

# Mountains & Marshes

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

Winter / Spring 2008-09

## SCELP Victory in Federal Court

### Federal Court Orders More Environmental Studies for Highway Through Congaree National Park

**O**n September 30, 2008, Federal District Judge Margaret Seymour issued an order ruling in favor of Friends of Congaree Swamp, South Carolina Wildlife Federation and the National Audubon Society in their suit against the Federal Highway Administration (FHWA). The order concludes that the Environmental Assessment issued by FHWA for the proposed reconstruction of bridges and causeways for the US Highway 601 crossing of the Congaree River floodplain did not comply with the National Environmental Policy Act.

Congaree River floodplain is about 4 miles wide at this crossing point, and includes a number of channels and remnants of old main river beds in addition to the main Congaree River floodplain. The existing highway crossing was built through the floodplain in the 1940s. The crossing consists of four bridges that total 4,113 feet in length and more than three miles of earthen causeways that were created by filling floodplain wetlands.

The United States Congress established the Congaree Swamp National Monument in 1976 after recognizing that the Congaree River floodplain contains the largest intact tract of old growth bottomland hardwood forest remaining in the United States. In 1988, Congress enlarged the authorized boundary of the Congaree Swamp National Monument, increasing the authorized area from 15,200 acres to 22,200 acres, and designated the majority of this area as part of the National Wilderness Preservation System.

In 2003, Congress made a large portion of this floodplain the Congaree National Park, SC's first and only National Park. At the same time, Congress enlarged the authorized area of the park, adding 4,576 acres to its boundaries. The expanded boundaries now include the areas on both sides of U.S. Highway 601. The full authorized area of the park now includes more than 26,776 acres.

Congaree National Park was established primarily because of its unique natural resources. In addition to containing the largest old-growth floodplain forest in the US, it contains some of the least disturbed habitat left in the Southeastern Floodplains and Low Terraces ecoregion. It has been designated as a Globally Important Bird Area, an International Biosphere Reserve, a Wilderness Area, and a Natural National Landmark.

The Congaree River floodplain is blessed with an abundance of biologically diverse flora and fauna. The area boasts approximately 90 tree species, with many trees of state record size. All eight woodpecker species found in the Southeast live within the park. In a recent study of the floodplain, researchers found 56 of the state's 142 known freshwater fish species.

At the Highway 601 crossing, the west side of the road is heavily wooded up to the edge of the road shoulder. On the east side, a corridor clear of trees contains electric transmission wires and poles.



*The existing Highway 601 crossing through the Congaree National Park*

Judge Seymour's order concluded that the environmental assessment prepared by the FHWA "lacks the requisite scientific analysis and rigor." The FHWA has been enjoined from further actions on the bridge program until this deficiency is resolved.

The ruling was a welcomed relief to SCELP's Jimmy Chandler, who argued the case on September 9. A related state administrative appeal, challenging a state permit and water quality certification, was rejected by an Administrative Law Judge in March. SCELP and its clients had decided to drop further appeals in the state proceeding and concentrate on the federal case.

The Highway 601 crossing runs through the authorized boundaries of the expanded Congaree National Park. The

*(Continued on page 6)*

## A Note from the Director

The South Carolina Environmental Law Project won an important environmental case in Federal Court this year, as we proudly report on page one. Filing a case in Federal Court is unusual for SCELPL. Although we have participated in several cases in the Federal District Court for South Carolina, we tend to pursue most of our cases in state court, or through the state administrative appeals process.



*Jimmy's daughter, Leigh, hits one for the Riptide*

We made a careful decision to stick to our state courts when SCELPL was established in 1987. During the 1980s, the Reagan administration pushed a policy of federal deference to state environmental regulation. South Carolina's environmental groups had a tough time getting the national environmental law firms to pursue cases in this state, although we had serious environmental problems that needed legal attention. Federal Judges appointed by Reagan were retreating from some of the environmental precedents established in prior years.

We decided that South Carolina needed its own set of legal precedents for environmental protection. We saw opportunities in a good SC Coastal Zone Management Act, a broad Pollution Control Act, and a unique state constitutional provision protecting due process rights in administrative decisions.

More than 21 years later, we're very comfortable with the decision we made in 1987. We've set key precedents in wetlands and coastal resource protection, standing, constitutional rights and other issues. The state environmental law books are replete with discussion of our cases.

