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U.S. DISTRICT COURT  
SAVANNAH DIV.

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

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**COPY**

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. CV407-06

**PLAINTIFFS' RESPONSES TO**  
**INTERROGATORIES PROPOUNDED**  
**IN ORDER DATED JANUARY 18, 2007**

COME NOW Plaintiffs in the above-captioned matter and hereby submit the following answers to the interrogatories propounded to the parties in this Court's 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?*

**Answer:**

The proper procedures for reviewing the application at issue in this matter were not followed. Importantly, any review of the Danas' application under the

State Programmatic General Permit ("PGP"), PG00083 ("PGP 83") was inappropriate. The application submitted by the Danas failed to meet the requirements for coverage under PGP 83. Specifically, PGP 83 does not apply when the proposed dock is either [1] larger in size than that allowed by the maximum dimensions set forth in the permit or [2] out of character with other existing docks within visual proximity. If the proposed dock does not adhere to all criteria under PGP 83, then an Individual Permit is required.

As the evidence clearly indicates, the dock at issue in this matter requires an Individual Permit. In fact, the Georgia Department of Natural Resources, Coastal Resources Division's ("DNR CRD") own actions and explanations pertaining to this matter clearly indicate that this matter was not suitable for review and permitting under PGP 83. *See* Correspondence of January 5, 2007 from Brad Gane, Assistant Director for Ecological Services, DNR CRD, to Senator Eric Johnson, attached hereto for the Court's ready reference as Exhibit 1. *See also*, Federal Defendant's Opposition to Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction, pages 4-5 (acknowledging that the statements contained in Mr. Gane's letter provide an accurate characterization of the matter).

As discussed in further detail below in response to Question 2(b), there are no other docks in the area that are similar in character to Defendant Dana's proposed dock. *See* Exhibit 3, ¶ 38. In fact, most lots south of the Dana property have no docks. *See* Affidavit of Elizabeth Cain, ¶ 38, Exhibit T. At the end of the

tributary's reach is a short 75 foot dock. *Id.* The docks located north of the Dana property are in keeping in size and character with the pre-existing Dana dock, and are, at maximum, 250 feet in length. *Id.*

Notably, Mr. Gane of DNR CRD admits that the dock is out of character with other existing docks within visual proximity. Not only does he state that "the proposed dock is **longer than others in the neighborhood,**" (emphasis added), but he specifically notes that it is not possible for docks similar to the proposed dock to be present in this area due to the unique characteristics of the tidal channels in the area making it difficult to reach deeper water. Thus, according to DNR, Defendant Dana's proposed dock was a one-of-a-kind for the area and not conducive for review under the General Permit, PGP 83. *See also*, Exhibit 2, a true and correct copy is attached hereto (a true and correct aerial image of the Tom Creek Basin which was provided DNR CRD by ES&T, Defendant Dana's own consultants as part of the permit application).

This fact is further supported by Mr. Gane's own admissions that the permitting of this proposed dock involves "*unique circumstances.*" As Mr. Gane notes, those unique circumstances center around the fact that the proposed dock does not comport with other docks in the area and that it is impossible for there to be other docks in the area comparable to Defendant Dana's proposed dock. Interestingly, Mr. Gane mentions the *uniqueness* of this matter no less than three times in his one and a half page correspondence. The very fact that the proposed dock presents unique circumstances indicates that it was not conducive for review

and permitting under the General Permit scheme.

In addition to the unique characteristics involved in this matter and the fact that the DNR openly admits that Defendant Dana's proposed dock was out of character with the docks in the area, the very fact that the originally issued permit required subsequent modifications indicates that it was not appropriate for the "fast-track" consideration under PGP 83. In this instance, the permit was subsequently modified to address concerns regarding both the proposed dock's environmental impact on marsh areas as well as its interference with navigable channels.

As Defendants acknowledge, the purpose of the General Permit is to limit the need for case-by-case review of those activities that are substantially similar in nature and cause only minimal individual and cumulative environmental impacts. *See* Federal Defendant's Opposition to Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction at page 4.

Because Defendant Dana's proposed dock failed to meet the requirements of the general permit, PGP 38, an Individual Permit was required.

In addition to an Individual Permit, Defendant Dana's proposed dock also required a Coast Marshlands Protection Act Permit. Notably, the dock at issue in this matter is not exempt from regulation under Georgia's Coastal Marshlands Protection Act ("CMPA"). While the CMPA does provide an exception from permitting for private docks, Defendant Dana's proposed dock does not qualify for the private dock exception. O.C.G.A. § 12-5-295 (7).

