

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

Appellate Case No.: 2015-001915

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.

**Amended Return to the Petition for Writ
of Certiorari By Defendant South Carolina Department
of Health and Environmental Control**

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SCDHEC RETURN TO PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 242, SCACR, Respondent South Carolina Department of Health and Environmental Control offers this return to Chem-Nuclear Systems, LLC's Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The Department concurs with the Statement of the Case set forth by Chem-Nuclear in its Petition.

ARGUMENTS BY SCDHEC

The Department supports the Request for this Supreme Court to grant a certiorari review from the Court of Appeals decision in Chem-Nuclear II.¹ As the agency charged with administering and enforcing the regulations at issue, the Department seeks resolution regarding the proper interpretation of the regulations, and offers the following arguments that are unique to and reflective of the agency's position as the regulator of the Barnwell facility.

I. THE COURT OF APPEALS' INTERPRETATION OF REGULATIONS GOVERNING LAND DISPOSAL OF LOW-LEVEL RADIOACTIVE WASTE RAISES A NOVEL QUESTION OF LAW.

The Court's interpretation of Regulation 61-63, Sections 7.11.11 and 7.10.7, calls into issue the legal interpretation of the regulations governing shallow land disposal of low-level radioactive waste at the Barnwell facility. The Court of Appeals concluded that DHEC "failed to

¹ Sierra Club v. SCDHEC and Chem-Nuclear Systems, LLC, 2014 WL 3734366 (Ct. App., filed July 30, 2014), *withdrawn, substituted and refiled on rehearing*, 2015 WL 474 6971 (Ct. App., filed August 12, 2015), ("Chem-Nuclear II").

enforce the law of South Carolina” as to Sections 7.11.11.1, 2, and 4, and Section 7.10.7.² The Court’s interpretation of these regulatory provisions differs significantly from the Department’s interpretation of them. Where for the first time the legal interpretation of these requirements has been challenged and ruled upon, it is a novel question of law that is appropriate for resolution by this Court. An issue regarding the interpretation of a legislative enactment is a question of law, and this Court is free to decide the question with no particular deference to the lower court.³

II. THE COURT’S REGULATORY INTERPRETATION DOES NOT COMPORT WITH THE PLAIN LANGUAGE OF SECTION 7.11.11.

Section 7.11.11 was promulgated by the Department in 1995 to ensure that the disposal units and engineered barriers used by Chem-Nuclear in the disposal of low-level radioactive waste are designed and constructed to meet certain “objectives.”⁴ The objectives at issue here are: (1) to minimize the migration of water onto the disposal units (defined as a vault or a trench) in 7.11.11.1; (2) to minimize the migration of waste-contaminated water out of the disposal units in 7.11.11.2; and (3) to temporarily collect and retain water and other liquids for a time sufficient to allow for the detection and removal or other remedial measures without the contamination of groundwater or the surrounding soil in 7.11.11.4. Because the Court concluded that Chem-Nuclear failed to comply with these sections of the regulation, it also concluded that Chem-Nuclear did not comply with Section 7.10.7, which requires that “the applicant’s demonstration provides reasonable assurance that the applicable technical requirements of this part will be met.” The plain language of the regulation relative to the objectives in Section 7.11.11 do not

² Chem-Nuclear II, at 21.

³ Hagood v. Sommerville, 362 S.C. 191, 193, 607 S.E.2d 707, 708 (2005).

