

THE STATE OF SOUTH CAROLINA

In the Supreme Court

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APPEAL FROM ADMINISTRATIVE LAW COURT

S.C. SUPREME COURT

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

Supreme Court Case No. 2018-000137

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.

**PETITIONERS' RESPONSE IN OPPOSITION TO RESPONDENTS' PETITION FOR  
REHEARING**

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June 26, 2020  
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Pursuant to Rules 221(a) and 240, SCACR, Petitioners respectfully request that this Court deny rehearing of Opinion No. 27949 issued on February 19, 2020 (“Opinion”), as petitioned by the South Carolina Ports Authority (“SPA”) and the South Carolina Department of Health and Environmental Control (“DHEC”).

### **STANDARD FOR REHEARING**

Rule 221(a), SCACR, requires that a party requesting rehearing “state with particularity the points supposed to have been overlooked or misapprehended by the court.” “The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.” *Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (citation omitted). A petition for rehearing should not be used “to repeat arguments already considered and rejected by this [C]ourt.” *Williams v. Wade*, 365 Ark. 217, 217, 226 S.W.3d 790, 791 (2006).

### **INTRODUCTION**

The Court’s Opinion examines the major issues presented in this case thoroughly, and resolves them correctly. The petitions for rehearing filed by SPA and DHEC present no grounds for questioning or disturbing that result. Instead, the Petitions largely regurgitate arguments already made to, and considered by, the Court, supplemented by a few meritless arguments that Respondents should have made earlier but failed to. The Petitions should be denied.

On the central substantive issue—whether Petitioners have S.C. Code Ann. § 44-1-60(G) “affected person” standing—the Opinion recognizes that “whether a statute confers a standing [on a party] is an exercise in statutory interpretation.” Op. 6 (quoting *Youngblood v. S.C. Dep’t of Soc. Servs.*, 402 S.C. 311, 317, 741, S.E.2d 515, 518 (2013)). The Court interpreted the

undefined term “affected” using that word’s customary meaning, and found that the Petitioners’ members—whose homes are adjacent to SPA’s proposed 28-acre shipping terminal and who reasonably fear that the diesel soot emissions already injuring them will increase—so qualify. Op. 12.

According to the rehearing requests, “*statutory standing does not exist*” under Section 44-1-60(G). SPA Pet. for Reh’g (“SPA Pet.”) 11 (emphasis added); *see also* DHEC Pet. for Reh’g (“DHEC Pet.”) 2. This remarkable statement is refuted by the statute’s plain language. When it enacted Section 44-1-60 in 2006, the General Assembly created a new, uniform administrative review process for DHEC decisions, and directed that an “applicant, permittee, licensee, or *affected person may file a request with the Administrative Law Court for a contested case hearing.*” S.C. Code § 44-1-60(G) (emphasis added). The Opinion’s recognition of statutory standing carries out unmistakable legislative intent.

Respondents’ other grounds for rehearing run mostly in a similar vein: meritless arguments recycled from earlier briefs. SPA again claims that it is “undisputed,” SPA Pet. 5, that a new 28-acre facility with a 100,000-square-foot terminal capable of home-basing much larger vessels will change nothing for Petitioners even though numerous SPA documents and multiple sworn affidavits show the exact opposite. They again demand deference to DHEC’s obviously mistaken readings of laws that are outside that agency’s specialized expertise. They again insist that standing for administrative review must be proved by expert medical testimony, and again claim that this Court misunderstands its own decision in *Carnival Corp. v. Historic Ansonborough Neighborhood Ass’n*, 407 S.C. 67, 753 S.E.2d 846 (2014). The Court has rejected these claims once before and should do so again.

The Respondents’ newer arguments could have been made before but were not—with good reason. No support exists for the claim that “affected person” statutory standing merges with “public importance” standing. The notion that “affected person” standing is unworkable ignores the Opinion’s recognition of practical factors like proximity that courts use all the time in determining if a party has alleged a sufficient injury for standing, even under the Respondents’ preferred federal Article III test. There is no basis for rehearing, new or old, on the issue of standing.

On the sanctions and discovery issues, SPA’s petition for rehearing identifies no points overlooked or misapprehended by the Court. Instead SPA repeats the same arguments it has made throughout this appeal, and which the Opinion finds meritless. The Opinion properly finds that a motion is not frivolous simply because its denial was unappealed, and that the Administrative Law Court (“ALC”) must have factual support for a finding of sanctionable frivolity, which was absent here.

There is also no ground for disturbing the Opinion’s holding on discovery. As the Opinion observes, the ALC *sua sponte* granted ongoing discovery and condoned the parties engaging in it, such that its later retroactive revocation of that discovery was error. There was no barrier to review of the ALC’s decision, and the Court properly reversed the discovery decision to facilitate orderly proceedings below now that the erroneous summary judgment order has been reversed.

## **ARGUMENT**

### **I. Respondents’ New Standing Arguments Are Tardy, Barred, and Meritless.**

Respondents’ petitions for rehearing attempt to introduce new arguments on standing. Because “[t]he purpose of a petition for rehearing is not to present points which lawyers for the

losing parties have overlooked or misapprehended,” the Court need not—and, indeed, should not—consider these new arguments here. *Kennedy*, 349 S.C. at 532, 564 S.E.2d at 322. The arguments are barred, and they are also meritless.

