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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 21-09*)
Date: February 5, 2021

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 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 parties have submitted their briefings. In addition, SELC has filed an amicus brief on behalf of the NC Coastal Federation in support of the Commission. We are waiting for the court to assign a hearing date.

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 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. Defendant filed a Motion to Dismiss. We submitted a response on Jan 11, 2020 and also filed a motion requesting the Secretary's decision be vacated.

II. NORTH CAROLINA COURT OF APPEALS

Batson, Baldwin, and Batson/Baldwin Owners' Association v. CRC - Carteret Co. Superior Ct. This is the appeal from an award of \$89,444.36 in attorneys' fees and costs by the Superior Court after it 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 bridge. The record will be filed in the Court on February 12, 2021 and Appellant CRC's brief will be due approximately 30 days later.

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

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/ CAMA Major Permit issued to Mr. Vann for construction of an upland boat basin and pier at in Corolla, NC. A hearing on the petition was held November 30, 2020 before Judge Marvin Blount III. He affirmed the Commission's decision in its entirety. Petitioner has not appealed and we will close our file.

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 settled the case. As part of the settlement, NCDOT is revising development plans for the Site. Once the revised plans are permitted, the petition will be dismissed and we will close our file.

Randolph v. DCM (20 EHR 8264) Petitioners are 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. Our motion for summary judgment and was heard on January 22, 2021. We are waiting the court's decision.

James and Joanne Kastberg v. DCM (20 EHR 03015). Petitioners are challenging the Town of Kure Beach's CAMA LPO's denial by of their application to place a pool oceanward of the Town's development line. If the Commission grants the Town's request to amend its development line, this case would appear to be moot. Otherwise, a hearing on Respondent's motion for summary judgment is scheduled remotely for March 11, 2020.

Smith v. DCM (20 EHR 03550). Third-Party Petitioner Smith is challenging the issuance of a CAMA permit authorizing construction of a pier on an existing structure. The permit holder has intervened. The matter is stayed in OAH as Petitioner and permittee holder explore settlement

VI. VARIANCES - None other than the one before you today.

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

Since your last meeting, the Chair has received one third party request for a hearing in OAH from **James and Diane Kennedy** to challenge CAMA General Permit No. 78274-C issued on 01/12/2021 authorizing the development of a pier and platform at 419 Island View Drive, Newport, Carteret County. The final agency decision will be sent out on February 17, 2021.