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S.C. Supreme Court

**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.

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

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The Petitioner, Chem-Nuclear Systems, LLC, (“Chem-Nuclear”), respectfully replies to the Return to the Petition for Writ of Certiorari filed by the Respondent, Sierra Club, as follows:

ARGUMENT AND CITATION OF AUTHORITY

Chem-Nuclear’s Petition Raises Novel Questions of Law

As a general rule, “[i]n a case raising a novel question of law regarding the interpretation of a statute, the appellate court is free to decide the question with no particular deference to the lower court.”¹ In Sierra Club v. S. C. Department of Health and Environmental Control and Chem-Nuclear,² the Court of Appeals remanded this challenge to the renewal of Chem-Nuclear’s license to the Administrative Law Court (“ALC”) to make findings regarding compliance with 24A S.C. Code Ann. Regs. 61-63 part 7.11.³ Compliance with Part 7.11 had not been litigated before the ALC, but the issue was determined to have been raised and ruled upon based on the Sierra Club’s post-hearing filings with the ALC. But, until Chem-Nuclear I, and the remand directive, evidence and arguments related to Part 7.11 has not been presented.

Moreover, in Chem-Nuclear I, the Court of Appeals articulated, for the first time, that “[Part] 7.11 imposes additional compliance requirements for Chem-Nuclear such that the balancing test of ALARA would not be sufficient to address

¹ Sloan v. S. C. Bd. Of Physical Therapy Examiners, 370 S. C. 452, 466, 636 S. E. 2d 598, 605 (2006).

² Sierra Club v. S.C. Dept. of Health and Envtl. Control and Chem-Nuclear Systems, LLC, 387 S. C. 424, 693 S. E. 2d 13 (Ct.App. 2010), *rehearing denied* (3 May 2010), *certiorari denied* (21 July 2011) (“Chem-Nuclear I”).

³ Chem-Nuclear I, 387 S. C. 424, 434-435, 693 S. E. 2d 13, 18-19.

whether Chem-Nuclear is in compliance with [Part] 7.11.”⁴ The Court of Appeals interestingly described the requirements of Part 7.11 as “technical requirements.”⁵

The Sierra Club argues, albeit incorrectly, that the questions presented in Chem-Nuclear’s Petition are not novel and, in addition, are traceable back to Chem-Nuclear I where this Supreme Court denied certiorari review. Sierra Club overlooks the fact that the Court of Appeals in this case⁶ (*i.e.*; Chem-Nuclear II), was reviewing an (1) entirely different Order from the ALC which contained (2) separate findings and (3) separate conclusions regarding compliance with Section 7.11 which (4) the ALC **had not addressed** in the case giving rise to Chem-Nuclear I. Moreover, the Court of Appeals, in Chem-Nuclear II, went well beyond its prior holding in Chem-Nuclear I regarding compliance with Part 7.11 by:

- a. distinguishing between “technical requirements” and “performance objectives”;⁷
- b. establishing different standards for determining compliance with technical requirements and performance objectives;⁸
- c. interpreting the minimization requirements of Part 7.11 as requiring reduction “to the smallest possible amount”;⁹ and

⁴ Chem-Nuclear I, 387 S. C. 424, 435, 693 S. E. 2d 13, 19.

⁵ Chem-Nuclear I, 387 S. C. 424, 435, 693 S. E. 2d 13, 18.

⁶ 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”).

⁷ Chem-Nuclear II, 2015 WL 4746971, **5-7, 21.

⁸ Chem-Nuclear II, 2015 WL 4746971, *10, 21.

- d. describing the responsibility to minimize contact between water and waste as the equivalent of “sheltering the disposal trenches from rainfall” and utilizing a “leachate collection system” within the trenches.¹⁰

The Court of Appeals’ newly minted interpretation of “minimization” in the context of Part 7.11, to the exclusion of any of the other requirements in 24A S.C. Code Ann. Regs. 61-63 that are applicable to the Barnwell facility, constitutes a novel question of statutory and regulatory interpretation for this Supreme Court.

The ALC’s Findings In 2005

The Sierra Club claims the ALC’s Finding No. 102 in the 2005 ALC Order – “[n]one of the trenches at the Chem-Nuclear site have an impermeable liner or a leachate collection system” – is the law of the case and, therefore, supports the Court of Appeals’ conclusions in Chem-Nuclear II that Chem-Nuclear had not complied with Subpart 7.11.11.4.¹¹ However, this argument ignores the fact the ALC, in 2005, did not find that the lack of a liner in disposal trenches resulted in non-compliance. It is undisputed that there are no liners in the trenches. Nevertheless, Chem-Nuclear’s lack of any challenge to an uncontested finding in 2005 does not bar Chem-Nuclear’s present argument that the disposal facility complies with Part 7.11’s requirements and that a lined trench is unnecessary to comply with Part 7.11. Moreover, a lined trench and leachate collection system are likely to increase the hazard of worker and (potentially) public exposure to radiation, rather than protect workers and the public.

