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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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 Petitioner.

Appellate Case No. 2015-001915

SIERRA CLUB'S RETURN TO CHEM-NUCLEAR SYSTEMS, LLC'S PETITION FOR WRIT OF CERTIORARI

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Rule 242(b) governs this Court's review of petitions for writs of certiorari, which shall be granted "only where there are special and important reasons." SCACR Rule 242(b). Those reasons may include whether there are novel questions of law, whether there is a dissent in the Court of Appeals decision; whether the Court of Appeals decision is in conflict with a prior decision; whether substantial constitutional issues are directly involved; and whether a federal question is included. While none of these reasons are controlling, the only listed reason that could apply in this case is "where there are novel questions of law." Id.

There is no dispute that this is the first time an appellate court has ruled on the regulations at issue in this case. Indeed, these regulations were written solely for the purpose of Chem Nuclear's operations in South Carolina. Chem-Nuclear's Barnwell Facility is the only site of its kind in the State and is one of only three radioactive nuclear waste disposal sites in the United States, thus the regulations necessarily apply broadly and comprehensively to its disposal activities.[1]

This case is the first time a challenge to the disposal practices authorized in Chem Nuclear's license has ever been raised through the administrative and appellate processes. But that does not justify this Court exercising its discretion to hear a case that has already resulted in two extensive, comprehensive and unanimous opinions by the Court of Appeals, both concluding that the renewal license issued to Chem Nuclear by DHEC does not comply with specific

[1]Waste is not simply stored at the Barnwell facility, but is permanently "disposed" there. Disposal is defined as "isolation of wastes from the biosphere inhabited by man and his food chains by emplacement in a land disposal facility," Subsection 7.2.6

regulatory provisions of Subsection 7.11.11.[2] Ultimately, the "novel questions of law" in this case were thoroughly analyzed twice by the Court of Appeals. Thus, this Court, in its discretion, need not disturb that sound analysis.

I. The Mandatory Requirements of Subsection 7.11.11

Section 7.11.11. requires that Chem-Nuclear's disposal units and the incorporated engineered barriers[3] shall be designed and constructed to meet the following objectives:

> (1.) to minimize the migration of water onto the disposal units.
>
> (2.) to minimize the migration of waste or waste contaminated water out of the disposal units.
>
> . . .
>
> (4.) temporary collection and retention of 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.

Virtually all of the objectives in Section 7.11.11 promote the goal of keeping water away from waste.

A. The Court of Appeals Does Not Interpret "Minimize" to Mean "Prevent," and Sierra Club has Never Argued for Such an Interpretation

Chem Nuclear in its petition and DHEC in its return repeatedly conflate and misstate the

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[2] Sierra Club notes that Judge Huff notified the parties prior to oral argument that he had been in the legislature during the time that the Chem Nuclear facility was being proposed, having worked on the passage of the regulations at issue.

[3] Section 7.11.9 requires Chem-Nuclear to "incorporate engineered barriers for all waste classifications. The engineered barriers shall be designed and constructed to complement and improve the ability of the disposal facility to meet the performance objectives in this part." Engineered barriers as defined as "a man-made structure or device that is intended to improve the land disposal facility's ability to meet the performance objectives of this part." S.C. Code Ann. Reg. 61-63, Section 7.2.9. In this case, the engineered barriers are the "disposal trenches, disposal vaults, and enhanced caps." (App. p. 379, 2005 Order, FF # 81).

Court of Appeals' Opinion as requiring "prevention" as opposed to "minimization" as used in Subsection 7.11.11. The Court does not conclude that compliance with 7.11.11.1 means that Chem Nuclear must prevent any and all rainfall from entering the trenches. Nothing in the Opinion mandates "prevention" or "elimination" of migration of water. As the Opinion notes, DHEC and Chem Nuclear "filed a joint brief with this court in which they set forth the following definition of minimize: 'to reduce to the smallest possible amount, extent, size or degree.'" Sierra Club v. Chem-Nuclear Systems, LLC & DHEC, __S.C.__ , __S.E.2d.__ (2014 WL 3734366, filed July 30, 2014) (hereinafter "Chem-Nuclear II") at 12. Sierra Club agrees with this definition and nothing in the Opinion goes so far as to say that Chem Nuclear must "prevent all water from entering open trenches" (Chem Nuclear Petition, p. 8) or "prevent rainfall onto disposal units." (DHEC Return, p. 3). [4]

But the Opinion is very clear that there must be an effort to "minimize" or "reduce to the smallest possible extent" the migration of rainwater onto vaults and trenches. Chem Nuclear II, at 10. The Opinion notes that Chem Nuclear is not doing a single thing to "minimize" or to reduce to the smallest possible amount the migration of rainfall onto or out of disposal units. Id. at 11.

