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

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

Sierra Club . . . . . Appellant,

vs.

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

APPELLANT'S RETURN TO RESPONDENTS' PETITION FOR REHEARING

The Appellant Sierra Club hereby responds to Respondent Chem-Nuclear and Respondent DHEC's Petitions for Rehearing.

STANDARD FOR REHEARING

South Carolina Appellate Court Rule 221 allows a party to petition the court for rehearing to demonstrate points supposed to have been overlooked or misapprehended by the court. SCACR 221. "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." Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E. 234 (1933); Kennedy v. S. Carolina Ret. Sys., 349 S.C. 531, 532, 564 S.E.2d 322 (2001); see also Jean H. Toal, Shahin Vafai & Robert Muckenfuss,

Appellate Practice in South Carolina 309 (1999). In order to prevail, Respondents Chem-Nuclear and DHEC cannot present new arguments, but must show how the Court overlooked the arguments made before the court.

ARGUMENT

Chem-Nuclear's Barnwell facility is one of only three radioactive nuclear waste disposal sites in the United States. Waste is not simply stored at the Barnwell facility, but is permanently "disposed" there. (Disposal is defined as "isolation of wastes from the biosphere inhabited by man and his food chains by emplacement in a land disposal facility," Subsection 7.2.6). As this Court and the parties well know, the radioactive nuclear waste disposal regulations are multi-layered, comprehensive and complex. The breadth and complexity of the regulations is not surprising given the nature of the materials that are being buried in South Carolina's soils. Chem-Nuclear's Barnwell Facility is the only site of its kind in the State, thus the regulations necessarily apply broadly and comprehensively to its disposal activities.

Yet, throughout their Petitions for Rehearing, both Chem-Nuclear and DHEC try to dissuade this Court from ensuring compliance with every single one of those regulatory requirements, effectively arguing that some portions of the regulations should trump or supercede the provisions in Subsection 7.11.11. On the whole, Chem-Nuclear and DHEC suggest that since Chem-Nuclear is in compliance with Part III and other sections of the regulations, that is enough and the license does not need to meet the specific requirements of 7.11.11. Chem-Nuclear and DHEC's arguments ask the Court to ignore the plain language of specific regulatory provisions, as well as DHEC's interpretation of the word "minimize," in favor of more loosely-defined and less restrictive provisions in other regulatory sections addressing different criteria.

Technical Requirements are Separate and Distinct Criteria from Performance Objectives

DHEC now complains that this Court overlooked the "crucial interplay" between the performance objectives and the technical requirements of Part VII.[1] (DHEC Petition, p. 1). DHEC's complaint centers around its argument that the technical requirements are only relevant to the extent that they help achieve the performance objectives. (DHEC Petition, p. 2). In other words, DHEC assigns no significance or value to the technical requirements outside of whether the performance objectives have been met. That argument must fail for two reasons. First, the Court of Appeals in 2010 concluded that the technical requirements are *in addition to, not limited by,* the performance objectives. DHEC did not seek review of that decision and thus it is not preserved for review. "A decree from which no appeal is taken becomes the law of the case in all subsequent proceedings involving the same parties and the same subject matter is the well-settled law in this state, and it is therefore unnecessary to enter upon any extended discussion of this postulate." Matheson v. McCormac, 187 S.C. 260, 196 S.E. 883, 884 (1938). See also In re Morrison, 321 S.C. 370 n. 2, 468 S.E.2d 651 n. 2 (1996) (noting that an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal); Anonymous (M-156-90) v. State Bd. of Med. Examiners, 323 S.C. 260, 278, 473 S.E.2d 870, 879 (S.C. Ct. App. 1996) rev'd, 329 S.C. 371, 496 S.E.2d 17 (1998); State v. Sullivan, 310 S.C. 311, 426 S.E.2d 766 (1993) (to preserve an issue for appellate review, appellant must object at the first opportunity).

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[1]DHEC's attempt to distinguish this Court's 2010 ruling that Section 7.11.11 imposes additional requirements beyond the performance objective from this Court's 2014 ruling that 7.11 contains technical requirements for disposal unit and engineered barrier specifications is strained. Both times this Court has heard this appeal, there has been a clear recognition that Section 7.11 required more than the performance based standards.

