Mountains & Marshes

South Carolina Environmental Law Project ~ P. O. Box 1380 ~ Pawleys Island, SC 29585 ~ 843-527-0078

Winter/Spring 2007-08

Opening the Courthouse Doors, Again

SCELP Victory in South Carolina Supreme Court Re-Affirms Citizens' Rights

On July 30, 2007, the South Carolina Environmental Law Project won a case in the South Carolina Supreme Court that will help every citizen who wants to take legal action to enforce this state's environmental laws. The issue in the case: what must a person prove in order to be deemed to have "standing" to appeal a state permit allowing alteration of public beaches?

SCELP's client in the case was Jim Smiley, an Isle of Palms resident who runs and walks on the beach nearly every day. Smiley appealed a permit issued by the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management which would allow the Wild Dunes Community Association to excavate sand from the beach and move it to protect private property. But his appeal was thrown out by an Administrative Law Judge, without a hearing.

The Administrative Law Judge said that jogging on the beach wasn't a sufficient interest to give Smiley standing to appeal the permit. The judge also said that if the beach excavation interfered with his use of the beach, well, he could just go to some other beach. Finally, the judge said that Smiley had no case because the project would improve the beach, despite the fact that no evidence had been presented.

Jim Smiley appealed the ALJ's ruling to the Coastal Zone Management Appellate Panel, but the Panel voted 7 to 4 to affirm the ALJ's decision.

A retired College of Charleston biology professor, Smiley had handled the case without a lawyer up to this point. The next step after the Appellate Panel, however, was in state circuit court. So he asked SCELP for some help.

SCELP's attorneys had been watching with dismay as some of the state's Administrative Law Judges had dismissed a number of cases, based on what we believe was a misunderstanding of the law of standing. After review of Smiley's case, we decided that it was a good opportunity to take to the appellate courts to re-establish or re-affirm some fundamental principles of standing that dated back several decades.

In 1972, in a case called *Sierra Club v. Morton*, the United States Supreme Court established a clear and relatively easy-to-meet set of standards for determining whether a person had standing to sue in environmental cases. The first standard was that the person must actually use the area or natural resource that would be adversely impacted by the permit or

Jim Smiley on the Isle of Palms beach

action being contested. In other words, an abstract interest in environmental protection would not give a person standing to contest a development in a wildlife refuge. The person must actually **use** the affected area.

Second, the person must show an actual injury to his or her use of the area. The Court said that in meeting the "injury" test, it was sufficient to show that the contested project would harm the "scenery, natural and historic objects and wildlife of the park

Story Continued on page 6

A Note from the Director

This year marked the 20th anniversary of the creation of the South Carolina Environmental Law Project. Last year, we thought this occasion would be marked by hoopla, celebrations, special publications, tooting our horn. Instead, 2007 has been another year of hard work, quietly going about our business of using legal tools to protect this state's natural resources. We've just been too busy to party over this anniversary.

Our cases get the most attention, especially when we win and establish key legal precedents. But there is a quiet, mostly unnoticed part of our work that may be more important, and more effective, than our litigation. We estimate that only about half of our time is spent working directly on pending lawsuits and permit appeals. The rest is spent consulting with individuals and groups who need specialized environmental law advice, negotiating with regulators and developers to avoid lawsuits and appeals, and finding solutions to thorny regulatory problems. Through these efforts, we help reduce environmental impacts of projects and avoid appeals.

Rebecca, Jimmy & Leigh Chandler

We serve as a South Carolina community resource – for our clients, for other attorneys, for anyone seeking help with an environmental legal problem. We provide services, and all of our work is done in collaboration with groups and citizens who need our help.

We are proud to have served South Carolina for the past 20 years and look forward to continuing to do so. We thank our loyal supporters for allowing us this opportunity.

.....Jimmy Chandler

Hello, Goodbye:

The title of the Beatles classic captures our staff and Board of Directors changes over the past few months.

Kathy Taylor, who dedicated eight years to SCELP, has left. Kathy worked hard to maintain our numerous case files and donor database, investigate funding sources and draft grant proposals, and keep Jimmy and Amy in line, all while cheerfully answering calls and making sure the coffee pot was full! We are thankful for Kathy's contributions to SCELP's success, and wish her well in her future endeavors.

We were very fortunate that Jordan McDonald offered to volunteer with SCELP just as Kathy was preparing to leave. After Kathy's departure, Jordan agreed to join the SCELP staff full time, taking over Kathy's duties. We were immediately impressed with Jordan's organizational skills, willingness to take on new challenges and effortless transition into full time staff position.

