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SC Court of Appeals

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

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

South Carolina Court of Appeals
2015 WL 4746971, filed 12 August 2015

Sierra Club,

Respondent,

v.

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

Defendants,

Of whom Chem-Nuclear Systems, LLC, is the

Petitioner.

**PETITION FOR CERTIORARI
OF THE
PETITIONER, CHEM-NUCLEAR SYSTEMS, LLC,**

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I. CERTIFICATE OF COUNSEL

Counsel for the Petitioners certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on 12 August 2015.

II. QUESTIONS PRESENTED ON CERTIORARI

- A. Whether The Court of Appeals Misapprehended/Overlooked Chem-Nuclear's Compliance With The ALC's Directive In The 2005 ALC Order To Conduct Further Studies To Address Concerns Regarding Reducing Contact Between Rainfall And Waste?
- B. Whether The Court of Appeals Misapprehended/Overlooked The Purpose of Subpart 7.11 – "Conditions Of License" In Concluding That Subpart 7.11 Imposed Technical Requirements As Noted In Subpart 7.1.3 Rather Than "Burial Operation Conditions" As Noted On License 097?
- C. Whether The Court of Appeals Misapprehended/Overlooked The Standard For Determining Compliance With Subpart 7.11 In Chem-Nuclear I By Excluding Both Other Result-Based Evidence Unrelated To ALARA And Design Features Which Did Not Eliminate Contact With Rainfall?
- D. Whether The Court of Appeals Misapprehended/Overlooked The Barnwell Facility's Natural Physical Attributes Analyzed Under Subpart 7.7, Which Includes Extensive Groundwater Pathways And Travel Time Allowing For Significant Reduction In Tritium Radiation Content Prior To Any Potential For Release?
- E. Whether Public Policy and Legal Considerations Mandate Deference To DHEC In Interpreting The Requirements Of Subpart 7.11, Since DHEC Has The Technical Expertise And Experience To Balance The Numerous And Potentially Competing Considerations In S.C. Code Ann. Reg. § 61-63 Which The Judiciary May Lack?

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF SOUTH CAROLINA:

COMES NOW the Petitioner, Chem-Nuclear Systems, LLC, pursuant to Rule 242, SCACR, and respectfully requests this Supreme Court to grant a certiorari review from the Court of Appeals' recent decision herein.¹

III. STATEMENT OF THE CASE

This matter arises on remand from a contested case hearing challenging the Respondent, South Carolina Department of Health and Environmental Control's, issuance of a renewal license to Chem-Nuclear authorizing the operation of the Low Level Radioactive Waste Disposal Facility in Barnwell County (the "Barnwell Facility"). Chem-Nuclear's license was reissued on 14 March 2004, and two weeks later, the Sierra Club filed a request for a contested case with the Administrative Law Court. The contested case hearing was conducted on 16-18, 22, February 2005. On 13 October 2005, the ALC affirmed renewal of the license, but directed Chem-Nuclear to conduct studies "to evaluate the scientific and economic feasibility of employing or implementing designs and operation procedures at the Barnwell Site to reduce contact between waste in open trenches and rainfall (the "2005 ALC Order").²

Chem-Nuclear complied with this directive, performed the specified studies, and submitted the results to DHEC on 7 April 2006. Chem-Nuclear therein considered 1) whether disposal trenches could be sheltered with roofs; 2) whether

¹ See Sierra Club v. SCDHEC and Chem-Nuclear Systems, LLC, 2014 WL 3734366 (Ct.App., filed 30 July 2014), *withdrawn, substituted and refiled on rehearing*, 2015 WL 4746971 (Ct.App., filed 12 August 2015) ("Chem-Nuclear II").

² Sierra Club v. SCDHEC and Chem-Nuclear Systems, LLC, Docket No. 04-ALJ-07-0126-CC, 2005 WL 2997193.

waste could be stored, temporarily, in dry storage facilities prior to disposal; and 3) whether disposal vaults could be sealed and grouted. As to items 1 and 3, Chem-Nuclear concluded, and DHEC concurred by letter dated 10 March 2008, that the dose of radiation to workers for implementing these measures would exceed any potential environmental benefit³. As to item 2, Chem-Nuclear developed CNS Procedure S20-OP-051, Temporary Storage of Waste, acknowledged by DHEC in the same letter. No further administrative action was taken or warranted, as the ALC had not required a remand to DHEC.

Sierra Club appealed the 2005 ALC Order to the Court of Appeals. On 10 March 2010, the Court of Appeals issued its first opinion,⁴ affirming in part and remanding in part the 2005 ALC Order. Importantly, for purposes of this Petition, the Court of Appeals limited the ALC's review on remand to consideration of the factual findings from the 2005 ALC Order.⁵ These remand instructions prevented the ALC from considering the study that Chem-Nuclear prepared and presented to DHEC as required by the 2005 ALC Order.

³ DHEC noted that the "collective population dose savings at the compliance point ... is 8.4 person-millirem for the hypothetical population of 100 people. The radiation exposure to workers would be significantly more than this hypothetical dose." The exposure to workers is a reality, but the exposure to the public is entirely hypothetical as there is no access to the compliance point where tritium concentrations are measured and monitored.

⁴ Sierra Club v. DHEC and Chem-Nuclear, 387 S.C. 424, 693 S.E.2d 13 (Ct.App. 2010), *certiorari denied* (21 July 2011) ("Chem-Nuclear I").

⁵ On remand, we instruct the ALC that [S]ections 7.11 and 7.23.6 impose additional compliance requirements for Chem-Nuclear and further instruct the ALC to apply its factual findings to these sections of [R]egulation 61-63." Chem-Nuclear I, 387 S.C. 424, 432, 693 S.E.2d 13, 20.

