THE STATE OF SOUTH CAROLINA

In the Supreme Court



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APPEAL FROM ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge
Case No. 13-ALJ-07-0056-CC
Appellant Case No. 2014-000847

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Supreme Court Case No. 2018-000137

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

v.

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

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# PETITIONERS' REPLY BRIEF TO SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

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## INTRODUCTION

The brief filed by the Department of Health and Environmental Control ("DHEC") follows its long-standing practice of essentially repeating whatever S.C. State Ports Authority ("SPA") says. The practice began in the permitting review process itself, when DHEC followed SPA's direction in refusing to consider or investigate Petitioners' proposed measures to reduce environmental impacts from the proposed cruise terminal. It now culminates in a brief filed with this Court that cuts and pastes large swaths from SPA's brief, and repeats SPA's talking points essentially verbatim.

Fortunately, the General Assembly foresaw the possibility that DHEC would on occasion fall short in its duty to independently protect citizens from unnecessary and unlawful pollution. It enacted S.C. Code Ann. § 44-1-60 to give all "persons" "affected" by a DHEC staff permitting decision access to administrative review, first before the DHEC Board and then at the Administrative Law Court ("ALC"). That process allows South Carolina property owners, families, and businesses to contest the legality of permitted polluting projects that would injure them.

Judging by the legal positions they have taken in this case, DHEC and SPA want to make such review vanishingly rare. Understandably, state agency officials do not relish having their decisions questioned by ordinary citizens; if it were up to them, there might be no review at all.

But it is not up to them. The General Assembly established a review procedure and gave citizens the right to use it. It is now up this Court to ensure that

the decisions rendered below, which effectively shut down that process to "affected persons" if there is more than one injured person, are reversed.

DHEC's arguments, to the extent they vary from SPA's at all, add nothing meaningful except additional errors. As with SPA, DHEC's brief is strangely devoid of specific legal argument; it repeats conclusory declarations over and over with no law to back them up. DHEC fails to address, much less refute, our demonstration that the courts below committed clear error by using the wrong legal standards to enter summary judgment against Petitioners' standing. Those courts ignored the evidence set forth in numerous affidavits and SPA's own documents showing that the proposed terminal project would extend and grow cruise operations and their impacts, exacerbating neighbor's existing injuries and causing new ones. The courts below further failed to follow proper summary judgment practice by construing every possible inference in favor of SPA rather than non-movant Petitioners.

In addition to erroneously entering summary judgment, the ALC's order sanctioning parties for contending the term "must" is a mandatory term was a plain abuse of discretion. DHEC fails to address our textual argument, and then incorrectly claims that a number of courts have ruled the language is discretionary when, in fact, they have not. The issue has never been litigated before this case, and in litigating here, Petitioners offered a reasoned and reasonable view of the statutory text. Sanctioning a party for arguing one side of a statutory interpretation question of first impression was a gratuitous abuse of discretion.

Finally, DHEC fails entirely to counter our showing that the ALC abused its

discretion by retroactively closing discovery when the parties had conducted, and the ALC had condoned, discovery long past the date later declared to be a deadline. Rather than challenge our presentation of record evidence documenting the parties' and the ALC's specific actions, DHEC just says Petitioners have "mistaken beliefs" about those actions. Documents and evidence are not "beliefs;" they are facts. DHEC does nothing to negate our factual showing, which makes clear that the ALC abused its discretion by retroactively closing the discovery that it had itself explicitly recognized and condoned.

## FACTS

DHEC's factual discussion largely parrots SPA's, with multiple paragraphs cut and pasted seemingly verbatim into DHEC's brief. *Compare* DHEC 4-5, *with* SPA 7-8. Rather than repeat our responses to SPA's factual mistakes here, we incorporate them by reference. In very brief summary, DHEC's premise is that its permitting decision is meaningless. DHEC adopts SPA's view that cruise operations can continue and expand with or without a new terminal. DHEC 5. However well that view may fit with the Agencies' legal arguments, it does not fit with the actual record in this case—a record that DHEC studiously avoids. For example, it fails to mention that SPA, in applying for its DHEC permit, stated that the "need for a new terminal has become critical" due to "terminal security requirements," and that to address those requirements, SPA had entered a Memorandum of Understanding with the U.S. Customs and Border Protection for "conditional approval of ongoing cruise operations on a trial basis" that was renewed on the "understanding that an

improved facility would be needed for continued operations." R.01243; *see* R.02473 (SPA: "the facility must be updated to comply with the Maritime Transportation Security Act of 2002 (post-9/11 requirements)"); R.02479 (SPA: "urgently needs upgrades to property serve passengers and ships").