Pursuant to O.C.G.A. § 12-5-295 (7), an exception from the permitting requirements of the CMPA is provided for:

(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...

O.C.G.A. § 12-5-282 (12) of the CMPA 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.

(emphasis added). The project description submitted in connection with the permit application for PGP 83 on behalf of Defendants Dana, by its consultants ES&T, states that the proposed dock will include a covered/enclosed fixed deck and that the enclosed deck will be screened above four (4) feet. Because Defendant Dana's dock has enclosures as well as screening higher than three feet, it does not meet the definition of a private dock and thus, does not qualify for the private dock exception.

Additionally, Plaintiffs contend that Defendant Dana's proposed dock complex creates a navigation hazard as it obstructs Plaintiffs' ability to navigate to Tom Creek and impedes the flow of navigation on Tom Creek. Specifically, as addressed in more detail below, Defendant Dana's proposed dock blocks Plaintiffs', as well as other neighbors', most common and historically used access to Tom Creek. See Affidavit of

Elizabeth Cain, ¶ 40; Affidavit of Larry Gibson,, a true and correct copy of which is attached hereto as Exhibit 4, ¶¶ 6, 9; *See also*, Exhibit 1 (acknowledging that other neighbors in the area use these tributaries to navigate through the marshlands). The proposed dock complex also impedes navigation on Tom Creek as it blocks a significant portion of Tom Creek. *See* Affidavit of Elizabeth Cain ¶ 8. *See also* Exhibit 1, Affidavit of Elizabeth Cain attached to Plaintiffs' Motion for Temporary Restraining Order and Motion for Preliminary Injunction, ¶ 17 and Exhibit 2, Affidavit of Larry Gibson attached to Plaintiffs' Motion for Temporary Restraining Order and Motion for Preliminary Injunction, ¶ 12.

The Coastal Marshlands Protection Act ("CMPA"), O.C.G.A. § 12-5-280 et seq. sets forth the appropriate standard of review for evaluating and permitting the dock structure at issue in this matter. Pursuant to the CMPA, the dock structure is to be evaluated and permitted by the Coastal Marshlands Protection Committee after a *full review of the potential impacts and an opportunity for public notice, comment and a hearing*.

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

**Answer:**

Prior to issuance, the only review that was conducted, which was cursory at best, was done by DNR. The very fact that this Court has presented these questions to the Parties, unequivocally demonstrates that an adequate analysis in

this matter was not conducted.

It is abundantly clear from the record in this matter that DNR did very little to no evaluation of this matter prior to issuing the permit to Defendants Dana. According to DNR CRD's own explanation of the permitting process, it appears that DNR did not conduct an evaluation, in the true sense of the word, but merely provided a rubber-stamp approval of the application. *See* Exhibit 1 (providing the following explanation of the process: "The DNR CRD experience is that applicants seek to maximize the size dock to be built and that they are willing to go to great distance to reach deeper water. The DNR CRD position has been that if an applicant is riparian and his lot is dockable, approval is usually granted").

Only after the permit was issued and subsequently questioned by Plaintiffs did Mr. Gane with DNR CRD attempt to justify DNR's position. He then stated that "the dock was approved based on the reasonableness of the proposal and because the proposal was found to be consistent with the PGP guidelines and other docks approved by the DNR CRD." *Id.* Notably, Mr. Gane fails to provide any evidence supporting this statement. Even more interesting, however, is that Mr. Gane's own statements directly contradict this position. As discussed in greater detail above in response to Question 1(a), and more fully below, Mr. Gane acknowledges that the proposed dock is out of character with the surrounding docks in the area. *See Id.* (stating that "the proposed dock is **longer than others in the neighborhood,**" and that "the circumstances at this site [Defendants Dana

proposed dock] are unique for the area) (emphasis added).

