports Authority's statutory mission to maintain and increase maritime commerce in South Carolina. This will include resumption of truck and rail traffic necessary to support cargo operations, along with the air emissions associated with those operations, and cruise passenger operations, as before, will continue in some form in their existing location.¹⁹

When compared side-by-side with the capital improvement plan, the negative ramifications of Cruise Opponents' opposition become manifest:

<u>Comparison of the Positions of the Ports Authority and the Cruise Opponents</u>	
<u>OCRM AND PORTS AUTHORITY</u>	<u>OPPONENTS</u>
<u>Relocation</u> of Operations to Northern End of Union Pier Terminal (UPT)	<u>Status Quo</u> and Projected Growth if Cruise Operations Maintained on Southern End
Cruise vessel calls voluntarily limited to 104 per calendar year, with a procedure for change.	Cruise vessel calls voluntarily limited to 104 per calendar year, with a procedure for change.

¹⁹ See Mot. Summ. J. Standing, Exh. 16, Lehman Aff. ¶¶ 8-11 (noting that cruise operations at UPT will continue—with greater or lesser size and frequency—regardless of the permitting decision in this contested case). (R. pp. 001545-1546)

UPT will no longer receive cargo ships.	UPT resumes receiving over 200 cargo vessels per year, at an average of 4 per week.
Rail access to the northern end of UPT will cease.	Fully operational rail spur to UPT which causes daily, temporary vehicular blockage.
Implementation of an on-site traffic management plan, which more quickly facilitates and absorbs maritime cruise traffic from City streets.	Continued existing safety road closures due to location of cruise terminal operations at southern end of UPT.
Restoration and re-use of southern end of UPT.	Continued use of all of UPT for cruise vessel operations on the south and cargo on the north.

In other words, aside from the wholesale elimination of all maritime activity on the Charleston peninsula (which is Cruise Opponents' true objective), the practical result of Cruise Opponents' position is maintaining the status quo, which provides a worse outcome versus adoption of the Ports Authority's capital improvement plan.

Summary of Argument

Cruise Opponents sought to challenge the license issued by DHEC pursuant to S.C. Code Ann. § 44-1-60, which allows the filing of a contested case hearing challenging a final agency action by DHEC. The ALC correctly applied constitutional standing principles to find that Cruise Opponents are not "affected persons" under S.C. Code Ann. § 44-1-60 because they did not establish a genuine issue of material fact regarding their burden to prove injury-in-fact, causation, and redressability. Standing Order at 5. (R. p.

000081) The ALC also properly determined that none of the Cruise Opponents meets the requirements for associational standing because their members do not have standing to sue in their own right and, with a single exception, the challenged license is not pertinent to their associational purposes. Standing Order at 14-17. (R. pp. 000090-93) Finally, the ALC also correctly found that Cruise Opponents should not be afforded standing pursuant to the public importance exception because a ruling in this case is unnecessary for future guidance. Standing Order at 18. (R. p. 000094)

The Motion to Vacate Order is not appealable and, in any event, Cruise Opponents are not entitled to relief on any water quality certification issues. The Discovery Order also is not appealable based on the posture of the case and is a matter committed to the discretion of the trial court. Finally, in light of the pertinent statutory language, the ALC properly awarded sanctions against Cruise Opponents for their frivolous motion to remand. Sanctions Order. (R. pp. 000069-76)

The decisions of the ALC should be affirmed.

Argument²⁰

1. The ALC correctly entered summary judgment against Cruise Opponents because they failed to establish any genuine issue of material fact regarding their standing to challenge the license issued by DHEC.

Cruise Opponents have the burden of establishing standing. *Georgetown County League of Women Voters v. Smith Land Co.*, 393 S.C. 350, 358, 713 S.E.2d 287, 292 (2011). Standing is conferred by statute; by the constitution; or by the public importance exception. *Bodman v. State*, 403 S.C. 60, 66-67, 742 S.E.2d 363, 366 (2013). As associations, Cruise Opponents arguably have standing only if one or more of their individual members would have standing. *Sea Pines Assoc. for the Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 600-01, 550 S.E.2d 287, 291 (2001); *see also Baird v. Charleston County*, 333 S.C. 519, 530, 511 S.E.2d 69, 75 (1999). Because neither the associations nor these individual members are the object of the licensing decision, the Cruise Opponents' burden to prove standing is "substantially more difficult." *Beaufort Realty Co., Inc. v. Beaufort County*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992)). Finally, the public importance exception affords standing only if "an issue is of such public importance as to require its resolution for future guidance." *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 79, 753 S.E.2d 846,

²⁰ Any allegation contained in Cruise Opponents' brief that is not expressly addressed or rebutted in this brief is denied.

852-53 (2014) (quoting *Davis v. Richland Cnty. Council*, 372 S.C. 497, 500, 642 S.E.2d 740, 741 (2007)).

Standard of Review

This Court reviews a grant of summary judgment using the same standard applied by the ALC. *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 354, 650 S.E.2d 68, 70 (2007). Summary judgment must be granted if “there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRPC. The non-moving party cannot simply rest on allegations or denials but must identify facts establishing a genuine issue for trial. *Bennett v. Investors Title Ins. Co.*, 370 S.C. 578, 589, 635 S.E.2d 649, 654 (Ct. App. 2006). Affidavits proffered by the non-moving party must consist of more than conclusory or speculative allegations of fact or subjective beliefs to survive summary judgment. *Dawkins v. Fields*, 354 S.C. 58, 68, 580 S.E.2d 433, 438 (2003). The general rule for adjudging a summary judgment motion does not allow a court to transform a party’s affidavit from what it submitted into what it wished it had submitted. *Shupe v. Settle*, 315 S.C. 510, 516-17, 445 S.E.2d 651, 655 (Ct. App. 1994) (“A conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment.”).

Analysis

A. This Court should affirm the ALC's determination that Cruise Opponents lack standing because they failed to meet their burden to come forward with evidence showing that they meet the *Lujan-Sea Pines* factors.

Cruise Opponents seek to challenge the license as "affected persons" under section 44-1-60 of the South Carolina Code. "[D]etermining whether a statute confers standing is an exercise in statutory interpretation." *Youngblood v. S.C. Dep't of Soc. Servs.*, 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013). Standing should be determined by application of constitutional principles if the statute does not adequately identify those who have standing. *See Smiley v. S.C. Dep't of Health & Envtl. Control*, 374 S.C. 326, 329, 649 S.E.2d 31, 32-34 (2007) (applying constitutional standing principles in determining whether Smiley was a "person adversely affected"). Because section 44-1-60 does not create a lesser standing threshold, Cruise Opponents must show (1) an injury-in-fact; (2) a causal connection between the injury and the challenged conduct; and (3) a likelihood that the injury will be redressed by a favorable decision. *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291 (2001). Cruise Opponents have not met their burden. At bottom, Cruise Opponents' standing argument is based not on viewing facts in the light most favorable to the non-moving party, but on complaining that the ALC did not view their generalized grievances as specific allegations of concrete and particularized injuries.

- (1) *The ALC correctly found that none of the affidavits proffered by Cruise Opponents establishes a genuine issue of material fact regarding the existence of an injury-in-fact.*

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.” *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291. There is no injury-in-fact when a party merely alleges harm indistinguishable from that suffered by the general public. *Id.* (holding that standing does not exist for “a general interest common to all members of the public”); *see also Warth v. Seldin*, 422 U.S. 490, 501 (1975). As the ALC explained in its comprehensive analysis of the affidavits, Cruise Opponents’ affidavits do no more than allege generalized injuries that are conjectural or hypothetical and not actual or imminent. Standing Order pp. 8-11. (R. pp. 000084-87)

In their brief, Cruise Opponents do not make any serious argument that the ALC erred in finding no injury-in-fact. Beyond expressing dismay that the ALC actually disregarded the speculative injury allegations in the affidavits, they never come to grips with the evidentiary insufficiency of their response to the summary judgment motion. *See* Rule 56(e), SCRCP (“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.”). Perhaps the most fundamental flaw is that, without a single expert affidavit, Cruise Opponents try to connect existing and future operations at Union Pier to alleged present-

day health issues. They repeatedly point to the affidavit of Tommie Robertson, who complained that soot from the existing cruise ships caused her throat to hurt and that prolonged exposure to this soot will exacerbate her injuries. (R. pp.002587-2591) But there is nothing to tie Ms. Robertson's alleged injuries to cruise ships because both cargo and cruise ships call on Union Pier Terminal. And, moreover, nothing in Ms. Robertson's affidavit provides admissible evidence to establish that she will suffer an injury in fact directly related to the activity licensed by DHEC. *See* Standing Order p. 10 (R. p. 000086); Rule 56(e), SCRCP. She certainly is not qualified to opine about any alleged impact to her health from cruise terminal operations at Union Pier, and the remainder of her affidavit does no more than articulate inadmissible conclusory opinions and generalized grievances. That does not establish standing.

The remaining affidavits proffered by Cruise Opponents are even more fundamentally flawed.²¹ Christina Dodd complains that she is concerned about breathing pollution from cruise ships, but is not qualified to opine as to any connection between her inadmissible concerns and present or future cruise operations at Union Pier. *See* Christina Dodd Aff. at 2 (alleging current injuries with no admissible testimony connecting allegations to the

²¹ The Ports Authority's extensive briefing to the ALC describes in detail the multiple deficiencies in the affidavits. *See* SPA Reply in Support of Motion to Dismiss for Lack of Standing (R. pp. 000466-503); Reply in Support of Mot. Summ. J. Standing (R. pp. 002809-2859).

license), (R. p. 000399); *see also* Standing Order at 8 n.9 & 9 n.12. Stephen Gates' affidavit consists of inadmissible personal opinion, legal conclusions, unsupported speculations, and hearsay repetition of purported medical opinions. Standing Order at 7-8, 10 & n.13, (R. pp. 000083-84; 000086). Marty Morganello's complaints 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). And Cruise Opponents mention the affidavit of Virginia Lane only in passing, probably because her testimony 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).

In sum, Cruise Opponents make no credible argument that the ALC erred in finding no injury-in-fact. Instead of seriously analyzing the affidavits, they argue—incorrectly, *see* discussion *infra*—that their threshold showing is so low as not to bar any claim.

(2) *The ALC correctly found that none of the affidavits proffered by Cruise Opponents establishes a genuine dispute of material fact regarding a causal connection between their alleged injuries and the license.*

Cruise Opponents do not advance any substantive challenge to the ALC's finding that they failed to show a causal connection between the license and their alleged injuries. *See Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291. Their entire argument is that implementing the capital improvement plan

will allow expansion of cruise activities at Union Pier and further injure their members, as opposed to demonstrating any correlation between their alleged injuries and the proposed addition of five pilings to the existing approximately 1,008 already beneath Building 322.

A similar case is *Bailey v. S.C. Department of Health & Environmental Control*, 388 S.C. 1, 693 S.E.2d 426 (Ct. App. 2010), in which the court found there was no causal connection between the grant of a modification permit and the alleged impairment of a landowner's use and enjoyment of his property "because the boats [that are the subject of the neighbor's challenge] had been docked there for years, and they would continue to be docked there regardless of the permitting decision." *Id.*, 388 S.C. at 7, 693 S.E.2d at 429. Similarly, cruise ships have called on Union Pier continuously since 1973 and will continue to do so there and on the Charleston peninsula even if the cruise terminal is not moved to Building 322. Lehman Aff. at ¶¶9-10; *see Bailey*, 388 S.C. at 7, 693 S.E.2d at 430 (holding that "potential of having boats mooring at the dock would still exist" regardless of the permitting decision); *see also Beaufort Realty*, 346 S.C. at 303, 551 S.E.2d at 590.

To be sure, Cruise Opponents expend much energy complaining that their true issue is the possible exacerbation of their alleged injuries rather than the alleged injuries at present. But they failed to introduce expert testimony that would take their unsubstantiated assertions out of the realm of mere speculation. Moreover, this argument is undermined by *Bailey* because the

landowner in that case did not have standing even though he argued the permit would facilitate *increased* commercial development in the area through the expected conversion of the dock into a marina. *Bailey v. S.C. Dep't of Health & Env'tl. Control*, No. 07-ALJ-07-0583-CC (July 23, 2008) (Geathers, J.). Similarly, Cruise Opponents have not established a causal connection by alleging the license will result in increased passenger cruise activity at Union Pier, especially when there is no expert testimony or other evidence to take these allegations out of the realm of mere speculation.

Cruise Opponents fail to challenge the ALC's finding that their argument "relies on assumptions about the decisions of third parties, like Carnival Cruise Lines, who is not part of this action, and who must initially decide to expand the size of its fleet in Charleston." Standing Order at 13, (R. p. 000089); *see Allen v. Wright*, 468 U.S. 737 (1984); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976). Just as the government is not liable for every traffic accident that takes place on its roads, or an airport is not liable for mistakes made by individual airlines, the collateral effects of independent actions taken by companies who use the Ports Authority's terminal facilities are neither attributable to nor caused by the Ports Authority when it installs the necessary infrastructure to accommodate cruise passenger vessels. *See, e.g., Florida Audubon Soc. v. Bentsen*, 94 F.3d 658, 670 (D.C. Cir. 1996). Finally, because the Cruise Opponents do not challenge the ALC's finding on appeal regarding the conduct of third-parties

as the origin of injuries allegedly suffered, that finding is the law of the case and requires affirming the ALC.

