

# Mountains & Marshes

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Summer/Fall 2007

## Citizens Suit Victory

### *SCELP Wins Landmark Citizens Enforcement Suit*

The South Carolina Environmental Law Project (SCELP) recently won a big victory for citizens' rights to enforce the SC Coastal Zone Management Act (CZMA) and for the protection of coastal wetlands.

On February 20, 2007, state Circuit Court Judge Roger Young issued an order declaring that private citizens and groups have the right to file suit to enforce the CZMA where the state has failed to do so, and ordered fill removed from a creek at Fenwick Island in Colleton County where the creek was filled without a state permit. The order also required the full restoration of the area, and declared unlawful a state agency agreement allowing the fill dirt to remain in place without a permit.

This case represents the first time that an environmental group has used a little-noticed provision of the CZMA to bring an enforcement action against someone who has violated the Act. Section 48-39-160 of the CZMA says that the state court "shall have jurisdiction to restrain a violation of this chapter at the suit of the department, the Attorney General or any person adversely affected."

SCELP overcame a series of arguments against this citizen enforcement action. Ultimately, SCELP prevailed without a trial. The judge granted summary judgment, concluding that depositions and other evidence demonstrated that there was no genuine issue of material fact and that we were entitled to judg-

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**Fenwick Island** — this pristine area is where standpipes and fill dirt were installed in the critical area restricting tidal flow to the creek and marsh beyond.

ment as a matter of law. The Court's order granted all of the relief we requested.

The case arose in 2002. The owner of most of Fenwick Island, Dewey Wise, had obtained a permit from the South Carolina Coastal Council in 1985, allowing the construction of a short bridge across a creek that runs up into the interior of the island. In 2001 and early 2002, the area around the bridge began eroding. Rather than deal with the erosion, Wise tore down the bridge and placed fill dirt in the creek where the bridge had been. The fill dirt blocked all tidal flow to the creek and marsh above the bridge location.

The fill was soon detected by officers of the SC Department of Natural Resources, who reported it to the SC Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management (OCRM) (the agency that replaced the Coastal Council in 1994). OCRM issued a Notice of Violation, alleging a violation of the CZMA for filling salt water "critical area" waters without a permit. But OCRM later backed down, and al-

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**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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**Thank you.**

## New Cases

### **Wetlands Protection Cases —**

SCELP has filed suit in two cases to seek a judicial declaration of the State's authority and duty to regulate isolated freshwater wetlands.

Several years ago, environmental groups petitioned the Board of the SC Department of Health and Environmental Control to promulgate regulations governing permits for isolated wetlands. The petition argued that these wetlands are "waters of the State" as defined in the SC Pollution Control Act, and that the Act and DHEC water quality regulations prohibit discharges to the wetlands without a permit. The DHEC Board agreed, and the agency prepared regulations. The regulations were killed by the SC General Assembly.

In these two cases, developers are seeking to fill, or have already filled, wetlands without a state permit or other approval. Even without wetlands permitting regulations, we believe the statute and water quality standards require a permit. We are asking the Court to issue a declaratory ruling that a state permit is required. In the case where filling has already occurred, we are seeking an order requiring restoration of the wetland.

### **Ballentine Stream Destruction —**

Wal-Mart wants to construct a 24 hour supercenter along with 36 outparcels in the Ballentine area of Richland County and doesn't mind that a natural stream and adjacent wetlands would be destroyed in the process.

DHEC issued a permit to the developer, Meyers-Briggs, allowing the filling and piping of over 800 linear feet of stream, along with the wetlands adjacent to the stream despite objections from both the U.S. Fish and Wildlife Service and the S.C. Department of Natural Resources. The stream flows into Metz Branch and the Broad River.

The former Assistant Chief of DHEC's Bureau of Water opines that DHEC failed to properly apply regulatory standards in issuing this permit.

On behalf of Ballentine First and several residents, SCELP has challenged that permit decision in the Administrative Law Court. The hearing will be held September 25th-26th in Columbia.

## Board Update

**Professor Kim Diana Connolly**, pictured here with her family, is the newest addition to our Board of Directors.

Kim is a professor at the University of South Carolina School of Law where she specializes in environmental law, and wetlands law and policy.

Welcome aboard, Kim. We are honored by your desire to serve and your continued zeal to protect South Carolina's natural resources.



# Goat Island Protected from Large-Scale Development

**S**CELP has successfully defended Goat Island, a quaint natural island in Charleston County, against a proposal that could have changed the island's character. Goat Island is a sparsely populated island with no bridge access and no serviceable roads. Charleston County has designated Goat Island as a Special Purpose District for Natural Resource Management.

The thirty full-time residents enjoy the relaxed, quiet, slow-paced living on the island. In exchange, they have to transport all their goods by boat – everything from groceries and water to large appliances and building materials. Residents access the island by driving their boats from the mainland to private docks. These docks are all four-feet wide.

A new resident and owner of several lots on Goat Island decided he wanted to change the way of life on Goat Island. Although he already has an existing four-foot wide dock, the resident applied for a permit for a commercial-sized docking structure that would open up the island for large-scale development and change forever the unique character of the island. The 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.



**Goat Island** — an aerial view of a portion of this rare unspoiled island in Charleston county that SCELP has succeeded in helping protect from large-scale development.

