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SC Court of Appeals

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,

Respondent,

v.

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

Petitioners.

CHEM-NUCLEAR SYSTEMS, LLC'S REPLY TO THE SIERRA CLUB'S RETURN TO PETITIONS FOR REHEARING

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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 submits this Reply to the Return to Petitions for Rehearing submitted by the Respondent, Sierra Club.

ARGUMENT AND CITATION OF AUTHORITY

A. There Is A Significant Difference Between "Reversing A Permit" And Reversing The ALC's Decision. Sierra Club Incorrectly Asserts That *S.C. Code Ann.* § 1-23-610 Authorizes The ALC Or This Court Of Appeals To Revoke Chem-Nuclear's Operating License Without DHEC Action.

Chem-Nuclear disputes the validity of this Court's remedy based on the potential lack of procedural protections prior to revocation. Chem-Nuclear does not dispute that 1) DHEC has the authority, if warranted, to revoke the license for the Barnwell LLRW disposal facility; 2) the ALC has jurisdiction and authority to review and affirm (or reverse, modify, or remand) such revocation; and 3) this Court has the authority to affirm the Final Order and Decision of the ALC which would give effect to the revocation (or reverse, or remand). But, neither this Court nor the ALC can revoke the license *ab initio*. This Court's and the ALC's authority arise from the statutory authorizations contained in S. C. Code Ann. Sec. 1-23-600 and 1-23-610 governing administrative and judicial review of contested cases. A DHEC-initiated revocation proceeding constitutes an action that gives rise to a contested case in accordance with S. C. Code Ann. Sec. 1-23-310.

While S. C. Code Ann. Sec. 1-23-610 is authority for this Court's review and disposition of an ALC Final Order and Decision, it is not authority for *ab initio* revocation of Chem-Nuclear's license. As is demonstrated by the definition of a "contested case" in the Administrative Procedures Act, any licensing procedure, including revocation, gives rise to a contested case. S. C. Code Ann. Sec. 1-23-310 (3) and (4). The contested case presently subject to judicial review by this Court was a renewal of an existing license, not revocation of an existing license. Revocation of Chem-Nuclear's license gives rise to a new contested case. Should DHEC determine that Chem-Nuclear's license should be revoked, and if Chem-Nuclear challenged DHEC's determination using the procedures in S. C. Code Ann. Sec. 44-1-60, than the ALC's jurisdiction would be triggered to review the revocation. But this Court's remedy ignores these jurisdictional issues and administrative processes.

B. Sierra Club Misrepresents The History Of This Litigation History By Claiming Chem-Nuclear Failed To Appeal This Court of Appeals' Prior Conclusion That The Technical Requirements Under *S. C. Code Ann. Reg.* 61—63 Part VII, 7.11.11, Are In Addition To And Are Not Limited By The Performance Objectives.

In the 2010 *Chem-Nuclear I* Petition for Rehearing and Petition for Writ of Certiorari, Chem-Nuclear specifically challenged the problematic conclusion in *Chem-Nuclear I* **1** addressing the application of ALARA. Chem-Nuclear argued in

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1 This Court of Appeals stated that "we believe section 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." Chem-Nuclear I, 387 S.C. 424, 435, 693 S.E.2d 13, 19.

efforts to seek review of *Chem-Nuclear I* that "[u]nder ALARA, the Barnwell Facility must first meet the dose requirements contained in Part III of Reg. 61-63" before any additional compliance determinations are made.[2]

Chem-Nuclear is cognizant of this Court of Appeals' 2010 rejection of that argument as a ground for rehearing, but such rejection does not, as the Sierra Club asserts, constitute a complete bar to a similar subsequent challenge based on this Court' of Appeals' additional findings related to ALARA in *Chem-Nuclear II*, discussed more fully below.

C. The Sierra Club Mischaracterizes Chem-Nuclear's Arguments Regarding ALARA's Applicability When Determining Compliance with *S. C. Code Ann. Reg.* 7.11.11.

The Sierra Club asserts both Chem-Nuclear and DHEC are barred by principles of judicial finality from raising certain issues. The effect of *Chem-Nuclear I* is judicial finality as to the issues decided. "After the remittitur is sent down from an appellate court, the trial court acquires jurisdiction to enforce the judgment and take any action consistent with the appellate court ruling."[3] Matters decided by the appellate court cannot be reheard, reconsidered, or relitigated in the trial court, even under the guise of a different form.[4] The

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[2] *See* Petition for Rehearing of Respondent Chem-Nuclear Systems, LLC, p.10.

