

Mountains & Marshes

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

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Protecting Congaree Swamp

Over the last six months, SCELCP has been fighting hard to protect Congaree Swamp and Congaree National Park from the perpetuation of a mistake made half a century ago. The SC Department of Transportation (DOT) wants to enlarge and keep in place miles of causeways through the Congaree Swamp. A portion of the causeways lies within the boundaries of South Carolina's only national park. On behalf of Friends of Congaree Swamp, S. C. Wildlife Federation and Audubon S. C., SCELCP has filed administrative appeals and a lawsuit in Federal District Court, challenging permits for this project.

In July, the staff of the SC Department of Health and Environmental Control (DHEC) issued a proposed decision to allow the causeways and bridge replacements for the US Highway 601 crossing of the Congaree River and the adjacent swamp. DOT plans to fill more wetlands in the swamp and to take only very minor action toward correction of the damage done to the swamp when the existing bridge/causeway system was built in the 1940s.

SCELCP asked for a "final review conference" before the DHEC Board. At its August meeting, the Board voted to suspend the proceeding to allow all parties to meet and seek a compromise. But DOT stood firm, resisting all of our efforts to find a compromise solution.

The DHEC Board reconvened the review conference in September and voted to remand the case back to the DHEC staff, directing them to

give more consideration to additional alternatives to DOT's plan.

Just before the September Board meeting, the deadline arrived for legal challenges to the Environmental Assessment prepared by DOT as part of the Federal funding and permitting

process. Rather than lose their rights, SCELCP's clients authorized the filing of a lawsuit to challenge the adequacy of the Environmental Assessment. Under the National Environmental Policy Act (NEPA), federal agencies must prepare an Environmental Impact Statement (EIS) before every major Federal action signifi-

cantly affecting the human environment. In this case, DOT prepared a brief Environmental Assessment concluding that the bridge/causeway project would not have significant effects.

With the project located in part within the Congaree National Park, the National Park Service has argued strenuously against this project and requested modifications to protect the swamp. The Environmental Assessment gives scant attention to the National Park, and erroneously states that the project is consistent with future plans for the Park.

Our suit asks the Federal Court to declare the Environmental Assessment to be in violation of NEPA, and to order DOT to prepare a full EIS.

The DHEC Board's vote was put in writing in October. Within minutes after the Board's order was issued, the DHEC staff issued its new decision on the permit. The new decision appears to have been hastily made, and simply requires



Photo courtesy of Virginia Winn

A Note from the Director

The South Carolina Environmental Law Project will reach its 20th anniversary in 2007. As we plan events and special publications for this special year, I've been giving a lot of thought to the accomplishments, and frustrations, of our work.

I'm very proud of the role SCELPL has played in ensuring that citizens and small groups have a voice in environmental legal proceedings in this state. We've established key legal precedents securing constitutional rights in permit proceedings. I'm happy about wetlands we've helped save, hazardous waste dumps and incinerators we've helped close down, water quality problems we've solved.



Jimmy with wife, Rebecca, and daughter, Leigh, standing amid the oak trees in their front yard.

But I'm frustrated by having to re-fight battles we thought we had won. In a recent hearing, I was terribly disappointed to hear a key state regulator admit that he has never read some of the most important legal decisions interpreting the regulations he is supposed to implement. SCELPL has been around long enough to see DHEC staff come and go. We were once astonished to hear a DHEC lawyer declare that the agency "has no institutional memory," but we now know that her statement was absolutely true. Great legal victories won in 1988, 1991, and 1997 are simply unknown to the new staff

members now in charge in this new century. I'm also frustrated by the

fact that even DHEC lawyers fail to explain these legal precedents to agency staff, and are willing to defend agency decisions that fly in the face of these precedents.

