SCELP
The South Carolina Environmental Law Project
Lawyers for the *Wild Side* of South Carolina

SUMMER 2017

Inside this Issue

COURT OF APPEALS HOLDS PARTIES TO THEIR WORD

Pawleys Island wetlands

ON MARCH 15, the S.C. Court of Appeals ruled that the plain language of a settlement agreement and consent order that says wetlands "shall" be preserved means that those wetlands must, in fact, be preserved. The Court reversed the ruling from the Administrative Law Court ("ALC"), which affirmed DHEC's decision not to enforce the agreement. The previous settlement dates back to 2000, when the Pawleys Island Community Church (the "Church") obtained permits from DHEC to fill in wetlands for an expansion project. Representing local residents Dan and Mary Abel, SCELP's founder Jimmy Chandler challenged the permit and the parties resolved the matter with a negotiated settlement agreement that was adopted as a final court order in January 2001. Under the agreement, the Church promised to leave half of the onsite wetlands preserved in their natural state.

However, in 2012 the Church applied for a new DHEC permit for additional construction activities that would destroy the remaining wetlands. Initially, DHEC indicated it could not issue the permit because it was in violation of the parties' agreement. Then, without the consent of all parties, the Church unsuccessfully sought to have the ALC modify the agreement to eliminate the wetland protections. Although the agreement was never modified, in 2014 DHEC granted the new permit, which was promptly challenged by SCELP on behalf of the Abels as in violation of the original agreement to which they are parties.

On February 12, 2015, ALC Judge Shirley Robinson granted DHEC and the Church's motion to dismiss the case and denied our motions for summary judgment and enforcement of the agreement. The ALC's decision was based on the dubious argument that even if the 2001 agreement was a valid and enforceable contract, "its

(continued from page 1)

applicability is limited to the 2001 construction project" but not further construction on the same property impacting the same wetlands and involving the same parties.

Relying on well and long-established rules and principles of contact law, the Court of Appeals reversed that decision, remanding the case back to the ALC to consider the propriety of the new permit in light of the clear terms of the agreement and order. In its reasoning, the Court noted that "*the ALC improperly rewrote the unambiguous language of the consent order*," that "*the ALC erred by interpreting the consent order to include a temporal limitation*," and that under the interpretation espoused by the ALC the original settlement "*would be rendered meaningless.*"

This is an important victory for the rule of law and parties' rights to freely settle their disputes outside of a courtroom. While both sides had to bend, the ultimate settlement agreement represented what each party agreed to live with. If a court later refuses to honor or undoes such an agreement, then it will severely disincentive parties from reaching similar resolutions in the future. Here, we had to litigate the enforceability of a settlement to ensure agreed upon protections for our natural resources.

This case is also a reminder that a decision by the ALC is hardly ever the last word on DHEC environmental permits. Some ALC decisions are upheld by higher courts when challenged, others are overturned. In its 30-year history of forceful public interest advocacy SCELP has amassed a large collection of the latter, which bolster the case for the most stringent due process and legal precautions against the destruction of critical natural resources before a decision is final. Whereas a wrong judicial order can always be reversed and the relevant legal issue sent back to a lower court for reconsideration, most often filled wetlands cannot be unfilled, paved roads cannot be unpaved or extinct species cannot be resurrected.

Board News

AT THE END of last year, we celebrated Leon Rice and Margaret Fabri's service on our Board of Directors upon conclusion of their terms. After 6 and 9 years, respectively, of competent and passionate service, we are very thankful that they are staying closely engaged; supporting our work, attending our events and visiting us at the office every now and then. We are also quite fortunate for the caliber of those who succeeded them on the Board.


Nancy Cave

Barbara Burgess and **Nancy Cave** joined the Board this year. Nancy recently retired from the Coastal Conservation League after 15 years as North Coast Office Director. Prior to the League, Nancy worked in marketing and communications at Citicorp, Nationsbank and Dun and Bradstreet, having begun her career in radio and television in Chicago. Nancy has been leading the charge and collaborating closely with SCELP in many past and ongoing fights in Georgetown and Horry Counties, and we are very excited to have her on our team. Barbara was a lobbyist with John Hancock Insurance Co., running their Washington, DC office for 15 years. Barabara retired to Seabrook Island, but remains active in the arts as well as environmental issues.

