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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 20-23*)
Date: August 27, 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 SC in which the State of South Carolina and local governments in NC intervened. To date no permits for geophysical surveys have been issued. The federal defendants have filed the Administrative Record. After disputes about the record are resolved, the parties will file dispositive motions.

II. FEDERAL LITIGATION

United States Court of Appeals, 4th Circuit, *Zito v. CRC*, 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 the 11th Amendment, which prevents a sovereign state from being sued in federal court unless certain requirements are met. The Plaintiffs, who are represented by the Pacific Legal Foundation, appealed. The briefing is complete including an amicus brief filed by SELC on behalf of the NC Coastal Federation in support of the Commission.

Consistency Appeal to US Dep't of Commerce, NOAA, USDC for the Eastern District of North Carolina, Northern Division. 2:20-CV-00059. The Secretary, US Department of Commerce issued a decision overriding North Carolina's objection to WesternGeco's consistency certificate for its proposed geological and geophysical seismic survey in the Atlantic Ocean off the eastern seaboard under the Coastal Zone Management Act. In a separate case, the Secretary issued a decision overriding South Carolina's objection. NCDOJ has filed a complaint appealing the agency decision.

III. SUPERIOR COURT - Carteret County

Pham v. Carteret Co. (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 near Beaufort, NC under the Tax Credit Program (repealed in 2013) was extinguished in a tax foreclosure sale. DCM performed the initial assessment determining that the land had conservation value. Mediation was held in August 2020. The parties will file dispositive motions a month before the October 26, 2020 trial.

IV. PETITIONS FOR JUDICIAL REVIEW

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

After 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. The superior court granted the PJR and remanded the matter to the OAH for a hearing on Petitioners' challenge of the CAMA permit. (See below). Petitioners' filed a motion requesting that an award of attorneys' fees totaling \$111,848.36 be assessed against NCDOT and the CRC. The Commission and NCDOT strongly opposed the motion. Before the hearing Petitioners withdrew their claim for fees against NCDOT. During the hearing on July 31, 2020, Petitioners' reduced their request to \$89,444.36. Judge Henry took the matter under advisement.

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. The matter was heard on July 8, 2020 in Wake Co. Superior Court. We are waiting for the court's ruling.

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 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. The CRC denied the request because the Permit was consistent with the pier head line established by DCM along the shoreline in a manner consistent with the rule. The matter was heard in Wake County Superior Court on June 29, 2020. Judge Ridgeway affirmed the Commission's denial of Petitioner's request for a hearing and in his order explained that DCM had properly issued the permit. Petitioner did not appeal. The file is closed.

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. We have filed a motion to dismiss the petition for judicial review because the CAMA Permit has been surrendered and any request to appeal the surrendered permit is moot. A Webex hearing is scheduled for September 8, 2020.

Riggs v. DEQ/DCM, 20 CVS 243 - Currituck County Superior Ct.

Petitioner appealed the Chair's denial of Petitioner's request for a contested case hearing to challenge the CAMA/Dredge and Fill Major Permit issued to Mr. Vann for construction of an upland boat basin and pier at in Corolla, NC. The Record and the Commission's response will be filed September 3, 2020. A hearing has not been scheduled yet.

V. OFFICE OF ADMINISTRATIVE HEARINGS (OAH):

Batson, Baldwin, and Batson/Baldwin Owners' Association v. DCM (20 EHR 2016)

Petitioners are challenging the CAMA permit issued to NC DOT for the Harkers Island replacement bridge in the OAH. NCDOT intervened in the contested case. The parties (including NCDOT) participated in settlement discussions with mediator Glenn Dunn on July 28, 2020. The parties have agreed to seek a six-month stay of the contested case to finalize a settlement.

Randolph v. DCM (20 EHR 8264) Petitioner is challenging 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. Prehearing Statements are due August 15, the discovery cutoff is October 26, dispositive motions are due Nov 2, and a hearing is scheduled in New Bern during the week of Nov. 16, 2020. This last date may change because of a conflict with your November Commission meeting.

James Spicuzza v. DEQ (20 EHR 02457): Petitioner is challenging the CAMA permit issued to Brian Smrz to replace a docking facility in a congested navigation corridor adjacent to riparian property in Wilmington, NC. Mr. Smrz has intervened. The prehearing statements were filed. Discovery ends Sept. 21, the deadline for dispositive motions is Sept 28, and the hearing is scheduled for the week of Oct 12, 2020 in Bolivia, NC.

Carolina Properties & Holdings, LLC v. DEQ/DCM (20 EHR 02929) Petitioner is challenging the CAMA GP issued in 2016 for construction of a dock in Holden Beach, NC claiming the dock as constructed extends into the riparian setback. The prehearing statements are due September 2; discovery ends October 19; the deadline for dispositive motions is October 26; and an evidentiary hearing is scheduled for November 9, 2020 in Bolivia, NC.

James and Joanne Kastberg v. DCM (20 EHR 03015). Petitioners are challenging the denial by the Town of Kure Beach CAMA LPO of their application to place a pool oceanward of the Town's development line within the perpetual easement Petitioners granted to the Town for beach nourishment. Prehearing statements are due September 11, discovery ends November 23, the deadline for dispositive motions is November 30; and an evidentiary hearing is scheduled for December 14, 2020 in Bolivia, NC.

VI. **VARIANCES** - None of your variance decisions from the June meeting were appealed.

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

Since your last meeting, the Chair considered three requests for hearings in OAH:

The Chair granted a request by **Jim Spicuzza** (CMT 20-03) to file a contested case hearing based on her determination that Petitioner had alleged facts regarding whether the CAMA permit negatively impacted riparian access notwithstanding that the permitted development was set back fifteen feet from the riparian corridor. (See contested cases above).

The Chair denied a request from **Kevin Riggs** (CMT 20-04) for a contested case hearing based on her determination that the fifteen-foot riparian setback did not apply on to the upland project location and Petitioner had failed to identify any statutory provision limiting the creation of high-ground basins based on the impact to the thirty-foot buffer on adjacent riparian property. The Chair specifically noted that the Commission's rules establishing the thirty foot buffer are based on the normal water level which is an ambulatory boundary. Mr. Riggs appealed. (See Petitions for Judicial Review above).

The Chair granted in part a request from **William Axson Smith, Jr.** (CMT 20-05) for a contested case hearing to challenge modification of a CAMA Major Permit authorizing development in Baker's Creek that Petitioner claims was issued without proper notice. Petitioner also alleges that the permitted development will adversely impact his riparian access and the public trust. Petitioner has until Sept 15 to file a petition in OAH and until Sept 26 to file a PJR challenging the Chair's decision limiting the issues to be heard during the hearing in OAH.