

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appellate Case No. 2015-001915

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MAY 30 2019

S.C. 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.

**RESPONDENT'S REPLY TO
PETITIONER'S RETURN TO MOTION FOR COSTS**

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

In opposition to Respondent's Motion for Costs, Petitioner Chem-Nuclear Systems, LLC ("Chem-Nuclear") (1) misinterprets SCACR Rule 242(j), which provides for costs to be assessed when the decision "has *the effect* of affirming" the lower court, and (2) mis-characterizes this Court's Opinion as an "overall ... favorable" decision. Return at 2. Petitioner states that "the most substantial portions of its arguments were adopted by this Court." Return at 3. This interpretation is strained at best. As this Court detailed in its Opinion, Respondent instituted this appeal in 2004 to challenge DHEC's issuance of a license renewal to Chem-Nuclear based on its contention that the license renewal violates the applicable DHEC regulations. A complex procedural history followed;

however, the “effect” of this Court’s ruling cannot be disputed: this Court’s opinion ultimately concluded Sierra Club prevailed in its contention that Chem-Nuclear was non-compliant with subsections 7.11.11.1 and 7.11.11.2 of Reg. 61-63 and affirmed the Court of Appeals on these issues: “[w]e affirm the court of appeals’ decision that Chem-Nuclear failed to comply with subsections 7.11.11.1 and 7.11.11.2.” Opinion at 19. This Court also affirmed the Court of Appeals, contrary to the position of Petitioner, on the issue of whether the requirements of 7.11 are technical requirements: “[w]e affirm the court of appeals’ conclusion that subsections 7.11.11.1, 7.11.11.2, and 7.11.11.4 are in the category of ‘technical requirements’ Chem-Nuclear must satisfy as a condition of its license.” Opinion at 17. This Court disagreed with Petitioner on its arguments regarding the burden of proof at the Administrative Law Court. “We do not read the court of appeals’ conclusion that there was no evidence to show Chem-Nuclear’s compliance with subsections 7.11.11.1 and 7.11.11.2 to be an impermissible shift in the burden of proof.” Opinion at 25. This Court further disagreed with Petitioner’s arguments regarding the deference to the agency’s interpretation of the regulatory language “migration of water onto” stating: “Certainly, we are not required to give deference to an agency’s interpretation of a regulation where that very interpretation has changed within the same litigation.” Opinion at 23.

This Court did conclude that one regulatory provision (subsection 7.11.11.4) had been complied with, and reversed the Court of Appeals on that issue. Opinion at 17. Nonetheless, this narrow reversal does not lead to a determination that Respondent has not prevailed on its challenge to the license renewal. Throughout this case’s long history, the Respondent has consistently and repeatedly argued that unsealed and ungrouted covers on disposal vaults, holes in the bottom of disposal vaults, unlined trenches with permeable floors, and a disposal system designed to allow

water to flow into and out of the disposal units fail to meet the technical regulatory criteria. Indeed, the Respondent prevailed in its main objectives of obtaining findings and conclusions that Chem-Nuclear's license fails to meet the regulatory criteria and ensuring compliance therewith. In addition to the rulings contained in its opinion, this Court is requiring substantial further proceedings as a result of Respondent's challenge, allowing any additional evidence to be submitted on the legality of the license renewal. This result cannot appropriately be construed as being favorable overall to Petitioner.

Petitioner makes several points relating to its position the appeal was meritorious, therefore precluding an award of costs. "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.'" Return at 2. "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." Return at 2-3. "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." Return at 3. Respondent has never contended the arguments raised by Chem-Nuclear were without merit or made in bad faith. However, Respondent is not moving for sanctions or attorneys fees under a theory of frivolous litigation. The SCARC rules do not require such a showing and Petitioner has not cited to any case law requiring such an analysis.

Respondent submits that the motion is timely and is not premature. Subsequent proceedings at the lower courts would constitute separate and distinct litigation and Respondent should not be required to wait until any potential further proceedings are concluded before recovering these reasonable and modest costs. Indeed, it is Respondent's hope that this Court's Opinion will be the

last on the subject of Chem-Nuclear's compliance, and that Chem-Nuclear and DHEC will take the necessary steps to ensure regulatory compliance, thus dispensing with the need for further litigation.

For these reasons, Respondent Sierra Club respectfully requests that its motion for costs be granted by this honorable Court.



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May 28, 2019

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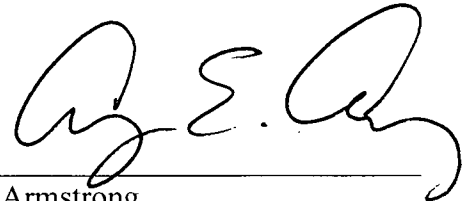
Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this date I served the foregoing motion for costs of Sierra Club 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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May 28, 2019