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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 20-31*)  
Date: November 9, 2020

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### 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. Judge Gergel has dismissed the litigation because the IHAs are expiring this month and the companies have indicated that they have no plans to do any seismic surveying in the Atlantic even if BOEM were to issue the permits. We will close our file.

### 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 11<sup>th</sup> 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. We are waiting for a hearing date.

**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. Defendant's Response is due Nov 19, 2020.

### 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. The court heard argument on cross motions for summary judgement on September 29, 2020. By order filed October 5, 2020, the court granted the Plaintiff Pham and the County's motion for summary judgment and held that Plaintiff holds the property fee and clear of the conservation restriction in the Deed recorded in December 2003.

#### 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 granted the request. The Commission filed a notice of appeal.

***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.

***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. No appeal was filed. We have closed our file.

***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 parties have agreed to submit their briefs before Thanksgiving and hold a hearing the week of November 30, 2020.

#### 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 finalized a settlement and we will close our file following dismissal of the petition.

***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. A hearing is scheduled in New Bern during the week of January 18, 2020.

***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 parties settled the case and the Petition has been dismissed with prejudice. We will close our file.

***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. The deadline to complete discovery and file dispositive motions is December 8, 2020 and a hearing on Respondent's motion for summary judgment is scheduled for March 8, 2020 in Bolivia, NC.

***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. Prehearing statements are due October 15, discovery ends December 28, the deadline for dispositive motions is January 4, 2021, and an evidentiary hearing is scheduled for January 18, 2021. The permit holder has intervened. The matter is stayed in OAH as the Petitioner and permittee holder explore settlement

VI. **VARIANCES** - None.

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

Since your last meeting, the Chair considered one request for a hearing in OAH:

The Chair denied a request from **Bianca Aniski** (CMT 20-06) for a contested case hearing based on her determination that the request was untimely, Petitioner did not have standing to raise issues on behalf of others, and Petitioner had failed to identify any CAMA provision or Commission rules that was inconsistent with the modification of the CAMA Permit.