(3) *The ALC correctly found that none of the affidavits proffered by Cruise Opponents establishes a genuine dispute of material fact regarding the inability of the ALC to redress their alleged injuries by denying or modifying the license.*

Cruise Opponents do not substantively challenge the ALC's finding that their alleged injuries would not be redressed by a denial of the license. Standing Order at 13, (R. p. 000089); *see Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291 (providing that it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision). Cruise Opponents misconstrue the ALC's finding, characterizing it as a finding that "exacerbation" of an existing injury cannot support standing." *See* Br. of Appellant at 37. The ALC made no such finding. Rather, it simply found that Cruise Opponents submitted no evidence, expert or otherwise, to demonstrate that approval of the license will cause any injury that they do not already suffer.²² Standing Order at 13. (R. p. 000089)

Cruise Opponents try to argue that rejecting the license will alleviate their alleged injuries because even existing cruise terminal operations at Union Pier will cease. As explained above, however, this is wrong: both cruise

²² This failure to proffer evidence is particularly significant because Cruise Opponents did not offer expert testimony after the same allegations were rejected by the Supreme Court as insufficient to confer standing. Reply in Support of Mot. Summ. J. Standing, Exh. 35, *Carnival Corp. v. Historic Ansonborough*, 407 S.C. 67, 753 S.E.2d 846 (2014). (App. Vol. II R. pp.003785-3795)

and marine terminal operations of similar scope and size will continue on Union Pier if the license is denied. Mot. Summ. J. Standing, Exh. 16, Lehman Aff. ¶¶9-11. (R. p. 001546) Cruise Opponents do nothing to counter Mr. Lehman's affidavit beyond speculating that things would surely be worse if the license is approved because the proposed new terminal in Building 322 would be larger. Br. of Appellant at 34-35. The suggestion that there will be no further passenger cruise operations at Union Pier if the Ports Authority cannot build a larger cruise terminal is refuted by Mr. Lehman's affidavit. Lehman Aff. ¶¶9-11. (R. p. 001546) Thus, Cruise Opponents' citation to *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000), does not salvage their claim of standing because they did not come forward with evidence to show that denial of the license would lessen their aesthetic and recreational values in view of the existing and ongoing cruise terminal activities at Union Pier. *See Bailey*, 388 S.C. at 7, 693 S.E.2d at 430.

B. Section 44-1-60 does not establish a lesser standing threshold than that required by the *Lujan-Sea-Pines* analysis.

Contrary to Cruise Opponents' argument, use of the term "affected" in section 44-1-60 does not, without more, confer standing on a person. *See Smiley*, 374 S.C. at 329, 649 S.E.2d at 32 (concluding that a person "adversely affected" by a permitting decision pursuant to former S.C. Code Ann. § 48-39-150 must satisfy the requirements of "constitutional standing" set forth in *Lujan*). In *Carnival*, the Supreme Court held that use of the term

“specially damaged” in a zoning statute “incorporates the particularized injury requirement of general standing doctrine.” 407 S.C. at 79, 753 S.E.2d at 852. Applying *Carnival*—which involved cruise operations in Charleston—and *Smiley*, the term “affected person” must be read to require a person to have standing under the *Lujan-Sea Pines* analysis. *See* S.C. Code Ann. Regs. 30-6.A (governing regulation for the license at issue and stating that a “[DHEC] decision involving the issuance, denial, suspension, or revocation of a permit or certification may be appealed by an affected person with standing pursuant to applicable law, including S.C. Code Title 44, Chapter 1; Title 1, Chapter 23; and Title 48, Chapter 39.”) (emphasis added).

Cruise Opponents’ argument appears to be that a person is “affected” if the person requests to be notified and to participate in the review process. *See* Br. of Appellant at 22. But that interpretation renders the term “affected” meaningless and would determine standing based on a person’s simple interest, not his personal stake in a permit.²³ *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)); *Sea Pines*, 345 S.C.

²³ 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).

at 600, 550 S.E.2d at 291 (“To have standing, one must have a personal stake in the subject matter of the lawsuit. In other words, one must be a real party in interest.”). Cruise Opponents’ argument appears to be based loosely on *S.C. Coastal Conservation League v. S.C. Dep’t of Health & Env’tl. Control*, 390 S.C. 418, 702 S.E.2d 246 (2010). But that case only determined whether DHEC was required to give notice in those circumstances; it did not evaluate the showing a person must make to challenge issuance of a license in the ALC as an “affected person.” *Id.* at 428, 702 S.E.2d at 251 (“In our view, the ALC’s and the court of appeals’ foray into the degree of ‘formality’ needed for § 44-1-60(E) ‘affected person’ status is *not necessary for deciding this appeal.*”) (emphasis added). In light of *Carnival* and *Smiley*, Cruise Opponents’ argument fails.

Perhaps recognizing this argument is unsupportable, Cruise Opponents contend that all they need show is that they are injured, arguing that the additional requirements of causation and redressability are inapplicable. Br. of Appellant at 25. But even here, they generally return to the theme that they are “affected” because “[t]hey participated in the process at every turn.” Br. of Appellant at 26. This argument suggests that the submission of affidavits was unnecessary because they participated in the administrative process. *See* Br. of Appellant at 27. But the Supreme Court has not followed this line of reasoning. *See Carnival*, 407 S.C. at 79, 753 S.E.2d at 852; *Smiley*, 374 S.C. at 328-29, 649 S.E.2d at 32-33. Thus, as a matter of state law, the

federal decisions cited by the Cruise Opponents regarding standing afforded to parties regarding procedural challenges do not assist in this argument.²⁴ *See, e.g., Mendoza v. Perez*, 754 F.3d 1002, 1010 (D.C. Cir. 2014) (“The requirements for standing differ where, as here, plaintiffs seek to enforce procedural (rather than substantive) rights.”).

The Cruise Opponents’ last argument assumes that the term “affected person” in section 44-1-60 requires a lesser showing than the *Lujan-Sea Pines* analysis and contends that the Cruise Opponents are indeed “affected persons.” But even accepting their erroneous statutory interpretation, Cruise Opponents failed even to show they were affected for the same reasons they did not suffer an injury in fact. *See* discussion *supra*. Accepting Cruise Opponents’ position would allow the term “affected person” to operate as a vehicle for virtually any person to challenge any license issued by DHEC under section 44-1-60. To be sure, Cruise Opponents recognize this problem, arguing that “affected persons” is a limited universe of citizens.” Br. of Appellant at 28. However, Cruise Opponents fail to explain just how the term would be limited.²⁵ This argument should be rejected and the ALC affirmed.

²⁴ Nor is the relief requested (*i.e.*, denying the license) procedural. It is substantive and intended to stop the project, in contrast to following a rulemaking or other process. *See, e.g., Mendoza*, 754 F.3d at 1010 (involving federal Administrative Procedure Act claim for failing to follow proper notice-and-comment procedures).

²⁵ Of course, as previously noted, the legislative intent was for the term “affected person” to be limited to the certificate of need definition.

C. The ALC correctly found that Cruise Opponents are not entitled to maintain this action through associational standing principles.

“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.” *Beaufort Realty*, 346 S.C. at 301, 551 S.E.2d at 589 (citing *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977)). Associational standing typically involves declaratory or injunctive relief because “it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured.” *Hunt*, 432 U.S. at 343 (quoting *Warth*, 422 U.S. at 515); *see also Smith Land*, 393 S.C. at 360, 713 S.E.2d at 293 (dissenting opinion). Of course, that is not the case here, further demonstrating the problems with the Cruise Opponents’ case.

The first prong of the *Beaufort Realty Hunt* analysis is not met based on the ALC’s determination that the individual members lacked standing. *See Sea Pines*, 345 S.C. 600-01, 550 S.E.2d at 291; *see also Hunt*, 432 U.S. at 342; *Md. Highways Contractors Ass’n, Inc. v. Md.*, 933 F.2d 1246; 1250 (4th Cir. 1991). The second *Beaufort Realty Hunt* prong also is not present because, for the reasons the ALC fully explains, none of the issues in this lawsuit is germane to any of the Cruise Opponents’ organizational purposes. Challenging the license does not inspire respect for Charleston’s material and

cultural heritage²⁶; protect any structure that adds to the architectural and cultural character of Charleston²⁷; foster a spirit of community with the Historic Ansonborough neighborhood²⁸; prevent harm to the state's natural resources and preserve quality of life, especially in light of the failure to establish any injury-in-fact arising from the license²⁹; protect the 620 members living south of Broad Street in view of the proposal to move cruise operations approximately 600 yards further away³⁰; or protect the world's oceans, waves, beaches, again especially in view of the failure to show any

²⁶ Preservation Society of Charleston. *See* Standing Order at 15. (R. p. 000091)

²⁷ Historic Charleston Foundation. *See* Standing Order at 15. (R. p. 000091) Ms. Lane's alleged business harm is not germane to her membership in the Historic Charleston Foundation. Standing Order p.9 n.11. (R. p. 000085)

²⁸ Historic Ansonborough Neighborhood Association. *See* Standing Order at 14-15. (R. pp. 000090-91)

²⁹ Coastal Conservation League. *See* Standing Order at 16. (R. p. 000092) As the ALC noted, the League must be more specific because of this broadly stated purpose, unless it is to be afforded associational standing for any topic it wishes to address. *Id.*

³⁰ Charlestowne Neighborhood Association. *See* Standing Order at 15 & n.19. (R. p. 000091) Cruise Opponents argue that the affidavit of Stephen Gates establishes associational standing through his conclusory testimony regarding the impact of the capital improvement plan on the organization. Br. of Appellants at 41-42. However, as noted above, Mr. Gates' affidavit is short on specifics and his unsupported statement that there is an impact does not compel the court to find that Charlestowne has standing.

cognizable injury attributable to the license.³¹ *See* Standing Order at 15-16. (R. pp. 000091-92)

Even if the conclusory and self-serving allegations set forth in the submitted affidavits are taken as true, the third *Beaufort Realty Hunt* factor is not present because the alleged injuries affect the individuals personally, rather than as members of the representative associations. *See* Standing Order at 16-17. (R. pp. 000092-93) For example, the allegations by Virginia Lane about alleged impacts to her architecture business are personal to her and do not establish standing by the Historic Charleston Foundation of which she is a member. *See* Standing Order at 9, n.11. (R. p. 000085) Similarly, the allegations by Tommie Robertson, even if accepted, involve personal injuries that do not assist the League in establishing standing for a matter germane to its organizational purposes. *See* Standing Order at 16-17 & nn.21-22. (R. pp. 000092-93)

Cruise Opponents complain that, in analyzing the individual participation prong, the ALC erred in applying the dissenting opinion from *Georgetown County League of Women Voters v. Smith Land Co.* The Court need not reach this issue because, for the reasons set forth above, Ms. Robertson's affidavit does not adequately establish an injury for standing purposes. Moreover, Cruise Opponents do not explain why the ALC erred in applying the analysis

³¹ Charleston Chapter of the Surfrider Foundation. *See* Standing Order at 15-16. (R. pp. 000091-92)

in the dissent other than to argue that *Carnival* grants standing if one or more of an associations' members will suffer an individual injury. Br. of Appellant at 43 (citing *Carnival*, 407 S.C. at 76, 753 S.E.2d at 850-51). But *Carnival* does no more than cite to the general rule and the question of whether associational standing existed was not an issue before the Court.

The question therefore remains what, in circumstances like those presented here, an association must show to establish that participation of the individual members is not required. *See* Standing Order at 17 n.21 ("Thus, to date, the only two Justices to have evaluated the *Beaufort Realty/Hunt* test under similar circumstances came down on the side of the Ports Authority's argument in this case, while the remaining three justices have taken no position on the issue."). In *Smith Land*, Justices Hearn and Kittredge conclude that, in order to satisfy the third prong of the *Hunt* test, the organization asserting its standing must show that the right it seeks to vindicate is common to the membership and that any alleged injuries derive from membership in the organization. *Id.*, 393 S.C. at 360, 713 S.E.2d at 293. Injury to one member does not extend to the rest of the organization. *Id.*, 393 S.C. at 361, 713 S.E.2d at 293. The third prong must be read to focus on injuries that are common to the membership in order to ensure that the persons actually injured receive the benefit of any recovery. *See Hunt*, 432 U.S. at 343.

The ALC properly found 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. Those injuries have nothing to do with her membership in the organization. Standing Order at 16-17. (R. pp. 000092-93) Cruise Opponents essentially advance a standard that renders meaningless the third prong of the *Beaufort Realty-Hunt* analysis. *See Hunt*, 432 U.S. at 343 (focusing on benefit to membership in discussion of associational standing and relief sought). Moreover, Ms. Robertson's affidavit does not establish a cognizable injury to support standing for either her or the association. Therefore, the ALC's determination that Cruise Opponents lack associational standing should be affirmed.

D. The ALC correctly refused to apply the public importance exception.

The ALC correctly found that applying the public importance exception was not appropriate here because it found no need to resolve the issue for future guidance. Standing Order at 18 ("[T]he permitted activity will not change the existing footprint of [Union Pier], nor will it change the function of [Union Pier] as a marine terminal, and the permit cost is not representative of its public importance or the need for future guidance."). (R. p. 000094) The ALC also found that Cruise Opponents did not show that resolution of the issue is needed for future guidance. *Id.*

There is no need for future guidance regarding the issues presented by this case. *See Carnival Corp.*, 407 S.C. at 79-81, 753 S.E.2d at 852-53. This matter deals with the routine question of whether DHEC properly issued a

license to install five pilings underneath Union Pier Terminal. It is a permitting issue of the type that DHEC and the ALC deal with as a matter of course. The issues do not rise to a level of public importance requiring guidance merely because matters pertaining to cruise ships may impact the City of Charleston. *See Carnival Corp.*, 407 S.C. at 79-81, 753 S.E.2d at 852-53. Moreover, because the only issue in this case is whether the license was properly granted, 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.”).

Cruise Opponents argue that this case impacts a profound public interest. However, the interest implicated by this case is substantially the same as that at issue in *Carnival Corp.*, in which the Supreme Court refused to apply the public importance exception for challenges to cruise operations pursuant to zoning ordinances and “tort liability for a public and a private nuisance cause of action.” (App. Vol. I R. pp.003785-3795) Cruise Opponents state that they should be afforded standing based on the ALC’s finding that their alleged injuries were “shared by all of Charleston’s residents and visitors.” Br. of Appellant at 39. But if the public importance exception is not implicated by claims of public and private nuisance, it is not implicated by

alleged generalized harms resulting from long-standing operations at an existing cruise terminal.

Nor is public importance established by the legislature's adoption of a budget proviso regarding shore power, *see* Br. of Appellant at 39-40, because legislation alone does not support application of the public importance exception, especially when, as in the case of a budget proviso, the enactment is valid for only one year. That position appears to repackage the argument rejected in *Carnival Corp.*, where the petitioners attempted to argue that a matter of public interest automatically equates to a matter of public importance for purposes of applying the exception. *See Carnival Corp.*, 407 S.C. at 81, 753 S.E.2d at 853. Adoption of that argument also would be contrary to the Supreme Court's injunction that "standing cannot be granted to every individual with a grievance against a public official" because that would subject public officials "to numerous lawsuits at the expense of both judicial economy and the freedom from frivolous lawsuits." *Id.* at 80, 753 S.E.2d at 853 (quoting *Sloan v. Sanford*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004)).