I know that the work of SCELPL will never be truly complete. We must carry on, inspired by our past successes and using the frustrations as motivation. Jimmy Chandler

Case Updates

Pawleys Island Golf: On behalf of the Georgetown County League of Women Voters, ("GCLWV") we successfully negotiated an agreement ending an appeal of a coastal zone consistency certification authorizing a wetland fill for a golf course. The developer of the golf course agreed to reduce the wetland fill for the golf course and to put all remaining wetlands on the golf course under conservation easement, in exchange for the GCLWV dropping its challenge to the certification.

Smiley/Park West: We have filed our briefs with the S.C. Supreme Court in two cases seeking to protect citizens' rights to challenge permitting decisions that would damage natural resources. We are hopeful that the high court will schedule oral arguments on these cases in early 2007.

Myrtle Trace: This key wetlands mitigation case, which SCELPL won at the DHEC Board and in Circuit Court, is now on appeal to the SC Court of Appeals.

Allendale Landfill: We thought this case had gone away, but a recent Ethics Commission advisory allowed a County Council member to vote on his son's landfill. We've amended our suit to challenge the county permit, and the case is now active in Allendale County court.

Cherry Grove/Perrone: This case, involving a family's claim to own canals, creeks and marshes in North Myrtle Beach and also a controversial dredging permit, has been on hold while the family resolves an internal battle over an estate. The estate suit was recently tried and a decision is expected soon.

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.*

Board of Directors

*Frances Close, Chair
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Robert Schofield, III
Wendy Zara*

Staff

*James S. Chandler, Jr., Director
Amy Armstrong, Staff Attorney
Kathy A. Taylor, Administrator*

Office address

*430 Highmarket Street
Georgetown, SC 29440*

Mailing address

*P. O. Box 1380
Pawleys Island, SC 29585*

Telephone: (843) 527-0078

FAX: (843) 527-0540

E-mail: ktaylor@scelp.org

Website: www.scelp.org

Protecting Critical Area Salt Marsh

Administrative Law Court hears appeal in Riverside Case

At a hearing on November 21, 2006, SCELPA presented evidence that state regulators violated state regulations when they issued a permit allowing dredging of vegetated critical area salt marsh. The developer of Riverside, a proposed 119-home real estate development on 25 acres of filled-in wetlands, applied to the South Carolina Department of Health and Environmental Control (DHEC) for a permit to dredge the salt marsh to create an 84-slip marina basin. DHEC approved the marina, plus almost 500 feet of additional community docks.

Administrative Law Judge John D. McLeod heard testimony from Dr. Jim Morris, Director of USC's Baruch Institute, Garvey Winans of the Georgetown County League of Women Voters, Nancy Cave of the Coastal Conservation League, the developer and DHEC staff.

DHEC staff witnesses admitted that the agency has not previously permitted dredging of vegetated marsh for private developments. In the past, the agency has limited dredging activities in tidal waters, typically requiring a 10 foot buffer from the marsh. But not this time.

The developer admitted that there were "red flags" when he purchased the property. The tract is adjacent to the navigational channel for the Port of Georgetown, and the legal setbacks prohibit marinas and docks within 125 feet of the channel boundary. That didn't deter the developer from hiring a former top DHEC official to push for this first-ever marsh dredging permit.

The regulations require that permits for dredging critical area meet an overriding public need, and there must be no feasible alternatives to the dredging. The developer admitted that it might be feasible to develop the property without a marina, but argued that dredging was necessary to achieve the "highest and best use" of

the property. The agency admitted that the private marina itself served no overriding public interest or public need, but argued that the developer's agreement to conduct water monitoring for 3 years at a yet-to-be-built nearby public



Riverside: the arrow above depicts the area where a developer wants to dredge critical area salt marsh to create a marina basin.

boat ramp, and to eradicate *Phragmites*, a type of marsh grass at the site, would somehow benefit the public. Neither DHEC nor the developer could explain how additional water quality testing would address any water quality problems. The agency already conducts regular water quality testing at the same site.

