ORIGINAL

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
414 S.C. 581, 779 S.E.2d 809 (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,

and South Carolina Department of Health and Environmental Control is,

Respondent.

REPLY BRIEF ON CERTIORARI OF THE PETITIONER, CHEM-NUCLEAR SYSTEMS, LLC,

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The Petitioner, Chem-Nuclear Systems, LLC, hereby responds and replies to the Brief on Certiorari of the Respondent, Sierra Club, as follows:

ARGUMENT AND CITATION OF AUTHORITY

A. The Sierra Club Argued That The Court Of Appeals Should Interpret *24A S.C. Code Ann.* Reg. 7.11.11.11 So As To Prevent Contact Between Water And Nuclear Waste.

Sierra Club argues in its brief that at no point did it, or the Court of Appeals, seek to interpret *24A S.C. Code Ann. Reg.* 61-63, Subpart 7.11.11 in such a manners as to prohibit "water coming into contact with waste."**1** This is, at best, a disingenuous argument given the facts. Despite Sierra Club's "protestations", it is clear that the Sierra Club advocated that the Court of Appeals should interpret *24A S.C. Code Ann. Reg.* 61-63, Subpart 7.11.11 as mandating no contact between water and waste. Moreover, the Sierra Club "seized" on the arguments of both Chem-Nuclear and the Respondent, South Carolina Department of Health and Environmental Control ("SCDHEC"), regarding minimization to create a "*gotcha*" situation in *Chem-Nuclear II* for Chem-Nuclear and SCDHEC.**2**

Sierra Club's initial challenge to the reissuance of Chem-Nuclear's license, as described in 2004, was to the practice of "shallow land burial in unlined trenches below the water table." Sierra Club noted that "[f]ar more ***protective management practices are readily available***, but are ***not required*** by this proposed license."**3** And, while the

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1 Sierra Club's Brief on Certiorari, p.5.

2 *See* Sierra Club v. South Carolina Dept. of Health and Envtl. Control, 2014 WL 3734366 (Ct.App., filed 30 July 2014), *opinion withdrawn and superseded by,* 414 S.C. 581, 779 S.E.2d 805 (Ct.App. 2015), *certiorari granted* (26 October 2017) ("Chem-Nuclear II").

3 (App.422, para. 1) Emphasis added). Sierra Club was referring to the design provided by Chem-Nuclear for a facility located in North Carolina which isolated waste from

ALC affirmed renewal of Chem-Nuclear's license,[4] the ALC identified issues needing further evaluation, based on Sierra Club's arguments, as "implementing designs and operational procedures at the Barnwell Site that will (1) shelter the disposal trenches from rainfall and prevent rainfall from entering the trenches, [and] (3) provide for sealing and grouting the concrete disposal vaults to ***prevent*** the intrusion of water to the maximum extent feasible."[5]

Consequently, when the Sierra Club's license challenge was remanded in *Chem-Nuclear I*[6] for review under the "additional compliance requirements"[7] in *24A S.C. Code Ann. Reg.* 61-63, the Sierra Club, in its arguments to the ALC, equated "prevention" with the regulatory requirement for "minimization". "[Sierra Club] argues that the North Carolina design, created by Chem-Nuclear, demonstrates that ***sealing the vaults to prevent contact between the waste and water*** would be one step towards minimizing this water migration and groundwater contamination." (App. 341, para. 1) (Emphasis added). And, in its brief to the Court of Appeals, in *Chem-Nuclear II*, Sierra Club equated minimization with prevention.[8]

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water utilizing an "earth mounded bunker design". (App.376-378, paras. 67-75).. Sierra Club endorsed the theoretical concept of "assured isolation" which is a storage concept, not a disposal concept. (App.378, paras. 76-78).

4 Sierra Club v. South Carolina Dept. of Health & Envtl. Control, 2005 WL 2997193, *11 (SC ALJ, filed 13 October 2005) (App.390-391, paras. 12-17).

5 Sierra Club v. South Carolina Dept. of Health & Envtl. Control, 2005 WL 2997193, *22 (App.390-391, para. 16).

6 *See* Sierra Club v. South Carolina Dept. of Health & Envtl. Control, 387 S.C. 424, 693 S.E.2d 13 (Ct.App. 2010), *certiorari denied* (21 July 2011) ("Chem-Nuclear I").

