

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

73206

Sierra Club,

Appellant,

v.

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

Respondents.

Of whom Chem-Nuclear Systems, LLC is the

Petitioner.

PETITION FOR REHEARING
OF THE
PETITIONER, CHEM-NUCLEAR SYSTEMS, LLC

Stephen P. Groves, Sr., Esquire
Mary D. Shahid, Esquire
Sara S. Rogers, Esquire
NEXSEN PRUET, LLC
205 King Street, Suite 400
Charleston, South Carolina 29401
Telephone: 843.720.1725
Telecopier: 843.414.8206

*Attorneys for the Petitioner,
Chem-Nuclear Systems, LLC*

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SC Court of Appeals

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

COMES NOW the Petitioner, Chem-Nuclear Systems, LLC (“Chem-Nuclear”), pursuant to Rules 221 and 240 of the South Carolina Appellate Court Rules, and respectfully requests this Court of Appeals to grant Chem-Nuclear a rehearing from this Court of Appeals’ 30 July 2014, decision herein.¹

ARGUMENT AND CITATION OF AUTHORITY

A. The Court of Appeals Misapprehended And/Or Overlooked Chem-Nuclear’s Compliance With The ALC’s Directive In The 2005 ALC Order To Conduct Further Studies To Address Concerns Regarding Reducing Contact Between Rainfall And Waste.

The 2005 ALC Order was a favorable outcome for Chem-Nuclear and for DHEC since the ALC concluded the Sierra Club “did not provide the [ALC] with concrete, competent evidence to demonstrate that the disposal methods permitted under License No. 097 fail to satisfy such regulatory requirements. . . .” (R.pp.46-47). The ALC, however, devised a remedy to finalize the discussions between DHEC and Chem-Nuclear concerning whether there should be protection of the “open trenches from direct rainfall and runoff such as temporary covers.” (R.p.47).² The ALC directed Chem-Nuclear to conduct a study and submit the results to DHEC. This study included evaluation of “the scientific and economic feasibility of employing or implementing designs and operational procedures at the Barnwell Site that will (1) shelter the disposal trenches from

¹ See Sierra Club v. SCDHEC and Chem-Nuclear Systems, LLC, ___ S.C. ___, ___ S.E.2d ___ (Ct.App. 2014) (2014 WL 3734366, filed 30 July 2014) (“Chem-Nuclear II”).

² The ALC did not remand the matter to DHEC to require temporary or permanent covers as part of the licensing conditions. Instead, the ALC merely sought to “close the loop” on an unfinished conversation, without dictating the outcome. (R.p.66).

rainfall and prevent rainfall from entering the trenches, (2) provide temporary dry storage facilities for the storage of wastes received during wet conditions, and (3) provide for sealing and grouting the concrete disposal vaults to prevent the intrusion of water to the maximum extent feasible.”³ Chem-Nuclear complied and sent the report⁴ to DHEC in April 2006.⁵

DHEC advised that the Feasibility Report was under review,⁶ but recommended Chem-Nuclear consider the issues identified in the 2005 ALC Order in its planning for trench designs and operational methods. Chem-Nuclear considered the feasibility of sheltering disposal trenches, providing temporary dry storage facilities for the waste,⁷ and sealing and grouting the concrete vaults.⁸

³ Sierra Club v. SCDHEC and Chem-Nuclear Systems, LLC, 2005 WL 2997193 (S. C. Admin. Law. Judge.Div., filed 13 October 2005). (R.pp.36-66).

⁴ The report was entitled Evaluation of the Scientific and Economic Feasibility for implementing new Designs and Operational Procedures at the Barnwell Site as Directed by the South Carolina Administrative Law Court Order Dated October 13, 2005. (the “Feasibility Report”).

⁵ Chem-Nuclear moved to supplement the appellate record herein with the Feasibility Report, but the Sierra Club objected and supplementation was denied. This Court of Appeals acknowledged the study and the Feasibility Report noting “[t]he record does not contain the results of these studies or the reasons DHEC chose not to amend the license requirements as a result of the [Feasibility] [R]eport.” See Chem-Nuclear II, 2014 WL 3734366, *20 fn.19.

⁶ DHEC, which completed its review on 10 March 2008, concurred with the Feasibility Report’s findings and conclusions.

⁷ Chem-Nuclear concluded temporary dry storage could be provided and had implemented policies for temporary storage of waste packages and for protection of waste packages from inclement weather. DHEC acknowledged these policies and procedures were in place.

⁸ Regarding sheltering of disposal trenches and sealing and grouting concrete disposal vaults, Chem-Nuclear calculated a worker dose attributable to cover operations. The proposal to grout and seal the vaults also resulted in a worker dose. The radiation dose to works to roof the trenches and seal and grout the vaults was

This analysis is entirely consistent with the concerns and issues expressed in the 2005 ALC Order.

While this Court of Appeals acknowledged the existence of the Feasibility Report, it incorrectly concluded the Feasibility Report required Chem-Nuclear to take further affirmative action.⁹ Based on the Feasibility Report, Chem-Nuclear's installation of a temporary/permanent roofing structure over open trenches and/or the grouting and sealing of the vaults would have been inconsistent with the requirements of Reg. 61-63.¹⁰ Chem-Nuclear and DHEC correctly concluded 7.18 would require rejection of the proposals to roof the trenches and seal and grout the vaults.

Conversely, this Court of Appeals concluded that "the record in this case conclusively demonstrates Chem-Nuclear has taken no action whatsoever to prevent even one rain drop from migrating onto one active vault or trench."¹¹ Based on this conclusion, this Court of Appeals determined the ALC's decision

significantly higher than any projected reduction to the hypothetical dose to the general public. For that reason, these concepts were rejected.

⁹ Aside from the matters noted in the 2012 ALC Order, Chem-Nuclear took no additional actions to attain compliance with 7.11.11, other than the temporary protection of waste packages during wet weather conditions.

