

# MOUNTAINS & MARSHES

FALL/WINTER 2004

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

## SCELP Enforcement Project Moves Forward

*Violators beware: The South Carolina Environmental Law Project is moving into high gear with legal challenges to violations of the state coastal management program. We've already won our first case. Read more about this case and our other efforts on page 3 inside.*



*Not a pretty picture? Salt marsh fill violations aren't the type of pretty picture normally found on the covers of environmental newsletters. This one shows a bulkhead being constructed in the marsh. Due to SCELP's successful efforts, the owner is now under an order requiring its removal.*



## Director's Commentary: The Quiet Side of SCEL P's Work

**T**he cases lawyers win or lose usually get more attention than the other work they do. At SCEL P, we're no different than other lawyers who try cases, and we love to talk about the major cases we win. But our trials are only a portion of our work.

A lot of our most important work is done quietly, behind the scenes. Over the 17 years of SCEL P's operations, we have represented clients in about 120 formal legal proceedings. During the same period of time, we have opened over 650 "issue" files: matters which we are monitoring and providing more informal legal assistance to our client groups. The work we do on these issues almost never gets into the newspapers, and usually is not even mentioned in this newsletter. But this work may be more significant than our cases.

We know the state's environmental management system well, and we are in constant contact with key administrators discussing regulatory issues and pushing for improvements in their decision-making. We have helped resolve dozens of major controversies that never blossomed into formal legal proceedings.

A few examples of recent results from this quiet side of our work: We have obtained improvements in the way that **coastal critical area permits** are written; the permits now have improved project descriptions, clarified language about permanency of special permit conditions, and a statement that the work authorized by the permit cannot be started if an appeal is filed. We helped persuade state regulators to deny a permit to place fill in wetlands at **Wedgfield Plantation**, and our quiet advocacy efforts have led to other denials and to changes that improved several issued permits. We've helped focus the debate about **state freshwater wetlands legislation**. We've helped improve public education about **wetlands and storm water management**. We obtained **buffer zone conservation easements and dock limits** along the Wando River and its tributaries in Mt. Pleasant to protect water quality and scenic beauty.

We're here when environmental groups need to file big lawsuits, and we're here to answer the small and large legal questions that come up every day. We get a lot of satisfaction from these quiet, positive results.

— Jimmy Chandler



*Jimmy Chandler and daughter, Leigh.*

## 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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## Board News

### *Wendy Zara joins SCEL P Board of Directors*

We're pleased to announce that Wendy Zara has become the newest member of SCEL P's Board. Wendy lives in Sheldon and works in Beaufort at A.G. Edwards & Sons, helping people plan their financial future. She's been active in local environmental and land use planning issues and a leader of the Northern Beaufort County Committee, the Beaufort Chamber of Commerce, and other community committees and task forces.

Wendy was born in New York City and lived up north until she and husband Michael moved to Sheldon in 1992. She has two grown daughters, four grandchildren, two dogs and a cat.

We've worked with Wendy for years, and are very pleased and excited to have her officially on board.



**A**my Armstrong's two-year Equal Justice Works Fellowship has run out, but Amy has accepted our offer to remain at SCEL P as Staff Attorney.

Amy has been in charge of reviewing and commenting on all major environmental permits. She also assists with all other phases of SCEL P's work, including consultation and advice to client groups, preparing and presenting permit appeals, analyzing environmental agency operations, and advocating improvements in those operations. She is playing an increasing role in fundraising and organizational development.

Amy serves on the boards of the Georgetown County League of Women Voters, the Winyah Group of the Sierra Club, the local Hospice organization, and Keep Georgetown Beautiful. "Amy's only been here two years, and already has more local friends than I," jokes SCEL P Director, Jimmy Chandler, a Georgetown native.

We are delighted to have Amy staying with us.

