



**SOUTH CAROLINA
ENVIRONMENTAL
LAW PROJECT**

Lawyers for the Wild Side

PO Box 1380, Pawleys Island, SC 29585 / (843) 527-0078 /
www.scelp.org

Executive Director & General Counsel
Amy E. Armstrong | amy@scelp.org

Special Counsel
Michael G. Corley | michael@scelp.org

Staff Attorneys
Benjamin D. Cunningham | ben@scelp.org
Leslie S. Lenhardt | leslie@scelp.org
Michael G. Martinez | mike@scelp.org
Lauren Megill Milton | lauren@scelp.org
Emily M. Nellerroe | emily@scelp.org

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VIA EMAIL

A. Tyler Stone
Long Range Planning Manager
Greenville County Planning Department
301 University Ridge
Suite 3800
Greenville, South Carolina 29601

RE: Comments Regarding Draft Unified Development Ordinance

Dear Mr. Stone:

I am writing on behalf of the South Carolina Environmental Law Project (SCELP), a nonprofit public interest law firm dedicated to the protection and preservation of South Carolina's natural resources and environment. I submit this letter to provide SCELP's comments on the draft regulations proposed for Greenville County's Unified Development Ordinance ("UDO"), which are available as of the date of this letter.

SCELP's comments primarily focus on components of the draft UDO that relate to environmental protection, but the comments will also address areas of ambiguity that SCELP believes require greater clarity.

I. Riparian Buffers

Article 6.3 of the UDO establishes standards for riparian buffers, requiring buffers "along all classes of streams" in accordance with the stormwater management design manual. Article 6.3.2(A) outlines the specific standards for the buffer size depending upon the size of the area the stream drains. *See* Article 6.3.2(A)(1) (requiring minimum 50-foot riparian buffer for all intermittent, perennial, and blue line streams "draining less than 50 acres"); Article 6.3.2(A)(2) (requiring minimum 100-foot riparian buffer for all intermittent, perennial, and blue line streams "draining 50 acres or more"). SCELP fully supports these standards but suggests a few additions.

First, the UDO should define or reference the appropriate standard for calculating the size of the area the stream drains. Eliminating any ambiguity over the size of the area drained by the

Our Mission 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.

relevant stream and accordingly whether the required buffer is 50 or 100 feet wide is beneficial in implementing the buffer requirements. The provision clearly establishes the applicable buffer size but lacks clarity regarding the method for determining whether an area drained by a particular stream is more or less than 50 acres.

Second, in addition to riparian buffers on all intermittent, perennial, and blue line streams, SCEL P urges Greenville County to require a riparian buffer on all waters of the State, as currently required by Article 22.3.5(E) of the Land Development Regulations. As the draft language is currently written, the ordinance does not require a permanent riparian buffer on any waterways beyond “all classes of streams.” Extending the riparian buffer requirement beyond only streams serves a critical function in protecting the water quality of the County’s waters and maintains consistency with the existing requirement in Article 22. Non-stream waterways—such as wetlands, ponds, and lakes—are all critical to protecting water quality and the County’s watersheds. The County’s own Riparian Buffer Design and Maintenance Manual emphasizes the importance of riparian buffers for *all* water bodies, not merely for streams. Protecting only streams will detrimentally impact the water quality of Greenville County, and these regulations must protect all water bodies.

Next, Article 6.3.2(D) requires the delineation of all “jurisdictional waters of the United States” or “streams classified as waters of the State” located within the proposed project boundary. This subsection should require the delineation not only of “streams” qualifying as “waters of the State” but any waterway located entirely or partially within the project boundary that satisfies the definition of “waters” or “waters of the State” as adopted by the General Assembly and the South Carolina Department of Health and Environmental Control. *See* S.C. Reg. § 61-9.122.2(b); S.C. Code Ann. § 48-1-10(2). To ensure the adequate protection of our County’s waterways, this language should be revised to require the delineation of all jurisdictional waters of the United States and all waters of the State, not simply a waterway considered a “stream.”

SCEL P also suggests clarifications to Article 6.3.2(E), which governs the standards for specified activities “taking place in the vicinity of a body of water that requires a riparian buffer.” First, consistent with the comments above, these standards should apply to any waters of the State or any waters of the United States, and the language should clearly reflect this applicability. Second, the language “in the vicinity of a body of water” presents issues of vagueness and ambiguity; SCEL P suggests more definitive language, eliminating the term entirely, or providing a definition of “vicinity.”