**A. Respondents’ “public importance” standing argument is barred and meritless.**

SPA argues that the Opinion’s recognition of “affected person” standing “effectively affords” Petitioners public importance standing “by rejecting the traditional standing analysis” without requiring “a matter of important public interest or the need for further guidance.” SPA Pet. 32–33. This argument is barred, since SPA could have raised it earlier in addressing Petitioners’ claim that the statute, by its clear terms, provides “affected persons” the right to invoke administrative review without Article III standing.

Even if not barred, the argument is meritless. Public importance standing confers standing “*without* requiring the plaintiff to show he has an interest greater than other potential plaintiffs.” *ATC S., Inc. v. Charleston Cty.*, 380 S.C. 191, 198, 669 S.E.2d 337, 341 (2008) (emphasis added). By contrast, the Opinion recognizes that Petitioners showed real harm that is “distinguishable from the impacts generally falling upon the public at large . . . .” Op. 11, 13. So, contrary to SPA’s claims and the standard for public importance standing, a person invoking Section 44-1-60(G) must assert a particularized effect from the challenged permit to satisfy standing. On the other hand, to show public importance standing, a party must show that an issue is of significant public import and that future guidance from the Court is needed on a point of law. *ATC S.*, 380 S.C. at 198, 669 S.E.2d at 341. Given the different elements of the two tests, the Opinion’s recognition of “affected person” standing does not merge with public importance standing.

**B. The Respondents' workability concerns are barred and meritless.**

Respondents' claim that "affected person" standing will create workability problems for lower courts, SPA Pet. 17; DHEC Pet. 2, is another argument they could have raised earlier: Petitioners have contended that "affected person" should be given its customary meaning throughout this litigation, Pet'rs' Br. 20. Respondents' argument is therefore not a proper basis for rehearing.

Even if properly raised, the argument is meritless and misleading. SPA attempts to seize on a sliver of the Opinion's definition of "affected"—"to influence in some way"—as evidence that the test for standing is overbroad, SPA Pet. 17, but the Opinion specifies that "affect" is "often used in the sense of acting *injuriouly* upon persons and things." Op. 8 (emphasis added) (quoting *Black's Law Dictionary* 53 (5th ed. 1979)). The Opinion thus requires more than a nebulous claim of "influence" to support standing under Section 44-1-60(G); it requires a showing of prospective injurious effect. A person alleging standing must show that his or her harms are more than generalized grievances "falling upon the public at large" and are "not speculative." Op. 10–11. To be sure, the fact that a project or permitted pollution causes particularized harm to more than one person does not render the harm an abstract grievance—but that is so even under SPA's preferred Article III test. *See* Pet'rs' Br. 17; *Pye v. United States*, 269 F.3d 459, 469 (4th Cir. 2001) ("So long as the plaintiff himself has a concrete and particularized injury, it does not matter that legions of other persons have the same injury."); *see also* Op. 13 (finding that Petitioners "made *individualized* assertions of *real, anticipated harm*" sufficient for standing) (emphasis added).

In the end, SPA's workability concerns with the Opinion's recognition of "affected person" standing are overblown hyperbole. Common sense application of the term using factors

identified by the Court—including geographic proximity to the permitted project, Op. 11, and discrete environmental effects, Op. 12 (increases in diesel soot pollution, water pollution, and traffic and noise)—will ensure that the recognized impacts are in line with the types of injuries that South Carolina courts have recognized for decades. *See, e.g., Georgetown Cty. League of Women Voters v. Smith Land Co., Inc.*, 393 S.C. 350, 353–54, 713 S.E.2d 287, 289 (2011) (unlawful wetland filling damaged plaintiffs’ “recreational and aesthetic interests”); *S.C. Wildlife Fed’n v. S.C. Coastal Council*, 296 S.C. 187, 371 S.E.2d 521 (1988) (plaintiffs had standing to challenge dredging approval based on their “use and enjoyment of the fish and wildlife of the wetlands”).

## **II. Respondents’ Old Standing Arguments Were Properly Rejected and Remain Meritless.**

In addition to raising new arguments, Respondents’ petitions for rehearing repeat many of the arguments made in their original briefs, which this Court expressly rejected. Rather than explain how the Court misapprehended or overlooked any of the reshaped points, Respondents are in essence asking to “have the case tried in [this Court] a second time.” *Kennedy*, 349 S.C. at 532, 564 S.E.2d at 322. That is not the purpose of a petition for rehearing, and this Court should not grant rehearing on any of the grounds below.

### **A. Testimony and SPA’s own documents prove that the challenged permit would result in a larger, more polluting terminal that would harm Petitioners.**

SPA attempts to reargue the facts by preposterously claiming that “it is undisputed” that cruise and cargo activities at SPA’s derelict terminal “can and will continue” and will not change without a new terminal or permit. SPA Pet. 5. But SPA’s own documents—including its application for the permits at issue in this case, which SPA was obliged to complete *truthfully*—show that a new facility is needed to comply with heightened federal security requirements and

to meet the expanding needs of the cruise industry. Pet’rs’ Reply Br. to SPA 1 (citing R.001243; 002473; 002479).<sup>1</sup> Thus, undisputed documents show that SPA’s cruise operation, and the pollution it causes, cannot continue without a new permitted terminal.