Dr. Morris explained that the marina would remove several species of marsh grasses that all provide public benefits by filtering water, and providing nutrients and habitat – facts which OCRM staff also admitted. Both Dr. Morris and an agency witness said that there was no real reason to eradicate the *Phragmites* at this particular site, and that the *Phragmites* provides the same wetland functions and benefits as other salt marsh wetland vegetation.

Judge McLeod has reserved making a decision until all parties have had a chance to review the hearing transcript and submit proposed orders.

Protecting Congaree Swamp (continued)

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a small amount of additional bridging and a shorter causeway. The new decision is not supported by any significant analysis.

DOT appealed both decisions by filing a request for a contested case hearing in the Ad-

ministrative Law Court (ALC). SCELPA appealed the new staff decision by filing another request for a review conference and a motion to intervene in the DOT appeal at the ALC.

The DHEC Board has agreed to hold a review conference at the Board's December meeting.

Chem-Nuclear Case Moves to the Supreme Court

Despite leaking radioactive waste, the ALC upholds permit for landfill

SC ELP's appeal of the renewal license for the Chem-Nuclear radioactive waste landfill in Barnwell has been delayed by a lawsuit filed by Chem-Nuclear in the South Carolina Supreme Court.

After the November 2005 decision of the Administrative Law Court (ALC) rejecting Sierra Club's challenge to the permit, SCELPA appealed the case to the DHEC Board. The ALC had upheld the permit despite finding serious problems with radioactivity leaking from the landfill. We were scheduled to argue our appeal to the DHEC Board in July.

Chem-Nuclear's lawsuit claims that the 2006

amendments to the SC Administrative Procedures Act eliminates the DHEC Board's authority to hear our appeal. We believe Chem-Nuclear is wrong. The South Carolina Attorney General agrees with our position and has filed a special brief in the case. The Supreme Court will hear arguments in the case sometime in early 2007.



Chem-Nuclear: *an unlined burial trench at Chem-Nuclear's radioactive waste landfill.*

In the meanwhile, the hearing at the DHEC Board is postponed, waste continues to flow into the landfill, and Chem-Nuclear has done nothing to correct the leaking radioactive materials. The leaking radioactive materials flow into the Savannah River, a source of drinking water for Beaufort County.

Proposed Weakening of Nationwide Permits Stopped

SCELP's challenge to weakening state conditions ends in success

SC ELP's challenge to proposed weakened state conditions of wetlands Nationwide permits has ended in success.

In 2005, the SC Department of Health and Environmental Control (DHEC) issued a public notice of its intent to weaken state conditions on federal Nationwide permits issued by the Corps of Engineers. Nationwide permits (NWP) authorize wetland alterations in advance, so that individual wetland activities are not placed on public notice and there is no opportunity for public comment on the individual projects. Each state is allowed to review the Corps'

nationwide permits and to place special state conditions on the use of these permits. In 2002, DHEC placed a number of special state conditions on nearly all of the 44 NWPs. The 2005 proposal would have weakened conditions on 19 of the NWPs.

SCELP worked hard to convince DHEC that the proposed changes were illegal and unwise. But in February 2006, DHEC issued notice of its final decision to make nearly all of the proposed changes.

On behalf of the Georgetown County League of Women Voters, SCELPA appealed the decision to the Administrative Law Court. As

a result of the appeal, DHEC was unable to implement the new conditions. After SCELPA asked the Court to grant summary judgment overturning the changes due to DHEC's lack of legal authority, DHEC proposed an indefinite delay of the changes.

The current NWPs are scheduled to expire in 2007, and the process of re-writing the NWPs has begun. To resolve our appeal, DHEC has agreed, by consent order, that it will not seek to implement the changes in the conditions of the 2002 NWPs and that nothing in the proposed changes will be considered as a precedent in reviewing the 2007 NWPs.

