



JOSH STEIN
ATTORNEY GENERAL

REPLY TO:
MARY L. LUCASSE
(919) 716-6962

MLUCASSE@NCDOJ.GOV

Memorandum

To: North Carolina Coastal Resource Commission
Fr: Mary L Lucasse, Esq.
Re: Legal Update to the Coastal Resources Commission (*CRC 20-08*)
Date: January 22, 2020

I. MULTISTATE LITIGATION

U.S. District Court, District of South Carolina Charleston Division: The National Marine Fisheries Service (NMFS) granted incidental harassment authorizations (IHA) on November 30, 2018 pursuant to the Marine Mammal Protection Act allowing five companies to conduct seismic testing for potential oil and gas resources in the Atlantic. NC and other states intervened in the litigation filed by various environmental organizations challenging the IHAs. The Court consolidated this case with another complaint brought by local governments in South Carolina in which the State of South Carolina intervened. To date no permits for geophysical surveys have been issued. On Jan. 3, 2020, Judge Gergel ruled on Plaintiffs' Motion to Compel Federal Defendants to Complete the Administrative Record. Specifically, the Court ordered the federal defendants to produce additional records and a privilege log showing all documents withheld based on a claim of the deliberative process privilege within 45 days (by Feb 17).

II. FEDERAL CASES

U.S. District Court, Eastern District of North Carolina, Northern Div., *Zito v. CRC, 2:19-cv-11-D.* Plaintiffs claim the CRC's decision denying their variance request resulted in a taking of private property without just compensation in violation of the United States Constitution. The parties have briefed three motions for the Court's consideration: 1) Defendant's second motion to dismiss arguing the 11th Amendment bars Plaintiffs' remaining claim; 2) NC Coastal Federation motion to intervene; and 3) Plaintiffs' motion requesting the Commission be bound by the stipulated facts in its FAD. We are waiting the Court's decisions. The Court granted the parties' joint request that no discovery begin until the Court rules on the motions. No trial date is set.

Consistency Appeal to US Dep't of Commerce, NOAA.

On July 11, 2109, WesternGeco submitted a Notice of Appeal to the U.S. Secretary of Commerce pursuant to the Coastal Zone Management Act of 1972 from an objection by DCM to WesternGeco's consistency certificate for its proposed project to conduct a geological and geophysical seismic survey off North Carolina. The parties have briefed the issues and submitted supplemental materials for the record. The Secretary has until May 28, 2020 to close the record. The deadline for the Secretary to issue a decision is about August 11, 2020.

III. SUPERIOR COURT - Carteret County

Beverly Pham v. Blair Pointe, LLC et al. 18 CVS 1289. The Attorney General, on behalf of the people of North Carolina, intervened in litigation filed by Plaintiff seeking a declaratory judgment

that a conservation restriction placed on approximately 12 acres (including wetlands) under the Tax Credit Program (repealed by the General Assembly in 2013) was extinguished as a result of a tax foreclosure sale. DCM had done the initial assessment that the land had conservation value. Dispositive motions and trial are scheduled for May 2020.

IV. PETITIONS FOR JUDICIAL REVIEW

Batson, Baldwin, and Batson/Baldwin Owners' Association v. CRC - Carteret Co. Superior Ct.

On May 31, 2019, the Chair denied requests for contested case hearings to challenge the CAMA permit issued to NC DOT for the Harkers Island replacement bridge. Petitioners appealed. Mary Lucasse represents the Commission and has filed the Record. Petitioners filed an Application for Temporary Restraining Order on November 22, 2019. No hearings have been scheduled on either the Petition or Application. The parties have been discussing settlement.

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 which granted NCDEQ's motion for summary judgment on the grounds that Petitioners had failed to show that the CAMA permits were improperly issued. Mary Lucasse and Sarah Zambon represent NCDEQ on the Petition for Judicial Review. The hearing on our motion to dismiss for failure to serve Respondent as required by the Administrative Procedure Act which is set for Feb.3, 2020.