Likewise preposterous is SPA’s claim that its new 28-acre cruise shipping terminal with expanded operations will *benefit* Petitioners and reduce impacts. SPA Pet. 7. SPA’s own documents show that this characterization is false. Pet’rs’ Reply Br. to SPA 2. SPA’s much larger<sup>2</sup> cruise terminal is explicitly engineered to host *larger* vessels—with greater impacts—than have ever been home-based at SPA’s existing “out of date” terminal.<sup>3</sup> Further, the new facility would be located much *closer* to Petitioners’ members.<sup>4</sup> Pet’rs’ Br. 10–13; Pet’rs’ Reply Br. to SPA 2–3.<sup>5</sup> Overwhelming evidence showed that the proposed terminal would continue and exacerbate existing injuries and create new ones.

SPA’s repeated arguments about *Bailey v. South Carolina Department of Health &*

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<sup>1</sup> In its own words, SPA has made “very clear” the “urgent need to improve” its “desolate,” “undistinguished,” “out-of-date,” and “unattractive” facility to meet the demands of the cruise industry. Pet’rs’ Reply Br. to SPA 2 (quoting R.002470; 002481; 002482).

<sup>2</sup> The 108,000-square-foot terminal building would be *three times larger* than the current one, and at 28 acres, cruise operations at the new terminal would occupy an area *four times greater* than at present. Pet’rs’ Reply Br. to SPA 2.

<sup>3</sup> The proposed terminal is designed to home-base a 3,500-passenger ship and accommodate up to 4,100-passenger ships, Pet’rs’ Reply Br. to SPA 3 n.3, whereas the current terminal struggles to home-base even a 2,500-passenger ship, Pet’rs’ Reply Br. to SPA 3.

<sup>4</sup> Declarant Tommie Robertson’s home is so close to the proposed terminal that she could “throw a rock” onto it. R.002588.

<sup>5</sup> SPA once again repeats the baseless claim that Petitioners’ injuries would be lessened with a new terminal because cruise operations and “cargo, rail and truck operations” will continue at UPT without a new cruise terminal. SPA Pet. 7. But SPA’s own documents show that SPA *ceased* major cargo and rail operations at UPT in 2011. Pet’rs’ Reply Br. to SPA 2–3 n.2 (citing R.002437); *see* R. 001717 (SPA in 2012: the “*only significant activity* at UPT was the use of the terminal for passenger cruise ships.”) (emphasis added). Thus, even assuming existing cruise operations could continue without it, the new terminal would exacerbate existing injuries and create new ones due to the facility’s changed location and engineered capacity to home-base much larger vessels than have ever home-based in Charleston before.

*Environmental Control*, 388 S.C. 1, 693 S.E.2d 426 (Ct. App. 2010), thus remain off the mark. SPA Pet. 28. The plaintiff challenging a dock modification permit in *Bailey* lacked standing because he provided no evidence that modification would change anything at all about an ongoing boat operation. Pet'rs' Reply Br. to SPA 14–15 (citing *Bailey*, 388 S.C. at 7–8, 693 S.E.2d at 429–30). The permit in *Bailey* did not alter the length of the existing dock, the number or types of boats moored at the dock, or the personal, recreational use of the dock. 388 S.C. at 7–8, 693 S.E.2d at 429–30. By contrast, the permit at issue here would alter the terminal's location and configuration, would greatly increase its size, and is intended to facilitate the home-basing of much larger polluting vessels than have ever home-based in Charleston before. *Bailey* remains factually distinguishable.

The Opinion correctly recognizes evidence that the proposal would exacerbate existing injuries and cause new ones. Op 10, 12, 13. SPA's recycled claims to the contrary create, at best, issues of fact that preclude summary judgment against Petitioners on standing rather than requiring it.<sup>6</sup>

**B. Respondents' notion that Section 44-1-60(G) provides no statutory standing is wrong.**

Respondents contend that “statutory standing does not exist” under Section 44-1-60(G), SPA Pet. 11; *see also* DHEC Pet. 2–3, but even a cursory view of the statutory language shows this is wrong. The statute provides that “[a]n applicant, permittee, licensee, or affected person may file a request with the Administrative Law Court for a contested case hearing” within a certain timeframe. S.C. Code Ann. § 44-1-60(G). There simply is no question that Section 44-1-60(G) creates statutory standing for participation in the administrative process. Since the

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<sup>6</sup> SPA's 38 page-long petition nowhere acknowledges the proper summary judgment standard nor applies it to the factual issues it raises regarding standing.

question of “whether a statute confers standing [on a party] is an exercise in statutory interpretation,” *Youngblood*, 402 S.C. at 317, 741 S.E.2d at 518 (2013), this Court properly engaged in statutory interpretation to find that Petitioners had standing.

Respondents theorize that *Freemantle v. Preston*, 398 S.C. 186, 728 S.E.2d 40 (2012), decided before *Youngblood*, somehow obviates the latter case and requires that the General Assembly “clearly and unequivocally provide the parameters for who may bring a lawsuit and under what circumstances” to confer standing by statute. SPA Pet. 9, 10; *see also* DHEC Pet. 2–3. In their view, the Court may *not* employ “traditional means of statutory interpretation” in the absence of technical “parameters” because “doing so would permit the Court to legislate the jurisdiction of the ALC.” SPA Pet. 10; *see also* DHEC Pet. 2–3.

The notion that provisions governing administrative review of DHEC permits go to “subject matter jurisdiction” and are immune to judicial construction, SPA Pet.10, recalls arguments SPA made to this Court several years ago that Section 44-1-60’s timing provisions defined “subject matter jurisdiction” such that courts could not consider DHEC’s failure to provide notice to a party who requested it. The Court unanimously rejected SPA’s view then. *See S.C. Coastal Conservation League v. S.C. Dep’t of Health & Envtl. Control*, 390 S.C. 418, 425–28, 702 S.E.2d 246, 250–52 (2008). It should do so again now.

