

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

ELIZABETH E. CAIN;
DAVID KAMINSKY and
LARRY GIBSON,

Plaintiffs,

v.

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.

Case No. _____

MEMORANDUM IN SUPPORT OF PLAINTIFFS'
MOTION FOR TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION

Defendants Mark A. Dana and Frances M. Dana own property located at 1414 Walthour Road, Chatham County, Georgia on which they have begun to build a massive dock complex extending more than three football fields in length beginning at an upland area, across a vast expanse of saltmarsh, and over numerous tidal creeks, before ultimately ending with a covered deck, boat hoist and large covered boathouse reaching more than three stories above the surrounding ground elevation. Defendants Dana have commenced land-disturbing activity and construction pursuant to their plans.

This action seeks injunctive relief against the U.S. Army Corps of Engineers ("the Corps"), the State of Georgia Coastal Resources Division, Department of Natural Resources,

("DNR/CRD") its Director sued in her official capacity, and the Danas because the Corps and DNR/CRD violated the Rivers and Harbors Act of March 3, 1899, 33 U.S.C. §403 et. seq. by issuing a permit to Defendants Dana authorizing the destruction of the marsh and other jurisdictional waters in question. The Corps and DNR/CRD violated the Rivers and Harbors Act of March 3, 1899 by authorizing the destruction of marsh, interference with navigation and construction of a residential dock out of character with others in visual proximity, all in blatant contravention of State of Georgia Programmatic General Permit No. PG00083, 960009050 and the Coastal Marshlands Protection Act (CMPA) by utilizing the State PGP instead of the appropriate standards imposed by the CMPA. Defendants reviewed and approved the application in question by applying an exception to the law which, on the face of the application itself, rendered such exception inapplicable.

Plaintiffs now seek a Temporary Restraining Order and Preliminary Injunction preventing destruction of marsh, interference with navigation and construction of a residential dock complex that is out of character with others in visual proximity pursuant to the Revocable License authorizing such construction until a final decision on the merits. Preliminary relief is appropriate because: (1) Defendants' actions clearly violate federal law; (2) Plaintiffs will suffer immediate and irreparable harm as a result of the construction; (3) No substantial harm will occur to other interests if the construction is temporarily halted; and (4) The public interest demands that preventing the improper destruction of marsh be given priority over private recreational interests. Accordingly, the Court should temporarily restrain and preliminarily enjoin Defendants Dana from taking further steps to construct the dock complex until a valid review of the proposed activity pursuant to the federal Individual Permit process and/or State

CMPA permit process takes place.

STATEMENT OF FACTS

Defendants Dana are, upon information and belief, the co-owners of property referred to as 1414 Walthour Road, Savannah, GA, 31410. Defendants Dana propose to add an additional 770 feet to an existing 210 foot dock, hereinafter referred to as the "Dock Site." The letter granting the dock permit allows for:

additional 770' x 4' portion to your existing 210' x 4' walkway, removing the existing floating dock and adding a 16' x 24' fixed deck with 4 16' x 16' cover, two (2) 26' x 2.5' catwalks to 26' x 11' covered boat hoist, and a 3' x 12' ramp to 6' x 20' floating dock.

The plans for the dock include construction of a dock house, which when completed will be at least 25 feet above mean high water line, an area of covered dock, and an enclosed boathouse.

The ecology of the Dock Site consists of the interface of upland marsh, tidal areas and typical marsh flora and fauna, including Spartina alterniflora, shrimp, crab, oysters, clams and mussels, including the increasingly rare Salt Marsh Ribbed Mussel (*Neugensia demissa*). Oyster catchers, raccoons and other predators feed on the oysters, mussels and clams. Wading birds such as egrets, herons and clapper rails eat the snails, worms, fiddler crabs and other components of the food chain. The marsh area in question is frequented by scavengers and birds of prey, including ospreys, hawks and bald eagles. Marine mammals, such as the Atlantic Bottlenose Dolphin, frequent the marsh, particularly on rising and falling tides, where they

traverse the innumerable smaller channels to feed on small fish and crustaceans being swept along by the tidal changes. The area around the site includes many small creeks and other navigable waterways of the U.S.

