THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ADMINISTRATIVE LAW COURT
Carolyn C. Matthews, Administrative Law Court Judge

RECEIVED
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S.C. Supreme Court

Case No. 08-ALJ-07-183-CC

Heath Hill, Petitioner,

v.

South Carolina Department of Health and Environmental Control and South Carolina Electric & Gas Company, Respondents.

PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 242 of the South Carolina Appellate Court Rules, Petitioner Heath Hill hereby petitions the Court to issue a writ of certiorari to review the opinion of the Court of Appeals captioned *Heath Hill v. South Carolina Department of Health and Environmental Control and South Carolina Electric & Gas Company, Unpublished Op. No. 2011-UP-502.* {Appendix ("App.") p. 12}. For the reasons set forth below, the petition should be granted and the decision of the Court of Appeals reversed.

Certification Regarding Rehearing

The undersigned hereby certifies that a petition for rehearing was made and finally ruled upon by the Court of Appeals on December 19, 2011.

Questions Presented for Review

I. **Does the Court of Appeals' ruling that Mr. Hill's challenge to the NPDES permit is moot conflict with this Court's prior precedent?**

II. **Does the Court of Appeals' ruling that none of the three exceptions to the mootness doctrine apply in this appeal conflict with this Court's prior precedent?**

III. **Does Mr. Hill's challenge to the NPDES and ISWLF permits based on the ALC's failure to consider the application of a 2001 Mixing Zone Consent Agreement between DHEC and SCE&G along with the impact of discharges in the groundwater and seeps, present a novel question? Do the unpermitted discharges into the Wateree River render the permits invalid?**

Statement of the Case

This is an appeal by neighboring land owner and farmer Heath Hill from a decision of the Administrative Law Court approving permits by the Department of Health and Environmental Control (DHEC) which allow the discharge of toxic arsenic to groundwater and the Wateree River from a landfill and coal ash storage ponds at the

Wateree coal-fired power plant of South Carolina Electric and Gas Company (SCE&G) in the Eastover community of Richland County. Mr. Hill contends that use of his farmland and natural resources are threatened by DHEC permits for a Class Two Solid Waste Landfill and related National Pollutant Discharge Elimination System (NPDES) wastewater discharge, which fail to adequately control arsenic contamination of groundwater below the leaking unlined coal ash storage ponds and surface water leaking or seeping through the ash pond dike into the Wateree River.

Mr Hill timely requested the conduct of a contested case hearing by the Administrative Law Court to review the final DHEC decisions received on or about July 28, 2008 to issue SCE&G Wateree Station Industrial Solid Waste Landfill (ISWL) Permit No. SCR10H934, and the decision received on or about August 29, 2008 to issue NPDES wastewater discharge Permit No.: SC0002038 for SCE&G's Wateree Station.

DHEC issued a Class Two Solid Waste Landfill Permit and an NPDES Discharge Permit to SCE&G in connection with the installation of a Flue Gas Desulfurization Scrubber System (FGD Scrubber) at Wateree Station {R. pp. 1-3} The Clean Air Interstate Rule (CAIR, 70 Fed. Reg 25162 (May 12, 2005) promulgated by the U.S. Environmental Protection Agency pursuant to the Federal Clean Air Act, requires SCE&G to reduce sulfur dioxide emission from the combustion of coal. (Id.) The FGD Scrubber uses calcium carbonate to remove sulfur and other contaminants from the smokestack during the production of electricity. (Id.)

As coal is burned to produce electricity, fly ash and bottom ash is produced. FGD gypsum is a waste material produced in the desulfurization of flue gases. {R. p. 624}. Once the FGD Scrubber is operational, the gypsum byproduct is removed from the

scrubber and transferred to the scrubber blow down pond, which is also part of the NPDES system. {R. p. 634 line 16 – p. 636 line 11}. From the scrubber blow down pond, the waste gypsum from the FGD scrubber will be removed, stacked and transported by dump truck to the landfill for permanent storage. {R. p. 636 line 20-p. 125 line 7}. Any liquid associated with this process or any rainfall affecting the site, becomes part of the waste discharge subject to the NPDES permit application. (Id.)