As the Opinion recognizes, the General Assembly established the ALC as an administrative body that makes administrative decisions and is thus “distinguishable from judicial review.” Op. 9 n.3; *see* S.C. Code Ann. § 1-23-500 (establishing the ALC as “within the executive branch of the government of this State”). The General Assembly is free to establish rights and remedies under state law as it sees fit, *State v. Moorer*, 152 S.C. 455, \_\_\_, 150 S.E. 269, 274 (1929), and discerning who may participate in a statutorily-established administrative

procedure is a straightforward question of “statutory interpretation.” *Youngblood*, 402 S.C. at 317, 741 S.E.2d at 518.

Because statutory standing exists here, “[t]he traditional concepts of constitutional standing are inapplicable . . . .” *Freemantle*, 398 S.C. at 194, 728 S.E.2d at 44. *Freemantle* interpreted the grant of standing in South Carolina’s Freedom of Information Act (“FOIA”) to “any citizen of the State” to bring a FOIA claim in Circuit Court. *Id.* at 195, 728 S.E.2d at 45 (quoting S.C. Code Ann. § 30-4-100(a)). If SPA’s view of the law were correct, the lack of technical “parameters” in FOIA’s grant of statutory standing should have *triggered* the federal constitutional overlay SPA says is required here. It did not. *Freemantle* does not support the theory that the General Assembly must use judicially specified “magic words” to establish statutory standing or that statutory terms providing administrative remedies are immune to statutory interpretation.

Rather than a dramatic departure, the Opinion’s conclusion that Section 44-1-60(G) provides statutory standing to “affected persons” to administratively contest DHEC permits follows *Youngblood* and *Freemantle* by construing “affected person” to have a distinct, nonsuperfluous meaning apart from Article III standing. The General Assembly, the Opinion notes, “*intended* DHEC to receive input from all persons affected by a project with potentially harmful environmental impacts,” including in a contested case hearing. Op. 11 (emphasis added); see *Florence Cty. Democratic Party v. Florence Cty. Republican Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012) (“The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature.”). Because the General Assembly did not define “affected” in this context, the Court followed precedent and gave the term its “usual and customary meaning.” Op. 8 (quoting *Travelscape, LLC v. S.C. Dep’t of Rev.*, 391 S.C. 89, 99,

705 S.E.2d 28, 33 (2011)); *see also State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010) (“[T]he legislative intent must prevail if it can be *reasonably discovered* in the language used . . . .”) (emphasis added).

The Opinion therefore effectuates legislative intent. It also upholds the South Carolina Constitution by ensuring that no person affected by a DHEC decision would be denied administrative recourse. *See* S.C. Const. art. I, § 22 (“No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency *affecting* private rights except on due notice and an opportunity to be heard . . . .”) (emphasis added).

**C. Use of “affected person” standing elsewhere in Title 44 confirms the Opinion got it right.**

SPA claims that the Opinion misconstrues the General Assembly’s intent in Section 44-1-60(G) by “effectively ignor[ing]” other provisions in Title 44 where the term “affected person” is defined in more detail. SPA Pet. 14. This argument was raised at oral argument and remains meritless. Oral Argument at 18:45, *Pres. Soc. of Charleston v. S.C. Dep’t of Health & Envtl. Control*, Op. No. 27949 (S.C. Sup. Ct. filed Feb 19, 2020).

The General Assembly’s use of *identical language* to designate statutory standing in other categories of permit challenges only *reinforces* the conclusion that Section 44-1-60(G) provides statutory standing. “It is well-settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result.” *Grant v. City of Folly Beach*, 346 S.C. 74, 79, 551 S.E.2d 229, 231 (2001). By interpreting “affected person” in Section 44-1-60(G) to confer statutory standing—consistent with other provisions in Title 44—the Opinion provides the term a common significance across interrelated statutes and avoids rendering the General Assembly’s deliberate use of “affected

person” in Section 44-1-60(G) “meaningless.” Pet’rs’ Br. 20–21 (citing *Florence Cty.*, 398 S.C. at 128, 727 S.E.2d at 420) (“This Court will not construe a statute in a way which . . . renders it meaningless.”).

And a look at the specific statutory provisions cited by SPA—Sections 44-7-130(1) and 44-1-65—confirms that the Opinion got it right. Sections 44-7-130(1) and 44-1-65 govern the DHEC permitting programs for healthcare facilities and animal facilities, respectively; each provision defines when an “affected person” has statutory standing to contest a permit according to geographic distance from the permitted facility.<sup>7</sup> Notably, the General Assembly used and defined the term “affected person” in Section 44-7-130(1), 1992 Act No. 511, § 2, almost 15 years before the enactment of Section 44-1-60 in 2006, 2006 Act No. 387, § 48. Section 44-1-65, meanwhile, amended Section 44-1-60 in 2018 to create distinct procedures for “affected persons” to appeal animal facility permits. 2018 Act No. 139, § 1. So, the General Assembly had established a practice of granting statutory standing with the term “affected person” long before, and has continued that practice long since, Section 44-1-60(G). The inescapable conclusion is that the General Assembly intended Section 44-1-60(G) to confer statutory standing on “affected persons.” *Whitner v. State*, 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997) (“[T]here is a basic presumption that the legislature has knowledge of previous legislation . . . .”); *Doe v. State*, 421 S.C. 490, 499 n.6, 808 S.E.2d 807, 811 n.6 (2017) (“[T]he term ‘legislative history’ . . . may include, as we did, the historical evolution of the statute at issue.”).

