

Mountains & Marshes

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

Winter/Spring 2005-06

ARE WE LOSING OUR ENVIRONMENTAL RIGHTS?

Jim Smiley, a retired biology professor at the College of Charleston, lives on the Isle of Palms, and he walks and runs on the beach almost every day. When he learned that beach-front property owners had applied for a permit to dig up thousands of cubic yards of sand from the public beach and move it to private property, he did not like it. The bulldozers, dump trucks and other equipment would make

it dangerous to be on that part of the beach. And weren't the Public Trust Doctrine and the Coastal Zone Management Act supposed to protect public resources like the beach?

When the permit was issued, he filed an appeal. But his appeal was summarily dismissed by an Administrative Law Judge. Jim Smiley has no standing to appeal, the judge said.

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New regulations governing bridges to coastal islands are under review. See page 3.

Finding Motivation

Sometimes it seems like SCEL P's successes are all in the past, and that the precedents we've set in wetland, coastal management and hazardous waste cases are slip-sliding away. And there's no doubt that organized development groups are working hard to chip away at environmental protection laws, and at citizens' rights to enforce those laws.

The climate in the SC General Assembly makes it very difficult for our state environmental management agency to update regulations. Legislators and even judges are openly hostile to the SC Department of Health and Environmental Control. Hostile House members have prodded the Legislative Audit Council to investigate the DHEC water quality certification and coastal management programs. Efforts are well underway to cut back on citizen participation in the enforcement of environmental laws. There is sometimes a sense of futility in pursuing the types of cases SCEL P has been



so successful at in the past. Fortunately, there are bright spots. We've moved toward consensus over new coastal bridge regulations and freshwater wetlands legislation. DHEC has strong and involved leadership in Board Chair Elizabeth Hagood. The new head of the coastal management program, Carolyn Boltin, has proven to be a fast learner and strong leader in her first few months. A judge has found serious problems at the Chem-Nuclear landfill, giving us a basis to seek remedies from the DHEC Board.

When we feel like giving up, we know we must stay focused on these bright spots. We know that every day, our work at SCEL P makes our client groups stronger, that our work has value, that we are needed even more during these difficult days. The moral, psychic and financial support we receive from our friends, neighbors and fellow nature lovers keep us going.

More and more, my personal motivation owes a lot to my daughter Leigh, who has joined me on this page for the past few years. Thank you, Leigh, and thanks to all of you who keep us going.

.....Jimmy Chandler

Transitions

Recently, SCEL P said goodbye to two of our board members who have resigned after collectively serving for ten years.

Ginny Prevost served as our Treasurer, and spearheaded our efforts to devise a new Strategic Plan. Ginny is President of the Sewee Association, works on many other worthy projects, is an avid bicyclist, and recently spent 12 days in New Zealand.

Linda Ketron is Director of Non-Credit Activities at Coastal Carolina University's Waccamaw Higher Education Center and also the founder of Bike-the-Neck. Linda has hosted wonderful fundraising events for SCEL P and many other groups.

Thank you, ladies, for your service to SCEL P.

South Carolina Environmental Law Project, Inc.

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(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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Grant Supports Local Projects

To have the greatest impact on environmental law and policy in South Carolina, SCEL P usually tries to focus on issues of state-wide significance. But a special grant has us working on local Georgetown County issues.

Since 2004, the Frances P. Bunnelle Foundation has funded projects to improve the quality of life in Georgetown County. SCEL P has been blessed with the support of the Bunnelle Foundation. The Foundation's special Community Grant will allow us to work on a new county storm-water ordinance and an update to our comprehensive zoning plan.

We see this grant as an opportunity to assist in drafting ordinances that will protect local natural resources in this fast-growing area. If we succeed in our efforts, the stormwater ordinance may serve as a model for water quality protection in other counties.

Our work on these projects is well underway — and we're proud to say we're having an impact, with many of our recommendations incorporated into the draft stormwater ordinance.

Are We Losing Our Environmental Rights?

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The project would only temporarily interfere with use of the beach, the judge said, despite the fact that the permit allowed the digging of sand each month for five years. She called the impact on his use of the beach “general and hypothetical.”