2. Cruise Opponents may not appeal from the denial of their motion to vacate, which was correctly denied by the ALC in any event.

Cruise Opponents filed their motion to vacate on or about November 1, 2013, contending that there was no required water quality certification for

the Project.³² They based this contention on the Federal District Court's order vacating the Corps' NWP 3 authorization for the Project. Thus, according to Cruise Opponents, the license "should be immediately vacated" or, "[a]lternatively, proceedings in relation to the state permit should be remanded to DHEC." Cruise Opponents' Mot. to Vacate pp. 2-3, (R. pp. 000762-763); *see also* Ports Authority Resp. to Mot. to Vacate.³³ (R. pp.

³² Before issuing any federal permit with respect to a project that may result in a discharge into navigable waters of the United States, the Corps is required to obtain either a water quality certification from the state in which the discharge is to take place or waiver of such water quality certification pursuant to Section 401 of the Clean Water Act, 33 U.S.C.A. § 1341 (401 Certification). *See* S.C. Code Ann. Regs. 61-101. The 401 Certification must be issued, denied, or waived by DHEC within one year after its receipt of the request for certification. If no action is taken by the state—DHEC in this instance—within one year after it receives the request, the state waives its right to act on the request for certification. *See* 33 U.S.C.A. § 1341(a)(1).

³³ At this point, the Motion to Vacate is in any event moot. DHEC issued the required 401 Certification for the Project within one year after it received the Application when it issued the 401 Certification for NWP 3 undertakings on April 23, 2013 or, alternatively, when it issued the License (which as a matter of law serves as a 401 Certification) on December 18, 2012. *See* S.C. Code Ann. Regs. 30-2(H); S.C. Code Ann. Regs. 61-101.A.8 ("The Department will not issue a separate 401 water quality certification for an activity which requires a direct permit for alteration of the critical area of the coastal zone ... The direct permit will serve as the 401 water quality certification for an associated Federal permit.").

The Cruise Opponents argue that no 401 Certification exists for the Project. However, in such event, DHEC's one-year period under Section 401 of the CWA to issue such 401 Certification closed in January 2013 (as the application was filed in January 2012). In that case, the 401 Certification has been waived as a matter of law. Under either scenario, the Project either has an affirmative 401 Certification (imposing no conditions) or it has a waiver from the requirements of Section 401 of the Clean Water Act (imposing no conditions). *See generally*, Ports Authority Resp. to Mot. to Vacate. (R. pp. 000802-902)

000802-902) On December 27, 2013, the ALC denied the motion to vacate, finding in pertinent part as follows:

At this stage of the litigation, there is not sufficient evidence for this Court to determine the extent of DHEC's review or the procedures that were followed in issuing the permit. Moreover, in presenting their challenge to DHEC's determination, Petitioners can certainly dispute whether review of this matter should be based, in part, on the 401 Certification associated with NWP3 or the critical area permit and CZC Certification. The ALC can 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. Thus, the motion to vacate must be denied at this stage of the litigation.

Order Denying Mot. to Vacate at 7 (emphasis added). (R. p. 000062)

A. The Motion to Vacate Order is not properly before this Court because it is the equivalent of the denial of a motion for summary judgment and, as such, is never appealable.

Although the Motion to Vacate Order denied a request for relief captioned as a motion to vacate, it is necessary to consider the substance of the relief sought in that motion to determine whether the Motion to Vacate Order may be appealed to this Court. *See Richland County v. Kaiser*, 351 S.C. 89, 94, 567 S.E.2d 260, 262 (2002) ("Accordingly, because the relief sought was more in the nature of a request for an injunction than a mandamus, we will treat this action as an appeal from the denial of injunctive relief."); *see also, e.g., Fields v. Reg'l Med. Ctr. of Orangeburg*, 363 S.C. 19, 27, 608 S.E.2d 506, 510 (2005) (holding that appeal was timely because "[i]t is proper to treat Plaintiff's written motion as a Rule 59(e) motion even though it was erroneously captioned as a motion for new trial."); *Lucey v. Meyer*, 401 S.C.

122, 131-33, 736 S.E.2d 274, 279-80 (Ct. App. 2012) (holding that appeal was timely because Rule 59(a) motion was in substance a Rule 59(e) motion that stayed the time for appeal). Applying that analysis here requires a conclusion that the Motion to Vacate Order is not appealable because the motion to vacate actually was a motion for summary judgment.

In the motion to vacate, Cruise Opponents argued that they were entitled to judgment as a matter of law with respect to their claims. *See* Rule 56(b), SCRPC. In their request for contested case hearing, Cruise Opponents claimed that the ALC should reverse the decision to issue the license or, alternatively, remand the decision to DHEC to review additional issues. *See* Pet'rs' Req. Contested Case Hrg. p.13. (R. p. 000132) In the motion to vacate, Cruise Opponents argued that, because the Federal District Court "issued an order vacating the Corps' NWP 3 authorization" for the project, the License "should be immediately vacated" or, "[a]lternatively, proceedings in relation to the state permit should be remanded to DHEC." Cruise Opponents' Mot. Vacate pp.2-3 (R. pp. 000762-763);

In other words, the motion to vacate in substance contends that "there is no genuine issue of material fact [with respect to their claims for relief] and that [they are] entitled to judgment as a matter of law." Rule 56(b), SCRPC. That makes the motion to vacate a motion for summary judgment. *Kaiser*, 351 S.C. at 94, 567 S.E.2d at 262 ("It is the substance of the requested relief that matters regardless of the form in which the relief was framed.") (internal

quotation marks omitted); see *Sanford v. S.C. State Ethics Comm'n*, 385 S.C. 483, 495-96, 685 S.E.2d 600, 607 (2002) (treating petition for writ of mandamus as request for injunctive relief for purposes of reviewing claims on appeal because “that is substantively what he is requesting”).

The conclusion that the motion to vacate actually is a motion for summary judgment is further demonstrated by a review of the findings in the Motion to Vacate Order. An order denying summary judgment decides “nothing about the merits”; allows the moving party to raise the issues again at a later stage of the proceedings; and “simply decides the case should proceed to trial.” *Ballenger v. Bowen*, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994). By denying the motion to vacate because it did not have sufficient evidence to render a decision at that time, the ALC determined that there was a genuine issue of material fact with respect to issues presented in the motion to vacate, that the challenge to the Permit could be raised later in the litigation, and that the ALC could make a final determination at that time based on the facts of the case. *See* Motion to Vacate Order. (R. pp. 000056-63)

Consequently, because the motion to vacate in substance is a motion for summary judgment, the Motion to Vacate Order denying that motion is not appealable. *Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 167-68, 580 S.E.2d 440, 443-44 (2003) (“The denial of summary judgment is not appealable, even after final judgment.”); *Ballenger*, 313 S.C. at 476-78, 443 S.E.2d at 380 (“This Court has repeatedly held that the denial of summary

judgment is not directly appealable.”). The Motion to Vacate Order “does not finally determine anything about the merits of the case” and the issues presented in the underlying motion “may be raised again later in the proceedings.” *Ballenger*, 313 S.C. at 477, 443 S.E.2d at 380. If Cruise Opponents prevail on their challenge to the Standing Order, they can raise on remand the same issues presented in the motion to vacate. *See id.* If they do not prevail in this challenge, the issues presented in the motion to vacate are irrelevant because Cruise Opponents never had standing to raise those issues in the first instance and should not be permitted to challenge them on appeal. Regardless, the Motion to Vacate Order is an order denying summary judgment and may not be appealed even though there is a final judgment in the case.

B. As a matter of law Cruise Opponents were not entitled to the relief they sought in the motion to vacate.

The project received all necessary licenses required by state law, including the state requirement under Section 401 of the Clean Water Act. Because the Project occurs in a “critical area” of the coastal zone in South Carolina, South Carolina law requires a critical area permit from DHEC, *see* S.C. Code Ann. § 48-39-130(A), as well as a coastal zone consistency determination (CZCD), *see* S.C. Code Ann. § 48-39-80. DHEC issued the permit within one year of the request, and that permit serves as the 401 Certification, the critical area permit, and the CZCD for the Project. *See* Mot. Summ. J. Standing, Exh. 6,

Permit, (R. pp. 001285-1306); *see* Order Denying Mot. to Vacate, filed Dec. 20, 2013, at 6.³⁴ (R. p. 000061)

Cruise Opponents continue to misunderstand the law surrounding the 401 Certification program generally, as well as its application to the Project specifically. While Cruise Opponents' argument that a different 401 Certification procedure is followed for projects qualifying for a Nationwide Permit is certainly novel, it is an argument borne out of convenience and is not only unsupported by any statute or case law, but is directly contradicted by the plain language of our state's regulations governing critical area permits. As the ALC correctly determined:

Under state law, the critical area permit serves as the 401 Certification and the 401 Certification serves as the CZC Certification.... [W]ater quality issues were a part of DHEC's analysis in its critical area permit evaluation, *see* S.C. Code Ann. Regs. 30-2(H), and the critical area permit issued by DHEC for the Project also serves as the 401 Certification. Moreover, since the critical area permit is "project specific" and by law it "serves as the 401 water quality certification," it appears that the existing critical area permit document may serve as the 401 Certification as it was issued later in time and subsequent to DHEC's general certification for NWP 3.

³⁴ Pursuant to South Carolina law, the Project's critical area permit is the 401 Certification. S.C. Code Ann. Regs. 30-2(H), 61-101.A.8. Further, "the [CZCD] determination shall be issued as a component of, and concurrently with, the [401] certification" in accordance with the requirements of a CZCD under the CMP, and "the [401] certification will serve also as the [CZCD]." S.C. Code Ann. Regs. 61-101.A.7.

Order Denying Mot. to Vacate, filed Dec. 20, 2013, at 6. (R. p. 000061) Thus, as a matter of law, the critical area permit is a 401 Certification for the Project.³⁵

3. Cruise Opponents are not entitled to relief from the ALC's denial of their Motion to Expand Discovery.³⁶

The 90-day discovery period allowed by the ALC rules of procedure expired on May 20, 2013. Rule 21.A, RPALC; *see* Discovery Order at 2 (R. p. 000065); Br. of Appellants at 52. Cruise Opponents served interrogatories and requests to produce during this 90-day period, *but never asked the ALC to expand discovery before the period expired*. Discovery Order at 2. (R. p. 000065) Cruise Opponents in fact did not file a Motion to Expand Discovery until more than seven months later, on December 23, 2013. (R. pp. 001041-1045) The ALC initially denied the motion in the Discovery Order, (R. pp. 000064-68), but, after Cruise Opponents moved for reconsideration, it made the following determination in the Standing Order:

³⁵ Alternatively, under Cruise Opponents' theory, no 401 Certification was issued within the one-year timeframe and thus certification has been waived. In either instance, the Project received the requisite decision to move forward under Section 401.

Moreover, Cruise Opponents never raised any challenge, issue, or allegation to the 401 Certification until the Motion to Vacate. They did not challenge the 401 Certification for the NWP 3, and did not raise the 401 Certification issue to the DHEC Board or the ALC in their request for contested case. Thus, Cruise Opponents have waived any challenge to the status of the 401 Certification.

³⁶ Because Cruise Opponents lack standing, the Court need not reach this discovery issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

Petitioners filed a Motion for Reconsideration of this Court's Order of March 3, 2014, denying Petitioner's Motion to Expand Discovery on March 13, 2014. In response to the Court's e-mail inquiry on March 24, 2014, counsel for Petitioners represented to the Court that Petitioners sought expanded discovery in order to prepare for the hearing on the merits and not for purposes of responding to the Motion for Summary Judgment. Therefore, the Order denying Petitioners' Motion to Expand Discovery is vacated. Nevertheless, in light of the disposition of the summary judgment motion, the Motion for Expanded Discovery is moot and is thus denied. Likewise, all remaining outstanding motions are moot and are also denied.

Standing Order at 19 n.23 (emphasis added). (R. p. 000095)

Standard of Review

The ALC's rulings on discovery issues are reviewed for abuse of discretion. *Oncology & Hematology Assocs. of S.C., LLC v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 380, 387, 692 S.E.2d 920, 924 (2010). These determinations are given deference "absent a clear showing of an abuse of discretion." *Hedgepath v. Am. Tel. & Tel. Co.*, 348 S.C. 340, 353, 559 S.E.2d 327, 334 (Ct. App. 2001). An abuse of discretion occurs if there is an error of law or a lack of evidence to support any factual conclusions. *Id.* Cruise Opponents have the burden to show that the ALC abused its discretion. *Dunn v. Dunn*, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989).

A. None of the ALC's discovery rulings are properly before this Court because the ALC vacated the Discovery Order and because Cruise Opponents failed to challenge the denial of their Motion to Expand Discovery as moot.

The Discovery Order is not appealable because the ALC vacated that order, rendering it null and void. *See Webster v. Clanton*, 259 S.C. 387, 391, 192 S.E.2d 214, 216 (1972) (holding that custody order issued without notice

“was clearly void, and of no effect whatever and no appeal therefrom was necessary to protect the rights of the father”); BLACK’S LAW DICTIONARY (9th ed. 2009) (defining vacate as to “nullify or cancel; make void; invalidate <the court vacated the judgment>”). Cruise Opponents’ attempted appeal from the Discovery Order therefore should be dismissed. *See Leviner v. Sonoco Products Co.*, 339 S.C. 492, 494, 530 S.E.2d 127, 128 (2000) (holding that the Court of Appeals should have dismissed an appeal from a void order); *see also Brennan’s, Inc. v. Colbert*, 125 So. 3d 537, 541, *on reh’g* (Ct. App. La. Nov. 15, 2013) (holding there is no appeal “from an absolutely null order”); *cf. Hudson v. S.C. Dep’t of Highways & Pub. Transp.*, 324 S.C. 245, 246, 478 S.E.2d 839, 840 (1996) (dismissing appeal from void order).