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<sup>7</sup> SPA concedes in its petition for rehearing that Sections 44-7-130(1) and 44-1-65 both confer statutory standing rather than Article III standing. SPA Pet. 15 (citing the “clear intent by the General Assembly to create statutory standing for qualifying ‘affected persons’” under those statutory provisions).

That “affected person” standing in Sections 44-7-130(1) and 44-1-65 includes additional limitations reflects their narrower focus on healthcare facilities and animal facilities. Section 44-7-130(1) defines an “affected person” as, among other things, “a person residing within the geographic area served or to be served by the applicant”; Section 44-1-65 defines an “affected person” as “a property owner with standing within a one-mile radius” of the permitted facility. The General Assembly could have included those kinds of limitations in Section 44-1-60 but chose not to, and that choice must be respected. If anything, the General Assembly’s decision to adopt a “broad test” for standing reflects “the nature and scope of environmental consequences” from DHEC permits, which are “often highly uncertain before study.” Op. at 12 (quoting *City of Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975)). Contrary to Respondents’ claims, the breadth of the grant does not make it any less legitimate. *See supra* pp. 10–11.

**D. DHEC’s regulations prove “affected person” and Article III standing are distinct.**

Respondents once again argue that “affected person” standing must incorporate Article III standing because of a pre-existing regulation, S.C. Code Regs. 30-6(A). SPA Pet. 14 n.4; DHEC Pet. 3–4; *see also* SPA Br. 18–19; Oral Argument at 22:30, *Pres. Soc.*, Op. No. 27949.

This argument remains meritless. The text of Regulation 30-6(A) does not purport to define the term “affected person” in Section 44-1-60(G), nor does it suggest that the term is synonymous with Article III standing. To the contrary, the regulation provides that “an affected person *with standing*” may appeal an Office of Ocean and Coastal Resource Management (“OCRM”) decision. S.C. Code Regs. 30-6(A) (emphasis added). Applying the rule against surplusage, this language plainly recognizes a distinction between “affected person” status and Article III “standing.” *In re Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) (“A statute

should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.”) (citation omitted). And because Regulation 30-6(A) was in place before Section 44-1-60 was enacted, the General Assembly’s explicit grant of administrative participation rights to “affected persons” *without* mentioning “standing” means Article III standing is *not* required.<sup>8</sup>

That conclusion is not changed by *Kiawah Development Partners, II v. South Carolina Department of Health & Environmental Control*, 411 S.C. 16, 34, 766 S.E.2d 707, 718 (2014), where this Court recognized deference to agencies that “have been entrusted with administering their statutes and regulations and . . . have unique skill and expertise in administering those statutes and regulations.” “Affected person” is not a technical term of art, and DHEC does not possess “unique skill and expertise” in determining who may invoke review *in the ALC*. *Cf. B & H Medical, LLC v. United States* 116 Fed. Cl. 671, 681 (Fed. Cl. 2014) (“[A]dministrative agencies have no particular expertise in determining the scope of [a] court’s jurisdiction.”). Further, an agency receives deference for a consistent interpretation of a regulation. James T. O’Reilly, *ADMINISTRATIVE RULEMAKING* § 18:8 (2019 ed. 2019). No evidence exists that DHEC has adopted or applied a consistent interpretation of Section 44-1-60 that would be entitled to any deference, and its own failure to distinguish the patent differences of language between Section 44-1-60(G) and Regulation 30-6(A) further show that deference on the merits is undeserved.

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<sup>8</sup> As explained below, *infra* p. 18 n.12, because Section 44-1-60 was enacted *after* Regulation 30-6(A) specifically to impose uniform and controlling procedures for DHEC (including OCRM) administrative review, Regulation 30-6(A) appears to be superseded.

**E. The Opinion’s conclusion that Petitioners are “affected persons” is based on clear record evidence.**

SPA’s contention that the Opinion improperly bootstraps Petitioners’ participation in the permitting process to make them “affected persons,” SPA Pet. 31, is yet another repackaged argument, SPA Br. 17, 19. In truth, the Opinion recognizes “affected person” standing due to Petitioners’ “individualized assertions of real, anticipated harm” traceable to the permitted cruise terminal. Op. 13. Petitioners’ alleged harms—including diesel soot pollution, water pollution, and traffic and noise—will be exacerbated by a new, larger terminal located closer to their homes, and are thus tied to the challenged Permit. Pet’rs’ Br. 10–12.<sup>9</sup> Petitioners’ active participation in the earlier stages of the permitting process only reinforces this conclusion by underscoring that Petitioners have a “real, material [and] substantial interest” in the “subject matter of the lawsuit.” *Mulherin-Howell v. Cobb*, 362 S.C. 588, 597, 608 S.E.2d 587, 592 (2005). Because the contested case hearing is part of an administrative process in which Petitioners were so heavily involved, it would have been unjust—and, indeed, unconstitutional—to lock Petitioners out at that stage on standing grounds. *See* S.C. Const. art. I, § 22 (“No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency *affecting* private rights except on due notice and an opportunity to be heard . . . .”) (emphasis added).