Third, Article 6.3.2(E)(5) reduces the minimum riparian buffer to only 40 feet if the “removal of trees” is “a part of silviculture activity.” The term “silviculture” is not defined. If “silviculture” is intended to encompass the definition for “forestry and logging activities,” SCEL P suggests adding the term “silviculture” alongside “forestry and logging activities.” More substantively, the presence of this exemption appears to confirm the intent that riparian buffers

are not generally required on non-stream waters—the only instance when removal of trees as part of silviculture activity would be permitted with a 40-foot wide riparian buffer is on non-stream waterways because Article 6.3.2(E) makes clear that the wider buffer widths set forth in Article 6.3.2(A) (50 feet and 100 feet wide, respectively) prevail in any conflict. Instead, the 40-foot wide buffer would apply only on waters not otherwise requiring a riparian buffer, i.e., non-stream waters. Furthermore, the absence of a permanent riparian buffer requirement on non-stream waters means a person could conduct either “stumping on agricultural land” or “removal of trees as a part of silviculture activity” and thereafter eliminate the required riparian buffer upon completion of such work, removing the significant benefits riparian buffers provide for water quality.

Article 6.3.2(E)(7) also illustrates this same problem. Under this subsection, “Clearing of land that has existing lakes, ponds, or jurisdictional wetlands shall only take place outside of a riparian buffer a minimum of 50 feet in width.” While this provision mandates a riparian buffer on those non-stream waters during land clearing activities, it leaves those waterways unprotected by a buffer beyond the completion of land clearing. As currently drafted, a developer could maintain a 50-foot riparian buffer while clearing land containing an existing lake, pond, or jurisdictional wetland, but would not be required to maintain a permanent riparian buffer to those waterways once construction of the development is completed. As recognized in Greenville County’s own manual, riparian buffers serve several important functions: “successfully filter out pollutants, stabilize the bank, shade the waterbody, and provide habitat for wildlife from microscopic to migratory.” *Greenville County Riparian Buffer Manual*, p. 2. Allowing development—with its increased impervious surface and stormwater runoff—without requiring a permanent riparian buffer on all waterways will significantly harm water quality in Greenville County. *See id.* at 3 (“Riparian buffers are essential for protection of water quality.”).

Additionally, SCELPA urges removal of the word *jurisdictional* in Article 6.3.2(E)(7). As defined by the UDO, a jurisdictional wetland is only one that satisfies the federal definition adopted by the U.S. Army Corps of Engineers. Greenville County must not narrow its protection of wetlands to only those that meet the federal standard. Instead, Greenville County should protect *all* “wetlands” as defined in the definitions section. For example, “isolated wetlands” are not considered “jurisdictional” and the Corps lacks any authority to regulate actions affecting them. *See Solid Waste Agency of Northern Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (“SWANCC”). However, isolated wetlands provide the same benefits and serve the same functions as non-isolated wetlands, and therefore still qualify as a “wetland,” where the State and the County have the authority to regulate actions affecting them. *See Spectre, LLC v. S.C. Dep’t of Health and Envtl. Ctrl.*, 386 S.C. 357, 368 (2010) (holding DHEC had authority over isolated wetlands under the state Coastal Zone Management Act even though the Corps did not have such authority after SWANCC); *Georgetown Cnty League of Women Voters v. Smith Land Co.*, 393 S.C. 350, 352-53 (2011) (holding DHEC has the authority to regulate isolated wetlands under the state Pollution Control Act). As these cases demonstrate, whether a wetland satisfies the federal test to be considered “jurisdictional” is irrelevant to State or local regulatory

authority. The UDO should apply to *all wetlands*, not simply those satisfying federal jurisdiction, and the County must eliminate the word “jurisdictional” from any provision regulating activities affecting wetlands, in particular Article 6.3.2(E)(7).

SCELP also suggests clarification of Article 6.3.2(E)(8). SCELP supports the increased riparian buffer size when a threatened or endangered plant species is present on the development site, as well as the requirement to prepare a report evaluating “critical areas.” However, the term “critical areas” is vague and undefined in the UDO. SCELP therefore suggests defining the term,¹ or instead utilizing the term “critical habitat” as defined and interpreted under the Endangered Species Act. *See* 16 U.S.C. § 1532(5)(A)(i)-(ii). The required critical area report must assess whether any areas on the development site meet the definition of critical habitat—regardless of whether the U.S. Fish & Wildlife Service has actually designated critical habitat for the particular endangered or threatened species—and outline methods that must be implemented to protect and preserve the natural and ecological features that constitute the critical habitat from any effects caused by activities on site. In addition, the provision should be extended to threatened and endanger animal species whose critical habitat is located on site.