⁴ While South Carolina’s regulations governing land disposal of radioactive waste mirror the federal Nuclear Regulatory Commission’s (NRC) regulations to maintain compatibility as an agreement state with NRC, Section 7.11.11 was written by the Department and promulgated to reflect the objectives for the operational changes instituted in 1995 requiring the use of the engineered barriers and disposal units. Having written the objectives, the Department stands in the best position to interpret, implement and enforce them.

require the “specific actions” contemplated by the Court when it concluded that “compliance with ‘technical requirements’ regulations may be determined only by examining the ‘specific actions’ taken by Chem-Nuclear.”⁵

A. Section 7.11.11.1.

The plain language of Section 7.11.11.1 - that the disposal units and engineered barriers be designed and constructed to minimize the migration of water onto the disposal units - does not require “specific actions” by Chem-Nuclear to prevent rainfall onto those units. The Court found that “[N]either the 2005 order, the remand order, nor any other portion of the record or the briefs contain any evidence that Chem-Nuclear has taken a single action to stop a single raindrop from falling onto the active vaults or trenches.”⁶ The plain language of the regulation does not require a construction design that prevents rainfall onto disposal units. Shallow land disposal by definition cannot provide absolute isolation from the elements, including rainfall. The regulation, taken as a whole, supports the Department’s view of Section 7.11.11.1, which is not to prevent rainfall directly onto the disposal units, but rather to minimize the migration of surface water onto them. The Department does not view “rainfall” as “migration” or equate the act of rain falling as migration of water. The Department’s interpretation of migration of water has always been the management of water from rainfall once it has fallen and not the management of rainfall from the sky.

The Department’s interpretation is supported by other requirements in the regulation that contemplate surface water and groundwater management at the Barnwell facility. Section 7.6.6, for example, requires construction of the facility to include information on methods “to control

⁵ Chem-Nuclear II, at 6.

⁶ Chem-Nuclear II, at 11.

surface water and groundwater access to wastes.” License Condition 71.B requires that trenches be protected to prevent *surface water runoff* from entering active trenches. (Emphasis added). License Condition 73 requires Chem-Nuclear to use proper surface water management techniques to insure *surface water runoff* is directed away from the trenches. (Emphases added). The clear intent of the regulation is to manage rainfall once it lands.

The Court has established a compliance standard for Section 7.11.11.1 that appears to require the use of rain covers or shelters over the trenches. While the Department is not averse to considering rain covers or shelters over the trenches and vaults, it cannot do so without regard to their potential impact on compliance with other regulatory provisions, including the “performance objectives” in Sections 7.18 through 7.21, which include maintaining radiation protection standards for workers at the site under ALARA.⁷ Section 7.11.9 plainly states that “[T]he engineered barriers shall be designed and constructed to complement and improve the ability of the disposal facility to meet the *performance objectives* of this Part.” (Emphasis added). The performance objectives are clearly connected to the design and construction of the engineered barriers. The engineered barriers must be designed and constructed to not only minimize the migration of water onto the disposal units but also to complement and improve the disposal facility’s ability to meet the performance objectives for radiation exposure of workers under ALARA. The Court’s interpretation of Section 7.11.11.1 leaves no room for this consideration. To apply the compliance standard set by the Court would set up a conflict with other parts of the regulation including the application of ALARA principles in the field of health physics and the associated concept of radiation protection.

⁷ “ALARA” in the performance objectives of Sections 7.18 through 7.21 means “as low as is reasonably achievable.”

B. Section 7.11.11.2.

The Court concluded that Chem-Nuclear did not comply with Section 7.11.11.2 because there were no specific actions in the record to show that it minimized waste-contaminated water out of the disposal trenches. The Court's finding of non-compliance was based, in part, on the absence of findings in the 2005 ALC order that addressed this issue.⁸ As the Department noted in its Petition for Rehearing to the Court of Appeals, the lack of findings in the 2005 Order is not indicative of a lack of compliance with 7.11.11.2. By basing its findings of non-compliance on the absence of an ALC finding, the Court shifted an impossible burden of proof to both Chem-Nuclear and the Department.

The Court appears to be requiring the "specific action" of sealing and grouting of the vaults for compliance with Section 7.11.11.2. There are a number of considerations that must be evaluated to determine the technical feasibility of sealing the vaults and the consequences of implementing such a requirement. If the Court's interpretation stands and sealing and grouting is required for compliance, it may be in conflict with the Department's responsibility to review the technical feasibility of such a measure, weigh the consequences of requiring such actions, and evaluate such actions in the context of other applicable regulatory requirements.

