

STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS

Appeal from the Administrative Law Court
Honorable Ralph King Anderson, III, Administrative Law Judge
Case No. 04-ALC-07-0126-CC

Sierra Club,

Appellant,

v.

South Carolina Department of Health and
Environmental Control and Chem-Nuclear
Systems, LLC,

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JUL 05 2013

SC Court of Appeals

Respondents.

REPLY TO APPELLANT'S RETURN TO
RESPONDENTS' MOTION TO STRIKE OBJECTIONABLE MATERIAL,
REQUIRE A CORRECTED/REVISED/AMENDED RECORD ON APPEAL,
AND FOR AN EXTENSION OF TIME TO FILE FINAL BRIEFS

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TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA
COURT OF APPEALS:

COMES NOW the Respondents, Chem-Nuclear Systems, LLC ("Chem-Nuclear") and the South Carolina Department of Health and Environmental Control ("SCDHEC"), pursuant to Rule 240(f) of the South Carolina Appellate Court Rules, and jointly respectfully files their Reply to the Return to Motion to Strike Objectionable Material, Require a Corrected/Revised/Amended Record on Appeal, and for an Extension of Time to File Final Briefs recently submitted to this Court of Appeals by the Appellant, Sierra Club.

Notwithstanding the Sierra Club's "arguments" to the contrary, the evidence before this Court of Appeals clearly shows that this Court of Appeals should issue an order which (a) strikes certain objectionable material from the Record on Appeal (the "ROA"), (b) requires the Sierra Club to submit a Corrected/Revised/Amended ROA, and (c) grants Chem-Nuclear and SCDHEC an additional extension of time in which to file their joint Final Briefs in this appellate matter until such time as the Sierra Club files a corrected/revised/amended ROA.

The grounds upon which this Court of Appeals should grant Chem-Nuclear's and SCDHEC's requested motion and, in turn, deny the Sierra Club's recent Motion for Leave to File Amended Designation of Matter Out of Time, is as follows:

1. The Sierra Club submitted its original *Designation of Matter to be Included in the Record on Appeal* (the "DOM") on 11 January 2013, containing 12 separate document entries which the Sierra Club proposed to include in the ROA.

2. Chem-Nuclear and SCDHEC filed their joint Respondents' Initial Brief and DOM on 28 February 2013, which contained three document entries which Chem-Nuclear and SCDHEC proposed to include in the ROA, namely (a) the ALC's 2005 Final Order and Decision (the "2005 ALC Order"); (b) this Court of Appeals' 2010 appellate decision issued in the first appeal (the "Sierra Club v. SCDHEC Opinion"); and (c) the ALC's 2005 Final Order and Decision on Remand (the "2012 ALC Order").¹
3. On 29 April 2013, the Sierra Club filed an Amended DOM, containing an additional entry (Exhibit No. 13) which the Sierra Club proposed to include in the ROA and which consisted of eight pages of CNS Site Inspection photographs.
4. This Court of Appeals, by letter dated 6 May 2013, advised the Sierra Club that its amended DOM had been filed untimely and the Sierra Club would need, no later than 16 May 2013, to file a motion seeking permission for the late filing;
5. The Sierra Club, by letter dated 14 May 2013, filed the original and 15 copies of the ROA with this Court of Appeals and provided a copy of the ROA to Chem-Nuclear and SCDHEC which, as served, contained the eight pages of CNS Site Inspection photographs.
6. The Sierra Club did not adhere to this Court of Appeals' directive and file the appropriate motion. The Sierra Club has readily admitted and acknowledged that it failed to first seek this Court of Appeals' leave to file the amended DOM containing Exhibit No. 13, but now seeks this Court of Appeals' permission to accept the amended DOM – all of which is after the ROA has already been prepared, served, and filed with this Court of Appeals.
7. The Sierra Club is attempting to add one exhibit - Exhibit No. 13 – that was cited in the *2005 ALC Order*. This is one exhibit referenced in one of the *2005 ALC Order's* 123 Findings of Fact, each finding of fact which had its own citation back to the record then before the ALC at that time.

¹ Chem-Nuclear and SCDHEC specifically noted in their joint DOM that the Sierra Club had "designated multiple matters that [were] inappropriate for inclusion in the [ROA]." (Respondents' Joint DOM, p.2).

8. The Sierra Club argues, albeit incorrectly, that there is no basis in the South Carolina Appellate Court Rules for objecting to including evidence which was properly admitted before the ALC, was cited in the *2005 ALC Order*, and is relevant to the issues before this Court of Appeals.²
9. This Court of Appeals, when it considered the first appeal of the *2005 ALC Order*, had before it the record from the 2005 ALC hearing. As this Court of Appeals is aware, it ultimately issued an opinion in 2010, which affirmed in part and remanded in part the *2005 ALC Order*.
10. In the *Sierra Club v. SCDHEC Opinion*, this Court of Appeals instructed the ALC “to apply its factual findings” as had been contained in the *2005 ALC Order* when determining whether Chem Nuclear was in compliance with *DHEC Regulation* 61-63, Part VII, Sections 7.10.5 through 7.10.10, 7.11, and 7.23.6. (See *Sierra Club v. S.C. Dep’t of Health & Env’tl Control*, 387 S.C. 424, 439, 693 S.E.2d 13, 21 (Ct.App. 2010)).
11. Based on this Court of Appeals’ specific instructions to the ALC in the *Sierra Club v. SCDHEC Opinion to apply the factual findings from the 2005 ALC Order*, the parties agreed on a scheduling call with the presiding ALJ (Hon. Ralph King Anderson, III) on 23 January 2012, and agreed that the parties would brief the issues on remand using the factual findings contained in the *2005 ALC Order*.
12. Importantly, again based on this Court of Appeals’ specific instructions to the ALC in the *Sierra Club v. SCDHEC Opinion to apply the factual findings from the 2005 ALC Order*, the parties explicitly agreed that they **would not** reopen the voluminous record which had served as the basis for the original ALC hearing (held on 16-18 February, 2005).³ Moreover, the parties’ respective proposed orders submitted to the ALC, as well as, their respective memoranda of law which the ALJ requested regarding the remanded issues only cited to the *2005 ALC Order’s* factual findings.