Second, DHEC's argument simply does not make intuitive sense. DHEC argues that "evidence that the performance objectives have been met is appropriate to demonstrate compliance with other requirements of the regulation." (DHEC Petition, p. 2). If that is the case, then there would be no need for the "other requirements," and specifically technical requirements of 7.11.11. Sierra Club agrees that the requirements of 7.11.11 are designed to meet objectives, but that does not diminish the requirements of the regulations or the clear language used: to "minimize the migration of water onto disposal units" and "minimize the migration of water out of disposal units." DHEC is correct that the provisions of 7.11.11 do not tell Chem-Nuclear precisely the specific actions that it must take to meet the requirements; rather, they allow DHEC and Chem-Nuclear some discretion in determining how minimization, detection, monitoring and remediation will be achieved. Moreover, the regulations cannot be interpreted to allow DHEC and Chem-Nuclear to actively encourage the migration of water out of disposal units.[2] If Section 7.11.11 of the regulations are to have any meaning, they must be applied as this Court did in its recent Order.

Finally, DHEC is foreclosed from arguing that the technical requirements of Sections 7.11 and 7.23.6 do not apply or are superseded by the performance objectives because this Court, in Chem-Nuclear I, rejected that argument finding that the technical requirements of Sections

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[2]It is uncontradicted that the disposal units are designed to be unsealed, ungrouted, left open while being filled with radioactive waste, with holes in the bottoms such that water is encouraged to enter into and flow out of the units. The engineered barriers are not sealed or grouted against water intrusion, thus allowing and encouraging rain to enter the vaults. There are holes in those engineered barriers to allow water that has been in contact with waste to flow out of the barriers, as well as to allow groundwater to rise up into the vaults, which has happened in the past. (R. p. 48, 2005 Order, FF# 55). The engineered barriers include partially impermeable floors to allow water that has fallen into and flowed out of vaults, coming into contact with waste, to infiltrate into the surrounding soil.

7.11 impose ***additional*** requirements beyond the performance objectives. Chem-Nuclear I, 387 S.C. at 436, 693 S.E.2d at 19. In its 2014 Order, this Court reiterated that "subsections 7.11.11 and 7.23.6 require Chem-Nuclear to take action to design and construct the disposal site, disposal units, and engineered barriers to meet the specifications in those subsections." Chem-Nuclear II, citing Chem-Nuclear I at 423, 435, 436.

Chem-Nuclear's reason for not achieving the requirements of 7.11.11 is to fall back on the performance objectives of 7.18 – the as low as reasonably achievable ("ALARA") standard. One regulation cannot be used to defeat compliance with another . . . (Chem-Nuclear Petition, p. 5 & 15-16). Essentially, where the Court has found that the ALARA standard is a lower standard than the design standards in Section 7.11.11, Chem-Nuclear asks that the ALARA standard in Part III be controlling over Part VII and utilized to negate the requirements of 7.11.11. (Chem-Nuclear Petition, p. 16). Chem-Nuclear tells this Court that compliance with one part of the regulations is proof that it has complied with another, technical, part. The Court's ruling is consistent with the regulations confirming that Part CII is "in addition to, and not separate[] from the remaining parts of 61-63." (Chem-Nuclear Petition, p. 17). If the Court had concluded otherwise, then there would be no need for Section 7.11.11 because it would serve no useful purpose. plain and ordinary meaning of the terms. New York Times Co. v. Spartanburg County School Dist. No. 7, 374 S.C. 307, 649 S.E.2d 28 (2007). "[T]he primary rule of statutory construction is that the Court must ascertain the intention of the legislature . . . [, and] [t]hus, the court will reject the agency's interpretation where it is specifically contrary to the statute or regulation." Commissioners of Public Works v. DHEC, 372 S.C. 351, 359 (Ct. App. 2007) (quotations omitted). Courts will reject statutory interpretations that lead to absurd results clearly

unintended by the legislature or that defeat the plain legislative intent. Peake v. SCDMV, 375 S.C. 589, 599, 654 S.E.2d 284, 289; Kiriakides v. United Artists Commc'ns, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994)). Furthermore, the appellate court must presume the legislature intended to accomplish something with an enacted statute and did not intend for a section or provision to be purposeless or futile. Duvall v. S.C. Budget and Control Bd., 377 S.C. 36, 42, 659 S.E.2d 125, 128 (2008).

