

**ORIGINAL**

FILED  
U.S. DISTRICT COURT  
SAVANNAH DIV.

IN THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF GEORGIA  
SAVANNAH DIVISION

2007 FEB -7 AM 11: 58

CLERK *[Signature]*  
SO. DIST. OF GA.

ELIZABETH E. CAIN; )  
DAVID KAMINSKY; and )  
LARRY GIBSON, )

Plaintiffs, )

v. )

CASE NO. CV407-06

U.S. ARMY CORPS OF ENGINEERS; )  
GEORGIA STATE DEPARTMENT OF )  
NATURAL RESOURCES, COASTAL )  
RESOURCES DIVISION; SUSAN )  
SHIPMAN; MARK A. DANA; and )  
FRANCES M. DANA, )

Defendants. )

O R D E R

Before the Court is Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction. (Doc. 2.) On January 17, 2007 at 4:00 p.m., this Court held a hearing on Plaintiffs' motion, at which time the Court heard oral arguments from the parties. After the hearing, the Court issued an Order seeking written answers to certain interrogatories about the facts of the case. The parties responded with supplemental filings. After considering the parties' briefs, oral arguments, and written responses to the Court's questions, the Court concludes that Plaintiffs' motion should be DENIED.

**BACKGROUND**

Plaintiffs Elizabeth Cain, David Kaminsky, and Larry Gibson have brought this action to prevent their neighbors, Defendants Mark and Frances Dana, from building a dock extension on the marsh in the Tom's Creek Basin on Wilmington Island. The Georgia Department of Natural Resources, Coastal Resources Division (DNR), acting under authority delegated by the U.S. Army Corps of Engineers (the Corps), issued a revocable license to the Danas for the dock construction pursuant to the Programmatic General Permit ("PGP"). Plaintiffs claim this decision was arbitrary and capricious, and in violation of the Georgia Coastal Marshland Protection Act (CMPA); the State Programmatic General Permit No. PG00083, 960009050; the Administrative Procedure Act; and the U.S. Rivers and Harbors Act of 1899. Plaintiffs have moved for a temporary restraining order and preliminary injunction claiming that the permit was issued without any meaningful evaluation as to whether the dock qualified for the PGP.

With respect to private single-family docks, the Corps issued the PGP in 2001. This permit sets forth the guidelines for private docks that do not need to proceed through the Corps' full permitting process. The PGP is administered by the Georgia DNR, Coastal Resources

Division. Thus, DNR has authority to authorize docks that comply with the conditions of the PGP.

On July 26, 2006, John Wynne, the Coastal Permit Coordinator of DNR's Coastal Resources Division, visited the site of the proposed dock extension. Mr. Wynne evaluated the permit application and determined that the proposed dock met the conditions of the PGP, including finding that there were similar docks within visual proximity to the site. (Doc. 22, Affidavit of John Wynne.) Mr. Wynne considered the "dock corridor" in relation to neighboring property lines and the possibility of navigable tributaries through the marsh grass. In addition, during a two-day period from August 8-9, 2006, Mr. Wynne communicated with applicants' agent regarding shade coverage, and the applicants agreed to reduce the width of the walkway to lessen the impact of shading over the marsh grass. On August 30, 2006, DNR issued a revocable license approving the project.

After learning of the proposed construction in December of 2006, Plaintiffs Cain and Gibson made several inquiries to DNR. In response to their concerns regarding access to deep water, DNR required a modification of the plans that included a bridge over a creek traversed by the walkway.

Plaintiffs filed a Complaint on January 8, 2007 and immediately moved for a temporary restraining order and preliminary injunction. At the time the Complaint was filed, construction had begun and was ongoing. By the date of the hearing, all of the pilings for the walkway had been driven and much of the decking had been laid. In preparation for the hearing, the Corps performed a review of the dock and found that it complied with the conditions of the PGP.

#### ANALYSIS

Plaintiffs have moved for a preliminary injunction arguing that the decision to issue a revocable license was arbitrary and capricious. For a preliminary injunction to be issued, the moving party must show "(1) a substantial likelihood of success on the merits; (2) that irreparable injury will be suffered if the relief is not granted; (3) that the threatened injury outweighs the harm the relief would inflict on the non-movant; and (4) that entry of the relief would serve the public interest." Schiavo ex rel. Schindler v. Schiavo, 403 F.3d 1223, 1225-1226 (11th Cir. 2005).

A court reviewing an agency decision under the arbitrary and capricious standard must defer to the wisdom of the agency provided that its decision is reasoned and

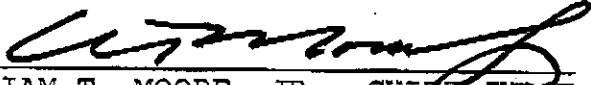
rational. Zukas v. Hinson, 124 F.3d 1407, 1409 (11th Cir. 1997). An agency's decision should be set aside only if the agency relied on improper factors, failed to consider important relevant factors, or committed a clear error of judgment that lacks a rational connection between the facts found and the choice made. Legal Env'tl. Assistance Found., Inc. v. U.S. E.P.A., 276 F.3d 1253, 1265 (11th Cir. 2001); Arango v. U.S. Dep't of the Treasury, 115 F.3d 922, 928 (11th Cir.1997). Although the court's inquiry into the facts is to be searching and careful, the ultimate standard of review is narrow, and a party seeking review under the arbitrary and capricious standard carries "a heavy burden indeed." Legal Env'tl., 276 F.3d at 1265. The court is not empowered to substitute its judgment for that of the agency. Zukas, 124 F.3d at 1409.

In the instant case, DNR reviewed the proposed project and issued the revocable license. Plaintiffs have not shown that DNR deviated from its standard procedures for approving private dock applications. The Coastal Permit Coordinator performed a site evaluation and required several modifications to reduce the impact of the project. This review was conducted before DNR issued the revocable license. DNR's permit coordinator considered all of the factors relevant to Plaintiffs' motion, including the

conditions of the PGP, visual proximity, navigable tributaries, and applicability of the Coastal Marshlands Protection Act. The Court is not empowered to substitute its judgment for that of the agency absent a clear error of judgment. Because the Court finds that Plaintiffs have not provided sufficient evidence of such an error, Plaintiffs have not demonstrated a substantial likelihood of success on the merits.

For these reasons, the Motion for Temporary Restraining Order and Preliminary Injunction is DENIED.

SO ORDERED this 7<sup>th</sup> day of February, 2007.

  
WILLIAM T. MOORE, JR., CHIEF JUDGE  
UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF GEORGIA