Taken together, these documents show that DHEC's approval of the new terminal project was needed for SPA to continue legal cruise operations. Other documents show that the new terminal project is specifically engineered to home-base significantly larger, and more polluting, ships than have ever home-based year round in Charleston before. *See* Reply to SPA at 2-3. And the evidence shows that the location of a new terminal much closer to individuals like Tommie Robertson, who live within a stone's throw of where the new terminal would be built, would increase the harms already caused by existing cruise ship operations. Those harms include inhalation of visible diesel soot that causes throat pain and contains known carcinogens. Even SPA's consultant recognized that, when it comes to diesel soot emissions, "proximity matters." R.002464. If siting a source on a property owner's doorstep that emits 120 tons per year of regulated air pollutants and generates traffic from thousands of vehicles daily does not make that property owner qualify as an "affected persons," the term is meaningless.

## ARGUMENT

### I. Petitioners Have Overwhelmingly Demonstrated That They Have Standing

DHEC's brief muddles various elements of standing into an overlapping mishmash of propositions that turn out, upon examination, to be uniformly wrong.

### A. DHEC's Assertion That Standing Arises Only After the Damage Is Done Is Incorrect

First DHEC argues Petitioners' claimed injury is "hypothetical" because it relates to a "proposed, but yet-to-be-built cruise terminal." DHEC 7. Of course, that cannot be the correct test for judging standing to challenge a permit for a project, since *all* permits are issued before construction. DHEC's theory would mean *no* citizen could *ever* challenge a DHEC permit. *But see* S.C. Code Ann. § 44-1-60(F) (establishing procedure to challenge DHEC permits *before* they are finalized).

Courts have never required a person to wait until the damage is done, or even begun, to have standing to prevent harm; if the "perceived threat to [plaintiffs] is sufficiently real and immediate to show an existing controversy," standing is present. *Blum v. Yaretsky*, 457 U.S. 991, 1000 (1982) (internal quotation omitted). As the Fourth Circuit put it in upholding a South Carolinian's standing to challenge a Clean Water Act permit, a citizen:

> [N]eed not wait until his lake becomes barren and sterile or assumes an unpleasant color and smell before he can invoke the protections of the Clean Water Act. Such a novel demand would eliminate the claims of those who are directly threatened but not yet engulfed by an unlawful discharge. Article III does not bar such concrete disputes from court.

*Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000).

DHEC's citation to *Beaufort Realty Co. v. Beaufort County*, 346 S.C. 298, 303, 551 S.E.2d 588, 590 (Ct. App. 2001), is misplaced. In fact, it directly flaunts this Court's subsequent holding in *Smiley v. S.C. Department of Health and Environmental Control*, "that to read *Beaufort Realty* as denying standing to an

individual unless and until the 'injury' has been inflicted ignores the 'actual or imminent' requirement of *Lujan/Sea Pines* and elevates dicta in *Beaufort Realty* over its two holdings: that the environmental group was asserting speculative concerns rather than injury, and had failed to demonstrate a causal connection." 374 S.C. 326, 331, 649 S.E.2d 31, 33–34 (2007). The Court should reject DHEC's misreading once again.

### B. DHEC's Assertion that Expert Testimony Is Needed to Show Injury Is Incorrect

DHEC contends that Petitioners' injury is speculative because they have not presented expert testimony of standing. DHEC 8. Needless to say, DHEC cites no authority for that proposition; there is none, because case law does not require such proof. In fact, DHEC fundamentally misconstrues the standing inquiry set out in U.S. Supreme Court case law. Environmental "plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 183 (2000) (internal quotation omitted). Courts have not required "additional scientific proof where there was a direct nexus between the claimant and the area of environmental impairment." *Gaston Copper*, 204 F.3d at 159.

Neither SPA nor DHEC disputes the "direct nexus" between Petitioners and their areas of environmental impairment—their homes, their bodies, their neighborhoods, their local air and water. Given those immediate connections and the overwhelming testimony setting forth directly perceived injuries and reasonable

fears that those injuries would continue with the project, no additional scientific evidence was required to show standing.

Further, DHEC simply ignores documentary evidence demonstrating that Petitioners' concerns are well founded, such as information showing that cruise ships can dump raw sewage three miles out to sea and undertreated gray water within three miles, R.001794; that an idling cruise ship can have the air pollution equivalent of 34,000 cars, *id.*; that SPA's main cruise tenant, Carnival Cruise Lines, violated federal environmental law by bypassing controls and dumping oily pollution into public waters, R.002152; that "treated" graywater from cruise ships can have higher concentration of pollutants than water that flows into land-based wastewater treatment plants, R.001887; that SPA's terminal will emit 120 tons of criteria pollutants per year, R.001718; and that maritime diesel emissions contain numerous pollutants including particulate soot, a probable carcinogen, R.002612, 002628.

