

Legal Update
(MLL revised February 5, 2019)

I. MULTISTATE LITIGATION

United States District Court for the District of South Carolina, Charleston Division:

Two cases were filed by various conversation groups, including NC Coastal Federation, and South Carolina local governments against the National Marine Fisheries Service (NMFS) and the US Secretary of Commerce seeking declaratory and injunctive relief to challenge NMFS's grant of "incidental harassment authorizations (IHAs)" pursuant to the Marine Mammal Protection Act allowing five companies to conduct seismic testing to explore the Atlantic ocean floor from FL to ME for potential oil and gas resources. North Carolina, along with Maryland, Connecticut, Delaware, Maine, New Jersey, New York, Massachusetts Virginia, and South Carolina moved to intervene. North Carolina is represented by attorneys Marc Bernstein and Ryan Park from the NC AG's office. The five companies also moved to intervene. On Jan 18, 2019, Judge Gergel granted the Federal Defendants' motion to stay and issued an injunction enjoining the Federal Defendants, as well as non-party BOEM, and any other federal agency or entity from taking action to promulgate permits, otherwise approve, or take any other official action regarding the pending permit applications for oil and gas surveys in the Atlantic based on the five IHAs issued by the NMFS to Spectrum Geo Inc., TGS-NOPEC Geophysical Company, Inc., Ion GeoVentures (and subsidiary GX Technology Corporation), WesternGeco LLC and CGG. The injunction remains in effect until funds have been appropriated for the Department of Justice and all Federal Defendants, the Court has received the Federal Defendants' responses to the pending motions to intervene, and the Court has ruled on those motions. The Federal Defendants have filed their response to the pending motions to intervene asking that certain conditions be imposed if the Court is inclined to grant intervention. Other parties may file a reply. We are waiting for the Court's ruling.

II. PETITIONS FOR JUDICIAL REVIEW

New Hanover County Superior Court:

Town of Wrightsville Beach v. CRC and Grand View Holdings, LLC, 17 CVS 004392. Petitioners requested review of the Commission's denial of its request for a hearing to challenge DCM's issue of CAMA Major Development Permit No. 110-17. This permit authorized the development of eight additional slips at an existing two-slip docking facility adjacent to the Intercoastal waterway near the Heide Trask Bridge. The Town objected to the pier expansion based on concerns that increased boat traffic would impact its sewer force main located in the bed of the Intercoastal Waterway. The sewer force main transports waste from the Town to the Cape Fear Sewage Plant. The permitted pier is located above the sewer main in two places. The Permittee intervened. All parties are represented and have filed briefs in support of their positions. The parties are still working towards settlement but have scheduled the hearing for April 22, 2019 to move the case forward if no settlement is reached.

III. OFFICE OF ADMINISTRATIVE HEARINGS (OAH):

Sunset Beach Taxpayers Association and NC Coastal Federation v. DCM (16 EHR 7974) and Sun's Set LLC v. DCM (16 EHR 8032). These contested cases are stayed. The cases involve an appeal of DCM's issuance of Major CAMA Permit No 70-16 for the development of infrastructure for a 21-lot residential project at the western end of Sunset Beach in Brunswick County. On Dec. 8, 2017, the Parties in a related superior court action to quiet title requested the case be placed on inactive status to give the State time to acquire funding to purchase the property. Since then, the General Assembly allocated \$2.5 million for the purchase. The developer and the NC Department of Administration are negotiating settlement terms including the value of the property. DOA has hired local counsel for a title opinion and then will move on to an appraisal.

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Gwendolyn Smuts, Marvin Tignor, and Bell Sadler v. DEQ (18 EHR 07490, 07391, 07392). The Chair granted three of the seven petitions requesting third party hearings to challenge CAMA Minor Permits issued for construction of two 12-bedroom homes in the Town of Southern Shores on the grounds that petitioners have alleged that the CAMA Minor Permits are not consistent with the Town's current land use plan. Petitioner Sadler withdrew her petition shortly after filing in OAH. Petitioners whose requests for hearings in OAH were denied did NOT file petitions for judicial review. I am representing DEQ along with Assistant Attorney General Sarah Zambon. We have requested the cases be consolidated and the permit holder has moved to intervene. We are waiting for the Administrative Law Judge's ruling on these motions and have sent out written discovery requests and requests for admissions. The current hearing date is scheduled for the week of the Commission's April meeting. We plan to request a different hearing date so as not to inconvenience staff or the Commission.

IV. VARIANCES:

Riggings Homeowners, Inc. (CRC-VR-15-08). At this meeting, the Commission will consider Petitioners' request to amend the variance issued by this Commission by Final Agency Decision dated December 11, 2015 to delete the reporting requirement.

Michael and Catherine Zito (CRC-VR-18-04). During its November 2018 meeting, the Commission considered Petitioners' request for a variance to rebuild a home destroyed by fire in 2016. The proposed variance would have allowed construction oceanward of the erosion setback. Petitioners received the final agency decision denying the variance on December 31, 2018. Petitioner did not file a petition for judicial review within 30 days and the file has been closed.