Jim appealed to the Coastal Zone Management Appellate Panel, but lost in a 7 to 4 vote. He then got SCEL P to take the case to circuit court and the Court of Appeals. SCEL P lost both appeals.

The courts said Jim Smiley could jog somewhere else while the beach sand is being dug up and moved. They belittled his claim that interference with his jogging was an injury that could give rise to standing.

These rulings, if upheld, take South Carolina far outside the mainstream rules of standing. Since 1988, South Carolina has followed the law stated by the US Supreme Court and lower federal courts. Those courts have said that a person has standing to challenge a permit if he uses a natural resource and his use could be harmed by the permitted project. The harm does not have to be very significant, “an identifiable trifle is enough for standing to fight out a question of principle”.

SCEL P’s cases in the 1980s led to the rulings that adopted the federal standard for “standing.” SCEL P and its clients have relied on the precedents set by those cases for nearly two decades. In the Smiley case, and in a series of similar cases, Administrative Law Judges have now reinterpreted the rules for standing.

In a 2004 ruling, an ALJ dismissed a dock permit for lack of standing, despite uncontested evidence that the dock would interfere with recreational uses and commercial fishing. The judge said that the



dock was in public waters and thus affected all members of the public, apparently saying that as a result, no one can challenge the permit.

Under the new standards set by the Administrative Law Court and the Court of Appeals, it could be difficult for SCEL P’s clients to establish standing in future cases.

The Court of Appeals order in

Smiley’s case is “unpublished,” and thus it is not supposed to be taken as precedent-setting. But the Administrative Law Court is featuring the case on its web site, so it will surely influence future cases.

SCEL P has filed a petition asking the SC Supreme Court to overturn the Smiley ruling, and we have taken the dock ruling to circuit court.

New Regulations for Bridges to Coastal Islands

The Board of the SC Department of Health and Environmental Control (DHEC) is in the process of approving new regulations governing permits for bridges to coastal islands.

The new regulations were urgent after a decision in February 2005 by the SC Supreme Court that threw out the existing rules. With more than 2,500 islands dotting the state’s coast, OCRM began an intense effort to write new regulations.

A six-member Marsh Islands Advisory Committee was given the task of finding consensus among varied interests. The six-member committee included development and environmental interests, including SCEL P’s own, Jimmy Chandler. After long and difficult debate, the committee arrived at a consensus. The committee’s recommended rules, with only slight changes, were approved by the DHEC Board and placed on public notice for comments.

The new rule sets minimum sizes for islands that can have bridges, and maximum lengths for bridges. The rule also sets performance standards for islands with bridges, including limits on docks and housing density. Freshwater wetlands must be avoided and protected by buffers, and stormwater management will be strict. There are limits on lighting, buffer and open space requirements, limits on impervious surfaces, and protection for existing vegetation. Septic tanks must meet more stringent standards than normal. Variances are allowed only where there is clear and convincing evidence of an overriding public interest. Conservation easements will lock in the buffers and other natural resource protections.

Congaree National Park

DOT plan for 601 bridge ignores Congaree National Park values.

South Carolina's only national park has been slated by Congress to grow to include the area around the US Highway 601 bridge across the Congaree River. The 601 bridge is in dire need of replacement. The old crossing uses causeways constructed by filling wetlands within the Congaree River floodplain for most of its length. The replacement of this old bridge presents a unique opportunity to correct a past mistake, remove the old wetland fill causeway, and build a scenic bridge across this floodplain within the authorized boundary of the park.

Unfortunately the S.C. Department of Transportation (DOT) doesn't seem to see things that way. DOT has applied for a permit to fill 8 more acres of floodplain wetlands for causeways, proposing only minor increases in the length of the bridges.

The SC Department of Natural Resources, the US Fish & Wildlife Service, the National Parks Service, and independent scientists all say that the DOT plan will have negative impacts on the Congaree floodplain wetlands. These entities and a host of others are pushing for removal



Times past: USC Law School professor Bill McAninch, Columbia attorney, historical restoration expert, and art collector Mark Coplan, and SCEL P's Jimmy Chandler on a 1981 Sierra Club hike in the Congaree Swamp.

of the causeways, restoration of the floodplain blocked by the causeways, and bridging of the entire floodplain area.