[3] Muller v. Myrtle Beach Golf & Yacht Club, 313 S.C 412, 438 S.E.2d 248 (1993); Christy v. Christy, 317 S.C. 145, 452 S.E.2d 1 (Ct.App.1994).

[4] 5 C.J.S., Appeal and Error, § 975(a) (West Group 1993).

"decision of the appellate court is final as to all questions decided [and it] is the duty of the trial court to follow the decision of the appellate court."[5]

In *Chem-Nuclear I* it appears that the following issues were finally resolved by this Court of Appeals and, therefore, not subject to later trial or appellate court challenge:

1) Chem-Nuclear's compliance with all applicable regulatory provisions except for *S. C. Code Ann. Regs.* 7.23.6, 7.11, and the sections in *S. C. Code Ann. Reg.* 7.10 which the ALC had not addressed;

2) Sierra Club's preservation of the issue of compliance under *S. C. Code Ann. Regs.* 7.11 and 7.23.6 for review;

3) This Court of Appeals' conclusion that *S. C. Code Ann. Reg.* 7.11 "impose[d] additional compliance requirements"[6] and ALARA was not sufficient to demonstrate compliance with *S. C. Code Ann. Reg.* 7.11; and

4) the conclusion that *S. C. Code Ann. Reg.* 7.23.6 imposed additional compliance requirements for Chem-Nuclear.

Contrary to the Sierra Club's "assertions", Chem-Nuclear is not attempting to challenge these matters which became final as of the 2010 remittitur to the ALC. This Court of Appeals, in *Chem-Nuclear II*, went well beyond the *Chem-Nuclear I* when determining that "minimize" meant "eliminate." Seeking to distinguish the regulatory requirement to "minimize" from the Sierra Club's claim that "no water should be allowed to enter the trenches," DHEC and Chem-Nuclear utilized a reasonable definition – "to reduce to the smallest possible

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5 5 C.J.S., Appeal and Error, § 975(a); Ackerman v. McMillan, 324 S. C. 440, 442 477 S. E. 2d 267, 268 (1996).

6 Chem-Nuclear I, 387 S.C. 424, 435, 693 S.E.2d 13, 19.

amount, extent, size or degree."[7] This definition contemplates reduction, not total elimination. Yet this Court of Appeals determined that Chem-Nuclear was not compliant with S. C. Code Ann. Reg. 7.11 because Chem-Nuclear had failed to eliminate the presence of all rainfall into the disposal trenches. Moreover, this Court of Appeals disregarded and/or ignored the qualifier contained in the definition – "reduction to the smallest amount ***possible***."

This Court of Appeals went well beyond its findings in *Chem-Nuclear I* related to the standard for review of compliance with S. C. Code Ann. Reg. 7.11.11. This Court of Appeals determined that ALARA[8] was not a consideration in evaluating Chem-Nuclear's compliance with S. C. Code Ann. Reg. 7.11.11.[9] This is an expansion of this Court of Appeals' 2010 determination ALARA "would not be sufficient."[10] The term "sufficient" is defined "as much as is needed."[11] It does not mean either "irrelevant" or "inapplicable."

D. The ALC Engaged In More Than A "Result-Based" Analysis When Concluding Chem-Nuclear Had Satisfied The Requirements Of *S. C. Code Ann. Reg.* 7.11.11 And Chem-Nuclear Can Identify Measures Which Have Been Taken To Minimize Rainfall Into The Trenches.

The ALC's findings and conclusions demonstrate analysis of much more than mere site performance for determination of compliance with S. C. Code

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7 Chem-Nuclear II, 2014 WL 3734366, *11

8 This effectively means that worker exposure is not a consideration when determining what technical steps are necessary for compliance with R. 7.11.11.

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

10 Chem-Nuclear I, 387 S.C. 424, 435, 693 S.E.2d 13, 19.

11 American Heritage Dictionary of the English Language, p.___.

Ann. Reg. 7.11.11. The ALC analyzed, in factual detail, the disposal practices in relation to the requirement to minimize contact between water and disposal units and water and waste. The ALC's analysis related to the design and function of the trenches, vaults, and waste containers:

> The floor in that [Class A] trench is sloped at the corner locations, and a drainage system is installed to facilitate monitoring of water infiltration entering the trench. . . . . French drain and sump system on the floor of the B/C trench allows monitoring of any water that accumulates in the trench. . . . . The entire slit trench floor is filled with coarse drain sand and sloped to one end. Standpipes to monitor water accumulation are installed periodically along the length of the trench.