The Technical Requirements of 7.11.11 Require More Than a Results-Based Analysis

Importantly, even if the Court agreed with DHEC that "the results to be achieved are determinative" of whether Chem-Nuclear's license meets the requirements of Section 7.11.11, it still has a problem: Judge Geathers found that in some areas, tritium level increased between 1997 and 2001. Judge Geathers found that 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 (emphasis added). Thus, the "results" are not entirely favorable in a results-based analysis.

Contrary to Chem-Nuclear's arguments, this Court in 2014 did not expand the "additional compliance requirements" identified by this Court in 2010. (Chem-Nuclear Petition, p. 6). As evidenced by the opinion, this Court was fully aware of the distinction between technical requirements and performance objectives, noting that the "regulations containing technical requirements require Chem-Nuclear to take specific action to comply with the regulation, while regulations containing performance objectives require Chem-Nuclear to achieve certain results sought under the regulation." Sierra Club v. Chem-Nuclear Systems, LLC & DHEC, __S.C.__ , __S.E.2d.__ (2014 WL 3734366, filed July 30, 2014) (Chem-Nuclear II). The performance

objectives "do not impose specific requirements as to how Chem-Nuclear must accomplish any particular result," but the technical requirements do. Id. Thus, while the results being achieved at the site are relevant to whether Chem-Nuclear is meeting the performance objectives, Chem-Nuclear and DHEC cannot rest alone on "results" and must also demonstrate that the actions are being taken to meet specific requirements, for example those actions that demonstrate that migration of water onto and out of disposal units is minimized. To this day, neither Chem-Nuclear nor DHEC can identify any action being taken to minimize the migration of rainwater, as this Court clearly recognized.

The "Technical Requirement" vs. "Performance Objective" Terminology is a Distinction Without a Difference

Whether the Court referred to Section 7.11.11 as "technical requirements" or "compliance requirements" or "Conditions of Licenses" is a distinction without a difference.[3] (Chem-Nuclear Petition, p. 8-9). Similarly neither the heading of a regulation nor a permit condition are controlling in determining compliance with the regulations. (Chem-Nuclear Petition, p. 9, declaring that "7.11.11's title is clear and unambiguous").[4] What is important is the language of the regulation. Although the title and headings are part of the statute, they may not be construed

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[3]However, if it is true that the requirements of Section 7.11.11 are merely permit conditions and not stand-alone requirements for the renewal license, as argued by Chem-Nuclear, then DHEC has clearly failed to enforce those requirements. Sierra Club submits that Section 7.11.11 is a specific regulatory requirement necessary for securing a license, not just a permit condition

[4]Sierra Club would also point out that Chem-Nuclear's new argument about 7.11.11 being useful only as a permit condition and not as a separate regulatory requirement was not presented to this Court through appellate briefing and thus cannot be raised on rehearing. Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E. 234 (1933).

to limit the plain meaning of the text. Garner v. Houck, 312 S.C. 481, 486, 435 S.E.2d 847, 849 (1993) (citing Brotherhood of Railroad Trainmen v. Baltimore & O.R. Co., 331 U.S. 519, 67 S.Ct. 1387, 91 L.Ed. 1646 (1947)). For interpretative purposes, the title of a statute and heading of a section are of use only when they shed light on some ambiguous word or phrase and as tools available for resolution of doubt, but they cannot undo or limit what the text makes plain. Garner v. Houck, 312 S.C. 481, 486, 435 S.E.2d 847, 849 (1993). The title and headings of a statute may not be construed to limit the plain language of a statute, but may be used to shed light on an ambiguous word or phrase. McInnis v. McInnis, 348 S.C. 585, 592, 560 S.E.2d 632, 636 (Ct. App. 2002) (citing Garner v. Houck, 312 S.C. 481, 486, 435 S.E.2d 847, 849 (1993)).