Cruise Opponents furthermore have waived their right to challenge the vacatur of the Discovery Order and the denial of their Motion to Expand Discovery as moot. Their third issue on appeal is directed to the initial Discovery Order alone and, thus, does not raise any other discovery arguments. Br. of Appellants at 1; *see* Rule 208(b)(1)(B), SCACR. Even if the issue as stated could be read as raising a challenge to the vacatur of the Discovery Order and denial of their motion as moot, Cruise Opponents have abandoned the issue by limiting their argument to the Discovery Order alone and failing to mention the subsequent actions by the ALC. *Fields v. Melrose Ltd. P’ship*, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993) (“An issue raised on appeal but not argued in the brief is deemed abandoned and will

not be considered by the appellate court.”). Finally, in light of Cruise Opponents’ affirmative representation to the ALC regarding their need for discovery only for trial, *see discussion supra*, p.41, Standing Order at 19 n.23. (R. p. 000095),³⁷ any attempt to challenge discovery issues in relation to the summary judgment motion is waived.³⁸ *See Degenhart v. Knights of Columbus*, 309 S.C. 114, 118, 420 S.E.2d 495, 497 (1992) (holding that appeal of motion to compel discovery was not preserved where party did not request a continuance or ask the court to hold in abeyance any ruling on the motion for summary judgment); *see Bayle v. S.C. Dep’t of Transp.*, 344 S.C. 115, 128, 542 S.E.2d 736, 742-43 (Ct. App. 2001).

³⁷ Cruise Opponents are judicially estopped from taking a contrary position on appeal. *Hayne Federal Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997); *see Cothran v. Brown*, 357 S.C. 210, 216, 592 S.E.2d 629, 632 (2003) (evaluating elements of judicial estoppel by considering, among other things, a statement made by a party’s counsel).

³⁸ Even if this Court determines that Cruise Opponents have standing, the nature and extent of any discovery should be left for the ALC to consider on remand. Because the initial Discovery Order was vacated and the motion to expand discovery denied as moot, the ALC would be required to make factual findings in the first instance in considering the motion to expand discovery. *See Hedgepath*, 348 S.C. at 353, 559 S.E.2d at 334 (abuse of discretion review includes consideration of evidentiary support). In this respect, Cruise Opponents’ efforts to re-open discovery prior to the contested case hearing is similarly unripe for this Court’s review; should this Court determine standing to bring this action exists, Cruise Opponents may revisit the discovery motion at the appropriate time.

B. Even if the issue is properly raised, the ALC did not abuse its discretion in denying the Motion to Expand Discovery in the Discovery Order for failing to comply with the ALC's rules of procedure.

Cruise Opponents do not explain why, if discovery was so important, *see* Br. of Appellants at 55-57, they did not seek additional discovery until approximately a month before the original trial date in January 2014 and only after the Ports Authority stated that it intended to file a motion for summary judgment. Discovery Order at 3. (R. p. 000066) Their argument boils down to the proposition that the motion to expand should have been granted because the ALC's discovery rules are "observed mainly in the breach." Br. of Appellants at 53-54.³⁹ The issue is not, however, good cause for expanded discovery in response to a timely filed motion, but Cruise Opponents' failure to file any motion for more than seven months after discovery closed. Discovery Order at 3. (R. p. 000066) Their selective characterization of the timeline, Br. of Appellant at 50-51, simply illustrates that there were many months in which they 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)

³⁹ Cruise Opponents cite to the affidavit of Leslie Riley, which does not address Cruise Opponents' failure to make a timely motion. Leslie S. Riley Aff. at 2. But Ms. Riley's affidavit should not be considered in any event because Cruise Opponents first submitted it with their motion to reconsider the Discovery Order even though it clearly pertains to the issues raised in their original motion. *See* Rule 6(d), SCRCRCP. *Compare* Pet'rs' Mot. for Recons. at 5-6 & Exh. D (discussing need for discovery period beyond 90-days) *with* Pet'rs' Mot. to Expand Disc. at 2-3 (same). (R. pp. 001042-1043)

Without a justifiable explanation, Cruise Opponents attempt to explain away their failure to comply with the rules of procedure by characterizing that failure as inconsequential. *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 609-10, 681 S.E.2d 885, 889 (2009) (holding that petitioner did not demonstrate good cause when it failed to explain why properly served complaint was not answered). For example, they inappropriately characterize as “ludicrous” the finding that they had “ample opportunity to conduct discovery,” Br. of Appellant at 52, while ignoring the rest of that finding: “Petitioners ... in no way have been hindered from seeking to expand the length and/or scope of discovery *within the applicable ninety-day discovery period.*” Discovery Order at 3 (emphasis added). (R. p. 000066) And their claims of good cause for the ALC to expand discovery, Br. of Appellant at 53-57, miss the point because they do not address the fact that denial of their motion resulted in large part 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); *see Rivera-Almodovar v. Instituto Socioeconomico Comunitario, Inc.*, 730 F.3d 23, 26 (1st Cir. 2013) (holding that litigant must show excusable neglect rather than good cause for untimely motion to extend discovery deadlines); *see also Derrick v. Johnson Controls, Inc.*, 3:10-CV-

3295-CMC, 2012 WL 2072782 (D.S.C. June 8, 2012) (unpublished) (“If a party was not diligent, the good cause inquiry should end.”).

In the end, Cruise Opponents do not provide any adequate explanation for their failure to comply with the ALC’s procedural rules. Characterizing the rules of procedure as suggestions and failing to act diligently under those rules does not constitute good cause, let alone excusable neglect. *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)”); *Mauro v. Clabaugh*, 299 S.C. 184, 192, 383 S.E.2d 244, 249 (Ct. App. 1989) (mistaken belief that a counterclaim did not require a reply does not constitute good cause for allowing a late-filed reply); *cf. White Oak Manor, Inc. v. Lexington Ins. Co.*, 407 S.C. 1, 12, 753 S.E.2d 537, 543 (2014) (losing and failing to answer a complaint does not constitute good cause for setting aside a default judgment). Cruise Opponents’ attempted appeal of the Discovery Order therefore should be dismissed.

4. The ALC did not abuse its discretion in awarding sanctions against Cruise Opponents for filing a motion to remand the license to the DHEC Board on a basis unsupported by the pertinent statute.

The ALC did not abuse its discretion in awarding sanctions against Cruise Opponents for filing a frivolous motion to remand the case to the DHEC Board. Cruise Opponents contended that remand was necessary because S.C. Code Ann. § 44-1-60(F) requires the DHEC Board to conduct a final review conference in every case. But this contention was based on a single word in

the statute considered in isolation and was contrary to the statutory language taken as a whole, prior ALC and appellate court interpretations of the statute, and—significantly—Cruise Opponents’ own prior interpretation of that statute. The ALC awarded sanctions in the amount of the costs incurred by Respondents, including attorneys’ fees, in responding to the motion. (R. pp.000069-76) Cruise Opponents do not dispute the ALC’s findings, instead contending that a more lenient version of the reasonable attorney standard should apply. The award of sanctions should be affirmed.

Standard of Review

The imposition of sanctions is reviewed on appeal as an equitable matter, subject to the discretionary authority of the lower court. *Ex parte Gregory*, 378 S.C. 430, 436-37, 663 S.E.2d 46, 50 (2008). The appellate court reviews the findings of fact of the lower court, taking its own view of the evidence; where the appellate court concurs in the findings of the lower court, the award of sanctions is reviewed under a discretionary standard and will not be disturbed absent a clear abuse of discretion. *Ex parte Gregory*, 378 S.C. at 437, 663 S.E.2d at 50 (citing *Runyon v. Wright*, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996)). An abuse of discretion occurs only when the lower court’s conclusions are without reasonable factual support. *Runyon*, 322 S.C. at 19, 471 S.E.2d at 162 (citing *Dunn v. Dunn*, 298 S.C. 499, 381 S.E.2d 734 (1989)).

Analysis

A. Cruise Opponents failed to appeal the Order denying the Motion to Remand.

Cruise Opponents have not appealed either the ALC's order denying the motion to remand or the propriety of the ALC's construction of S.C. Code Ann. § 44-1-60(F). The order denying the motion to remand expressly rejected the Cruise Opponents' construction of the statute and the strained argument that the statute is ambiguous. Order Denying Remand at 2-4. (R. pp. 000009-11) Although the order denying remand was not immediately appealable, Cruise Opponents were required to raise it in this appeal because the findings in that order formed the basis of the Sanctions Order that Cruise Opponents now challenge. *See Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 565, 564 S.E.2d 94, 98 (2002). In appealing the Sanctions Order and arguing they acted reasonably, Cruise Opponents rely principally upon their construction of the statute that the ALC rejected when denying the motion to remand.⁴⁰

Because the order denying remand was not appealed, the findings in that order now are the law of the case and may not be reviewed by this Court. *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (“[A]n unappealed ruling, right or wrong, is the law of

⁴⁰ In effect, Cruise Opponents have failed to appeal from the crucial finding of the ALC upon which it based its factual determination that the motion to remand was frivolous.

the case.”). Cruise Opponents therefore cannot challenge the ALC’s construction of S.C. Code Ann. § 44-1-60(F). *Langley v. Boyter*, 284 S.C. 162, 181, 325 S.E.2d 550, 561 (Ct. App. 1984) (“[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.”). Instead, they are limited to arguing that their remand argument was reasonable even though it had been rejected by longstanding case law and failed to employ the basic tenets of statutory construction. The ALC correctly rejected this argument.

B. S.C. Code Ann. § 44-1-60(F) unambiguously establishes a discretionary standard for conducting final review conferences by the DHEC Board.

Regardless of Cruise Opponents’ failure to appeal the order denying the motion to remand, S.C. Code Ann. § 44-1-60(F) is capable of only one construction. The statute provides in pertinent part:

No later than sixty calendar days after the date of receipt of a request for final review, a final review conference must be conducted by the board, its designee, or a committee of three members of the board appointed by the chair. If the board declines in writing to schedule a final review conference or if a final review conference is not conducted within sixty calendar days, the staff decision becomes the final agency decision, and an applicant, permittee, licensee, or affected person requests pursuant to subsection (G) a contested case hearing before the Administrative Law Court....

(Emphasis added). In seeking remand, the Cruise Opponents quoted only the first sentence and ignored the remainder of subsection (F), contrary to principles of statutory construction. *State v. Gordon*, 356 S.C. 143, 152, 588 S.E.2d 105, 110 (2003) (“[T]he court should not consider the particular clause

being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law.”); *see also Georgia-Carolina Bail Bonds, Inc. v. County of Aiken*, 354 S.C. 18, 25, 579 S.E.2d 334, 338 (Ct. App. 2003).

Even a cursory review of the statute demonstrates that S.C. Code Ann. § 44-1-60(F) makes the final review conference discretionary. Moreover, S.C. Code Ann. § 44-1-60(G)(1) further demonstrates that the final review conference is discretionary, stating that a contested case request may be filed 30 days after “notice is mailed to the applicant, permittee, licensee, and affected persons that the *board declined to hold a final review conference*.” (Emphasis added.) Cruise Opponents’ effort to escape this provision, through reference to a single word in a single sentence contained in the statute, taken out of context from the remaining statutory language, demonstrates not ambiguity but a frivolous effort designed to delay litigation and, ultimately, construction of the cruise terminal. *See Bank of Am. Nat. Trust & Sav. Ass’n v. 203 N. LaSalle St. P’ship*, 526 U.S. 434, 461, 119 S. Ct. 1411, 1425 (1999) (Thomas, J., concurring) (“A mere disagreement among litigants over the meaning of a statute does not prove ambiguity; it usually means that one of the litigants is simply wrong.”). This is especially so given that counsel for the Cruise Opponents previously affirmatively represented to the Supreme

Court in another case that a final review conference is discretionary.⁴¹ In short, the statute provides no support for the argument that Cruise Opponents made for remanding the case.

C. Filing the Motion to Remand was unreasonable.

The ALC also correctly found that filing the motion to remand was unreasonable based on three supporting factual findings: “[g]iven [1] the clear statutory language, [2] the case law directly recognizing the discretionary nature of DHEC Board review and [3] prior affirmations by Petitioners, a reasonable attorney under these circumstances would not have filed the Motion to Remand.” Sanctions Order at 6. (R. p. 000074) Each of the ALC’s findings is supported by reference to the statute, case law, and other pertinent materials. The ALC also carefully considered whether Cruise Opponents’ conduct was encompassed by Rule 72, referencing Black’s Law Dictionary and Webster’s New World Dictionary definitions of frivolous. Sanctions Order at 5 (defining frivolous as “lacking a legal basis or legal merit; not serious; not reasonably purposeful” and “of little value or importance ... or not properly serious or sensible,” respectively). (R. p. 000073) None of these findings or definitions is challenged by Cruise

⁴¹ 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 Petition 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)

Opponents on appeal. Accordingly, this Court may consider only whether the ALC abused its discretion in awarding sanctions based on the unchallenged facts. *See Runyon*, 322 S.C. at 19, 471 S.E.2d at 162 (citing *Dunn v. Dunn*, 298 S.C. 499, 381 S.E.2d 734 (1989)).

D. There is no “bad faith” finding requirement to the imposition of sanctions under Rule 72, RPALC.

Cruise Opponents misapprehend the ALC’s standard for sanctions under Rule 72, RPALC. Rather than make the admittedly difficult argument that they acted reasonably in moving to remand, Cruise Opponents instead argue an inverse application: because their actions were not egregious (according to them, which implicitly acknowledges such actions may have been unreasonable), there was no bad faith. However, neither Rule 72 nor the Sanctions Act requires a finding of bad faith as a basis for sanctions. *See* Sanctions Order at 2-3 (setting forth the standard under Rule 72, RPALC, including its reference to S.C. Code Ann. § 15-36-10 (Frivolous Civil Proceeding Sanctions Act (“Sanctions Act”)) (citing Rule 72, RPALC, 2009 Revised Notes). (R. pp. 000070-71) Therefore, Cruise Opponents’ argument regarding the lack of “egregious behavior” present in other cases is beside the point. *See* Br. of Appellants at 61-63 (citing *Ex parte Bon Secours-St. Francis Xavier Hospital Inc.*, 393 S.C. 590, 713 S.E.2d 624 (2011); *Rutland v. Holler, Dennis, Corbett, Ormond & Garner (Law Firm)*, 371 S.C. 91, 637 S.E. 316 (Ct. App. 2006); *Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 633 S.E.2d 722 (2006); and *Holmes v. Haynsworth, Sinkler & Boyd, P.A.*, 408 S.C. 620, 760

S.E.2d 399 (2014)). Moreover, the ALC found that “the law simply requires that the Court find the filing was ‘frivolous.’” Sanctions Order at 5, and Cruise Opponents failed to appeal from this finding. (R. p. 000073).

