

# Mountains & Marshes

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

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## SCELP Files New Appeals to Protect Wetlands and Wildlife Habitat



Giff Beaton

### Protecting Piping Plover Habitat

**W**orking with Audubon South Carolina and the S.C. Wildlife Federation, SCELP has filed an appeal of a permit that would allow excavation of 150 acres of sand from the eastern end of Kiawah Island that is used by the federally endangered Piping Plover. This endangered bird's habitat would be destroyed to protect a golf course.

According to the U. S. Fish & Wildlife Service, the eastern end of Kiawah Island has the second highest number of non-breeding Piping Plovers in South Carolina, and this area is designated as "critical habitat" under the Endangered Species Act. Nevertheless, DHEC and its Office of Ocean and Coastal Resource Management ("OCRM") issued a permit that would allow destruction of these 150 acres of critical habitat used by the Piping Plover during migration and wintering.

We are asking the Administrative Law Court to reverse the agency decision, deny the permit, and protect this precious bird habitat.

### Riverside Development

**S**CCELP is representing the Coastal Conservation League and the Georgetown County League of Women Voters in challenging a project that would allow dredging of vegetated critical area salt marsh. Smith Land Company is proposing a residential development on the Sampit River in Georgetown County, and OCRM issued a permit for dredging of marsh to create a marina basin that would serve to enhance property values.

The amount of marsh that would be dredged is relatively small. But this dredging of marsh is very significant because it represents a departure from OCRM policy, which in the past prohibited dredging of vegetated critical area marsh. The developer also received a permit allowing an access bridge and three community docks, none of which are being challenged in this appeal. SCELP is asking the ALC to deny the portion of the permit that allows dredging of vegetated marsh. — *See more on new cases inside.*



*Riverside: Should developers be allowed to dredge vegetated critical area marsh to enhance property values? Apparently, DHEC/OCRM thinks so.*

# Supreme Court Takes Up Environmental Rights Cases

To people like Jim Smiley, Jan and John Maize, Joe Calandra, Joe Mueller and Carl DiPace, proper enforcement of environmental laws is important. To them, the right to challenge permitting decisions that allow damage to natural re-



Jim Smiley at the Isle of Palms.

sources is essential to protecting their quality of life. SCEL P has been fighting hard to help them protect this right in two significant cases.

The cover story of our last newsletter was about Jim Smiley. Jim was told by an Administrative Law Judge that he did not have standing to protect the beach at Isle of Palms – a beach he walks and runs

on almost every day. The story also mentioned the Maizes and others who were also shut out of the Administrative Law Court when they tried to challenge permits for community docks that would interfere with their recreational and commercial uses of the Wando River.

The Court of Appeals in the Smiley case and the Circuit Court in the docks case both upheld the rulings denying standing. SCEL P believes these rulings are entirely inconsistent with established case law. We asked the Supreme Court to hear both these cases because citizens' rights to protect their environment is a matter of significant public interest.

The Supreme Court recently agreed to hear both cases. We are preparing the appeals now, and we are optimistic that the Court will rule that these citizens have the standing to protect their environmental rights.

## 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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## Good Mitigation Ruling Upheld

*Judge affirms DHEC ruling to protect Myrtle Trace nature preserve*

In SCEL P's Myrtle Trace case, we represent a group of homeowners who were promised a nature preserve buffer area lying between their homes and the Conway Hospital complex. For six years, we've worked hard to protect this promised nature preserve. Last month, we moved one step closer to final victory.

In 2001 and 2005, the Board of the SC Department of Health and Environmental Control

(DHEC) ruled that because this nature preserve buffer area had been established as mitigation for wetland impacts in the development of the Myrtle Trace neighborhood, the mitigation requirement, and the nature preserve, must remain in place. The 2001 ruling was overturned due to technical problems, sending the case back to the Board for another hearing. The Board stuck to its earlier ruling, and a developer took the case

back to court.

In May, Horry County Judge Stanley Cross affirmed the DHEC ruling. The developer has asked Judge Cross to reconsider, but we are confident that this ruling will stand and be upheld if the developer pursues further appeals.

There are hundreds of mitigation areas set aside across the state, and this ruling gives us more confidence that these areas will truly remain protected.

# SCELP Files New Appeals (continued from cover page)

## Nationwide Permit Certification Appeal

**U**nder the Clean Water Act (“CWA”), the Corps of Engineers can issue nationwide permits (“NWP”) for activities purportedly having minor impacts to waters and wetlands of the U.S. The CWA also gives DHEC authority to review these nationwide permits under a state certification program and allows DHEC to place additional conditions on them to ensure protection of wetlands. The federal Coastal Zone Management Act gives similar authority to OCRM.