But our job hasn't gotten any easier. We're now defending our past successes against renewed attacks. The state political and administrative systems sometimes seem more hostile to environmental concerns even as more citizens become alarmed by lax regulation. But with your help, we'll keep fighting to protect this state's unique natural resources

..... Jimmy Chandler

### A YEAR WITH SCELPL . . .



I have been working at SCELPL now for over a year. Looking back it's interesting to note that when I walked through the doors the first time on that August afternoon I had no intention on making this my full time employment. I was perfectly happy selling real estate and working on my law school applications and was just looking for a place to volunteer some of my extra time. SCELPL seemed like a great place to do that and to also get some experience in a field I might one day pursue. I loved the fact that these people took cases that wouldn't otherwise get access to our courts. These attorneys worked more for the greater good than for the paychecks and that was touching. They always say it's best to have passion in your work. These people have passion.

I enjoyed my first day volunteering at SCELPL and spent that night reading more about the successes of the organization. I was excited about being able to help out. As fate would have it, a full time position opened up the very next day. Mr. Chandler called and asked if I would be interested and I was. What began as a part time volunteering stint has become a full time passion for me. I'm grateful for the opportunity to work in a way that makes such a difference. It has been a fulfilling experience that I would not change for the world.

- Jordan McDonald

### South Carolina Environmental Law Project, Inc.

*(a 501c3 non-profit corporation)*

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*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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# Does South Carolina Really NEED More Landfills?

The South Carolina Department of Health and Environmental Control (DHEC) recently issued a permit for a 154,000 tons-per-year construction and demolition (C & D) debris landfill in Laurens County. In November of 2007, DHEC issued a “determination of need” for a new municipal solid waste landfill in Williamsburg County with a capacity of up to 2,375,000 tons per year.



Photo courtesy of <http://www.hpsupplies.info/images/lo-landfill.jpg>

These decisions are remarkable because Laurens County generates less than 15,000 tons per year of C & D waste and has existing C & D landfills licensed to handle over 160,000 tons per year, and because Williamsburg County generates only around 45,000 tons per year of municipal solid waste.

In 1991, the South Carolina General Assembly passed the Solid Waste Management Act. This act states: “No permit to construct a new solid waste management facility or to expand an existing solid waste management facility may be issued until a demonstration of need is approved by the department.”

Despite this statutory mandate, DHEC has already licensed enough landfills to handle twice the amount of waste generated in this state. With excess capacity already licensed, does Laurens County really need another C & D landfill with enough space to handle ten times the amount of C & D waste generated in the county? Does Williamsburg County really need the capacity to handle 50 times the amount of garbage generated each year by its residents? Of course not. So why has DHEC approved these landfills?

The 1991 Solid Waste Management Act requires DHEC to adopt regulations to implement the “demonstration of need” requirement. Despite this mandate, DHEC had no regulation defining need until 2000.

The regulation adopted in 2000 provides a process

that is supposed to determine whether a facility is needed. It requires an applicant for a permit to submit the longitude and latitude coordinates for the site of the proposed new facility, and a proposed disposal rate. Using the latitude and longitude, DHEC then draws a circle around the proposed site. For a C & D landfill, the radius of the circle is 10 miles, and for all other facilities the radius is 75 miles. If there are less than two commercial disposal sites within the circle, the facility is deemed to be needed. The annual capacity limit for the facility is set at the total of the amount of waste generated within every county that is touched by the circle.

In a recent deposition, a spokesman for DHEC testified that “the Demonstration of Need Regulation actually looks at the location of landfills, not actually what is needed in that county.” He’s right.

So we have a statute that requires a demonstration of need, and a regulation that fails to provide a mechanism for determining need. And in addition to already allowing twice as much capacity as we need, the regulations have provisions that could allow several times more capacity. As a result, SCELPA is pursuing two landfill cases in the Administrative Law Court and preparing to pursue a third. In all of these cases, DHEC is relying upon a regulation that admittedly fails to measure need.