Jordan graduated from Coastal Carolina University in 2005 with a major in Psychology and a minor in Political Science. She is very interested in environmental law and plans on attending law school in the near future. Jordan likes to stay busy and is competitive in surfing, Jujitsu and Thai boxing. She grew up in Murrells Inlet and currently lives in Surfside Beach with her two Jack Russells, Jax and Wiley. She enjoys spending her free time outdoors (in the water if possible) and with friends and family.

(See page 8 for changes in our Board)

South Carolina Environmental Law Project, Inc.
(a 501c3 tax-exempt non-profit corporation)

Mission Statement

To protect the natural environment of South Carolina by providing legal services and advice to environmental organizations and concerned citizens and by improving the state's system of environmental regulation.

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Winter/Spring 2008 Case Updates:

Goat Island:

We are pleased to report our continued success in our efforts to protect Goat Island.

In March, 2007, Administrative Law Judge Marvin F. Kittrell agreed with us and ruled that Adam Bernholz was prohibited from constructing a 12' x 208' commercial-sized docking structure that would allow him to drive vehicles with construction materials from a barge onto Goat Island. Goat Island is a sparsely populated island with no bridge access and no serviceable roads. Mr. Bernholz owns several properties on the island, and the proposed structure would open up the island to large-scale development. The structure would have impacted 2,500 square feet of salt marsh.

Bernholz appealed the ALJ's Order to the Coastal Zone Management Appellate Panel. The Appellate Panel conducted a hearing on October 26, 2007, and voted to affirm the ALJ's Order.

Ballentine:

Our hard work on this case to protect a headwater stream that flows into Metz Branch and the Broad River in Richland County has paid off.

On behalf of residents living in the Ballentine area of Irmo, we appealed a proposed 401 water quality certification that DHEC issued to Bright-Meyers Development Corporation in the Administrative Law Court. The certification would have allowed the filling of 807 linear feet of headwater stream bisecting a 42 acre tract for the construction of a Wal-Mart Superstore parking lot. The law prohibits filling of streams if there is a feasible alternative to the proposed activity that would reduce adverse consequences on water quality.

While investigating this case and preparing for trial, we discovered that the developer had considered an alternative site design that would greatly reduce the adverse consequences on water quality. That alternative involved leaving the stream intact, except for a road crossing. The alternative would qualify for a Nationwide Permit because the impacts would be "minimal," still allowing for development of the site essentially as planned, while protecting the integrity of the stream and associated water quality.

With the help of former DHEC Bureau of Water Assistant Chief, Chester Sansbury, and Earthworks' Steve Strickland, we pushed the developer to adopt the alternative plan and we achieved success. Bright-Meyers agreed to redesign the site to avoid the stream, except for one road crossing to connect the high ground portions of the property bisected by the stream. Bright-Meyers also agreed to maintain a 25' vegetated buffer on either side of the stream to protect water quality and to leave trees greater that 18" in diameter. We are pleased that this settlement significantly reduces impacts to the stream and protects natural vegetation and trees on site.

Riverside:

A settlement has been reached that will eliminate all dredging of critical area marsh at the proposed Riverside development in Georgetown.

After suffering a setback at the Administrative Law Court when the judge upheld the dredging permit, we appealed again to the Coastal Zone Management Appellate Panel. We were preparing our appeal arguments when the developer offered to eliminate all dredging from the project and convert the proposed marina to a linear facility with boat slips lining the edge of the property. The case will be remanded to the Administrative Law Court to vacate the judge's earlier ruling and to amend the permit to reflect the agreed-upon plan.

Marsh fringe at site of proposed Riverside development in Georgetown.

This settlement accomplishes the primary goal of our Riverside appeal – to protect important precedents prohibiting the dredging of critical area salt marsh.

More:

See page 7 for more Case Updates

Our heartfelt thanks for the commitment of our supporters listed here.

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(Continued from page 1)

and would impair the enjoyment of the park . . . ." In tying this injury to the person's use of the area, the Court went on to say:

> "Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process. But the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured."

In a case decided a year later, the US Supreme Court refused to adopt a test requiring the injury to be "significant," saying that an "identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation."

The Smiley decision ensures that citizens will have the right to be involved in cases involving our beaches when erosion re-kindles the debate over public trust vs. private property.

SCELP took Jim Smiley's case to circuit court in Charleston, pointing out that the South Carolina Supreme Court had adopted these federal standing rules in 1988 – in two earlier cases brought by SCELP. But we lost and the court again affirmed the ALJ's decision, based on its misreading of two recent South Carolina cases.

So we appealed again, taking the case to the South Carolina Court of Appeals. And again we lost. The Court of Appeals didn't even publish its opinion in the standard case reference books, apparently deeming the case of little significance.