Also material to consideration of this Petition is the Court of Appeals' conclusion in Chem-Nuclear I regarding the means and methods for Chem-Nuclear to comply with the requirements of S. C. Code Ann. Reg. 61-63 Part 7.11.⁶

In the subsequent Final Order and Decision on Remand (the "2012 ALC Order"), the ALC applied "the factual findings of the 2005 Order."⁷ The ALC adhered to the remand directive and made express findings related to measures Chem-Nuclear has undertaken to minimize the migration of water onto the disposal units, out of the disposal units, to provide for detection of water in disposal units, and to collect and retain water to allow for detection and remediation of contamination. The ALC expressly enumerated the measures taken to "minimize" exposure between waste and water, within the constraints of reliance on the factual findings in the 2005 ALC Order. Importantly, and as noted in Chem-Nuclear I, there were no findings in the 2005 ALC Order related to compliance with Part 7.11.11 because compliance with this Part wasn't expressly raised until the Sierra Club filed a post-trial Motion for Reconsideration.⁸

⁶ The Court of Appeals stated:

We remand the issue to the ALC and instruct it to apply its factual findings to the technical requirements of these regulations. Specifically, we believe that [Subpart] 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.

⁷ See Sierra Club v. SCDHEC and Chem-Nuclear Systems, Docket No. 04-ALJ-07-0126.

⁸ "In its motion for reconsideration, the Sierra Club specifically mentioned sections 7.11 and 7.23.6 of [R]egulation 61-63 and argued Chem-Nuclear's current disposal practices [were] not in compliance with these sections. The ALC did not

The Sierra Club appealed the 2012 ALC Order to the Court of Appeals. Sierra Club argued, for the first time in this protracted process, that the requirements of 7.11.11 for “minimization” of contact between water and waste actually required that no water be allowed to come into contact with waste. Importantly, both the Sierra Club (and the Court of Appeals) ignored multiple applicable regulatory requirements contained in Regulation 61-63 which are intended to be read in concert.⁹

Operations at the Barnwell facility are entirely consistent with these requirements which make clear that minimization does not mean the total prevention of contact between waste and water – groundwater or rainwater. The ALC, in the 2012 ALC Order, relies extensively on the “ERPV,” a predictive model which considered the movement of radionuclides in groundwater from the facility to the compliance point.¹⁰ The assessment and modeling embodied in the ERPV to

specifically rule on the Sierra Club’s motion[,] but generally denied the[] motion for reconsideration.” Chem-Nuclear I, 387 S.C. 424, 429, 693 S.E.2d 13, 16.

⁹ For example, Regulation 61-63 Part 7.22 establishes “Disposal Site Suitability Requirements for Land Disposal,” Part 7.22 addresses “near surface disposal” which describes operations at the Barnwell facility. Part 7.22.16 provides as follows: “The disposal site shall provide sufficient depth to the water table that groundwater intrusion, perennial or otherwise, into the waste will not occur. [SCDHEC] will consider an exception to this requirement to allow disposal below the water table if it can be conclusively shown that disposal site characteristics will result in molecular diffusion being the predominant means of radionuclide movement and the rate of movement will result in the performance objectives being met.” (Emphasis added).

¹⁰ As noted in the 2005 ALC Order, “[w]hile the maximum measured tritium concentration, measured on July 18, 2001, results in a hypothetical dose of 5.7 mrem at the compliance point, the maximum predicted tritium concentration, based on the ERPV, would result in a dose of 13 mrem per year at the compliance point.” Sierra Club v. SCDHEC and Chem-Nuclear Systems, 2005 WL 2997193 at Findings 60-66. Axiomatically. 13 mrem, and 5.7 mrem are both well below the regulatory limit for exposures which is an annual dose of 25 mrem to the whole body. See 24A S. C. Code Ann. Regs. 61-63, Sec. 7.18.

determine regulatory compliance includes consideration of groundwater travel time and radioactive decay rates which is consistent with the exception provided for in Subpart 7.22.16. Consideration of these factors wouldn't be part of the regulatory framework if the required engineered barriers were intended to prevent all contact between waste and water.

The Court of Appeals issued its second opinion on 30 July 2014,¹¹ after which both DHEC and Chem-Nuclear sought a rehearing. In response the Court of Appeals granted both Petitions for Rehearing, withdrew the original opinion and refiled an opinion on 12 August 2015. The substituted Chem-Nuclear II opinion¹² did not address Petitioners' multiple concerns related to the Court of Appeals' interpretation of the requirements of Reg. 61-63. The Court of Appeals adopted Sierra Club's position that the regulatory framework, and particularly Subpart 7.11, required Chem-Nuclear to prevent any contact between water and waste by "sheltering" (roofing) the disposal trenches from rainfall" and "sealing and grouting the concrete disposal vaults to prevent the intrusion of water." The Court of Appeals noted, albeit incorrectly, that "[w]hen pressed at oral argument to list what Chem-Nuclear ha[d] done to reduce rainfall onto active disposal units, neither Chem-Nuclear nor DHEC could name one action Chem-Nuclear took. . . ."¹³ In fact, Chem-Nuclear and the 2012 ALC Order listed multiple actions intended to achieve compliance with Subpart 7.11.11.

¹¹ Sierra Club v. DHEC and Chem-Nuclear, 2014 WL 3734366 (Ct.App., filed 30 July 2015) ("Chem-Nuclear II").

¹² Sierra Club v. DHEC and Chem-Nuclear, 2015 WL 4746971 (Ct.App., filed 12 August 2015).

¹³ Chem-Nuclear II, 2015 WL 4746971, *11.

In Chem-Nuclear II, the Court of Appeals significantly enlarged its holding in Chem-Nuclear I “that 7.11 impose[d] 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 Part 7.11.” In Chem-Nuclear II, the Court of Appeals concluded those “additional compliance requirements” must be specific actions taken to satisfy Subpart 7.11.11, rather than actions which satisfy other requirements and support compliance with Subpart 7.11.11. And, the Court of Appeals makes clear that Subpart 7.11.11’s “minimization” requirements mandated roofing trenches, sealed vaults, and a leachate collection system.¹⁴

The most problematic conclusion in Chem-Nuclear II is the Court of Appeals’ abject rejection of ALARA requirements when considering disposal operations. In Chem-Nuclear I, the Court of Appeals simply rejected ALARA as the sole basis for compliance with Subpart 7.11.11. In Chem-Nuclear II, the Court of Appeals effectively has hamstrung Chem-Nuclear in protecting workers from a potentially increased radiological exposure.¹⁵

ALARA is defined in Subpart 3.2.6 as:

. . . acronym for (‘as low as reasonably achievable’) means making every reasonable effort to maintain exposures to radiation as far below the dose limits in this part as is practical consistent with the purpose for which the licensed activity is undertaken, taking into account the state of technology , the economics of improvements in relation to state of technology, the economics of improvements in relation to benefits to the

¹⁴ Chem-Nuclear II, 2015 WL 4746971, **10-17.