DHEC does not actually contest *any* of these facts. Nor does it dispute that Petitioners have already experienced tangible negative impacts from cruise operations. Nor does it dispute that Petitioners use resources immediately surrounding the proposed cruise terminal. Nor does it dispute that Petitioners have contended based on personal experience that their use, enjoyment of, and investments in those areas would be diminished by the project. Nor does DHEC deny that Petitioners' aesthetic and recreational interests, including demonstrated impacts to Charleston's historic integrity and appearance, are cognizable injuries to

Petitioners. *See Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res.*, 345 S.C. 594, 601–02, 550 S.E.2d 287, 291–92 (2001) ("South Carolina case law has specifically recognized an injury to one's aesthetic and recreational interests [are] judicially cognizable injur[ies] in fact.").

Because it has done none of this, DHEC fails to defend the ALC's erroneous entry of summary judgment on the basis that no question of fact existed as to cognizable injury in fact. *Friends of the Earth*, 528 U.S. at 183-184 (standing shown where plaintiffs assert that "affiant members' reasonable concerns about the effects" of discharges "directly affected those affiants' recreational, aesthetic, and economic interests.")

### C. Multiple Affidavits Showing Particularized Injury Do Not Show "Generalized Grievance"—They Show Standing

DHEC contends that the injuries of Tommie Robertson and other witnesses are mere generalized grievances. DHEC 10. Either DHEC believes, like SPA, that no more than one person can *ever* be injured, or it has not read the affidavits. Our reply to SPA shows the former position is untenable. An examination of the actual affidavits submitted in this case shows the latter one is too.

Tommie Robertson testified that she has personally "experienced the negative effects of the thick black smoke being emitted from ship smokestacks firsthand" and watched as "the thick smoke move[d] from the cruise ship toward [her] home." R.02589. These harmful emissions have become so unbearable that she "can no longer open any windows or enjoy [her] terrace while the cruise ships are in town." *Id.* She has also "personally experienced [] health impacts in the form of a

sore throat or difficulty breathing" when she is "outdoors while the cruise ship is docked" at the existing terminal. *Id.* She "seriously fear[s]" that her experience "will only get worse with increased and prolonged exposure" and is "deeply concerned that if the SPA constructs a new cruise terminal closer to [her] home, and if there are larger and more frequent ships, the adverse effects [she] experience will be significantly increased," as will the "interference with use and enjoyment of [her] property . . . ." *Id.*

Christina Dodd also lives near the proposed cruise terminal and has experienced increased oily soot inside her home's window sills due to cruise operations and is "very concerned what this residue from burned sulphur-heavy fuel is doing to [her] lungs and overall health," as she is "breathing this pollution both inside and outside of [her] home." R.002576-578. She testified that a permit that "facilitates more cruise ships and more people without the limitations needed to combat the problems of pollution and traffic that I have already experienced" will "only make things worse." *Id.*

Steve Gates experienced "oily soot deposits" on his home that was "heavier and more oily than anything [he] had seen on [his] property prior to 2010 when Carnival began its cruise ship operation at Union Pier" R.002594-5. Gates testified that his "health is seriously threatened" by cruise operations, citing medical opinions of the Charleston County Medical Society and South Carolina Medical Association "who have warned and advised local residents of the increased risks associated with low-grade sulfur emissions from cruise ships idling and debarking

from port," making him "personally concerned about the real and substantial risks posed by this soot and additional air emissions on my health." R.002595. Gates testified that the advent of year-round cruise home porting had interfered with the "use and enjoyment" of his "property and the historic district of Charleston," R.002594, and that, among other things, the cruise operation's addition of 500 cars to "already busy streets" has made it "essentially [] impractical to go about [] daily activities when the cruise ship are in town." Nearby East Bay Street "becomes gridlocked with cruise ship traffic heading for the Union Pier terminal" such that what "would normally be a 5-minute trip" from his house "ends up taking 45 minutes." *Id.*

