



SCELP

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

SUMMER 2019

Inside this Issue

1

Saving Ingram Dunes

2

Staff News

3

Good News

4, 5, 6

Case Updates

7

New Case



Maritime forest atop relic dunes in North Myrtle Beach

BIG WIN FOR NORTH MYRTLE BEACH AND S.C. NATURAL HERITAGE

As coastal development and the tides keep rising, and as the Grand Stand's rapid population growth spills ever more concrete on sensitive areas, there is hope.

Ingram Dunes, one of the highest and oldest relic dune systems in South Carolina, was nearly cleared and flattened for a 31-unit residential housing development and related infrastructure. But the tenacity of hundreds of concerned citizens, elected leaders, conservation organizations, and SCELP's legal minds saved one of North Myrtle Beach's most cherished natural places from obliteration.

Working on behalf of the group Preserve Ingram Dunes, we advocated for protection of the Dunes at every step. During the permitting process and at public hearings we urged decision-makers to save this unique and beloved sanctuary. When

DHEC issued a permit authorizing the clear-cutting and leveling of the ancient dunes, we filed an appeal with the state's Administrative Law Court seeking to overturn that permit. The development would have destroyed a culturally, historically, and environmentally significant state resource.

The site is not only an important wildlife habitat and a treasured green space, the dunes help protect the surrounding neighborhood from polluted runoff and flooding.

At the same time, we worked to help identify and secure funding sources, fostering the City of North Myrtle Beach's acquisition of the property.

(continued on page 3)



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

Greg VanDerwerker, M.D., Chair
John Barton, Esquire
Barbara Burgess, Esquire
Nancy Cave, Esquire
Allen Grumbine, Esquire
Susan Hilfer
Elizabeth Igleheart
Justin Lucey, Esquire
Clarkson McDow, Esquire
Walton McLeod, Esquire
Leon Rice, Esquire
Wendy Zara

Staff

Amy E. Armstrong, *Executive Director*
Michael Corley, *Upstate Coordinator*
& *Staff Attorney*
Ben Cunningham, *Staff Attorney*
Leslie Lenhardt, *Staff Attorney*
Jessie White, *Staff Attorney*
Lorraine Chow,
Communications Specialist
Filippo Ravalico, *Program Manager*
Debbie Weiner, *Office Manager*

Main Address

430 Highmarket Street
Georgetown, SC 29440

Mailing Address

P. O. Box 1380
Pawleys Island, SC 29585
Telephone: (843) 527-0078
Website: www.scelp.org

Printed on 100% recycled paper

SCELP Keeps Growing

Although we were sad to see Staff Attorney **Amelia Thompson** and Office Manager **Janet Delaney** go earlier this year, we were thrilled to welcome four new people to our Georgetown home office. Staff Attorneys **Leslie Lenhardt** and **Ben Cunningham**, Office Manager **Debbie Weiner** and Communications Specialist **Lorraine Chow** each bring a diverse array of experience and expertise to assist with SCELP's growing docket of cases across South Carolina.

With five attorneys adding up to 70+ years of legal experience, three offices, three supportstaff members, and the steady leadership of an outstanding Board of Directors, **SCELP's team is more capable, resourceful, and stronger than ever.** This is just what our state needs at a time of increasingly complex challenges and multiplying threats to our land, water, wildlife, and communities' overall quality of life.

As pledged on our 30th anniversary in 2017, we are building strong foundations for the next three decades of environmental protection and justice in South Carolina and this is only possible because of you. **Thank you!**



Leslie Lenhardt



Ben Cunningham



Debbie Weiner



Lorraine Chow

HOW YOU CAN HELP...

Your loyal support and engagement is what keeps us going and makes a difference for environmental protection in our state. Visit www.scelp.org to learn more about our work, latest developments, and ways to be involved. You can make a gift online or mailing the enclosed envelope. Let us know if you see any emerging or ongoing threats to our natural resources. Share your enthusiasm for SCELP with your friends and family. **Thank you!**

Thankfully, the widespread efforts to save Ingram Dunes reached critical mass before we had to fight this out in court. In May, the City struck an agreement to purchase and preserve 7.24 acres of the 9.35-acre property for \$2.5 million thanks to donations and contributions from the Ingram family, the S.C. Conservation Bank, the public, and the City

itself. The two acres that do not contain the high dunes can be developed into seven single-family homes on an existing road. SCLP will dismiss Preserve Ingram Dunes' appeal once the purchase is finalized, which we expect near the end of June.