On information and belief, in early June, 2006, Defendants sought authorization for the proposed Dock complex by applying to the United States Army Corps of Engineers (“the Corps”) for issuance of a Revocable License under Programmatic General Permit PGP0083 (96009050). Pursuant to § 10 of the Rivers and Harbors Act of March 3, 1899, the Savannah District of the Corps has jurisdiction over the proposed Dock Complex insofar as the site includes navigable waters of the United States. That agency has delegated authority to the State of Georgia to administer this State PGP, based upon the delegation which occurred on July 23, 2001.

The application as submitted consisted solely of a standard application form with general schematic drawings of the proposed dock complex. Nowhere in the application packet is there any evaluation or indication of site suitability of the proposed dock’s consistency with other area existing docks within visual proximity as required by State Programmatic General Permit No. PG00083, 96 0009050, Condition J.

There is no indication of the existence or extent of creeks and other waterways in the area, including any analysis of their navigability and impacts the proposed complex would have on that navigability as required by State Programmatic General Permit No. PG00083, 96 0009050, Condition I.

Unbeknownst to Plaintiffs, the Coastal Resources Division of the Georgia Department of Natural Resources on August 30, 2006 granted a Revocable License in response to the Defendants' application.

The dock itself is the length of approximately three and a half football fields, or nearly one thousand feet. Together with the floating dock, covered deck, boat hoist and enclosed boathouse, the complex is far and away the largest structure in or around the marsh for thousands of feet in either direction. The proposed dock complex will interfere with navigation and negatively impact the view from nearby properties. The proposed dock complex is not consistent with other docks within visual proximity, and in fact is many times longer and higher than any other dock in the Tom's Creek basin.

Without conducting a proper field reconnaissance that would have revealed the above deficiencies, the plans were approved. Proper evaluation of the site would have shown that the site does not meet the conditions of the so-called "Fast-Track" Programmatic General Process (hereinafter "PG P") but should have been evaluated under the Individual Permit Process because Conditions I and J were not met:

"Walkways crossing tidal tributaries navigable by watercraft must be bridged so that navigation is not impeded." State Programmatic General Permit No. PG00083, 96 0009050, Condition I.

...the dock structure shall...be structurally adequate and not out of character with other existing docks

within visual proximity of the proposed docks. State
Programmatic General Permit No. PG00083, 96
0009050, Condition J.

On or about the second week of December, 2006, a barge appeared at the proposed dock site. Plaintiff Cain immediately contacted DNR via e-mail to obtain information from that agency about what was proposed to occur. Upon learning the magnitude of the project, she immediately expressed her concerns that the proposed dock site would impede boat traffic on the navigable creek, obstruct her view and impact marsh ecology. On December 11, 2006, Plaintiff Cain wrote to the DNR on behalf of herself and other nearby property owners, again expressing their concerns regarding construction of the massive dock complex.

On or about December 19, 2006, Plaintiff Cain spoke with a DNR representative who informed her that the site plan would need to be revised to include a bridge to allow for passage of boats on one of the formerly navigable creeks that flow under the proposed dock extension.

On December 20, Plaintiff Cain spoke with Defendants Dana in an effort to request a meeting regarding stopping work on the dock until the site could be properly evaluated. Defendant Dana said he would meet with Cain after the holidays. Work continued on the dock. On December 29, 2006, Plaintiff Cain delivered a letter to Defendants Dana, again expressing her concerns and requesting a meeting with them. No response was provided by Defendants Dana. On January 1, 2007, Plaintiff Cain delivered a letter to Defendants Dana yet again expressing the concerns of the Plaintiffs and other nearby property owners. No response was provided by Defendants.

On or about January 2, 2007, Plaintiff Cain left a message for Defendants Dana asking that they immediately contact with Plaintiffs to further discuss the situation. As of January 8, 2007, Plaintiffs have not heard from Defendants Dana.

On information and belief, either the Corps or DNR have recently instructed Defendants Dana to modify the approved site plans for the Dock Complex, by requiring an elevated bridge/walkway to traverse the navigable creek. This modification occurred, again, without any meaningful site evaluation or analysis as to impact of the modification on navigation, viewshed, sightlines, and the fragile marsh ecosystem. These modifications were conducted with no engineering analysis or submittal of revised plans or public notice, and afforded Plaintiffs no opportunity for public notice and comment.