Williams v. CRC. 19 CVS 16394 - Wake Co. Superior Ct

Petitioner appealed the Chair's denial of Petitioner's request for a contested case hearing to challenge the CAMA permit issued to Russell Newbold for construction of a new 212 foot long pier at 231 Riverside Drive in Sneads Ferry, North Carolina. Petitioner claims the permitted development exceeds the line established by adjacent piers. Mary Lucasse represents the Commission on the Petition for Judicial Review and filed the Record on January 9, 2020. Petitioner's brief is due February 10 and the Commission's brief is due March 30.

Batchelor v. DEQ/DCM, 20 CVS 17 - Pender County Superior Ct.

William Batchelor appealed the Chair's denial of his request for a contested case hearing to challenge the CAMA General Permit issued to his neighbor for construction of a new pier. Among other arguments, Petitioner claims the third party hearing request process is unconstitutional, that permittee is not a riparian owner, that the permit violates the one quarter width rule, and that the development will adversely impact coastal wetlands. Mary Lucasse represents the Commission and has requested petitioner voluntarily dismiss the petition because the CAMA Permit has been surrendered. If the petition is not dismissed, the record and Respondent's response to the petition will be filed on Feb 21, 2020.

V. OFFICE OF ADMINISTRATIVE HEARINGS (OAH): No ongoing cases

VI. VARIANCES - None other than the ones before you at this meeting.

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

Since your last meeting, the Chair heard two new Third Party Hearing Requests. **Mr. Batchelor** (CMT 19-11) requested a hearing to challenge a GP authorizing a new pier. That request was denied. The second request was submitted by **Mr. Glenn** (CMT-12) requesting a hearing to challenge the CAMA Major Permit allowing construction of a 218-unit dry stack storage facility in Southport, NC. The Chair denied the request and Petitioner has 30 days (up to Feb 10) to file a petition for judicial review.

2019 Variance Tally with Issues

Revised January 2020

Case #	Petitioner	County	Heard at this Meeting	Commission's Decision	Outcome	Issue
18-04	Catherine and Michael Zito (rep. by attorney Chris Seawell)	Dare	Nov 27-29, 2018	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	Served Dec 31, 2018 No appeal in State Court. Takings claim filed in US Dist. Ct. for Eastern District of NC – ongoing	Ocean front setback
18-05	Tom and Judy Lampley (rep. by attorney Charles Evans)	Perquimans	Feb 27, 2019	Denied	No appeal. Requests for rule-making submitted – first one withdrawn. Second to be submitted for April 2020 meeting	30-foot Buffer rule
19-01	Vicki and Joe Hatch	Dare	Feb 27, 2019	Remand for additional information and then withdrawn	Withdrawn after Petitioner provided info allowing DCM to determine project less than 50% repair	Ocean Front Setback. Issue was actually repair and replacement
19-02	Susan Thrasher	Onslow	April 17, 2019	Granted		De minimus Ocean Front setback
19-03	Dill			Incomplete		
19-04	NC Ports (rep. by Special Deputy AG Scott Slusser)	New Hanover	April 17, 2019	Granted with conditions including MOU between NC Ports & DEQ	No appeal. MOU signed Sept 2019	Expedited hearing Dredging in CW and PNA.
19-05	Benny Thomas Pollard (rep. by attorney Glenn Dunn)	Onslow	Sept 18, 2019	Granted		Added 4 units to structure in 75-foot estuarine shoreline <i>AEC de minimis</i>
19-06	Robert L. Stallings, IV (rep. by attorney Amy Wang)	Pamlico	July 17, 2019	Denied	No appeal	Request to construct upland basin in PNA