The ISWLF is permitted to handle the disposal of the gypsum, as well as all other byproducts of coal combustion including fly ash and bottom ash, which contain high levels of contaminants like arsenic. {R. p. 677} Gypsum, fly ash and bottom ash deposited in the landfill is exposed to rainfall and other liquid and creates contaminated liquid called "leachate". (Id.) Unfortunately, leachate containing contaminants such as arsenic pools in the lined landfill, either due to natural rain events or leachate associated with the production process. The liquid waste must be disposed of properly. (Id.) Gravity forces the leachate from the landfill into a lined leachate collection pond. From the lined leachate collection pond, the leachate is pumped to *unlined* Ash Pond 1, which overflows to *unlined* Ash Pond 2. Ash Pond 1 and Ash Pond 2 are former gravel pits, each 80 acres in size. These former borrow pits have been in operation for nearly forty years. {R. pp. 731-732}. These two unlined ponds are a simple form of passive treatment of contaminants like arsenic through sedimentation. The NPDES permit for the outfall at Ash Pond 2 addresses only the monitored contaminants discharging from the outfall, but it does not address the contaminants discharging from the groundwater and seeps. {R. pp. 231-232}. These ponds are leaking arsenic into the groundwater below the ponds, as well as through the seeps adjacent to the Wateree River. (Id.)

At SCE&G's Request, DHEC agreed to a "mixing zone" in the groundwater below the site where contaminant concentrations are allowed to exceed otherwise applicable groundwater protection standards. {R. p. 10}. The mixing zone for groundwater is limited to the site property. The mixing zone cannot be extended out into the bottom of the Wateree River, it stops at the company boundary. {R. p. 265}. Petitioner asked the ALC consider the Mixing Zone, and to apply its standards in the context of the entire waste stream system: leachate from the lined landfill, leachate from the scrubber blow-down pond, leachate and ash sluiced into unlined Ash Pond 1, which flows into unlined Ash Pond 2, and finally the outfall. {R. pp. 272-273}.

Summary of Grounds for Certiorari

Rule 242 of the South Carolina Appellate Court Rules provides the considerations for when a writ of certiorari is appropriate. Two of the listed considerations are present in this action and weigh in favor of this Court issuing a writ of certiorari and reversing the Court of Appeals.

First, the decision of the Court of Appeals conflicts with a prior decisions of this Court as to the issue of mootness, as well as to the merits of the underlying case. *See* Rule 242 (b)(3), SCACR. The Court of Appeals' decision finding that the appeal is now moot based on the issuance of the 2010 NPDES permit conflicts with the court's precedent of *Sloan v. Department of Transp.* 379 S.C. 160, 167-169, 666 S.E.2d 236, 240 (S.C., 2008) The issues raised on appeal represent an ongoing justiciable controversy, capable of repetition but evading review. The questions raised on appeal are ones of imperative and manifest urgency to establish a rule for future conduct in matters of public interest. The decision by the trial court may affect future events or have

collateral consequences for the parties.

Second, the unpermitted discharges through groundwater and the seeps violate Water Quality Standards. Therefore, the challenged permits must be denied.

Third, this matter involves a novel issue of law. *See* Rule 242 (b)(1), SCACR. This Court has not addressed whether a Mixing Zone can be used indefinitely, without public input, and applied to a contaminated area in violation of the Mixing Zone regulation.

Argument

I. The Court of Appeals' ruling that Mr. Hill's challenge to the NPDES permit is moot conflicts with this Court's prior precedent.

The issues raised on appeal represent an ongoing justiciable controversy concerning the Class Two Solid Waste Landfill Permit and an NPDES Discharge Permit. Respondent argues that no actual controversy exists, therefore the Appeal is "moot". A case becomes moot if it is *impossible* for the reviewing court to grant effectual relief. *Ex parte Moore*, 550 S.E.2d 877 (emphasis added). This condition for mootness does not exist here. The case should be remanded and the ALC asked to consider whether the mixing zone was properly applied with regard to the permits on appeal.

The pollution containment and control system for managing the pollutants associated with the coal combustion process at Wateree Station, including toxic arsenic, is designed to fail. So long as the arsenic-contaminated liquid "leachate" accumulated from the new landfill is routed through the unlined and leaking coal ash ponds before it reaches the permitted NPDES discharge pipe, the permit is designed to fail. Where the design and performance of the unlined and leaking coal ash ponds are an essential

element in the approved landfill and NPDES wastewater systems, the ALC erred in refusing to consider the vast leaking ponds in its review of the permits and erred further in failing to deny the permits or require effective remedial measures to correct these design defects.

