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

South Carolina Court of Appeals
414 S.C. 581, 779 S.E.2d 805 (Ct. App. 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.

PETITIONER'S RETURN TO RESPONDENT'S MOTION FOR COSTS

David J. Parrish, Esquire
Mary D. Shahid, Esquire
Sara S. Rogers, Esquire
NEXSEN PRUET, LLC
205 King Street, Suite 400
Charleston, South Carolina 29401
Telephone 843.720.1725
Telecopier 843.414.8206

Attorneys for Petitioner Chem-Nuclear Systems, LLC

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

Petitioner Chem-Nuclear Systems, LLC ("Chem-Nuclear") respectfully requests that Respondent Sierra Club's Motion for Costs pursuant to Rules 222 and Rule 242(j), SCARC, be denied.

Rule 442(j)(1) states in pertinent part: "When the decision of the Supreme Court has the effect of affirming or reversing in part or vacating the judgment of the lower court or tribunal which was on appeal, costs shall be allowed only as ordered by the Supreme Court." Similarly, Rule 222(a) states in pertinent part: "When an appeal is affirmed or reversed in part or is vacated, costs shall be allowed only as ordered by the appellate court."

The decision of this Court in this appeal falls within the scope of the above-quoted provisions of Rule 442(j)(1) and Rule 222(a), in that this Court's decision affirmed as modified in part and reversed in part the opinion of the court of appeals and remanded this matter to DHEC to conduct further proceedings based on guidelines set forth by this Court.

Chem-Nuclear had no choice but to seek this Court's review of the court of appeals' opinion, and the overall results of this Court's decision are favorable to Chem-Nuclear. As observed by this Court, "Chem-Nuclear's desire for our review of the court of appeals' decision is partly centered on the health and safety of its workers, and we understand this concern." *Sierra Club v. S.C. Dep't of Health & Envtl. Control*, Op. No. 27871 (S.C. Sup.Ct. filed Mar. 27, 2019) (Davis Adv.Sh. No. 13 at 21). As also noted by this Court, the court of appeals improperly limited the scope of evidence that could be considered by DHEC and the ALC (administrative law court) on remand, which improperly impeded Chem-Nuclear's ability to offer evidence to demonstrate its compliance with regulatory requirements. *Id. at 25.* Notably, too, DHEC submitted a respondent's

brief to this Court agreeing with Chem-Nuclear's arguments and expanding on certain issues raised by Chem-Nuclear. *Id.* at 8.

Although this Court's decision affirms certain portions of the court of appeals' opinion, this Court modified or reversed the portions of the court of appeals' opinion "to the extent it can be read to (1) mandate what specific actions must be taken in accomplishing the technical requirements of Part VII [of Regulation 61-63] and (2) completely ignore the concept of ALARA when Chem-Nuclear takes direct action to satisfy the technical requirements of Part VII." *Id.* at 27. This Court also modified or revised the portion of the court of appeals' opinion that limited the record and evidence that could be submitted to and considered by DHEC and the ALC on remand. *Id.* at 28. And this Court reversed the court of appeals' conclusion that Chem-Nuclear is noncompliant with subsection 7.11.11.4. *Id.* Accordingly, the overall result of this Court's decision was favorable to Chem-Nuclear because it reversed or modified the court of appeals' improper conclusions and improper evidentiary limitations that would have greatly impeded the ability of Chem-Nuclear to demonstrate, and DHEC and the ALC to determine, whether Chem-Nuclear demonstrates compliance with subsections 7.10.7, 7.11.11.1, and 7.11.11.2. of Regulation 61-63 upon remand.

The issues involved in this matter are complex. The effect of this Court's decision is to remove improper restrictions imposed on Chem-Nuclear, DHEC, and the ALC when addressing this matter upon remand as directed by this Court. Chem-Nuclear had a good faith basis for its positions before this Court, and the most substantial portions of its arguments were adopted by this Court. The ultimate determination of the effectiveness of Respondent's appeals will not be determined until DHEC considers and decides the matters that this Court has directed it to address upon remand. As

such, Respondent was not a "prevailing party" to the extent that concept is embodied in Rules 222 and 242(j)(1), SCRCP, and its motion for costs should be denied.

Finally, given the long history of this matter, there is a potential that this matter will yet again appear before this Court on appeal following conclusion of consideration of the matters required upon remand. Therefore, in addition to being inappropriate in this procedural posture, a motion for costs is premature at this time.

For these reasons, Chem-Nuclear respectfully request that Respondent's motion for costs be denied.

Respectfully submitted:

NEXSEN PRUET, LLC

By: David J. Parrish by [illegible]

David J. Parrish, Esquire
Mary D. Shahid, Esquire, Esquire
Sara S. Rogers, Esquire
205 King Street, Suite 400
Charleston, South Carolina 29401
Telephone 843.720.1725
Telecopier 843.414.8206
E-Mail: dparrish@nexsenpruet.com
mshahid@nexsenpruet.com
srogers@nexsenpruet.com

Attorneys for Petitioner Chem-Nuclear Systems, LLC

Charleston, South Carolina
May 21, 2019

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

South Carolina Court of Appeals
414 S.C. 581, 779 S.E.2d 805 (Ct. App. 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.

PROOF OF SERVICE FOR
PETITIONER'S RETURN TO RESPONDENT'S MOTION FOR COSTS

I, David J. Parrish, Esquire, hereby certify that on May 21, 2019, I served a copy of the PETITIONER'S RETURN TO RESPONDENT'S MOTION FOR COSTS 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:

Amy E. Armstrong, Esquire
Michael G. Corley, Esquire
SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT
Post Office Box 1380
Pawley's Island, South Carolina 29585

Robert Guild, Esquire
314 Pall Mall
Columbia, South Carolina 29201

Attorneys for the Respondent-Appellant,
Sierra Club

Jacquelyn S. Dickman, Esquire
Deputy General Counsel
Claire H. Prince, Esquire
Office of General Counsel
SOUTH CAROLINA DEPARTMENT OF HEALTH
AND ENVIRONMENTAL CONTROL
2600 Bull Street
Columbia, South Caroli29201

Attorneys for the Defendant,
S.C. Dept. of Health & Envtl. Control

David J. Parrish, Esquire

Charleston, South Carolina
May 21, 2019