ARGUMENT

As detailed above, Plaintiff have presented the Defendants and this Court with evidence of the violation of the Programmatic General Permit (“PGP”) in question. Defendants’ utilization of the PGP. was arbitrary and capricious, an abuse of discretion, and is otherwise not in accordance with the law.

For a Temporary Restraining Order or Preliminary Injunction (collectively, “preliminary relief”) to be granted, 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). Evaluation of these factors weighs heavily in favor of granting preliminary relief staying the Permits.

I. PLAINTIFFS ARE LIKELY TO PREVAIL ON THEIR CLAIMS

In this action, the Plaintiffs claim, pursuant to the Administrative Procedure Act, 5 U.S.C. § 706, that the issuance of the Revocable License was arbitrary and capricious, was an abuse of the Corps' and DNR/CRD's discretion, was not supported by substantial evidence and otherwise was not in accordance with law. Specifically, the Corps and DNR/CRD made the erroneous decision that the proposed dock complex in question would not impede navigation and was not out of character with other existing docks within visual proximity of the proposed docks, and was therefore appropriate for coverage under the State PGP.

Section 10 of the Rivers and Harbors Act of March 3, 1899 authorizes the Secretary of the Army to delegate authority to the State of Georgia to administer a State Programmatic General Permit, as long as such permit is in compliance with the Act. The Section 10 permitting program is administered by the State of Georgia, Coastal Resources Division of the Department of Natural Resources. All dock construction and review activities must be authorized under a "permit" issued by the State¹.

The Corps' and the State's issuance of approval for the dock complex suffers from a number of fatal flaws.

First, the plans submitted by the Applicants made no reference to, or demonstrate the existence of, any tidal tributaries between the upland area and the deepwater channel nearly 1,000 feet away. In reality, as shown in the attached photographs attached to Cain Affidavit Exhibit 1, the area is crisscrossed by numerous tidal tributaries. At least 4-6 significant tidal creeks, all of which are used, or capable of being used, for navigation must be traversed. The

¹ This "permit" is actually a Revocable License to traverse the marsh and utilize the water bottoms of the State for the proposed activity.

proposed dock complex will impede navigation both directly and indirectly. Direct impedance will occur as a result of the structures themselves and extended pilings and decking that support the dock. See Affidavits of Cain and Gibson, attached hereto as Exhibits 1 and 2 respectively. See also the Declaration of Expert Witness, James Holland, attached hereto as Exhibit 3. Indirect damage occurs as a result of the accumulation of large masses of floating vegetation, called marsh wrack, which will collect in and around the structure and pilings. See Affidavits of Cain and Gibson and Declaration of James Holland, attached hereto as Exhibits 1, 2 and 3 respectively.

Second, the proposed dock complex is completely “out of character with other existing docks within visual proximity of the proposed docks,” in direct contravention of Condition J of the State Programmatic General Permit No. PG00083, 960009050. As noted at paragraph 52 of the Complaint, Condition J provides as follows:

...the dock structure shall...be structurally adequate and not out of character with other existing docks within visual proximity of the proposed docks. State Programmatic General Permit No. PG00083, 960009050, Condition J.

As fully described in the Affidavits of Plaintiffs Cain and Gibson, the character of this area of the Tom’s Creek basin is one of small, short docks that immediately terminate at the nearest tidal creek. In contrast, the dock complex itself proposed here will be nearly three and one-half times as long as any other dock in visual proximity. Additionally, the other docks within visual proximity do not traverse other creeks, thereby blocking those creeks traversed. Further, as also set out in the Affidavits of Plaintiffs Cain and Gibson, and that of expert witness James Holland, Altamaha Riverkeeper, docks of the size and magnitude proposed here impede

the normal flow of marsh creeks, thereby impeding navigation but to alter the visual and biological nature of the marsh in direct proximity to the dock.