Photo courtesy of [Http://www.resourcesystemsconsulting.com/blog](http://www.resourcesystemsconsulting.com/blog)

In August 2008, the DHEC Board was asked to approve a new “Demonstration of Need” regulation. Unfortunately, it doesn’t measure need either. At the Board hearing on the proposal, the DHEC staff admitted that the agency has permitted excess capacity but said that the regulation is the best it’s been able to come up with. The Board directed the staff to get to work on another new regulation that really does measure need. Meanwhile, SCELPA and its clients are forced to deal with permits that make South Carolina a magnet for out-of-state waste.

The fight to end South Carolina’s role as the dumping ground of the entire nation continues...

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

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Story continued from page 1...

The earthen causeways are barriers to water flow through the floodplain, causing a major interruption in wetland and floodplain functions.

Some of the wetland and floodplain impacts include: (1) an alteration in the natural hydrological conditions, (2) "sheet flow" of water across the floodplain has been blocked, (3) animal migration has been blocked, (4) the floodplain ecosystem has been fragmented, and (5) the nutrient exchange that normally fuels the base of a river's ecology has been altered. These impacts would be avoided if bridging were used instead of earthen causeways; however, the proposed

bridge and causeway project calls for keeping most of the earthen fill for the causeways in place. The project would fill an additional 8.13 acres of wetlands to shift the causeways to the west, clearing the existing heavily forested area on the upstream side of the existing highway. The new plan calls for a slight increase in the length of the bridges and a corresponding slight reduction in the length of the causeways. The total length of the four new bridges would be 4,275 feet, while the length of the causeways would be more than 14,000 feet — nearly 3 miles.

Funding for the proposed widening of the causeways and construction of new bridges will come from the FHWA.

The FHWA has not prepared an Environmental Impact Statement for this bridge/causeway project. Instead, the SC Department of Transportation prepared an Environmental Assessment (EA). An EA is supposed to be a brief document "provid[ing] sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact."

The EA contains a single paragraph addressing impacts to the floodplain. It makes a two-sentence refer-

ence to the Congaree National Park as part of its single paragraph addressing impacts to land use and claims without supporting evidence that "this project



*This floodplain contains the largest tract of old growth bottomland hardwood forest remaining in the United States.*

is consistent with . . . future plans" for the park. This statement has been directly contradicted by the Superintendent of the Congaree National Park, who wrote " . . . the project as proposed is certainly not consistent with National Park Service management policies or future park resource management plans."

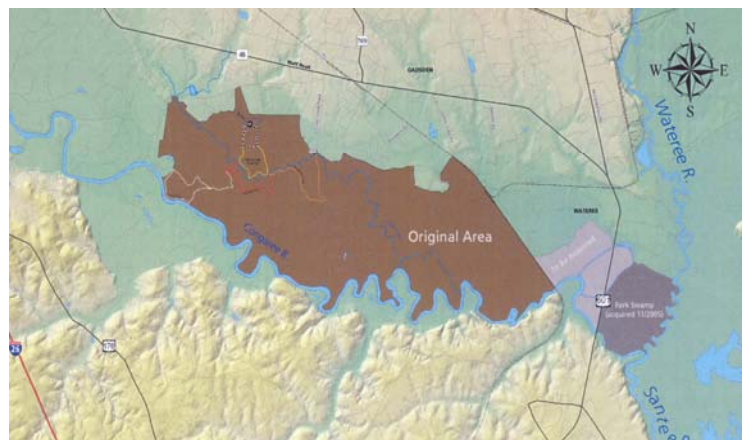
The Park Service notes that hydrology "is the key component to the ecological integrity of the unique floodplain habitats protected by Congaree National Park. As an active river floodplain, park resources are vulnerable to the effects, activities and alterations to hydrology that take place on adjacent lands as well as throughout the watershed. It is therefore critical to the ecological value and legacy of this unique forest that the integrity of the floodplain ecosystem be maintained and not altered by unnatural hydrological conditions." The Park Service submitted a letter that

lists numerous deficiencies in the EA.

The SC Department of Natural Resources and the U.S. Fish and Wildlife Service joined in the National Park Service's concerns. USFWS said that "a net increase in impacts in habitat as unique as the Congaree floodplain is unacceptable."

Despite these comments, and similar comments submitted by environmental groups, the FHWA issued a Finding of No Significant Impacts (FONSI) in November 2005. In March 2006, FHWA published a special public notice in the Federal Register establishing a 6-month deadline for filing legal challenges to the sufficiency of the EA and FONSI. SCELPA and its clients met this deadline, filing suit on September 12, 2006.

