



SCELP

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

WINTER 2017

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POLICY OF RETREAT FROM THE BEACH AT CRITICAL JUNCTURE

photo credit: Witt Langstaff

SOUTH CAROLINA'S policy of retreat has been on the law books since 1988. The policy discourages building too close to the beach/dune system and encourages those who have built too close to it to move back. At that time our legislature recognized that rising sea levels have serious ramifications for humans and wildlife. Now we are experiencing those ramifications first hand, and the policy of retreat is being put to the test as more and more homeowners find their properties beset by high tides.

Two recent issues have arisen exemplifying this dilemma. One case involves erosion control structure on our beaches and the other involves the construction of a house seaward of the state's jurisdictional setback building lines.

In the first case, beachwalkers on Isle of Palms and Harbor Island observed that experimental plastic seawalls were obstructing the beach and interfering with sea

turtle nesting. Mother sea turtles were crawling up to the seawalls, known as Wave Dissipation Systems, and then retreating back to the ocean, unable to reach nesting habitat. It should go without saying, but if houses were not built too close to the ocean, the walls would not be necessary and the sea turtles would not be impeded.

In response to this nesting interference, SCELP sent out a notice letter to federal and state agencies alerting them that these walls are a violation of the Endangered Species Act ("ESA") on behalf of the Sierra Club and the S.C. Wildlife Federation ("SCWF"). The ESA prohibits interfering with nesting and reproduction of protected species, including endangered sea turtles that return every year to lay eggs on South Carolina's beaches. In response, the South Carolina Department of Health and Environmental Regulation ("DHEC") consulted with experts and determined that the experimental seawalls should be removed because



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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SCELP Expands with an Upstate Office



SCELP STAFF RETREAT AT CAESAR'S HEAD

For the first time in our nearly thirty years of operation, SCELP has expanded beyond its home office in Georgetown. We take much pride in informing you that SCELP's Upstate Office opened on October 6, 2016 in Greenville and that it is off to a roaring start. The Upstate Office will be led by Michael Corley, who has rejoined the organization as Upstate Coordinator and

Staff Attorney. Michael served as staff attorney in the Georgetown office from 2010-2014. During his previous tenure, Michael played a key role in many significant SCELP cases, and we are thrilled to have him back as a member of the team. This move signifies an exciting new chapter in the history of SCELP.

The need for a second SCELP office is something we have contemplated as an organization for some time. While we've certainly striven to be the *South Carolina* Environmental Law Project, logistics and organizational constraints have limited our ability to fully serve the westernmost part of our state. The dire need for SCELP's services in the Upstate was reaffirmed by Michael's observations during his last two years practicing at a law firm in Greenville. The Upstate is home to the same development pressure, political shortsightedness, and general environmental disregard as in other parts of the state, but it has never been home to a public interest environmental law firm until now. Through this expansion, we will make ourselves more readily available to serve individuals, organizations and partners working to protect this area's valuable natural resources. We look forward to building the same network of partners and supporters in the Upstate as we enjoy in other parts of the state, and we welcome your assistance in spreading the word about this exciting development.

A Note From Michael



I could not imagine a more gratifying opportunity than the one I have now as SCELP's Upstate Coordinator. I was born and raised in the Upstate, and my passion for environmental protection originates from my enjoyment of the outdoors during those formative years. It was the Upstate landscape that stoked a passion which has shaped me personally and professionally, and I now get to work for the direct benefit of that landscape where it all started. This is nothing short of a dream realized for me.

Since reluctantly stepping away from SCELP in order to move back to the Upstate in 2014, I've done my best to stay involved in environmental advocacy in a personal capacity. I teach as an adjunct at Furman's Shi Center for Sustainability, and I'm on the board of a couple of great Upstate environmental non-profits. However, I've continued to long for the opportunity to use my legal skills and knowledge for public environmental protection, as I had been doing at SCELP. I have to say that I always had in the back of my mind that I could one day work for SCELP in the Upstate, but I am ecstatic that the opportunity has come to fruition this soon.

SAVE THE DATE: FEBRUARY 12, 2017
OYSTER ROAST AT BOWEN'S ISLAND RESTAURANT, CHARLESTON

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!