Mr. Gates also testified that if SPA "constructs a new cruise ship terminal, these negative consequences [he is] currently experiencing will be increased" and that the "harms will be significantly increased" because "the new terminal will allow larger (3500+passenger) and more ships to dock at Union Pier." R.002595. Gates further stated that since SPA has indicated that a new terminal was essential for ongoing and growing cruise industry, the "negative impacts that [neighborhood association] members are currently experiencing will be perpetuated and exacerbated by allowing SPA to install the pilings and construct its new expanded cruise terminal." R.002596. He testified that he is concerned that if SPA allowed to move forward to expand operations with new terminal "without agreeing to legal limitations on the scale and scope of those operations such as the use of shorepower," then he is "certain" his "quality of life and use and enjoyment will

suffer further harm and the nationally treasured historic character of [his] neighborhood will be jeopardized and potentially lost forever." R.002596

Along similar lines, Virginia Lane, an architect who lives and works two blocks away from the terminal, testified that since 2010 home-basing operations began, she experienced a "dramatic negative effect" including "tremendous detrimental impact on traffic and congestion in the historic district;" her clients, employees, and colleagues "have expressed problems with being able to access" her office "due to cruise related traffic," and she is concerned about impacts to business and to value of property if a new terminal is built. R.002584. She testified that large ultramodern cruise vessels "visually overpower the historic district, lessening my enjoyment in viewing the architecture," and that the Historic Charleston Foundation challenged DHEC's permit "with the goal of adequate controls to preserve and protect the historical, architectural, and material culture that make up Charleston's rich an irreplaceable heritage" R.002583-85.

Marty Moganello "regularly swim[s] and kayak[s]" and "enjoy[s] the recreation and aesthetic value" of the "waterways surrounding [his] home." R.002752. He testified that "cruise ships are able to dump raw sewage merely 3 miles off the coast and into our waterways" and "within one mile of the coast [] dump gray water, which consists of water used by cruise ship passengers to wash their hands, take showers, clean dishes and more." R.002751. "The dumping of this waste directly into our waterways not only pollutes the waterways themselves, but also exposes members of the public like myself who use and enjoy those waterways

to risks of disease and infection." *Id.*

Morganello testified that the permitted terminal "will decrease [his] ability to use and enjoy" area waterways for fear of health impacts from increased cruise ships discharges." R.002752. He believes "[t]he potential for raw sewage and pollution to wash onshore or otherwise come into contact" with him while he is "using the waterways is a real threat." And he is concerned that DHEC's permit, which he describes as "a precursor to expanded cruise ship operations," will allow "larger and more frequent cruise ships" and increase "the amount of waste being dumped into" area waters and "the risked posed by contamination of those waters," thus decreasing his "ability to use and enjoy the waterways for fear of health impacts" R.002752.

Katie Zimmerman cited a Congressional Research Service report regarding numerous waste streams of cruise ships and the "risk they pose to human health." R.002603. She testified that pollution from the ships in area waters presents "recognized threats to water quality that CCL seeks to protect on behalf of and in concert with its members," and that DHEC should have considered those threats and options to reduce them. R.002605. She also discussed an expert report "showing that shore-side power would significantly reduce emissions of not only sulfur dioxide, but also of other major pollutants." R.002604.

Hundreds of League members participated in the DHEC process advocating pollution reduction options that "were not considered" in DHEC's decision, such as limits on size, limits on the number of ships, shorepower, and access to pollution

discharge logs to reduce unpermitted discharges into local waters. R.002601.

These affidavits overwhelmingly demonstrate individually particularized injury from DHEC's proposed permit. They describe specific harms that specific people have already experienced as a result of cruise operations, and that are reasonably traceable to ongoing and expanded operations which DHEC's permits will enable. Because the injuries are sufficiently personal to the individuals, they are not defeated because others are harmed as well. *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 24 (1988). Moreover, because "aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society," the fact that that particular "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).

### D. Petitioners' Injuries Are Redressable

DHEC tells the Court that Petitioners "failed to provide *any* evidence that the denial of the permit would redress the Petitioners' alleged injuries." DHEC 9 (emphasis original). In fact, Petitioners submitted evidence demonstrating that setting aside DHEC's permit, or issuing a new permit with proper conditions, would prevent Petitioners' injuries from being exacerbated or their experiencing new ones.

Among other things, Petitioners contend that DHEC failed to consider the "extent to which all feasible safeguards" were "taken to avoid adverse environmental impact resulting from a project," S.C. Code Ann. § 48-39-150(A)(9) (R.001338); minimization of impacts to a National Historic Landmark district,

Coastal Zone Management Plan IV-25 (R.001338); and whether SPA had a "feasible alternative" to "reduce[] adverse consequences on water quality," S.C. Code Ann. Regs. 61-101(F)(3)(c), (F)(5)(b). Prevailing on their claims could, and should, mean that DHEC would impose conditions to reduce the project's injury to the Petitioners. Further, where, as here, a statute gives cause of action to adversely affected or aggrieved persons, the causation and redressability elements of Article III standing are relaxed. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 n.7 (1992). The provision of an administrative remedy shows the General Assembly's "evident intent" to make agency action reviewable, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012), obviating the need to second-guess the remedy provided to redress a party's injury.