¹⁰ As is noted in 7.1.1 "[t]he requirements of this part are in addition to, and not in substitution for, other applicable requirements of these regulations." 7.20 requires that "[o]perations at the land disposal facility shall be conducted in compliance with the standards for radiation protection set out in Part III of these regulations, except for releases of radioactivity in effluents from the land disposal facility, which shall be governed by 7.18. Every reasonable effort should be made to maintain radiation exposures as low as is reasonably achievable." (Emphasis added). Consequently, the question becomes whether it reasonable to significantly increase worker exposure to radiation when the potential increase in dose to the public is negligible? The simple answer is "no".

¹¹ Chem-Nuclear II, 2014 WL 3734366, *12.

Chem-Nuclear was compliant with 7.11.11 was legally flawed. Aside from misconstruing 7.11.11 which requires that the migration of water be minimized, and not that rainfall be absolutely prevented from entering the trench, this Court of Appeals failed to recognize that 7.11.11 neither justified nor supported any action to roof and/or cover open trenches or to seal and grout vaults, or to allow water to pond or pool with the installation of liner.

B. The Court of Appeals Misapprehended Or Overlooked The Significance Of Its *Chem-Nuclear I* Remand Instructions Which Prevented The ALC From Considering Matters Outside The Original Appellate Record Or The Studies Performed By Chem-Nuclear In Response to the 2005 ALC Order.

This Court of Appeals, in *Chem-Nuclear I*,¹² determined remand was necessary because the ALC had failed to address all of the issues raised by the Sierra Club, including 7.11.11. This Court of Appeals instructed the ALC to apply its 2005 factual findings and rule on compliance with 7.11.11. These instructions foreclosed the ALC's consideration of the Feasibility Report. This Court of Appeals further restricted the ALC by holding 7.11 "imposes additional compliance requirements for Chem-Nuclear such that the balancing test of ALARA would not be sufficient to address whether Chem-Nuclear is in compliance with section 7.11."¹³

The Court of Appeals' statement that "additional compliance requirements" exist has been expanded, in *Chem-Nuclear II*, to encompass only affirmative acts

¹² *Sierra Club v. SCDHEC and Chem-Nuclear Systems, LLC*, 387 S.C. 424, 693 S.E.2d 13 (Ct.App. 2010), *rehearing denied* (3 May 2010), *certiorari denied* (21 July 2011) ("*Chem-Nuclear I*").

¹³ *Chem-Nuclear I*, 387 S.C. 424, 693 S.E.2d 13.

taken by Chem-Nuclear to apparently prevent all rainfall from entering the trenches, a flawed interpretation of the requirements of 7.11.11.¹⁴ Importantly, the ALC, in issuing the 2012 ALC Order, complied with this Court of Appeals' directive to determine Chem-Nuclear's compliance with 7.11 without exclusive reliance on ALARA.¹⁵ These findings are fully supported by the 2005 ALC Order and demonstrate adherence with the requirements of 7.11.11, independent of the ALC's reliance on the evidence of decline on tritium concentrations at the compliance point and reliance on any other ALARA based standard.¹⁶

This Court of Appeals, in Chem Nuclear I, held that:

At this point, we cannot address whether the ALC erred without giving it an opportunity to issue a specific ruling on whether Chem-Nuclear's disposal practices were in compliance with

¹⁴ These affirmative actions are separate from Chem-Nuclear's compliance with and adherence to all other sections of 61-63 Part VII. Such an expansion would mean that this Court of Appeals, in Chem-Nuclear I, directed the parties on remand to undertake an exercise in complete futility. Chem-Nuclear doesn't believe that this Court of Appeals intended in 2010, when it issued Chem-Nuclear I, for the remand to the ALC to be futile and unproductive.

¹⁵ The ALC noted the design and function of the engineered barriers, as required by subparts 7.6.2, 7.11.9, 7.11.10, 7.21, and 7.32.5. The ALC noted the water collection system which allows for diversion of water that accumulates in the trenches. This water collection system is clearly responsive to the requirements of subpart 7.11.11. In addition, the water detection system, also noted by the ALC, is clearly responsive to the requirements of subpart 7.11.11. The ALC noted the existence of a partially impermeable clay liner in the bottom of the trenches that impedes infiltration and the drainage system installed within the trenches to move water out of the trenches. All of these measures operate to minimize the migration of water, to provide for detection and for removal.

¹⁶ Surprisingly, Chem-Nuclear II now illogically concludes the 2005 ALC Order's factual findings are inapplicable to determining Chem-Nuclear's compliance with subpart 7.11.11. Assuming that is correct, this Court of Appeals, in Chem-Nuclear I, should have remanded the matter to the ALC, with discretion for a remand to DHEC to determine compliance with subpart 7.11.11 through demonstration of Chem-Nuclear's additional measures to attain compliance, or an explanation as to why those measures were or may not be feasible.

sections 7.11, 7.23.6 and subsections of 7.10 that the ALC did not address. On remand, we instruct the ALC that sections 7.11 and 7.23.6 impose additional compliance requirements for Chem-Nuclear and further instruct the ALC to apply its factual findings to these sections of [Reg.] 61-63.¹⁷

The ALC, on remand, addressed 7.11's requirements in light of the 2005 ALC Order's factual findings.¹⁸ The ALC enforced this Court of Appeals' only restriction on remand and did not place exclusive reliance on site performance and/or ALARA. This Court of Appeals has now significantly enlarged that original restriction placed upon the ALC by eliminating the ALC's reliance on any facts established to demonstrate Chem-Nuclear's compliance with sections of Part VII separate from that of 7.11 and by misconstruing the requirements of 7.11.11. In so doing, this Court of Appeals has rendered the Chem-Nuclear I remand proceeding before the ALC in 2012, simply an exercise in complete and utter futility.

C. The Court of Appeals Misapprehended Or Overlooked The Purpose of 7.11: "Conditions Of License" In Concluding 7.11 Imposed Technical Requirements Described In 7.1.3, Rather Than "Burial Operation Conditions" As Noted On License No. 097.

