THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

73368

Case No. 04-ALJ-07-0126-CC

Sierra Club . . . . . Appellant,

vs.

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

APPELLANT'S RESPONSE TO RESPONDENT CHEM-NUCLEAR SYSTEMS, LLC'S MOTION FOR IMPOSITION OF STAY

Appellant Sierra Club submits the following response in opposition to Chem-Nuclear Systems, LLC's ("Chem-Nuclear") motion for imposition of stay (called supersedeas under SCACR Rule 241) pending final resolution of appeals process.

ARGUMENT

Standard under Rule 241

South Carolina Appellate Court Rule 241(a) sets forth the general rule that an automatic stay is in effect for the duration of the appeal, subject to the exceptions found in Rule 241(b). One of those exceptions is for appeals "from administrative tribunals as provided in S.C. Code Ann. § 1-23-380(A)(2) and § 1-23-600(G)(5)," of the Administrative Procedures Act ("APA"). SCACR

Rule 241(b)(11). This matter involves an appeal from the Administrative Law Court pursuant to the provisions of the APA, thus the automatic stay does not apply to this case. Because the automatic stay does not apply, Chem Nuclear has continued operating under the renewal license which has been the subject of this appeal for the ten (10) years that this appeal has been pending. Rule 241(c) provides that a party seeking to stay the effect of an appeal may petition the appellate court for an order of supersedeas.

In reviewing a petition for supersedeas (called a petition for imposition of a stay by Chem-Nuclear), the Court considers whether the supersedeas is necessary to preserve the jurisdiction of the appeal or to prevent a contested issue from becoming moot. SCACR Rule 241(c)(2). The general rule is that the effect of a supersedeas or stay is to suspend proceedings and preserve the status quo pending the determination of the appeal or proceeding in error. Melton v. Walker, 209 S.C. 330, 336, 40 S.E.2d 161, 164 (1946). "An order staying proceedings pending appeal to the Supreme Court . . . should be made only when it appears that the party making the application has just reason to apprehend that without a stay he would be deprived of the benefit of the favorable result of the appeal." Porter v. Lesesne, 85 S.C. 399, 67 S.E. 453 (1910). As the moving party, Chem-Nuclear bears the burden of proving stay of enforcement of the decision is warranted. Midlands Util., Inc. v. S. Carolina Dep't of Health & Envtl. Control, 287 S.C. 483, 339 S.E.2d 862 (1986).

Chem-Nuclear Fails to Provide Any Basis for Granting Supersedeas

Chem-Nuclear fails to explain how this Court or the Supreme Court's jurisdiction would not be preserved, how the case would become moot or how the status quo would be any different if it develops and implements a written compliance plan pursuant to this Court's most recent

Order. Under this Court's Order, it concluded that Chem-Nuclear's license is invalid, but did not revoke the license, rather requiring a written plan for compliance. Chem-Nuclear is authorized to continue to dispose of nuclear waste under the license, despite the Court's conclusion that "DHEC failed to enforce the law of South Carolina" by not requiring compliance with certain technical standards aimed at minimizing the migration of water onto and out of disposal units. The status quo, in the form of Chem-Nuclear continuing to dispose of waste under its license, continues under this Court's Order. Chem-Nuclear will still be operating under the license at issue, and if it were to eventually prevail in this case, it could discontinue the more protective design requirements it will have implemented under this Court's compliance plan remedy. This case will not be rendered moot by imposition of this Court's Order, nor will the jurisdiction of this Court or the Supreme Court be diminished.

Moreover, Chem-Nuclear acknowledges that the status quo has continued to change since 2005 as amendments have been made to the license. (Motion, p. 13). Given the amendments and changes to the license, it is unclear exactly what the status quo is, much less how it would be disrupted by this Court's remedy. Chem-Nuclear simply does not want to take any action to address the migration of water onto and out of disposal units or the collection, retention, testing and removal of water from disposal units.

Finally, to the extent that the development of a written compliance plan and a compliance determination by the ALC are different than the status quo, Sierra Club asserts that when a case involves "monumental hazardous conditions" related to the disposal of radioactive waste, any directive to improve those hazardous conditions should not be stayed. (2005 ALC Order, p. 13, FF # 56). The past decade's rulings indicate concern over the disposal practices at the Barnwell

facility. In 2005, the ALC recognized that the disposal practices constitute "monumental hazardous conditions," but failed to directly address the technical requirements that could reduce those hazardous conditions. (R. p. 48, FF # 56). In 2010, this Court recognized the gravity of the disposal conditions at the Barnwell facility, but without legal conclusions related to the specific technical provisions, the Court was constrained in providing a remedy. In 2012, the ALC failed to apply the relevant findings to the applicable technical provisions on remand, and finally, in 2014, this Court issued a reasoned and practical remedy. Chem-Nuclear's casual suggestion that this Court's directive for a written compliance plan may be "altogether unnecessary" is simply unfounded based on all the evidence and decisions to date.