POLICY OF RETREAT FROM BEACH AT CRITICAL JUNCTURE (continued from page 1)



HARBOR ISLAND HOUSE ON ACTIVE BEACH



PLASTIC SEAWALL RESULTS IN FALSE SEA TURTLE CRAWL

of their harmful effect on nesting sea turtles. However, the proponents of these experimental seawalls asked the DHEC Board to review this removal order, arguing that the walls should remain in place. SCELPA filed a motion to intervene on behalf of Sierra Club and SCWF, which was denied by the DHEC Board. Then the Board overturned its own staff's removal order. These plastic walls may still be standing, but we are committed to fighting for their removal well before next year's nesting season. On behalf of Sierra Club and SCWF, we filed an appeal of the DHEC Board decision before the Administrative Law Court on November 9th. We are also preparing to file a federal ESA case, seeking to have these harmful walls permanently removed.

The second case involves a permit to relocate a home seaward of the state's jurisdictional setback line. A number of homes on Harbor Island now sit on the active beach, and homeowners have attempted several temporary, ineffective measures to fight back against this enduring problem, including the plastic seawalls. One homeowner on Harbor Island has proposed the step of outright moving his Harbor Island home in order to get it off of the active beach, a move which would be consistent with our state's policy of retreat. Unfortunately, though, he proposes to move it to another property where it would also be located seaward of the legally designated ocean setback line—in other words, out of the frying pan and into the fire. SCELPA has challenged his proposed construction on the new lot, which required a special permit from DHEC because of its proximity to the ocean. Certainly the problem of what to do with houses that were built too close to the ocean is a difficult one to which there is no easy solution. The solution, though, is not to be found in more shortsightedness, and SCELPA is committed to involvement in cases like these so that sound policy and precedent is established in relation to this emerging problem precipitated by sea level rise.

SIDE NOTE on the Automatic Stay: The filing of that request for board review triggered the automatic stay, which is a due process protection in place during South Carolina administrative proceedings that preserves the status quo. In this case, the stay kept those walls up, but it also has helped us in other cases to prevent construction. The automatic stay is an important due process right for anyone impacted by agency decisions. The automatic stay has helped us to protect Captain Sams Spit, even under new and continuing tactics by developers to authorize construction. Ultimately, the automatic stay is more than a useful tool for SCELPA and others in challenging permits, it is a constitutional due process right for all of the people of South Carolina.

CASE UPDATES

Oral Arguments in PI Church

LAST WINTER we submitted our final briefs to the Court of Appeals in connection with our case in which we are seeking to enforce the terms of a settlement agreement. Our clients are Pawleys Island residents and parties to that agreement, which expressly preserves wetlands remaining onsite at a local church stating the protected wetland "shall remain in its natural state." Despite this contractual agreement, DHEC issued authorization to the church to impact those protected wetlands. The Administrative Law Court upheld the DHEC authorization after concluding that our clients could not enforce the agreement, even though they gave up important rights in order to obtain permanent protection for those wetlands as part of the settlement agreement. Oral arguments before the Court of Appeals took place on November 9, 2016.



photo credit: Writ Langstaff

Hurricane Matthew Evidences Folly of Building on Captain Sams Spit

WE ARE CONTINUING through the discovery process in our challenge to the permits issued by DHEC to KDP to build a steel sheetpile wall, road and associated infrastructure for 26 residential lots on Captain Sams Spit. Volumes of documents have been exchanged and numerous witness depositions taken. We have also gone on multiple site visits with our experts, Dr. Richard Porcher and Dr. Rob Young. The trial has not yet been scheduled but we anticipate it will be in early 2017. In our enduring challenge to the 2,783-ft bulkhead and 40-ft wide revetment authorized by Administrative Law Judge Tripp Anderson on remand, we submitted initial legal briefs to the Supreme Court on November 16th, who will hear the arguments on this project for a fourth time.

Meanwhile, Hurricane Matthew delivered a powerful message highlighting the unsuitability of the dynamic spit for development. Kiawah Island experienced significant erosion on its beaches with the area between Beachwalker Park and Captain Sams Inlet experiencing between 70 and 120 feet of erosion – much greater than the middle parts of the island. With historic erosion from the Kiawah River on the one side and the loss of beach and dune system on the other (as shown in the small pictures), the risks associated with development on the Spit are even more apparent and the ability to construct the needed infrastructure even more questionable.