# SCELP's Citizen Enforcement Project

*Three cases describe SCELP's efforts to right some serious wrongs to the natural landscape of South Carolina.*

Over its 17-year history, most of the work of the South Carolina Environmental Law project has involved legal challenges to various environmental permits. We work to stop or improve bad projects before they get started. Sometimes, however, there are people who alter the environment without proper permits, or who go beyond the limits of their permits. Our state environmental management agency, the South Carolina Department of Health and Environmental Control (DHEC), is responsible for taking enforcement action when these violations occur. But some environmental laws allow for citizen enforcement actions. SCELP has participated in several citizens suits under the Federal Clean Water Act. In recent months, SCELP has begun to implement a citizen enforcement provision in the SC Coastal Zone Management Act. These cases are described below.

## Heritage Shores—Hill Lot

Wayne Hill obtained a permit to build a bulkhead along the “critical area” boundary of a small lot in the Cherry Grove section of North Myrtle Beach (see photo front cover). The critical area boundary is the edge between high ground and salt marsh. Instead of building the bulkhead at this boundary, as his permit required, Hill built it between 6.5 feet and 31 feet into the marsh. He then backfilled the marsh with 17 truckloads of dirt.

After SCELP's Cherry Grove clients complained, the state Office of Ocean and Coastal Resource Management (OCRM) began an enforcement proceeding. Hill refused to remove the fill and move the bulkhead, insisting on a hearing before an Administrative Law Judge.

SCELP intervened in the case on behalf of the Coastal Conservation League, asserting our rights to participate as affected parties. At a hearing before ALJ John D. Geathers on April 20, 2004, we presented evidence and cross-examined Hill and his witnesses.

On August 23, 2004, Judge Geathers issued an order

finding Hill in violation of his permit and the coastal regulations. He ordered Hill to re-locate the bulkhead so that it is in compliance with his permit and to pay a \$1,000 fine.

Hill has appealed and the case remains pending before the Coastal Zone Management Appellate Panel.

## Fenwick Island

Dewey Wise, a former State Senator and former member of the South Carolina Coastal Council (the predecessor to OCRM), is the owner of most of South Fenwick Island in Colleton County. The island is surrounded by coastal waters and wetlands that are considered “critical areas” under the SC Coastal Zone Management Act.

In 1985, Wise obtained a permit to

construct a small bridge across a breach in an old causeway. In 2002, Wise removed the bridge and placed fill in the critical area, converting the bridge to a complete causeway. He did not seek or obtain any permits for this activity.

When OCRM learned of Wise's activities, the agency began an enforcement proceeding by issuing a Notice of Violation. Within a few weeks, the agency reached a settlement with Wise, under which Wise paid a \$250 fine, placed three pipes in the filled area, and was allowed to keep the fill in place without obtaining a permit. Wise also later replaced a “trunk” (an impoundment water control structure) in the same causeway, without a permit.

In December 2003, SCELP filed suit against Wise on behalf of the Coastal Conservation League. The suit alleges that Wise has violated the SC Coastal Zone Management Act by placing fill in critical area waters and wetlands without the required permit. We also allege citizen rights of enforcement under Section 48-39-160 of that Act.

At a hearing in June 2004, Judge Jackson Gregory denied Wise's motion to dismiss the case. By agreement, OCRM was added to the case as a Defendant. In October, OCRM filed a

*(Continued on page 4)*



*Site of the former bridges at Fenwick Island. The box structures are “stand-pipes,” which control water flow.*



## Inlet Oaks Dredging Case Settled Successfully

**A** Murrells Inlet dredging appeal has been settled with an agreement that will eliminate most of the proposed dredging and preserve salt marsh and shellfish beds.

Inlet Oaks Development Corporation applied for a permit to dredge the waters of Murrells Inlet adjacent to a proposed residential development. The proposed dredging site had been the site of a protracted and controversial marina permit appeal during the 1980s and 1990s, known as the Triska case. Inlet Oaks wanted to enhance the value of its property by deepening the channel and increasing deep water access.