But we didn't give up. We filed a petition in the South Carolina Supreme Court, urging it to review the case as a matter of significant public interest. At the same time, we asked the Supreme Court to hear a second "standing" case. In the second case, residents of Charleston County who used the Wando River on a regular basis had been told by another Administrative Law Judge that they had no standing to challenge dock permits that would have interfered with their use of the river.

In the spring of 2006, the Supreme Court agreed to hear both cases.

On April 23, 2007, the cases were heard together by the Supreme Court. SCELP's Amy Armstrong presented our opening arguments, and Jimmy Chandler handled the closing. We felt that the arguments had gone well – the Court had peppered our opposing counsel with difficult questions – but we've learned that guessing the outcome based on the arguments is nearly impossible.

On July 23, the court affirmed the previous Wando River decision without issuing an opinion, except to cite a case for the proposition that the Court, in reviewing a decision of the Administrative Law Court, may affirm on any ground shown by the record. At that point, we were worried but remained hopeful about the Smiley case.

We were worried because we thought we should win both cases. But in the Wando case, the parties had been allowed a full trial, and it was possible that the Court believed that the permit decision had been supported by the evidence and thus the erroneous ruling on standing didn't matter.

On July 30, we got the call from the Clerk of the Supreme Court that we had wanted: the bottom line in the Smiley case was "reversed and remanded."

The Supreme Court, after reviewing the history and facts of the case, first said that it agreed with Smiley that the Court of Appeals had "misapplied" its own previous opinion in a case called *Beaufort Realty vs. Beaufort County*, in ruling that Smiley had not yet been injured. The Court, pointing out that an imminent future injury is sufficient for standing, concluded that "Smiley has adequately demonstrated that his injury is 'actual and imminent' for purposes of standing."

The opinion, written by Justice Costa Pleicones, next addressed the question of whether Smiley's injury was "sufficient." Citing the US Supreme Court cases mentioned earlier, the Court concluded that interference

with his jogging was a sufficient injury.

The Court reversed the decision on standing and, because there had not yet been a hearing on the basic principles behind Smiley's challenge to the permit, the Supreme Court turned to the Court of Appeals' comments on the merits:

> "The Court of Appeals went on to discuss the Public Trust Doctrine and beach renourishment statutes, and conclude that 'The excavation of sand does not substantially impair the public interest and is within the State's policy of preserving and restoring its beaches, thus [Smiley] has failed to demonstrate how the permit would violate these protections.' We vacate, in its entirety, this speculative ruling on the merits of Smiley's claims, which are not germane to the standing issue."

The Court remanded the case to the Administrative Law Court, where it is now pending and awaiting a hearing on the merits. The decision of the Supreme Court was unanimous.

This ruling reverses a clear trend that was unfavorable to citizens who wish to challenge permits that harm public resources. If citizens are barred by harsh rules on standing, then cases with great merit simply will not be heard. Citizen involvement in the permitting process is critical to proper environmental management, and some of the most important legal precedents in environmental law came in suits filed by groups and individuals under the standing rules adopted in 1972.

SCELP won the first South Carolina environmental standing cases in 1988, and in 1991, we obtained rulings guaranteeing citizens' rights to due process of law in environmental permitting matters. As the Smiley case shows, citizens must be constantly vigilant in protecting their environmental rights, and opposing forces are always at work attempting to reduce those rights.

The Smiley decision means that the courthouse doors remain open to citizens who care enough to take legal action to protect natural resources.

Case Updates, continued:

601 Bridge Cases: In August, SCELP filed a motion for summary judgment on behalf of Friends of Congaree Swamp, SC Wildlife Federation and Audubon SC, in our Federal Court lawsuit seeking an Enviornmental Impact Statement for the new bridges in Congaree National Park. We also completed a three-day trial in the Administrative Law Court in October, dealing with state permitting of the project. No decisions have been rendered in either case.

Chem-Nuclear: The SC Supreme Court ruled that our next appeal will be heard by the SC Court of Appeals, not the DHEC Board. We are in the process of submitting briefs. Meanwhile, the SC Attorney General has criticized DHEC for allowing Chem-Nuclear to dictate agency non-disclosure of documents showing contamination of the landfill site.