DHEC also asserts the *impossibility* of redressability citing the "undeniable reality" that the permit "has zero impact on the Port's Authority's ability to *continue* cruise operations." DHEC 9 (emphases in original). Once again DHEC is just repeating SPA talking points without regard to the record. The record shows that when SPA sought a permit from DHEC, it cited the "need" for a new terminal to allow operations to continue. *See* Reply to SPA at 1 (citing R.001243). And Petitioners submitted multiple documents from SPA's own files as well as affidavit testimony establishing that a new terminal would allow cruise operations (and injuries from them) to continue and expand beyond what would otherwise be possible without a DHEC permit. *See* supra at 7-13. Notably, the measures pressed by Petitioners as legally required for SPA's permit—such as shorepower and

accountability for water pollution—would reduce impacts *even if* SPA did *not* need a new terminal to continue or expand operations. Thus they have shown standing, including redressability, even if the Agencies' mistaken premise (that a new $35 million 28-acre terminal would change absolutely nothing) were correct (which it isn't).

While DHEC evidently feels free to ignore these record materials, the ALC, resolving SPA's motion for summary judgment, did not have that liberty. It was required to "view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable" to Petitioners. *Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.*, 385 S.C. 452, 456, 684 S.E.2d 756, 758 (2009) (internal quotation omitted). Its failure to do so was reversible error.

### E. Petitioners' Injuries Are "Fairly Traceable" to the Terminal Permit

DHEC's arguments on traceability blur and overlap with its arguments on injury and redressability. They are all meritless. The alleged injuries from continued and expanded cruise operation are not only "fairly traceable" to DHEC's approvals, approvals from DHEC were sought because they were necessary but-for prerequisites.[1]

SPA sought DHEC's authorizations because SPA intends to build a larger

[1] Since the Petitioners specifically argued that they demonstrated standing by showing "injury-in-fact fairly *traceable* to DHEC's decisions" that "could be *redressed* by administrative review" 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, Appellants' Ct. of Appeals Initial Br. 30 30, 33-34, SPA's claim that this is unpreserved, SPA 20-21, is wrong.

cruise terminal to home base larger cruise ships. Petitioners have submitted documents from SPA's own files showing this fact. *See* Reply to SPA at 3. They have also submitted multiple affidavits and documents explicitly explaining the link between the proposed terminal and the exacerbation of their injuries. DHEC once again does not actually respond to any of this record evidence, beyond randomly firing evidentiary objections into the air and hoping they hit something. But where a party meets its burden of production in opposing summary judgment, conclusory disparagements of that evidence do not support granting summary judgment – they require denying it. DHEC has failed to rebut Petitioners' showing that they showed every element of Article III constitutional standing by overwhelming proof.[2]

## II. DHEC's Associational Standing Arguments Are Legally Unsound and Factually Untenable

DHEC repeats SPA's erroneous argument that Petitioners lack associational standing because none of the alleged injuries "have anything to do with or derive from the respective affiants' membership in the organization." DHEC 11. Once again DHEC is operating in record-free mode. To take but one example, Virginia Lane's affidavit explicitly links her injury (degradation of downtown Charleston's

[2] DHEC takes the birdshot approach to evidentiary objections, spraying out labels like hearsay and speculation, DHEC 9, without directing the Court to any specific portion of any specific affidavit or explaining how any legal label fits it. They don't. As shown in our brief, blanket evidentiary objections do not negate affidavits based on personal experience and conveying that experience and its factual corollaries in detail, *see* supra at 8-13. The closest DHEC comes to specifics is to claim that Mr. Gates' affidavit contains "hearsay repetition" of a medical society warning, DHEC 9. But the warning was offered to show its effect on Mr. Gates to increase his already reasonable concern that the diesel particulate soot coating his house is also a hazard to his health. *United States v. Dupree*, 706 F.3d 131, 136 (2d Cir. 2013) ("a statement offered to show its effect on the listener is not hearsay"). Further, Gates' concerns are verified by multiple documents in the record. *See* Reply to SPA at 11.

nationally significant historic area) to the actions and mission of Petitioner Historic Charleston Foundation, which seeks to prevent degradation of Charleston's nationally significant historic area. R.002583-85.