**Salt marsh and shellfish beds preserved.** SCELPA achieves desired results through settlement of this action.

SCELPA, representing the Coastal Conservation League, the League of Women Voters of Georgetown County and Sierra Club, appealed the permit issued for the proposed dredging. The permit had scaled back the dredging, but the limits were stated in a confusing manner. When it became clear that the Office of Ocean and Coastal Resource Management intended to severely limit the dredging, settlement negotiations quickly moved forward.

The settlement allows limited dredging of a sand bar that restricts flow at the mouth of an old man-made (but now naturalized) slough, with no real deepening of the channel. A proposed boat ramp was also re-located to eliminate destruction of a healthy stand of salt marsh.

## Citizen Enforcement (continued)

(Continued from page 3)

motion to amend its Answer in the case, to support most of SCELPA's allegations.

The case remains pending in Colleton County circuit court and will probably go to trial early in 2005. The suit appears to be the first instance of a citizen enforcement suit under Section 48-39-160.

### Cherry Grove—Heritage Shores

In early 2002, SCELPA and its clients, the Coastal Conservation League, Sierra Club, and a group

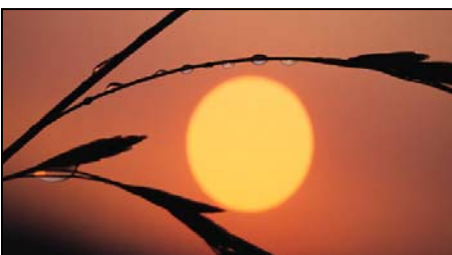
of Cherry Grove property owners, reached a settlement with a group of developers and lot owners relating to the development of an area known as Heritage Shores. Under the settlement, development was allowed to proceed on a portion of the property, and another portion was set aside as a public park.

In the development area, the property owners were allowed to obtain bulkhead permits, so long as the bulkheads were constructed in compliance with OCRM regulations, which allow filling of no more than 1.5 feet of critical area. All permits were applied for and granted showing the bulkheads to be constructed on the critical area boundary.

Soon after bulkhead construction began, however, SCELPA began receiving complaints from our Cherry Grove supporters, saying

that the bulkheads were being built out into the marsh and creeks. For months, we attempted to gather the necessary evidence to allow challenges to these bulkheads. During the Wayne Hill hearing, we finally got what we needed. OCRM prepared an aerial photograph of the area, with the critical area map superimposed at the same scale, and the violations are readily apparent. The bulkheads appear to violate the settlement agreement and OCRM regulations.

SCELPA has given notice to the developers and property owners of the violations, and we are preparing for legal action to seek remedies. We expect to file suit before the end of the year in Horry County circuit court.



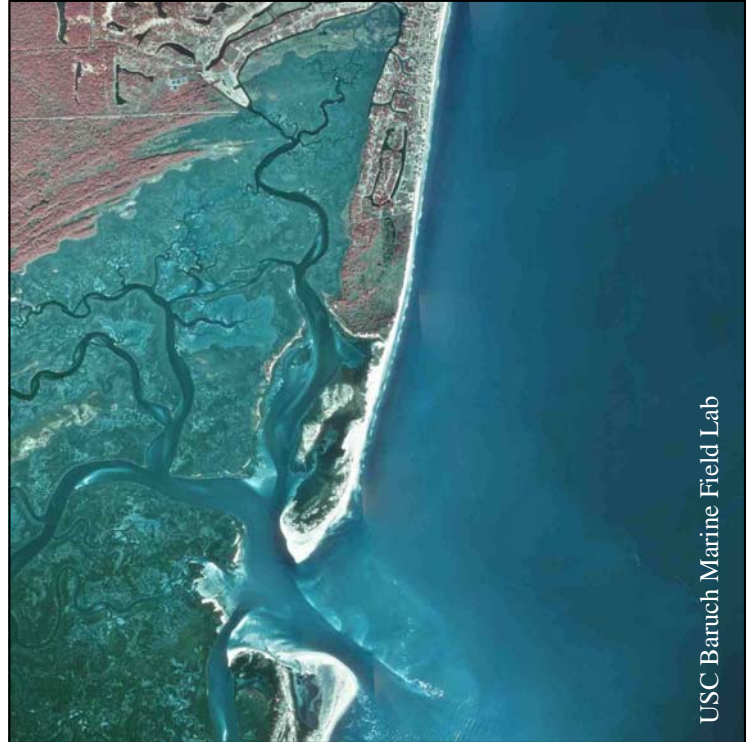
## Pristine North Inlet Estuary Protected

**T**he Debordieu Colony Homeowners Association has withdrawn its request to mine sand from a sandbar at the mouth of pristine North Inlet for use in beach renourishment.