C. Section 7.11.11.4.

In finding Chem-Nuclear did not comply with Section 7.11.11.4, the Court relied on a finding in the 2005 ALC Order that none of the trenches at the facility have a leachate collection system. It reasoned that the ALC's finding regarding the non-existence of a leachate collection

⁸ The Court stated, "The ALC noted the 2005 order contained 'no finding that Chem-Nuclear's waste disposal design is faulty or fails to minimize the migration of waste contaminated water out of disposal units.' We find the ALC erred in relying on the absence of such a finding in the 2005 order." *Chem-Nuclear II*, at 15. Yet, the Court then used the same absence of findings as conclusive evidence that Chem-Nuclear was *not* in compliance with Section 7.11.11.2.

system undermined the ALC's conclusion that Chem-Nuclear complied with this section and "supports our determination that the ALC erred in reaching that conclusion."⁹ The interpretation by the Court that Section 7.11.11.4 requires a leachate collection system to collect, retain, test, and remove or remediate water is most troublesome because there is *nothing* in the regulation that defines, describes, or requires that such a system be implemented. In fact, there are scientific and technical reasons why, in the management of low-level radioactive waste, the use of a leachate collection system may *not* be the best water management method. The Court overreaches in its interpretation that compliance with this section requires the "specific action" of implementing a leachate collection system.

Further, when DHEC and Chem-Nuclear argued that a leachate collection system raised concerns regarding radioactive exposure to workers handling and processing the leachate, the Court dismissed these concerns as being "contrary to the purpose and intent of the regulation." The Court's interpretation conflicts with the plain language of the regulations. Section 7.1.3 requirements for licensing land disposal of radioactive waste include establishing "procedural requirements and *performance objectives* applicable to any method of land disposal." (Emphasis added). Section 7.1.7 requires that land disposal facilities be sited, designed, operated, closed and controlled after closure so that "reasonable assurance exists that exposures to individuals are within the requirements established in the performance objectives of 7.18 through 7.21." The performance objectives of Sections 7.18 through 7.21 require that "every reasonable effort should be made to maintain radiation exposures as low as is reasonably achievable" for workers, inadvertent intruders, and the general public. The performance objectives are an integral and critical part of the application of the regulatory requirements to the disposal operations. To state

⁹ Chem-Nuclear II, at 16.

that worker safety concerns are contrary to the purpose and intent of the regulation is to misapply and misinterpret the regulatory provisions in the application of Section 7.11.11.4.

The Court's statement that it fails to see the danger of radioactive contamination of workers as a result of implementing a leachate collection system highlights the difficulty the Department has with the Court indicating the "specific actions" necessary for Chem-Nuclear to show compliance with the regulations. As required by Section 7.7.3 of the regulation, are "analyses of the protection of individuals during operations shall include assessments of expected exposures due to routine operations and likely accidents during handling, storage, and disposal of waste. The analyses shall provide reasonable assurance that exposures will be controlled to meet the requirements of Part III of these regulations." The Court's interpretation regarding the "specific action" required for compliance does not account for expected exposure limits. The Department is bound by and has the responsibility for ensuring that other, important and interconnecting regulatory requirements are met. The difficulty with the Court's interpretation is that it predetermines the actions necessary to show compliance, placing the Department in the untenable position of accepting a regulatory interpretation on remand that isolates certain provisions from other, important regulatory requirements that the Department must also administer and enforce.

