STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from the Court of Appeals

Appellate Case No.: 2015-001915

Sierra Club,

Respondent,

vs.

South Carolina Department of Health and Environmental Control and Chem-Nuclear Systems, LLC,

Defendants,

Of whom Chem-Nuclear, LLC is Petitioner

and South Carolina Department of Health and Environmental Control is Respondent.

BRIEF OF RESPONDENT SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL ON CERTIORARI

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II. STATEMENT OF THE CASE

The Department of Health and Environmental Control (the Department) concurs with the Statement of the Case set forth by the Petitioner, Chem-Nuclear Systems, LLC (Chem-Nuclear), in its Brief on Certiorari.

As an Agreement State with the federal Nuclear Regulatory Commission (NRC), the Department is required to promulgate regulations that are compatible with NRC regulations. As the agency authorized by the NRC to regulate the land disposal of low-level radioactive waste, the Department's regulations, found in Part VII of S.C. Code Ann. Regs. 61-63, establish the procedures, criteria, and terms and conditions for the issuance of the license to Chem-Nuclear to operate the low-level radioactive waste disposal facility in Barnwell, South Carolina. Having written the regulations at issue here for the Barnwell facility, the Department has the expertise and is best positioned to interpret, implement, and enforce them.

III. ARGUMENT AND CITATION OF AUTHORITY

The Department supports the Arguments and Citations of Authority set forth in Chem-Nuclear's Brief on Certiorari. In addition, as the agency charged with administering and enforcing the regulations at issue, the Department submits the following arguments that are unique to the agency's position as the regulator of the Barnwell facility.

A. THE COURT OF APPEALS ERRONEOUSLY SHIFTED THE BURDEN OF PROOF TO CHEM-NUCLEAR AND THE DEPARTMENT.

1. Sierra Club Bore the Burden of Proof At Each Stage of These Proceedings.

It is axiomatic that the burden of proof rests with the party who by the pleadings has the affirmative on the issue.[1] Generally, the burden of proof is on the party asserting the affirmative issue in an adjudicatory administrative proceeding.[2] The Sierra Club challenged the decision of the Department to renew Chem-Nuclear's license to operate the Barnwell low-level radioactive waste disposal facility. In the 2005 ALC Order, the Court stated that "Petitioner [Sierra Club], as the moving party challenging the Department's decision to renew Chem-Nuclear's license, bears the burden of proving its case by a preponderance of the evidence." (App. 386).[3] The ALC concluded that Sierra Club failed to present evidence so as to warrant reversal of the renewal of License No. 097 based on Sections 7.10.1 through 7.10.4 of S.C. Code Ann. Regs. 61-63 (2011 & Supp. 2017), and failed to demonstrate a violation of ALARA,[4] as set forth in Sections 3.4.2 and 7.18. (App. 390). The ALC stated that to demonstrate a violation of the regulatory requirements for disposal,

> [i]t is not enough to merely show that DHEC has not required, and Chem-Nuclear has not employed, the most protective or most isolating methods of radioactive waste disposal currently available. Rather, the regulatory standards require a highly detailed, highly technical analysis that weighs both the state of technology of waste disposal and the social and economic costs of various disposal practices to determine whether the methods in question adequately protect the public from exposure to radioactive materials.

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[1] See Leventis v. S.C. Dep't of Health & Envtl. Control, 340 S.C. 118, 132-33, 530 S.E.2d 643, 651 (Ct. App. 2000) (citing Hoffman v. County of Greenville, 242 S.C. 34, 39, 129 S.E.2d 757, 760 (1963), and 2 Am. Jr. 2d Administrative Law § 360 (1994)).

[2] Id. at 133 (citing 73A C.J.S. Public Administrative Law and Procedure § 128 at 35 (1983)).

[3] Sierra Club v. S.C. Dep't of Health and Envtl. Control, Docket No. 04-ALJ-07-0126-CC, 2005 WL 2997193 (S.C. Admin. Law Ct. Oct. 13, 2005) (hereinafter referred to as the 2005 ALC Order).

[4] "ALARA" means "as low as reasonably achievable" with respect to 5 S.C. Code Ann. Reg. 61-63, § 7.18, stating that "[r]easonable effort should be made to maintain releases of radioactivity in effluents to the general environment 'as low as reasonably achievable.'"