The change came about after SCEL P mobilized several environmental groups, concerned citizens and experts in coastal geology, obtained a well-attended public hearing and good press coverage, and persuaded the state permitting agencies that the permit should be denied.

The original proposed sand mining site was adjacent to the North Inlet-Winyah Bay National Estuarine Research Reserve – one of only 13 such reserves in the country – the site of world-renowned long term research of the marine ecosystem, and some of the finest oyster beds in the state. DeBordieu wanted to take sand from this public resource to place in front of its nearly private beach to protect a small handful of houses that were built too close to the ocean.

DeBordieu has wisely amended its application to obtain sand from an off-shore sand source, about 2-3 miles from the mouth of North Inlet.



USC Baruch Marine Field Lab

**A rare treasure protected.** *SCEL P's efforts to protect the North Inlet sandbar become a reality.*

## Wetlands Ruling: State Must Consider All Wetlands Impacts



**S**CEL P has won a preliminary ruling from an Administrative Law Judge, requiring the SC Department of Health and Environmental Control (DHEC) to consider impacts to wetlands at a development site, even though some of those wetlands had not been identified and delineated by the US Army Corps of Engineers.

The ruling came in our appeal of coastal zone consistency and water quality certifications issued to Creekside Cottages, LLC, that would allow filling of wetlands that drain directly into the Murrells Inlet estuary. Representing Murrells Inlet residents, the Coastal Conservation League, and the League of Women Voters of Georgetown County, our appeal was based in part on evidence that DHEC did not consider impacts to all of the wetlands on the site, as required by law. DHEC had accepted the developer's wetlands map, despite letters and testimony at a public hearing that the site actually contained more wetlands than those represented by the developer. Our appeal also alleges that the proposed wetland fill will negatively impact the important Murrells Inlet estuary.

After we won the preliminary wetlands ruling, our wetlands expert examined the site and reported additional wetlands. The developer now agrees that there are additional wetlands, and the case has been remanded from the Administrative Law Court to the agencies, to re-start the permitting and certification process. The preliminary ruling is important because it establishes that DHEC may not simply rely on the developer's wetland delineation, even where that delineation has been approved by the Corps.

SCEL P will continue to advocate protection of the wetlands on the Creekside tract.



# Nature's Attorney

**A**s a fifteen-year resident of Murrells Inlet, I've been involved in more than a few environmental causes: from starting our annual "Spring Tide" cleanup of the salt marsh and community, to fighting a proposed Wal-Mart within a half-mile of the creek. As one of the plaintiffs in the case involving the developers of Creek-side Cottages, detailed on Page 5 of this newsletter; I can tell you, if not for the intervention of SCEL P on our behalf, a natural, functioning wetland stream on that land would already have been filled and ruined — and the Inlet estuary, already declining due to urban runoff, would have taken yet another blow.

We live in a time when our remaining natural landscape is under economic siege. In our coastal areas, what little forested land that remains has grown more valuable by the minute — and thus more vulnerable to hastily considered development, clear-cutting, and paving, the ill effects of which range from polluted runoff to a cluttered, aesthetically degraded quality of human life.

In development land-deals, the human parties are well represented by lawyers. But who represents the interests of the landscape, the wildlife, the groundwater? We have state agencies to do that, but as you can read in this newsletter, they don't always do the job — and that's where the South Carolina Environmental Law Project comes in. In a world where sensible rules get bent by influence and money — and the environment declines accordingly — SCEL P is there as Nature's Attorney. To my mind, theirs is a noble and important calling, more important every day — and well worth any support that you might give.

