

Mountains & Marshes

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

Winter/Spring 2012

Supreme Court Victory Protects Captain Sam's Spit

Days before this newsletter went to press we received a long-awaited call from the South Carolina Supreme Court announcing that our State's highest Court had reversed the decision of an Administrative Law Judge (ALJ) which would have allowed the construction of a half-mile long concrete block wall, known as a revetment, along the shores of the Kiawah River at Captain Sam's Spit.

The case began with a request from Kiawah Development Partners to construct a 2,783' long by 40' wide revetment to facilitate a residential development on the approximately 150 acre pristine Spit. The revetment would cover 2.63 acres of the sandy banks of the Kiawah River, which is widely used by the public for fishing, picnicking, landing kayaks, and other recreational activities. The Spit itself is one of the few remaining barrier island spits in the State that is natural and untouched by human development.

The S.C. Department of Health and Environmental Control (DHEC) denied a majority of the structure, but authorized 270' of the wall. On behalf of the S.C. Coastal Conservation League, SCELCP challenged that decision and KDP challenged the denial of the remaining 2,500' of wall. A trial was conducted during a week in August 2009, with Judge Ralph King Anderson, III, issuing his decision to authorize the full length of the structure on January 22, 2010.

SCELCP and DHEC appealed the ALJ's decision to the S.C. Court of Appeals. SCELCP simultaneously filed a motion to transfer the case to the Supreme Court and asking the Court to impose an order preventing construction of the bulkhead/revetment until the Court issued an opinion. The Court heard arguments on January 18, 2011 and issued its opinion on November 21, 2011. The Court's opinion is a sweeping victory for Captain Sam's Spit and for protection of our coastal resources.



The sandy banks of the Kiawah River, which the Supreme Court ruled cannot be covered with a concrete block wall



The Supreme Court ruled that the ALJ's decision contained "numerous errors of law." The Court explained that the S.C. Coastal Zone Management Act requires that high priority be given to protecting "natural systems in the coastal zone" and that coastal areas such as this be used to "ensure the maximum benefit to the people, but not necessarily a combination of uses which will generate measurable, maximum dollar benefits." DHEC is required "to ensure the continued use of tidelands, submerged lands, and waters for public purposes," and the public purpose

and interest "encompasses that of the entire Spit, and the surrounding coastal zone." The regulations demand denial of a structure like this that will have "**any** adverse effect on public access," unless one of two exceptions apply – neither of which apply in this case.

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A Note from the Director



Amy and her mastiff, Rufus, enjoying the beach

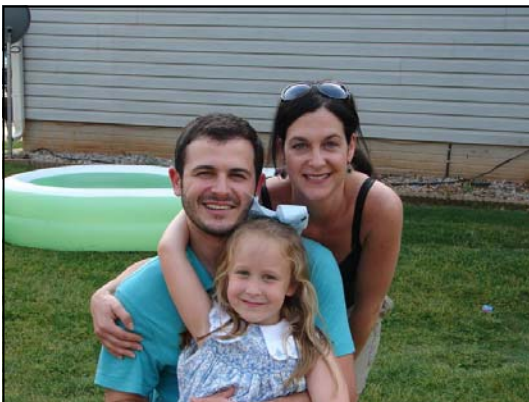
This past year has continued to bring many new challenges and changes for both myself and SCELPA. Our office administrator, Jordan McDonald, left to pursue a career in mixed martial arts; we initiated a flurry of new cases challenging unwise and environmentally degrading projects; and the SCELPA Board of Directors has recently undertaken a

capital campaign to hire a new attorney. Through all of these challenges and changes, I continue to be extremely grateful for the tremendous support from all of our consistent contributors and the environmental community as a whole.

Seeing first hand that all too often environmental decisions fail to protect our natural resources, that decisions are influenced by politics, rather than the law, or that our State regulatory agency lacks adequate funding to do its job, it is easy to become discouraged. We are all living through tough economic times and state and federal governments are regularly sacrificing natural resource protections as a result. But we have been invigorated by our two recent S.C. Supreme Court wins — a landmark decision establishing protection for isolated wetlands throughout the State (you can read more about this case on page 8) and a decision that ensures protection for Captain Sam's Spit and fragile coastal resources — as well as our tremendous gathering of friends at the 2nd Annual Wild Side event. I view both of these victories as tributes to the work that Jimmy Chandler started nearly 25 years ago, as well as an indicator that SCELPA continues to provide critical services necessary to protect our special natural resources. Part of our ability to continue to meet the demands includes increasing our capacity to provide these critical services through hiring a third attorney — a goal that I look forward to meeting in 2012.