HOW YOU CAN HELP...

Your ongoing support is what keeps us going. On our website **www.scelp.org** you can learn more about our work and ways to be involved. You can donate on-line or use the enclosed envelope to mail your gift. Share your enthusiasm for SCELP with your friends and family. Thank you!

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.

Main Address

430 Highmarket Street
Georgetown, SC 29440

Mailing Address

P. O. Box 1380
Pawleys Island, SC 29585
Telephone: (843) 527-0078
P. O. Box 5761, Greenville, SC 29606
Telephone: (864) 412-7921
Website: www.scelp.org

Printed on 100% recycled paper

NEW CASES

SCELP TAKES UP PICKENS COUNTY COAL ASH FIGHT

SCELP is pleased to represent Pickens County and its citizens in fighting for health, safety, and self-determination in relation to coal ash.

The County had worked closely with a landfill company over a period of years to develop and approve a plan for construction of a "class 2" landfill, so that local citizens and businesses would have a place to dispose of materials from land clearing, yard work, and construction, such as: brush and limbs, logs, rock, masonry, glass, and pipes. Disposal of these relatively innocuous materials is consistent with the plan Pickens County has developed for solid waste disposal.

However, unbeknownst to the County or anyone residing therein, the landfill company and DHEC began meeting surreptitiously to modify the landfill plan to allow coal ash disposal. DHEC eventually approved significant modifications to the landfill design and operation, clearing the way for the landfill to accept much more hazardous wastes. Most startlingly, DHEC agreed with the landfill company's proposal to categorize these landfill modifications as "minor," meaning that no public notice or opportunity for participation was provided. In short, this former "class 2" landfill was modified to accept coal ash without any notice being provided to Pickens County, neighboring property owners, or other concerned citizens. The original landfill design underwent an extensive public notice and publication process, but the controversial and dangerous change was hidden.

Coal Ash is controversial and dangerous due to its propensity to create dust, its propensity to contain toxic substances, and its propensity to contaminate groundwater and surface water. Coal ash contains toxic chemicals, such as mercury, lead, and arsenic. It is a known carcinogen and is highly soluable in water, which causes leaching and water contamination issues. In addition to water contamination, disposal of coal ash can also lead to tiny coal ash particles blowing up into the atmosphere and then being inhaled by nearby populations. Obviously no one in proximity of this proposed landfill thinks there is anything "minor" about the addition of coal ash disposal.

When Pickens County found out about the permit modification, months after it had been mailed to just the landfill company, the County filed suit along with adjacent property owners. However, their case was dismissed by the Administrative Law Court (ALC) on the basis that it was not filed within the short window for challenging permit decisions after they are issued. In other words, under the ALC's decision, the landfill modifications are shielded from challenge because DHEC and the landfill company kept the public from knowing about them. SCELP has taken over the appeal of this timeliness decision and is asking the S.C. Court of Appeals not to reward this deceptive course of action.

Business Alliance Intervention Opposing Seismic Blasting Permits

AFTER THE LAST administration took the Atlantic out of the five-year plan for drilling last spring, the Bureau of Ocean Energy Management ("BOEM") denied all six pending permits for seismic blasting. Those permittees filed appeals in March to the Interior Board of Land Appeals ("Board"). On May 1, SCELP, on behalf of the Business Alliance for Protecting the Atlantic Coast ("BAPAC"), moved to intervene in those appeals. On May 10, BOEM moved to remand the appeals back to itself, which we opposed on May 15. Within hours, the Board ordered remand.

The basis for BOEM's request is the change in administration. President Trump issued an executive order in April, followed by Secretary Zinke's order in May, pushing for expedited consideration of seismic permitting, among other things. In response, BOEM rescinded a previous memorandum providing justification for the permit denials and requested that the Board send back the denials.