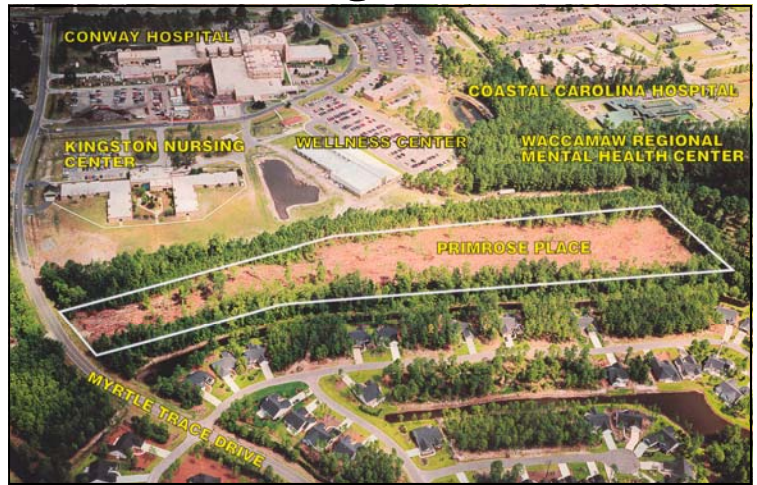
— Chip Smith, Murrells Inlet

## DHEC Board Reaffirms Wetlands Mitigation Rule

**T**he governing board of the South Carolina Department of Health and Environmental Control (DHEC) has ruled that once a developer has set aside land for preservation, as mitigation for a development's wetlands impacts, the land cannot later be developed, absent extraordinary circumstances.

The ruling, by a unanimous vote during the board's October 2004 meeting, re-affirmed an earlier 2001 board decision. The 2001 board decision had been reversed by a state circuit court judge due to defects in the board's written order. Between 2001 and 2004, the membership of the board had completely changed, requiring the 2004 board to conduct a new review of the case.

The decision came in SCEL P's Myrtle Trace case. Our clients, residents of the Myrtle Trace subdivision near Conway in Horry County, were promised that a wooded tract adjacent to their neighborhood would remain a "nature preserve." The de-



*Once a nature preserve, now a clear-cut. SCEL P is working to keep the outlined tract as a buffer.*

### Quick Case Updates

**Chem-Nuclear Low Level Radioactive Waste Land-fill:** after months of working to resolve issues about confidential and trade secret documents, we're preparing for a February 2005 trial in this effort to get improved operating requirements at the landfill.

**Cherry Grove - Perrone marsh ownership:** this case has been stalled by the death of one of the plaintiffs; our motions to intervene for Sierra Club, Coastal Conservation League and property owners remain pending in the Horry County court.

**Standing cases:** the Smiley case has been fully briefed and we are waiting on a hearing date in the Court of appeals; in the Henry dock case, we won a victory in the Coastal Zone Management Appellate Panel sending the case back for a hearing on standing, and this victory was recently upheld in court in Beaufort County.

**Ashley River dock:** in September, an Administrative Law Judge upheld the denial of a dock permit within the historic Ashley River corridor, opposed by SCEL P and its client, the SC Department of Archives and History.

velopers of Myrtle Trace had agreed to preserve the tract as compensation for filling and excavating wetlands for the subdivision construction. Later, one member of the development group sold the "nature preserve" tract to a new development company, which immediately clear-cut nearly all of the trees on the site and applied for development permits.

In seeking permits, the new developer argued that the original mitigation requirements were not enforceable because no conservation easement or deed restriction was recorded in the land title records. The DHEC board's ruling reflects the board's view that such recording is not necessary to allow the agency to exercise its traditional "police powers" over wetlands, including mitigation requirements.

The developer has announced the intent to appeal the case once more to state courts. SCEL P will defend the Board's decision. We also have filed a separate suit in state court seeking a declaration that the "nature preserve" is protected by "buffer" designations on recorded plats of the tract, and the new developer had been informed of the designation.