The story of Ingram Dunes gives us hope. Every dollar, every petition

signature, every call or letter to an elected official helped stop this unwise development and protect this iconic treasure of North Myrtle Beach and the state.

We often say that we could do none of our work without you, because it is the truth. So thank you once again for helping us save the Dunes!

GOOD NEWS

Supreme Court Victory in Radioactive Contamination Case

After a 14-year legal battle, the S.C. Supreme Court agreed with us: Chem Nuclear's low-level radioactive landfill license fails to comply with the regulatory provisions designed to minimize contact between waste and water. Specifically, the Court held that the facility was not designed "to minimize the migration of water onto the disposal units" nor "to minimize the migration of water or waste contaminated water out of the disposal units" as required by state law.

The leaking 48-year-old nuclear waste landfill in Barnwell County is one of the nation's largest dumping grounds for low-level radioactive wastes. Due to poor design, rain falling onto disposal units at the site has caused radioactive materials to leach into groundwater, which drives a tritium plume into a nearby creek that flows to the Savannah River.

The site's failure to minimize water falling onto and flowing out of disposal units has gone unaddressed since we first challenged the license in 2004 on behalf of the Sierra Club.



We won in our 14-year-old Chem Nuclear case before the S.C. Supreme Court

Thankfully, the Supreme Court has at last weighed in, confirming that:

1. the concrete disposal vaults are not sealed against water intrusion and have holes in the floors to permit water to drain from the vaults into the trenches;
2. the holes in the vaults have allowed water to rise up into them;
3. the disposal trenches into which the vaults are placed are designed to allow water to infiltrate the soil below the trenches;
4. none of the trenches have an impermeable liner or leachate collection system;
5. the trenches are uncovered, allowing rainwater to collect in the open trenches;
6. water that comes into contact with the disposed waste eventually percolates into the soil, driving groundwater that carries radioactive material like tritium;
7. radioactive tritium has migrated in a plume underneath the site and been detected in the closest surface waters at Mary's Branch, a tributary of the Savannah River.

The ball is now back in DHEC's court to address the compliance issues. We will continue to hold Chem Nuclear and DHEC accountable to the legal standards aimed at minimizing migration of nuclear waste into our environment.

Along with a few other important cases, this victory reminds us that persistence is an essential trait of successful advocacy for environmental protection and conservation. Thank you for sticking with us on this and our other decade-long battles!

CASE UPDATES



A wildlife sanctuary and coastal landmark at the southern end of Kiawah Island

Captain Sams Spit

As with our Chem Nuclear case, the fight to protect Captain Sams Spit is arduous and long-lived, having entered its 11th year. After Administrative Law Judge Ralph King Anderson III upheld DHEC's most recently issued authorization for development of the Spit in late 2018 (his third ruling on this issue), we filed a notice of appeal in the S.C. Court of Appeals. We anticipate filing

our initial brief in June. In the meantime, on May 17 we filed a motion to transfer the appeal to the S.C. Supreme Court. We believe that the Supreme Court is better suited to hear the pending appeal because of its familiarity with the factual and legal issues surrounding the proposed development on Captain Sams. We are ready to argue this case before the Supreme Court for a fifth time, and do more, if needed, to keep protecting such an iconic and special place.

Harbor Island Beached Houses

Several homes on Harbor Island have been sitting on public trust property on the active beach below the high water mark for some time. The buildings are located in the middle section of the island, which has experienced significant erosion over the past decade. The erosion has been compounded by multiple storm events over the past two years, and now the ocean is washing underneath these houses.

There are no power or water lines running to the houses and siding, appliance fixtures, wires, and broken levels of porches are falling off and onto the beach.

DHEC expressed that it is “concerned about the structural integrity of the homes and the potential public safety issues” including near future collapses, which “could become a significant safety hazard and an obvious environmental problem.”

On behalf of the Harbor Island Owners Association we filed a complaint in Beaufort County Circuit Court alleging violations of the Public Trust Doctrine and the Public Waters Nuisance Abatement Act at the end of 2018. Under common law, the State holds lands below the high water mark in trust for the benefit of the public and has an affirmative duty to act to protect public trust assets. This should include the duty to remove structures that have become obstructions to public use and enjoyment of that property. Additionally, the Act authorizes the State to require removal of nuisance structures located on public waters.