In short, the unlined leaking ash ponds, a component of the proposed waste treatment system, were leaking at the time of the appeal, they are leaking now and they will continue to leak in the future because the ALC erred by refusing to require remedial measures to correct the design defects.

Respondent concedes that the issues raised in this appeal are capable of repetition, yet argues that the issues do not evade review. {App. p. 28}. As the Court is aware, South Carolina has adopted the "lenient" approach to evading review analysis, which does not require a reasonable expectation that the same complaining party be subjected to the action again. *Byrd v. Irmo High School* 321 S.C. 426, 468 S.E.2d 861 (S.C.,1996). In *Sloan v. Department of Transp.* 379 S.C. 160, 167-169, 666 S.E.2d 236, 240 (S.C.,2008), the court addressed the question of whether an issue evades review. In *Sloan*, the issue was whether the SCDOT properly authorized an emergency procurement provision to rectify a construction project significantly behind schedule, by circumventing the usual competitive bidding process. The emergency procurement came four years into the construction project, which was then completed within about six months. The project was completed just a few months after Sloan filed suit. The court applied the "capable of repetition but evading review" exception to mootness in *Sloan*, and found that the issues raised by Sloan were not moot. The court cited the reasoning in *Greenville County I,* 356 S.C. at 555, 590 S.E.2d at 351 (where the Court of Appeals

found that Sloan's case, which presented an issue related to the procurement code's design-build exception, was one that was likely to recur but evade review because "design-build source selection accelerates the process of awarding public works contracts and the ultimate completion of the projects themselves").

Here, the issue of the unlined leaking ash ponds, a component of the proposed waste treatment system, supposedly governed by the Mixing Zone Consent Agreement is capable of repetition and continues to evade review. These ponds were leaking at the time of the appeal, they are leaking now, and they will continue to leak in the future. The 2001 "Mixing Zone" consent agreement will allow continued discharge of toxic arsenic to groundwater below SCE&G's leaking coal ash ponds. Landfill "leachate" liquid contaminated with arsenic will be routed to these unlined ash ponds without proper treatment. The NPDES and Landfill permits depend upon the Mixing Zone Agreement. The 2001 Mixing Zone Consent Agreement is specifically referred to in the NPDES Permit cited in Respondent's motion to dismiss based on mootness under **Groundwater Requirements:** "Analytical parameters should be similar to those specified in Mixing Zone Agreement #01-053-W, with the addition of total mercury, established for the SCE&G/Wateree Facility in February 2001." {App. p. 90}. The original adoption of the Mixing Zone 2001 Consent Agreement is not being challenged, but *its application* to excuse a flawed landfill design and NPDES permit is being challenged on appeal.

Respondent has consistently taken the position that the issues regarding the continued use of the unlined, leaking ash ponds, along with the continued reliance upon the 2001 Mixing Zone Consent Agreement enforcement could not be considered by the ALC, nor could these issues be considered on appeal. {R. p. 11 and see also Br. of Resp.

SCE&G at pp. 9-10} If Respondent is correct, that the Mixing Zone Consent Order (governing the unlined leaking ash ponds) is not to be considered as part of the waste treatment system, then Appellant cannot review these issues, ever. According to SCE&G's position, the Appellant must suffer the threat of contamination for at least five more years until the next opportunity for Permit Review, yet even then, the unlined leaking ash ponds and the 2001 Mixing Zone Consent Agreement cannot be reviewed according to SCE&G. SCE&G's position confirms that the issues raised on Appeal are capable of repetition but evading review.

II. The Court of Appeals' ruling that none of the three exceptions to the mootness doctrine apply in this appeal conflicts with this Court's prior precedent.

This is not a dispute simply between two adjacent landowners. Appellant is an adjacent landowner, citizen and resident of the Eastover community, who uses and enjoys the natural resources of the area, including the Wateree River, which will be adversely affected by the activities proposed under the subject permits. He is concerned for the safety of his family and that of the community. {R. 69-70}. The subject permits clearly impact the public at large as well as the Appellant. The general public enjoys the natural resources of the area, including the River, which is impacted by the proposed activities. The South Carolina Department of Health and Environmental Control is the state agency charged with protecting public health, coastal resources, and the State's land, air and water quality. Clearly, the issues of this appeal concern matters of public interest.