SCELP is working with Sierra Club, SC Wildlife Federation, Friends of the Congaree and others seeking a better plan for this bridge. If DHEC will not protect our only National Park, what will it protect?

Mixed Ruling in Radioactive Waste Landfill Case

Chem-Nuclear ruling leaves many concerns unanswered.

On October 13, 2005, Administrative Law Judge John Geathers issued his ruling in our appeal of the renewal license for the Chem-Nuclear radioactive waste landfill in Barnwell. The ruling affirmed the decision of the South Carolina Department of Health and Environmental Control (DHEC) staff and upheld the license renewal. The judge's order, however, found that there are "problems" at the landfill, and he ordered Chem-Nuclear to conduct a study of "the scientific and economic feasibility of employing or implementing designs and operational procedures" to solve those problems.

SCELP represents Sierra Club in this case, which was described in more detail in the Spring/Summer 2005 edition of this newsletter. The appeal ruling followed a four-day hearing held in February 2005.

The problems noted by Judge Geathers are related to the landfill's failure to properly secure the wastes from water intrusion. His order found:

"The concrete vaults at the Barnwell Facility are not sealed against water intrusion. The floors of the vaults have holes to allow water to drain from the vaults, and the lids of the vaults are not grouted or otherwise sealed to prevent water from entering the vault. Further, when waste is buried underground, a particularly rainy period will moisten the soil around the buried waste, even with enhanced capping. And, the water table rises during wet periods, as documented by monitoring measurements at the Chem-Nuclear site. The Barnwell site receives an average of 47 inches of rain per year; by comparison, desert environments like central Washington where U.S. Ecology has its waste disposal site receive only 10 or 11 inches of rainfall per year.

"The problems caused by rainfall are compounded because, when Chem-Nuclear is filling a vault, the vault has no cover or roof, so rain can fall directly into the vault during the loading period. . . . Rainfall that accumulates in the trenches eventu-

ally percolates into the soil, and drives the groundwater movement that is carrying tritium and other radioactive materials into Mary's Branch Creek."

Judge Geathers also found that radioactive materials have been leaking from the landfill for over 25 years. He noted that DHEC staff had asked Chem-Nuclear to study improved designs and practices for the landfill several years ago, but there has been no follow-up for the past four years. He found that more than ten years ago, Chem-Nuclear had designed a landfill for North Carolina that would solve all of the problems that are present at the company's South Carolina site.

In assessing the problems at Barnwell, Judge Geathers said, *"The monumental hazardous conditions that can result from tritium and other radioactive materials leaching into the soils, and, in turn, into the groundwater, cannot be ignored."*

Unfortunately, the order issued by Judge Geathers concluded that the

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Success at the Appellate Panel

Enforcement action results in violator being ordered to restore destroyed salt marsh.

We won two cases before the Coastal Zone Management Appellate Panel on November 18th, 2005.

The first case was an enforcement action brought against Wayne Hill, who destroyed and filled about 1500 square feet of salt marsh to enlarge his lot in the Heritage Shores section of North Myrtle Beach.

In 2002, the Office of Ocean and Coastal Resource Management (OCRM) issued a permit to Hill for a bulkhead to be built on the "critical area line" - the line between high ground and salt marsh. But Hill vio-

lated this permit, and coastal protection laws, by constructing the bulkhead up to 31 feet into the salt marsh and dumping 17 truckloads of dirt in the marsh. After being cited for the violation, Hill appealed, and SCEL P, representing the Coastal Conservation League, intervened on OCRM's side.

After a hearing in April, 2004, an Administrative Law Judge ordered Hill to remove his bulkhead and to restore the marsh.

Hill appealed this order to the Appellate Panel, but the Panel upheld the ruling that Hill broke the law, violated his permit, and must restore

the destroyed salt marsh.