Putting aside its cavalier disregard of the appellate record, DHEC's legal contention that a member's injury must "derive from" membership in an association is wrong, and fundamentally misreads *Warth v. Selden*, 422 U.S. 490 (1975). As explained in Petitioners' Reply to SPA at 17-20, the language quoted by DHEC applies only when an organization asserts standing on its own behalf, not to representational standing. *Warth*, 422 U.S. at 511. Representational standing is governed by the familiar three-factor test—standing by at least one member, germaness, and no need for individual member participation in the litigation—which Petitioners fully met here.

To the extent that DHEC's argument about individual injuries supposedly having "nothing to do with" their respective organizations goes to germaneness, the record refutes it. The organizations were established to protect neighborhood wellbeing, preserve the local environment and human health, and to guard the integrity of some of the most revered and best preserved historic resources in South Carolina and the United States.[3] Their purposes and activities fully encompass the

[3] *See e.g.*, R.002595-96 (CNA) ("the founding principles [of the group] in preserving the historic quality of our neighborhood will continue to be directly threated by" the proposed terminal, so "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"); R.002600-01 (CCL) ("mission is to protect the natural environment of the South Carolina coastal plain and to enhance health and quality of life in our communities by working with individuals, businesses, and government to ensure balanced solutions"); R.002644-45 (PSC) (purpose is to "take whatever

harms that Petitioners seek to avoid or reduce in this case.

## III. The Two-Issue Rule Is Inapplicable

DHEC's assertion of the two-issue rule to avoid review of the lower courts' standing rulings is meritless. As shown fully in our Reply to SPA, this Court has treated standing as a single issue in applying the two issue rule. *Sloan v. Dep't of Transp.*, 365 S.C. 299, 307, 618 S.E.2d 876, 880 (2005). Further, the issue of standing's sub-elements are functionally intertwined and overlapping, *see, e.g.*, Note, *Causation in Environmental Law*, 128 Harv. L. Rev. 2256, 2275 (2015) (recognizing that injury and causation are intertwined elements in *Laidlaw*, 528 U.S. at 181-83. DHEC's own brief makes that point by confusingly mixing the elements together on every page.

Even if the two-issue rule applied, the Petitioners fully appealed the ALC's Article III standing ruling to the Court of Appeals and to this Court, including the sub-elements of causation/traceability and redressability. *See* Reply to SPA 16.

## IV. The ALC Abused Its Discretion in Sanctioning Litigants for Contending That "Must" Sets Forth a Mandatory Duty

The ALC's sanctions order, leveled against Petitioners for espousing a

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steps may be necessary and feasible to prevent the destruction or defacement of any such building sit or structure"; "[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.002582 (HCF) ("mission is to preserve and protect the historical, architectural and material culture that make up Charleston's rich and irreplaceable heritage"); R.002588 (CCCC) (Non-profit founded in 2010 with the primary purpose of finding a more appropriate location for cruise operations and establishing legally binding limitations on those operations.); R.000091 (Surfrider) ("environmental organization dedicated to the protection and enjoyment of the world's oceans, waves and beaches for all people, through conservation, activism, research and education.")

reasonable statutory interpretation, was an abuse of discretion.DHEC's claim that the issue is unreviewable because Petitioners did not also appeal the ALC's remand order is a baseless diversion. The issue on appeal is whether putting forth one of two possible interpretations of an ambiguous statute was *sanctionable*, which is why the Petitioners appealed the *sanctions* order. Further, the sanctions order directly addresses the statutory interpretation that gave rise to it. R.000072–74. This Court has not hesitated to rule on a sanctions order alone. *See Ex parte Bon Secours-St. Francis Xavier Hosp., Inc.*, 393 S.C. 590, 593, 713 S.E.2d 624, 625 (2011). In fact, DHEC has not been able to point to *any* case where a court declined to rule on a sanctions order because the appellants failed to appeal a separate interlocutory order that was based on different legal standards applied to different facts.[4]

Setting aside the procedural distraction, DHEC has not refuted Petitioners' showing that sanctions are inappropriate where litigants set out textually-based interpretations of a statute, and offered them in good faith rather than for an improper purpose like delay. Sanctions "should be rare" and applied only in "extreme" cases where an attorney's conduct "goes far beyond" that of a reasonable litigant. *Bon Secours*, 713 S.E.2d at 625-26. Making an argument based on a

[4] In *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 564 S.E.2d 94 (2002), this Court ruled on an interlocutory class certification order to avoid unnecessary future litigation but said nothing about whether it was necessary to separately appeal that order to challenge a sanctions order or any other order. The other case DHEC cites addresses the two-issue rule and is similarly inapposite. The irony of the Agencies' position is that reliance on such dubious authority to appeal a separate interlocutory order would likely subject appellants to *further* sanctions.