If permitted, this activity would entail seismic airguns blasting intense sound into the Atlantic Ocean near the Outer Continental Shelf every ten seconds, 24/7, for as long as the permits are in place. The blasting could also take place simultaneously by all six companies. Scientific studies have shown that seismic blasting injures and drives away marine life, including marketable fish species, which the 500,000 commercial fishing families in BAPAC rely upon for their livelihood.

BAPAC opposes seismic blasting because of the financial losses that businesses along the Atlantic Coast will suffer due to seismic's impact on fishing, recreation and tourism, which form a huge economy. Overall, businesses along the Atlantic in fishing, recreation, and tourism generate nearly 1.4 million jobs and over $95 billion in gross domestic product.

The 30th Anniversary Tour

WHEN SCELP TURNED 20, Jimmy Chandler confessed to our newsletters readers that although we anticipated the occasion to be marked by "hoopla and celebrations" we had just been too busy to party over that anniversary. This year we committed not to let the 30th go un-celebrated and, taking advantage of increased staff resources and the experience gained over the years, we are grateful for the celebrations behind us and excited for the celebrations ahead of us.

In February, we kicked-off the year hosting our Seismic Oyster Roast in Charleston, where we gathered with SODA friends and many other Don't Drill SC allies at the iconic Bowens Island Restaurant and, along with over 100 friends, cheered to the seismic victory in the fight against offshore drilling in the Atlantic. We knew the new administration was troubling news on this front, and the occasion further reinforced our determination to stand alongside our communities in fighting back every inch to save our coastal treasures from offshore drilling.

After another bad weather postponement, we brought our celebration to Columbia in May. About 50 people joined us at the River Rat Brewery, such as some of the very early supporters of SCELP, including founding Board member Daryl Hawkins who shared a few memories of the early days, followed by Amy's brief remarks on what lay ahead for our organization and our ongoing challenges.

After a quick stop in Greenville in June, our 30th Anniversary wagon is headed to its main stop: the 8th Annual Wild Side on November 4th at Hobcaw Barony. We look forward to seeing you then!

CLOCKWISE FROM TOP
SCELP staff and friends gather at River Rat Brewery; Amy Armstrong and former Board member Daryl Hawkins;Queen Quet with Amy Armstrong and Liz Igleheart; My Girl, My Whiskey & Me perform at River Rat

SCELP's Filippo Ravalico and summer intern Kalli Savvas

Palmetto Giving Day

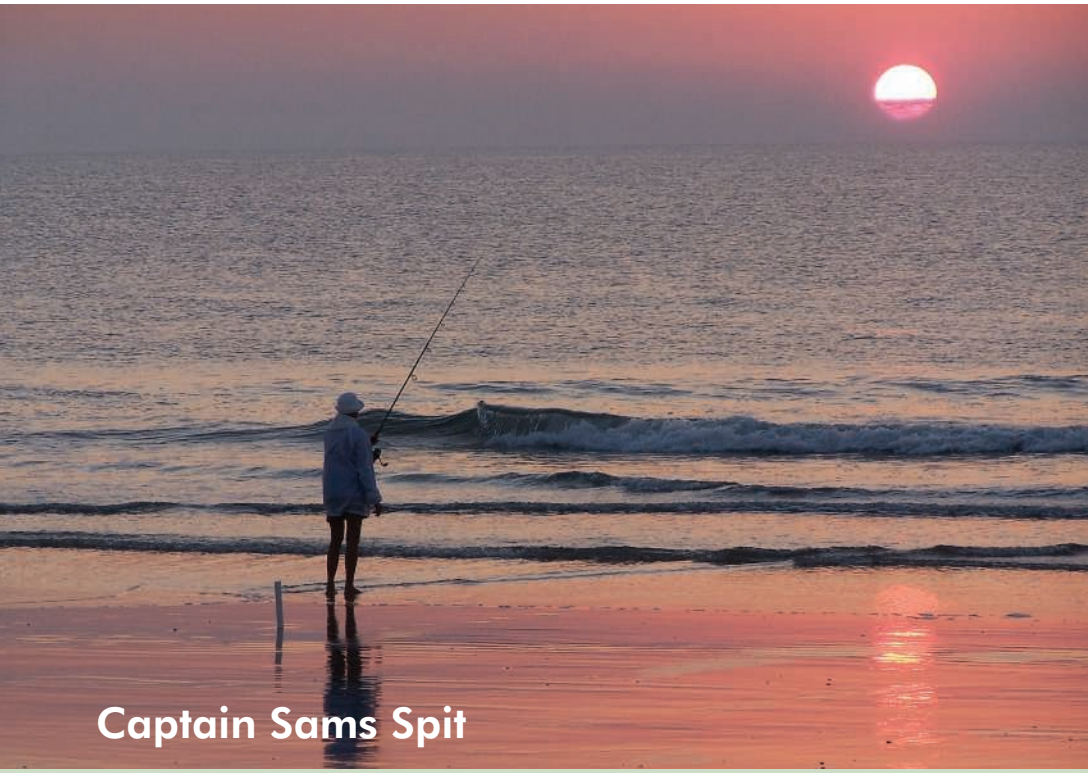
ON MAY 2, we had another great Giving Day – nearly $55,000 raised, with our new record in online gifts in 24 hours: 122 gifts totaling $24,727! This was on top of the matching funds made available by a few special donors (Frances P. Bunnelle Foundation, Harry Dalton, Tamsberg Family Fund, Greg VanDerwerker and other anonymous donors, including almost the entire Board). Palmetto Giving Day was even more successful as a whole. Planned and executed as a grassroots collaboration of 33 nonprofits in Georgetown County, we well exceeded our fundraising goal of $500,000, ending the day with $676,000 in total gifts, confirming the extraordinary generosity of our community and our organizations' supporters.