III. THE COURT FAILS TO ACCORD DEFERENCE TO THE AGENCY IN THE INTERPRETATION OF ITS OWN REGULATIONS.

While the Department recognizes the Court's remand to the Department for further proceedings is a proper remedy, it is concerned that the Court's interpretation of the regulations seems to dictate the "specific actions" required to show compliance. Under the Court's ruling, any Department decision that is less than or in conflict with the actions articulated by the Court will likely result in continued legal claims of noncompliance with the regulations. The

Department is the agency charged by law with regulating the Barnwell facility. In this case, the Court has failed to give deference to the Department's interpretation of its own regulation. As this Court articulated in Kiawah Development Partners II, interpreting and applying statutes and regulations administered by the agency is a two-step process.¹⁰

First, a court must determine whether the language of the regulation directly speaks to the issue and, if so, the court must utilize the clear meaning of the regulation. The plain language of Section 7.11.11 does not mean preventing rainfall onto the disposal units and engineered barriers, the sealing and grouting of the disposal units, or the installation of a leachate collection system. Whether these measures may or may not be technically feasible or comply with the regulations as a whole does not erase the fact that the plain meaning of Sections 7.11.11.1, 2 and 4 does not require the "specific actions" the Court seems to have established as measures of compliance with the regulation.

To the extent the regulation requires interpretation of its very technical and interlocking provisions, the second prong of the court's two-step analysis applies. If the regulation is silent or ambiguous with respect to a specific issue, the court then must give deference to the agency's interpretation, assuming the interpretation is worthy of deference. This Court has stated the deference doctrine to provide that "where an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts, including the ALC, will defer to the agency's interpretation absent compelling reasons. We defer to an agency interpretation unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'"¹¹

¹⁰ Kiawah Development Partners, II v. SC Coastal Conservation League & SC DHEC, 411 S.C. 16, 32, 766 S.E.2d 707, 717 (2014).

¹¹ Kiawah Development Partners II, at 718-719.

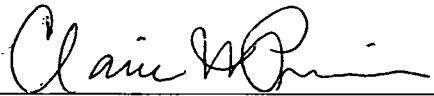
The Department's interpretation of its own regulations has not been arbitrary, capricious or manifestly contrary to the statute, and the Department did not fail to enforce the law. The regulations contemplate the management of surface water and groundwater. The Department promulgated Section 7.11.11 to ensure that the disposal units and engineered barriers were designed and constructed to minimize migration of water onto and out of the disposal units to take appropriate measures to further manage that water. The Department included these objectives as part of the license conditions as required by the regulation. In addition, the Department considered other applicable regulatory requirements, including those required to protect exposure of workers, inadvertent intruders, and the general public. Unlike the Court's analysis, the Department *did not* apply the regulations in a manner that isolates regulatory compliance from compliance with other applicable regulatory requirements. The Department *did not* interpret the regulations to require "specific actions" by Chem-Nuclear that are not reflected in the plain language of the regulation and that may in fact conflict with or hinder compliance with other provisions of the regulation that the Department has responsibility to administer. In considering all of the regulatory requirements for the renewal of the Barnwell license, the Department properly found that Chem-Nuclear demonstrated with reasonable assurance that the applicable technical requirements of Part VII were met as required by Section 7.10.7. The Department should be permitted to consider all regulatory options that may enhance compliance with the provisions of 7.11.11 which may or may not include the specific actions the Court appears to be using as the compliance standard.

CONCLUSION

In consideration of the foregoing, the Department respectfully requests that this Court grant certiorari to review the Court of Appeals decision, and to provide clarity on the correct application of the regulations to the disposal of low-level radioactive waste at the Barnwell facility.

Respectfully Submitted,

South Carolina Department of Health and
Environmental Control

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CERTIFICATE OF SERVICE

I, Donna Hellerman, Legal Assistant for the South Carolina Department of Health and Environmental Control, hereby certify that I have on this **13th day of October, 2015**, served a copy of Defendant SCDHEC's *Amended Return to Petition for Writ of Certiorari* upon all parties and counsel of record in the above-captioned case, via United States Mail, First Class, postage prepaid, addressed as follows:

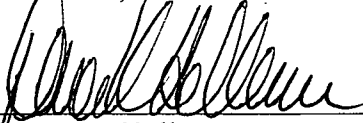
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