reasonable interpretation of an ambiguous statute is not sanctionable conduct. *See Clarendon County v. TYKAT, Inc.*, 09-ALJ-17-0458-CC, 2010 WL 6782564, at *4-5 (June 1, 2010) (denying sanctions even against litigant whose proposed statutory construction would require a "coerced reading, rejecting established canons of construction"); *Fair Hous. Rights Ctr. in Se. Penn. v. Post Goldtex GP, LLC*, No. CIV.A. 14-4441, 2015 WL 171840, at *8 (E.D. Pa. Jan. 14, 2015), *aff'd*, 823 F.3d 209 (3d Cir. 2016) (motion to dismiss, but not for sanctions, granted where court did not accept plaintiffs' interpretation of ambiguous statute).

The Petitioners' statutory reading is reasonable and non-frivolous. The statute directs that the DHEC Board "must" hold a review conference within sixty days of a request, and that if it does not, the ALC has jurisdiction. S.C. Code Ann. § 44-1-60(F). The Petitioners did not ignore the "decline" language in sections 44-1-60(F) and (G)(1). Instead, they have demonstrated, with dictionary quotations and citations, that the language can be read to impose a mandatory duty on the Board. Petitioners' Opening Br. 34. That the ALC did not agree hardly means Petitioners' argument was frivolous.

The language at issue has *never* before been litigated. The cases DHEC cites said to show that it has either paraphrase the statutory language or discuss it in dicta with no textual analysis. *Trident Med. Ctr., LLC v. S.C. Dep't Health & Envtl. Control*, Nos. 09-ALJ-07-0332-CC, 09-ALJ-07-0333-CC, 09-ALJ-07-CC, 2012 WL 7187635, at *22 (Sept. 26, 2012) (paraphrasing section in conclusion as a matter of law stating DHEC Board affirmed staff Certificate of Need application approvals

without final review conferences); *Hill v. S.C. Dep't Health & Envtl. Control*, No. 10-ALJ-07-0625-CC, 2010 WL 578666, at *2 (Dec. 9, 2010) (paraphrasing section in discussion of whether ALC hearing request was timely); *Wise v. S.C. Dep't Health & Envtl. Control*, No. 10-ALJ-07-0851-CC, 2011 WL 2413274, at *2 (Feb. 23, 2011) (paraphrasing section in discussion of whether ALC could hear request where plaintiff did not timely file and participate in DHEC Board review process); *Pinckney Point, LLC v. S.C. Dep't Health & Envtl. Control*, No. 08-ALJ-07-0363-CC, 2009 WL 6527323, at *16 (Nov. 13, 2009) (dicta in discussion of whether ALC has jurisdiction to conduct de novo hearings of permitting decisions). Whether the Board "must" hold conferences, and what remedies are available when it "declines" were not discussed, much less litigated. Yet even if contrary precedent did exist, an attorney does not act frivolously by making a "good faith argument for an extension, modification or reversal of existing law." Rule 3.1, RPC, Rule 407, SCACR.

Nor does the background discussion in a brief filed years ago in a case where the meaning of this provision was *not* litigated add to the discussion. The Petitioners have never contended that the statute can only be read one way. That they assumed one interpretation in a background discussion years ago and then discerned a better interpretation years later when the provision's meaning was actually litigated is not sanctionable conduct. It is ethical lawyering. Preamble, RPC, Rule 407, SCACR ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system").

The sanctions order was an arbitrary abuse of discretion. It should be

reversed.

## V. The ALC Abused Its Discretion in Prematurely Closing Discovery When All Parties and the ALC Acknowledged Discovery Was Ongoing

As with the sanctions argument, DHEC again attempts to insulate an abusive ALC order with fabricated procedural barriers. DHEC claims the discovery order is unreviewable because the ALC in a footnote vacated the discovery order *sua sponte* and denied it as moot "in light of the disposition of the summary judgment motion" currently on appeal. R.000095. This argument fails first because the Agencies are precluded from re-arguing an issue that this Court already rejected in denying a motion to dismiss.[5] Second, DHEC has not actually identified any rule that prohibits this Court from reviewing a vacated order. For example, in *Webster v. Clanton*, this Court voided an unappealed child custody order because "no appeal [] was necessary to protect the rights of the father" seeking custody. 259 S.C. 387, 391-92, 192 S.E.2d 214, 216 (1972). The Court then declined to decide the issue underlying that order because "the record [was] entirely insufficient," not because the order had been voided. *Id.* The other case DHEC cites also does not declare a rule prohibiting review of final orders that are later vacated. In *Leviner v. Sonoco Products Co.*, 339 S.C. 492, 493, 530 S.E.2d 127, 127 (2000), this Court determined that first of two conflicting orders was the "final," appealable order as the second