CASE UPDATES

Challenges to New Seawall Gearing Up

BY THE TIME you read this newsletter, we will have finished the trial over whether DHEC acted within its scope of authority by permitting the first new seawall on our beaches since the 1988 passage of the Beachfront Management Act, which prohibits such structures. Despite this prohibition, a small group of beachfront property owners retained a lobbyist to secure an exemption through a budget proviso, and DHEC granted the permit for a new seawall.

Through discovery, we learned that DHEC failed to utilize any standards or criteria in making its decision to grant the permit. In legal terms that means that DHEC failed to exercise discretion and thus its decision is arbitrary and capricious. While we are optimistic about this administrative challenge, we have also filed a constitutional challenge to the budget proviso for violating the S.C. Constitution's "One Subject Clause." That clause requires that every law can relate to only one subject, which must be expressed in the title. In February we filed a complaint in circuit court, asking the court to rule that the budget proviso allowing a new seawall violates the one subject provision of the Constitution.



Captain Sams Spit

WE NEVER SEEM to have a shortage of news about Captain Sams Spit. Perhaps because we have multiple legal challenges to various aspects of the proposed development. Perhaps because the developer is relentless in its attempts to build on this fragile stretch of land. Either way, we have been busy on these multiple fronts.

We submitted our legal briefs to the Supreme Court challenging Administrative Law Judge Tripp Anderson's decision to yet-again authorize an extensive erosion control structure along the banks of the Kiawah River. We expect the Court to hear arguments related to that project for a fourth time. In our challenge to the permits authorizing road construction and lot development, we have reviewed 1,000s of documents, taken numerous depositions, and worked with our experts Rob Young, Director of the Center for the Study of Developed Shorelines, botanist Richard Porcher and others to prepare for trial. We have also undertaken an independent assessment of the extent of erosion on the Kiawah River, and specifically the space available for road construction to the Spit. That case is shaping up nicely, with trial set for the end of August.

Tracks showing a false crawl

Nesting Sea Turtles Remain in Jeopardy

SINCE WE BEGAN advocating for the removal of illegal experimental seawalls on Isle of Palms and Harbor Island last July, many new developments have taken place. Our sixty-day notice letter did push DHEC to order removal of the walls, but the inventor of the walls and some homeowners appealed that decision to the ALC. Meanwhile, we also filed an Endangered Species Act claim in federal court on December 6, 2016, against DHEC for authorizing the walls. These experimental seawalls block sea turtles from nesting, causing false crawls, where the mother sea turtle returns to the ocean without laying her eggs. DHEC also issued a report concluding the walls did not work, but the Board chose to override staff and allow the walls to stay up. While we await decisions from the courts, a new nesting season has begun and the walls remain in place. SCELP is working for the removal of these walls as quickly as possible, but the wheels of justice are turning slowly for these endangered sea turtles.