This Court of Appeals concluded that 7.11 sets forth "technical requirements" which is a more limiting description of 7.11 than was provided in Chem-Nuclear I where 7.11 is described as "compliance requirements."¹⁹ In

¹⁷ Chem-Nuclear I, 387 S.C. 424, ___, 693 S.E.2d 13, ___.

¹⁸ Had those findings not been as comprehensive as they were, following a week long hearing in 2005, than the ALC may not have been able to determine compliance with subpart 7.11. Fortunately that was not the case as the evidence presented, and the ALC's findings, were comprehensive and extensive as to the design and function of the engineered barriers, the water collection and detection system, and the partially impermeable clay liner.

¹⁹ Chem-Nuclear I, 387 S.C. 424, 693 S.E.2d 13.

concluding 7.11 imposed “technical requirements” instead of just “compliance requirements,” this Court of Appeals determined these “newly discovered” requirements necessitated specific action by Chem-Nuclear.²⁰

Review of Part VII shows 7.11 is described as “Conditions of Licenses.” Moreover, a review of License No. 097 indicates that the requirements of 7.11.11.1 through 7.11.11.4 are included verbatim as Permit Condition No. 82, under the conditions described as “Burial Operation Conditions.”²¹ In characterizing 7.11.11 as a license condition, DHEC has required that the licensed activity can only occur provided the enumerated permit conditions are accomplished. In the event that Chem-Nuclear does not conduct burial operations in accordance with the enumerated conditions, DHEC has grounds to proceed with enforcement.²²

This Court of Appeals incorrectly determined 7.11.11 included “technical requirements” which necessitated specific action by Chem-Nuclear. 7.11.11 simply embodies licensing conditions. As noted, 7.11.11’s title is clear and unambiguous. DHEC complied with 7.11.11 by including the requirements as

²⁰ Chem-Nuclear I, 387 S.C. 424, 693 S.E.2d 13.

²¹ DHEC has authority, under the Pollution Control Act, to “[i]ssue, deny, revoke, suspend or modify permits, under such conditions as it may prescribe for the discharge of sewage, industrial waste or other waste or air contaminants ...” S. C. Code Ann. § 48-1-50(5) (Thomson Reuters West 2013) (Emphasis added). Permit conditions are, by their very nature, an important regulatory tool. “[T]he power to permit necessarily carries with it the power to place conditions on a permit.” Edisto Aquaculture Corp. v. S.C. Wildlife & Marine Resources Dept., 311 S. C. 37, 40, 426 S. E. 2d 753, 755 (1993).

²² Part VII, 1.12.2 authorizes DHEC to “make findings of fact and determinations and to assess fines and civil penalties relating to violation of the provisions of the Act or any regulation, license or license condition”

express “license conditions”. This enables DHEC to pursue enforcement in the event Chem-Nuclear fails to implement these conditions. This Court of Appeals improperly added additional requirements not intended by 7.11.11.

D. **Even If 7.11’s Requirements Are “Technical,” This Court Of Appeals Misapprehended Or Overlooked The Significance Of 7.6 And 7.7 Which Dictate The Information Necessary To Demonstrate Compliance And Which Do Not Impose Any Requirement To Demonstrate Or Analyze The Efficacy Of A Roof Or Cover Over, Or A Line In, An Open Trench.**

Part VII, 7.6, entitled “Specific Technical Information,” is applicable to both the performance objectives and the applicable technical requirements of Part VII.²³ The “Specific Technical Information” required to review design features does not prescribe any particular method of “cover” and certainly doesn’t reference “roofs” or “temporary covers” or “leachate collection systems,” as indicated in *Chem-Nuclear II*.

What is clear from 7.6 is that the same information which supports compliance with a “technical requirement” may also support compliance with a performance objective. For example, 7.6.3 requires “[a] description of the principal design criteria and their relationship to the performance objective.” Additionally, 7.7., “Technical Analyses,” illustrates the direct connection between

23 “The specific technical information shall include the following information needed for demonstration that the performance objectives and the applicable technical requirements of this part will be met.” 7.6, prefatory language. In fact, 7.6 does not dictate design, but requires the applicant to provide descriptions of the design features, including “those design features related to infiltration of water; integrity of covers for disposal units, design of covers for disposal units; ... contact of wastes with standing water; disposal site drainage” 7.6.2. The term “cover” as referenced in 7.6.2, is referred to in 7.2.1 as a “soil cover,” or “disposal unit cover,” or “intruder barrier.” See 7.2.14. It is referenced in the plural - “integrity of covers for disposal units; structural stability of engineered barriers, backfill, wastes and covers” 7.6.2.

technical requirements and performance objectives.²⁴ While this Court of Appeals was quick to dismiss ALARA consideration in determining if Chem-Nuclear had complied with 7.11.11, DHEC requires Chem-Nuclear to perform that very analysis.²⁵

Assuming, *arguendo*, that the compliance requirements contained in 7.11.11 are, indeed, “technical requirements”, then 7.6 and 7.7 clearly provide the context as to how such “technical requirements” are reviewed and assessed for consistency with Part VII. DHEC reasonably does not dictate with precision the design features for a LLRW disposal site. Moreover, all technical analysis must be necessarily accompanied by an ALARA analysis. This Court of Appeals’ conclusions in *Chem-Nuclear II* are inconsistent with and, indeed, may be contrary to the mandatory requirements of 7.6 and 7.7.

E. The Court of Appeals Misapprehended Or Overlooked The Standard For Determining Compliance With 7.11 In *Chem-Nuclear I* And In Further Restricting This Standard By Excluding Both Other Result-Based Evidence Unrelated To ALARA And Design Features Which Did Not Eliminate Contact With Rainfall.

