

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 22-06)
Date: January 23, 2022

I. FEDERAL LITIGATION

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 under the Coastal Zone Management Act for a proposed geological and geophysical seismic survey in the Atlantic Ocean off North Carolina. NCDOJ appealed the agency decision. Defendant moved to dismiss based on mootness. NC requested the Secretary's decision be vacated. The Court held that (1) the State had legal standing to challenge the Secretary of Commerce's decision to override DCM's consistency objection and (2) because the case was moot through no fault of the State, the Secretary's decision must be vacated and the Secretary's June 2020 decision to override DCM's consistency objection no longer has any legal effect. Defendant did not appeal. We closed the file.

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. All briefs are filed and we are waiting a decision.

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 summary judgment to DEQ finding the CAMA permits were consistent 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.

Henry Fonvielle v. CRC (21 CVS 003584) - New Hanover Superior Ct. Petitioner appealed the Commission's denial of a TPHP to challenge the minor permit issued by the Town of Wrightsville Beach's LPO authorizing construction of an oceanfront house based on the LPO's interpretation of the static line exception. The court denied Petitioner's motion to stay and for an injunction. Petitioner dismissed the complaint against DCM. The Permittee's intervened. On December 8, 2021, there was a hearing on various preliminary motions. We are waiting on the Court's ruling. The hearing on the petition for judicial review will be heard March 8, 2022.

V. OFFICE OF ADMINISTRATIVE HEARINGS (OAH):

Freeman Beach LLC v. DCM (21 EHR 02751) Petitioner challenged 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. Freeman Beach LLC and the Town of Carolina Beach settled the property claims filed in superior court (the Commission was not a party). Petitioner then dismissed its contested case in the Office of Administrative Hearings. I have closed the file.

McBride v. DCM (21 EHR 4440) Based on alleged impacts to navigation, Petitioner challenged the general permit issued by DCM for construction of a pier on Newton Creek in Pamlico County. Petitioner claims the pier interferes with navigation and the use of public trust waters in a manner inconsistent with the requirements of 15A NCAC 07H .1204(c). The hearing is scheduled for the week beginning April 11, 2022. Mary Crawley is representing DCM.

Smith v. DCM (21 EHR 3163) Shawn Maier is representing DCM. Based on alleged impacts to navigation, Petitioner challenged 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 dispensers along Baker's Creek in Beaufort County, North Carolina. The case was settled. We will close our file once the contested case is dismissed.

VI. VARIANCES - None other than the ones before you today. A summary of the variances considered by the Commission in 2021 is attached.

VII. REQUESTS BY THIRD PARTIES TO FILE CONTESTED CASES IN OAH - A summary of the requests considered by the Chair in 2021 is attached. Following is a review of the requests received since your last meeting:

The **Town of Edenton** (CMT 21-12) requested permission to challenge the issuance of a general permit for construction of a bulkhead and pier in Chowan County alleging there are significant questions regarding impacts from the development and the general permit process should not have been used. The Chair denied the request based on her finding that superior court, not OAH, had jurisdiction over the claims. Petitioner did not file a petition for judicial review. I have closed the file.

Brockway (CMT 21-13) requested permission to challenge the issuance of a permit to replace an existing dune accessway in Dare County. The Chair denied the request based on her determination that the petitioner failed to allege facts or make legal arguments to demonstrate that a contested case hearing would not be frivolous. Petitioner did not file a petition for judicial review. I have closed our file.

Horton (CMT 21-14) requested permission to challenge the issuance of Minor Permit No. WO-21-41 by the CAMA Local Permit Officer for Carteret County to Paxon McLean Holz authorizing the development of fencing and two gates on the upland portion of Permittee's property located at 328 Live Oak Drive in Cape Carteret, Carteret County, North Carolina. The Chair denied the request based on her finding that DCM, the Commission, and OAH did not have jurisdiction to decide the property issues raised by Petitioner. To date, we have not received a petition for judicial review and I will close our file.

Mance (CMT22-01) filed a request for a contested case hearing to challenge a proposed oceanfront development. However, because the permit has not yet been issued, DCM informed Petitioner that the request was premature and provided information on the procedure for objecting to the proposed development.

VIII. PUBLIC RECORDS REQUEST: On October 26, 2021, DCM and the Commission received a request for public records from the attorney representing Petitioner Henry Fonvielle for, among other things, all final agency decisions, third party hearing requests, staff recommendations, and guidance documents relating to third party hearing requests received in the last ten years that were not timely. Documents were produced in response to the request in January.

