

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

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

Plaintiffs,)

v.)

CASE NO. CV407-006

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.)

**STATE OF GEORGIA DEFENDANTS' RESPONSE TO
QUESTIONS POSED BY THE COURT**

COME NOW, the Georgia Department of Natural Resources ("DNR"), Coastal Resources Division ("CRD"), and Susan Shipman, Director of the Coastal Resources Division, defendants, and hereby submit the following responses to the questions posed by this Court.

- 1) *The Permitting Process and Timeline*
 - a) *What are the normal procedures for reviewing an application? Were those procedures followed in approving this dock?*

Upon receipt of the application package at DNR, the associate permit coordinator organizes the application into a working file, fills out and starts what the agency calls the "blue form." (See State's Ex. D.) The "blue form" is a tracking form/checklist that is used by staff to track completeness of the application and its evaluation through the course of its review.

The associate permit coordinator will also do a brief check of the structure dimensions to verify that it falls within the parameters of the PGP0083 permit. A copy of the application will also be made and submitted to our legal staff for a review of the parcel ownership and to confirm it is a riparian parcel, as well as confirmation that the permit does meet the exemption requirements of the Coastal Marshland Protection Act. Private recreational docks are exempt from permitting under the Coastal Marshlands Protection Act ("CMPA") of 1970. The CMPA, at O.C.G.A. §12-5-295, provides that certain activities are exempted from the permitting process:

(7) The building of a private dock exclusively for the noncommercial use of the owner or his or her invitees and constructed on pilings, the walkways of which are above the marsh grass not obstructing tidal flow, by: (A) The owner of a lot on which a detached single-family residence is located on high land adjoining such dock; or (B) The owner of a lot having at least 50 front feet of land abutting the marshlands which contains high land suitable for the construction of a detached single-family residence and where the construction of such a residence is not prohibited.

"Private dock" is defined in the CMPA as "a structure built onto or over the marsh and submerged lands which is used for recreational fishing and other

recreational activities, is not available to the public, does not have enclosures, and does not create a navigation hazard; provided, however, that a private dock may be covered and screened with wainscoting not higher than three feet and may be equipped with a hoist." O.C.G.A. § 12-5-282 (12).

DNR's working file is then given to the appropriate permit coordinator for the County in which the project is located. The permit coordinator will review the file for missing information, insure that the adjacent property owner notification forms have been submitted, schedule and conduct a site visit and verify that the application is suitable for processing under the U.S. Army Corps of Engineers' Programmatic General Permit No. 0083 ("PGP0083"), or redirect it for processing under one of the other permit mechanisms such as the Army Corps of Engineers ("the Corps") Individual Permit.

Once the file is deemed "complete" it is sent back to the associate permit coordinator for final review after which the Revocable License letter is written and then issued by the Assistant Division Director for Ecological Services along with the Revocable License document signed by the Director of Coastal Resources Division on behalf of the Commissioner of the Department Natural Resources, who has been delegated such authority by the Governor of the State of Georgia.

These above described procedures were followed in approving the Dana dock application for issuance of a State Revocable License and for compliance with the PGP0083. (See State's Ex. A and B.)

b) *What type of evaluation did DNR (or the Corps) perform prior to issuing the license?*

The DNR staff evaluated the application for legal ownership, compliance with the parameters of the PGP0083 permit conditions covered under the Project Description section items (a) thru (j), confirmed that the application met the exemptions of the CMPA, and conducted a site visit (or visits) to determine whether the proposed dock structure was in character with other existing docks within visual proximity of the proposed dock as well to visually identify any obvious navigable waterways that may be encroached upon by the proposed dock. (See State's Ex. A and B.) The Corp does not generally involve itself with this process since it is aware that DNR is evaluating the application both for State purposes, as well as for compliance with the PGP0083 permit.

c) *What notice did Plaintiffs' receive prior to construction, and what notice were they entitled to receive? When did they receive notice?*

State law contains no public notice requirements prior to the issuance of a State Revocable License. The Corps PGP0083 permit requires only that the adjacent property owners be notified. None of the Plaintiffs' are considered to be adjacent property owners; therefore, there was no legal requirement that they be

notified. Since the Plaintiffs' are not adjacent property owners they were not notified.

d) How much construction occurred after Mr. and Mrs. Dana received notice of Plaintiffs' Complaint and motion?

The State Defendants have no first-hand knowledge of when construction of the dock began or when the Danas actually received notice of Plaintiffs' Complaint.