(App. 391). The ALC held that "Petitioner [Sierra Club] did not provide the Court with concrete, competent evidence to demonstrate that the disposal methods permitted under License No. 097 fail to satisfy such regulatory requirements, and, therefore, DHEC's permitting decision must stand." (App. 391).

On appeal, the Court of Appeals stated that its review was confined to the record, and that "the decision of the ALC should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law." (App. 355).[5] As this Court stated in Waters v. S.C. Land Resources Conservation Commission,

> [s]ubstantial evidence is not a mere scintilla of evidence nor evidence viewed blindly from one side, but is evidence which, when considering the record as a whole, would allow reasonable minds to reach the conclusion that the agency reached. The possibility of drawing two inconsistent conclusions from the evidence will not mean the agency's conclusion was unsupported by substantial evidence.[6]

Importantly, with respect to the burden of proof, this Court has held that "*the burden is on appellants* to prove convincingly that the agency's decision is unsupported by the evidence."[7] Thus, in maintaining its challenge to the license renewal, the Sierra Club bore the burden of proof. That burden was not met. The Court of Appeals affirmed the ALC's finding in the 2005 ALC Order that Sierra Club failed to present sufficient evidence that established Chem-Nuclear was not in compliance with Sections 7.10.1, 7.10.2, 7.10.3, and 7.10.4, and that the Sierra Club failed to

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[5] Sierra Club v. S.C. Dep't of Health and Envtl. Control and Chem-Nuclear Systems, LLC, 387 S.C. 424, 431, 693 S.E.2d 13, 16 (Ct. App. 2010), cert. denied, 2011 S.C. LEXIS 266 (July 21, 2011) (hereinafter referred to as Chem-Nuclear I).

[6] Waters v. S.C. Land Resources Conservation Comm'n, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996) (citing Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984)).

[7] Palmetto Alliance, Inc., 282 S.C. at 432, 319 S.E.2d at 696 (citing Hamm v. AT&T, 302 S.C. 210, 394 S.E.2d 842 (1990)) (emphasis added).

present evidence demonstrating Chem-Nuclear violated Section 7.18 and the ALARA test. (App. 352).[8]

2. The Record on Remand was limited by the Court of Appeals' Order in Chem-Nuclear I.

The Court in Chem-Nuclear I remanded the case to provide the ALC with an opportunity to make specific findings regarding subsections 7.10.5 through 7.10.10 and to determine whether Chem-Nuclear complied with sections 7.11 and 7.23.6. Sections 7.11 and 7.23.6 were not specifically challenged at the initial evidentiary hearing before the ALC, and were only first raised by the Sierra Club in its post-hearing motion for reconsideration. Nonetheless, the Court found that the Sierra Club had "generally preserved" compliance issues involving subsections 7.11 and 7.23.6, and instructed the ALC on remand to apply the factual findings from the 2005 ALC Order to subsections 7.11 and 7.23.6. (App. 352, 353).[9] Specifically, the Court found that both subsections 7.11 and 7.23.6 impose "additional compliance requirements" on Chem-Nuclear, and instructed the ALC to "apply its factual findings to the 'technical requirements' of these regulations" to determine if Chem-Nuclear is in compliance. (App. 357 and 359).[10] Importantly, the Court confined the ALC to the findings in the 2005 ALC Order with instructions to apply these findings to regulatory sections (7.11 and 7.23.6) that were not specifically raised or addressed during the evidentiary hearing.

Following the Court's instructions, the ALC considered on remand *only the findings from the 2005 ALC Order*. (App. 328).[11] With concurrence from the parties, the ALC applied its factual

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[8] Chem-Nuclear I, 387 S.C. 424, 693 S.E.2d 13.
[9] Id. at 432, 693 S.E.2d at 17.
[10] Id. at 435, 693 S.E.2d at 17-18.
[11] Sierra Club v. S.C. Dep't of Health and Envtl. Control and Chem-Nuclear Systems, LLC, Docket No. 04-ALJ-07-0126-CC (S.C. Admin. Law Ct. 2012), hereinafter referred to as the 2012 ALC Order.

findings from the 2005 ALC Order to subsections 7.11.11 and 7.23.6, and made specific findings regarding the remaining subsections 7.10.5 through 7.10.10. In doing so, the ALC did not shift the burden of proof, stating again that the burden was on the Sierra Club to demonstrate, by a preponderance of the evidence, that the license renewal was not authorized based on the ALC's factual findings in the 2005 ALC Order as applied to the remanded sections. (App. 348). Having found the burden of proof remained with the Sierra Club, the ALC concluded that "Petitioner [Sierra Club] has failed to carry that burden, as this Court finds and concludes that the factual findings in the 2005 Decision, when applied to 24A S.C. Code Ann. Reg. 61-63 Secs. 7.10.5 – 7.10.10, 7.11, and 7.23.6, demonstrate that the Barnwell Facility is compliant with these regulations and that renewal of License No. 097 was proper." (App. 348).