Similarly, the ALC properly rejected the “reasonable attorney” affidavits submitted by the Cruise Opponents in opposition to the motion for sanctions. The ALC correctly found that neither affidavit was persuasive on the issue of the frivolity of the motion to remand. Sanctions Order at 5-6. (R. pp. 000073-74) The first affidavit was biased because it was submitted by a member of the law firm representing Cruise Opponents. The other affiant had no demonstrable practice experience in the administrative arena before DHEC or the ALC. In sum, both affidavits are merely impermissible testimony on issues of law, *see Dawkins v. Fields*, 354 S.C. 58, 66, 580 S.E.2d 433, 437 (2003), with no attempt to aver that the opinions contained in the affidavits are based on personal knowledge, or that either affiant is an expert in this area of the law. The ALC was correct to reject the submitted affidavits out of hand.

E. Cruise Opponents fail to appeal the imposition and amount of attorneys’ fees as a reasonable sanction.

Finally, in challenging the Sanctions Order, Cruise Opponents do not appeal from the ALC’s determination that a monetary sanction in the form of an award of attorneys’ fees and costs incurred by the Ports Authority is the appropriate remedy for their frivolous filing. Nor do they appeal from the

amount—\$9,300.00—of attorneys’ fees awarded.⁴² Accordingly, those rulings are the law of the case and beyond the scope of review. *See Atl. Coast Builders & Contractors*, 398 S.C. at 329, 730 S.E.2d at 285. Cruise Opponents’ failure to appeal both the award and amount of attorneys’ fees means that, should this Court agree that the ALC did not abuse its discretion in awarding sanctions, the sanctions inquiry is concluded and the imposition and amount of attorneys’ fees must be sustained by the Court.

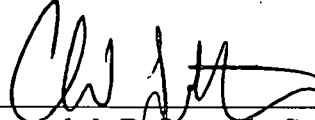
Regardless, the ALC’s award of the attorneys’ fees attributable to the Ports Authority’s defense of the motion to remand is directly related to the sanctioned conduct. *See Balloon Plantation v. Head Balloons*, 303 S.C. 152, 399 S.E.2d 439 (Ct. App. 1990) (holding that a sanction should be aimed at the specific misconduct of the party sanctioned). In fact, the Ports Authority requested additional attorneys’ fees and costs of \$11,672.50, representing the fees and costs incurred in seeking sanctions for the Cruise Opponents’ frivolous motion to remand. Although the ALC limited the sanctions award to the costs attributable solely to defending the motion to remand, it found the additional request “has merit” and “is reasonable.” Sanctions Order at 6 n.7. (R. p. 000074) Based on those findings, this Court would be justified in awarding the Ports Authority the full amount of fees and costs originally requested.

⁴² Indeed, counsel for the Cruise Opponents represented to the ALC that “[w]e certainly will accept anything the court wishes to do” on the motion for sanctions. *See* September 6, 2013 Hrg. Tr. at 74:4-6. (R. p. 003115)

Conclusion

For the reasons explained above, the decisions of the ALC should be affirmed and the appeal should be denied.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISRATIVE LAW COURT

Ralph K. Anderson, III, Chief Administrative Law Judge

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,

v.

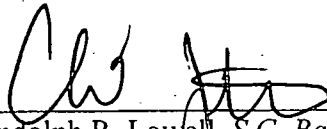
South Carolina Department of Health and
Environmental Control and South Carolina
State Ports Authority, ... Respondents.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Respondent South
Carolina State Ports Authority complies with Rule 211(b), SCACR.

[SIGNATURE PAGE FOLLOWS]

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Communities for Cruise Control, ...Appellants,

v.

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

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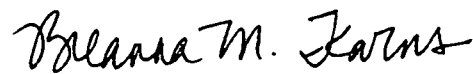
This is to certify that I, a paralegal with the law firm Willoughby & Hoefer, P.A.,
have caused to be served this day one (1) copy of the **Final Brief of Respondent South
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v.

South Carolina Department of Health and
Environmental Control and South Carolina
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**Final Brief of Respondent South Carolina Department
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Table of Contents

Table of Contents.....	i
Table of Authorities.....	ii
Statement of Issues on Appeal.....	1
Statement of the Case.....	2
Statement of the Facts.....	2
Summary of Argument.....	2
Argument.....	3
I. The Administrative Law Court correctly entered summary judgment against Appellants because they failed to establish any genuine issue of material fact regarding their standing to challenge the critical area permit issued by the Department	3
II. Appellants may not appeal from the denial of their motion to vacate, which was correctly denied by the Administrative Law Court	3
III. Appellants are not entitled to relief from the Administrative Law Court 's denial of their Motion to Expand Discovery.....	7
IV. The Administrative Law Court did not abuse its discretion in awarding sanctions against Appellants for filing a motion to remand the critical area permit to the DHEC Board on a basis unsupported by the pertinent Statute	7
Conclusion.....	7

Table of Authorities

Cases

<u>Ballenger v. Bowen</u> , 313 S.C. 476, 443 S.E.2d 379 (1994)	5
<u>Culbertson v. Clemens</u> , 322 S.C. 20, 23, 471 S.E.2d 163, 164 (1996)).....	5
<u>Ex parte Wilson</u> , 367 S.C. 7, 13, 625 S.E.2d 205, 209 (2005)	5
<u>Futch v. McAllister Towing of Georgetown, Inc.</u> , 335 S.C. 598, 518 S.E.2d 591 (1999)	6
<u>Mid-State Distribs., Inc. v. Century Importers, Inc.</u> , 310 S.C. 330, 426 S.E.2d 777 (1993)	5
<u>Richland County v. Kaiser</u> , 351 S.C. 89, 567 S.E.2d 260 (2002)	5
<u>S.C. Labor Ltd., LLC v. E. Tree Serv., Inc.</u> , 362 S.C. 654, 609 S.E.2d 305 (Ct. App. 2005)	6
<u>Starnes v. S.C. Dep't of Public Safety</u> , 342 S.C. 216, 535 S.E.2d 665 (Ct. App. 2000)	6
<u>Whiteside v. Cherokee County School District No. One</u> , 311 S.C. 335, 428 S.E.2d 886 (1993)	6

South Carolina Statutes

S.C. Code Ann. § 44-1-60	2
--------------------------------	---

South Carolina Regulations

23A S.C. Code Ann. Reg. 30-2(R)	3
23A S.C. Code Ann. Reg. 61-101.A.8.....	4

Other Authorities

SCRCP 56(b)	4
SCACR Rule 220(b)	6

Statement of Issues on Appeal

1. Standing requires a concrete, particularized, and imminent injury that is causally connected to the challenged conduct and that likely will be redressed by a favorable decision. There were no specific, admissible facts showing that Appellants' alleged injuries differed from those suffered by the general public, were causally connected to the critical area permit issued by DHEC, or would be redressed by denial of the critical area permit. Did the Administrative Law Court err in determining Appellants lacked standing?
2. Appellants moved to vacate the critical area permit, essentially seeking summary judgment that DHEC did not make a required water quality certification. The Administrative Law Court denied that motion even before finding the lack of standing, determining that the disputed water quality certification could be considered in a later hearing. May Appellants appeal from the denial of this order?
3. Absent court approval, the Administrative Law Court rules require completing discovery within 90 days after an Administrative Law Judge is assigned. The Administrative Law Court denied Appellants' Motion to Expand Discovery filed well after the 90-day period, but subsequently vacated the order and denied the motion as moot. May Appellants appeal from this discovery order and, if so, did the Administrative Law Court abuse its discretion in denying the motion?
4. Appellants moved to remand the critical area permit, arguing that the DHEC Board was required to hold a final review conference even though S.C. Code Ann. § 44-1-60 recognizes that a conference is discretionary by specifying what happens if a conference is declined in writing or not held. After denying that motion, the Administrative Law Court granted the Ports Authority's subsequent motion for sanctions, finding the motion frivolous. Did the Administrative Law Court abuse its discretion?

Statement of the Case

The Department adopts and incorporates by reference Respondent South Carolina State Ports Authority's (SPA) Statement of the Case from their Initial Respondent's Brief.¹

Statement of the Facts

The Department adopts and incorporates by reference Respondent South Carolina State Ports Authority's (SPA) Statement of the Facts from their Initial Respondent's Brief.

Summary of Argument

Appellants sought to challenge the critical area permit issued by the South Carolina Department of Health and Environmental Control's Office of Ocean and Coastal Resource Management ("the Department" or "DHEC") pursuant to S.C. Code Ann. § 44-1-60, which allows an "applicant, permittee, licensee, or affected person" to file a contested case hearing challenging a final agency action by DHEC. The Administrative Law Court ("ALC") correctly applied constitutional standing principles to find that Appellants are not an "affected person" under S.C. Code Ann. § 44-1-60 because they did not establish a genuine issue of material fact regarding their burden to prove injury-in-fact, causation, and redressability. The ALC also properly determined that none of the Appellants meet all of the requirements for associational standing because their members do not have standing to sue in their own right and, with a single exception, the challenged permit is not pertinent to their associational purposes. Finally, the ALC also correctly found that Appellants should not be afforded standing pursuant to the public importance

¹ With the exception of Respondent South Carolina State Ports Authority's reference to the critical area permit using a broader and more generic term (i.e., "license").

exception because a ruling in this case is unnecessary for future guidance. The Order Denying Petitioners' Motion to Vacate ("MTV Order") and the Discovery Order are unappealable, and sanctions were appropriate. The decisions of the ALC should be affirmed.

Argument

- 1. The Administrative Law Court correctly entered summary judgment against Appellants because they failed to establish any genuine issue of material fact regarding their standing to challenge the critical area permit issued by the Department.**

The Department concurs with and incorporates by reference SPA's analysis for the first issue on appeal in its Initial Respondent's Brief at pages 15 to 32.

- 2. Appellants may not appeal from the denial of their motion to vacate, which was correctly denied by the ALC.**

The Department contends that this Court can and should affirm the ALC's MTV Order without determining whether the Department either waived the 401 certification or issued the 401 Certification with its April 23, 2012 letter to the U.S. Army Corps of Engineers or with its December 18, 2012 critical area permit. Moreover, the insufficiency of evidence cited by the ALC at the bottom of page 6 and the top of page 7 of the MTV Order (pertinent language from MTV Order quoted below) should preclude this Court from addressing SPA's mootness argument in its Initial Respondent's Brief. In footnote 33 on page 33 of its Initial Respondent's Brief, SPA makes the following 401 waiver argument:

"At this point, the Motion to Vacate is in any event moot. DHEC issued the required 401 Certification for the Project within one year after it received the Application when it issued the 401 Certification for NWP 3 undertakings on April 23, 2013 or, alternatively, when it issued the License (which as a matter of law serves as a 401 Certification) on December 18, 2012. *See* S.C. Code Ann. Regs. 30-2(R); S.C. Code Ann.

Regs. 61-101.A.8 ("The Department will not issue a separate 401 water quality certification for an activity which requires a direct permit for alteration of the critical area of the coastal zone ... The direct permit will serve as the 401 water quality certification for an associated Federal permit.").

The Cruise Opponents argue that no 401 Certification exists for the Project. However, in such event, DHEC's one-year period under Section 401 of the CWA to issue such 401 Certification closed in January 2013 (as the application was filed in January 2012). In that case, the 401 Certification has been waived as a matter of law. Under either scenario, the Project either has an affirmative 401 Certification (imposing no conditions) or it has a waiver from the requirements of Section 401 of the Clean Water Act (imposing no conditions). *See generally* Exh. 13, Ports Authority Resp. to Mot. to Vacate. (R. pp.)"

This Court need not address SPA's above-referenced mootness argument. In its Initial Respondent's Brief, SPA correctly asserts that the MTV Order is not properly before this Court because the Order is the equivalent of the denial of a summary judgment motion and, as such, is never appealable.² Given Appellants' argument in their Second Amended Initial Brief and previously in their Motion to Vacate,³ the Department concurs with SPA's contention that the MTV Order is in reality a non-appealable interlocutory order denying Petitioners' summary judgment motion.⁴ Like the

² An order denying summary judgment decides "nothing about the merits"; allows the moving party to raise the issues again at a later stage of the proceedings; and "simply decides the case should proceed to trial." Ballenger v. Bowen, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994). "This Court has repeatedly held that the denial of summary judgment is not directly appealable." *Id.*, 313 S.C. at 476-78, 443 S.E.2d at 380.

³ Petitioners argue in pertinent part that, because the Federal District Court "issued an order vacating the Corps' NWP 3 authorization" for the Project, the Permit "should be immediately vacated" or, "[a]lternatively, proceedings in relation to the state permit should be remanded to DHEC." Mot. Vacate pp. 2, 3. This argument by Petitioners is simply another way of stating that "there is no genuine issue of material fact [with respect to their claims for relief] and that [they are] entitled to judgment as a matter of law." S.C. R. Civ. P. 56(b).

⁴ The Petitioners' captioning their motion as a Motion to Vacate is not determinative. "It is the substance of the requested relief that matters regardless of the form in which the

characteristics of a summary judgment denial order articulated in Ballenger v. Bowen, 313 S.C. 476, 443 S.E.2d 379, (1994) (see footnote 2 above), the MTV Order in this case did not decide the merits of Appellants' arguments, but simply decided the case should proceed to trial. In particular, the ALC stated the following:

Since the Project may still be eligible for general, NWP approval, it appears premature to dismiss this case upon the presumption that an analysis under NWP 3 is improper.⁵

...

At this stage of the litigation, there is not sufficient evidence for this Court to determine the extent of DHEC's review or the procedures that were followed in issuing the permit. Moreover, in presenting their challenge to DHEC's determination, Petitioners can certainly dispute whether review of this matter should be based, in part, on the 401 Certification associated with NWP3 or the critical area permit and CZC Certification. The ALC can 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. Thus, the motion to vacate must be denied at this stage of the litigation."⁶

MTV Order pp. 6-7. (emphasis added). The ALC thus determined that there was a genuine issue of material fact regarding when the Department issued its 401 Certification and denied the Appellants' motion to vacate in order to allow this matter to be resolved

relief was framed." Richland County v. Kaiser, 351 S.C. 89, 94, 567 S.E.2d 260, 262 (2002)).