In *Sloan v. Department of Transp* 379 S.C. 160, 167-169, 666 S.E.2d 236, 240 (S.C. 2008) the court notes that where judicial guidance exists on the legal issue

presented, there is no imperative and manifest urgency for an advisory opinion. In *Sloan*, no case law specifically addressed DOT's authorization for an emergency procurement. The court found that because DOT's authorization for an emergency procurement could occur at anytime, there was an urgent nature to the issue.

The issues here are just as urgent as the issues in *Sloan*. Here, we have components of a waste treatment system (the unlined ash ponds) that continue to leak toxic arsenic into the river and groundwater, and a regulatory agency that continues to misuse the Mixing Zone Consent Agreement enforcement action as a pretext to "contain" the plume of arsenic in the groundwater. The question the court faced in *Sloan*, whether DOT's use of the emergency procurement provision was proper to circumvent the standard competitive bidding process, is strikingly similar to the questions raised in this case. Here, the question of whether DHEC can defer to a separate enforcement action, i.e. the 2001 Mixing Zone Consent Agreement, to circumvent the acknowledged deficiencies of the unlined ash ponds is a novel question and one of first impression. The questions raised on appeal are ones of imperative and manifest urgency to establish a rule for future conduct in matters of public interest. The appeal is not moot.

III. The decision by the trial court may affect future events or have collateral consequences for the parties.

In *Sloan*, the Court succinctly addressed the issue of whether a decision by the trial court may affect future events or have collateral consequences for the parties: "a decision on the merits of this case certainly will affect future events, *to wit*, how the DOT decides to authorize emergency procurements in the future." Here, a decision on the merits by the ALC will certainly affect, among other things, whether SCE&G and DHEC

may utilize a "private" Mixing Zone Consent Agreement enforcement action to evade review of a waste treatment system that continues to use ash ponds leaking toxic arsenic as components of the waste treatment system. Furthermore, a decision on the merits affects whether DHEC can violate the requirements of a true Mixing Zone simply by arguing that the Agreement created in 2001 is not subject to review. The decision by the ALC will affect future events and have collateral consequences for the parties, therefore, Petitioner's appeal is not moot.

The 2001 mixing zone consent agreement between DHEC and SCE&G and the impact of the groundwater seeps from the Wateree River bank has not been superseded by the 2010 NPDES permit such that any adjudication by the court regarding the NPDES permit favorable to Mr. Hill would have no practical legal effect upon the existing controversy. Both the 2010 and 2008 NPDES permits are dependent upon the continued use of unlined leaking ash ponds. These ash ponds are governed by a separate enforcement measure, the 2001 mixing zone consent agreement. The Court should reverse the ALC's order, and require remedial measures to correct the design defects of the wastewater treatment system.

All of the exceptions to the mootness doctrine apply to this appeal. Hill noted in his return to SCE&G's motion to dismiss that that SCE&G conceded that the issues raised in this appeal are capable of repetition, affecting future events. According to the ALC Order, the Appellant could not contest the 2001 Mixing Zone Consent Agreement relied upon by the ISWLF and NPDES permits. The ALC disallowed the Appellant to contest the 2001 "private" enforcement measure in 2008 permit appeals; he could not contest the private enforcement measure in a 2010 appeal or an appeal in 2050. Hence,

the 2001 Mixing Zone Consent Agreement is capable of repetition and evades review. The existing controversy is not simply limited to the 2008 vs. the 2010 NPDES permits, both permits are dependent upon the 2001 private enforcement agreement.

The ISWLF permit uses unlined leaking ash ponds as part its design. Those ash ponds are governed by the 2001 mixing zone consent agreement between DHEC and SCE&G. The mootness issue relates only 2010 NPDES permit. Even if the Respondents are correct that the 2010 NPDES permit supercedes the 2008 NPDES permit, the Court has still failed to address why it is an acceptable design for an ISWLF to remain dependent upon a failing private enforcement measure from 2001. The record clearly shows that Water Quality standards are violated by the seeps discovered by the Appellant, by the discovery of the plume of arsenic moving through the groundwater under the unlined ponds, and by continuous violation of the mixing zone standards.