Here, there is no doubt about what the words "minimize," "migrate," or "water" mean and those words are controlling over the headings of the regulations. This Court did not create "newly discovered" requirements, rather it applied the plain language of the text, aided by DHEC's definition of the word "minimize."

This Court's Opinion is Not Contrary to Sections 7.6 and 7.7

This Court's opinion is not contrary to Sections 7.6 and 7.7, both of which relate to the presentation of information necessary to demonstrate that other sections (the performance objectives and technical requirements) will be met. Neither section contains any standards for the manner of disposal. Section 7.6 directs the applicant to provide information to establish compliance, and specifically asks for complete "descriptions" of "design criteria" and "design features," among other things. Sierra Club submits that this section merely requires Chem-Nuclear to describe how it will design the disposal units such that they are compliant with the applicable regulatory requirements, including Subsection 7.11.11. Section 7.7 directs the

applicant to conduct analyses to establish compliance with the performance objectives. These two sections require Chem-Nuclear to produce information, but contain no technical criteria.

Section 7.11.11 is Equally Applicable to Rain as it is to Surface Water

DHEC again launches into a new argument that the "intent of subsection 7.11.11.1 is . . . that the migration of ***surface water*** onto the disposal units is minimized." (DHEC Petition, p. 5, emphasis added). DHEC's as-of-late construction of 7.11.11.1 creates a new definition of "water" as "surface water," despite its concurrence with this Court that rainwater is "water" and can "migrate" when it falls from the sky onto the vaults and trenches.[5] (DHEC Petition, p. 4). DHEC points to no legal error in the Court's conclusion that Section 7.11.11.1 requires minimization of water in the form of rain onto the vaults and trenches, it just disagrees with it.

The ALC Was Constrained by the 2005 Findings Which Are Not Under Review on Appeal

DHEC asserts that there is "substantial evidence" to support its determination that minimization of migration of water is being achieved with respect to compliance with 7.11.11.1 and 7.11.11.2. (DHEC Petition, p. 6). Contrary to DHEC's suggestion, this Court is not reviewing this appeal for "substantial evidence," nor whether the 2012 ALC Order made sufficient findings, but rather whether the ALC committed an error of law in applying the facts of the 2005 findings. (DHEC Petition, p. 6). As identified in the Order, the ALC erred in its legal conclusions as to compliance with 7.11.11.2 based on the 2005 findings that holes in the vaults

[5]Sierra Club does not dispute that some measures have been taken to reduce and minimize the contact with flowing surface water, as emphasized by Chem-Nuclear and DHEC. The site is not located in the path of an existing waterway and the trenches are sloped to divert sheet flow from rain events from the trenches so that it does not drain into the trenches. However, Chem-Nuclear's arguments fail to address the undeniable rainfall problem that was formally recognized by the ALC in 2005.

allow water to drain from and rise up into the vaults and that the trenches allow liquids to percolate into the soil. (R. p. 46, FF# 48, p. 56, FF# 103, 2005 Order).

DHEC is also wrong in its assertion that the ALC should be able "*to make additional findings* based on the existing findings." (DHEC Petition, p. 7, emphasis added). In Chem-Nuclear I, this Court *constrained* the ALC from making further findings, instead ordering the ALC on remand to apply the findings from the 2005 Order and make new conclusions of law based on the regulatory provisions not addressed in the 2005 Order. Sierra Club v. DHEC & Chem-Nuclear, 387 S.C. 424, 693 S.E.2d 13 (Ct. App. 2010).