DHEC falls back on the "absence of specific findings" to address compliance. Sierra Club raised the issue of compliance with Regulation 7.11.11 before the ALC in 2005 by presenting evidence that Chem-Nuclear's design and disposal practices do not minimize the migration of water onto and out of the disposal units (vaults and trenches). DHEC's argument now seems to be that a lack of any evidence that Chem-Nuclear is minimizing migration of water should be read in a light favorable to the permitting agency. The absence of evidence of the minimization

[4]The 2005 ALC Findings of an "undeniable 'rainfall problem'" bolster and provide support for this conclusion. Id.

of migration of water speak for itself: minimization is not being achieved.

Moreover, the Court of Appeals Opinion that Chem Nuclear is not minimizing the migration of waste-contaminated water out of the disposal units is based on multiple findings, not a lack of findings. (DHEC return, p. 5). The Opinion carefully considered all of the findings from the 2005 ALC Order in arriving at its conclusion that Chem Nuclear's renewal license did not contain measures to ensure that migration of water onto and out of disposal units was reduced to the smallest amount possible, which is required under Subsection 7.11.11. Chem Nuclear II, p. 11.

The primary "engineered barriers" utilized by Chem-Nuclear include disposal trenches, disposal vaults, and enhanced caps. (App. p. 379, FF # 81). The disposal vaults provide only for structural stability to prevent subsistence. (App. p. 377, FF # 70). The vaults are not sealed against water intrusion and have holes in the bottom to allow water to leave the vaults. (App. p. 372, FF # 47). None of the trenches at the Chem-Nuclear site have an impermeable liner or a leachate collection system, and are in fact designed to allow water to flow into the ground beneath the trenches. (App. p. 382, FF # 102). Not until a trench is completely filled with vaults containing waste will the cap be installed. (App. p. 382, FF # 100). It takes years before a trench is filled and a cap is installed. (App. p. 373, FF # 51).

Heavy rainfall in Barnwell County is not uncommon, and highlights the potential for ground and surface water contamination caused by the collection of rainwater in the open disposal trenches and on the radioactive waste waiting to be buried at the site. (App. p. 384, FF # 115). Photographs taken during DHEC inspections revealed rainwater collecting in open trenches. (App. p. 384, FF # 116).

Indeed, the ALC's 2005 findings clearly establish that the vaults were intentionally designed to ***allow*** water to migrate out of those units, and that the trenches were intentionally designed to ***allow*** water to infiltrate into the soil and groundwater beneath the trenches. (App. p. 372, FF# 47).

B. Rainfall is Water That Migrates and 7.11.11 is Equally Applicable to Rain as it is to Surface Water

DHEC's interpretation that it only needs to manage water once it is fallen from the sky and landed on the ground, but not water as it is falling from the sky is illogical. Water migrates in several major ways, two of which the Court of Appeals discussed: water falls from the sky in the form of rain and water moves across the surface of the land. Chem Nuclear II at 10-16. The Court of Appeals recognized that "DHEC concedes the phrase ["migration of water"] encompasses not only the flow of surface water, but also rainfall, even through it "need not rely on DHEC's concessions, however, because we find the subsection clearly applies to rainfall." Chem Nuclear II, at 10. It is hard to fathom how rainfall would not be migration of water and the Court of Appeals properly held that the plain language of "migration of water" necessarily encompasses rainfall.

It is clear that Chem-Nuclear is doing nothing to reduce rainfall from entering the trenches and vaults, and DHEC is not requiring it. Instead, Chem-Nuclear and DHEC both point to measures that minimize migration of ***surface water*** onto disposal units, or measures that move water out of the trenches once it has been in contact with waste and has migrated out of the disposal vaults. Proper application of the regulations to the facts requires Chem-Nuclear to take some action to reduce rainfall from entering the vaults and trenches in the first instance.