² See generally Rule 209(b), 210(c), SCACR.

³ That case was eventually appealed to this Court of Appeals and resulted in this Court of Appeals’ 2010 decision. See *Sierra Club v. S.C. Dep’t of Health & Env’tl Control*, 387 S.C. 424, 693 S.E.2d 13.

13. The Sierra Club apparently now seeks to selectively extract evidence from the record of the original 2005 ALC hearing in an effort to bolster its arguments in this appeal. All of the *2005 ALC Order's* factual findings are referenced in the record which was before the ALC in 2005. In addition, those same findings of facts were before this Court of Appeals during the earlier appeal. That is **not**, however, the record which should be before this Court of Appeals in this present appeal as this Court of Appeals considers the Sierra Club's appeal of the *2012 ALC Order*.
14. The Sierra Club argues that Exhibit No. 13 should be a part of the recon because it is ostensibly relevant to the issues on appeal and was cited in a factual finding in the 2005 ALC Order. If that was a legitimate basis for including Exhibit No. 13, then every exhibit, hearing transcript, depositions, testimony, *etc.* would be part of the ROA in this appeal. The 2005 record is not the record that is or which should be before this Court of Appeals in this appeal.
15. The record which should properly be before this Court of Appeals are the documents cited in Chem-Nuclear's and SCDHEC's DOM filed on or about 28 February 2013. The cited documents are: (a) the *2005 ALC Order*; (b) the *Sierra Club v. SCDHEC Opinion*; and (c) the *2012 ALC Order*.

As noted previously, the Sierra Club has served a ROA which contains matter which was not timely noticed and for which this Court of Appeals required the Sierra Club to specifically seek permission to include by motion. Had the Sierra Club complied with this Court of Appeals' directive, both Chem-Nuclear and SCDHEC would have had an opportunity to object to inclusion of the improperly included eight pages of CNS Site Inspection photographs. The Sierra Club ignored this Court of Appeals and filed the improper ROA eliminating, until now, Chem-Nuclear's and SCDHEC's ability to voice their joint objection.

Chem-Nuclear and SCDHEC respectfully request that the Sierra Club's Motion to Accept Amended Designation of Matter (in order to include Exhibit No. 13 in the ROA as already printed) be denied for (i) failure to timely file, (ii) failure to adhere to this Court of Appeals' prior directive, and (iii) because Exhibit No. 10 and all other matters of record from the original 2005 ALC hearing should not be included in the ROA of this present appeal. Chem-Nuclear and SCDHEC respectfully request this Court of Appeals accept Chem-Nuclear's and SCDHEC's DOM as filed on 28 February 2013.

Chem-Nuclear and SCDHEC respectfully reiterate their prior request that this Court of Appeals to strike the objectionable material (eight pages of CNS Site Inspection photographs) and require the Sierra Club to file a corrected/revised/amended ROA without the objectionable material, as well as grant Chem-Nuclear and SCDHEC an extension of time in which to file their joint Final Briefs until such time as the Sierra Club actually files the corrected/revised/amended ROA omitting the objectionable material.

Finally, Chem-Nuclear and SCDHEC also respectfully request this Court of Appeals to hold the briefing time in abeyance until such time as their motion and the Sierra Club's motion may be considered and ruled upon.

Respectfully submitted:

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2 July 2013

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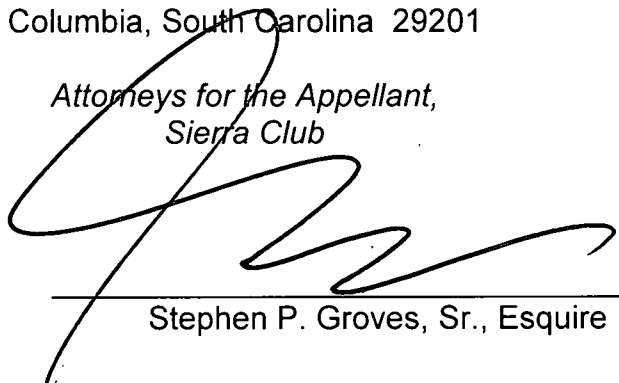
*Attorneys for the Respondent,
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I, Stephen P. Groves, Esquire, hereby certify that on 2 July 2013, I served a copy of the *Reply to Return to Motion To Strike Objectionable Material, Require A Corrected/Revised/Amended Record On Appeal, And For An Extension of Time in Which to File Final Briefs* submitted on behalf of the Respondents, Chem-Nuclear Systems, LLC, and the South Carolina Department of Health and Environmental Control, on all counsel of record herein via United States Mail, postage pre-paid, and addressed as follows:

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