In the second case, the Appellate Panel upheld prior staff and Administrative Law Judge decisions denying a permit for a dock on a tributary of the Ashley River. SCEL P represents the S.C. Department of Archives and History (DAH), who intervened in this case as part of its efforts to protect and preserve the scenic vistas of the historic Ashley River corridor. In 1991 and 1992, DAH worked with OCRM to secure the Ashley River Historic District Special Area Management Plan (SAMP), which protects scenic vistas and limits docks in the Ashley River Historic District.



Illegal fill: *property owner ordered to restore destroyed salt marsh area shown above in before and after photos.*

Daufuskie Marina Settlement

Marina design to be modified and new protections added.

The Coastal Conservation League and SCEL P have reached a settlement with a Daufuskie Island developer to resolve a five year battle over a 19-year-old marina permit.

The case involves a permit issued in 1986 for a lock harbor marina, a river marina, and a barge landing on property known as the Webb Tract on Daufuskie. To date, only the barge landing has been built. The permit has been renewed several times, and when the most recent renewal was issued in 2000, the League filed its appeal.

The settlement requires the developer to modify the marina design so the lock harbor is converted to "an inland salt water lagoon" with sloped, vegetated banks around most of the edges of the lagoon. The entrance to the lagoon will be designed to bar entry of large boats except during storm events when they can be allowed to enter for shelter. A new water quality plan will be prepared, and a "state of the art" stormwater management system will also be designed for the development.

Details of the settlement are being finalized.

Mixed Ruling in Radioactive Waste Landfill Case

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landfill meets all regulatory requirements and affirmed the renewal of the license for the landfill. Although he ordered studies of new designs and

procedures, his order fails to say what should or will happen as a result of the studies, nor does it provide any mechanism for review of the adequacy of the study. Our motion for

reconsideration was quickly denied.

Sierra Club has appealed Judge Geather's ruling; the appeal will be heard by the DHEC Board some time in 2006.

Perrone Case

Intervention granted in Cherry Grove ownership case.

A state circuit court judge has ruled that the Coastal Conservation League, Sierra Club, and the South Carolina Attorney General can intervene in a case involving a private claim of ownership of creeks, canals and salt marsh in the Cherry Grove section of North Myrtle Beach.

The suit was filed by members of the Perrone family against the City of North Myrtle Beach and the SC Department of Health and Environmental Control. The Perrones say the City is trespassing on their land, creating a private nuisance, and taking their land by discharging stormwater. They also

challenge the City's plans for re-dredging the Cherry Grove canals.

The Perrones earlier filed suit against DHEC and the State, seeking a ruling that they own this area.

That suit was dropped, and the new suit simply assumes the Perrones have ownership and seeks damages and an injunction.

This case has a long history, going back to litigation over a massive dredge and fill operation that occurred 50 years ago.



In a related matter, an administrative appeal is being waged over the City's dredging plans.

SCELP is working to protect the public interest in these areas, which we believe to be owned by the State under the Public Trust Doctrine.

Nationwide Permit Certifications

State agencies propose changes to Nationwide Permit Certifications.



Pawleys Island isolated wetland being cleared and filled under nationwide permit with no prior public notice.

In July, the SC Department of Health and Environmental Control and its Office of Ocean and Coastal Resource Management issued a public notice of the agency's proposal to relax state standards for 18 nationwide wetland permits. Each of the 18 changes would allow greater impacts to wetlands without prior public notice or agency review.

Nothing in the public notice or any other documents issued by the agency attempts to justify the changes on environmental grounds. Off-the-record discussions with knowledgeable staff members indicate that the changes were proposed in response to political pressure from members of the State Senate and House of Representatives, and from one or two development consultants.

State certification of nationwide federal permits is, to say the least, a fairly arcane topic. Nationwide permits (NWP) are supposed to authorize minor projects that have little impact. Up until now, however, DHEC and OCRM have refused to give state approval to many of the NWPs, and have imposed additional state requirements and individual state review of many NWPs. Without the additional state requirements and state review, there will no doubt be greater impacts occurring without any chance for public input or appeal. Nationally, environmental groups have uniformly believed that the NWPs are abused and lead to cumulatively significant impacts. SCELP has submitted lengthy comments objecting to the proposed changes, and will continue its effort to prevent this relaxation of state wetland standards.

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