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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 19-30*)

Date: September 10, 2019

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**I. MULTISTATE LITIGATION**

**U.S. District Court, District of South Carolina Charleston Division:** The National Marine Fisheries Service (NMFS) granted incidental harassment authorizations (IHA) 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. This case was consolidated with a complaint brought by local governments in South Carolina in which the State of South Carolina had intervened. Plaintiffs filed motions for a preliminary injunction requesting the companies be prohibited from conducting seismic testing. NC and other states joined in the motion. On Aug. 26, 2019, the court denied the motions for preliminary injunction without prejudice finding harm is not imminent as over 5 months have passed and no permits have been issued.

**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. Mary Lucasse and Marc Bernstein represent the CRC and filed a motion to dismiss arguing the federal court does not have jurisdiction as Plaintiffs failed to exhaust judicial remedies under North Carolina law to request compensation for the alleged takings. In response, Plaintiffs dismissed their state law claim. The court denied the CRC's first motion to dismiss when the United States Supreme Court issued its opinion in *Knick v. Township of Scott, Pennsylvania, et al.*, No. 17-647 on June 21, 2019 overturning the state litigation requirement. On Aug. 20, 2019, we filed a second motion to dismiss arguing the 11th Amendment bars Plaintiffs' remaining claim. Plaintiffs opposed the motion. Our reply is due Sept 20, 2019. The NC Coastal Federation filed a motion to intervene. The CRC took no position. Plaintiffs opposed the motion. Discovery is deferred until the court rules on the motions.

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

On July 11, 2019, WesternGeco submitted a Notice of Appeal (NOA) to the U.S. Secretary of Commerce pursuant to the Coastal Zone Management Act of 1972 (CZMA) 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. The Secretary determined this is an energy project under CZMA. Appellant requested and received an extension to Sept. 20, 2019 to coordinate with BOEM, the permitting agency to submit the record and a revised NOA. Mary Lucasse and Marc Bernstein represent DCM on the appeal.

**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. Mary Lucasse and Shawn Maier are representing North Carolina in the litigation. The parties plan to reschedule the current Dec trial date to conduct additional discovery.

**IV. PETITION FOR JUDICIAL REVIEW - Carteret County Superior Court**

***Batson, Baldwin, and Batson/Baldwin Owners' Association v. CRC.*** 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 and 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 consolidate the petitions. The parties are discussing a schedule for briefing and a hearing in the case.

**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 were stayed to give the parties time to explore settlement. On Sept 10, 2019, the NC Council of State approved terms for the State's acquisition of the property. Accordingly, the OAH cases will be dismissed.

***Gwendolyn Smuts and Marvin Tignor v. DEQ (18 EHR 07490 and 18 HER 07391).*** Two residents of the Town of Southern Shores challenged issuance of CAMA Minor Permits for construction of two 12-bedroom homes arguing the permits are not consistent with the Town's current land use plan. Mary Lucasse and Sarah Zambon represented DEQ. ALJ Ward granted our motion for summary judgment finding that the projects are consistent with objective requirements of the Town's land use plan and zoning ordinances, including requirements for height, density, and lot coverage. Petitioners have until September 11, 2019 to appeal.

**VI. VARIANCES:**

***Stallings CRC-VR-19-06.*** At its July meeting, the CRC denied a variance request to construct an upload boat basin. Petitioner did not file a petition for judicial review and we closed the file.

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

Since your last meeting, the Chair has denied requests by **Third Parties McBride (CMT 19-07), Caldwell (CMT 19-08), and Sands V HOA (CMT 19-09)**, for hearings in OAH to challenge a permit issued by the Town of Carolina Beach's Local Permit Officer (LPO). The Chair found that the LPO failed to ensure that adjacent riparian property owners had notice of the request for a CAMA minor permit. For that reason, although the requests were untimely, the Chair considered the merits of each request. The Chair determined that Petitioners had failed to allege facts or make legal arguments sufficient to show that the permit was inconsistent with CAMA or the CRC's rules. In addition, the Chair determined that the permit authorizing a three-unit townhome development on the oceanfront was consistent with the Town's development line. Petitioners have until Sept 12, 2019 to appeal.