Finally, the County should clarify the language in Article 6.3.2(C). First, the provision should state that “Riparian buffers must be protected during and post-construction” in all types of development. In addition, the provision should be amended to read, “For individual lots created through the Summary Plat process (Minor Subdivisions), riparian buffers may be located on private lots but must be permanently protected by plat and deed restrictions. In addition, Article 6.3.2(A)(3) and Article 6.3.2(E)(1) have conflicting premises: subsection (A)(3) prohibits the disturbance of existing vegetation within a riparian buffer while subsection (E)(1) suggests riparian buffers are allowed to be disturbed by construction activity so long as the area is re-vegetated using native vegetation. SCELP proposes the County strike subsection (E)(1) and clarify that re-vegetation and maintenance is only permitted as set forth in Article 6.3.3 and 6.3.4.

II. Campground Regulations

Article 4.2 establishes campground standards within Greenville County, which SCELP largely supports. However, we raise one issue relating to Article 4.2.5(f), which requires each campground to provide access to potable water and a safe sewer system. Because the definition of “campground” contained in the UDO’s definitional section encompasses “primitive campgrounds,” this requirement appears to mandate that even “primitive campgrounds” have potable water and a sewer system.

Requiring a typical sewer system in the types of areas where primitive campgrounds are typically located risks severe impacts on ecologically and environmentally sensitive areas. *See*

¹ If the County elects to use the phrase “critical areas” and define it, then the critical area report must evaluate whether any areas on the development site meet such definition.

National Park Service Campground Design Guidelines, p. 101 (describing waste management differences and noting the distinction between developed and primitive or backcountry campgrounds). As the language establishing the standards for campgrounds is derived from the provisions governing recreational vehicle (RV) parks, the campground water and sewer provision is essentially identical to the RV park provision, regardless of whether the campground even supports RVs. Although such a provision is sensible and essential in the RV park context, it is more problematic in primitive campgrounds that allow only tent camping, which tend to cause much less impact on the environment. Ideally, a wastewater collection system would be available at even primitive campgrounds but that would not require the traditionally envisioned “sewer” services. Therefore, SCEL P suggests revising this language, defining the term “primitive campground,” and clarifying the type of wastewater management for such primitive campgrounds.

III. Definitional Section

These comments will focus on several issues of ambiguity presented in the definitional section of the UDO.

- **Animal Production Facility:** The definition narrows the scope of this term by describing it as “a *large-scale* agricultural facility.” However, the language does not define what constitutes a “large-scale” facility as opposed to a “small-scale” facility. Exacerbating the ambiguity, the draft use regulations for zoned districts appear to eliminate the provisions governing “animal production facilities” entirely while the use table still reflects that such facilities are permitted in the agricultural district. Given the nature of the facility and the detrimental environmental and public health effects that arise from animal production, clear requirements for such a use is essential and SCEL P urges the Planning Department to clarify this language.
- **Campground:** As described above, SCEL P requests clarifying or defining “primitive campgrounds.”
- **Developable Land:** This term is defined as “land that is *suitable* as a location for structures.” Without further defining the term “suitable,” this definition leaves the term open to significant subjectivity regarding what is “suitable” and open to legal claims challenging the term as vague. SCEL P suggests including a reference to the term “undevelopable land” within this definition to clarify that land containing any of the “constraining factors” identified in the definition of “undevelopable land” is not “suitable” as a location for structures.
- **Endangered Species; Endangered Species Act; Threatened Species:** Each of these terms reference the “U.S. Fish & Wildlife and Fisheries Service.” However, this misidentifies two separate agencies. The U.S. Fish & Wildlife Service is an agency of

the United States Department of the Interior responsible for the implementation of the Endangered Species Act for land and freshwater species. The National Marine Fisheries Service is a completely separate and independent agency of the United States Department of Commerce's National Oceanic and Atmospheric Administration (NOAA) responsible for marine and anadromous species. This agency is also known as "NOAA Fisheries." In addition, SCEL P suggests noting the terms "endangered species," "threatened species," and "critical habitat" are each explicitly defined by the Endangered Species Act and its regulations, and including a citation referring to such definitions.