DHEC's contention that the ALC on remand was to make new findings based on the 2005 ALC Order is contrary to this Court's 2010 Order. In its 2010 Order, this Court specifically constrained the ALC on remand to the findings of the 2005 Order. Indeed, this Court recognized in its 2014 Order that "the ALC considered on remand only the findings from the 2005 order . . . therefore, we likewise consider only the findings from the 2005 order." Sierra Club v. SCDHEC and Chem-Nuclear Systems, LLC, ____S.C.____ (Ct. App. 2014) (2014 WL 3734366, filed July 30, 2014) (Chem-Nuclear II). Even Chem-Nuclear understands this Court's instructions constraining the ALC to the 2005 findings. Similarly, the ALC recognized the limitations on findings. (ALC Order, p. 2).

The ALC cannot be absolved from the obvious legal conclusion that migration of water out of disposal units is not minimized by simply proclaiming that there is "no finding" that the design "fails to minimize the migration . . . of waste-contaminated water out of disposal units." Sierra Club submits that the minimization requirement is a question of law that this Court answered based on the findings from the 2005 Order, the plain language of 7.11.11 and DHEC's

definition of "minimize."

DHEC now falls back on the "absence of specific findings" to address compliance. Sierra Club raised the issue of compliance with Regulation 7.11.11 before the ALC in 2005 by presenting evidence that Chem-Nuclear's design and disposal practices do not minimize the migration of water onto and out of the disposal units (vaults and trenches). DHEC's argument now seems to be that a lack of any evidence that Chem-Nuclear is minimizing migration of water should be read in a light favorable to the permitting agency. The absence of evidence and findings related to minimization of migration of water speak for themselves: minimization is not being achieved.

Contrary to DHEC's assertion, the Court has not created "newly conceived factors for compliance." (DHEC Petition, p. 10). Instead, the Court applied the regulatory provisions to the 2005 facts, as the ALC should have done based on the remand instructions in Chem-Nuclear I. And contrary to DHEC's assertion, the Court applied those provisions according to the "plain language" of the regulations, as well as DHEC's interpretation of "minimization." (DHEC Petition, p. 12).

The Court's Conclusions on 7.11.11 are Fully Supported by the Language Which Does Not Require Elimination, but Minimization, of Migration of Water

At base, DHEC's complaint about the compliance conclusion with Subsections 7.11.11.1 and 7.11.11.2 is that the Court applied DHEC's definition of "minimize," i.e., to "reduce to the smallest amount possible." Chem-Nuclear and DHEC exaggerate and conflate the Court's opinion to say that Chem-Nuclear must prevent any and all rainfall from entering the trenches

and "eliminate the contact of rainfall with the disposal units." (Chem-Nuclear Petition, p. 7 & 13). The Opinion is very clear that there must be an effort to "minimize" or "reduce to the smallest possible extent" the migration of rainwater onto vaults and trenches, but nowhere does the Court read the Subsection 7.11.11 as an absolute prohibition of any contact with rainwater. It is clear that Chem-Nuclear is doing nothing to reduce rainfall from entering the trenches and vaults, and DHEC is not requiring it. Instead, Chem-Nuclear and DHEC both point to measures that minimize migration of ***surface water*** onto disposal units, or measures that move water out of the trenches once it has been in contact with waste and has migrated out of the disposal vaults. This Court's proper application of the regulations to the facts requires Chem-Nuclear to take some action to reduce rainfall from entering the vaults and trenches in the first instance.

Chem-Nuclear asserts that the Court erred in concluding non-compliance with 7.11.11.1 and 7.11.11.2 because it concluded that a violation of 7.11.11.2 occurs 1) only when water comes into contact with waste and then that contaminated water migrates out of the disposal units and 2) because the holes in the vaults cause waste-contaminated water to drain into the trenches, percolating into the soil and groundwater. (Chem-Nuclear Petition, p. 19). The first "conclusion" is merely a restatement of 7.11.11.2 ("minimize migration of waste or waste-contaminated water out of the disposal units). The second "conclusion" comes directly from the findings of the 2005 Order and thus fully support the Court's conclusion on non-compliance with 7.11.11.1 and 7.11.11.2. See ALC Order, FF # 47, FF # 48, FF # 102.