THE 7TH ANNUAL WILD SIDE AT HOBCAW HOUSE

FOR THE SECOND YEAR in a row, a catastrophic weather event interfered with our annual celebration of the legacy of SCELCP's founder, Jimmy Chandler. Unlike last year, though, we had plenty of warning about the path of Hurricane Matthew and thanks to the flexibility of the many partners involved, we managed to reschedule without any change to our program and sponsor activities. Not everyone could adjust their schedule, including a few Board members, but those who could make it to Hobcaw Barony on November 5th for our 7th Annual Wild Side were rewarded by a sunny and crisp autumn day.

Old and new friends gathered to listen to our guest speaker Jim Elliott of the Center for Birds of Prey while taking in the glorious sunset over Winyah Bay in the background. Jim spoke about the important work of the conservation community in South Carolina including the respective roles we each play in the development of solutions to critical environmental issues in the state, and further celebrated the occasion by releasing a rehabilitated red-tailed hawk. The evening proceeded under a large and carefully decorated tent, featuring a rich silent auction and a selection of food and drink offerings, including local brews from New South Brewery and dessert from Kudzu and Pawleys Island Bakery. The perfectly pitched music by the Green Levels helped bring it all together for a great experience.

As Amy reminded us during her brief remarks, next year SCELCP will celebrate our 30th year of public interest legal work in defense of South Carolina's natural resources and it looks like we are going to be as busy as ever. We hope to see you and many of your friends at next year's planned events and celebration.

Thank you for sharing our concern for the natural environment of South Carolina and for supporting the Lawyers for the Wild Side.

OUR HEARTFELT THANKS FOR THE COMMITMENT OF THIS YEAR'S SUPPORTERS

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The Tilden and Huffines Families in Honor of Michael Murphy



CASE UPDATES

Bays and Bears

OUR EFFORTS TO PROTECT the world's largest complex of Carolina Bays, along with core habitat for our beleaguered coastal black bear population, have been a rollercoaster ride. The habitat is encompassed in Lewis Ocean Bay Heritage Preserve, which is given the state's highest designation for valuable and unique habitat under the Heritage Trust Act. When the Act was passed, heritage trust property could not be transferred or given to the government for a road project. The Act was amended in 2009 to allow DNR to give away heritage trust property for infrastructure projects, no doubt at the behest of those who want to build roads through those properties like Horry County.

When it came to paving International Drive, Horry County knew it had an even more difficult obstacle due to the nature and designation of Lewis Ocean Bay Heritage Preserve. DNR initially refused to allow the County to build a road through the Preserve at all, but eventually relented on the condition that Horry County implement measures to maintain habitat continuity for the coastal black bear population in 2010. The primary measure was installation of wildlife passages. Wildlife passages have been used throughout the U.S. and the world to allow animals to safely cross roads, and their effectiveness is well-documented. Google wildlife passages or crossings, you will be amazed by their prolific use for a variety of species, including for the Florida Panther, deer, bears, and even penguins!

But as the rest of the world advances, Horry County insists on maintaining an outdated and short-sighted approach to road projects. The County enlisted former Representative Nelson Hardwick (who pled guilty to assault and battery earlier this year) to pressure DNR to relent from the requirement for wildlife underpasses. Why you may ask. During discovery the only reason we found was because DOT Chairman Mike Wooten, whose engineering firm was hired to design the road, "in his mind" did not think they were necessary. Of course, that mindset contradicts all of the scientific literature on the topic.

DNR's attorney who handled the negotiations testified that Hardwick "browbeat" DNR into releasing the County from the single measure that made the idea of sealing off LOB with a fourth road bearable. The County reneged on the passages, and DNR succumbed to political influence.

There can be no doubt that the 5-lane highway will fragment high quality habitat, disrupt movement patterns of black bears, and convert 22 acres of heritage trust property into road. Cumulatively, the road would be the nail in the coffin for LOBHP, leaving it as an isolated island of habitat, surrounded on all sides by major highways and development.

