

# Mountains & Marshes

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

## SCELP Makes Headway in Environmental Battles



*Federally threatened Flatwoods Salamander populations continue to decrease due to loss of their wetland breeding habitat*



*This Pitcher Plant is an example of unique flora that depend on wetland habitat to thrive*



*The wetland dependent Wood Stork is the only stork breeding in the US.*



*The Supreme Court affirmed protection for coastal wetlands like this in a landmark case argued by SCELP earlier this year (see pg 2)*

### ***The South Carolina Environmental Law Project (SCELP)***

began 2010 with a string of successes in our State's highest courts, as well as before the DHEC Board. It's not often that we win four cases between our biannual newsletters, but we are excited that decisions protecting our natural resources are being made in both judicial and administrative forums. We are dedicating this issue to you, our readers and friends, to thank you for your continued support that has helped make these successes possible. We hope that you share our renewed inspiration for environmental conservation in this state with your financial support of our work.



## **Threat to Isolated Coastal Wetland Protections Finally Over**

SCELP's nearly 10 year battle against repeated attacks on the Coastal Management Program has ended with an exceptional ruling from the South Carolina Supreme Court.

The SC Coastal Management Program has been used for over thirty years to protect wetlands and other natural resources in the coastal zone. Several developers have attempted to have the Coastal Management Program ("CMP") declared invalid and inapplicable to isolated wetlands. In this most recent case, a developer operating under the name Spectre, LLC, wanted to fill in 32 acres of isolated wetlands in Murrells Inlet, SC, in connection with a 63 acre commercial development. When DHEC denied the permit based on the CMP policies that provide safeguards for wetlands, Spectre challenged the validity of the CMP in the Administrative Law Court.

Administrative Law Judge John McLeod agreed with the developer, ruling that the Program does not cover wetlands that are not within the jurisdiction of the federal Clean Water Act, and that the Coastal Management Program is invalid because it was not promulgated as a regulation under the state Administrative Procedures Act.

SCELP appealed this decision, and the South Carolina Supreme Court agreed to hear our case. On February 1, 2010, the Supreme Court issued a sweeping unanimous opinion overturning Judge McLeod's Order, upholding the validity of the South Carolina Coastal Management Program and reaffirming its applicability to all wetlands in the coastal zone.



*The legal uncertainty over protection for wetlands in coastal South Carolina has ended with the S.C. Supreme Court's validation of the Coastal Management Program*

## **Radioactive Nuclear Waste Facility Must Meet Protective Standards**

The South Carolina Court of Appeals agreed with SCELP and our client, the Sierra Club, that radioactive nuclear waste must be disposed of in compliance with regulations requiring engineered barriers that minimize the migration of water into and out of waste disposal units and that prevent contact between the waste and the surrounding earth.

The Chem-Nuclear facility, located in Barnwell, is one of only three low-level radioactive waste disposal facilities in the entire country. The other two are in Richland, Washington and Clive, Utah. DHEC has issued permits to Chem-Nuclear for its disposal facility for nearly thirty years, and until now none of those permits have ever been challenged. The most recent permit allows Chem-Nuclear to dispose of radioactive nuclear waste in concrete containers with holes in the bottom, which allows water to come into contact with the waste and seep into the groundwater. The containers are then buried in underground trenches that are left open, allowing rainfall to collect in the bottom of the trenches and come into contact with the waste. The permit failed to require adequate measures, such as sealed and grouted containers without holes, to prevent radioactive waste from getting into our water system.

Radioactive tritium leaking from all parts of the landfill has been detected in Mary's Branch creek, which is adjacent to the Chem-Nuclear facility and eventually flows into the Savannah River.

Our case was first heard by the Administrative Law Court, which upheld the permit. Even though the ALC noted that the leaking waste presents a "monumental hazardous condition that... cannot be overlooked," the Order failed to rule on whether the permit met the legal requirements for barriers to keep waste out of contact with water and man's environment. The Court of Appeals remanded the case back to the ALC to make specific legal conclusions on whether these requirements were met. The legal conclusions must be applied to the factual findings that the design of the facility allows waste to come into contact with water and infiltrate the soils



below the trenches. We believe that the application of the ALC's facts lead to the conclusion that the design does not meet the legal requirements for keeping radioactive waste out of our soils and water.

Chem-Nuclear asked the Court of Appeals to reconsider its ruling and that request was denied by the Court. As this newsletter goes to print, time has not expired for Chem-Nuclear to file another appeal.

## **D**HEC Board Reverses Staff in Captain Sam's Spit Case

SCELP persuaded the DHEC Board to deny a permit and coastal zone consistency certification issued to Kiawah Development Partners for the construction of a 340' long sheetpile retaining wall along the neck of Captain Sam's Spit on Kiawah Island.