(R.pp. 13-14). These are just a few of the multiple factual findings that the ALC provided related to measures taken by Chem-Nuclear to satisfy the technical requirements of *S. C. Code Ann. Reg.* 7.11.11. It is inaccurate to characterize the ALC's analysis as merely "result based." Moreover, Chem-Nuclear has identified additional measures taken to achieve technical compliance with *S. C. Code Ann. Reg.* 7.11.11 since the initial hearing before the ALC in 2005 including 1) transition to the smaller trench type – the B/C trench; 2) the use of temporary covers over empty or partially filled vaults; and 3) the use of temporary covers over large components placed directly in the trench.**12**

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12 *See* Petition for Rehearing of the Petitioner Chem-Nuclear Systems, LLC, fn. 54. The petition was filed on 13 August 2014. It is true that Chem-Nuclear's counsel did not provide this information in response to this Court of Appeals' questions during oral argument due to the dilemma of offering information not contained in the appellate record. Notwithstanding, given the tenor of the Chem-Nuclear II opinion, counsel believes it important and significant for this Court of Appeals to be aware Chem-Nuclear continues to refine and improve its disposal practices and make technological improvements at the Barnwell facility.

E. Chem-Nuclear Does Not Object To The Development Of A Compliance Plan, But Opposes This Court Of Appeals' Legal Standard Which Completely Disregards The Significance Of Evaluating Exposure To Workers Pursuant to ALARA.

The Sierra Club apparently misunderstands Chem-Nuclear's objectives in seeking a stay. Chem-Nuclear has no objection to development of a compliance plan. In fact, Chem-Nuclear has a long practice of coordinating with DHEC on site improvements and continues to do so at present. Chem-Nuclear does, however, oppose a legal standard dictating a compliance plan which compromises worker health and safety for the sake of a minimal, if any, reduction in contaminants at the compliance point for a facility which has an excellent operations and performance record. Under the "standard" articulated by this Court of Appeals, which exceeds the *Chem-Nuclear I* directives, no consideration in developing the compliance plan is given to potential worker doses pursuant to ALARA.**13** It is, at best, premature to develop a compliance plan before the legal standard for review of such plan is finally clarified through the appellate process. The potential for unnecessary worker exposure is the driving force behind Chem-Nuclear's impetus to seek rehearing and, if necessary, certiorari review, prior to submitting or implementing a compliance plan.

S. C. Code Ann. Reg. 61-63 Part VII 7.18 provides for "Protection of the General Population from Releases of Radioactivity" and is applicable to workers during operations. *See* 7.20. These standards require that "[r]easonable effort

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13 "Matters decided by the appellate court cannot be reheard, reconsidered, or relitigated in the trial court, even under the guise of a different form." *See* 5 C.J.S., Appeal and Error, § 975(a); Ackerman v. McMillan, 324 S. C. 440, 442 477 S. E. 2d 267, 268.

should be made to maintain releases of radioactivity in effluents to the general environment as low as is reasonably achievable" and "[e]very reasonable effort should be made to maintain radiation exposures as low as is reasonably achievable." This Court identifies this as a "performance objective." And, while Chem-Nuclear is cognizant that compliance with these standards alone does not demonstrate compliance with the requirements of 7.11.11, the standards in 7.18 and 7.20 are still relevant. A reduction at the compliance point, accomplished through technical changes to operations, may not be reasonable under 7.18 and 7.20 if it results in additional exposure to workers. And, since any release is already well below the regulatory compliance limit, the beneficial effect of may be outweighed by the possibility of unjustified worker doses.

F. Chem-Nuclear Has Maintained Its Position On The Points Raised In The Petition Throughout These Protracted Proceedings Related To The Relicensing Of The Barnwell Low-Level Radioactive Waste Disposal Facility.

In 2010, this Court of Appeals determined that remand was appropriate because the ALC had failed to address compliance with *S. C. Code Ann. Regs.* 61-63 Part VII 7.11 and 7.23.6. This Court of Appeals further determined these issues had been raised by Sierra Club through general reference to *S. C. Code Ann. Reg.* 61-63 in the Sierra Club's Pre-Hearing Statement to the ALC.[14] This Court of Appeals further concluded that a reference to *S. C. Code Ann. Reg.* 61-

[14] The Sierra Club's general reference to S. C. Code Ann. Reg. 61-63 was in response to the ALC's request to provide specific statutory and regulatory grounds relevant to the proceeding before the ALC.