2) Condition J.

a) How is "visual proximity" measured? From where?

Since the term "visual proximity" is contained in the PGP0083 permit that was promulgated, published, and issued by the Corps, DNR defers to the Corps' position on this question. However, when DNR reviews applications for compliance with the PGP0083 permit, and the DNR permit coordinator conducts the required site visit as part of the application review process, he/she will stand either at the upland location of the proposed dock or, as in the case of the Dana's dock, at the terminal end of the existing dock and conduct a visual observation of the surrounding area basically for as far as the eye can see.

b) Are there other docks in the area similar in character to the proposed dock? Comparable length? With covered boathouses? Bridging tidal tributaries?

According to DNR files, approximately 1254 yds. (3762') to the northeast is a private single-family recreational dock licensed by the State and reviewed under

the PGP0083 permit in May 2003. Its walkway is approximately 900' x 6'. The walkway terminates at a fixed deck 18' x 24' and then connects to a floating dock 8' x 20'. There was no request to cover the fixed deck or to construct a boat hoist as part of that permit application. That dock's walkway does traverse a similar type of braided high marsh system containing numerous small channels and tributaries similar to those in proximity to the Dana dock, which are navigable only during short intervals of time before and after the high tide. This dock was not required to bridge any of these smaller tributaries.

In addition, approximately 1196 yds. (3588') to the southwest is the Turner dock which was licensed by the State and reviewed under the PGP0083 permit in 2001. It has a walkway approximately 700' x 5' leading to a fixed deck 20' x 20' which is connected to a 10' x 28' float and a 12' x 20' covered hoist. This dock appears to cross a few small tidal tributaries but was not required to bridge any of them.

- c) *According to the Corps of Engineers Exhibit B-1, the nearest dock of comparable size is a 220 yard dock that is 1175 yards away. The Corps has also identified a 370 yard dock that is 1480 yards away. Are these docks visible from Mr. and Mrs. Dana's property, the pre-existing dock, and/or the end of the newly constructed extension?*

The dock located 1175 yards away is the Turner dock which is detailed in the answer to 2) Condition J, b) above. It is clearly visible from the terminal end of the Dana's pre-existing dock.

- d) *Did the DNR (or the Corps) make a determination regarding other docks in the area prior to issuing the license? What determination was made and how was it made?*

DNR did not do in-depth file research on other docks in the area. DNR concluded that the Dana's proposed dock was not out of character with other docks within visual proximity, given the visual proximity of the Turner dock, which also has a roofed boat hoist and is clearly visible from the pre-existing dock at the Dana property. (See State's Ex. A.)

- e) *What type of boat access do other docks in the area have?*

A number of the docks in the immediate vicinity of the Dana dock have access to deep water a few hours on either side of the high tide, depending upon the normal conditions that affect tidal range in coastal Georgia.

3) *Condition I*

- a) *What qualifies as a "tidal tributary navigable by watercraft?"*

Since the term "tidal tributary navigable by watercraft" is contained in the PGP0083 permit that was promulgated, published, and issued by the Corps, DNR defers to the Corps' position on this question.

- b) *How many such tributaries are crossed by the proposed dock extension, and what are their attributes?*

There appears to be one "primary" tributary that is directional in nature (i.e., it leads from one point to another). This has been identified as a route that has been historically used, along with others, by boaters in the area to traverse through

the marsh at periods of high tide. This is the tributary that was addressed to be bridged in the modified December 29, 2006, State Revocable License. (See State's Ex. F.) There are several other smaller tributaries that appear to be navigable at high tide stages but do not appear to lead anywhere in particular. That is to say they meander and loop and generally double-back on themselves as opposed to being directional and leading from one point to another. These smaller non-directional tributaries may be used at periods of high tides by small watercraft that can meander in and out of a high marsh braided system such as this. (See State's Ex. A and B)

- c) *Did the DNR (or the Corps) make any determination regarding these tributaries prior to issuing the license? What determination was made and how was it made?*

DNR will routinely view a downloaded "Google Image" of the site to try to determine the presence of navigable waterways and channels that a proposed dock might traverse. The "Google Image" for this particular site showed a high marsh braided system with several small tributaries that looped around and doubled back onto themselves. DNR will also conduct a site visit. Although there was one tributary that did appear to lead to deeper water in this case, neither the adjacent property owners nor the applicants' agent offered any indication that this would be a navigational issue due to the walkway addition. It also appeared evident from viewing the "Google Images" as well as from discussions with the applicants'

agent and site visits that there were alternative routes for the neighboring dock owners to transit to get to deeper water. Therefore, the navigation would not be impeded by the proposed dock consistent with the requirements of the PGP0083 permit. (See State's Ex. A and B.)