¹⁵ The Court of Appeals stated “[i]n determining compliance with the technical requirements of subsection 7.11.11.4, however, we consider the action taken by Chem-Nuclear to comply, not the reasons why it decided not to implement a certain measure based on its own ALARA analysis.” Chem-Nuclear II, 2015 WL 4746971, *17, fn.18.

public health and safety, and other societal and socioeconomic considerations, and in relation to utilization of nuclear energy and license materials in the public interest.

Chem-Nuclear is subject, in Reg. 61-63 Part 3, to dose limits, including limits for the members of the public and occupational dose limits. But, in addition to the regulatory limit, Chem-Nuclear is required to address ALARA and insure that the occupational exposure is as low as is reasonably achievable. Nevertheless, the Court of Appeals intends for Chem-Nuclear to take measures to prevent all water from entering open trenches and coming into contact with waste without any consideration of the impact that might have on occupational (worker) exposure.

Chem-Nuclear and SCDHEC seek this Supreme Court's review of certain issues critical to operations at the Barnwell Facility. Specifically, the Court of Appeals' opinion, if not addressed by this Supreme Court's review, would require Chem-Nuclear to comply with Subpart 7.11.11 with no regard to the ALARA analysis which includes a myriad of considerations and should guide all decisions as to operation and design. The Court of Appeals' analysis dictates (a) the installation of roofs over active trenches, (b) a liner to collect leachate within the trenches, and (c) the grouting and sealing of vaults. The installation of a liner and the grouting and sealing of vaults results in rainwater collection, rather than dispersion, and may increase the potential for worker exposure. The installation of a roof over a vast disposal trench may also increase the potential for occupational exposure. While Chem-Nuclear has assessed these measures, it is critical that the assessment of compliance with the requirements of Subpart 7.11.11 include consideration as to whether hypothetical doses of radiation to the general public and occupational doses are ALARA compliant. The Court of Appeals' opinion, if it

becomes the law which governs the application of Regulation 61-63, forecloses this consideration. This is an issue of significant import and a novel questions of law – the regulation of radioactive waste disposal and the protection of workers at the Barnwell Facility and the public.

IV. ARGUMENT AND CITATION OF AUTHORITY

A. The Court of Appeals Misapprehended/Overlooked Chem-Nuclear's Compliance With The ALC's Directive In The 2005 ALC Order To Conduct Further Studies To Address Concerns Regarding Reducing Contact Between Rainfall And Waste.

The 2005 ALC Order was a favorable outcome for Chem-Nuclear and for DHEC since the ALC concluded the Sierra Club “did not provide the [ALC] with concrete, competent evidence to demonstrate that the disposal methods permitted under License No. 097 fail to satisfy such regulatory requirements. . . .” (R.pp.46-47). The ALC, however, devised a remedy to finalize the discussions between DHEC and Chem-Nuclear concerning whether there should be protection of the “open trenches from direct rainfall and runoff such as temporary covers.” (R.p.47).¹⁶ The ALC directed Chem-Nuclear to conduct a study and submit the results to DHEC which was done.¹⁷ Chem-Nuclear complied and sent the eventual report to DHEC in April 2006.¹⁸

¹⁶ The ALC did not remand the matter to DHEC to require temporary or permanent covers as part of the licensing conditions. Instead, the ALC merely sought to “close the loop” on an unfinished conversation, without dictating the outcome. (R.p.66).

¹⁷ Sierra Club v. SCDHEC and Chem-Nuclear Systems, LLC, 2005 WL 2997193 (S. C. Admin. Law. Judge.Div., filed 13 October 2005). (R.pp.36-66). This study included evaluation of “the scientific and economic feasibility of employing or implementing designs and operational procedures at the Barnwell Site that will (1) shelter the disposal trenches from rainfall and prevent rainfall from entering the trenches, (2) provide temporary dry storage facilities for the storage of wastes received during wet conditions, and (3) provide for sealing and grouting the concrete disposal

Chem-Nuclear analyzed the feasibility of sheltering disposal trenches, providing temporary dry storage facilities for the waste,¹⁹ and sealing and grouting the concrete vaults.²⁰ While the Court of Appeals acknowledged the existence of the Feasibility Report, it incorrectly concluded the Feasibility Report required Chem-Nuclear to take further affirmative action. The Feasibility Report showed Chem-Nuclear's installation of a temporary/permanent roofing structure over open trenches and/or the grouting and sealing of the vaults clashed with the requirements of S.C. Code Ann. Reg. § 61-63.²¹ Chem-Nuclear and DHEC

vaults to prevent the intrusion of water to the maximum extent feasible." The report was entitled Evaluation of the Scientific and Economic Feasibility for implementing new Designs and Operational Procedures at the Barnwell Site as Directed by the South Carolina Administrative Law Court Order Dated October 13, 2005. (the "Feasibility Report").

¹⁸ Chem-Nuclear moved to supplement the appellate record in the Court of Appeals with the Feasibility Report, but the Sierra Club objected and supplementation was denied. Nevertheless, the Court of Appeals specifically acknowledged the study and the Feasibility Report noting "[t]he record does not contain the results of these studies or the reasons DHEC chose not to amend the license requirements as a result of the [Feasibility] [R]eport." See Chem-Nuclear II, 2015 WL 4746971, *21 fn.22.

¹⁹ Chem-Nuclear concluded temporary dry storage could be provided and had implemented policies for temporary storage of waste packages and for protection of waste packages from inclement weather. DHEC acknowledged that Chem-Nuclear put these policies and procedures were in place.

²⁰ Regarding sheltering of disposal trenches and sealing and grouting concrete disposal vaults, Chem-Nuclear calculated an occupational dose attributable to cover operations. The proposal to grout and seal the vaults also resulted in a worker dose.

