

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 21-15*)
Date: April 15, 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. 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. The remote oral argument is on May 4, 2021. NC Solicitor General Ryan Park will argue on behalf of the Commission. If you are interested in listening to the oral argument, let me know and I will forward information on how to listen.

***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 completed 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. Mediation took place on March 18 and was not successful. Appellant CRC's brief is due on May 14, 2021.

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.

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 petition is dismissed, we will close our file.

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. Our motion for summary judgment was denied. The case is scheduled for hearing beginning May 19, 2021.

Replogle v. DEQ/DCM (21 EHR 1268) 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. The petition was filed March 9, 2021. Prehearing Statements to be filed shortly. The discovery deadline is June 28, 2021 with dispositive motions to be filed by July 5, 2021. The hearing is scheduled for the week of July 19, 2021.

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

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

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

On February 17, 2021, the Chair denied **James and Diane Kennedy's** (CMT 21-01) request 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 on the grounds it was untimely and failed to identify the manner in which they claimed the permit decision was inconsistent with a CAMA provision or rule. The deadline to file a petition for judicial review has passed. I will close my file.

On February 23, 2021, the Chair granted a third party hearing request from **Henry Zaytoun, Jr.** (CMT 21-02) to challenge General Permit No. 77757D issued to 7 Beach Bay Lane, LLC authorizing the development of a pier at its property on Figure Eight Island, New Hanover County, North Carolina. The Chair found that petitioner had made legal

arguments and demonstrated facts sufficient to have a contested case hearing on issues relating to the location of the riparian line. However, Petitioner elected not to file a petition in the Office of Administrative Hearings. I have closed the file.

Kelly Smith and Jeffrey Poteat filed a third party hearing request (CMT 21-03) seeking to challenge a CAMA permit issued for construction of a house on Oak Island. Following a discussion with DCM Staff about the basis of the appeal which concerned FEMA flood maps and the enforcement process for dune impacts, Petitioners withdrew their request.

Rich Cerrato (CMT-21-04) and **Richard Hilderman** (CMT 21-05) both requested permission to file a petition for a contested case hearing to challenge the February 18, 2021 Major Modification of CAMA/State Dredge & Fill Law Major Permit No. 79-19 issued to the Town of Sunset Beach authorizing a change in the disposal area for beach-compatible sand. The Permit was initially issued in 2019 and authorized placement of beach-compatible material dredged from South Jinks Creek along the upland beach between 5th and 12th streets. The Permit Mod authorized placement of this beach-compatible material in an area about 600 feet offshore between 3rd and 13th Streets in Sunset Beach. The Final Agency Decision denied the request on the grounds that the request was untimely as to the 2019 permit and petitioners had failed to meet their burden to make legal arguments or identify facts to demonstrate they were entitled to a contested case hearing on the issue of the location for the dredge spoils. The decision was issued March 23, 2021. Any appeal must be filed by April 22, 2021.