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<sup>9</sup> Not only is there no support for SPA’s recycled claim that standing must be proved by expert testimony, SPA Pet. 26–27, state and federal precedent overwhelmingly holds that lay witnesses *may* offer opinions or inferences as to standing if rationally based on their perception. Pet’rs’ Reply Br. to SPA 9–11; *see Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183–84 (2000) (holding that injury-in-fact was satisfied by “affiants’ reasonable concerns about the effects of [pollutant] discharges”).

**F. *Carnival* remains distinguishable.**

SPA once again insists that the *Carnival* decision should control here, SPA Pet. 18–19, but that issue has already been exhaustively and repeatedly briefed, SPA Br. 20–21, 24; Pet’rs’ Br. 2, 16–19; Pet’rs’ Reply Br. to SPA 7–9, and the Opinion conclusively finds that this case presents a markedly different factual record set in an entirely distinct legal framework, Op. 10. SPA offers nothing new to support rehearing on the issue.<sup>10</sup>

**G. SPA’s parade of horrors is meritless.**

SPA’s discussion of the results that will supposedly flow from “affected person” standing is remarkably long, SPA Pet. 19-26, and remarkably short on merit.

SPA contends that, by embracing only a “*de minimis* showing that a person is ‘affected,’” the Opinion flings open the door to permit challenges based on “novel” and “abstract” theories of injury. SPA Pet. 21. But the Opinion nowhere suggests that “*de minimis*” or “abstract” concerns will suffice; the Opinion notes the need for harms to be “real,” “anticipated,” and “individualized.” Op. 10–13. Moreover, SPA’s preferred Article III standing test casts an injury net that is, if anything, even broader, and whose breadth can be expanded by statutes like Section 44-1-60. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) (reaffirming that the “injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing”) (internal quotations and citations omitted); *Ass’n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 154 (1970) (finding Article III injury-in-fact

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<sup>10</sup> Since the *Carnival* decision resolved a motion to dismiss without going beyond the four corners of the complaint, the fact that affidavits were “submitted,” SPA Pet. 18, is irrelevant. The face of the *Carnival* opinion makes plain that those declarations were not considered, whereas in this case multiple declarations and numerous of SPA’s own records supporting harm were entered into the record in opposition to SPA’s motion for *summary judgment* on standing, and have been briefed at every level.

includes harm to “aesthetic,” “conservational,” “recreational,” and “spiritual” values); *Diamond v. Charles*, 476 U.S. 54, 65 n.17 (1986) (“The Illinois Legislature . . . has the power to create new interests, the invasion of which may confer standing. In such a case, the requirements of Art. III may be met.”).

SPA’s hypotheticals also fail. SPA posits that a person living in Alaska could challenge the Permit here “by alleging that the purported increased pollution from cruise ships in Charleston will impact the planetary atmosphere, which will then ‘affect’ those living in Alaska.” SPA Pet. 21. But this hypothetical does not allege that the pollution in Charleston will actually affect the specific Alaskan, just as SPA fails, in its Florida and New York examples, SPA Pet. 21–22, to include an allegation that pollution dumped by cruise ships at sea—admittedly, a problem<sup>11</sup>—has anything to do with South Carolina or a DHEC permit. Nor are SPA’s closer-to-home examples any more convincing. The fact that someone from Seneca visits Charleston from time to time and is injured by unlawfully authorized pollution is *not* a reason for finding that the South Carolina citizen is *not* an “affected person.” See, e.g., *Ohio Valley Envtl. Coalition, Inc. v. Alex Energy, Inc.*, 12 F.Supp.3d 844, 863 (S.D. W. Va. 2014) (finding Article III standing satisfied where plaintiff “plans to return to [the location at issue] likely once a year in the future”).

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<sup>11</sup> SPA’s home-base cruise tenant, Carnival Cruise Lines, has pled guilty multiple times to criminal violations of federal environmental statutes for unauthorized discharges and for falsifying pollution records. Most recently, it was fined \$20 million by the Southern District of Florida for violating the terms of its probation. Order Accepting Proposed Settlement at 1, *United States v. Princess Cruise Lines, LTD.*, No. 1:16-cr-20897-PAS (S.D. Fla. June 6, 2019), ECF No. 143.

**H. The General Assembly did not acquiesce to a federal Article III test in enacting Section 44-1-60(G).**

SPA claims again that the General Assembly intended to import Article III standing into Section 44-1-60(G) by acquiescing to earlier judicial constructions that adopted the federal standard. SPA Pet. 22; SPA Br. 18–19. SPA remains mistaken.

This Court has never held that a statutory grant of standing to “affected persons” to participate in administrative proceedings requires importation of Article III standing limitations. To the contrary, in *Sea Pines Ass’n for Protection of Wildlife, Inc. v. South Carolina Department of Natural Resources*, 345 S.C. 594, 596, 550 S.E.2d 287, 289 (2001), a homeowner association filed suit in Circuit Court to enjoin a Department of Natural Resources (“DNR”)-authorized deer culling program on Hilton Head. This Court applied Article III precedent to find that the citizens lacked standing to pursue their due process claims, but then went on to consider the plaintiffs’ challenges to DNR’s permitting decisions on the merits. *Id.* at 603, 550 S.E.2d at 292. *Sea Pines* thus recognized that constitutional standing is *not* required to challenge state-issued environmental permits, and that Article III standing and state administrative standing are distinct.