I am truly blessed to work and advocate for people and organizations that share my commitment to protecting our State's precious natural resources. We look forward to a great year — a celebration of **SCELPA's 25th Anniversary** — in 2012.

SCELPA Welcomes Phyllis Anne Nisoff



Phyllis with her children, Anna and Christopher

We are pleased to introduce Phyllis, our new Office Administrator and Paralegal. Phyllis comes from Atlanta, Georgia with over 25 years of legal expertise, as well as marketing, business development and recruiting experience. She obtained her associates degree in paralegal studies from NCPT in 1999. Phyllis is a delightful addition to the SCELPA staff and we hope you are able to meet her in the future.

South Carolina Environmental Law Project

(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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SCELP Takes on New Cases to Protect Our Special Places

Since our last newsletter, SCELP has taken on four important new cases that we will discuss in this newsletter. One of these cases aims to protect what is perhaps the most famous natural landmark in the State: the 1500 year old Angel Oak near Charleston. DHEC has approved a plan to place a large scale, high density residential and commercial development in the shadow of the Angel oak Tree. Another case involves a challenge to a DHEC permit authorizing the construction of three groins on Debidue Beach adjacent to the North Inlet-Winyah Bay National Estuarine Research Reserve (NERR). We have also challenged an expansion permit for the Plum Island Wastewater Treatment Plant in Charleston County, and a landfill permit modification issued to Williamsburg County.



Fight for the Angel Oak:

The Angel Oak was putting out leaves and dropping acorns for a thousand years before Columbus first stepped on shore. It is the oldest tree east of the Rocky Mountains. For those who have not had the pleasure of visiting the Tree, its grand stature is difficult to comprehend. The main trunk is over 25.5 feet in diameter. Extending out from this trunk are several main branches that are themselves the size of other ancient live oak trees. The branches spread out, sagging to the ground in many spots under their own great weight. In total, the Tree spreads out over 17,100 square feet of earth.

Presently, the Angel Oak enjoys a sizeable buffer from development on all sides. While the county park where the Angel Oak sits is merely two acres in size, to this point the surrounding private property has remained as farm or woodland. However, a Charleston developer that goes by the name of Angel Oak Village (AOV) proposes to change things drastically. AOV owns the 42 acres bordering the northern half of Angel Oak Park. AOV's development plan calls for over 500 residential units and 45,000 square feet of retain space on these 42 acres. The AOV property, which is now completely forested, will be essentially clear cut except for a narrow buffer around the Park. A number of experts have evaluated the proposed project and determined that it stands to significantly impact the Angel Oak Tree and could very well lead to the eventual demise of the ancient tree.

The case is currently pending in the Administrative Law Court. SCELP has challenged DHEC's approval of the project on a number of grounds. In considering the project, DHEC determined that impacts to the Angel Oak and Angel Oak Park were beyond the scope of their analysis. SCELP is challenging this determination, especially on the grounds that the applicable regulations require consideration of a project's impacts on special and unique habitats. SCELP is also challenging DHEC's failure to consider feasible alternatives and impacts to the adjacent waterbody Church Creek.

We expect this to be a contentious and hard-fought battle and hope you will join in saving this invaluable tree.

Williamsburg Landfill:

The Coalition of Concerned Citizens of Williamsburg County and S.C. Coastal Conservation League have mounted a fight to protect the air quality, water quality and way of life in rural Williamsburg County from a proposed new 400,000 ton/year landfill. SCELP, on behalf of these groups, filed an appeal of the landfill permit modification alleging numerous violations of the regulations. Central to our case is the fact that the existing landfill proposed to be modified by the decision is unlined, is at capacity, is no longer accepting waste, and has been ordered closed by DHEC. Opposition from the citizens resulted in Williamsburg County Council's decision to withdraw its permit modification request. The case is still pending in the Administrative Law Court, but SCELP is working to have the case dismissed.

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SCELP's 2nd Annual Wild Side Celebration a Success!