²¹ As is noted in Section 7.1.1 "[t]he requirements of this part are in addition to, and not in substitution for, other applicable requirements of these regulations." Section 7.20 requires that "[o]perations at the land disposal facility shall be conducted in compliance with the standards for radiation protection set out in Part III of these regulations, except for releases of radioactivity in effluents from the land disposal facility, which shall be governed by 7.18. *Every reasonable effort should be made to maintain radiation exposures as low as is reasonably achievable.*" (Emphasis added). Consequently, the question becomes whether it reasonable to significantly increase worker exposure to

correctly concluded Subpart 7.20 required rejection of the proposals to roof and line the trenches and seal and grout the vaults.²²

If an ALARA analysis indicates that the potential occupational dose could increase through this use of new disposal and operational design, and the benefit of new design does not outweigh the burden of additional dose to workers, then compliance with ALARA would dictate not increasing the occupational dose. Despite the existence of regulatory limits, Chem-Nuclear can't simply be satisfied with compliance with these limits. Instead, it must constantly strive to keep any releases and exposures as low as is reasonably achievable.

B. The Court of Appeals Misapprehended/Overlooked The Purpose of Subpart 7.11: "Conditions Of License" In Concluding Subpart 7.11 Imposed Technical Requirements Described In Subpart 7.1.3, Rather Than "Burial Operation Conditions" As Noted On License No. 097.

The Court of Appeals' *Chem-Nuclear I* conclusion "additional compliance requirements" exist has been greatly expanded in *Chem-Nuclear II*, to encompass only affirmative acts to prevent all rainfall from entering the trenches, a flawed interpretation of Subpart 7.11.11's requirement.²³

radiation when the potential increase in dose to the public is negligible? The simple answer is "no".

²² Subpart 7.18 provides that "[c]oncentrations of radioactive material which may be released to the general environment in groundwater, surface water, air, soil, plants, or animals shall not result in an annual dose exceeding an equivalent of 25 millirems ... to the whole body, 75 millirems ... to the thyroid, and 2.5 millirems ... to any other organ of any member of the public. Reasonable effort should be made to maintain releases of radioactivity in effluents to the general environment as low as reasonably achievable"

²³ These affirmative actions are separate from Chem-Nuclear's compliance with and adherence to all other sections of S.C. Code Ann. Reg. § 61-63 Part VII. This expansion means the Court of Appeals, in *Chem-Nuclear I*, directed the parties on remand to undertake an exercise in complete futility. The Court of Appeals, when it

Importantly, the ALC, in issuing the 2012 ALC Order, complied with the Court of Appeals' directive in Chem-Nuclear 1 to determine Chem-Nuclear's compliance with Subpart 7.11 without exclusive reliance on ALARA.²⁴ The 2005 ALC Order supports these findings and shows adherence to Subpart 7.11.11's requirements, independent of the ALC's reliance on evidence of a decline on tritium concentrations at the compliance point and reliance on any other ALARA based standard.²⁵

The Court of Appeals, in Chem Nuclear I, held that:

At this point, we cannot address whether the ALC erred without giving it an opportunity to issue a specific ruling on whether Chem-Nuclear's disposal practices were in compliance with [Subparts] 7.11, 7.23.6 and subsections of 7.10 that the ALC did not address. On remand, we instruct the ALC that [Subparts] 7.11 and 7.23.6 impose additional compliance requirements for Chem-Nuclear and further instruct the ALC to apply its factual findings to these sections of [S.C. Code Ann. Reg. §] 61-63.²⁶

issued Chem-Nuclear I in 2010, logically could not have reasonably intended its remand to the ALC to be both futile and unproductive.

²⁴ The ALC noted the design and function of the engineered barriers, as required by Subparts 7.6.2, 7.11.9, 7.11.10, 7.21, and 7.32.5. The ALC noted the water collection system which allows for diversion of water that accumulates in the trenches. This water collection system is clearly responsive to the requirements of Subpart 7.11.11. In addition, the water detection system, also noted by the ALC, is clearly responsive to the requirements of Subpart 7.11.11. The ALC noted the existence of a partially impermeable clay liner in the bottom of the trenches that impedes infiltration and the drainage system installed within the trenches to move water out of the trenches. All of these measures operate to minimize the migration of water, to provide for detection and for removal.

²⁵ Surprisingly, Chem-Nuclear II now illogically concludes the 2005 ALC Order's factual findings were *inapplicable* to determining Chem-Nuclear's compliance with Subpart 7.11.11. Assuming that is correct, the Court of Appeals, in Chem-Nuclear I, should have remanded the matter to the ALC, with discretion for a remand to DHEC to determine compliance with Subpart 7.11.11 through demonstration of Chem-Nuclear's additional measures to attain compliance, *or* for an explanation as to why those measures were or may not be feasible.

²⁶ Chem-Nuclear I, 387 S.C. 424, 693 S.E.2d 13.

The ALC, on remand, addressed Subpart 7.11's requirements in light of the 2005 ALC Order's factual findings.²⁷ The ALC enforced the Court of Appeals' sole remand restriction and didn't place exclusive reliance on site performance or ALARA. The Court of Appeals has now significantly enlarged the original ALC restriction by eliminating the ALC's reliance on any established facts to demonstrate Chem-Nuclear's compliance with the sections of Part VII apart from Subpart 7.11 and by misconstruing the requirements of Subpart 7.11.11. In so doing the Court of Appeals rendered the Chem-Nuclear I remand proceeding before the ALC in 2012 an exercise in complete and utter futility.

The Court of Appeals concluded Subpart 7.11 set forth "technical requirements" which is a more limiting description of Subpart 7.11 than was provided in Chem-Nuclear I where Subpart 7.11 was described as "compliance requirements."²⁸ In concluding Subpart 7.11 imposed "technical requirements" instead of just "compliance requirements," the Court of Appeals determined these "newly discovered" requirements necessitated specific action by Chem-Nuclear.²⁹

Review of Part VII shows Subpart 7.11 is described as "Conditions of Licenses." Moreover, a review of License No. 097 indicates that the

²⁷ Had those findings not been as comprehensive as they were, following a week long hearing in 2005, than the ALC may not have been able to determine compliance with Subpart 7.11. Fortunately that was not the case as the evidence presented, and the ALC's findings, were comprehensive and extensive as to the design and function of the engineered barriers, the water collection and detection system, and the partially impermeable clay liner.

²⁸ Chem-Nuclear I, 387 S.C. 424, 693 S.E.2d 13.