This Court did not "significantly enlarge[] that original restriction placed upon the ALC" by "eliminating . . . reliance on any facts" that "demonstrate Chem-Nuclear's compliance with sections of Part VII separate from that of 7.11." (Chem-Nuclear Petition, p. 8). This Court

looked at the totality of the factual findings. Specifically, and distinct from the ALC, this Court reviewed facts related to compliance with Section 7.11.11 that were ignored or disregarded by the ALC. Those facts include: 1) DHEC's 2001 direction to Chem-Nuclear to consider temporary roofs and other conceptual trench designs to keep water out of trenches and vaults; 2) that final designs had not been submitted in 2005, despite the undeniable problem of rainfall in the vaults and trenches; 3) tritium is driven into the groundwater through rainfall in and on the disposal trenches; 4) tritium concentration varies with the amount of rainfall; 5) there is no cover or roof, so rain falls directly into the vaults during loading; 6) the vaults and trenches have no cover and are exposed to rainfall while they are active; 7) the vaults are not sealed against water intrustion. Chem-Nuclear, DHEC and the ALC would all have this Court disregard these relevant facts and place complete reliance on the fact that there are sloped trench floors, a drainage system for monitoring, backfilling of the voids between vaults, and clay caps installed *after* the trenches are filled as proof of minimizing migration of water onto the vaults and trenches. As this Court noted during oral argument and in its Opinion, those design features are relevant to detecting water once is has already migrated onto the disposal units or minimizing migration of water *after* the vaults are filled and the trenches closed and capped, but do not address rain falling onto the vaults and trenches when they are active (prior to being closed and capped).

The Court's Compliance Conclusions on Subsection 7.11.11.4 Are Supported by the 2005 Findings

This Court's conclusions regarding the lack of adequate monitoring, detection, testing and remediation measures, and specifically the lack of a "leachate collection system," derive entirely from the findings of the 2005 Order. (R. p. 56, 2005 Order, FF # 102). The findings from the

2005 Order with respect to the monitoring, detection and removal measures were never challenged or disputed by DHEC until now and thus cannot be challenged. In re Morrison, 321 S.C. 370 n. 2, 468 S.E.2d 651 n. 2 (1996) (noting that an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal).

DHEC Not Entitled to Deference When Interpretation Contrary to Plain Language

Chem-Nuclear proposes an absolute deference to DHEC in matters related to disposal of radioactive waste because the judiciary does not have the same expertise. (Chem-Nuclear Petition, p. 23). Our courts have rejected such absolute deference to DHEC, particularly when that deference is in direct conflict with the plain language of the regulations. Engaging & Guarding Laurens Cnty.'s Env't (EAGLE) v. S. Carolina Dep't of Health & Envtl. Control, 407 S.C. 334, 755 S.E.2d 444 (2014), reh'g denied (May 7, 2014). Where an agency's interpretation of the regulation leads to a **direct conflict** with the plain language of the statutory mandate, it is an error to show the utmost deference to that interpretation by requiring a "compelling reason to differ." S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control, 363 S.C. 67, 75, 610 S.E.3d 482, 486 (2005). An agency's long-standing interpretation of a statute is usually entitled to deference and should not be overruled by a reviewing court in the absence of cogent reasons, but the interpretation will not be sustained if it contradicts a statute's plain language. Etiwan Fertilizer Co., 217 S.C. 354, 359, 60 S.E.2d 682, 684 (1950). See Brown v. Bi-Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) ("We recognize the Court generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation. Nevertheless, where, as here, the plain language of the statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation." (citation omitted)).

During oral arguments DHEC admitted that rainwater is water as identified in 7.11.11. Chem-Nuclear now argues that DHEC only *applies* that regulation to "the movement of surface water." (Chem-Nuclear Petition, p. 24). Chem-Nuclear provides a strained rationale for rejecting this Court's conclusions based on 1) the misstatement that this Court required "elimination" as opposed to "minimization" and 2) its argument that 7.1.1, which provides that it is in addition to, and not a substitution for, other regulatory requirements, somehow precludes the Court's application of 7.11.11. Chem-Nuclear fails to explain exactly how this Court's interpretation of 7.11.11 is inconsistent with 7.1.1 and Sierra Club has uncovered no basis for this assertion.

