

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

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

Plaintiffs,)

v.)

Civil Action 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.)

RESPONSE TO JANUARY 18, 2007, ORDER
BY THE UNITED STATES ARMY CORPS OF ENGINEERS

COMES NOW the United States Army Corps of Engineers and files its
Response to the questions posed by the Court in its Order of January 18, 2007, as
follows:

1) The Permitting Process and Timeline

a) What are the normal procedures for reviewing an application? Were those procedures followed in approving this dock?

Whether conducted by the United States Army Corps of Engineers, Savannah District (the “Corps”) or the by the State of Georgia Department of Natural Resources, Coastal Resources Division, (“DNR”), the normal procedure for obtaining permission to construct a private, single-family dock within one of Georgia’s eleven coastal counties is described in Programmatic General Permit 0083 (“PGP0083”). *See* Gov’t Ex. C.¹ In essence, the normal procedure for reviewing an application for construction of a single-family recreational dock consists of the regulators verifying that the information and plans submitted by the applicant complies with the specifications and terms and conditions of PGP0083.

If a question arises regarding whether the information and plans submitted in the application meet the specifications and terms and conditions of PGP0083, DNR refers the application to the Corps for further consideration and a

¹For ease of reference, Government Exhibits A (Mr. Gane’s letter to Senator Johnson), B (Senior Regulatory Branch Manger Mark Padgett’s January 16, 2007, Affidavit), B-1 (Digital Aerial Photograph), and B-2 (Walkway photograph) were attached to the Federal Defendant’s Opposition to Plaintiff’s Motion for a Temporary Restraining Order. (Dkt. # 13.) Government’s Exhibits C-H have been filed under the caption “Government’s Supplemental Exhibits C-H,” (Dkt. # ___), of even date.

determination of whether the proposed activity is authorized by PGP0083.

Specifically, PGP0083 *requires* submission of the following: (i) a completed Georgia Department of Natural Resources Application form; (ii) a location map and a site development plan; (iii) a verification of notification from all landowners who have property adjoining or abutting the tract or parcel of land upon which the proposed project is to be located or may impact; (iv) a completed Revocable Licence Request form or a Revocable License from the State of Georgia; (v) a copy of a descriptive deed, instrument of title, or other permission showing authorization to use the adjacent upland property; and (vi) “any other information that might be required in order to make an appropriate decision concerning the permit application. (Gov’t Ex. C, p. 9.) In addition, an applicant is advised that he or she “*may* be required to have the exact location of the dock located by a registered surveyor.” (Gov’t Ex. C, p. 9)(emphasis added).

When the application is determined to be complete, DNR typically reviews the materials submitted and “a decision to issue or deny the permit will be made within 60 days from the date the completed application is received.”² (Gov Ex. C,

²While the PGP0083 refers to the issuance or denial of a “permit,” instead, the DNR would instead issue a successful applicant notice that, based on the information and plan he or she submitted, that the DNR had determined that the proposed dock complies with the PGP0083's requirements. *See* Corps’ Answer to question 1(c), *infra*.

p. 9.) Applicants are advised to contact DNR “for application materials and confirmation that his/her project will be eligible under this Programmatic General Permit.” (Gov’t Ex. C, p. 9.) Again, applicants are also told that “[i]f the project does **NOT** qualify under the Programmatic General Permit, the application will be subjected to the Individual Permit process by the U.S. Army Corps of Engineers, Savannah District.” (Gov’t Ex. C, p. 9)(emphasis in original).

In the normal course, after DNR verifies that the information and plans in the application meet the specifications and terms and conditions of PGP0083, the application and a copy of the State Revocable License are forwarded to the Corps for its records. If the applicant violates any specification or term and condition of PGP0083 in the construction or maintenance of the structure, the Corps, at its discretion, may conduct a compliance inspection and, if determined necessary, the Corps may bring an enforcement action to obtain compliance with the specifications and terms and conditions of PGP0083 and § 10 of the Rivers and Harbors Act of 1899. *See generally* 33 C.F.R. § 326 *et seq.*

While the DNR may well wish to comment upon the particulars, if any, of their review of the Danas’ application, the Corps can speak to this issue only by stating that after the initiation of this litigation, the Corps followed standard procedures for ensuring the Danas’ dock complied with PGP0083. Specifically,

the Corps' Senior Regulatory Project Manager Mark Padgett performed a review of the information and plans submitted by the Danas contained in DNR's file. (Dkt. # 13, Gov't Ex. B, ¶ 3.) In addition, Mr. Padgett has now conducted two compliance inspections of the walkway and proposed dock pursuant to the standard procedures for PGP0083. (See Gov't Ex. D, Corps' Inspection Report dated January 12, 2007; see Gov't Ex. E, Corps Inspection Report dated January 22, 2007); 33 C.F.R. § 326 *et seq.*