Judge Seymour found the EA lacking: "While long on illustrations and graphs, the EA lacks the rigorous analysis or references that are required by both the text of NEPA and the mandates of courts interpreting the statute." She continued, saying that the EA is "rife" with "conclusory statements" not supported by scientific evidence, and that "an inadequate EA compels the



*The Park, showing original and expanded park boundaries*

conclusion that Defendants failed to take the 'hard look' required under NEPA."

DHEC tried to get SC DOT to eliminate more of the causeways and to enlarge the bridges, to restore

Story continued on page 8...

# Winter/Spring 2009 Case Updates:

## **Risher Bridge:**

We recently intervened on behalf of the Coastal Conservation League in a case to defend the denial of a bridge permit. The

Rishers want to build a bridge to a pristine 0.26 acre hummock island off Fripp Island, but the rules prohibit bridges to islands less than one acre.



*This piece of land is obviously surrounded by water yet the owners claim this is NOT an island.*

Fortunately DHEC denied this permit, and together we will forcefully defend the denial and seek to uphold the access to small island regulations which were passed in 2006. The regulations represent hours of hard work and the consensus of a committee on which SCELPA's Jimmy Chandler served. Chandler played an instrumental role in ensuring strong language and protective rules for these small marsh islands – rules which we will vigorously defend at the hearing on November 17, 2008.

## **Deerfield Plantation:**

We are engaged in intense preparations for the hearing in the Administrative Law Court in this appeal, in which we are

seeking to protect a wetland system that carries stormwater for the neighborhood. The existence of the wetland system was never disclosed to DHEC so DHEC never assessed the impacts of the proposed development on the wetland system. The wetlands are part of an existing golf course, and we are also working to protect the neighborhood from potential flooding impacts from developing the golf course into dozens of small home sites. The neighborhood has already experienced flooding and the residents fear that new development will only make it worse.

## **Wedgfield Dredging:**

We successfully completed a two-day hearing of this appeal in the Administrative Law Court on August 25-26,

2008. The appeal challenges a permit authorizing the placement of dredged spoil material in 12.8 acres of wetlands adjacent to the Black River – the same permit that was denied in 2004. We submitted a compelling brief to the Court in late October, and are awaiting the Court's decision.

## **Cherry Grove Enforcement:**

Our case against Wayne Hill for illegally filling in critical area salt marsh to

enlarge his lot is moving forward. We filed final briefs in the S.C. Court of Appeals in late October, and are awaiting a date for the Court to schedule oral arguments. We are hopeful that the Court will uphold the Coastal Zone Management Act's prohibition on filling in salt marsh and require restoration of the site.



*Wayne Hill has already begun work on enlarging his lot so that he can build on it.*