Despite the plain language, DHEC urges that the intent of subsection 7.11.11.1 is that the migration of ***surface water*** onto the disposal units is minimized. (DHEC Return, p. 3-4). This as-of-late construction of 7.11.11.1 creates a new definition of "water" as "surface water," despite DHEC's concurrence with the lower Court that rainwater is "water" and can "migrate" when it falls from the sky onto the vaults and trenches.[5] (DHEC Return, p. 3-4). DHEC points to no legal error in the Court's conclusion that Section 7.11.11.1 requires minimization of water in the form of rain onto the vaults and trenches, it just disagrees with it.

C. The Court's Compliance Conclusions on Subsection 7.11.11. Are Supported by the 2005 Findings

The Court of Appeals did not "significantly enlarge[] the original ALC restriction by eliminating the ALC's reliance on any established facts to demonstrate Chem-Nuclear's compliance with sections of Part VII apart from that of 7.11." (Chem-Nuclear Petition, p. 13). Nor did it misconstrue 7.11.11. The Court looked at the totality of the factual findings. Specifically, and distinct from the ALC, the Court reviewed facts related to compliance with Section 7.11.11 that were ignored or disregarded by the ALC, as discussed in Section I.A. above. Those facts include: 1) DHEC's 2001 direction to Chem-Nuclear to consider temporary roofs and other conceptual trench designs to keep water out of trenches and vaults; 2) that final designs had not been submitted in 2005, despite the undeniable problem of rainfall in the vaults and trenches; 3) tritium is driven into the groundwater through rainfall in and on the disposal trenches; 4) tritium

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[5]Sierra Club does not dispute that some measures have been taken to reduce and minimize the contact with flowing surface water, as emphasized by Chem-Nuclear and DHEC. The site is not located in the path of an existing waterway and the trenches are sloped to divert sheet flow from rain events from the trenches so that it does not drain into the trenches. However, Chem-Nuclear's arguments fail to address the undeniable rainfall problem that was formally recognized by the ALC in 2005.

concentration varies with the amount of rainfall; 5) there is no cover or roof, so rain falls directly into the vaults during loading; 6) the vaults and trenches have no cover and are exposed to rainfall while they are active; 7) the vaults are not sealed against water intrustion. Chem-Nuclear, DHEC and the ALC would all have the Court disregard these relevant facts and place complete reliance on the fact that there are sloped trench floors, a drainage system for monitoring, backfilling of the voids between vaults, and clay caps installed *after* the trenches are filled as proof of minimizing migration of water onto the vaults and trenches. As the Court of Appeals discussed, those design features are relevant to detecting water once is has already migrated onto the disposal units or minimizing migration of water *after* the vaults are filled and the trenches closed and capped, but do not address rain falling onto the vaults and trenches when they are active (prior to being closed and capped).

With respect to Subsection 7.11.11.4, Chem Nuclear is required to collect, retain, test, and remove or remediate water. The Court of Appeals' conclusions regarding the lack of adequate monitoring, detection, testing and remediation measures, and specifically the lack of a "leachate collection system," derive entirely from the findings of the 2005 Order. (R. p. 56, 2005 Order, FF # 102). The findings from the 2005 Order with respect to the monitoring, detection and removal measures were never challenged or disputed until now and thus cannot be challenged. In re Morrison, 321 S.C. 370 n. 2, 468 S.E.2d 651 n. 2 (1996) (noting that an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal).

And while DHEC objects to a leachate collection system as a mechanism to do this, it points to nothing in the record or the 2005 findings to support a conclusion that requirement is met.

D. Section 7.11.11 Requires More Than a Results-Based Analysis[6]

Contrary to Chem Nuclear's assertion, the Court did not impose "significant additional limitations on the evidentiary standard" of Chem Nuclear I. (Petition, p. 17). Instead, as Chem Nuclear acknowledges, the Court concluded that "compliance may **not** be measured solely by results" and rejected the ALC's reliance on findings that were unrelated to the migration of water, and specifically rainwater, onto and out of the disposal units. Chem Nuclear II at 10 (emphasis added), (Petition, p. 17). Instead, the Court of Appeals looked to findings related to the design of the disposal units and how that design allowed and encouraged the migration of water. Id. at 10. The Court rejected the ALC's conclusions because the ALC did not consider the finding relevant to migration of rainwater and looked only at results-based findings.[7] Id. at 21.