²⁹ Chem-Nuclear I, 387 S.C. 424, 693 S.E.2d 13.

requirements of Subparts 7.11.11.1 through 7.11.11.4 are included verbatim as Permit Condition No. 82, under the conditions described as “Burial Operation Conditions.”³⁰ In characterizing Subpart 7.11.11 as a license condition, DHEC has required the licensed activity can only occur provided the enumerated permit conditions are accomplished. In the event Chem-Nuclear does not conduct burial operations in accordance with the enumerated conditions, DHEC has grounds to proceed with enforcement.³¹

The Court of Appeals incorrectly determined Subpart 7.11.11 included “technical requirements” which necessitated specific action by Chem-Nuclear. Subpart 7.11.11 simply embodies licensing conditions. As noted, Subpart 7.11.11’s title is clear and unambiguous. DHEC complied with Subpart 7.11.11 by including the requirements as express “license conditions”. This enables DHEC to pursue enforcement in the event Chem-Nuclear fails to implement these conditions. The Court of Appeals improperly added additional requirements not intended by Subpart 7.11.11.

³⁰ DHEC has authority, under the Pollution Control Act, to “[i]ssue, deny, revoke, suspend or modify permits, under such conditions as it may prescribe for the discharge of sewage, industrial waste or other waste or air contaminants ...” S. C. Code Ann. § 48-1-50(5) (Thomson Reuters West 2013) (Emphasis added). Permit conditions are, by their very nature, an important regulatory tool. “[T]he power to permit necessarily carries with it the power to place conditions on a permit.” Edisto Aquaculture Corp. v. S.C. Wildlife & Marine Resources Dept., 311 S. C. 37, 40, 426 S. E. 2d 753, 755 (1993).

³¹ Part VII, 1.12.2 authorizes DHEC to “make findings of fact and determinations and to assess fines and civil penalties relating to violation of the provisions of the Act or any regulation, license or license condition.” Chem-Nuclear questions the Court of Appeals’ determination that it has the authority given the posture of this case to order license revocation.

Part VII, 7.6, entitled "Specific Technical Information," is applicable to both the performance objectives and the applicable technical requirements of Part VII.³² The "Specific Technical Information" required to review design features does not prescribe any particular method of "cover" and certainly doesn't reference "roofs" or "temporary covers" or "leachate collection systems," as indicated in Chem-Nuclear II.

What is clear from Subpart 7.6 is that the same information which supports compliance with a "technical requirement" may also support compliance with a performance objective. For example, Subpart 7.6.3 requires "[a] description of the principal design criteria and their relationship to the performance objective." Additionally, Subpart 7.7., "Technical Analyses," illustrates the direct connection between technical requirements and performance objectives.³³

Assuming, *arguendo*, that the compliance requirements contained in Subpart 7.11.11 are, indeed, "technical requirements", then Subparts 7.6 and 7.7 clearly provide the context as to how such "technical requirements" are reviewed

³² "The specific technical information shall include the following information needed for demonstration that the performance objectives and the applicable technical requirements of this part will be met." Subpart 7.6, prefatory language. In fact, Subpart 7.6 does not dictate design, but requires the applicant to provide descriptions of the design features, including "those design features related to infiltration of water; integrity of covers for disposal units, design of covers for disposal units; ... contact of wastes with standing water; disposal site drainage" Subpart 7.6.2. The term "cover" as referenced in Subpart 7.6.2, is referred to in Subpart 7.2.1 as a "soil cover," or "disposal unit cover," or "intruder barrier." See Subpart 7.2.14. It is referenced in the plural - "integrity of covers for disposal units; structural stability of engineered barriers, backfill, wastes and covers" Subpart 7.6.2.

³³ "The specific technical information shall also include the following analyses needed to demonstrate that the performance objectives of this part will be met." Subpart 7.7, prefatory language.

and assessed for consistency with Part VII. DHEC reasonably does not dictate with precision the design features for a LLRW disposal site. Moreover, all technical analysis must be necessarily accompanied by an ALARA analysis. The Court of Appeals' conclusions in Chem-Nuclear II are inconsistent with and, indeed, may be contrary to the mandatory requirements of Subparts 7.6 and 7.7.

C. **The Court of Appeals Misapprehended/Overlooked The Standard For Determining Compliance With Subpart 7.11 In Chem-Nuclear I By Excluding Both Other Result-Based Evidence Unrelated To ALARA And Design Features Which Did Not Eliminate Contact With Rainfall.**

In Chem-Nuclear I, the Court of Appeals found Subpart 7.11 "impose[d] additional compliance requirements for Chem-Nuclear such that [ALARA's] balancing test was [insufficient] to address whether Chem-Nuclear was in compliance with . . . Subpart 7.11."³⁴ The 2005 ALC Order did not specifically address compliance with Subpart 7.11, but concluded "Chem-Nuclear and DHEC ha[d] shown adherence to ALARA in the measures taken by Chem-Nuclear to address tritium migration from the Barnwell Facility and the potential for releases from other radionuclides that are contained in the waste buried at the Site." (R.p.48). To the extent DHEC or Chem-Nuclear sought to support Chem-Nuclear's compliance with Subpart 7.11 through this "conclusion of law" and any associated "findings of fact", that would have constituted an insufficient evidentiary basis. Nevertheless, in Chem-Nuclear I, the Court of Appeals ***did not preclude*** either Chem-Nuclear, DHEC, or the ALC from using other findings

³⁴ Chem-Nuclear I, 387 S.C. 424, 693 S.E.2d 13.

related to other requirements within Part VII to, in fact, support Chem-Nuclear's compliance with Subpart 7.11.³⁵

The Court of Appeals, in finding the ALC had erred in concluding Chem-Nuclear complied with Subparts 7.11.11.1, 7.11.11.2, and 7.11.11.4, imposed significant additional limitations on the evidentiary standard which it had already established in *Chem-Nuclear I*. The Court of Appeals determined "compliance may not be measured solely by results." The record shows the ALC did not measure compliance by results, but instead relied on specific physical attributes of the protection system. (R.p.12-17).³⁶

The Court of Appeals, however, deemed the ALC's findings insufficient to establish Chem-Nuclear's compliance with Subparts 7.11.11.1 through 7.11.11.4.³⁷ First, the Court of Appeals concluded Subpart 7.11.11 imposed "technical requirements" and then determined the compliance measure was whether "Chem-Nuclear took any actions to meet the technical requirements imposed by these subsections."³⁸ The Court of Appeals rejected the ALC's referenced findings when considering compliance with Subparts 7.11.11.1 and 7.11.11.4, since those findings "have no effect on the initial migration of

³⁵ As is noted above, for the Court of Appeals to have do so would be to have rendered the remand to the ALC, which was limited solely to the findings of facts contained in the 2005 ALC Order, a mere nullity.

