

# Mountains & Marshes

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

Summer/ Fall 2009

## SCELP Working to Protect Pristine Coastal Site

**C**aptain Sam's Spit is a 130-acre pristine dune ridge and beach system on the southern tip of Kiawah Island. This unique spit is completely undeveloped and is bounded on the northwest by the Kiawah River and on the southeast by the Atlantic Ocean. Aside from being completely undeveloped, this portion of Kiawah is characteristic of barrier islands along South Carolina's coast – it shifts and moves in response to ocean currents.

When Kiawah Island was purchased by the Kuwaitis in 1975, a thorough study of the baseline conditions at Kiawah was performed. The study, entitled Environmental Inventory of Kiawah Island, was designed to provide optimal information necessary for informed decision-making. After reviewing historical data dating from 1661 through the present, the scientists concluded that the spit was "unstable." They further concluded that the spit "should not be developed because the land has been completely eroded and redeposited at least twice during the past 200 years and because the neck of the spit is obviously susceptible to over-wash during hurricanes."

And that's exactly how Kiawah Island had been developed – leaving Captain Sam's Spit alone.

Fast forward to 2008. The current owner, Kiawah Development Partners II ("KDP"), applied for a permit to construct a 2,783' long articulated revetment and bulkhead system in coastal waters and tideland areas along the banks of the Kiawah River at Captain Sam's Inlet. KDP is proposing to construct a residential development consisting of 50 houses on Captain Sam's Spit. Though there are no structures on the Spit, KDP asserts that this revetment is necessary to protect the proposed road to the new development.

On December 18, 2008, the DHEC staff issued notice that it was authorizing the construction of 270' of bulkhead and revetment along the northeastern end of the proposed project area. The proposed bulkhead/revetment would be along the southwest portion of the parking lot at Beachwalker Park, the current public-access area at Kiawah. Staff denied the remainder of the structure.

Both SCELP, on behalf of the Coastal Conservation League, and KDP appealed the permit to Administrative Law Court in January of 2009. KDP is seeking an additional 2,500' of bulkhead/revetment and SCELP is seeking to prevent any hardened erosion control structure from being built along the banks of the Kiawah River.

The banks of the River in the area of the permitted structure on Beachwalker Park contain vegetation which indicates that there is no current, active erosion occurring at the Park and the permitted structure is therefore not



*An aerial view of the portion of Kiawah Island known as Captain Sam's Spit*

necessary.

The coastal waters and tidelands are owned by the State of South Carolina and held in trust for the benefit of all of the citizens of the State under the Public Trust Doctrine. Under the Public Trust Doctrine, the State has a duty to protect these areas for the benefit of all of the people of the State.

The revetment/bulkhead system that KDP wants to construct would be located on state-owned public trust waters and lands. These waters and lands are used by the public for boating, kayaking, fishing, viewing wildlife and other recreational activities. Accordingly, both the State and its

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**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 would like to correct an omission from our previous newsletter.

**The Yaupon Garden Club**

has been a loyal contributor for over 6 years. They were omitted from our list of supporters in the Mountains to Marshes Winter-Spring 2009 issue.

# Update on Landfills

The South Carolina Environmental Law Project has been very active in a series of cases and issues involving proposed landfills over the first half of 2009.

The good news is that the original Williamsburg County “mega dump” has gone away. The Coalition of Concerned Citizens of Williamsburg, with help from state and local officials and others, persuaded Williamsburg County to terminate its agreement with the North Carolina landfill company, MRR Southern. The agreement with MRR had proposed opening a landfill with a capacity of up to 2,375,000 tons per year.

After terminating the MRR agreement, Williamsburg County resumed its search for a new means of disposing of the county’s solid waste. Although the quest continues, on June 3, 2009, the South Carolina Department of Health and Environmental Control (DHEC) approved an expansion of the county’s landfill capacity to 400,000 tons per year -- although the county generates less than 50,000 tons of waste each year.

On behalf of South Carolina Coastal Conservation League and South Carolina Wildlife Federation, SCELP has filed a request that the DHEC Board review the decision to approve 400,000 tons per year for the Williamsburg landfill. We see no logical reason for this high capacity.

On June 26, 2009, a new “demonstration of need” regulation became effective. The new regulation still uses the type of formula that has been used in the old regulation. SCELP believes that this formula is not consistent with the SC Solid Waste Management Act’s requirement of a “demonstration of need.” The new regulation, however, is a significant improvement over the old regulation, and should result in a reduction in both the number of new landfills and the permitted capacity of any new landfills.

One unresolved legal issue is whether proposed new landfills should be assessed under the new regulation. DHEC takes the position that landfills which requested approval of a demonstration of need before the effective date of the new regulation will be assessed under the old regulation, even where no permit has yet been issued and where public comment periods have not yet been conducted. SCELP disagrees with DHEC’s position, based on case law from the United States Supreme Court and state appellate courts.