OCRM denied the permit because it was far in excess of any docking structure that the agency has ever permitted, and in violation of their regulations. In addition, the structure would prevent sunlight from reaching the 2,500 square feet of vegetated wetlands that would be covered by the structure, resulting in the loss of *Spartina alterniflora* and other marsh grasses. These marsh grasses form the basis of the food chain for crabs, fish and shrimp.

The applicant appealed the denial, and SCELP was granted intervention on behalf of the Coastal Conservation League to defend the denial. Administrative Law Judge Marvin Kittrell held a hearing in the spring of 2006 in Columbia. SCELP presented testimony and evidence establishing harm to the wetlands, as well as to the unique character of Goat Island.

On March 15, 2007, Judge Kittrell issued an opinion denying the docking structure, thereby preserving Goat Island and its natural resources.

## Case Updates

**Riverside** — The trial of this case – involving a proposal to dredge critical area marsh – was held in November 2006. The parties have submitted proposed orders to the Administrative Law Judge, who now has the case under advisement.

**Chem-Nuclear** — The SC Supreme Court will hear arguments on June 20 on Chem-Nuclear's effort to avoid a hearing before the DHEC Board. Meanwhile, legislative efforts to expand the burial of radioactive waste in this landfill were defeated in the SC General Assembly.

**Spectre Wetlands Case** — The hearing of a developer's challenge to the validity of the SC Coastal Management Program and proposal to fill 32 acres of wetlands has been delayed by extensive pre-trial discovery. Spectre has taken depositions of 10 witnesses and made an unsuccessful effort to obtain confidential OCRM attorney-

client communications. No trial date has been set.

**Smiley/Park West** — The SC Supreme Court heard oral arguments in these cases – both involving the issue of “standing” to appeal coastal permits – on April 5. We believe the arguments went well, and we anticipate an order any week now.

**Congaree Swamp/Highway 601** — This case has moved to the Administrative Law Court for all issues. A trial has been scheduled for October 16-18, 2007.

**Cherry Grove/Perrone** — The Perrone's claim to ownership of the creeks and marshes in the Cherry Grove area of North Myrtle Beach suffered a setback in April. A judge ruled that the deed under which they claim title was obtained through improper influence and is thus invalid. We are now waiting to see if the order is appealed, and assessing its full impact on the dredging permit.

# Citizens Suit Victory

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lowed the fill to remain in place without a permit, under an agreement requiring Wise to place three 24-inch pipes into the fill. By avoiding a permit, the fill escaped the type of public notice, public comments, and public hearing scrutiny that the Act requires.

In 2003, OCRM discovered that Wise had added “stand-pipes” to the fill and had put a “trunk” structure in place near the fill, all without a permit. Again, OCRM issued a Notice of Violation. But, again, OCRM backed down and allowed the structures to remain without a permit.

On behalf of the SC Coastal Conservation League, SCELPL filed suit in late 2003. For over three years, SCELPL endured depositions, motions and other legal procedures. Finally, in January 2007, a hearing was held in front of Judge Young.

In deposition testimony, OCRM officials had admitted that it would be difficult, if not impossible, to justify issuing a permit for the type of fill placed in the creek at Fenwick Island. The affidavits of League members regarding their use of the nearby waters, and the negative impact of the fill on their use, were uncontested. The affidavit of our expert, Dr. Dennis Allen of the USC Baruch Marine Lab, as to the negative impacts of the

fill, was also uncontested. Dr. Allen said that the blocking of tidal flow decreases the productivity of this part of the ACE Basin estuary, and that flow was restricted even with the



**Fenwick Island** — Wise has been ordered to restore this site and surrounding area to its original environmentally desirable condition.

pipes.

The judge’s order first concluded that the League has standing because the fill will have negative impacts on its member’s use of the public natural resources at Fenwick Island. He then concluded that section 48-39-160 of the CZMA allows the League to pursue its action against Wise, and rejected Wise’s claims that the suit would violate his constitutional rights.

The order then states: “*Once the plaintiff’s standing and authority have been decided and Wise’s constitutional arguments are resolved, this case boils down to the issue of whether the critical area alterations done by Wise since 2002 were au-*

thorized by the permit issued to Wise by the South Carolina Coastal Council in 1985.” After discussion of the issues, the order first concluded that “*Nowhere in the Act or regulations is*

*the agency given authority to allow the filling or other alteration of the critical area through the enforcement process or any other means without a permit.*”

As to the breadth of the 1985 permit, the judge concluded: “*There is nothing in this case indicating that the 1985 bridge permit was issued to authorize anything other than the construction of a bridge built to the plans and specifications shown in the permit.*” He also rejected

arguments that the fill could be considered “normal maintenance and repair” of the bridge.

The order requires the fill, the pipes and the stand-pipes to be removed, along with bulkheads added to the fill in 2004 after the lawsuit was filed.

Wise was also ordered “*to restore the site and the surrounding area to its original environmentally desirable condition.*”

After Wise and OCRM filed motions asking the judge to reconsider, an agreement was reached under which after the fill is removed Wise will be allowed to re-build the bridge authorized by the 1985 permit, but Judge Young’s order will stand and will not be appealed.

The human spirit  
needs places  
where nature  
has not been rearranged  
by the hand of man.

~Author Unknown

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