IV. Mr. Hill's challenge to the NPDES and ISWLF permit based on the ALC's failure to consider the application of a 2001 Mixing Zone Consent Agreement between DHEC and SCE&G along with the impact of discharges through ground water and seeps, presents a novel question. The Permits on appeal are inadequate.

The decision by the ALC should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law. S.C. Code Ann. §1-23-610 (Supp. 2009). "Substantial evidence, when considering the record as a whole, would allow reasonable minds to reach the same conclusion as the [ALC] and is more than a mere scintilla of evidence." Blue Ribbon Taxi Corp. V. S.C. Dept. of Motor Vehicles, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct. App. 2008). This ALC made errors of law, substantial evidence exists that the ALC decision should be overturned. The Record on

Appeal establishes the following: (1) the "mixing zone" consent order allows continued discharge of toxic arsenic to groundwater below SCE&G's leaking ash ponds at concentrations 300 times the water quality standard, DHEC permits that fail to control this pollution must be denied; (2) "seeps" or leaks in SCE&G's coal ash pond dike allows continued discharge of toxic arsenic to the Wateree river exceeding water quality standards, DHEC permits that fail to control this pollution must be denied; (3) SCE&G's landfill "leachate" liquid contaminated with arsenic will be routed to leaking unlined coal ash ponds without proper treatment, therefore DHEC permits that fail to control this pollution must be denied.

A. Where a "mixing zone" consent order will allow continued discharge of toxic arsenic to groundwater below SCE&G's leaking ash ponds at concentrations 300 times the water quality standard, DHEC permits that fail to control this pollution must be denied.

Having provided the court proof that the Court of Appeals erred in dismissing Petitioner's appeal as moot, Petitioner now turns to the underlying merits of the appeal. The original adoption of the Mixing Zone and 2001 Consent Agreement are not being challenged, but its application to excuse a flawed landfill design and NPDES permit is being challenged in this appeal. As a component of the waste treatment system, which includes components such as the landfill leachate collection system, the leachate collection pond, and the two unlinded ash ponds, the mixing zone component must be discussed to provide depth and context necessary to describe the path of toxic arsenic. Simply put, the mixing zone does not extend into the river. According to DHEC Regulation 61-68C, "The contaminant(s) in question occurs within the bounds of the property;" yet contaminants are leaving the site. From the mixing zone established by the

2001 Consent Agreement, arsenic discharges to groundwater, to seeps and into the river in violation of water quality standards. To the extent the water treatment system has the potential to impact the river, it is relevant to show what is happening in the mixing zone to cause violations of water quality standards.

Respondent contends that for the first time on appeal, Appellant argues that the mixing zone was improperly granted. Fundamental to qualifications for relaxation of water quality standards in a groundwater mixing zone under DHEC regulations are the express requirements that the mixing zone be limited to facility property; that the contaminants in question are not dangerously toxic, mobile, or persistent; and that measures will be taken to minimize additional contamination and control migration of the contaminated groundwater; in short, that a cleanup plan is in place and that the contamination will not continue indefinitely. DHEC Regulation 61-68C. {R. p. 939} The evidence in this record demonstrates that SCE&G fails to meet each of these essential regulatory requirements. Expert testimony from Dr. David Freedman demonstrates that the arsenic in question is dangerously toxic, mobile and persistent. {R. p. 318} The requirements for granting a mixing zone inform the issues in this case, and highlight the dangers of the arsenic plume that exists between the ash ponds and the river. Furthermore, Appellant was not a party to the 2001 Consent Agreement. The ALC was Appellant's first and only opportunity for redress, and consideration of the express requirements of the mixing zone is entirely proper. In *Leventis v. South Carolina DHEC*, 340 S.C. 118, 530 S.E.2d 643 (Ct.App. 2000), another challenge to a DHEC landfill permit, the court rejected the notion than an ex parte agreement between DHEC and the landfill was binding on third party challengers, or that it relieved the landfill of its burden

of proof.