³⁶ This physical attributes included the (a) design of the trenches (including the partially impermeable sand/clay material in the bottom of the trench) (b) slope provided in the trench, (c) clay caps, (d) standpipe installed for water detection, (e) vault lids, (f) surface water management plan, (g) trench drainage system, (h) French drain and sump systems installed, and (i) pumping system to remove water from active trenches. (R.p.12-17).

³⁷ Chem-Nuclear II, 2015 WL 4746971, **10-17.

³⁸ Chem-Nuclear II, 2015 WL 4746971, *10.

rainfall.”³⁹ As relates to Subpart 7.11.11.4, the Court of Appeals determined that there was no evidence to support the assertion Chem-Nuclear minimized, by reducing to the smallest amount possible, the migration of waste-contaminated water.⁴⁰ The Court of Appeals rejected the ALC’s factual findings essentially because Chem-Nuclear did not utilize a “leachate collection system.”⁴¹

Nevertheless, when Subpart 7.11 is read in concert with Subparts 7.6 and 7.7, that shows the Court of Appeals has misconstrued Subpart 7.11.11’s intent and general purpose which is to minimize the migration of water, not to eliminate the contact of rainfall with the disposal units.⁴² Chem-Nuclear demonstrated its surface water controls with its pump and removal system, ponding or pooling controls, with its water detection system, and the partially impermeable clay and sand that allows for infiltration. Given the clear implication that rainfall is an expected event for which corrective measures have been put in place, the Court of Appeals improperly rejected these facts as a basis for determining compliance with Subparts 7.11.11.1-7.11.11.4.⁴³

³⁹ Chem-Nuclear II, 2015 WL 4746971, **10-13, 16-17.

⁴⁰ Chem-Nuclear II, 2015 WL 4746971, *13.

⁴¹ Chem-Nuclear II, 2015 WL 4746971, **16-17.

⁴² For example, Subpart 7.6.2 addresses “standing water” and the “infiltration of water.” Subpart 7.6.6 relates to “methods to control surface water.” If the intent were to prevent any rain from entering the trenches at all then Subpart 7.6, which governs the technical information required, would certainly specify methods to control rainfall. Instead, Subpart 7.6 seeks information on management measures including the prevention of ponding, surface water controls, and infiltration. All of which necessarily and reasonably presumes that rainfall has entered the trenches and requires management.

⁴³ The Court of Appeals improperly insisted that 1) a requirement to minimize migration was tantamount to preventing rainfall from entering the trenches

Unfortunately, the Court of Appeals ignored Subpart 7.7.1 which requires technical information related to “Pathways” which include “air, soil, groundwater, surface water, plant uptake, and exhumation of burrowing animals. The analyses shall clearly identify and differentiate between the roles performed by the natural disposal site characteristics and design features in isolation and segregating the wastes.” Consistent with Subpart 7.7.1, Chem-Nuclear reasonably relied, at least in part, upon the groundwater pathway and groundwater travel time to prevent releases of radioactivity which potentially might have exceeded the applicable regulatory limits.

By construing the requirement to “minimize the migration of water” to mean the elimination and prevention of rainfall from entering trenches, the Court of Appeals has strictly construed the minimization requirement. The Court of Appeals stated:

[S]ubsection 7.23.6 requires Chem-Nuclear to design the disposal site in a way that ‘minimize[s] to the extent practicable the contact of water with waste during storage, the contact of standing water with waste during disposal, and the contact of percolating or standing water with wastes after disposal.’⁴⁴

In doing so, the Court of Appeals dismissed, *nee* simply ignored, the relevancy of any ALARA analysis⁴⁵ and disregarded the effect of Reg. 61-63 Part III, 3.1,⁴⁶

and, 2) infiltration was inappropriate and a leachate collection system should be installed.

⁴⁴ Chem-Nuclear II, 2015 WL 4746971, *18. *See also* Chem-Nuclear II, 2015 WL 4746971, *11, fn.11.

⁴⁵ The Court of Appeals stated that in “determining compliance with the technical requirements of [Subpart] 7.11.11.4, however, we consider the actions taken by Chem-Nuclear to comply, not the reasons why it decided not to implement a certain

which applies to Chem-Nuclear as it encompasses LLRW disposal.⁴⁷ Part VII, 7.1.1 makes clear that the requirements of Part VII are “in addition to, and not in substitution for, other applicable requirements of these regulations.” Subpart 7.6.11 provides specific standards for the radiation safety program “to ensure compliance with the performance objective in [Subpart] 7.18.” Subpart 7.20 mandates protection of individuals during operations.”⁴⁸

The Court of Appeals improperly divorced Subparts 7.11.11.1 through 7.11.11.4 from Part III and from other plainly stated requirements in Part VII requiring radiation protection in all operations. These requirements cannot be separated. Like Subpart 7.23.6, the provisions in Subparts 7.11.11.1 through 7.11.11.4 are qualified by the aforementioned regulations and, consequently, the Court of Appeals’ strict interpretive standard is legally flawed in several ways.

measure based on its own ALARA analysis.” Chem-Nuclear II, 2015 WL 4746971, *17 fn.18.

⁴⁶ Purpose and Scope: “The regulations in this part apply to persons license by the Department to receive, possess, use, transfer, or dispose of radioactive material.”

⁴⁷ As a licensee, Chem-Nuclear is required to adhere to 3.4 and implement a radiation protection program “to ensure compliance with the provisions of this part.” Moreover, Chem-Nuclear must enforce the occupational dose limits for adults specified in 3.5. Furthermore, under 3.42, Chem-Nuclear is required to “use, to the extent practical, procedures and engineering controls based upon sound radiation protection principles to achieve occupational doses and doses to members of the public that are as low as is reasonably achievable (ALARA).”

