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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 21-32*)
Date: September 3, 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 sovereign immunity. Plaintiffs, who are represented by the Pacific Legal Foundation, appealed. SELC filed an amicus brief on behalf of the NC Coastal Federation in support of the Commission. NC Solicitor General Ryan Park argued remotely for the Commission before the Fourth Circuit Court of Appeals. **On August 9, 2021, the Court issued a unanimous decision in favor of the Commission affirming dismissal of the Zitos' complaint.** Petitioners have 90 days to petition the United States Supreme Court for review.

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. NCDOJ has filed a complaint appealing the agency decision. Defendant filed a motion to dismiss and a motion requesting the Secretary's decision be vacated. The briefing is complete and we are waiting the court's decision.

II. NORTH CAROLINA COURT OF APPEALS

Batson, Baldwin, and Batson/Baldwin Owners' Association v. CRC - Carteret Co. Superior Ct. File No. COA 21-110. The Commission appealed the Superior Court's order assessing \$89,444.36 in attorneys' fees and costs against the Commission after the Court 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 bridges. The appeal has been fully briefed and we are waiting to hear if the case will be scheduled for oral argument.

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. On July 8, 2020, a hearing was held in Wake Co Superior Court. At the Court's request, the parties submitted proposed orders and we are waiting for the Court's decision.

V. OFFICE OF ADMINISTRATIVE HEARINGS (OAH):

Randolph v. DCM (20 EHR 8264) Petitioners challenged 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. The day before the hearing, Mr. and Mrs. Randolph and the permit holder agreed to a compromise of the design of the wing wall extension. The contested case will be dismissed with prejudice after a new CAMA permit is issued and we will close our file.

Replogle v. DEQ/DCM (21 EHR 1268) Shawn Maier is representing DCM. Petitioner is challenging the denial of a permit application to redesign an area which is now in the 30' buffer at their home at 1170 Duck Road in Duck, North Carolina. The parties have reached an agreement in principle and are in the process of signing the agreement. Petitioners agreed to make several modifications to their proposed design, including moving stormwater collection chambers out of the 30' buffer, using natural vegetation instead of artificial turf, and replacing existing wooden decking and an impervious stone patio with elevated, slatted composite decking rather than permeable pavers. Following DCM's issuance of the permit and the expiration of the administrative appeal window, Petitioners will dismiss the contested case with prejudice.

Freeman Beach LLC v. DCM (21 EHR 02751) Petitioner is challenging the denial of a permit to install 2,500 linear feet of sand fencing on Petitioner's property on the south end of Freeman Park to build/extend the frontal dune, nourish the beach area, and help protect the property landward of the dunes. The petition was filed June 16, 2021. Mediation took place on July 27 and the parties agreed to explore the possibility of finding a revised design that is consistent with the Commission's rules. The Administrative Law Judge granted a 60 day stay while the parties explored this option.

Smith v. DCM (21 EHR 3163) Based on alleged impacts to navigation, Petitioner is challenging DCM's issuance of a minor modification to Permit 115-18 to T.J.'s Land Development, LLC authorizing (among other things) placement of two fuel tank dispensers in Baker's Creek in Beaufort County, North Carolina. The petition was filed July 19, 2021. Permittee intervened. The discovery deadline is October 25, 2021, with dispositive motions to be filed by Nov 1, 2021/ The hearing is scheduled for November 15, 2021. Shawn Maier is representing DCM in this contested case.

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

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

Axon Smith (CMT-21-06) requested permission to challenge DCM's issuance of a minor modification to Permit 115-18 to T.J.'s Land Development, LLC authorizing two fuel tank dispensers on the shore of Baker's Creek in Beaufort County based on alleged impacts to navigation. The Chair granted the request because there were conflicting forecasts of evidence regarding possible impacts to navigation. Petitioner's petition for contested case hearing was filed in the Office of Administrative Hearings (see above).

Phillip Smith (CMT 21-07) and **Laurent and Meredith Meilleur** (CMT 21-08) requested permission to challenge DCM's issuance of a dock permit pursuant to 7H .1205 and .1204 at a Site in Swansboro, NC. The Chair denied the request because Petitioners had failed to meet the requirements of the statute. The deadline to file petitions for judicial review was approximately Aug. 18, 2021. We have not received any petitions for judicial review and will close the files.

Henry Fonvielle (CMT 21-09) requested permission to challenge the minor permit issued by the Town of Wrightsville Beach's LPO authorizing construction of an oceanfront house based on an interpretation of the static line exception. The Chair denied the request because it was untimely (6 months late). The deadline to appeal the decision is approximately Sept. 20, 2021.