The success of the second-annual Wild Side event removed any doubt that this will become a yearly SCELP celebration. Along with many of our guests, we enjoyed the fellowship and comradery of old friends, as well as meeting new people who share a passion for our precious environment. We are committed to making next year's event, which will commemorate SCELP's 25th year, a true gathering of the broad SCELP network of friends and

supporters. We often talk about the "SCELP family" here at the office, and we want next year's very special Wild Side event to be much like a family reunion. If you have not yet attended a Wild Side event, make SCELP's silver anniversary your first, and we promise you will not regret it.

What do beautiful vistas, Leigh Chandler, local art and delicious food have in common? They were the hits of SCELP's 2011 Wild Side event. As the Wild Side guests enjoyed the fading light of a fall sun cast onto the waters of Winyah Bay, Jimmy's daughter Leigh delivered a touching tribute that drew tears and then a standing ovation from the crowd. Leigh's words and strength certainly provided the indelible moment of the night, and we are very grateful for our continuing relationship with this remarkable young woman. After the spoken program, the silent auction, dinner and live music took center stage. Among many other items, we were lucky enough to have great pieces of local art donated for the silent auction, and a number of folks happily left with new additions to their collections. While some were perusing the silent auction, others were enjoying some of the best food and drink our area has to offer. Bistro 217, Roz's Rice Mill, New South Brewery, and Manifesto Wines graciously worked with SCELP to provide delicious food and beverages.

Thanks to all the corporate sponsors, individual sponsors, in-kind sponsors and guests at this year's event. We are grateful that so many chose to not only show up but to truly make the evening one to remember. We hope you join us next year to celebrate our 25th anniversary!



Guests hear from Tom Wood of Citizens for Marlboro County about SCELP's fight to protect the community from a mega-dump



Sunset overlooking Winyah Bay at the 2011 Wild Side

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SCELP Challenges Groin Project on Debidue Beach

SCELP has filed a challenge to a permit issued by DHEC's Office of Ocean & Coastal Resource Management (OCRM) to Debordieu Colony Community Association (DCCA) authorizing the construction of three groins on Debidue Beach. Groins are erosion control structures constructed perpendicular to the beach, typically in an effort to protect beachfront houses. The proposed Debidue groins would be constructed of an aluminum sheetpile wall, concrete fill and bolstered with granite rock, and would extend approximately 300 feet into the ocean.

The groins are intended to protect a narrow strip of oceanfront houses that were built well-seaward of other oceanfront houses at the southernmost tip of Debordieu Colony. The houses are currently armored with a partially-failing seawall, which was built parallel to the shoreline. The houses were unwisely built seaward of adjacent houses due to artificial beach accretion that resulted when canals were dredged in the salt marsh and the dredge material was placed onto the beach, in essence extending the shoreline seaward.

Debordieu Colony is adjacent to the North Inlet/Winyah Bay National Estuarine Research Reserve ("NERR") in Georgetown County. In particular, the area proposed for the groins is at the south end of Debordieu Colony, closest to the NERR. This NERR is one of the few pristine estuaries left in the United States and one of only 28 NERRs in the country. The majority of the waters of North Inlet are classified as Outstanding Resource Waters – the highest water classification in the state. Scientists have been conducting long-term ecological studies at the NERR for decades because it is a test control site for the normal functions of estuaries.

SCELP is working with Rob Young, Director of the Center for the Study of Developed Shorelines and a recognized national expert on coastal geologic processes. Dr. Young and his colleagues have formally recognized that groins damage downdrift beaches by preventing the natural transport of sand. The groins trap the sand moving downdrift through longshore transport and prevent it from naturally nourishing downdrift beaches.

The regulations applicable to groins state that groins "may only be permitted after thorough analysis demonstrates that the groin will not cause a detrimental effect on adjacent or downdrift areas." Dr. Young will testify that the proposed groins will inevitably cause a detrimental effect on adjacent and downdrift areas, especially in light of their proximity to such an ecologically important and sensitive area.

Baruch Foundation, which manages the North Inlet/Winyah Bay NERR has also filed an appeal and SCELP has been working together with its attorneys to challenge the agency's decision. A trial date has been set for April 17-19, 2011. SCELP is representing the S.C. Coastal Conservation League and the Sierra Club-Winyah Group in the administrative appeal.