This Court’s decision in *Smiley v. South Carolina Department of Health & Environmental Control*, 374 S.C. 326, 649 S.E.2d 31(2007), cites *Sea Pines* without analysis as applying Article III standing in the state permit-appeal context, but concerned different statutory language in effect before Section 44-1-60 as well as Regulation 30-6(A), which as explained above, *supra* pp. 13–14, purports to allow only “affected persons with standing” to contest OCRM permit. *See Smiley*, 374 S.C. at 328–29, 649 S.E.2d at 32 (citing S.C. Code Regs. 30-

6(A)).<sup>12</sup> Beyond addressing different statutory and regulatory language, *Smiley* turned solely on Mr. Smiley’s alleged *injury* rather than any other element of Article III standing, *id.* at 329–30, 649 S.E.2d at 32–33, consistent with our view that “affected person” standing concerns injury. Finally, *Smiley* was decided before this Court clarified, in *ATC South*, 380 S.C. at 195, 669 S.E.2d at 339, that statutory standing and constitutional standing are *independent*.

In summary, there is no legislative acquiescence here. The South Carolina General Assembly is only presumed to be aware of *this* Court’s interpretation of statutes, *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 188, 525 S.E.2d 872, 879 (2000), and this Court has never construed the provisions of Section 44-1-60(G) as requiring all three elements of federal Article III standing for an “affected person” to invoke the administrative review procedures for DHEC determinations.

### **III. The Opinion Correctly Finds that the ALC Abused its Discretion in Imposing Sanctions.**

This Court relieved Petitioners of improper sanctions for arguing the term “must” in a Section 44-1-60(F)—a question of law which had never been directly addressed—confers a mandatory duty.<sup>13</sup> Op. 18. SPA’s repetitive and unsupported arguments to the contrary boil

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<sup>12</sup> The Court in *Smiley* specifically noted it was construing pre-existing law rather than the provisions of 2006 Act No. 387 that established Section 44-1-60. *Smiley*, 374 S.C. at 329 n.2, 649 S.E.2d at 32 n.2. As stated by the General Assembly, 2006 Act No. 387 was intended to “provide a uniform procedure for contested cases and appeals from administrative agencies and to the extent that a provision of this act conflicts with existing statute or regulation, *the provisions of this act are controlling.*” 2006 Act No. 387, § 53 (emphasis added). Thus, to the extent preexisting Regulation 30-6(A) requires Article III “standing” in addition to “affected person” status, Section 44-1-60(G)’s provision of ALC review for an “affected person” (with no mention of “standing”) controls.

<sup>13</sup> The statute states that no “later than sixty calendar days after the receipt of a request for final review,” the “final review conference *must* be conducted by the board.” S.C. Code Ann. § 44-1-60(F) (emphasis added). If the Board “declines” this duty to hold a final review conference within 60 days, jurisdiction moves to the ALC. *Id.*

down to the notion that a motion is definitively frivolous if a trial court finds it to be “incorrect on the law.” SPA Pet. 37–38; SPA Br. 31–32. As discussed below, SPA’s position is meritless.

SPA first makes a procedural argument: Because trial court decisions are analyzed under the abuse of discretion standard, and because Petitioners’ did not appeal the Remand Order, no disputed evidence exists on which to overturn the Sanctions Order. But the relevant order in this case is not the Remand Order, but the Sanctions Order. The Remand Order was not appealed and was not required to be appealed to preserve arguments regarding the Sanctions Order, whose findings *are* disputed and which Petitioners *did* appeal.<sup>14</sup> Op. 18 (“Petitioners’ failure to appeal the remand order does not preclude them from appealing the order finding their motion frivolous and imposing a sanction.”). Because Petitioners dispute and appealed the Sanctions Order, the Court may take its own view of the preponderance of the evidence underlying it and overturn the sanctions. “An abuse of discretion may be found if the conclusions reached by the lower court are without reasonable factual support.” *Runyon v. Wright*, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996).

Second, SPA misapplies the abuse of discretion and sanctions standards to mean that because the Court observed that Petitioners were “incorrect on the law,” Op. 18, it could not also overturn sanctions. But this confuses the decision on the motion to remand with the decision to award sanctions: The former could have been (and was) denied *without* it having been frivolous. Indeed, the issue is not whether the Petitioners were “incorrect on the law,” but rather whether the ALC’s decision to impose sanctions was supported by facts establishing that the motion was

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<sup>14</sup>Said another way, rather than risk further sanction threats from SPA, Petitioners were willing to accept the Remand Order’s resolution of the statutory language as the law of case. But that hardly means Petitioners were not entitled to argue that the Sanctions Order was improper in light of the facts and legal arguments that led to it.

frivolous or taken solely for the purpose of delay. The Opinion correctly and explicitly finds it was not. Op. 18.

Sanctions are a rare and extraordinary remedy reserved for instances of frivolity or bad faith. *Runyon*, 322 S.C. at 19, 471 S.E.2d at 162. Because no evidence exists that Petitioners' actions exhibited bad faith or frivolity, the ALC had no reasonable factual basis for imposing sanctions. Novel and creative arguments are expected of attorneys in order to adequately defend their clients. *See Hunter v. Earthgrains*, 281 F.3d 144, 153–54 (4th Cir. 2002) (“Creative claims . . . may merit dismissal, but not punishment.”) (internal quotations and citations omitted). And Petitioners should not be penalized for using every tool at their disposal to litigate their claim. Further, simply disagreeing with an argument does not rise to the level of frivolity required to support sanctions. Petitioners' assertion that “must” in Section 44-1-60(F) creates a mandatory duty for the Board to hold review conferences relied on well-recognized rules of statutory construction. *See Collins v. Doe*, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002) (the term “must” indicates a mandatory requirement); *S.C. Dep't of Social Servs. v. Lisa C.*, 380 S.C. 406, 416, 669 S.E.2d 647, 652 (Ct. App. 2008) (when two reasonable interpretations of a statute are possible, the statute is ambiguous). Therefore, the Opinion correctly applies the abuse of discretion standard to determine that the ALC's bad faith and frivolity findings were not supported by the facts and to reverse the sanctions determination. Op. 18.