With its compliance review completed, the Corps has verified the DNR's independent determination that the Danas' plans for the proposed dock, and the portion of the walkway that has already been constructed, complies with the specifications and terms and conditions of PGP0083. Specifically, Mr. Padgett has stated that after reviewing "the drawings, surveys, description of the dock, aerial photography and Global Imaging System maps, and upon my review of the State of Georgia's file for the Revocable License, I concluded that the proposed dock was in compliance with the terms and conditions of PGP0083, the Section 10 of the Rivers & Harbors Act of 1899 Programmatic General Permit." (Dkt. #13, Ex. B, ¶ 3.) As a result, it is the Corps' position that the procedures outlined in PGP0083 were followed in this case.

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

The Corps did not undertake any evaluation prior to the issuance of the August 30, 2006, revocable license because the Danas' application was presented to the DNR under the PGP0083. As a result, this question regarding the manner in which the DNR administered its revocable license program can best be addressed by counsel for the DNR.

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

The Corps has no knowledge as to notice given to the Plaintiffs prior to the commencement of construction. It is the Corps' position that notice to the Plaintiffs *was not required* under PGP0083 because verification of notification is required only "from all landowners who have property *adjoining or abutting* the tract or parcel of land within which the proposed project is to be located or may impact." (Gov't Ex. C, p.9)(emphasis added). A review of the DNR's file reveals that the Danas complied with this requirement when they provided certified mail receipts for notice sent to their adjacent neighbors, Dr. Mark Kamalson, 1412

Walthour Road, and Andrew Davis, 1410 Walthour Road.³ (Gov't Ex. F, Certified Mail Receipts.)

In addition, this question also raises a greater issue concerning notice to the public. While it is the Corps' position that prior to construction of the Danas' dock, the Plaintiffs were not entitled to notice under § 10 of the Rivers and Harbors Act of 1899 or the PGP0083, it is important to note that in creating PGP0083, the Corps did issue public notice on May 9, 2001, and, again, on July 21, 2006, pursuant to procedures for authorization of programmatic general permits. *See* 33 C.F.R §§ 320, 322, and 325; Gov't Exhs. G &H.

By way of background, Section 10 of the Rivers and Harbors Act of 1899 authorizes the Secretary of the Army, through the Chief of Engineers, to regulate construction of any structure, including walkways, floating and fixed docks, and pilings, in or over any navigable water of the United States. *See* 33 U.S.C. § 403; 33 C.F.R. § 322.2(b) (defining structures). Navigable waters of the United States are defined as those waters that are subject to the ebb and flow of the tide and/or that are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. 33 C.F.R. § 329.4. The Corps

³Upon information and belief, the lots are numbered in such a manner that the Danas' property, 1414 Walthour Road, is adjoined by lots numbered 1410 and 1412, rather than 1412 and 1416.

authorizes construction of such structures in navigable waters by issuing a permit.
33 C.F.R. § 320.2(b).

Permits come in two forms: individual and general. 33 C.F.R. §§ 320.1(c), 325.5. Individual permits are issued after a resource-intensive case-by-case review, involving, *inter alia*, evaluation of a specific structure or work, opportunity for public comment, a public interest review, and a formal determination. See 33 C.F.R. § 322.2(e) (defining individual permit), § 325 (policies and procedures to be followed in issuing permits) and § 320.4 (public interest review). By contrast, general permits are issued on a regional or nationwide basis in lieu of individual permits, “. . . for a category or categories of activities when: (1) those activities are substantially similar in nature and cause only minimal individual and cumulative environmental impacts; or (2) the general permit would result in avoiding unnecessary duplication of the regulatory control exercised by another Federal, state, or local agency provided it has been determined that the environmental consequences of the action are individually and cumulatively minimal.” 33 C.F.R. § 322.2(f). The Corps’ implementing regulations provide that the “general permit program . . . is the primary method of eliminating unnecessary federal control over activities which do not justify

individual control or which are adequately regulated by another agency.” 33 C.F.R. §§ 320.1(a)(3); 323.2(h).

When determining whether to issue a general permit authorizing activities pursuant to § 10 of the Rivers and Harbors Act of 1899, the Corps must conduct an evaluation pursuant to 33 C.F.R. §§ 320 and 325. A general permit complies if the Corps determines that the activities “are substantially similar in nature and cause only minimal individual and cumulative environmental impacts or the general permit would result in avoiding unnecessary duplication of regulatory control exercised by another Federal, state or local agency provided it has been determined that the environmental consequences of the action are individually and cumulatively minimal.” 33 C.F.R. §§ 322.2(f)(1) and (2). This evaluation is performed at the time of issuance of the general permit and need not be repeated when individual activities are undertaken pursuant to the permit.