In *Chem-Nuclear I*, this Court of Appeals concluded 7.11 “impose[d] additional compliance requirements for Chem-Nuclear such that the balancing test of ALARA would not be sufficient to address whether Chem-Nuclear is in

²⁴ “The specific technical information shall also include the following analyses needed to demonstrate that the performance objectives of this part will be met.” 7.7, prefatory language.

²⁵ Under subpart 7.7.3, Chem-Nuclear must undertake “[a]nalyses of the protection of individuals during operations [which] shall include demonstration assessments of expected exposures due to routine operations The analyses shall provide reasonable assurance that exposures will be controlled to meet the requirements of Part III of these regulations.”

compliance with section 7.11.”²⁶ The 2005 ALC Order did not specifically addressed compliance with 7.11, but concluded “Chem-Nuclear and DHEC ha[d] shown adherence to ALARA in the measures taken by Chem-Nuclear to address tritium migration from the Barnwell Facility and the potential for releases from other radionuclides that are contained in the waste buried at the Site.” (R.p.48). To the extent DHEC or Chem-Nuclear attempted to support compliance with 7.11 through this conclusion of law and any associated findings of fact, that would be an insufficient evidentiary basis. Nevertheless, this Court of Appeals, in Chem-Nuclear I, **did not preclude** Chem-Nuclear, DHEC, or the ALC from using other findings related to other requirements in Part VII to support Chem-Nuclear’s compliance with 7.11.²⁷

This Court of Appeals, in finding the ALC had erred in concluding Chem-Nuclear complied with 7.11.11.1, 7.11.11.2, 7.11.11.3, and 7.11.11.4, imposed significant additional limitations on the evidentiary standard which it had already established in Chem-Nuclear I. This Court of Appeals determined “compliance may not be measured solely by results.” The record shows the ALC did not measure compliance by results, but instead relied on specific physical attributes of the protection system. (R.p.12-17).²⁸

²⁶ Chem-Nuclear I, 387 S.C. 424, 693 S.E.2d 13.

²⁷ As is noted above, for this Court of Appeals to do so would be to render the remand, solely limited to the findings of facts in the 2005 ALC Order, a mere nullity.

²⁸ This physical attributes included the (a) design of the trenches (including the partially impermeable sand/clay material in the bottom of the trench) (b) slope provided in the trench, (c) clay caps, (d) standpipe installed for water detection,(e) vault lids, (f) surface water management plan, (g) trench drainage system, (h) French drain

This Court of Appeals, however, deemed the ALC's findings insufficient to establish Chem-Nuclear's compliance with 7.11.11.1 through 7.11.11.4. First, this Court of Appeals concluded 7.11.11 imposed "technical requirements" and then determined the compliance measure was whether "Chem-Nuclear took any actions to meet the technical requirements imposed by these subsections."²⁹ This Court of Appeals rejected the ALC's referenced findings when considering compliance with 7.11.11.1 and 7.11.11.2, since those findings "have no effect on the initial migration of rainfall."³⁰ As relates to 7.11.11.3, this Court of Appeals determined that there was no evidence to support the assertion Chem-Nuclear minimized, by reducing to the smallest amount possible, the migration of waste-contaminated water.³¹ Finally, as related to 7.11.11.4, this Court of Appeals rejected the ALC's factual findings essentially because Chem-Nuclear did not utilize a "leachate collection system."³²

Nevertheless, when 7.11 is read in concert with 7.6 and 7.7, that demonstrates this Court of Appeals has misconstrued 7.11.11's intent and general purpose which is to minimize the migration of water, not to eliminate the contact of rainfall with the disposal units.³³ Chem-Nuclear demonstrated

and sump systems installed, and (i) pumping system to remove water from active trenches. (R.p.12-17).

²⁹ Chem-Nuclear II, 2014 WL 3734366, *9.

³⁰ Chem-Nuclear II, 2014 WL 3734366, *15.

³¹ Chem-Nuclear II, 2014 WL 3734366, **14-15.

³² Chem-Nuclear II, 2014 WL 3734366, **15-16.

³³ For example, 7.6.2 addresses "standing water" and the "infiltration of water." 7.6.6 relates to "methods to control surface water." If the intent were to prevent

its surface water controls with its pump and removal system, ponding or pooling controls, with its water detection system, and the partially impermeable clay and sand that allows for infiltration. Given the clear implication that rainfall is an expected event for which corrective measures have been put in place, this Court of Appeals improperly rejected these facts as a basis for determining compliance with 7.11.11.1-7.11.11.4.**34**

Unfortunately, this Court of Appeals ignored 7.7.1 which requires technical information related to "Pathways" which include "air, soil, groundwater, surface water, plant uptake, and exhumation of burrowing animals. The analyses shall clearly identify and differentiate between the roles performed by the natural disposal site characteristics and design features in isolation and segregating the wastes." Consistent with 7.7.1, Chem-Nuclear reasonably relied, at least in part, upon the groundwater pathway and groundwater travel time to prevent releases of radioactivity which potentially might have exceed the applicable regulatory limits.

any rain from entering the trenches at all then 7.6, which governs the technical information required, would certainly specify methods to control rainfall. Instead, 7.6 seeks information on management measures including the prevention of ponding, surface water controls, and infiltration. All of which necessarily and reasonably presumes that rainfall has entered the trenches and requires management.

34 This Court of Appeals improperly insisted that 1) a requirement to minimize migration was tantamount to preventing rainfall from entering the trenches and, 2) infiltration was inappropriate and a leachate collection system should be installed.