[5] *Compare* SPA 38 ("None of the ALC's discovery rulings are properly before this Court because the ALC vacated the Discovery order and because Petitioners failed to challenge the denial of their motion to re-open discovery as moot."), *with* Respondent SPA's Mot. to Dismiss Appeal 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").

order was "void" as untimely under Rule 59(e), SCRCP. The Court went on to find that first order "was not directly appealable since it remanded the matter to the single commissioner for further proceedings," but said nothing about whether it is permissible to appeal a "voided" order.

DHEC's claim of abandonment, DHEC 18, is similarly meritless. The Petitioners need not formally appeal each subsequent procedural action—denial, then vacatur, then declaration of mootness—to preserve their right to review the ALC's error of denying the motion to expand discovery. *Fields v. Melrose Limited Partnership*, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993), states the unremarkable principle that an appellate court will not address a substantive issue raised in the statement of the issues but not argued in a party's brief. Here, the Petitioners raised their challenge in the issues on appeal and argued the point in their opening brief.

DHEC notes that Petitioners appealed the ALC's abusive discovery order even though the ALC had subsequently "vacated" that order "as moot" after entering summary judgment against Petitioners. DHEC 3. Why would Petitioners appeal a vacated order? The most natural interpretation is that vacatur was a maneuver to *avoid* appellate review, and had Petitioners *not* appealed the vacated order, they would on remand find themselves subject to it coming back into effect. Said another way, if summary judgment is reversed, absent appeal of the discovery order, Petitioners would be forced to brief summary judgment again without complete discovery, including, for example, depositions of SPA witnesses whose

affidavits make claims counter to the documentary record. R.002277-78. This is why it is essential for this Court to resolve the issue on the merits now.

Turning to the merits, DHEC does not dispute the timeline setting forth that the ALC and all parties proceeded as if discovery would continue months after the retroactively-imposed May 20, 2013 "deadline." The ALC itself condoned discovery ongoing well after this date, stating it hoped "parties could complete discovery" in time for the 2014 merits hearing, R.002232; SPA produced thousands of pages of documents even after the Petitioners filed their Motion to Expand Discovery, R.001042; and SPA stated in its prehearing statement that it would need "six to nine months"—until February 2014—to complete discovery, R.002231.

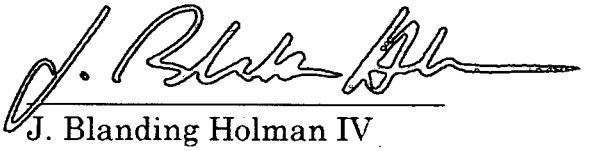
Given the usual course of discovery practice in the ALC and the ongoing discovery in the case, Petitioners had no cause to affirmatively seek to protect their right to participate in discovery that all parties were engaged in and which the ALC had explicitly condoned. Once SPA announced its retroactive change in position, Petitioners promptly sought a formal order protecting their discovery rights, denominating it as a motion to "expand" discovery in an abundance of caution given that such requests are freely allowed under the ALC Rules, Rule 21, SCALC. Petitioners easily met the "good cause" standard[6] by establishing harm based on the inability to conduct requested depositions. They also produced an affidavit from a seasoned practitioner who represented DHEC before the ALC for years; she confirmed that the 90-day deadline that SPA retroactively announced as binding is

[6] Cases the Agencies cite from other jurisdictions and interpreting different rules of procedure are not relevant to establish a heightened standard.

in fact rarely observed in environmental permitting cases, and stated that she had never experienced or heard of strict adherence to the 90-day limit. *See* Riley affidavit, R.002950–52.

DHEC has no answer to that testimony, nor to our showing that the ALC's retroactive closing of discovery when DHEC and the other parties had engaged in discovery well after that date, and the ALC had condoned it, was an unfair and arbitrary abuse of discretion. The discovery order should be reversed so that Petitioners can complete discovery prior to trial.

Respectfully submitted,



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December 7, 2018
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA

In the Supreme Court



APPEAL FROM ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Case No. 13-ALJ-07-0056-CC
Appellate Case No. 2014-000847

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

v.

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

## PROOF OF SERVICE

I hereby certify that on December 7, 2018, I caused to be served the foregoing *Petitioners' Reply Brief to South Carolina Department of Health and Environmental Control* on all counsel of record by placing copies of same in the U.S. Mail addressed to:

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