⁴⁸ The regulations, in turn, provide that:

Operations at the land disposal facility shall be conducted in compliance with the standards for radiation protection set out in Part III of these regulations, except for releases of radioactivity in effluents from the land disposal facility, which shall be governed by [Subpart] 7.18. Every reasonable effort should be made to maintain radiation exposures as low as is reasonably achievable

Subpart 3.5 dictates occupational doses in the Barnwell Facility which must be as low as reasonably achievable.

The first flaw is the conclusion a “technical requirement” may not be addressed by compliance with other regulations.⁴⁹ The next flaw is the conclusion a regulation requiring “water management” had to be read to mandate elimination of rainfall.⁵⁰ The final flaw was, despite Part VII’s clear introductory language confirming that the regulations were in addition to, and not separate, from the remaining parts of S.C. Code Ann. Reg. 61-63, the Court of Appeals concluded Subpart 7.11.11 had to be construed separately from all other sections contained in S.C. Code Ann. Reg. 61-63.

Chem-Nuclear understands sheltering open disposal trenches adds another level of redundancy to prevent the migration of water on contact between water and waste, even if the shelter is only temporary.⁵¹ Chem-Nuclear also understands sealing and grouting vaults⁵² assists in the prevention of contaminated water migration. Finally, Chem-Nuclear knows management of

⁴⁹ Chem-Nuclear is required to incorporate engineered barriers through requirements separate from Subpart 7.11.11. The engineered barriers are, however, designed to address the requirements of Subpart 7.11.11. The Court of Appeals wrongly concluded that compliance which satisfies two different regulatory requirements is unavailing and, in turn, Chem-Nuclear must demonstrate both an affirmative and separate action to satisfy Subpart 7.11.11. Furthermore, the Court of Appeals improperly determined that there are no other considerations which are relevant to possibly support a “no action” alternative.

⁵⁰ The elimination of any rainfall would, of course, negate any need for water management since there would be no water to manage.

⁵¹ A temporary shelter might be removed when wet weather conditions are either not threatened or present, or when a trench is filled to capacity. Additionally, based upon the size of the existing trenches, any temporary shelter is likely to be very large and require multiple workers to set-up, take-down, and move to other trenches.

⁵² Vaults would have to be periodically inspected to determine if they were full and ready for sealing. Sealing and grouting would likely occur in or adjacent to the disposal trenches.

impermeable trenches which collect rainwater helps prevent water migration.⁵³ Nevertheless, in each case, Chem-Nuclear must assess whether the pursuit of one or more of those preventative measures will result in an occupational dose to its or others' employees working in or around the Barnwell Facility and whether, under the totality of the circumstances of risk to the employees, that dose is justified in light of the potential benefits of such additional preventative measures.

These assessments are critical to addressing the risk of occupational harm. However, if Chem-Nuclear performed this evaluation the Court of Appeals has concluded this evaluation cannot dictate the terms of any "compliance plan" since Subpart 7.11.11 is so strictly construed.

D. The Court of Appeals Misapprehended/Overlooked The Barnwell Facility's Natural Attributes Analyzed Under Subpart 7.7, Which Includes Extensive Groundwater Pathways And Travel Time Allowing For Significant Reduction In Tritium Radiation Content Prior To Release.

The Court of Appeals overlooked the significance of the technical information required under Subpart 7.7 when it concluded that "[a] violation occurs only when water is allowed to come in contact with waste and waste-contaminated water then migrates out of the disposal units."⁵⁴ In addition, when

⁵³ As noted in the 2005 ALC Order: South Carolina's regulatory authority over radioactive waste is derived from a formal agreement with the United States Atomic Energy Commission ... States that entered into such agreements are referred to as Agreement States. An Agreement State may promulgate regulations more stringent than federal regulations, but it must, as a minimum, have regulations that are compatible with federal regulations. In fact, the Nuclear Regulatory Commission's regulations prescribes the site suitability requirements for land disposal. The requirements in Reg. 61-63 are presently consistent with the NRC requirements in that both sets of regulation envision water management and not the prevention of rainfall from entering the trenches.

⁵⁴ Chem-Nuclear II, 2015 WL 4746971, *14, fn.15 (addressing Subparts 7.11.11.1 and 7.11.11.2).

addressing the holes in the floors of the vaults, the Court of Appeals also overlooked the Barnwell Facility site's natural physical attributes in concluding "these holes permit water that has come in contact with residual tritium to drain into the trenches which, in turn, allow the water to percolate into the soil and groundwater beneath the facility"⁵⁵ In turn, the Court of Appeals concluded, in error, Chem-Nuclear did not comply with Subpart 7.11.11.1 and 7.11.11.2.⁵⁶

The Court of Appeals misapprehended the requirements of S.C. Code Ann. Reg. 61-63 Part VII which are intended to provide for the dispersal and management of surface water rather than the collection and retention of volumes of water with containing tritium contamination. Furthermore, the natural physical attributes of the Barnwell Facility site – groundwater pathways and travel time – clearly contribute positively to a reduction in the radiation and ensure site performance and compliance.

E. Public Policy And Applicable Law Mandates Deference To DHEC In Interpreting The Requirements Of Subpart 7.11, Since DHEC Has The Technical Expertise And Experience To Balance The Numerous And Potentially Competing Considerations In S.C. Code Ann. Reg. 61-63 Which The Judiciary May Lack.

The Court of Appeals, in reaching its conclusions and crafting its remedy, did not afford any deference to DHEC's interpretation and/or application of DHEC's own regulations. In matters as complex as the disposal of LLRW, it is particularly important for the judiciary to defer to agency expertise. Here deference should have been given in interpreting and applying the multiple, intertwined regulations contained in S.C. Code Ann. Reg. 61-63. Regarding

⁵⁵ Chem-Nuclear II, 2015 WL 4746971, *15.