7 Chem-Nuclear I, 387 S.C. 424, 435, 693 S.E.2d 13, 18-19. (App.358, para. 2).

8 (App.315, lines 3-5) ("The vaults have holes in the bottoms, are not grouted and sealed at the top, have no cover or roof, and thus allow rain to fall directly into the vault during the loading period.").

In response to Sierra Club's efforts to re-write the "minimization" requirements in *24A S.C. Code Ann. Reg.* 61-63, Subpart 7.11.11 and, in turn, convert those requirements to mandate "prevention," Chem-Nuclear and SCDHEC sought, in their Joint *Chem-Nuclear II* Brief, to distinguish by definition "minimization" from "prevention." (App. 255-256). Chem-Nuclear was not seeking to create a new standard, simply to clarify the existing standard and the inconsistencies between the physical barriers promoted by Sierra Club and the actual requirements of the *24A S.C. Code Ann. Reg.* 61-63, Subpart 7.11.11. (App.255-256).

Sierra Club seized on Chem-Nuclear's and SCDHEC's suggested definition of "minimization" and cried "*gotcha*." The Court of Appeals, in *Chem-Nuclear II*, reviewed Chem-Nuclear's containment measures to determine if water control measures were incorporated to reduce water infiltration "to the smallest amount possible."**9** The Court of Appeals noted that it "pressed [Chem-Nuclear's counsel] at oral argument to list what Chem-Nuclear had done to reduce rainfall onto active disposal units", but then the Court of Appeals rejected the information offered by Chem-Nuclear because that information hadn't been provided to the ALC.**10**

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9 Chem-Nuclear II, 414 S.C. 581, 607-611, 779 S.E.2d 805, 818-820.

10 *See Evaluation of the Scientific and Economic Feasibility of Implementing New Designs and Operational Procedures At the Barnwell Site as Directed by the South Carolina Administrative Law Court Order Dated October 13, 2005* (the "Feasibility Study"). Chem-Nuclear sought to supplement the appellate record in the Court of Appeals with the Feasibility Report, but the Sierra Club objected and supplementation was denied. Nevertheless, the Court of Appeals specifically acknowledged the study and the Feasibility Report noting "[t]he record does not contain the results of these studies or the reasons [SC]DHEC chose not to amend the license requirements as a result of the [Feasibility] [R]eport." *See* Chem-Nuclear II, 414 S.C. 581, 621 fn.22, 779 S.E.2d 805, 825 fn.22.

Sierra Club has ***always*** advocated the ***prevention*** of contact between waste and water. Based on these very expressed concerns, in 2004 (some 14 years ago), the ALC sought studies to address prevention – through the use of roofs, liners, and sealed vaults. The Sierra Club's focus has never been on ***minimization***, since it has always been on ***prevention***. This position continued through the remand to the ALC and the appeal which followed the ALC's Order on Remand.**11** SCDHEC and Chem-Nuclear sought to distinguish "minimization" and "prevention" and then faced the Court of Appeals' incredulousness for not being able to address regulatory requirements not litigated by the ALC because they had been raised, for the first time, in the Sierra Club's post-trial motions. The Court of Appeals' *Chem-Nuclear II* oral argument and decision embarrassed counsel and harmed Chem-Nuclear which has suffered as a litigant through this process. This Supreme Court has recognized these type of injuries and , injuries which this Supreme Court has recognized. "[T]his is not a 'gotcha' game aimed at embarrassing attorneys or harming litigants",**12** "but rather is an adherence to settled principles that serve an important function."**13**

It seems patently unfair for the Court of Appeals to have evaluated Chem-Nuclear's regulatory compliance using the newly-minted standard – "to reduce to the smallest possible amount, extent, size, or degree"**14** – which Chem-Nuclear and SCDHEC

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11 Chem-Nuclear II, 414 S.C. 581, 587, 779 S.E.2d 805, 808.

12 Johnson v. Roberts, ___ S.C. ___, ___ S.E.2d ___ (Ct.App. 2018) (Slip Op. No. 5535, p.5, filed 7 February 2018) (*quoting* Atlantic Coast Bldrs. & Contractors, LLC v. Lewis, 398 S. C. 323, 730 S. E. 2d 282 (2012).