3. The Court in Chem-Nuclear II shifted the burden for demonstrating compliance with the Court's novel and erroneous interpretation of the regulation.

The Sierra Club appealed the 2012 ALC Order.[12] The Sierra Club maintained its objections to the license renewal and, as the complaining party, it should have borne the burden of proof.[13] It did not. Instead, the Court of Appeals erroneously shifted the burden to Chem-Nuclear and the Department by adopting a novel interpretation of Sections 7.11 and 7.23.6 that required a demonstration of "specific actions" taken by Chem-Nuclear to show compliance. The Court stated, "[u]nder our holding in *Chem-Nuclear I*, . . . the technical requirements of subsections 7.11.11 and 7.23.6 require Chem-Nuclear to take action to design and construct the disposal site,

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[12] Sierra Club v. S.C. Dep't of Health and Envtl. Control and Chem-Nuclear Systems, LLC, Op. No. 5253 (S.C. Ct. App. filed July 30, 2014), reh'g granted (Aug. 12, 2015), opinion withdrawn and superseded by 414 S.C. 581, 779 S.E.2d 805 (Ct. App. 2015) (hereinafter referred to as Chem-Nuclear II), cert. granted (Oct. 26, 2017).

[13] See Leventis v. South Carolina Dep't of Health and Envtl. Control, 340 S.C. 118, 530 S.E.2d 643 (Ct. App. 2000) (citing Hoffman v. County of Greenville, 242 S.C. 34, 39, 129 S.E.2d 757, 760 (1963)).

disposal units, and engineered barriers to meet the specifications in those subsections." (App. 10).[14] The Court then created an artificial isolation of the regulatory requirements by defining two categories of regulation: (1) regulations containing "technical requirements" that require Chem-Nuclear to take actions to comply with the regulation, and (2) regulations containing "performance objectives" that require Chem-Nuclear to achieve certain results under the regulation. (App.007-008).[15]

The difficulty with the Court of Appeals' interpretation is two-fold. First, subsection 7.11.11 does not contain the technical specifications for the design and construction of the disposal units and engineered barriers that appear to be ordered by the Court. Subsection 7.11.11 plainly articulates a series of objectives for the design and construction of the disposal units and engineered barriers. It does not specify design and construction features such as covering of trenches and sealing and grouting of vaults. Second, having created this artificial separation in the regulation, the Court then uses the limited findings from the 2005 ALC Order to conclude that Chem-Nuclear, the Department, or both, failed to demonstrate specific, affirmative actions to show compliance with subsection 7.11.11.1, 2, 4, and consequently 7.10.7. In this way, the Court impermissibly shifts the burden of proof to Chem-Nuclear and/or the Department to demonstrate compliance with the "specific requirements" of section 7.11, as interpreted by the Court.

Subsection 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."[16] These objectives are contained under

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[14] Chem-Nuclear II, 414 S.C. at 596, 779 S.E.2d at 812.
[15] Id. at 593-594, 779 S.E.2d at 811.
[16] While South Carolina's regulations governing land disposal of radioactive waste generally mirror the federal NRC regulations to maintain compatibility as an agreement state with NRC, subsection 7.11.11 was written by the Department and promulgated to reflect the objectives for

the umbrella of Section 7.11, "Conditions of Licenses." (App. 426).[17] Section 7.11 requires that "[t]he disposal units and the incorporated engineered barriers shall be designed and constructed to meet the following objectives" that are listed in subsections 7.11.11.1 through 7.11.11.7 and 7.11.11.12. Condition 10 of License No. 097 requires Chem-Nuclear to comply with the requirements of Part VII of S.C. Code Ann. Regs. 61-63, which include Section 7.11. Condition 82 of the license lists the objectives in subsection 7.11.11. (App. 438). 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 in Chem-Nuclear II concluded that Chem-Nuclear failed to provide evidence that it complied with the Court's novel interpretation of these subsections of the regulation, it also concluded that Chem-Nuclear did not comply with subsection 7.10.7, which requires that "the applicant's demonstration provides reasonable assurance that the applicable technical requirements of this part [Part VII] will be met." (App. 029).[18] However, the plain language of the regulation relative to the objectives in subsection 7.11.11 does not require the "specific actions" articulated by the Court of Appeals.