⁹ Chem-Nuclear II, 2015 WL 4746971, **12-13.

¹⁰ Chem-Nuclear II, 2015 WL 4746971, **16-17, 21.

¹¹ Chem-Nuclear II, 2015 WL 4746971, **16-17.

**Chem-Nuclear Relies On More Than Results
In Order To Demonstrate Its Compliance
With The Applicable Regulations**

The 2005 ALC Order noted there was a pending request for information made by the Defendant, South Carolina Department of Health and Environmental Control (“DHEC”), seeking evaluation of the scientific and economic feasibility of (a) sheltering disposal trenches, (b) providing temporary dry storage for wastes received during wet weather conditions, and (c) sealing and grouting disposal vaults. In 2005, the ALC did not demonstrate any bias toward the outcome of this evaluation, but merely sought to have the questions which had previously been raised by DHEC resolved between Chem-Nuclear and DHEC.

As requested, Chem-Nuclear evaluated the measures identified by DHEC and the ALC and, in turn, provided the results of that evaluation to DHEC. Certain measures were found not feasible in light of the lack of measureable benefit to the public, as well as the increased risk hazard for worker exposure. The Court of Appeals, in Chem-Nuclear II, “transformed” DHEC’s request for evaluation into a compliance requirement by defining “minimization” and equating it with the construction of a “shelter” or roof over a trench.¹² The Court of Appeals went beyond DHEC’s 2005 request for additional information by adopting a position that a liner and leachate collection system would satisfy the regulatory requirement to minimize contact between water and waste.¹³

¹² Chem-Nuclear II, 2015 WL 4746971, **12-13.

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

In contrast to the Sierra Club's characterization of Chem-Nuclear's arguments, Chem-Nuclear is not attempting to evade technical requirements. Instead, Chem-Nuclear is seeking recognition that any technical modifications to the site, including those potentially mandated by the requirements of Part 7.11, must be evaluated just as the ALC suggested in 2005. Moreover, that such an evaluation includes a consideration of the regulatory duty, *nee* obligation, to protect workers from unnecessary exposure. Furthermore, while Chem-Nuclear agrees its monitoring of Mary's Branch Creek does not eliminate Chem-Nuclear's obligation to comply with all of the applicable sections of 24A S.C. Code Ann. Regs. 61-63, the monitoring data collected certainly supports a conclusion that Chem-Nuclear's operations are protective of the general population referenced in 24A S.C. Code Ann. Regs. 61-63, part 7.18.

The Sierra Club relies on a finding from the 2005 ALC Order:

It must be noted that at some monitoring stations tritium levels have actually increased between 1997 and 2001. And when the data [at some groundwater monitoring stations] concerning the tritium levels is compared to rainfall data as gauged by water table levels, it seems that the tritium concentrations have been varying with the amount of rainfall, and not necessarily varying as a result of new storage methods at the facility.

Nevertheless, this finding does not dilute the positive results achieved by Chem-Nuclear at the compliance point in Mary's Branch Creek. This data merely reflects that groundwater data fluctuates with travel time and decay rates. In any case, as a result of groundwater travel time and decay rates the discharge at the compliance point is still protective of the public.

Chem-Nuclear designed its disposal units (trenches)¹⁴ and engineered barriers¹⁵, as referenced in Subpart 7.11.11, by providing specific technical information to DHEC, as required by Part 7.6. That technical information, submitted as part of the application for license renewal, includes descriptions of the design features and of the operations of the disposal facility as required by Parts 7.6.2 and 7.6.6. Importantly, specific designs and operational methods are not mandated under Part 7.6. In addition, specific designs are also neither required nor mandated under Subpart 7.11.11. Consequently, it is illogical for the Court of Appeals to conclude Chem-Nuclear must set forth specific measures taken to address Subpart 7.11.11.¹⁶ Importantly, in 2012, the ALC did not rely exclusively on compliance data and results to support its conclusion that Chem-Nuclear's license comported with Subpart 7.11.11. Nor does Chem-Nuclear rely exclusively on compliance data and results. Instead, Chem-Nuclear relies on the design and function of the engineered barriers and the disposal units.¹⁷

¹⁴ See Part 7.2.8: "Disposal unit" means a discrete portion of the disposal site into which waste is placed for disposal. For near surface disposal, the unit is usually a vault or a trench."