As previously indicated, prior to issuance, the only review of the permit, which was cursory at best, was conducted by DNR. The U.S. Army Corps of Engineers ("Corps") **did not** conduct any evaluation of the Revocable License issued to Defendants Dana in this matter. In fact, the first time the Corps was even aware of this matter was after the permit was issued, in which case, the Corps provided nothing more than a post-hoc rationalization for the issuance of the permit. See Affidavit of Mark J. Padgett, Exhibit B to Federal Defendant's Opposition to Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction. Notably void from Mr. Padgett's affidavit is any discussion regarding the character of Defendant Dana's proposed dock in comparison with other docks in the area. *Id.* In fact, despite the fact that Mr. Padgett conducted a site visit to review the dock, Mr. Padgett makes no mention whatsoever of the size, type and character of the other docks in the area. *Id.* This is most curious since one of the fundamental requirements for determining whether an activity is authorized under PGP 83 is whether the character of the proposed dock comports with that of surrounding docks.

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

None. Under the Programmatic General Permit, only adjacent property owners are required to be given notice. See PGP 83. However, the notice requirements of the General Permit are inconsistent with the analysis that is



required to be conducted. Clearly it was intended that the notice provisions of the General Permit would be more extensive since the permit itself requires an evaluation of the proposed project in the context of visual proximity. *See* PGP 83. Accordingly, by definition, notice should be given to anyone in the visual proximity of the permitted activity.

The first notice Plaintiffs received of the intended dock construction was the arrival of a huge barge with a crane on December 6, 2006. Affidavit of Elizabeth Cain at ¶3. Notably, the adjacent property owners were not actually aware of the size and magnitude of Defendant Dana's proposed dock and its impact on the marsh ecosystem. *Id* at ¶7.

**Answer:**

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

**Answer:**

Defendants Dana first received notice of Plaintiffs' concerns well in advance of Plaintiffs' filing of the Complaint in this matter. In fact, Defendants Dana first received notice of Plaintiffs' concerns on December 20, 2006 when Plaintiff Elizabeth Cain spoke with Defendant Mark Dana in person regarding the matter. *See* Affidavit of Elizabeth Cain, ¶ 13, *See also*, Affidavit of Elizabeth Cain, Exhibit 1 to Supplement to Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction for timeline and photographic documentation. At this time, Ms. Cain informed Mr. Dana that she

wished to meet with him and other property owners in the area to discuss their concerns about the Dana's proposed dock. *Id.* Despite Mr. Dana's indication that he would do so after the holidays, Ms. Cain did not hear from Mr. Dana. *Id.*

On December 29, 2006, the Dana's were provided with written notice of Plaintiffs' concerns. *Id.* at ¶ 16, Exhibit 3-E. ("On December 29, no one was home at the Dana residence so I placed a letter in the Dana mail box from me personally to the Danas outlining my concerns and asking for a meeting). On December 31, 2006, Ms. Cain called the Dana residence to follow up. *Id.* at ¶ 18. Ms. Cain again provide written notice of Plaintiffs' concerns in this matter to Defendants Dana on January 1, 2007 when she hand delivered a letter from herself and nearby property owners to Frances Dana. *Id.* at ¶ 19. At this time, Ms. Cain also told Ms. Dana that she would like to coordinate an in-person meeting to discuss these concerns. *Id.* That evening, Ms. Cain called the Dana residence to follow-up. *Id.* at ¶ 20. Another follow-up call was placed on January 2, 2007 to which Plaintiffs received no response. *Id.* at ¶ 21. During Plaintiffs' efforts to contact Defendants Dana to discuss their concerns, work continued on Defendant Dana's dock.

On January 8, 2007, after several failed attempts to discuss the matter with Defendants Dana and continued construction of the dock, Plaintiffs filed their Complaint and Motion for Temporary Restraining Order and Preliminary Injunction. *Id.* at ¶ 25. Defendants Dana were personally served with a copy of Plaintiffs' Complaint and Motion on January 9, 2007.

Contrary to the misrepresentations made by Defendants during the hearing on this matter, work **did not** cease after Plaintiffs filed suit, nor even after Plaintiffs served Defendants, nor even after Defendants were made aware of the hearing on Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction. In truth, on January 15, 2007, a full six days after Defendants Dana were served with the Complaint and Plaintiffs' Motion as well as this Court's Order setting forth a hearing on the motion, Plaintiffs observed continued construction activities on the dock. *Id at ¶¶ 26-30, Exhibits 3-1 to 3-L.*

2) Condition J

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

Answer:

There are no regulations defining visual proximity. Rather, visual proximity takes on its plain meaning of that which lies within a viewshed or line-of-sight. In determining how to measure and from where to measure visual proximity, it is clear in this context that the only sensible answer is that visual proximity is measured from the interface of the marsh and the upland (the shoreline).