Contrary to Chem-Nuclear's arguments, Chem Nuclear II did not expand the "additional compliance requirements" identified by in Chem Nuclear I. (Chem-Nuclear Petition, p. 7). As evidenced by the opinion, the Court was fully aware of the distinction between technical

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[6]The Court of Appeals in Chem Nuclear I concluded that the technical requirements are *in addition to, not limited by,* the performance objectives. Neither DHEC nor Chem Nuclear sought review of that decision and thus it is not preserved for review. "A decree from which no appeal is taken becomes the law of the case in all subsequent proceedings involving the same parties and the same subject matter is the well-settled law in this state, and it is therefore unnecessary to enter upon any extended discussion of this postulate." Matheson v. McCormac, 187 S.C. 260, 196 S.E. 883, 884 (1938). See also In re Morrison, 321 S.C. 370 n. 2, 468 S.E.2d 651 n. 2 (1996) (noting that an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal); Anonymous (M-156-90) v. State Bd. of Med. Examiners, 323 S.C. 260, 278, 473 S.E.2d 870, 879 (S.C. Ct. App. 1996) rev'd, 329 S.C. 371, 496 S.E.2d 17 (1998); State v. Sullivan, 310 S.C. 311, 426 S.E.2d 766 (1993) (to preserve an issue for appellate review, appellant must object at the first opportunity).

[7]Even if the Court agreed with DHEC that "the results to be achieved are determinative" of whether Chem-Nuclear's license meets the requirements of Section 7.11.11, it still has a problem: Judge Geathers found that in some areas, tritium level increased between 1997 and 2001. Judge Geathers found that when tritium data is compared to rainfall data as gauged by water table levels, ***it appears that tritium concentrations have been varying with the amount of rainfall, not necessarily as a result of new storage methods***. (App. p. 372, FF # 46 (emphasis added). Thus, the "results" are not favorable for Chem Nuclear in a results-based analysis.

requirements and performance objectives, noting that the "regulations containing technical requirements require Chem-Nuclear to take specific action to comply with the regulation, while regulations containing performance objectives require Chem-Nuclear to achieve certain results sought under the regulation." Chem-Nuclear II at 5. The performance objectives "do not impose specific requirements as to how Chem-Nuclear must accomplish any particular result," but the technical requirements do. Id. Thus, while the results being achieved at the site are relevant to whether Chem-Nuclear is meeting the performance objectives, Chem-Nuclear and DHEC cannot rest alone on "results" and must also demonstrate that the actions are being taken to meet specific requirements, for example those actions that demonstrate that migration of water onto and out of disposal units is minimized. To this day, neither Chem-Nuclear nor DHEC can identify any action being taken to minimize the migration of rainwater, as the lower Court clearly recognized.

The Court of Appeals correctly concluded that pump and removal system, ponding and water detection systems and a partially permeable trench floor do not minimize the migration of water. Similarly, there is no basis to conclude that groundwater pathways and travel times minimize the migration of water onto and out of disposal units (Petition, p. 19).

II. The Court of Appeals Required Compliance With All of the Requirements, Not Only the Ones Chem Nuclear Asserts Are Controlling

Chem Nuclear is foreclosed from arguing that the technical requirements of Sections 7.11 and 7.23.6 do not apply or are superseded by the performance objectives because the Court of Appeals, in Chem-Nuclear I, rejected that argument finding that the technical requirements of Sections 7.11 impose ***"additional*** compliance requirements" beyond the performance objectives. Chem-Nuclear I, 387 S.C. at 436, 693 S.E.2d at 19. Again in 2014, the Court of Appeals reiterated

that "subsections 7.11.11 and 7.23.6 require Chem-Nuclear to take action to design and construct the disposal site, disposal units, and engineered barriers to meet the specifications in those subsections." Chem-Nuclear II, citing Chem-Nuclear I at 423, 435, 436. In Chem Nuclear I, the Court of Appeals found that "section 7.11 imposes additional compliance requirements for Chem-Nuclear such that the balancing test of ALARA would not be sufficient to address whether Chem-Nuclear is in compliance with section 7.11." 387 S.C. at 435; Chem Nuclear II at 7.

Chem-Nuclear disputes that Subsection 7.11.11 requires any action on its part. Chem Nuclear argues that it does not have to "strictly" comply with every single one of those regulatory requirements, effectively arguing that some portions of the regulations should trump or supercede the provisions in Subsection 7.11.11. (Chem Nuclear Petition, p. 25). In essence, Chem-Nuclear asserts that since it is in compliance with Part III and other results-based sections of the regulations the license does not need to meet the specific requirements of 7.11.11. Chem-Nuclear asks that the plain language of specific regulatory provisions be ignored, along with DHEC's interpretation of the word "minimize," in favor of more loosely-defined, results-based standard.