In addition to the violations of the Rivers and Harbors Act of March 3, 1899 and the SPG detailed above, the Revocable License or authorization granted to Defendants Dana violated the Act and permit on its face. The SPG can only be used for private docks that are not subject to the related permitting and resource protections provisions of the Coastal Marsh Protection Act, O.C.G.A. 12-5-280 et seq. That Act, enacted in 1970, provides for a comprehensive, detailed analysis of proposed structures that will or have the potential to alter the marsh. Of critical importance is the requirement that such structures be reviewed by the Coastal Marsh Protection Committee, and only after a full opportunity of public notice, comment and a hearing.

There exists, of course, exceptions to the Act. However, in the case at bar, the Corps and DNR/CRD erroneously applied a "private dock" exception to the application. However, on its face, the application submitted by Defendants Dana and approved by the several Defendants demonstrates that such exception is inapplicable.

O.C.G.A. 12-5-282 (7) defines "Private dock" 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.

The drawings submitted on behalf of Defendants Dana, by its consultants, Maupin Engineering, attached hereto as Exhibit 4, reflect on the face of the drawings that there will be both a covered dock and an enclosed boathouse, the existence of which both render utilization of the State PGP illegal.

Nevertheless, the Defendants Corps and DNR/CRD issued a Revocable License on August 30, 2006 specifically referencing those drawings. See Revocable License, August 30, 2006, attached hereto as Exhibit 5.

To then compound the illegal authorization granted to Defendants Dana, the Corps and/or DNR then engaged in yet further illegal activity. Upon learning of the proposed dock complex, Plaintiffs Cain and Gibson immediately contacted Defendants Corps and DNR/CRD to express their concerns about the dock complex.

In response to these conversations, on information and belief, over the Christmas/New Year holiday season, representatives of the Defendants contacted Defendants Dana to advise them that the largest of the creeks, previously intentionally unidentified by Defendants Dana, would have to be bridged. Ostensibly under the guise of addressing Plaintiffs' concerns regarding navigation impedance, the Corps and DNR./CRD engaged in further arbitrary and capricious action. With no additional review of the dock complex, with no requirement for any engineering plans, with absolutely no evaluation of the ecological or environmental impacts of such action, and, as critically, with no opportunity for public notice and comment, the Defendants compounded their prior illegal action. However, as we all know,

two wrongs do not make a right. Notification or approval of a revision to the Revocable License is a direct violation of the Administrative Procedures Act, an abuse of discretion and otherwise not in accordance with the law.

Both factually and legally, Plaintiffs are likely to prevail on their claims.

Accordingly, Plaintiffs have met the first criteria for preliminary relief.

II. PLAINTIFFS WILL SUFFER IRREPARABLE INJURY IF PRELIMINARY RELIEF IS NOT GRANTED

The irreparable injury requirement focuses on the potential *for* a change in the position of the parties. “The purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court’s ability to render a meaningful decision on the merits.” *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 576 (5^o Cir. 1974). “The question of irreparable injury does not focus on the significance of the injury, but rather whether the injury, irrespective of its gravity, is *irreparable* — that is, whether there is any adequate remedy at law for the injury in question.” *Sierra Club v. Martin*, 71 F. Supp. 2d 1268, 1327 (N.D. Ga. 1996), *rev ‘don other rounds*, 110 F.3d 1551 (11^o Cit 1997); *Canal Auth.*, 489 F.2d at 575 (“Assuming that the threatened harm is more than *de minimis*, it is not so much the magnitude but the irreparability that counts for purposes of a preliminary injunction”).

In reviewing a Programmatic General Permit application, the DNR/CRD must foster the goals set out in the Rivers and Harbors Act of March 3, 1899, as well as the obligations imposed upon them to preserve and protect the marsh and natural resources of the State of Georgia.

Here, though, the Court need not rely solely on assumption. Plaintiffs' injury will be real and irreparable. If preliminary relief is not granted, the result will be that the marsh area subject to the Revocable License will be altered – the very definition of irreparable harm. As a sister court in this Circuit has recently noted in a case seeking to halt destruction of freshwater wetlands, as opposed to their ecological and biological counterpart—saltwater marsh:

[T]he Court's task is to determine whether plaintiffs have demonstrated that irreparable harm will ensue absent issuance of a preliminary injunction. The dredging and filling of wetlands *that* may occur while the Court decides the case cannot be undone and, if the end result is that the Corps should not have issued [the permit], irreparable harm will have occurred in the meantime. Plaintiffs' experts' opinions regarding the likely harm to Lake Powell and the wetlands in the [permitted area) merely serve to confirm this obvious point. *Sierra Club v. United States Army Corps of Eng 'vs.*, 399 F. Supp. 2d 1335, 1348 (M.D. Fla. 2005).