- **Invasive Species:** Although the definition limits its scope to plant species, invasive species may also be animal species. The National Park Service has noted the term is defined as a "non-native species that causes harm to the environment, economy, or human, animal, or plant health." *Executive Order 13751*.
- **Clearing/Clear Cutting:** The draft definitions include the terms "clearing" in the current tree ordinance and "clear cutting" in the UDO that are effectively defined identically. SCEL P suggests maintaining one term for clarity.
- **Jurisdictional Wetlands:** this definition misspells "Army" when referencing the U.S. Army Corps of Engineers.
- **Intermittent stream; perennial stream:** These terms are used in Article 6 but are not defined.

Lastly, this section does not define two critical terms referenced in other sections, in particular the buffer regulations. Specifically, the definitions section does not include the terms "waters of the United States" or "waters of the State," both of which are technical terms of art with existing federal and state statutory and regulatory definitions. SCEL P accordingly requests the inclusion of the two terms with a reference to the statutory or regulatory authority for waters of the United States and waters of the State.

IV. Outdoor Shooting Range Regulations

Lastly, SCEL P submits the following comments regarding lead management and reclamation on outdoor shooting ranges. The United States Environmental Protection Agency (EPA) has recognized the detrimental impact that the use of lead ammunition at outdoor shooting ranges causes the environment and public health.

Spent lead ammunition presents harmful risks to both wildlife and domesticated animals. Specifically, spent lead ammunition can be consumed by wildlife and can contaminate nearby

streams and wetlands. Because many ranges are located near or adjacent to waterways, waterfowl are particularly susceptible to lead ingestion.

Lead can be introduced into the environment at shooting ranges by: (1) oxidizing when exposed to air or dissolving when exposed to acidic water or soil; (2) moving lead bullets, bullet particles, or dissolved lead through stormwater runoff; or (3) migrating dissolved lead through soils to groundwater. Failure to minimize lead release or migration into the environment, especially waterways or wetlands, has resulted in instances of successful litigation against shooting ranges under the Resource Conservation Recovery Act, the Comprehensive Environmental Response, Compensation, and Liability Act, and the Clean Water Act. Successful litigation can result in substantial expense to range owners in remediating contaminated soils and sediments.

Furthermore, the harmful effects of lead on the human body—especially children—are well documented. Even relatively low levels of lead in children can cause brain and nervous system damage, behavioral and learning problems, slowed growth, hearing problems, and impairment of vision and motor skills. Adults can suffer pregnancy and reproductive difficulties, high blood pressure, digestive problems, and neurological disorders. Many local waterways serve as recreational areas as well as public water supply, and, as noted above, lead is often introduced into waterways through stormwater runoff or groundwater.

Given the significant harmful effects from lead ingestion and the probable exposure pathway of lead contamination in waterways by outdoor shooting ranges, it is essential to require the implementation of best management practices or lead-shot alternatives at outdoor shooting ranges. The EPA has published a guide for outdoor shooting ranges to utilize in adopting such best management practices.² Accordingly, SCELPA urges the inclusion of a provision in the outdoor shooting range regulations that requires ranges to actively monitor and manage spent lead, which is easily accomplished through trapping and containing the actual bullets fired through earthen berms, backstops, or other traps. In addition, ranges should be required to monitor soil, immobilize any lead, and control runoff.

Finally, outdoor ranges should be required to conduct regular and periodic lead reclamation to minimize the presence of lead in soils and sediments and the risk of lead migration. These practices would not disturb outdoor ranges' ability to operate or residents' ability to engage in shooting activities at outdoor ranges. Instead, these practices allow such continued activities while ensuring that the byproducts of those activities do not inadvertently and unintentionally harm the environment, wildlife, water quality, or the health and safety of local residents.

² *Best Management Practices for Lead at Outdoor Shooting Ranges*, ENVIRONMENTAL PROTECTION AGENCY, 2005, available at https://www.epa.gov/sites/default/files/documents/epa_bmp.pdf.

Thank you for your time and consideration of these comments. Please do not hesitate to contact me with any questions or concerns.

Sincerely,

s/ Michael G. Martinez

Michael G. Martinez, Esq.

Staff Attorney

S.C. ENVIRONMENTAL LAW PROJECT

480 Conestee Road

Greenville, SC 29607

Telephone: (843) 527-0078