CASE UPDATE

Bays and Bears

IT HAS BEEN a bumpy ride these past two years as we stood up to protect the unique ecosystem and natural resource values of Lewis Ocean Bay Heritage Preserve while Horry County pushed aggressively to construct and pave a 5-lane highway immediately adjacent to and through the Preserve. Lewis Ocean Bay was designated and placed into the state's Heritage Trust Program in order to protect the world's largest complex of Carolina Bays and certain rare, threatened and endangered species who depend upon this valuable habitat, including South Carolina's population of coastal black bear. The proposed road project, known as International Drive, was originally planned as a 2-lane road with three wildlife underpasses at locations corresponding to where the road cut through known black bear travel corridors. However, the County was unhappy about the costs associated with incorporating wildlife protections into the road project and was ultimately successful in having those requirements eliminated. The County also decided to pursue a 5-lane road for the project, which involved the loss of approximately 20 acres of public trust property and the destruction of over 24 acres of wetlands.

Under state and federal law, special habitats like Lewis Ocean Bay and the flora and fauna it supports are supposed to receive heightened protection from degradation. Yet, that did not happen here. Accordingly, on behalf of the Coastal Conservation League and SC Wildlife Federation, we challenged the DHEC authorizations for this road project in the Administrative Law Court as well as the federal authorizations from the US Army Corps of Engineers in district court. In July 2016, Administrative Law Judge Tripp Anderson upheld the DHEC decision, which we appealed to the SC Court of Appeals. Within weeks, the County began to move forward with construction of the road, publicly acknowledging the risks associated with litigation. At that time we initiated our federal action, seeking an injunction to prevent irreparable harm to wetlands and public trust resources before a hearing on the merits could take place. Likewise, we asked the SC Court of Appeals to impose a supersedeas or "stay" the road construction until our case could be heard. Both the district court and Court of Appeals placed some limitations on construction; however, the judicial process could not keep up with the breakneck pace of Horry County, which claimed all wetlands had been filled by December 2016.

We were committed to this fight and continue to believe that our state and federal laws exist to protect important resources like Lewis Ocean Bay and the rare coastal black bear and other species who depend on them. But we were up against money, power and influence, and despite our commitment and the use of all legal tools available, settlement became inevitable and the parties agreed to the dismissal of all claims in April and May 2017. It is unfortunate that our clients never received an actual decision on the merits by a court in the judicial system and that an applicant can proceed with construction and cause irreparable harm before there is a final ruling on a permit's validity. Strong legal arguments and a cause worthy of the fight were simply not enough to overcome the political forces of state and federal government.

Gas Pipeline Project Raises Concerns

SCELP HAS BEEN working to improve a 55-mile natural gas pipeline proposed by Dominion, a private energy company. We oppose this project because of its water quality impacts (it will cross nearly 100 water bodies), because it fails to follow an existing pipeline right-of-way also owned by Dominion, because it locks our state into fossil fuel energy use for decades to come, and because of its impact on property owners (under natural gas laws, Dominion can to take property through eminent domain). Particularly troubling is the fact that Dominion's existing pipeline connects the same two points as the new pipeline, and following the existing route would not require use of eminent domain, yet no good reason has ever been offered for carving a new path across the Upstate, through previously undisturbed resources.

Partnering with Upstate Forever, we participated in both the state (DHEC) and federal (FERC) permitting processes, pushing the agencies to deny the pipeline or at least improve it by requiring reduction of environmental impacts. We also gave a voice to local residents and property owners by providing advice on the process and law, by speaking at county council meetings, and by pursuing all other avenues for influencing this bad project in a positive direction. Unfortunately, our overall experience with this process reflects that, within the field of environmental law, few areas are so heavily stacked in favor of approval and against challengers as is gas pipeline construction. Under our laws as they now exist, pipeline approval, including eminent domain, is practically a no-lose proposition for proponents.