This harm to the environment will harm the Plaintiffs' interests because the ecological properties of the marsh and surrounding area will be lost. This harm will directly impact surrounding wildlife and aquatic life and degrade the quality of the marsh that Plaintiffs

use and enjoy. See Affidavits of Plaintiffs Cain and Gibson and Declaration of James Holland, Altamaha Riverkeeper, which detail the impacts on the marsh from the dock complex.

As a final matter, the Plaintiffs' non-monetary injuries cannot be redressed by monetary compensation. "No monetary award can recompense this injury; thus, there is no adequate remedy at law for these injuries." *Sierra Club v. Martin*, 71 F. Supp. 2d 1268, 1327 (N.D. Ga. 1996), *rev 'd on other grounds*, 110 F.3d 1551 (11th Cir. 1997) (granting preliminary injunction preventing logging in National Forests); *US. v. Malibu Beach, Inc.*, 711 F. Supp. 1301, 1313 (D.N.J. 1989) ("there is no adequate remedy at law to compensate the public for the harm caused by the disposal of fill material into waters of the United States or in wetlands"). Accordingly, Plaintiffs will be irreparably injured if the construction is allowed to go forward, and preliminary relief should be granted.

III. THE HARM TO PLAINTIFFS FROM DENIAL OF PRELIMINARY RELIEF OUTWEIGHS THE HARM, IF ANY, TO DEFENDANTS FROM ITS ISSUANCE

As the Supreme Court has noted, when environmental injury "is sufficiently likely ... the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987). Here, the Corps and DNR/CRD will suffer no harm if preliminary relief is granted. The responsibility of the Corps in implementing Section 10 of the Rivers and Harbors Act of March 3, 1899, Coastal Zone Management Act and other attendant environmental statutes is to minimize harm to the environment. This purpose will be served by granting relief.

Similarly, Defendants Dana will suffer little, if any, harm from a delay while the Court reaches a final decision on the merits, and certainly will suffer no harm that is irreparable. They will suffer, at most, a delay in the implementation of their construction plans.

IV. THE PUBLIC INTEREST FAVORS ISSUANCE OF PRELIMINARY RELIEF

The public interest will be served, and no legitimate public interest will be harmed, if the requested preliminary relief is granted. *Sierra Club v. Martin* stressed two reasons that preliminary relief was in the public interest. First, the importance of the human environment outweighs short-term economic interests, and second, “the public has an interest in preventing Defendants from acting in a manner inconsistent with the applicable law.” 71 F. Supp. 2d at 1329. Both reasons apply here.

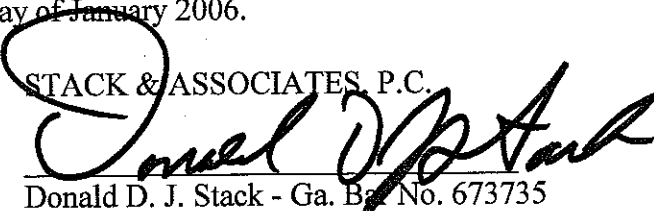
Environmental protection statutes generally declare a strong public interest in protecting water resources and assuring that federal agencies make informed permitting decisions. *See generally* 33 U.S.C. § 1251. Thus, the final factor also weighs in favor of granting preliminary relief.

CONCLUSION

The requirements for a preliminary injunction are fully satisfied in this case. Plaintiffs therefore request that the Court issue a Temporary Restraining Order and Preliminary Injunction staying the authorization granted by defendant United States Army Corps of Engineers and State of Georgia DNR/CRD under Rivers and Harbors Act of March 3, 1899 and State Programmatic General Permit No. PG00083, 960009050 to halt further construction of the dock complex at 1414 Walthour Road, Chatham County, Georgia.

Respectfully submitted this 17th day of January 2006.

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