SPA's claim that Petitioners knowingly made incorrect legal arguments is likewise unavailing. As the Opinion recognizes, Petitioners never before advanced the litigation position that Section 44-1-60(F) provides the Board discretion to conduct review conferences; rather, Petitioners summarized the process of administrative review generally in litigating other issues.

Op. 18.<sup>15</sup> Finally, it is undisputed that when Petitioners made their argument, no opinion from any court had squarely addressed the mandatory-versus-discretionary nature of DHEC Board review, and even now, SPA fails to cite any controlling authority on the issue.

The Court should decline to rehear this issue and instead preserve the relief it granted to Petitioners for these improper sanctions.

#### **IV. The Opinion Properly Reverses the ALC's Discovery Ruling.**

Petitioners challenged the ALC's March 2014 Order retroactively declaring that discovery had closed many months earlier in May 2013. SPA's petition offers nothing new, but instead serves up repetitive arguments that the Court has already addressed. Importantly, SPA fails to recognize that the Court found both that Petitioners had shown "good cause" for expanded discovery *and* that the ALC had *sua sponte* expanded discovery because the parties had been operating with the "ALC's knowledge and tacit approval" that discovery was continuing beyond the 90-day period of SCALC Rule 21(A).<sup>16</sup> Op. 15. Its failure to contest this latter holding—which independently justifies reversing the ALC's erroneous order—dooms its bid for rehearing based on rehashed arguments.

SPA's brief reprises its basic view is that the ALC is entitled to unbridled authority to "manage discovery in matters before it," including retroactively changing its mind on discovery beyond the 90-day window. SPA Pet. 34. But this position ignores that discovery orders must be reversed if the trial court abused its discretion, as occurred here. *State v. Newell*, 303 S.C.

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<sup>15</sup> SPA does not contend that Petitioners' litigating position was barred by judicial estoppel, for example, nor could it.

<sup>16</sup> Numerous communications between Petitioners, SPA, and the ALC show an understanding and approval of ongoing discovery. For example, on December 2, 2013, more than five months after discovery allegedly closed, an ALC order noted that as of September 6, 2013, "the parties were still conducting discovery." R.000041. And on August 19, 2013, two months after discovery allegedly closed, SPA subpoenaed third party witnesses. R.000543.

471, 476, 401 S.E.2d 420, 423 (Ct. App. 1991) (*citing* 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 2d § 261 at 126 (1982)).

SPA also once again claims that the ALC “never ruled on the substance of the motion to expand discovery,” SPA Pet. 34, even though Petitioners specifically appealed the Order Denying Expanded Discovery. And, as the Opinion recognizes, long before finding the discovery issue moot, the ALC had *already* ruled on the merits by *sua sponte* allowing expanded discovery—well before Petitioners filed their initial discovery motion. Op. 15. All parties, including SPA and the ALC, clearly acted as though discovery had not yet closed, until SPA unilaterally announced that it had. The Opinion explicitly recognizes that Petitioners continued discovery after the 90-day deadline with the ALC’s knowledge and tacit approval. Op. at 15. This tacit approval showed that the ALC had approved expanded discovery under SCALC Rule 21(A) prior to Petitioners’ motion. Therefore, when the ALC suddenly and without warning changed the deadline for discovery, it *retroactively* revoked discovery, a substantive decision reviewable by this Court. This abrupt reversal, the Opinion holds, was improper because Petitioners informed the ALC of their need for ongoing discovery as soon as they learned of SPA’s abrupt change in position. Op. 15. The Opinion also recognizes that Petitioners clearly met the good cause standard for expanding discovery by showing a need for more time to conduct depositions in a complex case.<sup>17</sup> Op. 15.

SPA also rehashes its old argument that it is improper to reopen discovery because Petitioners only wanted it reopened for the merits trial, not for summary judgment. SPA Pet. 35.

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<sup>17</sup> SCALC Rule 10 instructs each ALC to set a 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.”

However, this reasoning misunderstands Petitioners' position. As the Opinion recognizes, when Petitioners stated that reopening discovery was not essential to proper resolution of SPA's motion for summary judgment, they were referring to standing, the only matter in dispute at summary judgment. Op. 4. The remainder of the case will deal with issues beyond standing and will accordingly require more discovery. Therefore, reopening discovery remains an important part of Petitioners' case going forward and the remand remedy proposed by SPA is inappropriate and would serve no useful purpose since this Court determined that both prongs of SCALC Rule 21(A) had been met to justify expanded discovery.

### CONCLUSION

The Court's Opinion fully considers the arguments presented by SPA and DHEC, and their petitions present no grounds that the Court overlooked or misapprehended that would justify rehearing. The petitions for rehearing should be denied, and this case remanded for further proceedings consistent with the Opinion.

Respectfully submitted,

s/ J. Blanding Holman IV

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