- d) *Will the dock have an impact on the navigability of these tributaries, and would such impact affect the accessibility of Plaintiffs' docks or other docks in the area?*

It is DNR's belief that this dock will not impact or affect the accessibility of other dock owners in the area, nor impede navigation. In order to address the Plaintiffs' concerns, DNR requested that the Danas bridge the one "primary" tributary as noted previously, and the Danas agreed to do so.

4) *Coastal Marshland Protection Act*

- a) *Will the boat hoist be enclosed with only 3' wainscoting and screening?*

In order to be in compliance with the CMPA and the Revocable License issued by the State, any enclosures used on the Dana dock must not exceed the three foot limitation contained in the Act. It is DNR's understanding that the Dana boat hoist itself will not be screened in. The original application requested that the 16' x 16' covered fixed deck be screened in. In accordance with the PGP0083 permit, "the covered portion may be constructed either with walls of a single layer of woven screen wire or wainscot (lower 4' of the wall finished with wood, upper section finished in woven screen wire)." Although the PGP0083 permit allows that

4' of the wall can be finished in such a manner, as noted above, the CMPA requires that no more than 3' be finished. The "dock house" cannot be fully enclosed with wood, glass, fiberglass, metal, or any other solid type material.

- b) *If so, does the dock qualify for the private dock exception of the Coastal Marshland Protection Act? O.C.G.A. § 12-5-282 (12).*

Yes.

5) *Injury*

- a) *Given that a significant section of the walkway has already been constructed, would additional construction injure the Plaintiffs? How?*

DNR has insufficient knowledge to be able to respond to this question.

- b) *What costs have Defendants Dana incurred in construction of the partially completed dock since construction began in December 2006? What percentage is this of the total construction costs? Exclude costs expended prior to receiving the license, including any design, engineering, planning, or permit application costs. Also note any costs expended prior to the start of construction in December 2006.*

DNR has insufficient knowledge to be able to respond to this question.

- c) *Do the dock modifications-including the narrower 4' walkway and the bridge over the primary creek-minimize the injury to Plaintiffs?*

DNR believes that there was no legally cognizable "injury" to Plaintiffs before the mentioned modifications were incorporated, and that any potential inconvenience to Plaintiffs with respect to accessing deeper water were minimized as a result of the bridging that was incorporated in the Revocable License.

d) *What would be the harm to Defendants Dana of a preliminary injunction?*

DNR has insufficient knowledge to be able to respond to this question.

Respectfully submitted this 26th day of January, 2007.

THURBERT E. BAKER 033887
Attorney General

ISAAC BYRD 101150
Deputy Attorney General



JOHN E. HENNELLY 347075
Senior Assistant Attorney General

Please Address All
Communications To:

JOHN E. HENNELLY
Senior Assistant Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
Telephone: (404) 656-7540
Facsimile: (404) 651-6341

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CERTIFICATE OF SERVICE

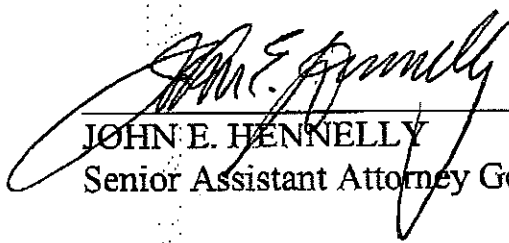
I do hereby certify that I have this day served the within and foregoing
**STATE OF GEORGIA DEFENDANTS' RESPONSE TO QUESTIONS
POSED BY THE COURT**, by hand delivering a copy thereof to:

Donald D. J. Stack, Esq.
Stack & Associates
7 East Congress Street, Suite 404
Savannah, Georgia 31401

Danial E. Bennett, Esq.
Assistant U.S. Attorney
Southern District of Georgia
100 Bull Street
Savannah, Georgia 31401

Timothy R. Walmsley, Esq.
Hunter Maclean
200 East Saint Julian Street
P.O. Box 9848
Savannah, Georgia 31412-0048

This 26th day of January, 2007.



JOHN E. HENNELLY
Senior Assistant Attorney General