IV. REQUEST FOR MODIFICATION OF DEVELOPMENT LINE

At your last meeting, the Commission denied the Town of Oak Island's request for modification of the existing development line established in 2016. The Town received the Final Agency Decision denying the request on January 2, 2019. Petitioner did not appeal by filing a petition for judicial review of the decision within 30 days. The Town may, upon presentation of additional material facts, return to the Commission for consideration of other proposed amendments to its development line.

V. REQUESTS FOR 3RD PARTY HEARINGS IN OAH:

Since your last meeting, the Commission Chair has considered one request by a third-party for a hearing in OAH to challenge permits issued by DCM. Specifically:

Vickie J. Hall, CMT 18-22: This request sought a hearing to contest CAMA General Permit No. 73301 issued on November 27, 2018 authorizing construction of a replacement bulkhead at the property located at 607 Neuse Harbour Boulevard, New Bern, Craven County, North Carolina adjacent to the Neuse River. The final agency decision denying the request was served on or before January 2, 2018. Petitioner was required to file a petition for judicial review by Feb 4, 2019. Since no appeal was filed, the case has been closed.

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VI. SUMMARY OF VARIANCES AND 3RD PARTY HEARING REQUESTS RECEIVED IN 2018 COMPARED TO PAST YEARS *(Charts with more information on issues attached)*

Variations received in 2017 and 2018

<p>2017 Variance Tally - 8 Requests:</p> <ul style="list-style-type: none"> • 1 from Elizabeth City Office • 5 from Wilmington Office • 2 from Morehead City Office 	<p>2 granted in part 1 denied in part, 1 remanded and later w/drawn at Pet's request 3 withdrawn or not acted on at Pet's request 1 resolved by DCM without decision 1 postponed to 2018 and later denied</p>
<p>2018 Variance Tally - 8 Requests:</p> <ul style="list-style-type: none"> • 4 from Elizabeth City Office • 4 from Wilmington Office 	<p>4 granted (1 with conditions), 2 denied, 1 incomplete, and not considered 1 continued to 2019 at Petitioners' request</p>

CAMA 3rd Party Appeals 2000-2018

YEAR	3 RD PARTY APPEALS FILED	GRANTED	DENIED	OTHER DISPOSITION*	FILED IN OAH	JUDICIAL REVIEW OF DENIAL
2000	23	0	23	0	NA	1
2001	15	0	12	3	NA	0
2002	12	0	10	2	NA	0
2003	20	10	10	0	5	4
2004	28	6	18	4	6	2
2005	28	9	10	9	11	4
2006	26	10	14	2	4	2
2007	40	19	17	4	19	8
2008	18	1	16	1	1 (dismissed)	4
2009	14	0	12	2	0	2
2010	12	0	11	1	1	3
2011	14	1	10	3	0	4
2012	9	0	8	1	0	1
2013	14	1	11	1	1	1
2014	8	1	7		1	0
2015	16	1	13	2	1	0
2016	5	2	3		2 (consolidated)	0
2017	10	1	8	1	0	2
2018	22	3	19	1	3 (1 dismissed)	0

Summary of CAMA 3rd Party Hearing Requests – 2018

22 Petitions filed challenging 8 permits	Breakdown: 19 Denied 3 Granted	LPO Town of SS (Eliz. City) 7 of 22 (1 permit)	Morehead City 1 of 22	Wilmington 14 of 22 (5 permits)
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<u>Case</u>	<u>Date</u>	<u>Petitioners</u>	<u>County</u>	<u>Granted</u>	<u>CCH or PJR</u>	<u>Issue</u>
18-01 to 18-10	Apr 4	McDowell, Murray, Fife Trust, Sexton, Price Trust, Schlichter, Tate, Keener, Moul, Ikalowych (<i>Atty Matt Nichols</i>)	Brunswick	No	No	SFR in Turtle Creek Subdivision private easement and covenants
18-11	Apr 26	McCormick Trust (<i>Atty McCormick</i>)	New Hanover	No	No	Finger pier
18-12	Aug 31	Norton (<i>Atty Matt Nichols</i>)	Onslow	No	No	Beach access, deck and gazebo
18-13	Sept 5	Walker McKnight	Brunswick	No		Construction of SFR near wetlands
18-14	Oct 31	Thomas Maier	New Hanover	No		Gazebo on dock
18-15	Nov 5	Sjoerdsma	Dare	No	No	Not consistent w/ LUP
18-16	Nov 5	Williams	Dare	No	No	Not consistent w/ LUP
18-17	Nov 7	Mackey	Dare	No	No	Not consistent w/ LUP
18-18	Nov 7	Royal	Dare	No	No	Not consistent w/ LUP
18-19	Nov 7	Sadler	Dare	Yes	Yes w/d	Not consistent w/ LUP
18-20	Nov 7	Tignor	Dare	Yes	Yes	Not consistent w/ LUP
18-21	Nov 8	Gwen Smuts	Dare	Yes	Yes	Not consistent w/ LUP
18-22	Dec 14	Vickie Hall	Craven	No	No	Construction of bulkhead