F. **When 7.1.1 Specifically States “The Requirements Of This Part Are In Addition To, And Not In Substitution For, Other Applicable Requirements Of These Regulations”, The Court Of Appeals Misapprehended Or Overlooked The Applicability Of The “Standards For Protection Against Radiation” (61-63 Part III) By Finding “There Is No Inherent Reasonableness Or Practicability Consideration Involved In Analyzing Chem-Nuclear’s Compliance” With 7.11.**

By construing the requirement to “minimize the migration of water” to mean the elimination and prevention of rainfall from entering trenches, this Court of Appeals has strictly construed the minimization requirement. This Court of Appeals stated:

[S]ubsection 7.23.6 requires Chem-Nuclear to ‘minimize to the extent practicable’ the contact of water with waste at different stages of the disposal process. We interpret subsection 7.23.6 as imposing a less stringent standard for compliance than subsection 7.11.11.1 because the term ‘minimize’ is followed by language prompting DHEC to consider the reasonableness of Chem-Nuclear’s efforts to comply. The lack of similar language in subsection 7.11.11.1 suggests there is no inherent reasonableness or practicability consideration involved in analyzing Chem-Nuclear’s compliance.³⁵

In doing so, this Court of Appeals dismissed the relevancy of any ALARA analysis³⁶ and disregarded the effect of Reg. 61-63 Part III, 3.1,³⁷ which applies to Chem-Nuclear as it encompasses LLRW disposal.³⁸ Part VII, 7.1.1 makes

³⁵ Chem-Nuclear II, 2014 WL 3734366, *11 fn.11.

³⁶ “Subsection 7.11.11.4 contains no language excusing Chem-Nuclear’s duty to comply with its regulatory requirements.” Chem-Nuclear II, 2014 WL 3734366, *16. “[W]e consider the actions taken by Chem-Nuclear to comply, not the reasons why it decided not to implement a certain measures based on its own ALARA analysis.” Chem-Nuclear II, 2014 WL 3734366, *16 fn.15.

³⁷ Purpose and Scope: “The regulations in this part apply to persons license by the Department to receive, possess, use, transfer, or dispose of radioactive material.”

³⁸ As a licensee, Chem-Nuclear is required to adhere to 3.4 and implement a radiation protection program “to ensure compliance with the provisions of this part.”

clear that the requirements of Part VII are “in addition to, and not in substitution for, other applicable requirements of these regulations.” 7.6.11 provides specific standards for the radiation safety program “to ensure compliance with the performance objective in 7.18.” 7.20 mandates protection of individuals during operations. “Operations at the land disposal facility shall be conducted in compliance with the standards for radiation protection set out in Part III of these regulations, except for releases of radioactivity in effluents from the land disposal facility, which shall be governed by 7.18. Every reasonable effort should be made to maintain radiation exposures as low as is reasonably achievable.”

This Court of Appeals improperly divorced 7.11.11.1 through 7.11.11.4 from Part III and from other plainly stated requirements in Part VII requiring radiation protection in all operations. These requirements cannot be separated. Like 7.23.6, the provisions in 7.11.11.1 through 7.11.11.4 are qualified by the aforementioned regulations and, consequently, this Court of Appeals’ strict interpretive standard is legally flawed in several ways. Firstly, the flaw is that the determination that a “technical requirement” cannot be addressed by compliance with other regulations.³⁹ The next flaw was this Court of Appeals conclusion that

Moreover, Chem-Nuclear must enforce the occupational dose limits for adults specified in 3.5. Furthermore, under 3.42, Chem-Nuclear is required to “use, to the extent practical, procedures and engineering controls based upon sound radiation protection principles to achieve occupational doses and doses to members of the public that are as low as is reasonably achievable (ALARA).”

39 Chem-Nuclear is required to incorporate engineered barriers through requirements separate from 7.11.11. The engineered barriers are, however, designed to address the requirements of 7.11.11. This Court of Appeals wrongly concluded that compliance which satisfies two different regulatory requirements is unavailing and, in turn, Chem-Nuclear must demonstrate both an affirmative and separate action to satisfy

a regulation which required "water management" had to be read to require the elimination of rainfall.⁴⁰ The final flaw was that, despite Part VII's clear introductory language confirming that the regulations were in addition to, and not separate, from the remaining parts of 61-63, this Court of Appeals concluded that 7.11.11 had to be construed separately from all other sections of Reg. 61-63.

G. Should 7.11 Be Applied Pursuant To This Court Of Appeals' "Strict Interpretation", There Is A Risk Of Unnecessary Exposure To The Barnwell Facility's Employees As Well As, Potentially To The Barnwell Facility's LLRW Transporters.

Chem-Nuclear understands that sheltering open disposal trenches adds another level of redundancy to prevent the migration of water on contact between water and waste, even if the shelter is only temporary.⁴¹ Chem-Nuclear also understands sealing and grouting vaults⁴² assists in the prevention of contaminated water migration. Finally, Chem-Nuclear knows management of impermeable trenches which collect rainwater helps prevent water migration. Nevertheless, in each case, Chem-Nuclear must assess whether the pursuit of one or more of those preventative measures will result in an occupational dose to its or others' employees working in or around the Barnwell Facility and whether,

7.11.11. Furthermore, this Court of Appeals improperly determined that there are no other considerations which are relevant to possibly support a "no action" alternative.

40 The elimination of any rainfall would, of course, negate any need for water management since there would be no water to manage.

41 Such a temporary shelter might be removed when wet weather conditions are either not threatened or present, or when a trench is filled to capacity. Additionally, based upon the size of the existing trenches, any temporary shelter is likely to be very large and require multiple workers to set-up, take-down, and move to other trenches.

42 Importantly, vaults would have to be inspected to determine if they were full and ready for sealing. Sealing and grouting would likely occur in or adjacent to the disposal trenches

under the totality of the circumstances of risk to the employees, that dose is justified.

These assessments are critical to addressing the risk of occupational harm. However, this Court of Appeals' announced "legal standard" and the resulting remedy completely eliminate this important evaluation and consideration. Even if Chem-Nuclear performed this evaluation, in executing the remedy, this Court of Appeals has concluded this evaluation cannot dictate the terms of any "compliance plan" since 7.11.11 is so strictly construed.