Chem-Nuclear complains that the Court could not consider the information and documentation contained in the study it conducted pursuant to the 2005 ALC Order ("Feasibility Report"). Yet nowhere does Chem-Nuclear (or DHEC, for that matter) attempt to explain how information and documentation would change the Court's determination on non-compliance with four technical regulatory requirements. Those requirements do not involve the giving or receiving of information or documentation to DHEC, and regardless of what information and documentation Chem-Nuclear provided to DHEC, there is no question but that the license has not been amended to address the deficiencies found in both the 2005 ALC Order and this Court's 2014 Order.[1] The fact that the 2005 ALC Order did not go as far as this Court's 2014 Order to require a plan to address the deficiencies does not diminish the recognition that rainwater falls

[1]Chem-Nuclear describes the amendments to the renewal license since 2004 in footnote 10 of its Motion and none of these amendments relate to the provisions of 7.11.11.1, 7.11.11.2, 7.11.11.4 or 7.10.7.

onto the disposal units and flows out of those disposal units by design.[2]

If the "Feasibility Report" actually addressed the deficiencies that the Sierra Club has been pointing to for nearly a decade (vault and trench designs that encourage the migration of water onto and out of those disposal units) then the matter of developing a plan in 90 days to address those deficiencies would have been unnecessary.

Chem-Nuclear continues to insist that the trend in tritium concentrations demonstrates that its disposal methods "successfully minimized the contact between waste and rain water," citing to a portion of the findings from the 2005 ALC Order (Motion, p. 8). However, Chem-Nuclear overlooks the 2005 ALC's complete findings, which indicate that in some areas, tritium levels have increased between 1997 and 2001. And when tritium data is compared to rainfall data as gauged by water table levels, it appears that tritium concentrations have been varying with the amount of rainfall, not necessarily as a result of new storage methods. (R. p. 46, FF # 46). This Court did not conclude that minimization could be "no contact whatsoever," as stated by Chem-Nuclear (Motion, p. 9), rather that it must be reduced to the smallest possible amount. Moreover, minimize cannot mean "encourage" or "promote," which is exactly the goal of the design of the vaults and trenches. Instead, as Chem-Nuclear admits, the design "allow[s] water to drain from the vaults" and "allow[s] water to migrate from the bottom of the trench." (Motion, p. 8, fn. 20).

Sierra Club does not read this Court's clear directive for the development and implementation of a plan as an "invitation" to submit a motion to stay (Motion, p. 11, fn. 30), but rather, clearly enunciating that plan development should begin immediately and is not stayed.

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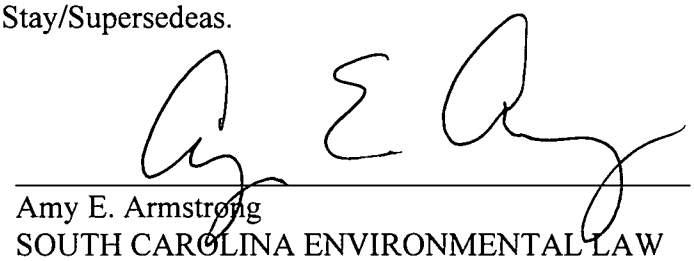
[2]Contrary to Chem-Nuclear's contention, this Court did not rule that "elimination" of contact between water and waste is the standard (Motion, p. 9), but rather to "reduce to the smallest amount possible."

CONCLUSION

For the foregoing reasons, the Sierra Club respectfully requests that this Court deny Chem-Nuclear's Petition for Imposition of Stay/Supersedeas.



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August 25, 2014

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August 25, 2014

Honorable Jenny Abbott Kitchings
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RE: Sierra Club v. SCDHEC & Chem-Nuclear Systems
Admin. Law Court Case No. 04-ALJ-07-0126-CC
Appellate Case No 2012-212791

Dear Ms. Kitchings:

I am enclosing the Sierra Club's Response to Respondent Chem-Nuclear Systems, LLC's Motion for Imposition of Stay and Sierra Club's Motion for an Extension of Time for Filing its Response to Respondent DHEC and Chem-Nuclear's Motions for Reconsideration, along with my filing fee and certificate of service.

Kindly return clocked-in copies of the Motion and Response in the self-addressed, stamped envelope.

Yours very truly,

Amy E. Armstrong

cc: Robert Guild, Esquire
Sara S. Rogers, Esquire
Stephen P. Groves, Esquire
Mary D. Shahid, Esquire
Jaquelyn S. Dickman, Esquire