2018 Variance Tally with Issues
(Rev. Jan. 25, 2019)

8 Requests:

- 4 from Elizabeth City Office
- 4 from Wilmington Office

- 4 granted (1 with conditions),
- 2 denied,
- 1 incomplete,
- 1 continued to 2019 at Petitioners' request

<u>Case</u>	<u>Petitioner</u>	<u>County</u>	<u>2018 Meeting</u>	<u>Commission's Decision</u>	<u>Outcome</u>	<u>Issues</u>
17-03	Rick and Valerie Heasley	Brunswick	Feb 13	Denied request to build pool within ocean front setback from static vegetation line.	No appeal.	Ocean Hazard AEC Setback
18-01	Sandy Court Beach, LLC (attorney Charles Evans)	Dare	Feb 13	Granted request to enclose 128 sf on landward side of house	No appeal	Ocean Hazard AEC Setback
18-02	West P. Hunter, Jr (attorney Todd Roessler)	Brunswick	Apr 10	Granted request to waive procedural requirement and to build within buffer conditioned on inclusion of storm water management plan	No appeal	30 foot buffer and request to waive obligation to seek local variance first
18-03	Dean & Marie-Elise Sackett (attorney Charles Evans)	Dare	Apr 10	Granted request to enclose 72.33 sf under roof on the landward side of house.	No appeal	Ocean Hazard AEC Setback
18-04	Stuart Jones	Dare		Did not consider	Incomplete	Issue unknown
18-04	Michael and Catherine Zito (attorney Chris Seawell)	Brunswick	Nov 27	Denied request to rebuild home destroyed by fire given 6 foot erosion rate/year and location of SE corner of house 12 feet landward of SVL within 180 foot setback		Ocean Hazard AEC Setback
18-05	Tom and Judy Lampley (attorney Charles Evans)	Perquimans		Continued to 2019		NOV 30 foot buffer
18-06	Town of Caswell Beach (attorney Justin Humphries)	Brunswick	Nov 27	Granted variance to install dune infiltration system in setback to improve road safety by removing water from road. Rebuild and vegetate dune after installed.		Ocean setback

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<u>Case</u>	<u>Petitioner</u>	<u>County</u>	<u>2017 Meeting</u>	<u>Commission's Decision</u>	<u>Outcome</u>	<u>Issues</u>
16-11	Andy and Deb Thexton	Pender	Feb 8	Remand for more facts on Town's nourishment plans, seller's disclosures, need for variance from Town, location of septic, and CAMA setback.	Petitioner w/d Request after receiving DCM's exemption letter for proposed repair (less than 50 %).	Ocean Hazard AEC Setback: Request to elevate and retrofit existing structure within setback w/ FEMA grant.
16-12	Sam and Ann Ennis	Pender			On Feb 6, 2017, Petitioner withdrew request for variance before it was heard by Commission.	Ocean Hazard AEC Setback: Request to elevate and retrofit structure w/in setback using FEMA grant.
17-01	Tucker Holden, LLC (Att'y Benedict DelRe)	Brunswick			On April 5, 2017, Petitioner withdrew request after DCM's approved rev. plans allowed as repair	30 Foot Buffer
17-02	Sanitary Fish Market & Restaurant, Inc. (Att'y Merrie Jo Alcoke)	Carteret	April 26	Granted request to construct access stairs to convert 2 nd story roof area to public use.		Urban waterfront rules limiting new structures w/ non-water dependent purpose.
17-03	Rick and Valerie Heasley	Brunswick	Deferred to 2018	Deferred request for pool within setback (SVL) at Pet's request	Denied at Feb 2018 Meeting. No appeal.	Ocean Hazard Setback

**2017 Variance Tally with Issues
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<u>Case</u>	<u>Petitioner</u>	<u>County</u>	<u>2017 Meeting</u>	<u>Commission's Decision</u>	<u>Outcome</u>	<u>Issues</u>
17-04	John W. Hopkins	Carteret		No decision on request to construct single family residence with impervious surface in 30 foot buffer	Resolved by DMC after reviewing NHW call. Determined plan consistent w/ CAMA	30 foot buffer
17-05	Kenneth A. Simpler (Att'y Chris Seawell)	Dare		No action on request for V from 15A NCAC 07H .0304 to expand hotel by enclosing 1,232 sf on ground floor. Proposed plan not consistent with FEMA.	Petitioner has not moved forward with request.	Ocean Hazard Setback
17-06	Michael and Mary Drummond (Att'y Clark Wright)	Pender	Nov 7	Granted Request for V from 15A NCAC 7H .0306(a) (9) to enclose 37 sf on landward side of house Denied request for V from 15a NCAC 7H .0309 to increase porch area by 137 sf more than 500 sf allowed in ocean setback.	No Appeal	Ocean Hazard Setback