But DHEC and OCRM are trying to give up

some of this authority through a proposal to weaken state conditions on 19 of the 44 NWPs. The weakened state certifications would apply state-wide and uniformly increase the alteration of wetlands that could occur with no further public notice, opportunity or input, or chance for appeal.

The Georgetown County League of Women Voters has asked SCELP to represent it in appealing the proposed amended certification of these 19 nationwide permits. We are asking the Administrative Law Court to reverse the proposed amendments.

## Bernholz Commercial Docking Facility

**G**oat Island is a small slice of natural, pristine beauty in Charleston County. The island does not have any serviceable roads and the residents enjoy the quiet, relaxed lifestyle of the island due in large part to difficulty accessing the island – the islanders transport all their goods by boat.

Now, a new Goat Island resident wants to change all that. Mr. Bernholz applied for a permit for an industrial-sized dock on the island that would open up the island for larger-scale development. The dock structure would be built of 12' x 208' metal grating and allow him to drive trucks with construction materials from a barge onto a number of Goat Island properties that he and his family own.

OCRМ denied the permit because this docking structure violates the regulations and Bernholz already has a functioning dock on his property.

The Coastal Conservation League asked SCELP to intervene to assist OCRM in defending the denial. ALJ Marvin F. Kittrell held a hearing on May 4, 2006, and we are hopeful for a decision upholding the denial.



*Goat Island: SCELP is working to preserve the natural, pristine beauty of Goat Island, pictured above.*

## Pawleys Island Golf Club

**S**CELP is also representing the Georgetown County League of Women Voters in the appeal of a coastal zone consistency certification. This certification would allow filling a 1.29 acre wetland for a redesigned golf course in Georgetown County.

The site has numerous wetlands, most of which are avoided in the new design. The golf

course has been in operation for over 30 years without the need for filling in wetlands.

We believe the certification would set a very low standard for filling wetlands in commercial developments where there is no public benefit and the wetlands can be avoided.

We are asking the court to reverse the certification, and deny the wetland fill.

# Allendale Landfill Challenged

*Allendale County Council hears from citizens opposing private landfill*

**S**CELP is representing Sierra Club in a challenge to a proposed private landfill in rural Allendale County. We have filed suit in state court seeking review of a county council decision to deem the landfill's county permit application "complete," despite the

fact that the application fails to provide essential information required under the county's landfill ordinance.

Despite our suit, county council moved forward with the application and held public hearings. But the hearings were mostly attended by citizens who op-

pose the landfill.

Recently, the county council reached a stalemate with a 2-2 vote on the landfill permit. This vote kills the landfill permit application. Our suit remains pending while we assess whether the case is now truly over and moot.

## Summer Clerks Help SCELP and Learn



*Michael Corley and Dehler Hart review development plans with staff attorney, Amy Armstrong.*

Every summer, SCELP works with law students who are interested in environmental law. The students help us with our cases, and we give them a chance to learn what a public interest environmental law practice is all about. Every year, up to three students have worked with SCELP in this way.

This summer, Michael Corley, a rising third-year student at the University of South Carolina Law School, is working with us full-time. Dehler Hart, a rising second-year student at Charleston Law School, is assisting us as a volunteer. We are rapidly becoming dependent upon the help we are getting from Michael and Dehler.

**Our website:** for more information about SCELP and our cases, please go to [www.scelp.org](http://www.scelp.org). Our "links" page can help you find environmental agencies, our client groups, and environmental laws and regulations.

## General Assembly Changes Environmental Laws

**S**CELP was very busy during the 2006 state legislative session. We worked closely with several environmental groups, providing our legal assessments of the many bills, amendments, and regulations that were being debated in the House and Senate.

Here's a quick overview of what our legislature did this year.

**New bridge regulations** were approved for coastal zone critical areas. The final regulations are not as strong as proposed by the Marsh Islands Advisory Committee, but do eliminate about 90% of coastal islands from consideration for a state bridge permit.

**New environmental permit appeals rules** were approved. Under the new rules, the first step

in the appeals process will be an informal appeal within the Department of Health and Environmental Control (DHEC). Once DHEC makes a final agency decision, the next level of appeal will be at the Administrative Law Court. Appeals from the ALC will now go to the SC Court of Appeals. Appeals to the DHEC Board and Coastal Zone Management Appellate Panel, and to state circuit court, have been eliminated.

**Counties lost authority** to impose local zoning rules on hog farms.

**Billboard companies were big winners** as the legislature made it nearly impossible for cities and counties to eliminate billboards.

A proposed **freshwater wetlands bill** stalled and died after showing initial promise.