13 Atlantic Coast Bldrs. & Contractors, LLC v. Lewis, 398 S. C. 323, 329-330, 730 S. E. 2d 282, 285.

14 Chem-Nuclear II, 414 S.C. 581, 607-611, 779 S.E.2d 805, 818-820.

introduced[15] solely to definitionally distinguish between Sierra Club's insistence that total prevention of waste contact with water was necessary and, moreover, was required by *24A S.C. Code Ann. Reg.* 61-63, Subpart 7.11.11's actual language. Furthermore, the ALC's 2004 contested case hearing did not even address the regulations at issue, the regulations were only raised in Sierra Club's post-trial motions, and then, on remand, the ALC was only permitted to evaluate the regulations based on the factual findings from the 2004 ALC hearing.

It is neither fair nor accurate, based on the Sierra Club's filings with this Supreme Court, the Court of Appeals, and the ALC, to now assert that the Sierra Club both (a) never "suggested" the relevant regulations be interpreted to prevent any contact between waste and water and (b) did not advocate the Court of Appeals should reach such an interpretation.

2. Sierra Club Objected To And Successfully Blocked Supplementing The Appellate Record With The *Feasibility Study*.

The Sierra Club objected to Chem-Nuclear's reference to the *Feasibility Study* prepared pursuant to the ALC's direction. The ALC acknowledged the existence of the *Feasibility Study* in the *2012 ALC Order*.[16] (App. 327-348). In this *2012 ALC Order*, the ALC recognized that in the *2005 ALC Order*:[17]

> The ALC [in 2005 had] also ordered Chem-Nuclear to conduct a study to address concerns raised during the hearing on the scientific and economic feasibility of employing or implementing certain designs and operational procedures at the [Barnwell] Site. That

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15 Chem-Nuclear II, 414 S.C. 581, 604, fn.13, 779 S.E.2d 805, 816 fn.13.

16 The 2012 ALC Order is entitled Final Order and Decision on Remand. (App.327).

17 *See* Sierra Club v. South Carolina Dept. of Health & Envtl. Control, 2005 WL 2997193, *22 (App.390-391, para. 16).

> study was done by Chem-Nuclear and submitted to [SC]DHEC on April 11, 2006, and sent to the parties. [SC]DHEC acknowledged receipt of [the] study on September 20, 2006, and concurred with the report's evaluation of the issues on April 10, 2008.

(App.327-328, fn.2). The Sierra Club did not challenge this finding which was consistent with requirements of the *2005 ALC Order*.**18** The *2012 ALC Order* specifically references a study involving:

> designs and operational procedures at the Barnwell Site that will (1) shelter the disposal trenches from rainfall and prevent rainfall from entering the trenches, (2) provide temporary dry storage facilities for the storage of wastes received during wet conditions, and (3) provide for sealing and grouting the concrete disposal vaults to prevent the intrusion of water to the maximum extent feasible.

(App.390-391).

Chem-Nuclear understood the importance of supplementing the appellate record with the *Feasibility Study* the ALC ordered undertaken. (App.392). Chem-Nuclear sent the *Feasibility Study* to the Sierra Club and to SCDHEC around 11 April 2006. (App.327-328, fn.2). Chem-Nuclear attempted, on no less than two separate occasions, to have the appellate record supplemented to include the *Feasibility Study*. On 7 April 2008, Chem-Nuclear moved the Court of Appeals to include the *Feasibility Study* in the appellate record. The Sierra Club objected to inclusion of the *Feasibility Study* on the basis of what the Sierra Club described as a "one-sided expansion of the record."**19** The Court of Appeals later denied Chem-Nuclear's attempt to supplement the appellate record.

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18 Sierra Club v. South Carolina Dept. of Health & Envtl. Control, 2005 WL 2997193, *22 (App.390-391, para. 16).

19 See Appellant's [Sierra Club's] Return to Chem-Nuclear's Motion to Supplement the Record filed with the Court of Appeals on 17 April 2008.