> Although DHEC issued the final permit to Laidlaw after completing the procedures required for permit issuance, including issuing a draft permit, giving public notice, affording an opportunity for public comment, and preparing responses to oral and written comments received, DHEC then effectively circumvented the permitting procedures by modifying the final permit through ex parte negotiations with Laidlaw. DHEC's ex parte agreement with Laidlaw negatively impacted Sierra Club's due process rights, undermined the spirit of the APA whose statutory framework is designed to ensure notice to and participation by all interested parties, and called into question the fairness of the permitting procedures. Consequently, we limit our holding to the facts of this case because absent the exhaustive twenty-four day hearing and meaningful review by the DHEC Board, which Sierra Club concedes cured two of Sierra Club's three major concerns, DHEC's and Laidlaw's actions might well require reversal. *Id.* at 135.

Similarly, to bind Heath Hill or any other member of the public by an ex parte consent agreement between DHEC and SCE&G would threaten Mr. Hill's and the public's right to due process.

The uncontrolled, unpermitted, and prohibited discharges of high concentrations of toxic arsenic to ground and surface waters of SCE&G's Wateree coal plant, contrary to DHEC'S own regulations will continue unabated under the permits approved by DHEC. The decision of the ALC which fails to address and remedy these discharges should therefore be overturned.

B. Where "seeps or leaks in SCE&G's coal ash pond dike allows continued discharge of toxic arsenic to the Wateree river exceeding water quality standards, DHEC permits that fail to control this pollution must be denied.

The decision of the ALC fails to address the seeps discovered by Appellant. Whether SCE&G complied with their inspection requirements is largely irrelevant to the issues of this appeal. Seeps were found in 1997 and were rediscovered by Appellant in 2009 during an on-site inspection. Further, in an effort to show the intermittent nature of

the seeps, Respondent asserts that seeps discovered in 2009 were not the same ones mapped in 1997 due to their location with respect to Monitoring Well 11. {R. p. 768} However, the precision of the 1997 map was not established at trial. What was established at trial was that at least two seeps discharging toxic arsenic existed in 1997 and that two seeps discharging toxic arsenic existed in 2009.

In further effort to minimize the impact of the seeps, Respondent cites 33 U.S.C. § 1362 (14) to assert that seeps are not "point sources" of pollution. However, the Repondent's brief omits the words: "including but not limited to any pipe, ditch, channel, tunnel..." within the definition of point source. 33 U.S.C. § 1362 (14). The word "channel" precisely describes the nature of the path of each seep traveling along the surface of the bank and into the river. These channels caused by water flowing from the ash pond are evidenced in Appellant's video Exhibit 17 of the record. As expert David Freedman testified, the point at which the seep enters the river, water quality standards are violated. {R. pp. 305-306}. As a matter of law the South Carolina Pollution Control Act, SC Code Ann. § 48-1-90(a), prohibits the discharges of pollution into the environment without a duly issued DHEC Permit. SCE&G does not have a permit for this discharge. The ALC decision erred by failing to address this question or mandate some form of remediation of the Respondent pursuant to R.61-9.122.43(a) of the NPDES Regultions.

Respondent points out that an effluent limit at the "end of the pipe" is based on the dilution of the receiving stream. {R. pp. 373-375} The issue here is not a question of "end of the pipe", it's a question of "end of the seep." No provision in the NPDES permit allows for any discharge other than from the outfall. Likewise, dilution of the receiving

stream is only a factor at the outfall. Dr. Freedman testified that the seeps discharge into a back eddy of the river. (R. pp. 447-448) The point at which the seep enters the river, according to Dr. Freedman, water quality standards are violated. Dr. Freedman also testified that more data is needed to fully evaluate the arsenic contamination problem at Wateree Station, such as the inventory of arsenic in ash pond one. {R. pp. 305-306}.

According to Footnote 3 of Respondent's brief, Respondent argues that it has not failed to meet effluent limits and has not asserted an "upset" defense for such an alleged violation, insinuating the Appellant's use of "upset' and "bypass" is misplaced. {App. p. 235} Appellant uses DHEC's own NPDES regulation regarding "upsets" or "bypasses" to point out that DHEC specifically contemplates and regulates these types of discharges at issue in this case. These provisions of the regulation do not condone the chronic or uncontrolled discharges documented here. R. 61-9.122.41(n). However, Respondent concedes that seeps have existed at least as far back as 1997. The discharges from the seeps are neither temporary nor unintentional; and, indeed, are caused by either "improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation," as described in the regulation. The discharges here are not excusable upset. Alternatively, these discharges *may* be deemed prohibited "bypasses" defined as "the intentional diversion of waste streams from any portion of a treatment facility." R. 61-9.122.41(m)(1)(I). A long history of seeps, uncorrected, raises a strong inference that Appellant had knowledge of their existence, or at least raises the inference of willful ignorance. Regardless, "bypass" defined in the regulations makes the point that discharges at issue here are contemplated by the regulation.