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

Answer:

No. There are no other docks in the area that are similar in character to the

proposed dock. In fact, as DNR has expressly acknowledged, Defendant Dana's proposed dock is entirely unique for the area. *See* Exhibit 1 (stating that "the circumstances at this site [Defendants Dana proposed dock] are unique for the area). Mr. Gane specifically notes that all the other docks in the area were similar to the existing dock extending from the Dana's property, which was much shorter (only 210 feet) and ended in a small creek. *Id.*

Most lots south of the Dana property have no docks. *See* Affidavit of Elizabeth Cain, ¶ 37, Exhibit 3-T. At the end of the tributary's reach is a short 75 foot dock. *Id.* The docks located north of the Dana property are in keeping in size and character with the pre-existing Dana dock, and are, at maximum, 250 feet in length. *Id.* With regard to the covered boathouses, there is only one small boathouse at the end of a dock that is no more than 250 feet in length in the Tom Creek Basin. *Id.*

It is important to note that Defendant Dana's proposed dock is located in the Tom Creek basin as opposed to First Creek basin. Significantly, First Creek, which includes docks somewhat similar in character to the proposed dock, is characterized as having deep water at all tides; *See also* Affidavit of Elizabeth Cain submitted with Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction (attaching photographs of the Tom Creek basin).

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?*

**Answer:**

As explained in response to Question 2(a), the issue at hand is not whether the docks are visible from the Dana's new or pre-existing dock, but what is visible from the land. In particular, this issue is what is visible from Plaintiffs' properties and what impact does the proposed dock have on the views from Plaintiffs' properties.

Plaintiffs note that the docks referenced in the Corps Exhibit B-1, are not comparable to Defendant Dana's proposed dock. Not only are the docks referenced by the Corps not comparable in size, but the hydrology of the area in which they are located is entirely different from that of Defendant Dana's proposed dock.

Defendant Dana's proposed dock seeks to extend the already existing 210' dock by 770', a combined length of 980', which is two to two and one half times longer than the docks identified by the Corps. Furthermore, the docks referenced in the Corps Exhibit B-1, are not comparable in character to Defendant Dana's proposed dock as they lie in an entirely different tidal basin. Significantly, the docks referred to by the Corps are located on First Creek which has deep water at all tides. ; *See also* Affidavit of Elizabeth Cain submitted with Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction (attaching photographs of the Tom Creek basin).

While on a very clear day these docks are visible way off in the distance, on the far horizon, from the Dana property, the pre-existing dock and from the end of the newly constructed large dock on the Dana property, they do not serve as an adequate comparison to Defendant Dana's proposed 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?*

**Answer:**

No. There is absolutely no evidence in the record anywhere to indicate that DNR or the Corps made any determination and/or evaluation of other docks in the area prior to issuing the permit. After the permit was issued, DNR expressly acknowledged that Defendant Dana's proposed dock was not consistent with other docks in the area. See Exhibit 1. In fact, Mr. Brad Gane with DNR CRD admits that Defendant Dana's proposed dock is longer than any of the other docks in the neighborhood and that it is unique compared to other docks in the neighborhood. *Id.* Significantly, Mr. Gane also acknowledges that the area is not conducive for docks similar to that proposed by Defendants Dana.

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

**Answer:**

Other docks in the area have boat access via tidal creeks and tributaries in an expanse to which Plaintiffs refer to as the Toms Creek Basin. See Affidavit of Elizabeth Cain at ¶ 38-40, Exhibit 3-U.

As previously indicated, most docks in the area are in keeping in size and character with the pre-existing Dana dock, and are, at a maximum, 250 feet in length. See Affidavit of Elizabeth Cain at ¶ 38. These docks extend only to the small tributaries providing access to Tom Creek. See Affidavit of Elizabeth Cain, ¶ 40; Affidavit of Larry Gibson, ¶ 6, *See also*, Exhibit 1 (noting that other docks in the area extend only to the small creek) and Exhibit 2 (aerial photograph of the Tom Creek basin area).