⁵ Based on the ALC's language above, there is insufficient evidence for this Court to determine the extent of DHEC's review or the procedures that were followed in issuing the permit. Accordingly, the Department contends that the facts of this case do not preclude a future 401 analysis for an individual Corps permit, if such a 401 Certification is deemed necessary. The 401 Certification issued in conjunction with NWP3 was based on the parameters established in that general permit and may not cover new issues that arise from a new individual permit.

⁶ "Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final." Ex parte Wilson, 367 S.C. 7, 13, 625 S.E.2d 205, 209 (2005) (citing Mid-State Distribs., Inc. v. Century Importers, Inc., 310 S.C. 330, 336, 426 S.E.2d 777, 780 (1993)). "As a general rule, only final judgments are appealable." Id., (citing Culbertson v. Clemens, 322 S.C. 20, 23, 471 S.E.2d 163, 164 (1996)).

after evidence was presented at trial. Consequently, because the MTV Order is a non-appealable interlocutory order and because no evidence was ever submitted addressing when the Department issued its 401 Certification, it would be premature for this Court to decide whether the Department waived the 401 Certification per S.C. Code Ann. Regs. 61-101.A.6.

Rule 220(b), SCACR maintains that an appellate court's opinion must express in writing "every point distinctly stated in the case which is necessary to the decision of the appeal . . ." (emphasis added). In this case, deciding the 401 waiver issue is *not* necessary to this Court's decision per Rule 220(b). The fact that the MTV Order is unappealable and interlocutory is a sufficient basis to deny the Appellants' appeal of this order without addressing SPA's above-referenced 401 waiver argument. Such a course of action (i.e., denying the appeal of the MTV Order without addressing the 401 waiver issue) is consistent with the Supreme Court's long held position that an appellate court need not and should not address remaining issues on appeal where the determination of a prior issue is dispositive. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613; 518 S.E.2d 591, 598 (1999); Whiteside v. Cherokee County School District No. One, 311 S.C. 335, 428 S.E.2d 886 (1993); Starnes v. S.C. Dep't of Public Safety, 342 S.C. 216, 222-23, 535 S.E.2d 665, 668 (Ct. App. 2000). To uphold the MTV Order, based in part on the 401 waiver issue when no evidence regarding this issue has been presented to the ALC, amounts to an unnecessary advisory opinion; particularly since proper grounds for affirming the order plainly exist (namely, the MTV Order is a non-appealable interlocutory order). This Court has consistently held that such advisory opinions are improper. See S.C. Labor Ltd., LLC v. E. Tree Serv., Inc., 362 S.C. 654,

658, 609 S.E.2d 305, 307 (Ct. App. 2005) ("We do not address this issue because we do not give advisory opinions."). Accordingly, affirmation of the MTV Order need not be based on a 401 waiver analysis.

3. Appellants are not entitled to relief from the Administrative Law Court's denial of their Motion to Expand Discovery.

The Department concurs with and incorporates by reference SPA's analysis for the third issue on appeal in its Initial Respondent's Brief at pages 39 to 45.

4. The Administrative Law Court did not abuse its discretion in awarding sanctions against Appellants for filing a motion to remand the critical area permit to the DHEC Board on a basis unsupported by the pertinent Statute.

The Department concurs with and incorporates by reference SPA's analysis for the fourth issue on appeal in its Initial Respondent's Brief at pages 45 to 53.

Conclusion

Based on the foregoing arguments and the well-reasoned decisions of Judge Anderson, DHEC respectfully requests that the Court of Appeals affirm all challenged Orders issued by Judge Anderson.

Respectfully submitted,



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April 30, 2015

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

SC Court of Appeals

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

PROOF OF SERVICE

The undersigned hereby certifies that on this date she has served the *Respondent DHEC's Final Brief* in this matter upon the following, by placing copies of same in the United States Mail, first class postage prepaid, addressed to:

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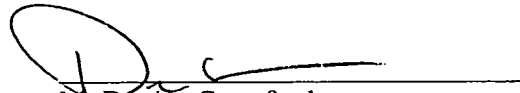
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THE STATE OF SOUTH CAROLINA

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Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston
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vs.

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
INTRODUCTION	1
ARGUMENT	2
I. The ALC Erred in Entering Summary Judgment on Standing	2
A. The ALC's Interpretation of "Affected Person" Was Clear Error	2
B. To The Extent Article III Constitutional Standing Is Required, an Article III Court Ruled that Community Groups Have Article III Standing	5
C. Record Evidence Demonstrated Community Groups' Standing Under Any Test	6
1. The Notion That SPA's \$35 Million Cruise Terminal Will Change Nothing Is Facially Implausible, And Disputed	7
2. Arguments about the Weight of Evidence Are Not Grounds for Ignoring It	9
D. The Community Groups Have Established Associational Standing	11
E. The Community Groups Have Established Public Importance Standing	13
II. The ALC Erred in Failing to Vacate SPA's Facially Invalid Permit	15
A. The Lack of Required Water Quality Certification Is Legally Fatal	15
B. SPA's Mootness/Waiver Argument Is Baseless	18

C. The ALC Order Denying the Motion to Vacate is Reviewable	19
D. The Motion to Vacate Was Not a Motion for Summary Judgment	21
III. The Order Denying Discovery Was A Patent Abuse of Discretion	21
A. Respondents and the ALC Understood That Discovery Extended Beyond May 20, 2013	21
B. Respondents Offer No Grounds to Sustain the ALC's Abuse of Discretion.....	23
C. There is No Barrier to Reviewing the Discovery Order	24
IV. The ALC Abused Its Discretion in Sanctioning the Community Groups for Offering a Reasonable and Good Faith Interpretation of an Ambiguous Statute.....	27
CONCLUSION.....	31

TABLE OF AUTHORITIES

Federal Cases

<i>AES Sparrows Point LNG v. Wilson</i> , 589 F.3d 721 (4th Cir. 2009)	19
<i>Allen v. Wright</i> , 468 U.S. 737 (1984)	10
<i>Bennett v. Spear</i> , 520 U.S. 154 (1997)	11
<i>Director, Office of Workers' Comp. Programs, Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co.</i> , 514 U.S. 122 (1995)	3
<i>Florida Audubon Society v. Bentsen</i> , 94 F.3d 658 (D.C. Cir. 1996)	10
<i>Humane Society of the United States v. Hodel</i> , 840 F.2d 45 (D.C. Cir. 1988)	12
<i>International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. Brock</i> , 477 U.S. 274 (1986)	13
<i>Maryland Highways Contractors Association, Inc. v. State of Maryland</i> , 933 F.2d 1246 (4th Cir. 1991)	11
<i>Simon v. Eastern Kentucky Welfare Rights Organization</i> , 426 U.S. 26 (1976)	10
<i>United States v. Students Challenging Regulatory Agency Procedures (SCRAP)</i> , 412 U.S. 669 (1973)	3, 10
<i>United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.</i> , 517 U.S. 544 (1996)	12, 13
<i>Warth v. Seldin</i> , 422 U.S. 490 (1975)	13

State Cases

<i>ATC S., Inc. v. Charleston County</i> , 380 S.C. 191, 669 S.E.2d 337 (2008)	14
<i>Atlantic Coast Builders & Contractors, LLC v. Lewis</i> , 398 S.C. 323, 730 S.E.2d 282 (2012)	30
<i>Bailey v. S. C. Department of Health & Environmental Control</i> , 388 S.C. 1, 693 S.E.2d 426 (Ct. App. 2010)	9
<i>Baird v. Charleston County</i> , 333 S.C. 519, 511 S.E.2d 69 (1999)	13, 14
<i>Bayle v. South Carolina Department of Transportation</i> , 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001)	26
<i>Brennan's, Inc. v. Colbert</i> , 125 So. 3d 537 (La. Ct. App. 2013)	25
<i>Briggs v. Richardson</i> , 273 S.C. 376, 256 S.E.2d 544 (1979)	20
<i>Brown v. County of Berkeley</i> , 366 S.C. 354, 622 S.E.2d 533 (2005)	20
<i>Carnival Corporation v. Historic Ansonborough Neighborhood Association</i> , 407 S.C. 67, 742 S.E.2d 846 (2014)	3, 11, 12, 14
<i>Center for a Sustainable Coast, Inc. v. Turner</i> , 751 S.E.2d 555 (Ga. Ct. App. 2013)	3
<i>City of Klamath Falls v. Environmental Quality Commission</i> , 119 Or. App. 375 (Or. Ct. App. 1993)	19
<i>Clarendon County v. TYKAT, Inc.</i> , 09-ALJ-17-0458-CC, 2010 WL 6782564, at *4-5 (SCALC June 2010)	29
<i>Converse Power Corporation v. S.C. Department of Health & Environmental Control</i> , 350 S.C. 39, 564 S.E.2d 341 (Ct. App. 2002)	17
<i>Dawkins v. Fields</i> , 354 S.C. 58, 580 S.E.2d 433 (2003)	9
<i>Degenhart v. Knights of Columbus</i> , 309 S.C. 114, 420 S.E.2d 495 (1992)	26

<i>Edge v. State Farm Mutual Automobile Insurance Co.</i> , 366 S.C. 511, 623 S.E.2d 387 (2005)	20
<i>Empire Power Co. v. N.C. Dep't of Environment, Health & Natural Resources, Div. of Environmental Management</i> , 447 S.E.2d 768 (N.C. 1994).....	2, 3
<i>Ex parte Bon Secours-St. Francis-Xavier Hospital, Inc.</i> 393 S.C. 590, 713 S.E.2d 624 (2011)	27, 28
<i>Ferguson v. Charleston Lincoln Mercury, Inc.</i> , 349 S.C. 558, 564 S.E.2d 94 (2002)	30
<i>Fields v. Melrose Limited Partnership</i> , 312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993).....	26
<i>FPL Energy Maine Hydro LLC v. Department of Environmental Prot.</i> , 926 A.2d 1197 (Me. 2007).....	19
<i>Georgetown County League of Women Voters v. Smith Land</i> , 393 S.C. 350, 713 S.E.2d 287 (2011)	12
<i>Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.</i> , 385 S.C. 452, 684 S.E.2d 756 (2009)	6
<i>Hill v. S.C. Department of Health & Environmental Control</i> , 389 S.C. 1, 698 S.E.2d 612 (2010)	7
<i>Hodges v. Rainey</i> , 341 S.C. 79, 533 S.E.2d 578 (2000)	5
<i>Hudson v. S.C. Department of Highways & Public Transp.</i> , 324 S.C. 245, 478 S.E.2d 839 (1996)	25, 26
<i>Huntley v. Young</i> , 319 S.C. 559, 462 S.E.2d 860 (1995)	19
<i>In re Anonymous Member of South Carolina Bar</i> , 346 S.C. 177, 552 S.E.2d 10 (2001)	29
<i>Langley v. Boyter</i> , 284 S.C. 162, 325 S.E.2d 550 (Ct. App. 1984) <i>opinion quashed</i> 286 S.C. 85, 332 S.E.2d 100 (1985).....	30
<i>Leviner v. Sonoco Products Company</i> , 339 S.C. 492, 530 S.E.2d 127 (2000)	25

<i>N.C. Dep't of Env't, Health & Natural Res.; Div. of Envtl. Mgmt.,</i> 447 S.E.2d 768, 777, 780 (N.C. 1994).....	3
<i>Peterson v. National Railroad Passenger Corporation,</i> 365 S.C. 391, 618 S.E.2d 903 (2005)	9
<i>Pitts v. Jackson National Life Insurance Co.,</i> 352 S.C. 319, 574 S.E.2d 502 (Ct.App.2002).....	20, 21
<i>Preservation Society of Charleston v. U.S. Army Corps of</i> <i>Engineers, No. 2:12-2942-RMG, 2013 WL6488282</i> (D.S.C. Sept. 18, 2013)	6, 15
<i>Ricks v. Weinrauch,</i> 293 S.C. 372, 360 S.E.2d 535 (Ct. App. 1987).....	23
<i>Ross v. Medical University of South Carolina,</i> 328 S.C. 51, 492 S.E.2d 621 (1997)	19
<i>S.C. Public Interest Foundation v. S. C. Transp. Infrastructure Bank,</i> 403 S.C. 640, 744 S.E.2d 521 (2013)	13, 14
<i>S.C. Department of Motor Vehicles v. Michael W. Tighe,</i> 06-ALJ-21-0132-AP, 2006 WL 2224705, at *11 (SCALC June 20, 2006).....	29
<i>Savannah Riverkeeper, et al. v. S.C. Department of Health</i> <i>& Environmental Control,</i> ALC No. 11-ALJ-07-0618-CC (May 31, 2012)	19
<i>Shirley's Iron Works, Inc. v. City of Union,</i> 403 S.C. 560, 743 S.E.2d 778 (2013)	19
<i>Shupe v. Settle,</i> 315 S.C. 51, 445 S.E.2d 651 (Ct. App. 1994).....	9
<i>Sierra Club v. S. C. Department of Health & Environmental Control,</i> No. 2012-212791, 2014 WL 3734366, *at 20 (S.C. Ct. App. July 30, 2014)	17
<i>Smiley v. S.C. Department of Health & Environmental Control,</i> 374 S.C. 326, 649 S.E.2d 31 (2007)	3, 11
<i>South Carolina Department of Social Services v. Lisa C.,</i> 380 S.C. 406, 669 S.E.2d 647 (Ct. App. 2008).....	27
<i>Sparks v. Palmetto Hardwood, Inc.</i> 406 S.C. 124, 750 S.E.2d 61 (2013)	28