H. **This Court Of Appeals Misapprehended Or Overlooked The Nuclear Regulatory Commission's Regulatory Requirement That The Disposal Site Be Designed To Prevent The "Ponding" Of Water In Its Consideration Of The Necessity For A Leachate Collection System.**

As noted in the 2005 ALC Order:

South Carolina's regulatory authority over radioactive waste is derived from a formal agreement with the United States Atomic Energy Commission ... States that entered into such agreements are referred to as Agreement States. An Agreement State may promulgate regulations more stringent than federal regulations, but it must, as a minimum, have regulations that are compatible with federal regulations.

The Nuclear Regulatory Commission's regulations prescribes the site suitability requirements for land disposal.⁴³ The requirements in Reg. 61-63 are presently consistent with the NRC requirements in that both sets of regulation

⁴³ See generally 10 CFR Part 61.50. For example, Part 61.50(5) provides that "[t]he disposal site must be generally well drained and free of areas of flooding or frequent ponding." Moreover, Part 61.51(5) provides that "[s]urface features must direct surface water drainage away from disposal units." Finally, Part 61-51(6) provides that "[t]he disposal site must be designed to minimize to the extent practicable the contact of water with waste during storage, the contact of standing water with waste during disposal, and the contact of percolating or standing water with wastes after disposal."

envision water management and not the prevention of rainfall from entering the trenches.⁴⁴

I. The Court of Appeals Misapprehended Or Overlooked The Barnwell Facility's Natural Attributes Analyzed Under 7.7, Which Includes Extensive Groundwater Pathways And Travel Time Allowing For Significant Reduction In Tritium Radiation Content Prior To Release.

The "Technical Analyses" contained in 7.7 includes an analysis of "[p]athways" to demonstrate "protection of the general population from releases of radioactivity." "The analyses shall clearly identify and differentiate between the roles performed by the natural disposal site characteristics and design features in isolating and segregating the wastes." This Court of Appeals overlooked the significance of this technical information when it concluded that "[a] violation occurs only when water is allowed to come in contact with waste and waste-contaminated water then migrates out of the disposal units."⁴⁵ And, when addressing the holes in the floors of the vaults, this Court of Appeals overlooked the natural physical attributes of the Barnwell Facility site when concluding that "these holes permit water that has come in contact with residual tritium to drain into the trenches which, in turn, allow the water to percolate into the soil and groundwater beneath the facility"⁴⁶ Based on this the Court concluded, in error, that Chem-Nuclear is not in compliance with 7.11.11.1 and 7.11.11.2.⁴⁷

⁴⁴ Importantly, if Reg. 61-63 Part VII were amended to require a leachate collection system, or if this Court of Appeals interpreted 7.11.11 as requiring a leachate collection system, the addition of such a requirement would render South Carolina's regulations inconsistent with the NRC's regulations.

⁴⁵ Chem-Nuclear II, 2014 WL 3734366, *11 fn.12.

⁴⁶ Chem-Nuclear II, 2014 WL 3734366, *14.

⁴⁷ Chem-Nuclear II, 2014 WL 3734366, **13-15.

This Court of Appeals has misapprehended the requirements of Reg. 61-63 Part VII which are intended to provide for the **dispersal and management of surface water** rather than the collection and retention of volumes of water with tritium contamination. Furthermore, the natural physical attributes of the Barnwell Facility site – groundwater pathways and travel time – clearly contribute positively to a reduction in the radiation and ensure site performance and compliance.

J. The Court of Appeals Misapprehended Or Overlooked The ALC's Contested Case Jurisdiction By Directing The ALC To Review Chem-Nuclear's "Compliance Plan"⁴⁸

This Court of Appeals' remedy is legally flawed. First, this Court of Appeals has overlooked the nature of the ALC's jurisdiction over contested cases. Second, this Court of Appeals has overlooked DHEC's statutory authorization to enforce and, where indicated, revoke permits. Third, this Court of Appeals has overlooked DHEC's enforcement and revocation procedures which provides Chem-Nuclear the procedural protections to which it is entitled.

This Court of Appeals directed the ALC to review Chem-Nuclear's "Compliance Plan", determine compliance, and revoke License No. 097 if the Compliance Plan was not compliant. This "direction" is patently inconsistent with judicial recognition of the ALC's jurisdiction:

Our state's constitution provides that '[n]o 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 . . . and he shall have in all such instances the right to judicial review.' To that end,

⁴⁸ This Argument encompasses the issues identified on pages iii - iv herein as "J," "K," and "L."

the ALC conducts a *de novo* hearing in contested cases, complete with the presentation of evidence and testimony. In contested permitting cases, the ALC presides as the fact-finder. According to the APA, an ALC's "final decision *shall include* findings of fact and conclusions of law, separately stated." Consequently, **the ALC is authorized to make a final determination—after a final agency decision** and subject to judicial review - as to whether an administrative agency should have granted or denied a particular permit. As to factual issues, judicial review of administrative agency orders is limited to a determination whether the order is supported by substantial evidence.⁴⁹

The ALC has contested case jurisdiction.⁵⁰ A contested case arises after a final agency decision. DHEC reviews the plans and procedures submitted by Chem-Nuclear, and then takes whatever licensing action may be necessary. The ALC can review challenges to DHEC's action as a contested case.⁵¹ DHEC has the authority to revoke the permit,⁵² not the ALC. The ALC, however, has the authority to hear a challenge to revocation and review DHEC's actions as a contested case.

This Court of Appeals has determined the need for a "compliance plan", based upon the absence of any evidence showing either Chem-Nuclear or DHEC

⁴⁹ Engaging and Guarding Laurens County's Environment v. SCDHEC and MRR Highway 92, LLC, Defendants, 407 S. C. 334, 344, 755 S. E. 2d 444, 449 (2014) (First emphasis in original, second emphasis added and internal citations omitted).

⁵⁰ S.C. Code Ann. § 1-23-600 (Thomson Reuters West 2012).

⁵¹ A "contested case" is a "proceeding including . . . licensing . . . in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for a hearing." S.C. Code Ann. § 1-23-310(3) (Thomson Reuters West 2013) (Emphasis added).