SCELP Celebrates at Hasty Point Plantation



On October 29th, SCELP Board member Bob Schofield hosted a first-of-its-kind event for SCELP at his beautiful plantation, Hasty Point, in Georgetown celebrating 19 years of our work. Our initial estimates that 60 people would attend rapidly proved conservative. As the RSVP list grew to 80, 90, and then topped 100, we were thrilled to be making decisions about tent sizes, number of tables, chairs, forks, and all matters pertaining to entertaining and feeding 120 people!

SCELP staff put together a slide presentation highlighting 19 years of cases. Gillian Roy graciously introduced Jimmy but not before she explained to all in attendance why she and her husband, Peter, support SCELP and appealed to others to follow their example. I know what Jimmy was thinking "Gillian's going to be a hard act to follow!" But follow he did and, if the number of times his presentation was interrupted by applause was any indication, Jimmy's message and enthusiastic passion for our work was evident to all.

A huge thank you to Bob and all of you who attended. We hope you enjoyed it as much as we did!



Lake Murray Marina Challenged

After defeat before the DHEC Board, SCEL P discusses next level of appeals with client groups

Q In behalf of three groups, Lake Murray Watch, Lake Murray Coalition, and Lake Murray Association, Inc., SCEL P, in August, filed a challenge to a proposed 84-slip marina on a small cove of Lake Murray near Chapin.

Lighthouse Developments, Inc. proposes to develop 92 lots on 15 acres of land, and wants to build the marina as an amenity for its development. SCEL P's clients believe that the marina is out of scale and out of character for the cove, will cause water quality problems, and will set a bad precedent encouraging more intense waterfront development on the lake.

Our initial appeal was heard by the DHEC Board at its October meeting. The marina sparked a spirited debate among the Board members. A motion to overturn the staff decision and deny the permit, however, was defeated by a 3 to 2 vote. Then a motion to affirm the permit was made, and the motion passed by a 3 to 2 vote. Two Board members who voted to affirm the permit announced that they thought the project was a bad one but that they felt bound to uphold the staff decision. One Board member was absent, and the Board Chair votes only in case of a tie.

SCEL P filed a motion asking the Board to reconsider its ruling, but the request was denied and a written order was issued at the November Board meeting. SCEL P is discussing the next level of appeals with its client groups.



Lake Murray: the arrow depicts the location of proposed marina.

SCEL P Fights to Protect Cypress Swamp

Wetlands case tests validity of South Carolina's Coastal Zone Management Plan

Q Developer's proposal to fill nearly 32 acres of wetlands has set off another major legal battle over the state's ability to regulate isolated wetlands.

After the South Carolina Department of Health and Environmental Control (DHEC) denied Spectre, LLC's request to fill 31.76 acres of wetlands on a 62.93-acre tract of land near Murrells Inlet, Spectre appealed. Spectre alleges that the South Carolina Coastal Management Program, which requires DHEC to protect coastal wetlands from commercial development, is legally defective and unenforceable. Spectre lost its first appeal at the DHEC Board in August, and now has appealed to the Administrative Law Court.

SCEL P has intervened in the case to defend the Coastal Management Program and the wetlands, on behalf of state and local chapters of the League of Women Voters, the SC Wildlife Federation and the Coastal Conservation League.

The Coastal Management Program was written by the old Coastal Council in 1979, ap-

proved by joint resolution of the South Carolina General Assembly and signed by the Governor. The SC Coastal Zone Management Act, enacted in 1977, directed the preparation of the Program, and says that "Upon review and approval of the proposed management plan by the Governor and General Assembly, the proposed plan shall become the final management plan for the State's coastal zone." The Program, enforced by DHEC since 1994, has been applied by the SC Supreme Court in several cases. Spectre, however, argues that the Program is invalid because it was not promulgated as a regulation pursuant to the requirements of the SC Administrative Procedures Act.

A Beaufort County judge ruled in 2002 that the Program is invalid. After that order was appealed and temporarily set aside by the SC Supreme Court, the developer pursuing that case withdrew his challenge to the Program and thus the issue remains unresolved. SCEL P believes that the Program was properly enacted and that its validity will ultimately be upheld.