<i>State v. Cheeks</i> , 400 S.C. 329, 733 S.E.2d 611 (Ct. App. 2012).....	12
<i>State v. Douglas</i> , 380 S.C. 499, 671 S.E.2d 606 (2009)	9, 10
<i>State v. Howard</i> , 384 S.C. 212, 682 S.E.2d 42 (Ct. App. 2009).....	6
<i>State v. Moorer</i> , 152 S.C. 455, 150 S.E. 269 (1929)	3, 4
<i>Thomas v. Waters</i> , 315 S.C. 534, S.E.2d 659 (Ct. App. 1994).....	6
<i>Thompson v. South Carolina Commission on Alcohol and Drug Abuse</i> , 267 S.C. 463, 229 S.E.2d 718 (1976).....	14
<i>Webster v. Clanton</i> , 259 S.C. 387, 192 S.E.2d 214 (1972)	24, 25
<i>Wells Fargo Bank, National Association v. EGIS 521, LLC</i> , No. 2012-UP-677, 2012 WL 10864567 (S.C. Ct. App. Dec. 19, 2012)	22
<i>Wright v. Craft</i> , 372 S.C. 1, 640 S.E.2d 486 (Ct. App. 2006).....	6
<i>Youngblood v. S.C. Department of Social Services</i> , 402 S.C. 311, 741 S.E.2d 515 (2013)	4, 5
 Constitutions	
U.S. Constitution, Article III.....	1, 5, 6
S.C. Const. art. V, § 9	12
 Federal Statutes	
16 U.S.C. § 1456.....	15, 16, 17, 18
33 U.S.C. § 1341.....	15, 16, 17, 18, 19, 21, 22
 Federal Regulations	
33 C.F.R. § 325.2(b)(1)(ii).....	19
 State Statutes	

S.C. Acts No. 387 (June 9, 2006)	5
S.C. Code Ann. § 1-23-380(4)	17
S.C. Code Ann. § 15-36-10.....	29

S.C. Code Ann. § 15-36-10(A)(4)(a)(ii)	27, 29
--	--------

S.C. Code Ann. § 44-1-60.....	3, 4, 5
-------------------------------	---------

S.C. Code Ann. § 44-1-60(B)	16
S.C. Code Ann. § 44-1-60(F).....	2, 27, 28

S.C. Code Ann. § 48-39-10(J)	15
S.C. Code Ann. § 48-39-130(A)	10
S.C. Code Ann. § 54-3-80.....	14, 15

State Rules and Regulations

S.C. Code Ann. Regs. 30-6	4, 5
S.C. Code Ann. Regs. 61-101	

S.C. Code Ann. Regs. 61-101(A)(4).....	18
S.C. Code Ann. Regs. 61-101(A)(7).....	16, 17
S.C. Code Ann. Regs. 61-101(A)(8).....	16, 21
S.C. Code Ann. Regs. 61-101(D)(1).....	16, 18
S.C. Code Ann. Regs. 61-101(E)(2)	16, 18
S.C. Code Ann. Regs. 61-101(F)(3)(a)(4)	18
S.C. Code Ann. Regs. 61-101(F)(5)(a).....	18
S.C. Code Ann. Regs. 61-101(F)(5)(b).....	18
S.C. Code Ann. Regs. 61-101(G)(1).....	18

Other Authorities

2014-2015 Appropriations Bill H. 4701, Pt. IB § 88.4.....	14
---	----

S.C. Appellate Court Rules

Rule 217, SCACR.....	12
----------------------	----

S.C. Administrative Law Court Rules

Rule 19, SCRALC	23
Rule 21, SCALCR	23, 24

S.C. Rules of Civil Procedure

Rule 6(d), SCRCP.....	23
Rule 59(e), SCRCP	25

Rule 60(b), SCRCP.....	25
Rule 68, SCRCP.....	23
Rule 69, SCRCP.....	23

INTRODUCTION

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

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

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

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

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

ARGUMENT

I. The ALC Erred in Entering Summary Judgment On Standing

A. The ALC’s Interpretation of “Affected Person” Was Clear Error

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

“[A]ffected person” means a person who can demonstrate injury-in-fact, which, in the context of agency action, means someone who can show injury to a concrete interest within the zone of interests protected by the statute. Appellants’ Second Amended Initial Br. at 25-28 (hereinafter “CG Br.”).¹

¹ See, e.g., *Dir., Office of Workers’ Comp. Programs, Dep’t of Labor v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 126-27 (1995); *Empire Power Co. v.*

This accords with *Smiley v. S.C. DHEC*, where the Supreme Court discussed the “statutory requirement that a person be ‘adversely affected’ or ‘aggrieved,’” and stated that “‘a concrete and particularized invasion’ of a legally protected interest . . . distinguish[es] a person with a direct stake in the outcome of a litigation - even though small - from a person with a mere interest in the problem.” 374 S.C. 326, 332, 649 S.E.2d 31, 34 (2007) (quoting *U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973)). *Smiley* does not hold that standing under Section 44-1-60 “should be determined by application of constitutional principles[.]” Br. of S.C. State Ports Auth. at 15 (hereinafter “SPA Br.”). Section 44-1-60 was not before the Court in *Smiley*; the plaintiff in that case sought review under procedures predating enactment of Section 44-1-60. See 374 S.C. at 329, 649 S.E.2d at 32 n.2. Likewise, *Carnival Corp. v. Historic Ansonborough Neighborhood Association*, 407 S.C. 67, 742 S.E.2d 846 (2014), did not address the meaning of “affected person,” SPA Br. at 23, but instead concerned standing for tort and zoning ordinance claims in a judicial forum. The present case centers on which “affected person[s]” can invoke an administrative procedure created by the General Assembly, and is determined by the statutory language and legislative intent rather than judicial principles of constitutional standing. See *State v. Moorner*, 152 S.C. 455, 150 S.E. 269, 274 (1929) (recognizing that the General Assembly may create a “new right with its remedy” and “vest in some board or person power to adjudicate all matters arising under the statute.”).

N.C. Dep’t of Env’t, Health & Natural Res., Div. of Env’tl. Mgmt., 447 S.E.2d 768, 777, 780 (N.C. 1994); *Ctr. for a Sustainable Coast, Inc. v. Turner*, 751 S.E.2d 555, 558 (Ga. Ct. App. 2013).

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

The Respondents only claim that interpreting “affected person” to mean an injured person renders the term surplusage. SPA Br. at 23-24.² But it is the Respondents’ position that reads the term out of the statute by superimposing a constitutional standing test that applies when “no statute confers standing.” *Youngblood v. S.C. DSS*, 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013) (emphasis added). Giving “affected person” its plain meaning, by contrast, gives the phrase substance and respects the General Assembly’s obvious intent in writing the statute – the opposite of making it surplusage.

Regulation 30-6’s phrase “affected person with standing” does not limit which “affected person” can invoke Section 44-1-60’s administrative procedures. SPA Br. at 23. Regulation 30-6 requires “standing according to applicable law, including S.C. Code Title 44, Chapter 1,” and Section 44-1-60 defines those entitled to invoke the procedure as “affected persons.” *See Youngblood*, 402 S.C. at 317, 741 S.E.2d at 518 (“Statutory standing exists, as the name implies, when a statute confers a right to sue on a party”).

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

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

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

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

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

Even if the Community Groups must show the three elements of standing used by Article III courts to be "affected persons" under Section 44-1-60, an Article III court already rejected SPA's contention that the Community Groups' members lack Article III standing to contest permits for SPA's cruise terminal. *Pres. Soc'y of Charleston v. U.S.*

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

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

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

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

terminal and adjacent to the site of the proposed larger terminal. She complains of impacts from the “thick smoke” emitted from cruise vessels at the existing terminal traveling to and enveloping her home, and being “forced to retreat indoors” within seconds of breathing the emissions that caused her throat to “immediately beg[i]n to hurt.” R.002588-89. She and other affiants testified that they feared negative health impacts, as well as property damage from the cruise ships’ “unbearable” diesel exhaust “coating [their] home[s] in filth.” R.002588-90; *see also* CG Br. at 22-24 (discussing other affiants’ testimony). They further testified that the injection of thousands of cars and trucks into the small, already congested neighborhoods where they live, as well as the looming, fifteen-story-tall, thousand-feet-long shapes of constantly docked cruise ships will injure their property, aesthetic and investment-backed historic-preservation interests. *See* CG Br. at 10-14, 22-24.

The injuries alleged are legally protected interests sufficient to support standing, particularly when viewed in the light most favorable to the Community Groups as the non-moving party. *See, e.g., Hill v. S.C. DHEC*, 389 S.C. 1, 22, 698 S.E.2d 612, 623 (2010) (“South Carolina case law has specifically recognized an injury to one’s aesthetic and recreational interests [are] judicially cognizable injur[ies] in fact.”). None of the arguments offered by the Respondents can obscure the ALC’s basic legal error of entering summary judgment in the face of multiple and obviously contested issues of fact.

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

The Respondents’ counter-intuitive assertion that the cruise terminal will not change or increase the cruise operations said to give rise to injury, SPA Br. at 9-12, 22, is contradicted by SPA’s and DHEC’s own documents showing that the new terminal is

engineered and intended to host larger ships (3,500 passengers) than the one currently home based nearby (2,500 passengers) and bring more traffic (over 1,700 vehicles per cruise visit) into Charleston's small, extremely congested historic district. CG Br. at 8-9; R.002457, R.002460. This evidence is not negated by SPA's lawyers calling it "wrong," SPA Br. at 22.³ And those documents, along with multiple affidavits asserting that SPA's much larger terminal (100,000 square feet versus 35,000 square feet) will, as intended, host much larger vessels that generate more pollution, readily distinguish this case from *Bailey v. S.C. DHEC*, 388 S.C. 1, 693 S.E.2d 426 (Ct. App. 2010), where there was *no* evidence supporting the plaintiff's allegation that the permitted dock would be used as a marina rather than as a private dock, as the permittee claimed. CG Br. at 8-9; R.002457, R.002460. The Community Groups presented substantial record evidence showing that the challenged DHEC permits authorizing the proposed cruise terminal will allow pollution from existing cruise operations to greatly increase in a way that will injure the legally protected interests of the Groups and their members, and that these injuries could not otherwise legally occur without DHEC's authorizations.⁴ CG Br. at 10-14; 22-24. That evidence alone distinguishes this case from *Bailey*.

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

⁴ SPA itself has conceded that the existing facility does not meet federal homeland security requirements, is outdated, desolate, and must be replaced. *See, e.g.*, R.002459.

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

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

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

Supporting affidavits need only be based on “personal knowledge,” setting forth facts that would be admissible at trial; evidence is admissible if it is relevant, *i.e.*, if “it tends to establish or to make more or less probable some matter at issue,” either “directly or indirectly.” *Peterson v. Nat'l R.R. Passenger Corp.*, 365 S.C. 391, 399, 618 S.E.2d 903, 907 (2005). Affiants need not be experts; rather, “lay witnesses are permitted to offer testimony in the form of opinions or inferences if the opinions or inferences are rationally based on the witness' perception.” *State v. Douglas*, 380 S.C. 499, 502, 671 S.E.2d 606, 608 (2009). The Groups' members testified based on their personal knowledge, experience, and “inferences rationally based on [their] perception” from living next to the existing, much smaller cruise terminal that the new, much larger cruise

terminal designed for much larger vessels will intensify the impacts of SPA's cruise operation and injure their legally protected interests. CG Br. at 10-14.

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

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

Florida Audubon Society v. Bentsen, 94 F.3d 658, 670 (D.C. Cir. 1996), addressed a claim of injury "far weaker than even the one alleged in *Simon*," where "the acts of not one, but several groups of third parties" needed to occur before any alleged injury could arise. Here, SPA sought DHEC's authorizations because SPA intends to build a larger

⁵ Since the Community Groups specifically argued that they demonstrated standing "by showing injury-in-fact fairly traceable to DHEC's decisions," and assigned error to the ALC's "disregard[ing] evidence showing that a cruise terminal designed for larger vessels carrying more passengers would lead to the existence of larger vessels and more passengers - and thus cause more pollution, more traffic, more damage and more disruption" that is the basis of the members' claimed injuries, CG Br. at 30, 33-34, SPA's claims that this is unpreserved, SPA Br. at 20-21, is wrong.

cruise terminal to home base larger cruise ships, and this larger and more intensive operation will cause injury. DHEC's approval need not be the "last link in the chain" to be fairly traceable to injury. *Bennett v. Spear*, 520 U.S. 154, 168-69 (1997) (holding that a litigant "wrongly equates injury 'fairly traceable' to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation.>").

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

D. The Community Groups Have Established Associational Standing

The three-part test for associational standing was recently summarized in *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 76, 753 S.E.2d 846, 851 (2014) (requiring injury to at least one member; that injury be within scope of an organization's purpose; and that participation of all members is not required to maintain the action). The Respondents cite *Maryland Highways Contractors Ass'n, Inc. v. State of Md.*, 933 F.2d 1246, 1251-52 (4th Cir. 1991), but that case simply found that an organization lacked associational standing because the only evidence of injury was inadmissible hearsay. *Id.* The members in this case provided voluminous evidence, based on their own personal knowledge, in affidavits and otherwise admissible evidence illustrating their individual standing.

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

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

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

Rather, where the organization seeks “some other form of prospective relief” than damages, like suits that seek to resolve a “question of law,” see *Int’l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Brock*, 477 U.S. 274, 287 (1986), courts will find associational standing based on the standing of one member because the requested remedy—resolution of an issue of law—will benefit both the injured member and other injured members alike even though they don’t all participate. *Brown*, 517 U.S. at 553 (quoting *Warth v. Seldin*, 422 U.S. 490 (1975)). Conferring standing to associations in those circumstances “recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others.” *Brock*, 477 U.S. at 290.

E. The Community Groups Have Established Public Importance Standing

The Respondents fail to distinguish cases like *Baird*, where the Supreme Court found allegations of unauthorized county-issued hospital bonds sufficient to establish public importance standing because “the issuance of the hospital bonds clearly impacts a profound public interest—the public health and welfare[,]” and those bringing the suit had “a significant interest in ensuring that their county acts within the legal parameters established by the legislature.” 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999). Allegations of illegal government action are “the precise instance where the public importance exception should apply.” *S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank*, 403 S.C. 640, 646, 744 S.E.2d 521, 524 (2013). The Community Groups allege that DHEC violated the law in issuing various authorizations permitting another state agency to build a large public works project that will cause legally prohibited impacts to residents as well as a federally protected and internationally celebrated historic district.

Carnival is distinguishable because the plaintiffs in that case alleged that SPA's *existing* terminal was a nuisance and violated local zoning ordinances; here they challenge unlawful state agency permitting of a proposed state owned \$35 million public terminal. See SPA Br. at 31.