¹⁵ See Part 7.2.9: "Engineered barrier" means a man-made structure or device that is intended to improve the land disposal facility's ability to meet the performance objectives in this part. This shall include above or below grade vaults or equivalent structures."

¹⁶ Chem-Nuclear II, 2015 WL 4746971, **11-17.

¹⁷ The engineered barriers and disposal units are designed to disperse liquid rather than have it collect. Such dispersal is consistent with Part 7.22 - "Disposal Site Suitability Requirements for Land Disposal." Subpart 7.22.1.6 contemplates contact between tritium and groundwater where "radionuclide movement and the rate of movement will result in the performance objectives being met." This regulatory recognition is reflected in Chem-Nuclear's reasonable and legitimate reliance on groundwater travel time and decay rates.

Minimization as envisioned in Subpart 7.11.11 must be read in concert with all the other requirements of 24A S.C. Code Ann. Regs. 61-63. Part 7 does not impose requirements for specific designs. The Court of Appeals has improperly construed Part 7 to require specific designs and has assigned no weight to the “function and design” of the trenches and engineered barriers which the ALC discussed in detail in 2012.

ALARA Is Not A “Competing Standard”

The Sierra Club claims Chem-Nuclear has never explained why it can't comply with ALARA and with Subpart 7.11.11. Sierra Club misapprehends ALARA, which is not a “competing design” requirement but, rather, dictates all decisions made related to the disposal operations at the Barnwell facility. ALARA 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”¹⁸ The design of the trenches and vaults in accordance with the objectives of Subpart 7.11.11 must also be consistent with ALARA and reflect **every reasonable effort** to maintain worker/public exposures to radiation as far below dose limits as is practical. As noted, the Court of Appeals wants trenches sheltered and water collected and pumped before it can percolate into the ground. While these proposed design features may satisfy the objectives of Subpart 7.11.11, such features may also result in increases to radiation exposure particular to workers at the facility. The Court of Appeals cannot divorce ALARA from compliance with Subpart 7.11.11.

¹⁸ Chem-Nuclear II, 2015 WL 4746971, *6 n.4 (quoting 24A S.C.Code Ann. Regs. 61-63 § 3.2.6 (Thomson Reuters West Supp.2010)).

The 2005 Feasibility Report

Contrary to the Sierra Club's assertions, the 2005 Feasibility Report is relevant. Unfortunately, the 2005 Feasibility Report is not reflected in the appellate record, although Chem-Nuclear requested the Court of Appeals, during the pendency of Chem-Nuclear I, to consider the report as it was done at the ALC's direction. As has been noted, the Sierra Club objected to any consideration of the 2005 Feasibility Report and the Court of Appeals, in Chem-Nuclear I, limited the ALC on remand to applying the findings of fact as set forth in the 2005 ALC Order. Chem-Nuclear should not be prejudiced by not "asking" the ALC to consider the 2005 Feasibility Report when the Court of Appeals' Chem-Nuclear I directive and intent on remand was clear.**19**

Sierra Club would like, on the one hand, to enjoy the admonishment that Chem-Nuclear received from the Court of Appeals for its failure to identify actions taken to address the concerns identified by the ALC in 2005, and on the other hand, ***actively*** prevent Chem-Nuclear from actually being able to demonstrate that it did take action following the issuance of the 2005 ALC Order.

19 Chem-Nuclear I, 387 S. C. 424, 438-439, 693 S.E.2d 13, 20, 21.

CONCLUSION

Based upon the foregoing arguments and citation of authority, the Petitioner, Chem-Nuclear Systems, LLC, respectfully requests 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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12 November 2015

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I, Stephen P. Groves, Esquire, hereby certify that on 12 November 2015, served one copy of the Reply to the Return to the Petition for Writ of 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:

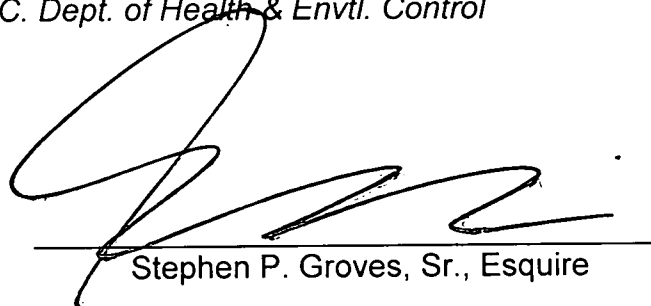
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