i. Subsection 7.11.11.1 does not require actions to prevent rainfall onto the disposal units.

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the operational changes instituted in 1995 requiring the use of the engineered barriers and disposal units, making these requirements more stringent than the NRC.

[17] S.C. Code Ann. Regs. 61-63, Section 7.11.

[18] Chem-Nuclear II, 414 S.C. at 617, 779 S.E.2d at 823.

With respect to subsection 7.11.11.1, the Court concluded that "...neither 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 active vaults or trenches." (App. 16).[19] The fatal flaw with the Court's finding is that subsection 7.11.11.1 does not support an interpretation that equates minimizing the migration of water onto the disposal units *to preventing rainfall* onto them, and the burden was not on Chem-Nuclear or the Department to demonstrate compliance with a standard that is not supported by the regulations and was not raised during the ALC hearing. By demanding a demonstration of affirmative actions by Chem-Nuclear and/or the Department to show compliance with the Court's new and erroneous interpretation of 7.11.11.1, and in presuming that a lack of specific findings in the 2005 ALC record demonstrate a failure to comply with this interpretation, the Court impermissibly shifts the burden of proof to Chem-Nuclear and DHEC.

The plain language of the regulation does not require a construction design that prevents rainfall onto disposal units. The regulation, taken as a whole, supports the Department's interpretation of subsection 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 the units. 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

[19] Id. at 602-603, 779 S.E.2d. at 816.

surface water and groundwater access to wastes."[20] License Condition 71.B requires that trenches be protected to prevent *surface water runoff* from entering active trenches. (Emphasis added). (App. 437). License Condition 73 requires Chem-Nuclear to use proper surface water management techniques to ensure *surface water runoff* is directed away from the trenches. (Emphases added). (App. 437). The clear intent of the regulation is to manage rainfall once it lands.

In determining the ALC erred in finding Chem-Nuclear complied with subsection 7.11.11.1, the Court relied, in part, on a DHEC directive in 2001 directing Chem-Nuclear to consider such measures as the sheltering of disposal trenches from rainfall and the sealing and grouting of disposal vaults, and on the 2005 ALC Order directing Chem-Nuclear to study the feasibility of implementing such designs. (App. 019).[21] Chem-Nuclear conducted the study required by the ALC and submitted the results to the Department.[22] Of course, the 2005 ALC Order would not have contained the results of the study, yet the Court of Appeals assumed that these measures should have been undertaken even though it acknowledged that it did not know the results of the study or the reasons for the Department's concurrence with it. (App. 033).[23] Nonetheless, the Court used a report not in the record and the details of which were not known to it to cast doubt on the Department's decision to renew the license and to conclude that it failed to enforce the law. (App.033).[24] This placed Chem-Nuclear and the Department between the proverbial rock and a hard place by shifting the burden to them to demonstrate why specific actions

[20] S.C. Code Ann. Regs. 61-63, subsection 7.6.6.
[21] Chem-Nuclear II, 414 S.C. at 605, 779 S.E.2d at 817.
[22] See Brief on Certiorari of Petitioner, Chem-Nuclear Systems, LLC, Statement of the Case, at pp. 2-3, for the results of the study.
[23] Chem-Nuclear II, 414 S.C. at 622, 779 S.E.2d at 826.
[24] Id.

not required by the regulation, not addressed in the proceedings below, and not articulated by the Court until the second appeal after the remand, were not implemented.

Based on no technical evidence or support, the Court established a compliance standard for subsection 7.11.11.1 that appears to require the use of rain covers or shelters over the trenches and vaults. Use of such rain covers or shelters over the trenches and vaults cannot be undertaken without regard to their potential impacts on compliance with other regulatory provisions, including the "performance objectives" in Sections 7.18 through 7.21, which include maintaining radiation exposure as low as reasonably achievable (ALARA). Subsection 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 in accordance with ALARA principles. The Court's interpretation of subsection 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, and would subject workers to real safety issues.

ii. Subsection 7.11.11.4 does not require a leachate collection system.