On March 11, 2010, the Board conducted a review of its staff's decision to approve the permit, and voted unanimously to reverse staff. In its Final Agency Decision, the Board ruled that the staff failed to adequately consider the "possible long-range, cumulative effects of the project, when reviewed in the context of other possible development and the general character of the area." The Board noted that "the primary purpose [of the project] . . . is to protect land for an access corridor including a possible future road and utilities to facilitate a residential development on the Spit." The Board said



*Diamondback Terrapins exhibit extreme site fidelity in terms of where they nest, returning to the same site year after year. Scientists studying the Terrapin have noted significant declines in the Kiawah Island population and believe the proposed wall would inhibit Terrapin nesting and further threaten this species*



*The only known nesting site in the Kiawah area for the Diamondback Terrapin is along the neck of Captain Sam's Spit in the location of the proposed wall. This shot was taken within that area*

that the Department has an obligation under the Coastal Management Program to consider impacts flowing from that development in the consistency review. (The CMP was recently affirmed in our Spectre case, also discussed in this newsletter). And the Board concluded that "given the pristine nature of the Spit and the Kiawah River in the vicinity, the lack of human improvements, the use of the area around the Spit as a public park, and the fact that much of the Spit is a Geographic Area of Particular Concern (habitat to the endangered Piping Plover) and an area of special resource significant (barrier island, dune areas, and public open space)," the consistency determination must be denied because of the long-range cumulative effects of the project on this area.

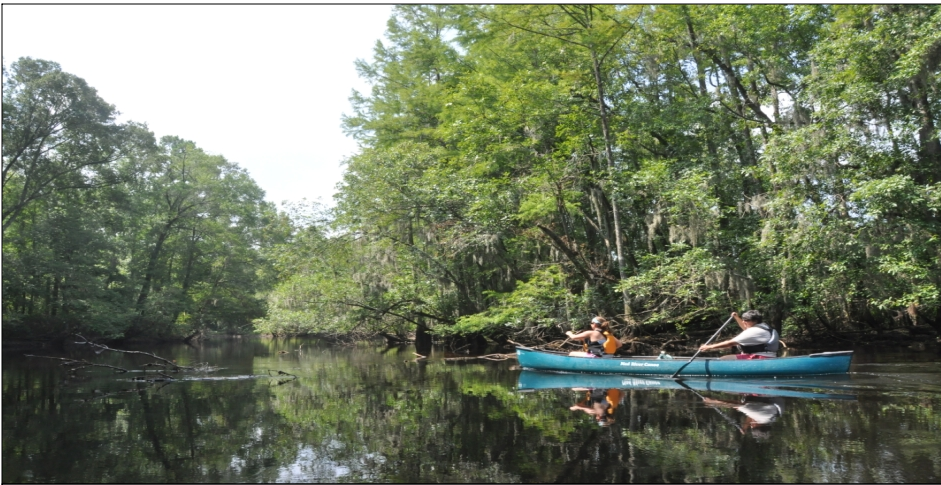
Kiawah Development Partners has appealed the Board's decision to the Administrative Law Court. SCELP is representing the Coastal Conservation League as an Intervenor in that case.

KDP applied for the sheetpile wall while our appeal of its critical area permit to construct a half-mile long, 40' wide revetment was pending in the Administrative Law Court. That case is now on appeal in the Court of Appeals and SCELP has asked the Supreme Court to hear the case directly as a matter of significant public interest and a legal principle of major importance.

### **How you can help...**

**Y**ou help us continue our work with your financial contributions. Just log onto our website [www.scelp.org](http://www.scelp.org) and donate on-line or use the enclosed envelope to mail a donation today  
**Thank you.**





*Under the DHEC proposal, permits in areas like this on the Scenic Pee Dee River would not be put on public notice or receive individual review*

## **N**atural Resource Impacts Must Be Considered in Permitting Decisions

On April 8, 2010, SCELPL convinced the DHEC Board that General Permits for activities in Navigable Waters must be reviewed for impacts to natural resources. On behalf of Upstate Forever (“UF”) and the SC Wildlife Federation (“SCWF”), SCELPL challenged two General Permits (“GP”) that granted blanket authorization to conduct activities in the State’s navigable waters. General permits authorize categories of activities without any public notice, public or resource agency comments and without individual review of impacts on natural resources.

One GP authorized construction of docks and pierheads in any navigable water of the State without any individual review. This GP failed to give any consideration to the impacts of docks in Outstanding Resource Waters, Scenic Rivers or Trout Waters – waters that deserve heightened protections. The other GP applied to activities that received a Nationwide Permit (“NWP”) from the US Army Corps of Engineers. It would have prevented any evaluation of impacts to water quality, wetlands and natural resources along our State’s navigable waters, including projects involving dredging, bank stabilization, outfall and intake structures and utility lines.

Along with UF, SCWF and SCELPL, the SC Department of Natural

**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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*The Broad River, home to diverse plant and animal life including the state endangered wild ginger. It’s a scenic stretch of undeveloped riverfront with only one bridge (SC 211) crossing the entire 15-mile stretch of river*

affecting our State’s navigable waterbodies. On several occasions, projects were significantly improved and environmental harm minimized because DNR submitted comments. In one case, a 50 foot buffer was made part of a residential development along the Black River in connection with a boat ramp that would now be authorized under the GP. The buffer was recommended by DNR and agreed to by the developer after the project was put on public notice.

The DHEC Board recognized the importance of evaluating natural resource impacts for the GPs, and remanded both General Permits back to the staff to work with SCELPL and our clients to find a solution. We are working towards putting in place a process that would allow continued review of these projects.