While the Court of Appeals failed to reference the *Feasibility Study* in *Chem-Nuclear I*,**20** the Court of Appeals, in *Chem-Nuclear II*, expressed concern regarding SCDHEC's failure to amend Chem-Nuclear's permit upon review of the *Feasibility Study* but concluded that "[t]he propriety of [SC]DHEC's decision to 'concur' with the report's evaluation of the issues is not before this [C]ourt ... ." (App.52).**21**

On 11 June 2010, Chem-Nuclear again attempted to have the appellate record supplemented – this time in this Supreme Court.**22** As before, Sierra Club again objected to inclusion of the *Feasibility Study* and, ultimately, this Supreme Court denied certiorari review of *Chem-Nuclear I*.

Due to the strict remand instructions in *Chem-Nuclear I* , Chem-Nuclear has not made any further efforts to have the *Feasibility Study* included in the appellate record. Nevertheless, Chem-Nuclear cannot ignore the Court of Appeals' "conclusion" in *Chem-Nuclear II*, that "the fact that [SC]DHEC did not require Chem-Nuclear to take ***any*** action or make ***any*** changes to its disposal practices casts doubt upon [SC]DHEC's decision to renew [Chem-Nuclear's] 'license."**23** This observation, which clearly tainted the Court of Appeals' decision, requires a through explanation and is the basis for the information Chem-Nuclear has discussed regarding the hypothetical dose calculation for workers resulting from sheltering trenches with roofs or sealing and grouting vaults.

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20 (App.352-361). *See* Chem-Nuclear I, 387 S.C. 424, 427-439, 693 S.E.2d 13, 14-21.

21 Chem-Nuclear II, 414 S.C.581, 621, 779 S.E.2d 805, 825-826. *See also* Chem-Nuclear II, 414 S.C.581, 621 fn.22, 779 S.E.2d 805, 825 fn.22. (Court of Appeals acknowledged the existence and use of the Feasibility Report).

22 Chem-Nuclear submitted its Motion to Supplement Record on Appeal to this Supreme Court along with Chem-Nuclear's Petition for Writ of Certiorari from the Court of Appeals' Chem-Nuclear I decision.

23 Chem-Nuclear II, 414 S.C.581, 621, 779 S.E.2d 805, 826 (Emphasis in original).

CONCLUSION

Chem-Nuclear seeks reversal of the Court of Appeals' opinion in *Chem-Nuclear II*. The Court of Appeals adopted a regulatory test – "reduce to the smallest possible amount" – and required Chem-Nuclear to identify measures taken to reduce contact between water and waste. Nevertheless, Sierra Club bears the burden of demonstrating Chem-Nuclear's non-compliance with *24A S.C. Code Ann. Reg.* 61-63, Subpart 7.11.11. Chem-Nuclear provided examples of minimization of contact between water and waste but the Court of Appeals ignored those examples since the minimization was associated with other legal requirements and not specific compliance with *24A S.C. Code Ann. Reg.* 61-63, Subpart 7.11.11. Chem-Nuclear's disposal practices adhere to all of the requirements of *S.C. Code Ann. Reg.* 61-63, including Part VII, 7.1.1 which provides that "[t]he requirements of this part are in addition to, and not in substitution for, other applicable requirements of this regulation." Consequently, *24A S.C. Code Ann. Reg.* 61-63, Subpart 7.11.11 is read in concert with *24A S.C. Code Ann. Reg.* 61-63, Subpart 61-63 Part III, "Standards for Protection Against Radiation."

Chem-Nuclear utilizes a sloping design, water collection system, and pumping system to minimize the migration of water in the disposal trenches. Water is neither collected in the trenches, nor sealed in the vaults, but is allowed to flow through the trench drainage system and away from waste forms. Chem-Nuclear employs a surface water management plan which pumps rainwater which collects in ditches to the holding ponds, rather than leaving water in contact with waste. These and other findings in *Chem-Nuclear II* support Chem-Nuclear's compliance with *S.C. Code Ann. Reg.* 61-63, Part VII and *24A S.C. Code Ann. Reg.* 61-63, Subpart 7.11.11.

Based upon the foregoing arguments and citation of authority, the Petitioner, Chem-Nuclear Systems, LLC, respectfully request this Supreme Court to reverse the Court of Appeals' decision in *Chem-Nuclear II* and affirm the *2012 ALC Order*.

Respectfully submitted:

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I, Stephen P. Groves, Esquire, hereby certify that on **7 February 2018**, served one copy of the ***Reply Brief on 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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