3. *Condition I*

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

Answer:

Tidal tributaries are 'navigable' by definition. Pursuant to the Corps' own regulations, navigable waters are those waters subject to the ebb and flow of the tide. 33 C.F.R. § 329.4. In addition, while the Corps acknowledges that the precise definition of 'navigability' is ultimately dependent on judicial interpretation, 33 C.F.R. § 329.3, well settled caselaw clearly supports this definition. In *Kaiser Aetna v. United States* the Supreme Court held that the 'ebb and flow test' is a valid test of navigability. *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979). Additionally, several circuit courts have adopted the 'ebb and flow test' as the determinative test for navigability. See *United States v. Angell*, 292 F.3d 333, 337 (2d Cir. 2002); *United States v. Tull*, 769 F.2d 182, 188 (4th Cir. 1985); *United States v. De Felice*, 641 F.2d 1169, 1175 (5th Cir. 1981); *American Dredging Co. v. Selleck*, 556 F.2d 180, 181 (3d Cir. 1977) and *United*

*States v. Stoeco Homes, Inc.*, 498 F.2d 597, 610 (3rd Cir. 1974).

The Corps' regulations refers to ships, boats, barges and rafts as all being 'watercraft.' 33 C.F.R. § 245.5. Moreover, throughout Title 33, the Corps refers to 'watercraft' as an "artificial contrivance used, or capable of being used, as a means of transportation on water." 33 C.F.R. § 95.010; 33 C.F.R. § 107.200; 33 C.F.R. § 138.20; etc.

Thus, by the Corps own regulations and federal case precedent, a "tidal tributary navigable by watercraft" is any water subject to the ebb and flow of the tide which allows navigation by an artificial contrivance - such as a motorboat, a flat bottom raft, kayak or canoe. It is clear that the area in question is a "tidal tributary navigable by watercraft."

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

**Answer:**

The proposed dock extension crosses at least four tributaries. Pursuant to the permit modification, only one of the four tributaries is bridged, thereby obstructing access to three of these tributaries. In fact, the creek where the pre-existing Dana floating dock once was is now completely obstructed and inaccessible. Importantly, this creek was traditionally used to access Tom Creek. See Affidavit of Elizabeth Cain, ¶ 40, 3-U; Affidavit of Larry Gibson, ¶ 6; See also, Exhibit 1 (acknowledging that other neighbors in the area use these



tributaries to navigate through the marshlands). The smaller tributaries allow for unimpeded flow of water to the upland marsh and provide alternative courses of navigation.

- 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?*

**Answer:**

No. There is absolutely no evidence in the record to suggest that DNR or the Corps made any determination regarding the navigability of these tributaries or the impacts of the proposed dock extension upon them **prior** to issuing the permit. See Complaint, ¶ 49. However, the very fact that the permit was subsequently modified to require a bridge over one of the four tributaries Defendant Dana's proposed dock crosses, clearly indicates that the proposed dock impedes the navigability of the area.

- 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?*

**Answer:**

As set forth above, DNR admitted that the dock obstructs the navigability and traditional use of the waters in the area. See Exhibit 1. The very fact that the permit was subsequently modified to require a bridge over one of the four

tributaries Defendant Dana's proposed dock crosses, illustrates that the proposed dock impedes the navigability of the area.

As previously indicated, Defendant Dana's proposed dock extension crosses at least four tributaries. Pursuant to the permit modification, only one of the four tributaries is bridged, thereby obstructing access to the three other tributaries. In fact, the creek where the pre-existing Dana floating dock once was is now completely obstructed and inaccessible. Significantly, this creek was traditionally used by Plaintiffs and others in the area to access Tom Creek. *See* Affidavit of Elizabeth Cain, ¶ 40; Affidavit of Larry Gibson, ¶ 6; *See also*, Exhibit 1 (acknowledging that other neighbors in the area use these tributaries to navigate through the marshlands). The wrack build-up due to the Dana's dock extension threatens to fill in the smaller creeks and forever destroy the neighbors' access to deep water. *See* Exhibit 2, Affidavit of Larry Gibson, ¶ 9 and Exhibit 3, Declaration of James Holland, ¶¶ 19 and 29, both attached to Plaintiffs' Motion for Temporary Restraining Order and Motion for Preliminary Injunction

In addition to blocking navigation to Tom Creek the proposed dock complex will impede navigation on Tom Creek. *See* Affidavit of Elizabeth Cain ¶ 8. *See also* Exhibit 1, Affidavit of Elizabeth Cain attached to Plaintiffs' Motion for Temporary Restraining Order and Motion for Preliminary Injunction, ¶ 17 and Exhibit 2, Affidavit of Larry Gibson attached to Plaintiffs' Motion for Temporary Restraining Order and Motion for Preliminary Injunction, ¶ 12. Specifically, the

proposed dock will block a significant amount of the already narrow Tom Creek channel. See Affidavit of Elizabeth Cain at ¶ 8-9.