63 Part VII 7.11 in a post-trial proceeding sufficiently satisfied the "ruled on" test and preserve these issues for appellate review.

Chem-Nuclear agrees that parties have a duty to raise issues in a fashion which allows development of a full and fair record sufficient to support resolution of the appealed issues. Chem-Nuclear has suffered significant prejudice from Sierra Club's "identification" and "preservation" of issues after the trial record closed, as well as from Sierra Club's persistent opposition to Chem-Nuclear's efforts to supplement the appellate record with crucial information and/or documentation which would have directly addresses these issues, specifically Chem-Nuclear's compliance with the technical requirements of *S. C. Code Ann. Reg.* 61-63 Part VII 7.11.11.

Sierra Club's incorrectly contends Chem-Nuclear is making new claims and arguments in its Petition for Rehearing. On 25 March 2010, Chem-Nuclear filed its initial Petition for Rehearing in *Chem-Nuclear I*,**15** and later filed a Petition for Certiorari with the South Carolina Supreme Court.**16** Chem-Nuclear sought review based on the following allegations of error:

1) There was no regulatory requirement mandating that the engineered barriers had to prevent all migration of tritium from the disposal facility;

2) The engineered barriers cannot be evaluated separate and apart from the overall Part VII performance objectives; and

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15 Sierra Club v. S.C. Dept. of Health and Envtl. Control, 387 S.C. 424, 693 S.E.2d 13 (Ct.App. 2010) ("Chem-Nuclear I").

16 This Court of Appeals denied Chem-Nuclear's Petition for Rehearing by order dated 3 May 2010. The South Carolina Supreme Court denied the Petition for Writ of Certiorari by order dated 21 July 2011.

3) The Court of Appeals had misapprehended ALARA within the regulatory scheme of *S. C. Code Ann. Reg.* 61-63; and

4) *S. C. Code Ann. Regs.* 7.11 and 7.23.6 were not applicable to a request to renew a license.

Chem-Nuclear's Petition for Rehearing filed in this *Chem-Nuclear II*[17] case is entirely consistent with the issues Chem-Nuclear raised in 2010, seeking to challenge *Chem-Nuclear I*.[18] Even though this Court of Appeals' remittitur rendered *Chem-Nuclear I* final, as is discussed herein, such finality did not render the arguments Chem-Nuclear asserted previously as either inappropriate or inapplicable to this Court of Appeals' determinations in *Chem-Nuclear II*. This is especially true given the fact that in Chem-Nuclear II, this Court of Appeals expanded its original opinion and legal conclusions in *Chem-Nuclear I* and included new findings and conclusions in its *Chem-Nuclear II* review of the ALC's Final Order and Decision on Remand.

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17 Sierra Club v. S.C. Dept. of Health and Envtl. Control, ___ S.C. ___, ___ S.E.2d ___ (Ct.App. 2014) (2014 WL 3734366, filed 30 July 2014) ("Chem-Nuclear II").

18 *See* Petition for Rehearing of Respondent Chem-Nuclear Systems, LLC and supporting memorandum of law filed on 25 March 2010.

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:

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By: _____

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9 September 2014

NPCOL1:3971051.1-MO-(SPG) 049893-00002

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Sierra Club,

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

Respondents.

Of whom Chem-Nuclear Systems, LLC is the

Petitioner.

CERTIFICATE OF SERVICE OF CHEM-NUCLEAR'S REPLY TO THE SIERRA CLUB'S RETURN TO PETITION FOR REHEARING

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I, Stephen P. Groves, Esquire, hereby certify that on 9 September 2014, served one copy each of ***Chem-Nuclear's Reply to the Sierra Club's Return to 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:

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Stephen P. Groves, Sr.
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9 September 2014

The Honorable Jenny Abbott Kitchings
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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 221(a), and 240(d) of the South Carolina Appellate Court Rules, please find enclosed find the original and seven (7) copies of **Chem-Nuclear, LLC's Reply to Sierra Club's Return to Petition for Rehearing** in the above captioned matter. It is my understanding that there is no filing fee required for this Reply.

I would appreciate you kindly filing **Chem-Nuclear, LLC's Reply to Sierra Club's Return to Petition for Rehearing** 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.

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