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## Memorandum

To: North Carolina Coastal Resource Commission  
Fr: Mary L Lucasse, Esq.  
Re: Legal Update to the Coastal Resources Commission (CRC 21-42)  
Date: October 29, 2021

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### I. FEDERAL LITIGATION

***Zito v. CRC***, United States Court of Appeals, 4th Circuit, File No. 20-1408. Mr. and Mrs. Zito challenged the Commission's denial of their variance request in federal court claiming the decision was an unconstitutional taking without just compensation. Judge Dever granted the Commission's motion to dismiss based on sovereign immunity. Plaintiffs appealed. SELC filed an amicus brief on behalf of the NC Coastal Federation in support of the Commission. **On August 9, 2021, the Fourth Circuit Court of Appeals issued a unanimous decision in favor of the Commission.** Petitioners filed a petition for certiorari asking the U.S. Supreme Court to review the 4<sup>th</sup> Circuit's decision. We are waiting to hear what the court decides.

***NC v. Coggins***, USDC for the Eastern District of North Carolina, Northern Division. 2:20-CV-00059. The Secretary of the US Department of Commerce issued a decision overriding North Carolina's objection to WesternGeco's consistency certificate under the Coastal Zone Management Act for a proposed geological and geophysical seismic survey in the Atlantic Ocean off North Carolina. NCDOJ appealed the agency decision. Defendant moved to dismiss based on mootness. NC requested the Secretary's decision be vacated. The Court held that (1) the State had legal standing to challenge the Secretary of Commerce's decision to override DCM's consistency objection and (2) because the case was moot through no fault of the State, the Secretary's decision must be vacated and the Secretary's June 2020 decision to override DCM's consistency objection no longer has any legal effect. Defendant may appeal.

### II. NORTH CAROLINA COURT OF APPEALS

***Batson, Baldwin, and Batson/Baldwin Owners' Association v. CRC - Carteret Co.*** Superior Ct. File No. COA 21-110. The Commission appealed the Superior Court's order assessing \$89,444.36 in attorneys' fees and costs against the Commission after the Court granted a petition for judicial review overturning the Chair's denial of requests for contested case hearings to challenge the CAMA permit issued to NC DOT for the Harkers Island replacement bridges. The appeal has been fully briefed. The court was calendared for November 17, 2021.

### III. PETITIONS FOR JUDICIAL REVIEW

***Smuts, Tignor v. NCDEQ, 98 OB LLC, 134 OB LLC (19 CVS 012379) - Wake Co. Superior Ct.*** Petitioners appealed Administrative Law Judge Randolph Ward's Final Decision granting DEQ's motion for summary judgment on the grounds that Petitioners had failed to show that the CAMA permits were inconsistent with the Town of Southern Shores Land Use Plan Update. On July 8, 2020, a hearing was held in Wake Co Superior Court. At the Court's request, the parties submitted proposed orders and we are waiting for the Court's decision.

***Henry Fonvielle v. CRC, DCM and others (21 CVS 003584) - New Hanover Superior Ct.*** Petitioner appealed the Commission's denial of a TPHR to challenge the minor permit issued by the Town of Wrightsville Beach's LPO authorizing construction of an oceanfront house based on the LPO's interpretation of the static line exception. The PJR is combined with a Complaint and Motion to Stay/Injunction. A hearing on the injunction took place on Oct 7, 2021. We are waiting on the Court's ruling. Respondent and Defendants have submitted motions for dismiss and other motions that have not yet been set for hearing.

### V. OFFICE OF ADMINISTRATIVE HEARINGS (OAH):

***Randolph v. DCM (20 EHR 8264)*** Petitioners challenged DCM's issuance of General Permit No. 78967C on April 7, 2020 to Eric Loken for the construction of a thirty-foot wing-wall extension to an existing bulkhead and wing wall on property located on the Neuse River in Craven County. The day before the hearing, Mr. and Mrs. Randolph and the permit holder agreed to a compromise of the design of the wing wall extension. After the new CAMA permit was issued, the contested case was dismissed with prejudice. We have closed our file.

***Freeman Beach LLC v. DCM (21 EHR 02751)*** Petitioner is challenging the denial of a permit to install 2,500 linear feet of sand fencing on Petitioner's property on the south end of Freeman Park to build/extend the frontal dune, nourish the beach area, and help protect the property landward of the dunes. The parties are exploring the possibility of finding a revised design that is consistent with the Commission's rules. While the permit challenge in OAH was ongoing, Freeman Beach LLC and the Town of Carolina Beach litigated property claims in superior court. After a hearing in October, the superior court ruled that the Town had taken property from Freeman Beach LLC, which necessarily included a finding that the LLC owned the property at issue. The parties asked the superior court to hold off ruling on all other issues to see if a settlement can be reached. We have been informed by Petitioner that the outcome of settlement negotiations or the court's order on the hearings may render the contested case moot. The contested case is currently stayed until Nov 1, 2021 and Petitioner has indicated it plans to request an additional extension of the stay.

***McBride v. DCM*** (21 EHR 4440) Based on alleged impacts to navigation, Petitioner challenged the general permit issued by DCM for construction of a platform on Newton Creek in Pamlico County. He claims the platform interferes with navigation or use of public trust waters in a manner inconsistent with the requirements of 15A NCAC 07H .1204(c). The petition was filed October 18, 2021. The Prehearing statement is due November 18, 2021. The discovery deadline is January 24, 2022, with dispositive motions to be filed by January 31, 2022. The hearing is scheduled for the week beginning February 14, 2022. Mary Crawley is representing DCM.

***Smith v. DCM*** (21 EHR 3163) Based on alleged impacts to navigation, Petitioner is challenging DCM's issuance of a minor modification to Permit 115-18 to T.J.'s Land Development, LLC authorizing (among other things) placement of two fuel dispensers along Baker's Creek in Beaufort County, North Carolina. The petition was filed July 19, 2021. Permittee intervened. The discovery deadline is November 1, with dispositive motions to be filed by Nov 10, 2021 and heard November 23. The evidentiary hearing is scheduled for December 8-9, 2021. Shawn Maier is representing DCM.

VI. **VARIANCES** - None other than the ones before you today.

VII. **REQUESTS BY THIRD PARTIES TO FILE CONTESTED CASE IN OAH:**

**Kenneth McBride** (CMT 21-10) requested permission to challenge the general permit issued by DCM for construction of a platform on Newton Creek in Pamlico County. The Chair granted the request because Petitioner had alleged facts demonstrating that the permitted platform would interfere with navigation or use of public trust waters in a manner inconsistent with the requirements of 15A NCAC 07H .1204(c). Petitioner filed his contested case petition in OAH (see above).

**Alice Glennon** (CMT 21-11) requested permission to challenge the CAMA Major Permit issued by DCM for construction of boat slips near Morehead City in Carteret County because she claimed the new lifts/slips impacted her view and was in the riparian setback. The Chair denied the request because the Permit included a condition that the slip/lift be constructed outside the setback. Petitioner had until Nov 5, 2021 to file a petition for judicial review.

The **Town of Edenton** (CMT 21-12) has requested permission to challenge the issuance of a general permit for construction of a bulkhead and pier in Chowan County claiming the general permit process should not have been used and that there are significant questions regarding impacts from the development that should be considered. The Chair has thirty days (until Nov. 19) to consider the request based on recent revisions by the General Assembly to the timeframe for third party hearing requests.