Cherry Grove: The Perrone family lawsuit claiming ownership of the marshes and creeks at Cherry Grove has been dropped, after the family lost a suit in which the court ruled that the family members claiming title had obtained their deed through improper influence. That ruling is on appeal and the ultimate outcome of this controversy

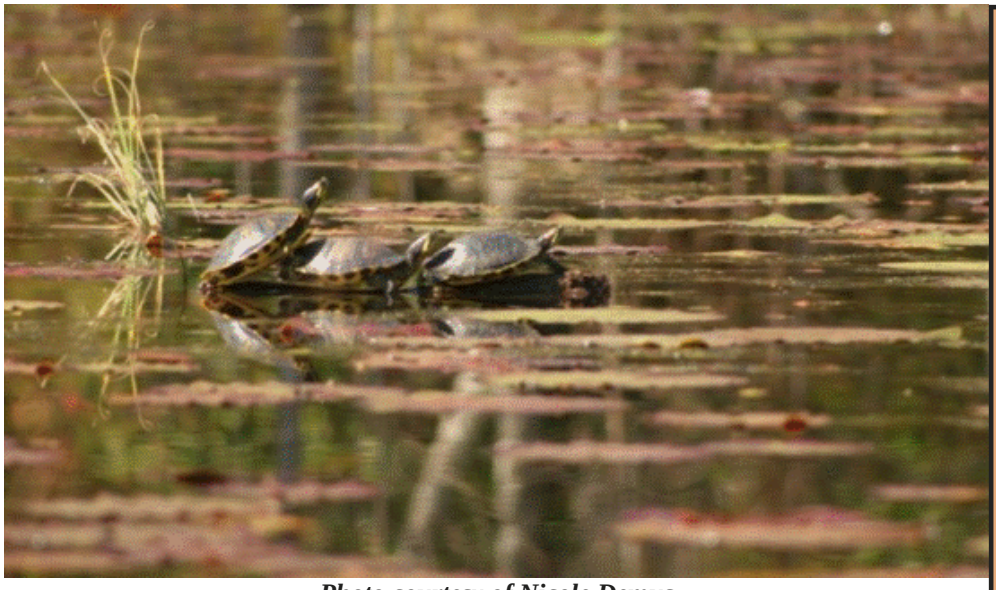

Photo courtesy of Nicole Demus

How You Can Help!

Please help us continue our work with your financial contributions. You can log onto our website www.scelp.org and donate on-line or use the enclosed envelope to mail a donation today.

Thank you.

New SCELP Board Members

The SCELP Board has obtained some exciting additions this year. We would like to welcome a returning member, Gary W. Poliakoff, as well as new members Margaret D. Fabri and David J. Harmon. We also wish the best to Trish Jerman and Bill Duncan as they cycle off our Board.

Gary, a Spartanburg attorney, returns to our board having previously served from 1989 through 1995. His experience in environmental litigation for victims of toxic exposure and property contamination is sure to be an important asset to our team. Gary has also represented a number of citizens groups and environmental groups on a *pro bono* basis.

Margaret is a practicing attorney in Charleston and her enthusiasm has already become a dynamic component in the framework of our board. She has been a long time advocate for environmental protection and served on the Coastal Council (now the Appellate Panel of the Office of Ocean and Coastal Resource Management) from 1993 to 1997.

David, our youngest Board member, is also a lawyer located in Charleston. He received a B.S. in Marine Science from USC as well as a M.S. in Oceanography, with a concentration in Wetlands Science and Management, from Louisiana State University. His scientific and legal backgrounds, paired with his passion for the environment, make him a great fit for SCELP.

Trish Jerman's tenure at SCELP is matched only by Francie Close and Jimmy Chandler. She served on SCELP's original Advisory Board when SCELP was part of Energy Research Foundation and on our Board since SCELP became a separate entity. Over these years her child has grown up and she has moved through several exciting jobs in her career.

SCELP Board members and staff working together at our recent retreat on Pawleys Island. Clockwise from left: Gary Poliakoff, Jimmy Chandler, Margaret Fabri, Kim Connolly, Bill Marscher, Daryl Hawkins, David Harmon, Wendy Zara, and consultant Allison Black Cornelius.

Bill Duncan was on the spot for SCELP in 2001 when our office burned and we needed space. He arrived first thing the next morning and provided a great interim office in a wonderful historic building. In addition to office space, Bill has given freely of his time, helping SCELP's attorneys in numerous cases.

We will miss Trish and Bill, and we thank them for their service.

Confused?

No, the South Carolina Environmental Law Project has not opened an office in Charleston. It is another organization, with a somewhat similar name and operating in six southeastern states, that recently opened a Charleston office and is running announcements on SC Educational Radio. SCELP can no longer claim to be the only non- profit public interest environmental law firm in South Carolina. However, we are still the only one that focuses exclusively on South Carolina.

"If future generations are to remember us with gratitude rather than contempt, we must leave them more than the miracles of technology. We must leave them with a glimpse of the world as it was in the beginning, not just after we got through with it." ***- President Lyndon B. Johnson***

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