The State and the individual homeowners filed motions to dismiss, which were granted and denied, respectively. We have asked for reconsideration and clarification of the court's dismissal



Harbor Island homes post-Hurricane Matthew

of the State and will be moving forward with discovery in the coming months.

Unfortunately, this situation is unlikely to remain isolated and we are striving to create important legal precedents as our communities come to terms with accelerating sea level rise.

Seismic Testing

Legal action to block seismic airgun testing is proceeding, despite the Secretary of the Interior's assertion on April 25, 2019 that it would halt its exploration of offshore drilling in the Atlantic.

The decision to put the exploration of drilling on hold has no legal bearing on either the Incidental Harassment Authorizations that we are challenging in federal court, or on the Bureau of Ocean and Energy Management's review of the permit applications, which is continuing.

This was confirmed in court filings by the Federal Defendants in the case, including the National Marine Fisheries Service. SCELPL continues working on behalf of the 16 municipalities and Small Business Chamber of Commerce to fight a damaging and fateful precursor to offshore drilling.

In February, we filed a motion for a preliminary injunction to block the seismic testing companies from undertaking



Beaufort Mayor Billy Keyserling speaks against seismic airgun exploration for oil and gas in the Atlantic

blasting activities until the presiding judge in the case, the Honorable Richard M. Gergel, issues a final order on the merits of our challenge. At the time of this publication, our motion, along with similar motions filed by a coalition of environmental groups and S.C. Attorney

General Alan Wilson, is pending before Judge Gergel. As we await a decision, we are working on compiling the vast evidence of the deleterious and potentially disastrous effects that seismic blasting would have on our coastal economy and quality of life.



Coal ash contains contaminants that can pollute our waterways

Pickens County Landfill

On May 6, Michael Corley argued in the Court of Appeals that by classifying a permit modification as "minor" and ignoring some other laws, DHEC and MRR, the landfill company, excluded the public, the County and other interested parties from the modification process completely.

The original landfill design underwent an extensive public notice and publication process, but the controversial and dangerous change to accept coal ash was hidden. Coal ash is controversial and dangerous due to its propensity to create dust, to contain toxic substances, and to contaminate groundwater and surface water.

The Administrative Law Court dismissed the permit modification challenge claiming that it was untimely, even though no notice of the permit modification was ever provided. We are asking the Court to rule that the modification is illegal and void pursuant to law, and that the case should proceed on the merits.



Groin on Hunting Island State Park impacts the amount of sand on the up-drift and down-drift sides of it

Hardening Our Shorelines Will Kill Our Beaches

Our treasured coastline is under threat on many fronts. Rising sea levels and extreme weather events are increasing coastal vulnerability. Unwise siting of coastal development and hard structures such as seawalls, bulkheads and groins are interfering with natural beach migration and robbing the sand supply. The resulting tension between private and public property keeps building up, along with the “coastal squeeze” on critical wildlife habitat. More than ever before, our state’s coastal laws must be strengthened and enforced.

But for years individuals from DeBordieu Colony, a gated beachfront community in Georgetown County, have looked to engineering with hard structures to protect vulnerable properties from the rising tide and eroding beach. So far, we have halted their efforts through litigation, but the DeBordieu group recently brought their efforts to the State House and nearly hijacked our beachfront protections.

Seawall Controversy at the State House

In May, an Upstate state legislator snuck an 11th hour amendment into a bill giving DeBordieu an outright exemption from state law prohibiting new seawalls, a

free pass for the benefit of approximately 17 beach houses.

The blitz was orchestrated by a team of lobbyists hired by the homeowners behind an existing wall, which is presently obstructing public access to the beach at higher tides. The new seawall would be located even further seaward and on public property.

The conservation community immediately stood up to this dangerous move. The construction of new seawalls is prohibited because well-documented research conclusively shows that these structures actually exacerbate erosion and lead to a loss of the dry sand beach.

We ensured that our elected officials understood the context and history of DeBordieu’s plans to armor their beach and why it harms our shared coastline. Governor Henry McMaster vetoed the bill, calling the seawall measure “tantamount to enacting local or special legislation, prohibited by our constitution.” As a result of powerful mobilization of allies, advocates, and citizens, the House sustained the Governor’s veto despite DeBordieu’s efforts for an override. If you emailed or called your representative you sure helped make a difference!