One of SCELP’s landfill cases involves a proposed new “C & D” (construction and demolition debris) landfill in Laurens County. Laurens County generates about 17,000 tons of C & D waste per year, and the county already has landfills with over 160,000 tons of annual capacity. DHEC proposes to grant a permit for the new landfill with an annual capacity of 154,000 tons, based on the total amount of C & D waste generated in Laurens, Greenville, and Spartanburg Counties. These three counties already have landfills with an annual capacity of over 800,000 tons. The “need” determination for this landfill was arrived at using the formula of the old regulation. Although that regulation also allows DHEC to consider

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# CASE UPDATES



*A retention pond in Deerfield*

## **Deerfield:**

Our Deerfield case went to trial in March at the Administrative Law Court (“ALC”). At issue was whether DHEC properly issued a stormwater permit and coastal zone consistency certification for a proposed residential development when it failed to consider impacts to wetlands and waters of the State and the history of flooding in the adjacent neighborhoods. We were disappointed with Judge John D. McLeod’s Order. While he ruled that there were wetlands and waters of the State that DHEC failed to consider, he did not require DHEC to look at impacts to those wetlands and waters. We have asked the Judge to reconsider his ruling and plan an appeal.

We have also filed suit in Federal Court seeking to overturn the Corps of

Engineers’ determination that there are no wetlands or waters of the US on the area that would be developed. The Corps’ determination was made without an inspection of the site.

## **Wayne Hill:**

We have submitted final briefs to the SC Court of Appeals in our enforcement case against Wayne Hill for filling in approximately 1500 square feet of critical area salt marsh in the Cherry Grove section of Myrtle Beach. We are awaiting a date for oral arguments.



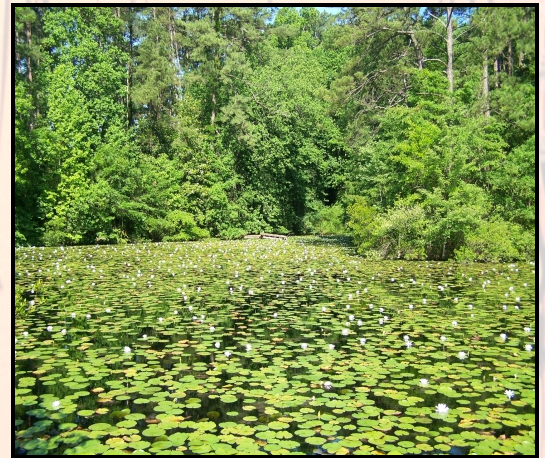
*Wayne Hill's lot in Cherry Grove*

## **Arcadia Lakes:**

SCELP represents the Town of Arcadia Lakes and a number of Town residents in challenging a stormwater permit for a residential development. In this case, the developer plans to excavate a pond, which is covered with lily pads and is part of a thriving ecosystem, for use as stormwater detention. The ecological functions of the pond would be lost if it is excavated, yet the developer didn’t ask permission to excavate the pond and DHEC failed to take into account this loss of functions in issuing its permit decision. A hearing has been set for September in Columbia.

## **Spectre - Challenge to Coastal Management Program**

Our appeal of the ruling that the SC Coastal Management Program is invalid has been fully brief and we are awaiting a hearing date in the South Carolina Supreme Court.



*The Lily Pad Pond*

## **Chem Nuclear:**

We have submitted final briefs to the SC Court of Appeals in our challenge to Chem Nuclear radioactive landfill permit issued by DHEC. We are asking the court to reverse the permit approval. The Administrative Law Court ruled that although the landfill is leaking radioactive materials to groundwaters and the Savannah River, the permit complies with the regulations requiring “isolation of wastes from the biosphere inhabited by man and his food chains.” A date for oral arguments has not been set.





#### *KIAWAH Continued from page 1...*

citizens have significant property rights in the coastal waters and lands along the Kiawah River. The proposed bulkhead/revetment system would convert over a half mile of public trust tidelands to private use to facilitate development on an unstable spit. The hardened structure, in addition to having negative impacts upon wildlife, would limit or restrict use of this publicly-owned property.

The Spit also falls entirely within a federally designated COBRA zone under the Coastal Barrier Resources Act, which prohibits federal flood insurance in these areas in an effort to deter development on unstable, dynamic barrier islands. In 2008, Congressman Henry Brown made an unsuccessful attempt at removing Captain Sam's Spit from its COBRA designation.

Captain Sam's Spit, the site of the proposed development, is essentially pristine. It supports a thriving wildlife community, including designated critical habitat for the endangered Piping Plover and the rare Diamondback terrapin. Piping Plovers are a migratory bird species that use Captain Sam's Spit as resting and feeding grounds. Human and animal activities that accompany development decrease the birds' ability to rest and feed. The terrapin nests along the banks of the Kiawah River specifically in the area of the proposed bulkhead/revetment system. The proposed structure would inhibit the terrapin from utilizing the banks for nesting activities.

Both the SC Department of Natural Resources and the US Fish & Wildlife Service recommended denial of the permit because of pristine, undeveloped nature of the spit and potential damage that could result if it were developed.



Administrative Law Judge John D. McLeod has been assigned to the case and a hearing has been set for the week of August 24, 2009. SCEL P is in intense preparations for the upcoming trial and asks for your support for our efforts in this case.

The Kiawah developer has also filed a \$100 million "takings" claim against the State for denying its permit application. SCEL P and the League will help fight this claim.



#### *LANDFILLS continued from page 2 . . .*

"additional factors in determining need on a case-by-case basis, DHEC refused to consider any additional factors in this case.

The Laurens County case, in which SCEL P represents a group called Engaging and Guarding Laurens County's Environment ("EAGLE"), will go to trial on July 22, 2009.

SCEL P has also filed a petition seeking a declaratory ruling on the validity of the "demonstration of need" regulation and its applicability to pending permits. The Administrative Law Court lacks authority to determine the regulation's validity, so we must first petition DHEC and then take this issue to state circuit court.

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

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

***Thank you.***