Despite this evidence, on July 23, 2016, Administrative Law Judge Ralph K. Anderson, III upheld the DHEC authorizations of the paving project. Judge Anderson also reached a troubling legal conclusion that essentially renders meaningless DHEC's involvement in this Clean Water Act (CWA) permit process. We have appealed the ALC's ruling to the S.C. Court of Appeals and are in the process of preparing our legal briefs.

Shortly after receiving the ALC's Order, on August 22, 2016, Horry County issued a press release announcing that it had begun construction. On behalf of the Coastal Conservation League and the S.C. Wildlife Federation, the SCERP team quickly jumped into action and filed a federal lawsuit challenging the Army Corps of Engineers' decisions authorizing the project. We also filed a motion to immediately halt Horry County's construction work, which led to a restraining order. The order enjoined Horry County from filling wetlands and doing any work on the LOB side of the road for nearly two months. On November 17, the Judge reversed course and denied our motion for a preliminary injunction, allowing the filling and destruction activities to resume. We have also asked the state Court of Appeals to prevent further construction and are assessing options; however this case has reinforced that we must continue to shine a light on the actions of those who seek to destroy our state's natural resources.

CASE UPDATES (continued)

Surface Water Withdrawal Act

SCELP'S LAWYERS are preparing for oral arguments before the state's highest court on December 1st in our challenge to the constitutionality of the Surface Water Withdrawal Act. Upon completion of our appellate briefing on September 27th, the Supreme Court scheduled arguments quickly. We are pleased that this case is receiving the swift and serious consideration that it deserves.

As you may recall from our previous updates, the Surface Water Withdrawal Act has a registration process that allows large agricultural users who take over three million gallons of water per month from our rivers and streams to bypass any permitting requirements. The Act does not cap the amount of water that can be taken on a monthly or annual basis, and protects those agricultural users from having any limits enforced upon them by the state agency. Instead, the Act leaves the state, and downstream users, powerless to protect our precious rivers, which are held in trust for public use. We are asking the Court to overturn the unconstitutional registration process so that the state of South Carolina can regain control of these public trust waterways and downstream users can protect their interests in maintaining water flow past their properties.



QUESTIONS & ANSWERS



Melanie Ruhlman is one of SCEL P's clients in our challenge to the Surface Water Withdrawal Act. She is a water resources specialist by trade, and she also serves as president of Save Our Saluda, a nonprofit watershed organization.

SCEL P: Tell us about your personal connection to the effects of unchecked surface water withdrawal.

Melanie: Living along the North Saluda River in upper Greenville County and kayaking other rivers in our region gives me firsthand exposure to the effects of competing water uses and their impacts. This is very apparent in drought times like we are currently experiencing.

SCEL P: What sort of impacts are you referring to?

Melanie: From June through August, there were eight days in which I counted dead fish in our river. Upstream from us there are withdrawals for drinking water and agricultural irrigation that have altered natural river flows and contribute to stressful conditions for aquatic life during dry periods when water demand is high. And when it stops raining, we can only paddle dam-controlled rivers with recreational releases.

SCEL P: How bad is the problem, in your experience?

Melanie: Hydrologic alteration due to the effects of water withdrawals, dams, and land use change is extensive here and elsewhere across the U.S. and may be a primary cause of impairment in river and stream ecosystems. For example, in the upper Reedy River, urbanization has led to a declining trend in river baseflow levels, which are the normal flows between storm events. The Reedy is now so low that during summer months, over half of the river below Greenville is composed of treated wastewater. The proportion is even higher during drought.

SCEL P: Why do we hear so much more about water quality problems stemming from pollutants, than about water quantity?

Melanie: Many people don't give a thought to water quantity, as long as they can turn on the faucet. There is a common misconception that we have a seemingly endless supply of water here in South Carolina and that it will always be there. Water quality problems stemming from spills or pollutant discharges from the end of a pipe are more tangible and more easily attract public attention. We are learning that water quantity and quality issues often cannot be separated.

SCEL P: Thanks for your input and for your personal contribution to this very important case!

