

**STATE OF SOUTH CAROLINA  
IN THE  
COURT OF APPEALS**

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

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Sierra Club,

Appellant,

v.

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

Respondents.

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**Respondent South Carolina Department of Health  
and Environmental Control's *Reply* to Appellant's  
Return to Petition for Rehearing**

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The Respondent South Carolina Department of Health and Environmental Control (DHEC or the Department) hereby replies to the Return of Appellant Sierra Club to the Department's Petition for Rehearing of this Court of Appeals' July 30, 2014 decision:

**Technical Requirements and Performance Objectives**

Appellant misstates the Department's position with regard to the important connection between the technical requirements of subsection 7.11.11 and the performance objectives of sections 7.18 (ALARA) through 7.21. (Sierra Club Return, p.3). The Department does not argue that the technical requirements are only relevant to achieve the performance objectives or that there is no "significance or value" to the technical requirements outside of whether the

performance objectives have been met. (Sierra Club Return, p.3) Rather, it is the Department's position that the technical requirements of subsection 7.11.11. cannot be isolated from the performance objectives in sections 7.18 through 7.21. As Appellant correctly notes, the low-level radioactive disposal regulations are multi-layered, comprehensive and complex. (Sierra Club Return, p.2). This is evidenced by the interconnectivity of the technical requirements and performance objectives throughout Part VII and why the regulation must be read as a whole rather than read in its component parts in isolation. (DHEC Petition, pp. 4, 12).

Moreover, Appellant is incorrect in stating this issue not preserved for consideration by the Court of Appeals. (Sierra Club Return, p.3). The Department filed a Petition for Rehearing of the Court of Appeals' March 10, 2010 decision on March 25, 2010. In the Petition for Rehearing, the Department asked for reconsideration and modification of the Court's opinion to clarify that section 7.11 cannot be pursued in a manner that disregards or is detrimental to ALARA considerations expressed in Part VII of the regulation. Respondent Chem-Nuclear filed a Petition for Writ of Certiorari after the Petition for Rehearing was denied. In its Return to Chem-Nuclear's Petition for Certiorari, the Department joined in Chem-Nuclear's argument to the extent it supported the Department's position that the requirements of section 7.11 do impose compliance requirements that have been satisfied by Chem-Nuclear. Sierra Club opposed the Petition, in part arguing that there was not a final determination. The issue concerning the relationship between the technical requirements and performance objectives of Part VII is properly preserved for appeal here, is a proper issue for consideration after remand to the ALC, and it an appropriate ground for sustaining the decision of the ALC.

### **Subsection 7.11.11.2**

The Department fully understood the instructions on remand to the ALC in *Chem-Nuclear I*. The Department does not contend that the ALC on remand was to make new factual findings. (Sierra Club Return, p. 10). In following the Court's instructions, the ALC applied to the fullest extent possible the 2005 factual findings and determined compliance with subsection 7.11.11.2. Yet, this Court found that the ALC erred in relying, in part, on the absence of specific negative findings to further support its determination that Chem-Nuclear had complied with this subsection. (DHEC Petition, p.7). This Court used the absence of findings in the 2005 Order to conclude that Chem-Nuclear was not in compliance with the regulation, thus shifting an impossible burden of proof to the Respondents. (*Chem-Nuclear II*, p. ).

### **Subsection 7.11.11.4**

There is one finding in the 2005 ALC Order that says, "None of the trenches at the Chem-Nuclear site have an impermeable liner or a leachate collection system." (2005 Order, Finding No.102). Subsection 7.11.11.4 contains no requirement for a leachate collection system, and nowhere in Part VII of the regulation is there a definition or reference to a leachate collection system. The Court of Appeals created a definition of a leachate collection system and applied it as the compliance standard for this subsection. As the Department noted in its Petition for Rehearing, there are numerous findings that support compliance with this subsection, and this Court erroneously created and applied a compliance standard that is not supported in the regulation. (DHEC Petition, p. 8). The Department could not have previously challenged or disputed the leachate collection system requirement because it has only now been introduced by the Court of Appeals as a compliance requirement.

### **The 2005 Report**

The Department's issue with the 2005 report is not, as Appellant states, that this Court could not consider that some changes have been made to address concerns related to rainfall. (Sierra Club Return, p. 15). The Department's issue is that this Court improperly assumed that DHEC did not require Chem-Nuclear to take any action or make any changes to its disposal practices, and this assumption "casts doubt upon DHEC's decision to renew the license." (*Chem-Nuclear II*, p.19). The mere existence of the report, which was not part of the record on appeal and the details of which were not known to the Court, should not be used to cast doubt on the Department's decision to renew the license or as evidence that DHEC failed to enforce the law. Furthermore, because the report was not part of the record, it would not have been appropriate for the Department – even in the Petition for Rehearing – to demonstrate how a report would change this Court's result. (Sierra Club Return, p. 15).

### **The Remedy**

In response to Appellant's arguments on the sufficiency of the remedy, the Department refers to and incorporates herein the arguments contained in the Department's Petition for Rehearing.

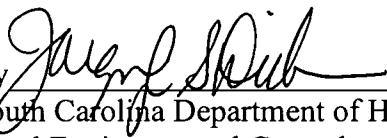
## CONCLUSION

For the reasons stated in the Department's Petition for Rehearing, and for the reasons set forth above, the Department respectfully requests that this Court grant its Petition for Rehearing.

Respectfully Submitted,

Claire H. Prince  
Special Counsel

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September \_\_\_\_, 2014  
Columbia, South Carolina

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SC Court of Appeals

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Sierra Club,

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South Carolina Department of Health and  
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CERTIFICATE OF SERVICE

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I, Sandra R. Wessinger, Legal Assistant for the South Carolina Department of Health and Environmental Control, hereby certify that I have on this **8th day of September, 2014**, served a copy of Respondent SCDHEC's *Reply to the Return to Petition for Rehearing* upon all parties and counsel of record in the above-captioned case, via United States Mail, First Class, postage prepaid, addressed as follows:

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September 8, 2014  
Columbia, SC

  
Sandra R. Wessinger



Catherine B. Templeton, Director

*Promoting and protecting the health of the public and the environment*

RECEIVED

September 8, 2014

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SC Court of Appeals

Honorable Jenny A. Kitchings  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

Re: Sierra Club vs. SCDHEC & Chem-Nuclear  
Appellate Case No.: 2012-212791

Dear Ms. Kitchings:

Enclosed please find the original and two (2) copies of *Respondent South Carolina Department of Health and Environmental Control's Reply to Return to the Petition for Rehearing* for filing in connection with the above-referenced case. I would appreciate you returning the stamped copies to our office with the courier.

Should you have any questions or need additional information concerning this matter, please do not hesitate to contact our office.

Sincerely,

Claire H. Prince  
Special Counsel

Enclosures:

cc: Amy Armstrong, Esquire  
Michael Corley, Esquire  
Robert Guild, Esquire  
Stephen P. Groves, Sr., Esquire  
Mary Shahid, Esquire  
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