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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 19-40*)

Date: November 6, 2019

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 South Carolina in which the State of South Carolina intervened. To date no permits for geophysical surveys have been issued. The IHAs are effective for one year from the date of issuance and may not extend beyond two years from date of issuance. Under the terms of the IHA, the Holder may submit a suspension request that if granted may not extend the effective period for more than the equivalent of a one-year period.

II. FEDERAL CASES

U.S. District Court, Eastern District of North Carolina, Northern Div., *Zito v. CRC, 2:19-cv-11-D.* Plaintiffs filed a complaint claiming the CRC's decision denying their variance request resulted in a taking of private property without just compensation in violation of the United States Constitution and the North Carolina Constitution. The parties have fully briefed three motions for the Court's consideration: 1) Defendant's second motion to dismiss arguing the 11th Amendment bars Plaintiffs' remaining claim; 2) NC Coastal Federation motion to intervene; and 3) Plaintiffs' motion requesting the Commission be bound by the stipulated facts in its FAD. We are waiting for the Court's rulings on these motions. On Nov. 6, 2019, the Court issued its scheduling order requiring expert reports by January 21, 2020, discovery completed by March 27, 2020, and dispositive motions filed by April 24, 2020. A trial date has not been set. .

Consistency Appeal to US Dep't of Commerce, NOAA.

On July 11, 2019, WesternGeco submitted a Notice of Appeal to the U.S. Secretary of Commerce pursuant to the Coastal Zone Management Act of 1972 from an objection by DCM to WesternGeco's consistency certificate for its proposed project to conduct a geological and geophysical seismic survey in the Atlantic Ocean. Appellant filed its brief and supplemental material for the record on Oct 21, 2019. The State's principal brief and supplemental materials for the record are due Nov 19, 2020. The State has requested an extension of time to file.

III. SUPERIOR COURT - Carteret County

Beverly Pham v. Blair Pointe, LLC et al. 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 (including wetlands) under the Tax Credit Program (repealed by the General Assembly in 2013) was extinguished as a result of a tax foreclosure sale. DCM had done the initial assessment that the land had conservation value. By agreement, the parties moved the mediation to Dec 20 with trial scheduled for May 25, 2020.

IV. PETITIONS FOR JUDICIAL REVIEW

Batson, Baldwin, and Batson/Baldwin Owners' Association v. CRC - Carteret Co. Superior Court
On May 31, 2019, the Chair denied requests for contested case hearings to challenge the CAMA permit issued to NC DOT for a replacement bridge to Harkers Island. Petitioners appealed. Mary Lucasse represents the Commission. She filed the Record of Proceedings in Superior Court. The court granted the parties' joint motion to quash summons issued to the Commission and NC DOT and consolidated the petitions. There has been no activity on this appeal since the Commission's last meeting.

Smuts, Tignor v. NCDEQ, 98 OB LLC, 134 OB LLC (19 CVS 012379) - Wake Co. Superior Ct.
Following a hearing on Respondent's motion for summary judgment, Administrative Law Judge Randolph Ward entered a Final Decision by Summary Judgment granting the motion. ALJ Ward found that Petitioners had failed to show any environmental reason for rejecting the CAMA permit applications and holding that DEQ did not have any obligation or right to withhold approval of the CAMA permits. On September 11, 2019, Petitioners appealed the decision. The Office of Administrative Hearings submitted the record to Superior Court. Petitioner's substantive brief is due Nov. 8, 2019. Mary Lucasse and Sarah Zambon represent NCDEQ on the Petition for Judicial Review.

V. OFFICE OF ADMINISTRATIVE HEARINGS (OAH):

Sunset Beach Taxpayers Association and NC Coastal Federation v. DCM (16 EHR 7974) and ***Sun's Set LLC v. DCM (16 EHR 8032)***. The cases appeal DCM's issuance of Major CAMA Permit No 70-16 for infrastructure development for a residential project at the western end of Sunset Beach in Brunswick County. Shawn Maier represents DCM in OAH. In 2017, the General Assembly allocated \$2.5 million to purchase the property. The OAH cases are stayed. On Sept 10, 2019, the NC Council of State approved terms for the State's acquisition of the property. The transfer of the property took place in early November and the OAH cases will be dismissed shortly.

VI. VARIANCES - None outstanding

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

Since your last meeting, the Chair heard one new Third Party Hearing Request submitted by **Joel Williams**, (CMT 19-10) seeking to challenge a pier permit issued for a permittee in Sneads Ferry, Onslow County. The Chair will issue the Final Agency Decision on Nov 18, 2019. .