⁵⁶ Chem-Nuclear II, 2015 WL 4746971, **10-16.

evidentiary matters in contested cases, the law provides that “notice may be taken of generally recognized technical or scientific facts with the agency’s specialized knowledge. . . . The agency’s experience, technical competence and specialized knowledge may be utilized in the evaluation of the evidence.”⁵⁷ And, in matters of regulatory interpretation “as a general rule, agencies charged with enforcing statutes . . . receive deference from the courts as to their interpretation of those laws.”⁵⁸ “The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons.”⁵⁹ “As repeatedly stated in our decisions, our deference doctrine provides that courts defer to an administrative agency’s interpretations with respect to the statutes entrusted to its administration or its own regulations ‘unless there is a compelling reason to differ.’”⁶⁰

Here the Court of Appeals determined that language related to minimizing the migration of water and waste contaminated water encompasses rainfall. DHEC, however, applies the applicable regulation to the movement of surface water, created as rainwater hits the surface of the earth. This is consistent with Part VII and the numerous references therein to surface water management.

⁵⁷ S.C. Code Ann. § 1-23-330(4) (Thomson Reuters West 2013).

⁵⁸ State v. Sweat, 379 S. C. 367, 385, 665 S. E. 2d 645, 655 (Ct.App. 2008); KDP II v. SCDHEC and SCCCL, 411 S. C. 16 (2014).

⁵⁹ CFRE, LLC v. Greenville County Assessor, 395 S. C. 67, 77, 716 S. E. 2d 877, 882. Conversely, albeit understandably, when and if an agency’s interpretation conflicts with the statute’s plain language, such an interpretation must be rejected. Sparks v. Palmetto Hardwood, Inc., 406 S. C. 124, 128, 750 S. E. 2d 61, 53 (2013); KDP II v. SCDHEC and SCCCL, 411 S. C. 16, 766 S Ed 2d 707, 718 (2014).

⁶⁰ KDP II v. SCDHEC and SCCCL, 411 S. C. 16, 766 S Ed 2d 707, 718 (2014).

Furthermore, the Court of Appeals “strictly construed” the “requirement to minimize” contained in Subpart 7.11.11, without qualification. DHEC, however, applies Subpart 7.11.11 as directed in Subpart 7.1.1. DHEC’s interpretation is not in conflict with the plain language of the regulation. Unfortunately, the Court of Appeals’ new interpretation is in conflict.

CONCLUSION

Based upon the foregoing arguments and citation of authority, the Petitioners respectfully request this Supreme Court to grant certiorari in this matter in order to reevaluate and review the Court of Appeals’ decision herein. This Petition for Writ of Certiorari presents novel questions of law in a matter of great import— the regulation of radioactive waste disposal and the protection of workers at the Barnwell Facility and the public.

Respectfully submitted:


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11 September 2015

NPCOLI:4479251.3-BR-(SPG) 049893-00002

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SC Court of Appeals

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

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

South Carolina Court of Appeals
2015 WL 4746971, filed 12 August 2015

Sierra Club,

Appellant,

v.

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

Respondents.

Of whom Chem-Nuclear Systems, LLC is the

Petitioner.

**PROOF OF SERVICE FOR THE
PETITION FOR CERTIORARI OF THE
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I, Stephen P. Groves, Esquire, hereby certify that on 11 September 2015, served one copy each of the Petition for Certiorari and the Appendix to the Petition for Certiorari submitted on behalf of the Petitioner, Chem-Nuclear Systems, LLC, on all counsel of record herein via United States Mail, postage pre-paid, and addressed as follows:

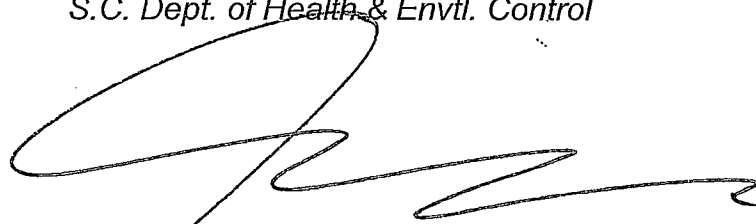
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Charleston, South Carolina

11 September 2015

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Admitted in SC

18 September 2015

The Honorable Jenny Abbott Kitchings
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SC Court of Appeals

Re: Sierra Club v. South Carolina Department of Health and Environmental Control and Chem Nuclear Systems, LLC

ALC Court Case No.: 04-ALC-07-0126-CC
COA Case Tracking No.: 2012-212791
SCT Case Tracking No.: 2015-001915
Our File No.: 049893-00002

Dear Ms. Kitchings:

Charleston

Charlotte

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Greensboro

Greenville

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Myrtle Beach

Raleigh

Pursuant to Rule 242 of the South Carolina Appellate Court Rules, please find enclosed two copies of Chem-Nuclear, LLC's Petition for Writ of Certiorari to the South Carolina Supreme Court in the above captioned matter.

I would appreciate you kindly filing one copy of Chem-Nuclear, LLC's Petition for Writ of Certiorari with the Court of Appeals and returning a stamped copy of each to my attention in the enclosed self-addressed and stamped envelope.

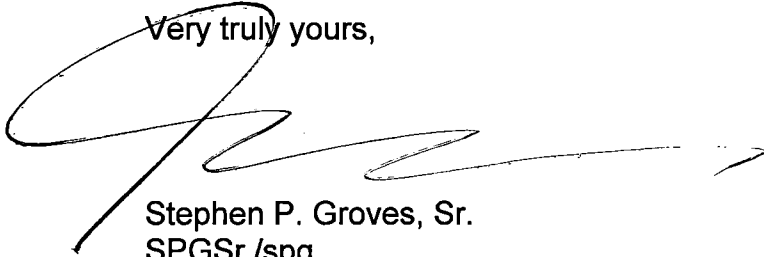
If you need anything else or I otherwise may be of any assistance to you or to the Court of Appeals regarding this matter, please feel free to contact me at your convenience. My direct telephone number is 843.720.1725, direct telecopier is 843.414.8206, and the e-mail is sgroves@nexsenpruet.com.

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Honorable Jenny Abbott Kitchings
Clerk of Court
18 September 2015
Page 2 of 2

Very truly yours,

A handwritten signature in black ink, appearing to read "Stephen P. Groves, Sr.", with a long horizontal flourish extending to the right.

Stephen P. Groves, Sr.
SPGSr./spg

cc: Hon. Daniel E. Shearouse, Supreme Court Clerk of Court
Jacquelyn Dickman, Esquire/Claire Prince, Esquire
Amy E. Armstrong, Esquire/Michael G. Corley
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