Chem Nuclear would have this Court disregard Subsection 7.11.11's specific requirements to "minimize the migration of water" because the ALARA requirements are met. Chem Nuclear does not get to pick and choose which provisions it will adhere to. It must adhere to them all. The Court of Appeals fully explains how 7.11.11 requires action, i.e., the design and construction to minimize migration of water, as opposed to results-based objectives. Chem Nuclear II at 10-13.

A. Technical Requirements Are In Addition to the Performance Objectives, Not Limited By Them

Chem-Nuclear's reason for not achieving the requirements of 7.11.11 is to fall back on the

performance objectives of 7.18 – the as low as reasonably achievable ("ALARA") standard. Chem Nuclear never explains how it cannot comply with both the ALARA standard and Subsection 7.11.11. Essentially, where the Court has found that the ALARA standard is a lower standard than the design standards in Section 7.11.11, Chem-Nuclear asks that the ALARA standard in Part III be controlling over Part VII and utilized to negate the requirements of 7.11.11. (Chem-Nuclear Petition, p. 19-20). Chem-Nuclear tells this Court that compliance with one part of the regulations is proof that it has complied with another, technical, part. The Court's ruling is consistent with the regulations confirming that Part VII is "in addition to, and not separate[] from the remaining parts of 61-63." (Chem-Nuclear Petition, p. 21). If the Court had concluded otherwise, then there would be no need for Section 7.11.11 because it would serve no useful purpose. "[T]he primary rule of statutory construction is that the Court must ascertain the intention of the legislature . . . [, and] [t]hus, the court will reject the agency's interpretation where it is specifically contrary to the statute or regulation." Commissioners of Public Works v. DHEC, 372 S.C. 351, 359 (Ct. App. 2007) (quotations omitted). Courts will reject statutory interpretations that lead to absurd results clearly unintended by the legislature or that defeat the plain legislative intent. Peake v. SCDMV, 375 S.C. 589, 599, 654 S.E.2d 284, 289; Kiriakides v. United Artists Commc'ns, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994)). Furthermore, the appellate court must presume the legislature intended to accomplish something with an enacted statute and did not intend for a section or provision to be purposeless or futile. Duvall v. S.C. Budget and Control Bd., 377 S.C. 36, 42, 659 S.E.2d 125, 128 (2008).

If evidence that the performance objectives have been met is appropriate to demonstrate compliance with other requirements of the regulation, then there would be no need for the "other

requirements," and specifically technical requirements of 7.11.11. While the requirements of 7.11.11 are designed to meet objectives, that does not diminish the requirements of the regulations or the clear language used: to "minimize the migration of water onto disposal units" and "minimize the migration of water out of disposal units." Subsection 7.11.11.1 & 2.

The Court of Appeals does not direct any particular action that would achieve compliance with Subsection 7.11.11, but identified findings that establish that not only is Chem Nuclear not taking steps to minimize the migration of water, it is actively implementing measures designed to allow water to migrate out of the disposal units. Chem Nuclear II at 12-13.

Whether the Court referred to Section 7.11.11 as "technical requirements" or "compliance requirements" or "Conditions of Licenses" is a distinction without a difference.[8] (Chem-Nuclear Petition, p. 13-14). Either way the mandates of 7.11.11 are **requirements** that Chem Nuclear must comply with in order to receive a renewal license. They always have been and always will be and nothing in the Opinion indicates that these requirements were "newly discovered" as suggested by Chem Nuclear. (Petition, p. 13). Similarly neither the heading of a regulation nor a permit condition are controlling in determining compliance with the regulations. (Chem-Nuclear Petition, p. 9, declaring that "7.11.11's title is clear and unambiguous").[9] What is important is the language of the regulation. Although the title and headings are part of the statute, they may not be

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[8]However, if it is true that the requirements of Section 7.11.11 are merely permit conditions and not stand-alone requirements for the renewal license, as argued by Chem-Nuclear, then DHEC has clearly failed to enforce those requirements. Sierra Club submits that Section 7.11.11 is a specific regulatory requirement necessary for securing a license, not just a permit condition