⁵² DHEC is authorized to "[i]ssue, deny, revoke, suspend[,] or modify permits . . . provided however, that no permits shall be revoked without first providing an opportunity for a hearing." S.C. Code Ann. § 48-1-50(5) (Thomson Reuters West 2012).

took affirmative and/or specific actions to address the concerns raised in the 2005 ALC Order. The Sierra Club, however, had the burden of demonstrating that no actions have been taken.

In sharp contrast to the Sierra Club's and this Court of Appeals' "conclusion" that neither Chem-Nuclear or DHEC had taken any actions to address the ALC's concerns, this Court of Appeals ignored the fact that License No. 097 is a fluid license, as demonstrated by the number of amendments made to License No, 097 since the 2005 proceeding. Moreover, the excluded Feasibility Report⁵³ clearly shows Chem-Nuclear revised its procedures to provide temporary dry storage of waste during wet weather conditions. Chem-Nuclear has taken additional measures, reviewed by DHEC, through revisions to or development of other procedures to address the issues of concern identified in the 2005 ALC Order.⁵⁴ This is, of course, in addition to the analysis provided in the Feasibility Report.

This Court of Appeals' conclusion that the lack of evidence of action was equivalent to evidence of no action was inaccurate. Instead, the lack of evidence of action stems from this Court of Appeals' refusal to consider the Feasibility Report, as well as, the significant restrictions placed on the Chem-Nuclear I

53 The Sierra Club took full advantage of both (a) this Court of Appeals' refusal to consider and/or supplement the appellate record with the Feasibility Report as evidence that neither Chem-Nuclear nor DHEC had taken any action, as well as, this Court of Appeals' Chem-Nuclear I remand instructions which foreclosed the ALC's consideration of the Feasibility Report or any other evidentiary matters arising since 2005.

54 These include (a) transition to the smaller trench type - the B/C trench; (b) the use of temporary covers over empty or partially filled vaults; and (c) the use of temporary covers over large components placed directly in the trench.

remand proceeding. Had the Court of Appeals reviewed the Feasibility Report and/or allowed the ALC to re-open the Chem-Nuclear I remanded contested case record, then this Court of Appeals would have had before it a record of the fairly continuous exchanges between DHEC and Chem-Nuclear regarding the concerns identified in the 2005 ALC Order together with the actions taken by DHEC and Chem-Nuclear to address those concerns.

K. Public Policy And Applicable Law Mandates Deference To DHEC In Interpreting The Requirements Of 7.11, Since DHEC Has The Technical Expertise And Experience To Balance The Numerous And Potentially Competing Considerations In Reg. 61-63 Which The Judiciary May Lack.⁵⁵

This Court of Appeals, in reaching its conclusions and crafting its remedy, did not afford any deference to DHEC's interpretation and/or application of DHEC's own regulations. In matters as complex as the disposal of LLRW, it seems reasonable for the judiciary to defer to the experts in radiological health when interpreting and applying the multiple, intertwined regulations contained in Reg. 61-63. Regarding evidentiary matters in contested cases, the law provides that "notice may be taken of generally recognized technical or scientific facts with the agency's specialized knowledge. . . . The agency's experience, technical competence and specialized knowledge may be utilized in the evaluation of the evidence."⁵⁶ And, in matters of regulatory interpretation "as a general rule, agencies charged with enforcing statutes . . . receive deference from the courts as

⁵⁵ This argument encompasses the issues identified on page iv as "M."

⁵⁶ S.C. Code Ann. § 1-23-330(4) (Thomson Reuters West 2013).

to their interpretation of those laws.”⁵⁷ “The interpretation of a statute is a question of law.”⁵⁸ Further, “[t]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons.”⁵⁹

Here this Court of Appeals determined that language related to “minimiz[ing] the migration of water” and “waste contaminated water” encompasses rainfall.⁶⁰ DHEC, however, applies the applicable regulation to the movement of surface water, created as rainwater hits the surface of the earth. This is consistent with Part VII and the numerous references therein to surface water management. Furthermore, this Court of Appeals “strictly construed” the “requirement to minimize” contained in 7.11.11, without qualification. DHEC, however, applies 7.11.11 as directed in 7.1.1.⁶¹ This Court of Appeals’ strict interpretation would require Chem-Nuclear and DHEC to adopt and/or implement measures to eliminate rainfall into the trenches without any consideration of and/or regard for the worker dose resulting from these measures. DHEC’s interpretation, however, accounts for and considers worker

⁵⁷ State v. Sweat, 379 S. C. 367, 385, 665 S. E. 2d 645, 655 (Ct.App. 2008).

⁵⁸ CFRE, LLC v. Greenville County Assessor, 395 S. C. 67, 74, 716 S. E. 2d 877, 881 (2001).

⁵⁹ CFRE, LLC v. Greenville County Assessor, 395 S. C. 67, 77, 716 S. E. 2d 877, 882. Conversely, albeit understandably, when and if an agency’s interpretation conflicts with the statute’s plain language, such an interpretation must be rejected. Sparks v. Palmetto Hardwood, Inc., 406 S. C. 124, 128, 750 S. E. 2d 61, 53 (2013).

⁶⁰ Chem-Nuclear II, 2014 WL 3734366.

⁶¹ Subpart 7.1.1 provides that the “requirements of this part are in addition to, and not in substitution for, other applicable requirements of these regulations.” (Emphasis added).

dose. Based on the directions provide in 7.1.1, DHEC's interpretation is not in conflict with the plain language of the regulation. Unfortunately, this Court of Appeals' new interpretation is in conflict. DHEC's interpretation of 7.11.11 is entitled to respectful consideration which this Court of Appeals did not provide in Chem-Nuclear II.

CONCLUSION

Based upon the foregoing arguments and citation of authority, the Respondent, Chem-Nuclear Systems, LLC, respectfully requests this Court of Appeals to grant a rehearing in this matter in order to reevaluate and review this Court of Appeals' recent decision herein.