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

While SPA officials might prefer not to be challenged by families and businesses living next to its proposed industrial leisure cruise operation, SPA Br. at 32, it must balance its development of the port with its mandate to protect the environment and the quality of life of citizens that live near its facilities. See, e.g., S.C. Code Ann. § 54-3-80 (SPA must discharge its duties with "consideration given to diminish or mitigate any negative effect port operations or expansion may have upon the environment,

transportation infrastructure, and quality of life of residents in communities located near existing or proposed port facilities.”). And like DHEC, SPA is bound to follow the laws of this State.

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

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

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

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

DHEC’s regulations require that 401 Water Quality Certifications be evaluated and authorized by DHEC’s Bureau of Water and issued simultaneously with the Critical Area Permit and Coastal Zone Consistency Certification (“CAP/CZCC”). S.C. Code Ann. Regs. 61-101(A)(7) (“For Federal permits that require both a water quality

certification and a coastal zone consistency certification, the coastal zone consistency certification determination shall be issued as a component of, and concurrently with, the water quality certification)” (emphasis added); S.C. Code Ann. Regs. 61-101(A)(8) (DHEC “will process permit applications” that require CAP and WQC “with coordination and input” from Bureau of Water “staff regarding water quality impacts” and issue decisions in a permit document that “serve[s] as the 401 water quality certification”). These procedural requirements – along with every other requirement for noticing, taking comment on, and issuing an individual WQC⁶ – were bypassed because SPA was proceeding under color of a NWP 3 authorization, which was removed by operation of a September 2013 federal court order.

DHEC does not dispute that: (1) a WQC is necessary for SPA’s project; (2) that the law requires affirmative Bureau of Water review of SPA’s project; (3) that Bureau of Water involvement, when it occurs, is manifest and visible; and (4) that Bureau of Water review did not occur here. Accordingly, the facial invalidity of the CAP/CZCC is uncontested by the agency that issued it, and the Community Groups were entitled to vacatur and remand to DHEC. *See* S.C. Code Ann. § 44-1-60(B) (DHEC must “comply with all requirements for public notice, receipt of public comments and public hearings before making a department decision”); S.C. Code Ann. § 1-23-380(4) (providing that in

⁶ DHEC failed to give notice of an individual 401 Certification, S.C. Code Ann. Regs. 61-101(D)(1); failed to prepare a required written water quality assessment, S.C. Code Ann. Regs. 61-101(E)(2); and made no mention of a WQC at all in the permit, in contrast with decisions that actually contain WQCs. *See* R.002315-22 (Charleston Navy Base DHEC approvals, including CAP, CZCC and “Water Quality Certification” in title, and separate Bureau of Water Technical Support Document). Further, the space for documenting Bureau of Water involvement is marked “N/A,” showing a complete lack of Bureau of Water involvement. R.002301.

“cases of alleged irregularities in procedure before the agency” matter can be “remanded to the agency” for appropriate action).⁷

SPA recognizes this issue as “a matter of law,” but contends that a CAP/CZCC always includes an invisible WQC, SPA Br. at 37-38, theorizing that a CAP serves as a WQC, which serves as a CZCC, such that DHEC need only consider and issue a CAP. DHEC does not embrace that circular theory, with good reason: it would *remove* federally required review procedures altogether. In reality, where all three reviews are required, DHEC staff – the Office of Coastal Resources Management (“OCRM”) and the Bureau of Water – work in coordination to issue a joint decision document containing the three component approvals. Where a CZCC and WQC are needed, the reviews occur in parallel and a joint document is issued that contains both “component” decisions “concurrently.” S.C. Code Ann. Regs. 61-101(A)(7). Where a CAP and WQC are needed, “coordination and input” from Bureau of Water “staff regarding water quality impacts” is required before the joint document can serve as the WQC.

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

The rules do not specify what occurs when *all three* approvals are needed, but SPA's interpretation – removing substantive water quality certification review altogether – renders the requirement for “component” and “concurrent[]” WQC and CZCC decisions and the requirement for Bureau of Water “coordination and input” on “water quality impacts” for a CAP meaningless. SPA's reading would also eviscerate federally required WQC evaluation procedures and risk the loss of federal approval for South Carolina's water quality program.⁸ See 33 U.S.C. § 1341. Finally, SPA's reading runs counter to DHEC's long-standing practice of conducting the distinct evaluations in parallel and issuing a joint document that explicitly reflects the component authorizations. See R.002315-22.

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

B. SPA's Mootness/ Waiver Argument Is Baseless

SPA seeks to avoid review on grounds that the ALC's order is moot, theorizing that DHEC “waived” its Section 401 authority such that remand to DHEC would be

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

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

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

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

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

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

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

Review of the ALC's Vacatur Order would conserve resources by potentially removing the need for a contested case altogether, and ensuring, if one occurs, that all issues concerning SPA's terminal are before the ALC and any appellate tribunal in a single action. This order also directly relates to the Final Order on standing, which turns on the ALC's view that following lawful procedures for SPA's proposed cruise terminal would *not* alter the Community Groups' claimed injuries or redress them. That holding begs the question of what the proper review procedure *is*. Determining whether the robust public notice and comment requirements and an expansive scope of review of DHEC's WQC regulations apply to SPA's project would inform the standing analysis as conceived by the ALC, since the WQC requirements – *e.g.*, a duty to minimize impacts on local inhabitants and the environment – would increase the likelihood that lawful permitting would reduce injury to the Community Groups and their members.

The Court's Order denying SPA's Motion to Dismiss Appeal finally determined whether the Order Denying the Motion to Vacate is appealable, and established law of the case.

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

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

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

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

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

DHEC and SPA do not dispute the timeline set forth in the Community Groups’ opening brief, which shows that the parties and the ALC all understood discovery to be

¹¹ SPA’s half-hearted issue preservation claim (SPA Br. at 39 n.35) is meritless. Even a superficial glance at the Motion to Vacate shows that the Community Groups raised the lack of a WQC directly to the ALC after a federal court vitiated SPA’s federal permit and attendant certification. The Community Groups were not required to “challenge” a WQC that did not, and does not, exist.

ongoing well after May 20, 2013, the date the ALC retroactively posited (six months later) that discovery closed. CG Br. at 49-51. The timeline began with the ALC ordering prehearing statements – including expectations for discovery – due on May 21, a day *after* discovery later was deemed to have “closed.” SPA’s prehearing statement, submitted May 20, proposed up to nine months of discovery, or until February 20th, 2014. Two weeks after receiving the prehearing statements, the ALC set a merits hearing date in 2014, intending to provide “over four months for discovery” and expressing hope that “the parties could complete discovery within the time period.” R.002934. SPA counsel then promised to “develop a scheduling order with deadlines for discovery” and informed the ALC that “the parties are working on a proposed scheduling order with deadlines on discovery.” R.002939-41. In August, SPA issued third party subpoenas that SPA counsel have characterized as “discovery.”¹² Finally, in late 2013, the ALC acknowledged that discovery was ongoing as of September 2013, four months *after* discovery had supposedly closed. R.000041 (Order Denying Mot. to Dismiss 3). As 2013 came to an end and 2014 began, SPA continued its dump of 30,000 pages of discovery on the Community Groups.

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

¹² R.002984-85. SPA offers no explanation for having engaged in discovery after the date it says discovery “closed.” Its conduct should bar it from insisting on closing discovery to prejudice the Community Groups. *Cf. Wells Fargo Bank, Nat. Ass’n v. EGIS 521, LLC*, No. 2012-UP-677, 2012 WL 10864567, at *1 (Ct. App. Dec. 19, 2012) (estopping party that engaged in lengthy discovery to other party’s prejudice from then changing course and seeking arbitration).

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

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

The Community Groups were not bound by the Rules of Civil Procedure to file a motion prior to May 20, SPA Br. at 43-45,¹³ because *all* the parties *and* the ALC understood that discovery extended beyond that date, as evidenced by the fact that the ALC required prehearing statements to be filed that day with discovery plans (which projected discovery extending well beyond May 20). As for ALC Rule 21, the Respondents have no substantive response to the testimony of a seasoned ALC practitioner who testified that she had never experienced, or heard of, strict insistence on that unrealistic 90-day limit on discovery – as confirmed by the ALC's conduct in this case. R.002950-52; *see also* CG Br. at 53.¹⁴

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

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

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

C. There is No Barrier to Reviewing the Discovery Order

The Respondents claim the discovery order is unreviewable because the ALC, in a footnote in the Final Order, *sua sponte* vacated the Discovery Order and then denied it as moot “in light of the disposition of the summary judgment motion.” R.000095 (Order Granting Summ. J. for Standing, 19 n.23). This transparent maneuver to insulate a palpably unfair discovery order from review fails for two reasons.

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

Second, there *is* no rule that prohibits this Court from substantively reviewing a vacated order. *Webster v. Clanton*, 259 S.C. 387, 391, 192 S.E.2d 214, 216 (1972), reviewed a procedural mess that resulted in a father appealing two child support orders, but failing to appeal the underlying order that granted custody of his son to his deceased wife’s sister. *Id.* The Supreme Court ignored the procedural oddities of the case and addressed the substantive issues, voiding the unappealed custody order because “no appeal therefrom was necessary to protect the rights of the father,” and only declining to decide the issue underlying that order – whether the father was entitled to custody – because “the record [was] entirely insufficient,” not because the order had been voided.

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

259 S.C. at 392, 192 S.E.2d at 216. The record here is replete, and shows a clear abuse of discretion.

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

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

And finally, *Hudson v. S.C. Dep't of Highways & Pub. Transp.*, 324 S.C. 245, 246, 478 S.E.2d 839, 840 (1996), involved a party's attempt to appeal a trial court's order granting a new trial under Rule 60(b), SCRPC, while appeal of the original trial was still pending. 324 S.C. at 246, 478 S.E.2d at 840. Because the rules in such circumstances require leave from an appellate court before a trial court can grant a Rule 60(b) motion, and no leave was granted, the court dismissed the appeal because "the trial court lacked

jurisdiction to entertain respondent's motion" for a new trial and the appeal was a waste of time. *Id.* No one contends the ALC lacked jurisdiction to enter its discovery order.

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

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

As should go without saying, a decision by this Court to reverse the ALC's summary judgment order on standing would remove any mootness concerns as to discovery, since the case would be remanded to the ALC for further proceedings.

Judicial economy would best be served by reversing the ALC's discovery prohibition now rather than waiting for an appeal following remand.¹⁶

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

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

In this case, counsel offered a good faith and reasonable argument interpreting ambiguous language in S.C. Code Ann. § 44-1-60(F), which sets forth the DHEC Board's duty to conduct final review conferences. A statute is ambiguous if it "is susceptible to two reasonable interpretations," *S.C. DSS v. Lisa C.*, 380 S.C. 406, 414, 669 S.E.2d 647, 651 (Ct. App. 2008), and Section 44-1-60(F) contains conflicting provisions stating that the Board "must" hold a final review conference no later than sixty days after a request, but also providing for appeal to the ALC if the Board "decline[s] in writing to schedule"

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

review or simply does “not conduct[]” final review. The statute can be read two ways. No court has ruled on whether board review is mandatory, as the issue had not been raised or ruled upon up until this case. The Community Groups contended to the ALC that Board review was mandatory to ensure that the agency generates an explanation of its decision, develops a record of the procedures it followed, and ensures that the staff decision is consistent with overall agency policy, prior to review before the ALC.

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

In sum, there is no evidence of extreme behavior in proposing one of two possible interpretations of an ambiguous statute. No court had construed the Board review provisions of Section 44-1-60(F), and agency practice cannot change a statute’s meaning. *See, e.g., Sparks v. Palmetto Hardwood, Inc.*, 406 S.C. 124, 128, 750 S.E.2d 61, 63 (2013). Even if contrary precedent existed, the Sanctions Act permits an attorney to make “a good faith or reasonable argument . . . for the extension, modification, or reversal of existing law.” S.C. Code Ann. § 15-36-10(A)(4)(a)(ii).¹⁷ The Community

¹⁷ For this reason alone, SPA’s citation to a background discussion in a brief filed years ago, in a case where the meaning of this provision *was not litigated*, is pointless. The

Groups cannot find and the Respondents do not offer any case, in South Carolina or any other jurisdiction, where a lawyer was sanctioned for offering an interpretation of a statute that was rejected by a court. *See* CG Br. at 59-60 (collecting cases).

At base, the Respondents' argument appears to be that counsel's interpretation was unreasonable because it did not prevail, citing as support the Community Groups' decision to not appeal the ALC's order denying the motion for remand that gave rise to SPA's sanction motion. SPA Br. at 47.¹⁸ But the Respondents confuse the difference between a winning argument and "a good faith or reasonable argument" permitted by the Sanctions Act. Making an argument based on a reasonable interpretation of a statute is not sanctionable conduct. *See S.C. Dep't of Motor Vehicles v. Michael W. Tighe*, 06-ALJ-21-0132-AP, 2006 WL 2224705, at *11 (June 20, 2006) (declining to give sanctions and fees in a case where parties argued over statutory construction); *Clarendon Cnty. v. TYKAT, Inc.*, Docket No.: 09-ALJ-17-0458-CC, 2010 WL 6782564, at *4-5 (June 2010) (denying attorney's fees and costs pursuant to § 15-36-10 against litigant who proposed statutory construction that would require a "coerced reading, rejecting established canons of construction"). Attorneys are only sanctioned if their conduct was so unreasonable to be considered bad faith—winning or losing has nothing to do with it. *See In re Anonymous Member of S.C. Bar*, 346 S.C. 177, 194, 552 S.E.2d 10, 18 (2001) (affirming sanctions against a law firm for "achieving success through abuse of the discovery rules rather than by the rule of law.").

Community Groups concede the language of the statute is ambiguous and can be read as mandatory or not.

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

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

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

There is simply no requirement that both orders be appealed, and the Respondents cite no authority to the contrary. The Groups chose to not appeal the denial of the motion to remand to focus limited resources on other issues. Their willingness to accept the ALC's plausible interpretation of an ambiguous statute hardly means that they abandoned

an issue at the heart of the sanctions order that was litigated below and briefed on appeal: whether putting forth one of two possible interpretations of an ambiguous statute that had never been interpreted by any court was sanctionable conduct.

CONCLUSION

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

Respectfully Submitted,



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May 4, 2015

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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Appellant Case No. 2014-000847

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

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

CERTIFICATE OF SERVICE

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