There are three types of general permits: regional permits, nationwide permits, and programmatic permits. District Engineers are authorized to issue permits for activities on a regional basis in accordance with applicable regulations to Section 10 of the Rivers and Harbors Act of 1899. District Engineers are encouraged to develop joint procedures with States that have programs regulating similar activities. 33 C.F.R. §§ 322.3(a), 325.2(2)(3), 325.8(b). After a regional

permit has been issued, individual activities falling within that category do not have to be further authorized by the procedures at 33 C.F.R. §§ 320 and 325.

In 2001, pursuant to 33 C.F.R. §§ 320, 322, and 325, the Savannah District processed a programmatic general permit to modify an existing programmatic general permit to authorize construction and maintenance of private residential, single-family, non-commercial recreational docks and appurtenant structures, in tidal waters of the United States in the eleven coastal counties of Georgia. In the absence of overriding public interest, favorable consideration will generally be given to applications from riparian owners for permits for piers, boat docks, moorings, platforms and similar structures for small boats. 33 C.F.R § 322.5(d). The Corps issued a joint public notice for the proposed programmatic general permit on May 9, 2001. The Corps performed a public interest review and considered the impacts of the activities, performed an alternative analysis as required by 33 C.F.R. §§ 320, 325, and made a finding that construction and maintenance of single-family recreational docks and appurtenant structures, individually and cumulatively, had no significant adverse effects on the quality of the human environment. The District issued programmatic general permit PGP0083 with special conditions on July 23, 2001. The permit was to expire on July 23, 2006. (See Gov't Ex. C, p. 3)

On July 21, 2006, the Corps issued a joint public notice to federal, state, local agencies and the public regarding the proposed extension of the authorization under PGP0083. (*See* Gov't Ex. G, Case Document and Environmental Assessment dated June 21, 2006.) The Corps performed another public interest review and considered the impacts of the activities, performed an alternative analysis as required by 33 C.F.R. §§ 320, 325, and made a finding that construction and maintenance of single-family recreational docks and appurtenant structures, individually and cumulatively, had no significant adverse effects on the quality of the human environment. *Id.* Thereafter the District extended the authorization of PGP0083 until July 23, 2007. (*See* Gov't Ex. C, p. 17.)

To avoid duplicative work and provide a more economical permit process for the public, PGP0083 authorizes the State of Georgia to administer the permit in conjunction with its revocable license program administered by the DNR. The DNR *does not* perform an evaluation pursuant to 33 C.F.R. §§ 320 and 325 or make a determination whether to authorize the construction of single-family recreational docks in tidal waters of the United States pursuant to the Rivers and Harbors Act of 1899. The DNR simply verifies that the information and plans submitted with an application to use State-owned tidal water bottoms for construction of a dock complies with the specifications and terms and conditions

outlined in PGP0083.

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

This question can best be addressed by counsel for Mr. and Mrs. Dana. The Corps can state, however, that based upon the observations of Mr. Padgett made on January 12, 2007, "all the pilings for the walkway were driven, nearly all of the decking for the walkway was laid on the pilings, and approximately 75% of the decking was fixed to the pilings" as of that date. (Dkt. #13, Ex. B, ¶ 4.)

2) Condition J

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

The Corps takes the position that the determination of whether a proposed dock is within "visual proximity" of other existing docks of necessity must be left to the discretion of the agency reviewing the information and plans submitted by the applicant and determined on a case-by-case basis.

The determination of "visual proximity" is, as stated in Condition J of PGP0083, made from the location of the proposed dock to any existing docks - " . . . the dock structure shall be constructed of uniform materials and be structurally adequate and not out of character with other existing docks within visual proximity of the proposed docks." (Gov't Ex. C, p.4.)

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

Yes. The Corps will rely on the Affidavit of Mark Padgett and his attached exhibits of record, prepared shortly after his site visit on January 12, 2007. (Dkt. # 13, Ex. B, ¶ 3 (“there were other docks within visual proximity that were similar in length and design to this authorized dock”), Ex. B-1 (Digital Aerial Photo of proposed dock and other docks in the vicinity), and B-2 (photograph of the Danas’ dock)). *See also* Corps’ Answer to Question 2(c).

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?

As the view to the South when standing on the upland-high marsh boundary (“shoreline”) of the Danas’ property is obstructed by trees, extended walkways and covered docks are visible first when standing approximately thirty-five feet (35’) from the shoreline on the *existing* 210-foot (210’) dock. (*See* Gov’t Ex. E, p.2, photographs numbers 1, 4-11.) Of course, extended walkways and covered docks are also visible when standing on the extension to the existing walkway. (*See* Gov’t Ex. E, p.2, photographs numbers 16, 17.) In addition, the Corps has learned that a covered dock is visible to the North when standing on the shoreline

of the Danas' property. (See Gov't Ex. E, p. 2, photograph number 2.)