NEW ISSUE



JANE OCHSENBEIN, CO-OWNER OF GATOR BAIT ADVENTURE TOURS (CENTER) WITH GROUP ON YAUHANNAH LAKE

Bucksport Marina Authorized Amidst Flooding

WHILE THE RURAL COMMUNITY of Bucksport in Horry County was being evacuated due to flooding of the Waccamaw and Pee Dee Rivers following Hurricane Matthew, DHEC issued a permit to Grand Strand Water and Sewer Authority (GSWSA) to construct an industrial marine commerce park at the site of the existing marina in Bucksport. The industrial park would support boat building and related services, threatening water quality, air quality and quality of life of the residents of the area who raised serious concerns with and objections to the project. The project will also directly impact the livelihoods and operations of local businesses in the outdoor recreation and tourism industry. The site is located immediately west of the Waccamaw National Wildlife Refuge on the banks of the Waccamaw River. We have filed two requests with the DHEC Board to review staff's decision authorizing this dubious proposal, one on behalf of the Coastal Conservation League, Waccamaw Riverkeeper/Winyah Rivers Foundation and Pastor Don Gause, a Bucksport resident, and the other on behalf of Gator Bait Adventure Tours, which leads guided kayak tours on the river and within the Refuge year-round.



photo credit: Witt Langstaff



Throw it Away: The Need for Solid Waste Reform in South Carolina

THE SOLID WASTE MANAGEMENT ACT has not been reformed since 1991. Its passage was contentious, but even so, DHEC is brave enough to revisit the Act because change is needed, badly. The main issue is one of enforcement. Unfortunately, South Carolina is home to businesses who take in recyclable materials, ranging from plastic bottles to concrete, and let those materials pile up without processing them in a timely manner. These businesses then dissolve, leaving what is essentially an unpermitted open air landfill.

Under the current law, DHEC has little enforcement power to make these businesses process the recyclables. While true recycling facilities need not go through the permitting process for landfills, bad actors who are not actually recycling these materials must be held accountable. Thus, SCELPA and a coalition of stakeholders have formed a workgroup to provide legal and technical expertise and advice on drafting effective legislative language. The proposed amendments to the Solid Waste Management Act will also include establishing a solid waste emergency fund, and clarifying confusing or inapplicable language throughout the Act. Keep an eye out for the bill, which DHEC hopes to introduce in the next legislative session.

A FINAL NOTE FROM THE DIRECTOR



2016 is not over yet and has already been a historic and incredibly busy year for SCELPA. As we brace for major changes on federal climate change and environmental policies, I want to share a passage on “respecting failure” by Duke Law Professor Jedediah Purdy, in the chapter aptly named Environmental Law in the Anthropocene from his 2015 book *After Nature*.

One might imagine, then, learning to see the global atmospheric system, the interwoven patterns of currents and winds, seasons and climatic regions, as something beautiful. It makes a world suited for human life, a world in which we have learned to live. It is the condition of all our homelands and home landscapes: the seasons we knew as children, the crops that show up in local markets, the wild animals glimpsed at

the edge of the yard or during a hike. The question to ask about greenhouse gases, in this light, would be not whether they move the planet off a natural baseline, let alone whether they pollute, but whether they tend to mar the beauty of a system that, for all its inherent perturbations, describes a set of rough balances that we have come to find beautiful. Alternatively, but not incompatibly, the global atmosphere might come to seem sublime: a brooding, powerful source of threat, beyond our complete understanding, out of the scale of our control, able to disrupt our familiar worlds and make us aware of human smallness and fragility ...

Both treasuring beauty and feeling awe at sublimity are ways of respecting an order of things, and of valuing motives to act so as to uphold it, to recognize the limits it might enforce.

Our conservation endeavors and public interest advocacy are inspired by this vision. We also believe that the rule of law is key to fostering this kind of imagination that will ultimately prevail over any deviation toward the ugliest and basest realities of fossil fuel profiteering and natural resources exploitation.

In wishing you and your families good health, peace and much love during the holidays season, I thank you for standing with a beautiful and sublime South Carolina.



The Board and staff of the South Carolina Environmental Law Project wish to thank our wonderful supporters for another terrific evening celebrating our founder Jimmy Chandler and the work that continues, thanks to his vision.

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