

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 20-15*)
Date: May 27, 2020

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 federal defendants have filed the Administrative Record. The parties are preparing motions for summary judgment.

II. FEDERAL LITIGATION

U.S. District Court, Eastern District of North Carolina, Northern Div., *Zito v. CRC*, 2:19-cv-11-D; USCA4 Appeal 20-1408. On March 27, 2020, Judge Dever granted the Commission's motion to dismiss based on lack of subject matter jurisdiction under the 11th Amendment. He dismissed as moot the NC Coastal Federation's motion to intervene and Plaintiffs' motion requesting the Commission be bound by the stipulated facts in its FAD. Plaintiffs appealed the dismissal to the United States District Court of Appeals for the 4th Circuit. Plaintiffs' brief is due June 2, 2020. The Commission's response is due July 2, 2020. NC Coastal Federation, represented by Southern Environmental Law Center, plans to file an amicus brief in support of the Commission.

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

On July 11, 2109, 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 off North Carolina. The parties have briefed the issues and submitted supplemental materials for the record. The Secretary will issue his decision shortly. WG has also submitted an appeal of South Carolina's objection to its consistency certificate.

III. SUPERIOR COURT - Carteret County

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 under the Tax Credit Program (repealed in 2013) was extinguished as a result of a tax foreclosure sale. DCM performed the initial assessment determining the land had conservation value. The parties have discussed ways to resolve this claim. Dispositive motions will be submitted in August 2020 followed by trial in October 2020, if necessary.

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 their petitions for judicial review and remanded the matter to the OAH for a hearing on Petitioners' challenge of the CAMA permit. (See below).

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 which granted NCDEQ's motion for summary judgment on the grounds that Petitioners had failed to show that the CAMA permits were improperly issued. Our motion to dismiss for failure to serve Respondent as required by the Administrative Procedure Act was denied. The matter has been fully briefed and a hearing on the Petition is set for June 22, 2020 in Wake Co. Superior Court.

Williams v. CRC. 19 CVS 16394 - Wake Co. Superior Ct

Petitioner appealed the Chair's denial of Petitioner's request for a contested case hearing to challenge the CAMA permit issued to Russell Newbold for construction of a new 212 foot long pier at 231 Riverside Drive in Sneads Ferry, North Carolina. Petitioner claims the permitted development exceeds the line established by adjacent piers. The matter has been fully briefed and a hearing on the Petition is set for June 29, 2020 in Wake County Superior Court.

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. We have not scheduled a hearing on the motion as civil superior court sessions in Judicial District 5 (including Pender Court) have been cancelled until further notice given the corona virus pandemic.

V. OFFICE OF ADMINISTRATIVE HEARINGS (OAH):

Batson, Baldwin, and Batson/Baldwin Owners' Association v. DCM - Petitioners have filed their Petition challenging the CAMA permit issued to NC DOT for the Harkers Island replacement bridge in the OAH.

Randolph v. DCM - Petitioners' Third Party request to file a contested case hearing to challenge the 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 on the Neuse River in Craven Co. was granted. Petitioners are required to file their Petition in OAH by May 29, 2020.

VI. **VARIANCES** - None other than the ones before you at this meeting.

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

Since your last meeting, the denial of Edward Glenn's request for a third party hearing (CMT-19-12) was not appealed and we have closed the file. Two new Third Party Hearing Requests were decided: **Willa Rae Sutton** (CMT 20-01) requested a hearing to challenge a minor permit issued to the Town of Atlantic Beach authorizing a lift station. The request was denied, was not appealed, and we have closed our file. In addition, Second Vice Chair Robin Smith, by authority delegated by the Chair, granted a third party hearing request from **Darren and April Randolph** (CMT 20-02) to file a petition in OAH to challenge a General Permit issued for construction of a wing wall extension on property adjacent to the Neuse River in Craven Co., NC. (See above). The Chair has also received a request for a third party hearing from **Jim Spicuzza** (CMT 20-03). The final agency decision is due June 11, 2020.