SCELP and Upstate Forever have decided against pursuing a formal legal challenge of the pipeline, but we do take away some positives from our months-long involvement. In addition to some minor pipeline reroutes that occurred through the FERC process, DHEC imposed a number of special conditions on construction that will be valuable in protecting water quality and wildlife. These improvements are the direct result of our efforts and local citizens' efforts to have a voice in this process. Perhaps even more valuable, we have forged partnerships and built momentum to take on this issue in a more comprehensive way going forward, starting with the laws that stack the deck so heavily in favor of pipeline companies. We look forward to continued efforts to turn the tide of fossil fuel pipeline construction in South Carolina.

The Automatic Stay: Battle Won, War Continues

PART OF SCELP'S work includes reviewing and advising upon the impact of proposed legislation for environmental advocacy groups. This year, SCELP was especially busy defending a process known as the automatic stay. Under state law, when an agency decision is challenged by an affected citizen, that decision and the underlying activity it relates to are automatically "stayed" until a hearing is held and a final administrative decision is rendered. This is consistent with South Carolina's Constitution affording citizens the right to due process of law, which includes notice, an opportunity to be heard in a meaningful way, and judicial review. In order to be heard in a meaningful way, a hearing must necessarily occur before a person's rights are affected. In the context of environmental permitting, the automatic stay means that the hearing must occur before the permitted activity takes place.

The Department of Health and Environmental Control (DHEC) is the agency responsible for overseeing human health and the environment, which includes issuing permits for activities that may affect our state's natural resources. Under the law governing the administrative decision-making process, when DHEC decides to issue a permit, it is treated as an initial staff decision and when an affected person challenges that decision, it does not become final until after it has been reviewed in the Administrative Law Court (ALC). It is during this time that the automatic stay goes into effect, preventing the project in question from moving forward until there has been a hearing and the ALC makes a final decision. For projects that threaten human health and/or degrade our natural environment, the stay is critical in avoiding irreparable harm. Moreover, an applicant can request that the ALC lift the stay by showing "good cause" or that no irreparable harm will occur. In all of the cases SCELP has brought before the ALC where an applicant has asked for the stay to be lifted, that request has been granted.

This system has been in place and functioning properly for many years. Nonetheless, during this session some state legislators pushed hard to fix a process that is not broken by making it harder to keep the stay in place. The proposed bills, S.105 and H.3565, sought to eliminate the automatic stay after a certain period of time notwithstanding the lack of a hearing or final decision by the ALC, as well as to switch the burden to the affected persons challenging an agency decision to prove the stay should remain in place by requiring them to meet the standard for an injunction, which is a difficult burden for most lawyers to prove and would be a prohibitively high hurdle for most citizens. This change in the law would have been devastating to citizens' due process rights, in addition to endangering human health and the environment by removing a check on bureaucratic decisions.

The automatic stay is an incredibly important protection that safeguards citizens' due process rights and ensures public participation in the administrative decision-making process. Our drinking water, the air we breathe, the beaches we enjoy, the waters that we fish from, and the hospitals we use when we get sick, are all under the permitting purview of DHEC. Thus, they are all endangered if there is no automatic stay. We are relieved that both proposed bills failed to pass and that the automatic stay remained in place this session. However, we recognize that the automatic stay will be subject to continued attacks by those who are willing to risk environmental harm and degradation and we must remain vigilant in our efforts to keep it in place.

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

Wild Side

CELEBRATING 30 YEARS
ESTABLISHED 1987

SAVE THE DATE • 8th Annual Wild Side!

The 8th annual Wild Side event will be held on November 4th at Hobcaw Barony. The featured speaker is Rudy Mancke, iconic naturalist and current host of *NatureNotes* on SCETV and South Carolina Public Radio. Programming, sponsorships, volunteer opportunities and other information are available on our website at www.scelp.org/wildside