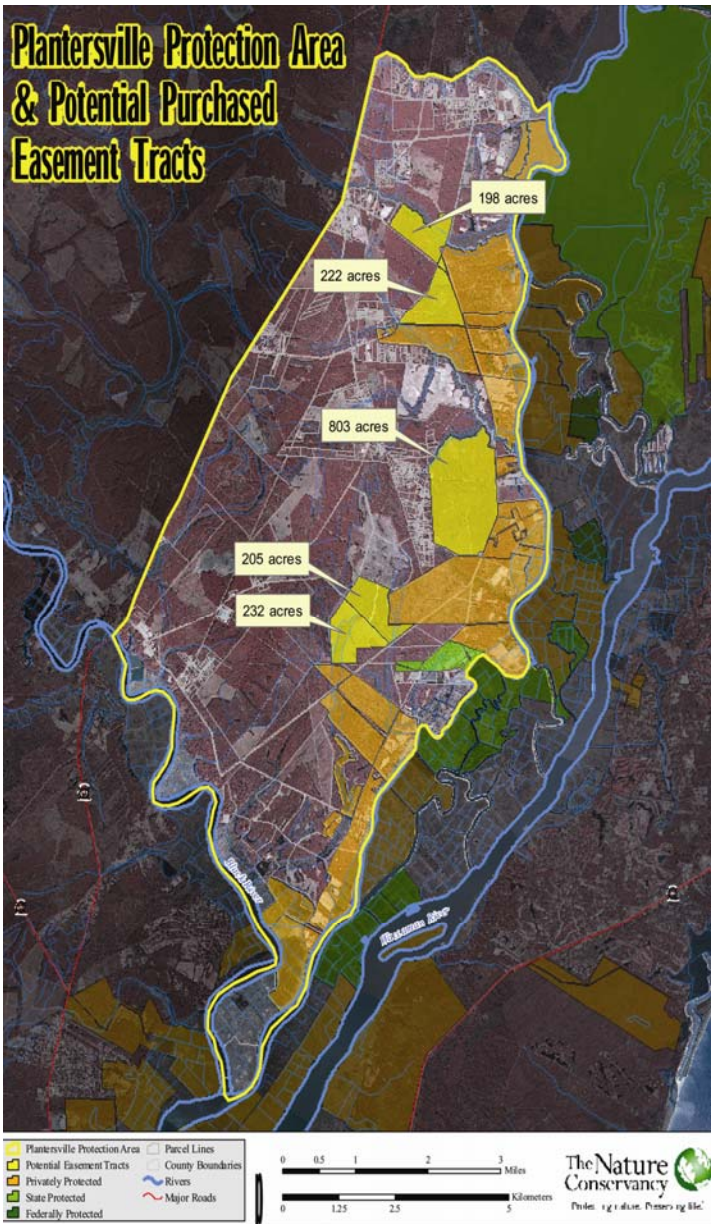
## **Myrtle Trace:**

After winning this case at the DHEC Board and in state circuit court, we were disappointed in the

S.C. Court of Appeals' recent ruling reversing those prior decisions. The case involves protection of an undisturbed wetland and buffer area that was set aside as mitigation for impacts to other wetlands permitted in 1989. The Court overturned DHEC's policy that once an area is protected as mitigation, it cannot be undone absent exceptional circumstances. We are asking the S.C. Supreme Court to hear an appeal.

# LAND PROTECTION ACHIEVED!

## Plantersville Protection Area & Potential Purchased Easement Tracts



SCELP's 2005 appeal of a permit issued to Central Electric Power Cooperative, on behalf of the Winyah Rivers Foundation ("WRF") and the Sierra Club, has led to an opportunity to participate in a major land protection initiative. As a result of our appeal, we achieved a settlement that gave our clients authorization to use over \$125,000 in mitigation proceeds for land protection. WRF's Christine Ellis, Mike Hyrowski, Larry Fox and SCELP's Amy Armstrong were appointed to the committee to investigate areas of high conservation value worthy of protection. Working with Maria Whitehead of The Nature Conservancy ("TNC"), we recently found an worthy project.

The Winyah Bay Drainage Protection Project, coordinated by TNC, is an effort to undertake landscape level protection of strategic tracts of freshwater, forested, and estuarine wetlands, along with uplands threatened by development in the Black, Pee Dee and Waccamaw River corridors. The area that will be protected by this project totals approximately 1,660 acres and consists of five former industrial forest tracts.

We are excited at the opportunity to use the funds we won in the settlement to protect this prime wildlife and natural resource habitat, and are comforted to know that these tracts will be protected in perpetuity. The easement will be held by the Pee Dee Land Trust. Other partners in this project include the Grissom Parkway Mitigation Fund, a grant from the WWW Foundation and private funds - each of which made this project a success.

*Congaree National Park Victory, continued from page 6 ...*

floodplain flow, restore damaged areas, and enhance wildlife habitat, through the state process. We believe that proper environmental studies will justify improvements in the project's design and make clear the significant public benefits that can be derived from a more careful approach. A more careful approach can avoid significant negative impacts on the floodplain and the national park. We hope that SC DOT and FHWA will end the hard-line approach they have taken so far, and begin a true collaboration with natural resource agencies and the public to make a truly thorough investigation into environmental impacts, a forthright acknowledgment of potential environmental harms, and proper design changes to avoid and mitigate those harms. With careful planning and cooperation, the end result can be something that DOT, FHWA and all of us can be proud of.

***To allow us to continue our important work on the cases and issues listed, we ask for your financial support. Without you, none of our work would be possible, and now its easier than ever to donate online. Go to [www.scelp.org](http://www.scelp.org) and click on "How you can help."***  
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