According to Footnote 7 of Respondent's brief, SCE&G concedes that the seeps should be addressed, but they argue that their existence does not affect the permits issued in this case. {App. 239} However, DHEC permit writer Melinda Vickers testified that she would need to consider arsenic concentrations in the seeps discovered by Appellant. {R. p. 587} Respondent attempts to minimize the impact of the arsenic in the seeps by utilizing Dr. Freedman's calculations. Admittedly, Dr. Freedman's calculation was limited by the data available to him, and he conceded that more data would be necessary determine the size and flow of the arsenic plume. {R. pp. 305-306}. Again, Melinda Vicker's testimony echoes that sentiment. Despite Respondent's attempts to minimize the impact of the seeps, the point at which the point source of pollution enters the river (whether through seeps or whether exiting the mixing zone in the ground water), water quality standards are violated. Movement of contaminants like arsenic must be considered before calculation of effluent limits pursuant to R.61.9.122.45(a) In *Sierra Club v. South Carolina Department of Health and Environmental Control and Chem-Nuclear Systems, LLC*, Opinion Number 4654 (S.C. Ct. App 3-10-2010) involving a challenge to a DHEC permit renewal for a landfill with a history or groundwater contamination, the court determined that the ALC failed to decide whether the landfill was in compliance with a number of DHEC regulatory requirements in light of the ALC's findings of fact. The court remanded the matter to the ALC to consider these regulatory requirements in light of the factual record.

The uncontrolled, unpermitted, and prohibited discharges of high concentrations of toxic arsenic to ground and surface waters of SCE&G's Wateree coal plant, contrary to DHEC'S own regulations will continue unabated under the permits approved by DHEC.

The decision of the ALC which fails to address and remedy these discharges should therefore be overturned.

C. Where SCE&G's landfill "leachate" liquid contaminated with arsenic will be routed to leaking unlined coal ash ponds without proper treatment, DHEC permits that fail to control this pollution must be denied.

Both fly ash and bottom ash will be permitted for disposal in the proposed landfill, not just the flue gas desulfurization scrubber solids. {R. p. 210}. There is no requirement that SCE&G continue its program of selling ash off-site for beneficial use to concrete companies, there is no inventory of arsenic in ash pond one, and there is no guarantee that Respondent will continue to remove ash from ash pond one. As designed, SCE&G is free to dispose of all coal combustion byproducts into the landfill, including ash laden with arsenic. All of this contrary to the provisions of the Mixing Zone regulation, which requires a binding commitment to minimize the addition of contaminant to ground water and/or control the migration of contaminants in ground water. Regulation 61-68C(11)(a)(1). {R. p. 939}. According to Dr. Freedman, the continued use of the unlined ash ponds will guarantee arsenic loading. {R. p. 243} Unlined Ash ponds 1 and 2 are the final steps in the sequence of waste treatment before the outfall of pond 2. Dr. Freedman concedes that the liner of the landfill meets the requirements of the regulation as Respondent points out. However, collecting the toxic material with an effective liner, just to sluice that same toxic material to an unlined ash pond makes no sense and presents a flaw in the waste treatment system being appealed in this case. Dr. Freedman established that the leachate collection pond provides an opportunity for SCE&G to treat and remove arsenic; otherwise, the landfill runoff will

simply add more arsenic to an already failing system. {R. pp. 254-255} {R. pp. 677-678}.

The uncontrolled, unpermitted, and prohibited discharges of high concentrations of toxic arsenic to ground and surface waters of SCE&G's Wateree coal plant, contrary to DHEC'S own regulations will continue unabated under the permits approved by DHEC. The decision of the ALC which fails to address and remedy these discharges should therefore be overturned.

Conclusion

Based on the foregoing, this Court should issue a writ of certiorari review and reverse the Court of Appeals' decision.

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I, the undersigned attorney do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Petition for Writ of Certiorari
Appendix

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