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?

The Corps did not undertake any evaluation prior to the issuance of the August 30, 2006, revocable license because the Danas' application was presented to the DNR under the PGP0083. As a result, this question regarding the manner in which the DNR administered its revocable license program can best be addressed by counsel for the DNR.

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

This question may well be best addressed by counsel for Mr. and Mrs. Dana and/or the DNR. The Corps would note, however, based upon its two site visits, that the type of boat access afforded by other docks in the area is varied. Some docks in this vicinity terminate in areas which are likely to be inundated by water for short time periods occurring only at or around high tide, i.e., constructed in "high-marsh" areas. (See Gov't Ex. B-1). Other docks in the vicinity terminate in areas adjacent to tidal tributaries that are inundated by water for longer periods occurring during both high and low tides. (See Gov't Ex. B-1.)

3) Condition I

a) What qualifies as a “tidal tributary navigable by watercraft?”

The Corps takes the position that a determination of whether a tidal tributary is navigable by watercraft must, of necessity, be left to the discretion of the agency and should be determined on a case-by-case basis considering factors such as channel size and depth, historical use, and location of the tidal tributary, among other factors that the agency finds informative at such time as the determination is made.

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

One tidal tributary navigable by watercraft is crossed by the proposed dock extension. The attributes of this tributary, based on observations by Mark J. Padgett, as documented in his January 22, 2007, Inspection Report, (Gov't Ex. E), are that it is 14-feet to 18-feet wide at the top of the channel measured from the existence of marsh grass on either side of the channel and the observation that it would likely contain water during most of the tidal cycle.

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?

The Corps did not undertake any evaluation prior to the issuance of the

August 30, 2006, revocable license because the Danas' application was presented to the DNR under the PGP0083. As a result, this question regarding the manner in which the DNR administered its revocable license program can best be addressed by counsel for the DNR.

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?

The Corps takes the position that the proposed walkway and dock will not have an adverse effect on navigation within navigable waters of the United States, including all of the tributaries crossed by the proposed walkway and dock. The proposed walkway and dock do not prohibit Plaintiffs or other dock owners in the area from accessing "deep water" from their respective docks. (*See Gov't Ex. e, p.2.*)

4) Coastal Marshland Protection Act

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

This question is best addressed by counsel for Mr. and Mrs. Dana and/or the DNR.

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).

This question is best addressed by counsel for Mr. and Mrs. Dana and/or the

DNR.

5) Injury

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

This question is best addressed by counsel for Plaintiffs.

b) What costs have Defendants Dana incurred in construction of the partially completed dock since construction began in December of 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.

This question is best be addressed by counsel for Mr. and Mrs. Dana.

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

This question is best be addressed by counsel for Mr. and Mrs. Dana and counsel for the Plaintiffs.

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

This question is best addressed by counsel for Mr. and Mrs. Dana.

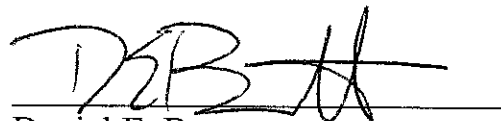
Conclusion.

For the reasons stated in its opposition materials, (Dkt. #13), during the January 17, 2007, hearing, and herein, the Corps respectfully submits that Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction, (Dkt. #2), should be denied.

This 24th day of January, 2007.

Respectfully submitted,

LISA GODBEY WOOD
UNITED STATES ATTORNEY

A handwritten signature in black ink, appearing to read 'D E Bennett', written over a horizontal line.

Danial E. Bennett
Assistant United States Attorney
Georgia State Bar No. 052683

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of a copy the foregoing Response to January 18, 2007, Order by the United States Army Corps of Engineers has this 24th day of January, 2007, has been mailed to the following:

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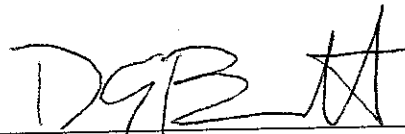
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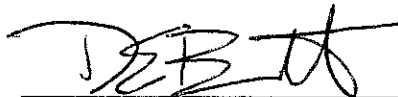
UNITED STATES ARMY CORPS OF ENGINEERS'
SUPPLEMENTAL EXHIBITS C-H

COMES NOW the United States Army Corps of Engineers and files its
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(Dkt. # __), filed on even date.

This 24th day of January, 2007.

Respectfully submitted,

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UNITED STATES ATTORNEY



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