Respectfully submitted:

NEXSEN PRUET, LLC

By: 

Stephen P. Groves, Sr., Esquire

Mary D. Shahid, Esquire, Esquire

Sara S. Rogers, Esquire

NEXSEN PRUET, LLC

205 King Street, Suite 400

Charleston, South Carolina 29401

Telephone: 843.720.1725

Telecopier: 843.414.8206

E-Mail: sgroves@nexsenpruet.com
mshahid@nexsenpruet.com
srogers@nexsenpruet.com

*Attorneys for the Respondent,
Chem-Nuclear Systems, LLC*

Charleston, South Carolina

13 August 2014

NPCOL1:3940102.1-MO-(SPG) 049893-00002

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,

Respondents.

Of whom Chem-Nuclear Systems, LLC is the

Petitioner.

PETITION FOR REHEARING
OF THE
PETITIONER, CHEM-NUCLEAR SYSTEMS, LLC

Stephen P. Groves, Sr., Esquire
Mary D. Shahid, Esquire
Sara S. Rogers, Esquire
NEXSEN PRUET, LLC
205 King Street, Suite 400
Charleston, South Carolina 29401
Telephone: 843.720.1725
Telecopier: 843.414.8206

*Attorneys for the Petitioner,
Chem-Nuclear Systems,*

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AUG 13 2014

SC Court of Appeals

I, Stephen P. Groves, Esquire, hereby certify that on 13 August 2014, served one copy each of the **Petition for Rehearing** submitted on behalf of the Respondent, Chem-Nuclear Systems, LLC, on all counsel of record herein via United States Mail, postage pre-paid, and addressed as follows:

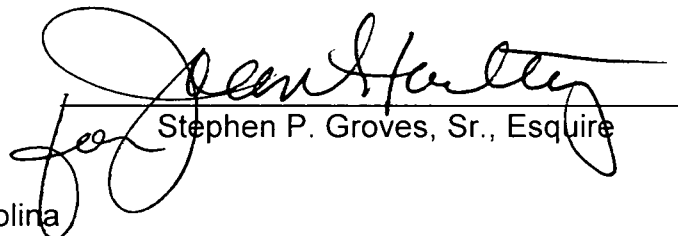
Amy E. Armstrong, Esquire
Michael G. Corley, Esquire
SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT
Post Office Box 1380
Pawleys Island, South Carolina 29585

Robert Guild, Esquire
314 Pall Mall
Columbia, South Carolina 29201

*Attorneys for the Appellant,
Appellant*

Jacquelyn S. Dickman, Esquire
Deputy General Counsel
Claire H. Prince, Esquire
Office of General Counsel
**SOUTH CAROLINA DEPARTMENT OF HEALTH
AND ENVIRONMENTAL CONTROL**
2600 Bull Street
Columbia, South Carolina 29201

*Attorneys for the Respondent,
S.C. Dept. of Health & Env'tl. Control*


Stephen P. Groves, Sr., Esquire

Charleston, South Carolina

13 August 2014

NPCOLI:3940102.1-MO-(SPG) 049893-00002

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AUG 13 2014

SC Court of Appeals

Stephen P. Groves, Sr.
Member
Admitted in SC

13 August 2014

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AUG 13 2014

SC Court of Appeals

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

Re: Sierra Club v SCDHEC & Chem Nuclear Systems, LLC
Administrative Law Court Case No.: 04-ALC-07-0126-CC
Appellate Case Tracking No.: 2012-212791

Dear Ms. Kitchings:

Pursuant to Rules 219(b), 221(a), and 240(d) of the South Carolina Appellate Court Rules, please find enclosed find the original and seven (7) copies of a Petition for Rehearing of the Petitioner, Chem-Nuclear Systems, LLC and a Motion for Imposition of Stay Pending Final Resolution of Appeals Process of the Respondent, Chem-Nuclear Systems, LLC in the above captioned matter. Finally, I enclose two (2) firms checks in the amount of \$25.00 (each) to cover the applicable filing fee.

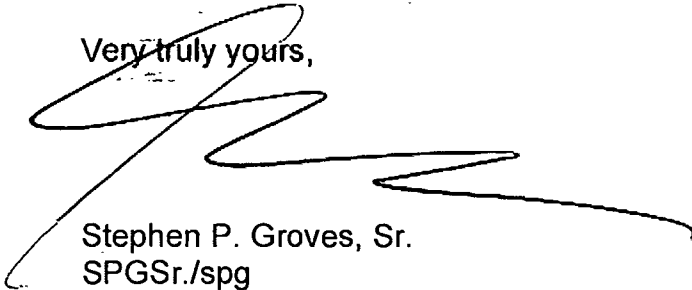
- Charleston
- Charlotte
- Columbia
- Greensboro
- Greenville
- Hilton Head
- Myrtle Beach
- Raleigh

I would appreciate you kindly filing the a Petition for Rehearing of the Petitioner, Chem-Nuclear Systems, LLC and a Motion for Imposition of Stay Pending Final Resolution of Appeals Process of the Respondent, Chem-Nuclear Systems, LLC and the Proof of Service with the Court of Appeals and returning a stamped copy of each to my attention via the courier who delivered these documents.

I look forward to hearing from you at your convenience. If you need anything else or I otherwise may be of any assistance to you or to the Court of Appeals regarding this matter, please feel free to contact me at your convenience. My direct telephone number is 843.720.1725, direct telecopier is 843.414.8206, and the e-mail is sgroves@nexsenpruet.com.

Honorable Jenny Abbott Kitchings
Clerk of Court
15 July 2014
Page 2 of 2

Very truly yours,

A handwritten signature in black ink, appearing to read "Stephen P. Groves, Sr.", with a long horizontal flourish extending to the right.

Stephen P. Groves, Sr.

SPGSr./spg

cc: Claire Prince, Esquire
Jacquelyn Dickman, Esquire
Amy E. Armstrong, Esquire
Robert Guild, Esquire

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