The Court's finding of non-compliance with subsection 7.11.11.4 appears to be based on the existing design of the vaults and the absence of a leachate collection system. The Court stated, "the ALC's finding regarding the non-existence of a leachate collection system undermines its

conclusion that Chem-Nuclear complied with this subsection and supports our determination that the ALC erred in reaching that conclusion." (App. 025).[25] There is *nothing* in the regulation that supports an interpretation that this subsection requires a leachate collection system. 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. To state that such a system "would allow Chem-Nuclear to satisfy the four requirements of subsection 7.11.11.4"[26] shifts the burden to Chem-Nuclear, and by extension to the Department, to provide evidence as to why a leachate collection system not required by the regulation is what would allow Chem-Nuclear to show compliance with this subsection. (App. 025).

The worker safety and worker exposure issues raised by Chem-Nuclear and the Department about such a system were summarily dismissed by the Court as an "argument contrary to the purpose and intent of the regulation." (App. 026).[27] The Court's interpretation conflicts with the plain language of the regulations. Subsection 7.1.3's requirements for licensing land disposal of radioactive waste include establishing "procedural requirements and *performance objectives* applicable to any method of land disposal." (Emphasis added). Subsection 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

[25] Id. at 612, 779 S.E.2d at 821-822.
[26] Id.
[27] Id. at 613, 779 S.E.2d at 821.

requirements to the disposal operations. To state 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 subsection 7.11.11.4. The Court overreaches in its interpretation without any evidence in the record or any "science-based" evidence that compliance with this section requires the "specific action" of implementing a leachate collection system. The Court's interpretation would place the Department in the untenable position of enforcing a regulatory interpretation that isolates certain provisions from others with real life consequences for worker exposure.

iii. Subsection 7.11.11.2 does not require sealing the drainage holes in the vaults.

The Court appears to be requiring the "specific action" of sealing the drainage holes in the vaults for compliance with subsection 7.11.11.2. The Court stated that,

> "[t]hese holes permit water that has come into contact with residual tritium to drain into the trenches, which, in turn, allow the water to percolate into the soil and groundwater beneath the facility. *This supports that Chem-Nuclear has not taken action to reduce to the smallest possible amount the migration of waste-contaminated water out of its vaults and trenches.*"

(Emphasis added). (App. 022).[28] By linking compliance to Chem-Nuclear having undertaken this specific action, the Court impermissibly shifts the burden to Chem-Nuclear and the Department as to why the absence of such action is *not* evidence of noncompliance. 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 in this case, and sealing of the vaults is required for compliance, it will 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 for environmental and worker safety.

[28] Chem-Nuclear II, 414 S.C. at 609, 779 S.E.2d at 810.

The Court concluded that the ALC erred in finding Chem-Nuclear complied with subsection 7.11.11.2. The Court based this, in part, on the absence of findings in the 2005 ALC record to support the Court's erroneous interpretation of this objective. (App. 023-024).[29] In Chem-Nuclear I, the Court stated that Section 7.11 imposed "additional compliance requirements" not addressed by the 2005 ALC Order, and instructed the ALC on remand to apply its factual findings to the "technical requirements" of Section 7.11, including subsection 7.11.11.2. (App. 358).[30] Without further guidance from the Court and limited by the 2005 factual findings, the ALC nonetheless applied the factual findings, affirming the Department's conclusion that Chem-Nuclear complied with this subsection.

The ALC identified findings that, as applied to subsection 7.11.11.2, "reflect a much greater effort to minimize the migration of waste or waste contaminated water out of the disposal units." (App. 342),[31] Regardless, the Court took the ALC's statement that "there is no finding that Chem-Nuclear's waste disposal design is faulty or fails to minimize the migration of...waste contaminated water out of the disposal units" as evidence that the ALC erred in relying on the absence of such a finding in the 2005 order. (App. 023)[32] The Court stated that the ALC "could not rely on the fact that the 2005 order did not contain the conclusion we ordered the ALC to make on remand..." (App. 023).[33] However, the lack of findings in the 2005 ALC Order to support the Court's erroneous interpretation of subsection 7.11.11.2 is *not* indicative of a lack of compliance with this subsection. The ALC on remand stated that "the findings do not reflect that Chem-Nuclear failed to minimize the migration of waste or waste contaminated water out of the disposal