The 2005 Feasibility Report

When this case was on remand to the ALC, neither DHEC nor Chem-Nuclear asked the ALC to consider the Feasibility Report, despite the topic having been specifically raised by the Administrative Law Judge on remand. Similarly, neither Chem-Nuclear nor DHEC raised the issue of this Court's denial of the motion to supplement the record with the "Feasibility Report," nor did they attempt to explain how that report could have had any impact on the issues before the Court. Even in the Petitions for Rehearing, neither Chem-Nuclear nor DHEC has made any effort to demonstrate how a report would change this Court's result.

DHEC's complaint is that because this Court could not consider the 2005 report it could not consider that some changes could have been made to address the concerns related to rainfall. (DHEC Petition, p. 5). Chem-Nuclear similarly complains that Sierra Club bears the burden of proving that neither Chem-Nuclear nor DHEC have taken any actions to address the ALC's concern, asserting that the license is "fluid" and implying that changes to address the compliance with 7.11.11 have occurred. (Chem-Nuclear Petition, p. 22). In its Motion for Imposition of

Stay, Chem-Nuclear came forth with all of the amendments that have been made to its license since 2004 and not a single one of them addresses the rainfall problems identified by the ALC in its 2005 Order.[6] (Motion for Imposition of Stay, p. 13, fn. 10). Chem-Nuclear acknowledges that shelters or covers over trenches, sealing and grouting vaults and lining trenches will achieve minimization of migration of water. (Chem-Nuclear Petition, p. 17). It does not claim that these measures would be unjustified because they would result in an unacceptable dose to employees. In fact, it has not even performed an evaluation to determine whether there would be any change in dose. (Chem-Nuclear Petition, p. 18, "Even if Chem-Nuclear performed this evaluation . . ."). If the Feasibility Report did, in fact, address the undeniable rainfall problem, the complying with this Court's remedy of developing a Compliance Plan should not be problematic for Chem-Nuclear.

Sufficiency of Remedy

Sierra Club believes that the remedy provided by this Court is fair and workable, allowing continued disposal, even though some of the technical requirements have not been met, but requiring a plan for compliance.[7] Yet DHEC argues that the remedy provided by this Court is in conflict with the basic tenets of administrative law. The argument is premised on burden-shifting and the inability of the ALC to conduct an adjudicatory review process of the compliance plan. Appellant suggests that if the Court believes there is any conflict, as an alternative either 1)

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[6]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.

[7]DHEC and Chem-Nuclear had no complaints with the ALC's Order in 2005 requiring a study as a remedy.

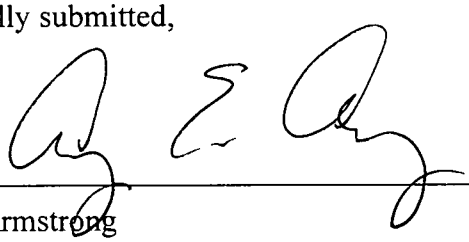
DHEC review the Plan and issue an agency decision on compliance, which could then be reviewed by the ALC, 2) remand to ALC for review of the compliance plan as part of this contested case proceeding, or 3) the license be overturned and Chem-Nuclear be ordered to discontinue accepting any waste until it has applied for and received a renewal license that meets the regulatory requirements enunciated in this Court's Opinion.

DHEC and Chem-Nuclear are wrong that this Court cannot overturn, reverse or "revoke" the permit. The Administrative Procedures Act authorizes this Court to "affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision." S.C. Code Ann. § 1-23-610.

CONCLUSION

For the reasons set forth above, the Sierra Club respectfully requests that this Court deny DHEC's Petition for Rehearing and Chem-Nuclear's Petition for Rehearing.

Respectfully submitted,



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August 29, 2014

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

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

Sierra Club . . . . . Petitioner/Appellant,

vs.

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

CERTIFICATE OF SERVICE

I hereby certify that on this date I served the foregoing **Response to Respondent Chem-Nuclear and DHEC's Petitions for Rehearing** upon counsel for the Respondents, by placing copies of same in the United State Mail, addressed to:

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