[9]Sierra Club would also point out that Chem-Nuclear's new argument about 7.11.11 being useful only as a permit condition and not as a separate regulatory requirement was not presented to this Court through appellate briefing and thus cannot be raised on rehearing. Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E. 234 (1933).

construed to limit the plain meaning of the text. Garner v. Houck, 312 S.C. 481, 486, 435 S.E.2d 847, 849 (1993) (citing Brotherhood of Railroad Trainmen v. Baltimore & O.R. Co., 331 U.S. 519, 67 S.Ct. 1387, 91 L.Ed. 1646 (1947)). For interpretative purposes, the title of a statute and heading of a section are of use only when they shed light on some ambiguous word or phrase and as tools available for resolution of doubt, but they cannot undo or limit what the text makes plain. Garner v. Houck, 312 S.C. 481, 486, 435 S.E.2d 847, 849 (1993). The title and headings of a statute may not be construed to limit the plain language of a statute, but may be used to shed light on an ambiguous word or phrase. McInnis v. McInnis, 348 S.C. 585, 592, 560 S.E.2d 632, 636 (Ct. App. 2002) (citing Garner v. Houck, 312 S.C. 481, 486, 435 S.E.2d 847, 849 (1993)). The reading of a statute or regulation to determine its meaning is done by reading the entire document as a whole, and not limited by the title. Spruill v. Richland Cnty. Sch. Dist. 2, 363 S.C. 61, 64, 609 S.E.2d 524, 526 (2005) ("We do not, however, determine the meaning of a regulation by reading its component parts in isolation, but rather construe the regulation as a whole.")

Here, there is no doubt about what the words "minimize," "migrate," or "water" mean and those words are controlling over the headings of the regulations. See Spruill. This Court did not create "newly discovered" requirements, rather it applied the plain language of the text, aided by DHEC's definition of the word "minimize." Chem Nuclear II at 12.

B. There are no Findings to Support a Conclusion that Compliance with 7.11.11 will Increase Worker Exposure or That Both Worker Safety and Minimization of Migration of Water Cannot Be Collectively Achieved

Chem Nuclear spends significant time talking about the possibility that minimizing the migration of water onto and out of disposal units may lead to increased worker exposure.. There

are no findings to support this as-of-late concern. Specifically, Chem Nuclear suggests that measures identified by the Court that would minimize migration of water "**may increase** the potential for worker exposure" or "occupational exposure." These possibilities are not supported by the record, much less the findings of the 2005 ALC Order.

The Court of Appeals Opinion leaves room for compliance with both ALARA and 7.11.11. As DHEC points out, the "engineered barriers must be designed and constructed to not only minimize the migration of water onto disposal units but also to complement and improve the disposal facility's ability to meet . . . ALARA." (DHEC, p. 4). There is no basis upon which the Court could conclude that DHEC cannot require and Chem Nuclear cannot achieve both. Indeed, if Chem Nuclear's disposal practices and design minimize the migration of water onto and out of disposal units, in theory the exposure to the public and the environment should decrease because there would be less contaminated water onsite. There is no evidence that the dose would be increased to the public, the environment or to workers if Chem Nuclear reduced to the smallest amount possible the migration of water onto and out of disposal units.

DHEC's interpretation of ALARA asks the Court to disregard the efforts to keep radiation exposures low for the general public and focuses solely on worker exposure, all without pointing to a single finding that worker exposure would be increased if there was a leachate collection system, sealed and grouted vaults, trench liners or trench covers, for example.

C. The Opinion is Not Contrary to Sections 7.6 and 7.7

This Court's opinion is not contrary to Sections 7.6 and 7.7, both of which relate to the presentation of information necessary to demonstrate that other sections (the performance objectives and technical requirements) will be met. Neither section contains any standards for the

manner of disposal. Section 7.6 directs the applicant to provide information to establish compliance, and specifically asks for complete "descriptions" of "design criteria" and "design features," among other things. Sierra Club submits that this section merely requires Chem-Nuclear to describe how it will design the disposal units such that they are compliant with the applicable regulatory requirements, including Subsection 7.11.11. Section 7.7 directs the applicant to conduct analyses to establish compliance with the performance objectives. These two sections require Chem-Nuclear to produce information, but contain no technical criteria.