2019 Variance Tally with Issues

Revised January 2020

19-07	NCDOT – Orcracoke (rep. by Assistant AG Mollie Cozart)	Hyde	July 17, 2019	Granted	No appeal.	Expedited Hearing 15A NCAC 07M .0201 and .0202 temporary control structures
19-08	Hampton Colony HOA (by HOA Alan Zenbert)	Onslow	July 30, 2019	Withdrawn		
19-09	Sunset Beach	Brunswick	Feb 2020	Ongoing		Dredging
19-10	Shinn Creek Estates HOA (rep. by attorney Clark Wright)	New Hanover	Feb 2020	Ongoing		Dredging

Summary of CAMA 3rd Party Hearing Requests – 2019

12 Petitions filed challenging 8 permits	Breakdown: 12 Denied/ 0 Granted	Appeal – 4 PJR filed consolidated into 2 appeals
---	--	---

<u>Case</u>	<u>Date</u>	<u>Petitioners</u>	<u>County</u>	<u>Granted</u>	<u>CCH or PJR</u>	<u>Summary of Issues</u>
19-01	Feb 11	<i>Stefan and Agnes Kribbeler</i>	Currituck	No	No	Request to challenge CAMA Minor Permit OB2019-002 issued by LPO based on concerns about view, oceanfront setback, and relocation of primary or frontal dune. 15A NCAC 07H .0306, .0308(b), .0309(b)
19-02	Feb 14	Pelican Point	Carteret	No	No	Request to challenge Emergency Permit No. 73412C allowing pier and walkway destroyed by Hurricane to be rebuilt based on HOA, easement. 15A NCAC 7H .1200 and .2500, and .0208(b)(6)
19-03	Apr 26	Donald A. Harte	Onslow	No	No	Request to challenge 1994 permit authorizing pier construction 15A NCAC 07H .1204(q)
19-04	May 16	Hollis and Carol Batson	Carteret	No	PJR	Requests hearing to challenge Major Permit 27-19 authorizing construction of replacement bridge to Harkers Island arguing permit is unconstitutional takings, contrary to 113A-120(a)(9), which requires a practicable alternative with less adverse impacts on the public resources, the Dredge & Fill Act, and 15A NCAC 7H .0202 - .0209.
19-05	May 16	Batson-Baldwin Owners' Assoc. Inc.	Carteret	No	PJR	See above
19-06	May 17	Lawrence and Elizabeth Baldwin	Carteret	No	PJR	See above

Summary of CAMA 3rd Party Hearing Requests – 2019

12 Petitions filed challenging 8 permits	Breakdown: 10 Denied/ 0 Granted	Appeal – 4 PJR filed consolidated into 2 appeals
---	--	---

<u>Case</u>	<u>Date</u>	<u>Petitioners</u>	<u>County</u>	<u>Granted</u>	<u>CCH or PJR</u>	<u>Summary of Issues</u>
19-07	July 29,	Steve and Susan McBride	New Hanover	No	No	Request to challenge CAMA Minor Permit 19-06 issued by Town of Carolina Beach LPO for construction of 3 unit townhouse development arguing permit violates Town's development line.
19-08	July 30	Caldwell	New Hanover	No	No	See above
19-09	July 30	Sands V HOA	New Hanover	No	No	See above
19-10	Nov 5	Williams	Onslow	No	PJR	Request to challenge GP 75741C authorizing development of 212-ft long pier as inconsistent with pier head line. 15A NCAC 7H .0208(a)(6)(G)(iii) and (i).
19-11	Nov 22	Batchelor	Pender	No	PJR	Request to challenge GP No. 74979D authoring new pier based on argument, not riparian owners and violates 15A NCAC 7H .1209(q), and will harm wetlands <i>Permit surrendered.</i>
19-12	Dec 4	Glenn	Brunswick	No.		Request to challenge Major Permit No. 00-01 to construct 218-unit dry stack storage facility in Southport, NC on grounds it is contrary to local statues, ordinances, and the LUP, etc. Date to file is Feb 10, 2019