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[29] Id.
[30] Chem-Nuclear I, 387 S.C. at 439, 693 S.E.2d at 20.
[31] 2012 ALC Order.
[32] Chem-Nuclear II, 414 S.C. at 609, 779 S.E.2d at 810.
[33] Id.

unit." (App. 342).[34] Yet the Court found that subsection 7.11.11.2 "required DHEC and the ALC to analyze the sufficiency of Chem-Nuclear's actions to comply with the plain language of this subsection." (App. 023). This clearly shifted the burden from Sierra Club to Chem-Nuclear and the Department. Moreover, the sufficiency of this analysis is premised on the Court's own view of what this subsection requires which is substantively different from the Department's own interpretation. Imposing a flawed interpretation onto the Department and Chem-Nuclear, and using the absence of findings to support that interpretation as a determinant that Chem-Nuclear is not in compliance, sets up an impermissible shifting of the burden of proof to Chem-Nuclear and the Department.

Finally, the Court also based its finding of non-compliance with subsection 7.11.11.2 on its holding that Chem-Nuclear failed to minimize the migration of water onto the vaults under subsection 7.11.11.1. (App. 022).[35] Based on the arguments posited in Section 3.A.i. above regarding the Court's flawed interpretation of subsection 7.11.11.1, the Court's reliance on its conclusion that Chem-Nuclear did not comply with that subsection irreparably taints its conclusion regarding Chem-Nuclear's non-compliance with subsection 7.11.11.2.

iv. Non-compliance with subsection 7.10.7 is based on the Court's erroneous conclusion that Chem-Nuclear and the Department failed to demonstrate compliance with subsection 7.11.11.

The burden shifted to Chem-Nuclear and the Department to demonstrate compliance based upon the Court's holding that, "[i]n light of our holding in *Chem-Nuclear I*, . . . it is no longer reasonable for DHEC to argue Chem-Nuclear complied with subsection 7.10.7 without considering what action Chem-Nuclear took to comply with the technical requirements of

[34] 2012 ALC Order.
[35] Chem-Nuclear II, 414 S.C. at 609, 779 S.E.2d at 810.

7.11.11." (App. 031).[36] The Court stated that "Chem-Nuclear failed to take *any* action to comply with subsections 7.11.11.1 and 7.11.11.4" and that "DHEC could not identify one action Chem-Nuclear took" to meet the requirement of 7.11.11.1. (App. 031).[37] The Court then states that "[t]o determine whether DHEC complied with subsection 7.10.7" required consideration of DHEC's role in the disposal of low-level radioactive waste. (App. 031).[38] Neither Chem-Nuclear nor the Department should carry the burden of proving actions that demonstrate compliance with interpretations that were never contemplated at the Department or ALC proceedings. The burden of proof rests with the Sierra Club as the challenging party. The Court's own novel and erroneous interpretation of the regulation and its insistence that Chem-Nuclear and/or the Department demonstrate in the record "specific actions" taken to show compliance, improperly shifts that burden proof to Chem-Nuclear and to the Department.

B. THE COURT FAILED TO ACCORD DEFERENCE TO THE AGENCY IN THE INTERPRETATION OF ITS OWN REGULATIONS.

The Court's interpretation of subsections 7.11.11.1, 2, and 4 and subsection 7.10.7 establishes "specific actions" required to show compliance. 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. While the Court may correct the decision of the ALC if it is affected by an error of law, and questions of law are reviewed de novo, the Court must generally give deference to an agency's interpretation of its own regulations.[39] And, the

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[36] Id. at 619, 779 S.E.2d at 824.
[37] Id.
[38] Chem-Nuclear II, at 619, 779 S.E.2d at 825.
[39] S.C. Dep't of Revenue v. Blue Moon of Newberry, Inc., 397 S.C. 256, 260-261, 725 S.E.2d 480, 483 (2012), reh'g denied (May 4, 2012) (citing Brown v. Bi-Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003)).

possibility of drawing two inconsistent conclusions from the evidence does not prevent an agency's finding from being supported by substantial evidence.[40]