Variance Tally with Issues - 2021

Revised Feb 202

Case #	Petitioner	County	Heard at this Meeting	Commission's Decision	Appeal	Issue
20-02	Topsail Reef HOA Rep. by Brian Edes	Onslow	April (remote)	Granted subject to conditions	No	Sandbags
21-01	Town of Carolina Beach Rep. by Noel Fox, Esq.	New Hanover	Feb (remote)	Granted	No	Request to install 2958 square feet of seasonal impermanent access decking oceanward of ocean hazard setback
21-01	Town of Topsail Beach Rep by Steve Coggins	Pender	June	Granted	No	Request to construct wheelchair ramp access sites - five feet wide, eighty to a hundred feet long, and oceanward of the sixty-foot setback measured from the static vegetation line.
21-03	Karen Sanders (pro se)	Pender	Sept (remote)	Granted		Request to enclose de minimus area on the street side (already under roof).
21-04	Town of Kure Beach Holly Ingram, Esq. Jim Eldridge, Esq.	New Hanover	Nov	Granted		Development Line

Variance Tally with Issues - 2021

Revised Feb 202

Case #	Petitioner	County	Heard at this Meeting	Commission's Decision	Appeal	Issue
21-05	Spogli Represented by Charles Baldwin, Esq.	Brunswick	Incomplete			Bald Head Island – Oceanfront setback
21-06	Carolyn Arnold/Jean McGraw	Carteret	Feb 2022 meeting			Septic oceanward of setback
21-07	NCDOT Represented by Colin Justice	Dare	Feb 2022 meeting			sandbags

Summary of CAMA 3rd Party Hearing Requests – 2021

14 TPHRs filed on 12 separate permits in 7 counties	Breakdown: 10 Denied 3 Granted 1 Withdrawn	Appeal – 1 PJR filed, 8 not appealed.
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<u>Case</u>	<u>Date</u>	<u>Petitioners</u>	<u>County</u>	<u>Granted</u>	<u>OAH/PJR</u>	<u>Summary of Issues</u>
21-01	Feb 2	James and Diane Kennedy (family attorney)	Carteret	No	No	Request to challenge GP No. 78274C issued to Island View Shores Property Owners Association, Inc. authorizing rebuilding of pier in same footprint following storm. Untimely
21-02	Feb 5	Henry Zaytoun, Jr. (pro se)	New Hanover	Yes	Did not file	Request to challenge pier permit based on riparian corridor.
21-03	Feb 17	Kelly Smith (pro se)	Brunswick	Withdrawn	No	Dune issues NOV
21-04	Mar 9	Rich Cerrato (pro se)	New Hanover	No	No	Request to challenge permit modification changing location to deposit beach compatible sand from dredging. N.C.G.S. § 113-229(h2). Untimely challenge to the original permit
21-05	Mar 9	Richard Hilderman (pro se)	New Hanover	No	No	Request to challenge permit modification changing location to deposit beach compatible sand from dredging. N.C.G.S. § 113-229(h2) Untimely challenge to the original permit.
21-06	June 21	William Axon Smith (Attorney Charles McCotter)	Brunswick	Yes	OAH	Request to challenge minor modification to Major Permit No. 115-18 issued to T.J.'s Land Development, LLC authorizing among other things, the addition of two fuel dispensers. Failed to provide notice to adjacent riparian property owner who claims impacts to navigation. 15A NCAC 07H .0207(d) and 7H .0208(a)(2)(G).

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21-07	July 1	Laurent and Meredith Meilleur (family attorney)	Onslow	No	No	Request to challenge GP based on claim it authorizes dock/pier past line of adjacent piers (15A NCAC 07H .1200 et seq.) Not adjacent riparian landowner. Untimely.
21-08	July 1	Phillip and Martha Smith (family attorney)	Onslow	No	No	Request to challenge GP based on claim it authorizes dock/pier past line of adjacent piers (15A NCAC 07H .1200 <i>et seq.</i>) Not adjacent riparian landowner. Untimely
21-09	Aug 3/5	Henry Fonvielle represented by Grady Richardson	New Hanover	No	PJR	Request to challenge CAMA minor permit authorizing construction of a residence based on claim permit inconsistent with oceanfront setbacks and did not receive notice. Not adjacent riparian landowner. Request untimely
21-10	Sept 14	McBride	Pamlico	Yes	OAH	Request to challenge permit based on claim that permitted platform interfered with navigation on Newton Creek in violation of 15A NCAC 07H 1200 et seq. – general permit for docks and piers.
21-11	Sept 23	Glennon	Carteret	No	No	Request to challenge permit authorizing boat lifts based on view. Untimely.
21-12	Oct 19	Town of Edenton (represented by Hood Ellis)	Chowan	No	No	Request to challenge permit for pier based on claim not in compliance with Town's historic design standards. Denied lack of jurisdiction.

Summary of CAMA 3rd Party Hearing Requests – 2021

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<u>Case</u>	<u>Date</u>	<u>Petitioners</u>	<u>County</u>	<u>Granted</u>	<u>OAH/PJR</u>	<u>Summary of Issues</u>
21-13	Nov 7	Brockway	Dare	No	No	Request to challenge permit for dune accessway and deck based on alleged impact to view and vegetation. Denied based on failure to allege facts or make legal arguments demonstrative hearing would not be frivolous.
21-14	Dec 1	Horton (represented by Clark Wright)	Carteret	No	waiting	Request to challenge permit issued for construction of fence and gates on upland property. Denied lack of subject matter jurisdiction