D. The 2005 Feasibility Report Is Not In the Record and Is Not Relevant

Chem Nuclear's suggestion that a 2005 "Feasibility Report," which was never made part of the record, somehow addresses its failure to comply with Subsection 7.11.11 is without merit. When this case was on remand to the ALC, Chem-Nuclear did not asked the ALC to consider the Feasibility Report. Similarly, Chem-Nuclear did not raise the issue of the Court of Appeals' denial of the motion to supplement the record with the "Feasibility Report." Most importantly, Chem Nuclear never attempts to explain how that report could have had any impact on the issues before the Court. Even in the Petition for Certiorari, Chem-Nuclear has not made any effort to demonstrate how a report would change the Court of Appeals' result.

Chem-Nuclear acknowledges that shelters or covers over trenches, sealing and grouting vaults and lining trenches will achieve minimization of migration of water. (Chem-Nuclear Petition, p. 21-22). It does not claim that these measures would be unjustified because they would result in an unacceptable dose to employees. In fact, it has not even performed an evaluation to determine whether there would be any change in dose. (Chem-Nuclear Petition for Rehearing, p. 18, "Even if Chem-Nuclear performed this evaluation . . .").

III. DHEC Is Not Entitled to Deference When Its Interpretation Is Contrary to the Plain Language

Chem-Nuclear proposes an absolute deference to DHEC in matters related to disposal of radioactive waste because the judiciary does not have the same expertise. (Chem-Nuclear Petition, p. 23). Our courts have rejected such absolute deference to DHEC, particularly when that deference is in direct conflict with the plain language of the regulations. Engaging & Guarding Laurens Cnty.'s Env't (EAGLE) v. S. Carolina Dep't of Health & Envtl. Control, 407 S.C. 334, 755 S.E.2d 444 (2014), reh'g denied (May 7, 2014). Where an agency's interpretation of the regulation leads to a **direct conflict** with the plain language of the statutory mandate, it is an error to show the utmost deference to that interpretation by requiring a "compelling reason to differ." S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control, 363 S.C. 67, 75, 610 S.E.3d 482, 486 (2005). An agency's long-standing interpretation of a statute is usually entitled to deference and should not be overruled by a reviewing court in the absence of cogent reasons, but the interpretation will not be sustained if it contradicts a statute's plain language. Etiwan Fertilizer Co., 217 S.C. 354, 359, 60 S.E.2d 682, 684 (1950). See Brown v. Bi-Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) ("We recognize the Court generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation. Nevertheless, where, as here, the plain language of the statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation." (Internal citation omitted)). In this case, there is not even a "long-standing interpretation," but an interpretation of a regulation that has only been applied in this instance.

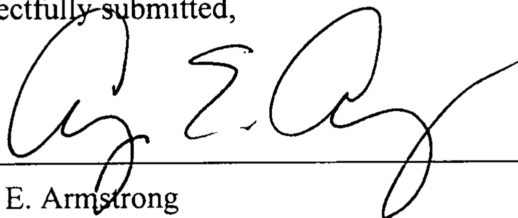
During oral arguments DHEC admitted that rainwater is water as identified in 7.11.11.

Chem-Nuclear now argues that DHEC only *applies* that regulation to "the movement of surface water." (Chem-Nuclear Petition, p. 24). Chem-Nuclear provides a strained rationale for rejecting this Court's conclusions based on 1) the misstatement that this Court required "elimination" as opposed to "minimization" and 2) its argument that 7.1.1, which provides that it is in addition to, and not a substitution for, other regulatory requirements, somehow precludes the Court's application of 7.11.11. Chem-Nuclear fails to explain exactly how this Court's interpretation of 7.11.11 is inconsistent with 7.1.1 and Sierra Club has uncovered no basis for this assertion.

CONCLUSION

Sierra Club asks this Court to deny the writ of certiorari and leave the sound analysis of the Court of Appeals intact. As that court stated: "It is important that DHEC enforce its own regulations and require Chem Nuclear to take action to comply with the technical requirements. This importance derives not simply from the need to avoid the serious consequences of non-compliance; it is important because it is the law." Chem Nuclear II at 21.

Respectfully submitted,



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October 22, 2015

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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 Petitioner.

Appellate Case No. 2015-001915

CERTIFICATE OF SERVICE

I hereby certify that on this date I served the foregoing Sierra Club's Return to the Petition for Certiorari of the Petitioner, Chem-Nuclear Systems, LLC on counsel for all parties, by placing copies of the same in the United States Mail, first-class postage prepaid, addressed to:

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