1. The Court of Appeals failed to give effect to the Department's application of the plain meaning of the regulation.

The Department's actions are wholly consistent with the requirements of subsections 7.11.11. As this Court articulated in Kiawah Development Partners II, interpreting and applying statutes and regulations administered by the agency is a two-step process.[41] 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. Subsection 7.11.11 is clear and unambiguous in its establishment of design and construction "objectives" as opposed to "specifications." The plain language of subsection 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. These measures may or may not be technically feasible, and the plain meaning of subsections 7.11.11.1, 2 and 4 does not require the "specific actions" the Court has erroneously established as measures of compliance with the regulation. Accordingly, the ALC's affirmation of the Department's decision to issue the license to Chem-Nuclear without requiring a showing of certain "specific actions" not demanded by the regulations was proper.

2. Deference to the Department's reasonable interpretation of its own regulation is warranted.

Even if the Court were to find the regulation requires interpretation of its very technical and interlocking provisions, the second prong of this Court's two-step analysis applies. If the

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[40] Grant v. S.C. Coastal Council, 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995) (quoting Palmetto Alliance, Inc., 282 S.C. at 432, 319 S.E.2d at 696).

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

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.'"[42]

The Department's interpretation of its own regulations was not arbitrary, capricious or manifestly contrary to the statute, and the Department did not fail to enforce the law. (App. 033).[43] The regulations contemplate the management of surface water and groundwater. The Department promulgated subsection 7.11.11 to ensure that the disposal units and engineered barriers are designed and constructed to minimize migration of water onto and out of the disposal units and 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. Of utmost importance, the Department considered other applicable regulatory requirements, including those required to protect exposure of workers, inadvertent intruders, and the general public. Here, the Court of Appeals' analysis applies the regulations in a manner that isolates regulatory compliance from compliance with other applicable regulatory requirements. The Court of Appeals interprets 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.

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[42] Id., 766 S.E.2d at 718-719.

[43] Chem-Nuclear II, 414 S.C. at 622, 779 S.E.2d at 826.

As an Agreement State with the NRC, the Department is required to promulgate regulations that are compatible with NRC regulations. (App. p. 366). The Department's 1995 revisions to Part VII requiring engineered barriers and the use of disposal vaults for all waste classes, and codifying the requirement for enhanced caps on all disposal trenches, resulted in regulations more stringent than NRC. (App. 366). The Department has vigorously enforced the design and construction criteria for the disposal units to meet the objectives of subsection 7.11.11. These objectives are not only in the regulation but also in Chem-Nuclear's license as Condition No. 82. (App. 438). The Department stands in the best position to interpret, implement and enforce these objectives.

The Department has responsibility to administer the regulations with consideration of the interaction and interconnectedness of the full regulation. In considering all of the regulatory requirements for the renewal of the Barnwell license, the Department properly found, and the ALC affirmed, that Chem-Nuclear demonstrated with reasonable assurance that the applicable technical requirements of Part VII were met as required by subsection 7.10.7. The Department should be permitted to consider all regulatory options that may enhance compliance with the provisions of subsection 7.11.11 which may or may not include the specific actions the Court appears to be using as the compliance standard. On these highly technical requirements and where environmental protection and worker and public safety are complex and interconnected, the Court must not ignore the expertise and responsibility of the governing agency in the interpretation of its own regulations.

CONCLUSION

Based upon the foregoing arguments and citation of authority, the Respondent, South Carolina Department of Health and Environmental Control, respectfully requests this Supreme Court reverse the Court of Appeals' decision as to the matters raised in this appeal.

Respectfully Submitted,

South Carolina Department of Health and Environmental Control

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Appellate Case No.: 2015-001915

Sierra Club,

Respondent,

vs.

South Carolina Department of Health and Environmental Control and Chem-Nuclear Systems, LLC,

Defendants,

Of whom Chem-Nuclear, LLC is Petitioner

and South Carolina Department of Health and Environmental Control is Respondent.

CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies that this Brief of Respondent complies with Rules 211(b), SCACR.

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CERTIFICATE OF SERVICE

I, Sandra R. Wessinger, Legal Assistant for the South Carolina Department of Health and Environmental Control, hereby certify that I have on this **29th day of January, 2018,** served a copy of the *Brief of Respondent South Carolina Department of Health and Environmental Control on 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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