Still, DeBordieu persists in seeking to

engineer our shoreline.

Proposed Groin-Field Roars Back

As we did in 2011, we are challenging a DHEC permit that authorizes the construction of three rock and concrete groins on the southern end of Debidue Beach. The case was filed in April before the Administrative Law Court on behalf of the Coastal Conservation League.

Should the project move forward, these structures will rob downdrift properties of the natural sand flow, including the beaches on Hobcaw Barony. The Baruch Foundation, which owns Hobcaw, also filed their own appeal in the ALC.

Eight years ago, the DeBordieu Colony Community Association received a nearly identical permit to construct three groins and conduct renourishment at Debidue Beach. The case was ultimately settled when the Association abandoned plans to build the groins and moved forward to renourish the beach.

Armoring our beaches with seawalls, groins and other hard structures jeopardizes our public beach and is not a long-term solution to a dynamic, moving shoreline.

NEW CASE

Opposing the Riskiest of Oceanfront Development

At a time when oceanfront structures are imperiled on many beaches in our state, pursuit of development even closer to the sea should not be possible. Yet, both legal and financial incentives remain for a quick profit through unsustainable oceanfront development. Lacking constructive legislative action, our environmental laws must be wielded in new and creative ways in order to protect the public interest. SCELPA has now engaged with the City of Folly Beach, the Coastal Conservation League, Save Folly Beach, and a group of local homeowners to do exactly that.

As a result of both natural and manmade forces, Folly Beach is one of the most sand-starved and erosive beaches on South Carolina's coast. This history of erosion has led to an unusual phenomenon and a new descriptive term: the "superbeachfront lot." Especially on the northeast end of Folly, residential lots are platted seaward of existing oceanfront development. These relic properties were platted in Folly's distant past but were claimed over time by erosion and sea level rise. While lot lines exist for these properties on paper, those lines typically encompass only ocean or beach.

Remarkably, though, efforts are now underway to develop a number of these ocean-bound properties, precipitated by the latest major renourishment on Folly Beach. Folly Beach as it exists today is reliant on a repeating and increasingly frequent cycle of renourishment in order to protect existing development and the public beach. The project builds the elevation of the shoreline, temporarily converting ocean and beach into dry ground, until natural forces eventually reclaim the renourishment sand. In the wake of Folly's late-2018 renourishment, several registered owners of superbeachfront property have stepped forward to claim ownership of newly created dry ground and to pursue development before the inevitable reversion to beach and ocean.

In response, we are challenging ownership of land artificially created through renourishment. Under South Carolina's Public Trust Doctrine, the state owns all land below the average high tide line and keeps this land in trust for the benefit of the public. When private property borders a shoreline, the boundary between public trust property and private property is not fixed.

Our lawsuit seeks to clarify that superbeachfront property lost to the ocean over time is not put back in private hands as a result of an artificial renourishment with taxpayer dollars.



Folly's late-2018 renourishment, converting ocean and beach into dry ground

credit: Andy Hollis

Rather, private properties bordering the beach and ocean will contract and expand as the average high tide line shifts over time.

The critical distinction is between erosion, accretion, and avulsion. Erosion and accretion are natural, gradual processes through which sand is either lost or gained from the beach. These normal processes shift the boundary between private property and public trust property. In contrast, avulsions are singular events through which massive amounts of sand are gained or lost all at once. **Avulsions, whether causing a loss of land (like a hurricane) or an increase in land (like a renourishment) should not shift the boundary between public and private property.**

While the law of avulsion is well established in other states, no South Carolina appellate court has ever been asked to determine the ownership status of beachfront land created by renourishment. As renourishment becomes more common and more necessary all along our coastline, it is critical to establish that these projects do not take property from the public, nor reopen ephemeral sandy patches for soon-to-be armored oceanfront development.



P. O. Box 1380
Pawleys Island, SC 29585



10th Annual Wild Side – October 12, 2019

The 10th annual Wild Side will be held on October 12th in historic Georgetown.

It is a special date and it will be a special event, with overlapping anniversaries, a new format, and a new venue: Kaminski House. Al George, Director of Conservation at the South Carolina Aquarium will be our guest speaker and we look forward to sharing a memorable night with you and your friends.

Programming, sponsorships, volunteer opportunities, and other information will soon be available on our website at www.scelp.org/wildside

Watersheds, Ocean, Wetlands – Join us for a celebration of the WOW of South Carolina!