An aerial of a groin on Hunting Island shows the downdrift erosion groins cause

Plum Island Expansion: SCELP has also challenged the expansion of Plum Island Wastewater Treatment Plant into the salt marsh that surrounds the island in the Charleston Harbor. Plum Island was created in the 1960s to house Charleston's wastewater treatment facilities. The island and treatment facilities were constructed before the advent of modern environmental laws, and involved filling of salt marsh to create the facility.

Rather than phasing out this ill-sited facility in favor of a more environmentally conscious design, Charleston Water Systems has developed a plan to expand the footprint of Plum Island by filling adjacent salt marsh. SCELP is challenging the initial phase of this plan, which has already been approved by DHEC, and consists of constructing a large pipeline in the adjacent marsh. The case is currently pending before the Administrative Law Court.

SCELP Wins Precedent Setting Supreme Court Victory for Isolated Wetlands



Aerial of the Carolina Bay at issue

For ten years the environmental community has fought for state-wide protections for “isolated wetlands,” wetlands that are not adjacent or connected to navigable waters. This fight was necessitated by a U.S. Supreme Court decision in 2001, which eliminated federal protection for between 300,000 – 600,000 acres of isolated wetlands in South Carolina. Since that time, the environmental community has made attempts at legislative fixes to ensure protection. SCELP has always taken the position that such wetlands are protected under our state’s Pollution Control Act, but no court had ever held as such.

In 2007, members of the Georgetown County League of Women Voters contacted SCELP and informed us of clearing and filling occurring on a small lot in Pawleys Island. The lot contained a pond and wetland that are part of one of the unique wetland bodies referred to as a Carolina Bay. Smith Land Company cleared the lot, brought in truckloads of dirt, and filled the wetlands and pond without receiving a permit from DHEC. The wetlands on the property were delineated as “isolated” by the U.S. Army Corps of Engineers, meaning that no federal Clean Water Act permit is required.

On behalf of the League of Women Voters, SCELP challenged the action arguing that the Pollution Control Act requires a permit before filling the isolated wetlands, which are waters of the State. Smith Land Company argued, and the circuit court agreed, that DHEC similarly did not have jurisdiction to regulate isolated wetlands. The circuit court also held that the citizens groups did not have a right to bring an action under the Pollution Control Act. SCELP appealed that decision.

On July 11, 2011, the South Carolina Supreme Court issued a landmark opinion declaring that S.C. law requires protection of isolated wetlands. The Court first noted that while the U.S. Supreme Court has held that isolated wetlands are not covered under the federal Clean Water Act, this has no impact on DHEC’s ability to regulate those wetlands. The Court found that DHEC in fact has jurisdiction to regulate isolated wetlands based on the clear language in the Pollution Control Act. Given that DHEC has jurisdiction over the isolated wetlands, the Court next held that Smith Land Company was required to get a permit from DHEC before filling the wetlands. Smith Land Company violated South Carolina law by filling isolated wetlands without a valid state permit. Finally, the Court held that the Pollution Control Act provides a private right of action. In other words, private citizens and groups can sue to enforce the provisions of the Act.



The Carolina Bay prior to being filled by Smith Land Company

In sum, the Supreme Court’s order provides important protections to our State’s ecologically diverse and valuable “isolated” wetlands. Carolina Bays are only one example of the unique ecosystems that can be found in such wetlands. Prior to filling in any isolated wetlands in the State, a Pollution Control Act permit is now required. The Court’s order also struck down what would have been a significant obstacle to those citizens seeking environmental accountability in this State. The Supreme Court’s opinion leaves no doubt that the Pollution Control Act opens the door for private citizens to enforce its terms. SCELP’s Amy Armstrong said the case is a “landmark decision establishing protections for isolated wetlands throughout the State, and mandating that a State permit be obtained prior to filling any of our State’s unique and essential wetland resources.”

Captain Sam’s Spit, continued from cover ... The Court ruled that “by law, OCRM must take into account the impact of any critical area permit on upland sprawl, general overdevelopment, and pristine habitats.” This powerful language will be useful in future cases where permits are issued that would effect pristine areas or allow overdevelopment and sprawl in environmentally sensitive coastal areas. You can read the Court’s full opinion at <http://www.sccourts.org/opinions/displayOpinion.cfm?aseNo=27065>