4. *Coastal Marshlands Protection Act*

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

**Answer:**

The project description submitted in connection with the permit application for PGP 83 on behalf of Defendants Dana, by its consultants ES&T, and incorporated into the permit conditions, specifically states that the proposed dock will include a covered/enclosed fixed deck and that the enclosed deck will be screened above four (4) feet. On its face, the permit impermissibly authorizes the installation of 4' wainscoting and screening in violation of the express provisions of the exemption.

b) *If so, does the dock qualify for the private dock exception of the Coastal Marshland Protection Act?*

**Answer:**

No. The proposed dock does not qualify for the private dock exception under the Coastal Marshlands Protection Act. The private dock exception is set forth at O.C.G.A. § 12-5-295 (7), which provides an exception from the permitting requirements of the CMPA for:

(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...

O.C.G.A. § 12-5-282 (12) 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 project description submitted in connection with the permit application for PGP 83 on behalf of Defendants Dana, by its consultants ES&T, states that the proposed dock will include a covered/enclosed fixed deck and that the enclosed deck will be screened above four (4) feet. Because Defendant Dana's dock has enclosures as well as screening higher than three feet, it does not meet the definition of a private dock and thus, does not qualify for the private dock exception.

Additionally, Plaintiffs contend that the dock does not qualify for the private dock exception because Defendant Dana's dock complex creates a navigation hazard.

5. *Injury*

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

**Answer:**

Yes, absolutely. Actually a significant portion of the dock has yet

to even be constructed. Further, much of the construction that has begun is incomplete. Although the pilings and joists have been installed, most of the decking for the walkway has not been properly spaced or nailed down at this point. In fact, except for approximately the first 200 feet, the decking has been laid down, but not properly spaced and nailed. The railings have not yet been installed on any of the walkway. In addition, the following items have yet to be constructed:

- ▶ the 16' x 24' fixed dock
- ▶ the 16' x 16' covered deck
- ▶ the 26' x 11' covered boat hoist
- ▶ the two (2) 26' x 2.5' catwalks to the 26' x 11' covered boat hoist
- ▶ the 6' x 20' floating dock
- ▶ the 3' x 12' ramp to the floating dock
- ▶ additionally, the pilings still have to be sunk for these portions and power and lights installed.

Construction of these items will obstruct Plaintiffs' view as well as impact their use and enjoyment of the marsh. The fixed dock and floating dock will severely compound the problems associated with the long walkway, will obstruct and impede tidal flow, will contribute to build-up of marsh wrack and will divert water into the basin, thereby impeding flow

of nutrients that feed the entire fragile marsh ecosystem. As discussed more fully below in response to Question 5©, construction will also interfere with and impede Plaintiffs' ability to navigate the channels in the area.

- 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.*

**Answer:**

Defendants Dana previously represented that they spent approximately \$100,000 on the dock. This is a broad figure which Plaintiffs are quite certain also includes the design, planning, engineering and permitting of the dock. As previously mentioned, Defendants Dana were aware of Plaintiffs' concerns on December 20, 2006, yet proceeded with construction.

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

**Answer:**

No. The scope of the modifications, including limiting the walkway to a

width of four feet and requiring the bridge spanning only one of the navigable waterways traversed by the enormous dock walkway and complex make, at most, only a slight difference in the injury to Plaintiffs.

While the modification of the width of the dock somewhat lessens the environmental impact, the modifications fail to adequately address the impact on the navigability of the area and do nothing to address the visual impact. As proposed and modified, the dock greatly impedes the navigability of the area. In fact, the modification requiring the bridge actually does very little to improve the navigability of the area as the bridge spans only one of the navigable waterways traversed by the dock. In addition to the creek, the proposed dock crosses several other navigable channels. Notably, those are the channels historically used by and most accessible to Plaintiffs. The proposed dock will completely block access to these channels and impede Plaintiffs ability to access Tom Creek.

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

**Answer:**

There is no harm to Defendants Dana. While Plaintiffs expect that Defendants Dana will argue potential exposure for breach of contract, well settled case law provides that impossibility is a defense. Here, a Court Order prohibiting further construction pending final resolution of this matter will insure Defendants from incurring costs for damages.

Respectfully submitted, this 26<sup>th</sup> of January 2007.

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