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REPLY TO:
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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 22-13**)
Date: May 25, 2022

I. NORTH CAROLINA SUPREME COURT

Batson, Baldwin, and Batson/Baldwin Owners' Association v. CRC (Carteret Co.) Docket No. 94A22. The Commission appealed the Court of Appeal's decision (see below) based on Judge Tyson's dissent that would have held that no fees should have been awarded because the Commission's decision denying the Petitioners' request for a hearing was substantially justified. The Commission brief is due June 6, 2022.

II. NORTH CAROLINA COURT OF APPEALS

Henry Fonvielle v. CRC (New Hanover Co.) Docket No. COA 22-____. Petitioner Henry Fonvielle filed a notice appealing the superior court's order affirming the Commission's final agency decision denying his request for a contested case hearing as untimely. (See below) We expect the record on appeal will be filed in early July and the briefing will be completed in September. This schedule could be expedited if all parties agree.

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 summary judgment to DEQ finding the CAMA permits were consistent 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.

Petition for Rulemaking by Nelson G. Paul (22CVS5974) – Wake Co. Superior Ct. The Commission denied Mr. Paul's Request for Rulemaking to repeal 15A NCAC 07H .0205(e). Mr. Paul appealed the decision. The Commission will respond and file the record with the superior court by June 23, 2022.

IV. OFFICE OF ADMINISTRATIVE HEARINGS (OAH):

McBride v. DCM (21 EHR 4440) Based on alleged interference with navigation under 15A NCAC 07H .1204(c), Petitioner challenged the general permit issued by DCM for the construction of a pier on

Newton Creek in Pamlico County. The hearing took place in Pamlico County on April 11-12, 2022. The ALJ entered an order finding for DCM. We will submit the proposed decision by June 9, 2022. Mary Lucasse and Mary Crawley represent DCM in this case.

V. VARIANCES – None other than the ones before you today. At the last meeting, the question was raised about whether there is an impact on the written final agency decision granting the variance if this Commission moves to adopt the reasoning in both DCM’s recommendation and a petitioner’s request. The issue here is that even if a petitioner and Staff agree on the factors, each may raise different grounds for their positions. It has been my practice to weave together the two positions that are in harmony and to leave out the parts of the argument on which there is no agreement between the parties. I welcome further direction from the Commission on this issue.

VI. REQUESTS BY THIRD PARTIES TO FILE CONTESTED CASES IN OAH: Following is the status of the current requests:

Wendy Moll (CMT 22-02) filed a request for a contested case hearing to challenge CAMA GP 85146 authorizing the construction of a dock at 80 Pamlico Shores Road in Hyde County, On April 26, 2022, the Chair issued her final agency decision denying the request on the grounds that the Petitioner had failed to identify and section of CAMA or the Commission’s rules violated by the decision to issue the permit. Any appeal of this decision is due by May 26, 2022.

Kevin and Kendra Knoernschild (CMT 22-03) filed a request for a contested case hearing to challenge the Notice of Violation (“NOV”) issued by DCM that directs the removal of the encroachment of a pier and marsh sill constructed by Mr. Strobel on his property located on the Atlantic Intracoastal Waterway at 2384 W. Tanglewood Dr. SW, Supply NC 28462. DCM Issued the NOV based on a signed sealed survey provided by the permittee. Petitioners’ request for a third-party hearing to challenge the NOV is based on two additional surveys they provided to DCM which they allege show that the development significantly encroaches on the riparian area and makes navigating more difficult. The Chair denied the request based on the statute which only provides the third party hearing process for requests to challenge permit decisions. Any appeal of this decision is due by June 12, 2022.

Chuck Jenkins (CMT 22-04) submitted a request for a contested case hearing to challenge CAMA Minor Permit 07-22 authorizing the construction of a single-family residence, pool, and decking on an oceanfront lot at 44 Porpoise Place, in North Topsail Beach, Onslow County, North Carolina. On May 18, 2022, the Chair denied the request based on Petitioner’s failure to allege facts or make legal arguments demonstrating that the permit was inconsistent with the CAMA or the Commission’s rules. An appeal of the final agency decision is due no later than June 17, 2022.

Mark and Delaine Mead (CMT 22-05) submitted a request for a contested case hearing to challenge CAMA Minor Permit OKI21-76 authorizing the construction of an ADA accessible circle drive providing temporary parking to drop off persons using wheelchairs or other assistive mobility devices that were permitted for construction on the Town’s property on two oceanfront lots, including an extension of SE 46th Street south of E Beach Drive in the Town of Oak Island. The Chair’s denial of the final agency decision was based on the Petitioners’ failure to allege facts or make legal arguments demonstrating that the permit was inconsistent with CAMA or the Commission’s rules. Any appeal of the decision must be filed by June 22, 2022.

VII **PUBLIC RECORDS REQUEST:** On March 3, 2022, DCM and the Commission received a second request for public records from the attorney representing Petitioner Henry Fonvielle for, among other things, documents relating to the use of the words “adjacent” and “adjoining.” Work to respond to this extensive request is ongoing.

VIII. **REQUEST FOR ADVISORY OPINION:** During its February meeting the Commission requested an advisory opinion on whether the Coastal Resources Commission has the authority to regulate platforms and floating structures within a franchise or shellfish lease permitted by the Division of Marine Fisheries, or whether this development falls under the agricultural exemption in CAMA. The Advisory Opinion will also address whether local governments have jurisdiction over coastal waters within the Town or County limits to regulate the placement of structures within shellfish leases or franchises and whether the best practice is to regulate these structures through local ordinances and/or CAMA land use plans. Counsel worked with DCM to develop the requested opinion and is working on the advisory opinion for the September meeting.