UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

Center For a Sustainable Coast and Karen Grainey, Plaintiffs, v. U.S. Army Corps of Engineers and Colonel Joseph R. Geary, in his official capacity as District Commander and District Engineer, U.S. Army Corps of Engineers, Savannah District,[1] Defendants.	*	2:19-CV-58-LGW-BWC

Plaintiffs' Motion for Summary Judgment and Supporting Memorandum

When Congress created Cumberland Island National Seashore, it directed that "the seashore shall be permanently preserved in its primitive state . . . ."[2] But the Army Corps of Engineers approved a dock within the seashore where there was no prior development. The Corps did this without considering how the dock may affect the seashore's primitive state — and without public notice.

[1] Col. Joseph R. Geary is the successor of Col. Daniel H. Hibner and is "automatically substituted as a party" under Fed. R. Civ. P. 25(d).

[2] 16 U.S.C. § 459i-5(b) (referred to as the "Seashore Act").

I. Standard of Review

Under the Administrative Procedure Act ("APA"), a court may "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . in excess of statutory . . . authority, or limitations, or short of statutory right; [or] without observation of procedure required by law."[3]

The "district court sits as an appellate tribunal" when reviewing agency action.[4] The court can adjudicate cross motions for summary judgment, but the standard set forth in Rule 56(a) does not apply.[5] Instead, of looking for genuine issues of material fact, the court decides "whether as a matter of law the agency action is supported by the administrative record and is otherwise consistent with the APA standard of review."[6]

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[3] 5 U.S.C. § 706 (2).

[4] *Georgia v. Wheeler*, 418 F. Supp. 3d 1336, 1348 (S.D. Ga. 2019), *appeal dismissed sub nom. Georgia Ex. Rel. Carr v. McCarthy*, No. 19-14237-CC, 2019 WL 7761571 (11th Cir. Dec. 26, 2019), and *reconsideration denied,* No. 2:15-CV-00079, 2020 WL 6948800 (S.D. Ga. Jan. 3, 2020) *citing Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001).

[5] *Wheeler*, 418 F. Supp. 3d at 1348 citing *Fulbright v. McHugh*, 67 F. Supp. 3d 81, 89 (D.D.C. 2014), *aff'd sub nom. Fulbright v. Murphy*, 650 F. App'x 3 (D.C. Cir. 2016). For this reason, Plaintiffs have not attached a statement of undisputed material facts.

[6] *Malladi v. Brown*, 987 F. Supp. 893, 922 (M.D. Ala. 1997), *aff'd sub nom. United States v. Ponder*, 150 F.3d 1197 (11th Cir. 1998); *CS-360, LLC v. U.S. Dep't of Veterans Affairs*, 101 F.Supp.3d 29, 32 (D.D.C. 2015).

The scope of review under the APA is generally narrow, and a court should not substitute its own judgment for that of the agency, but this does not shield the decision from a "thorough, probing, in-depth review."[7] Whether an agency's decision is arbitrary and capricious requires a "searching and careful" inquiry.[8]

Courts "must overturn" agency action if the agency failed to "scrupulously follow" its own regulations and procedures.[9]

Courts must also overturn agency action as arbitrary and capricious if the agency "relied on improper factors, failed to consider important relevant factors, . . . committed a clear error of judgment," or failed to "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[10]

Review under this standard "involves examining the reasons for agency decisions — or, as the case may be, the absence of such reasons."[11]

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[7] *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

[8] *Id.* at 416.

[9] *Sierra Club v. Martin*, 168 F.3d 1, 4 (11th Cir. 1999) *citing Simmons v. Block*, 782 F.2d 1545, 1550 (11th Cir.1986).

[10] *Sierra Club v. Martin*, 168 F.3d 1, 5 (11th Cir. 1999) *citing Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Aerial Banners, Inc. v. F.A.A.*, 547 F.3d 1257, 1260 (11th Cir. 2008) *citing U.S. Steel Corp. v. Astrue*, 495 F.3d 1272, 1279 (11th Cir.2007).

[11] *Judulang v. Holder*, 565 U.S. 42, 53 (2011) (citations and internal quotation marks omitted).

II. The Corps Violated NEPA by Approving the Dock with a Categorical Exclusion and Without Public Notice

A. The Dock Didn't Qualify for a Categorical Exclusion

NEPA requires federal agencies to take a "hard look" at the environmental impact of proposed actions.[12] This is satisfied by drafting an Environmental Assessment ("EA") or Environmental Impact Statement ("EIS") — unless the proposal is in a category of actions for which neither an EA nor EIS is required. These are called "categorical exclusions."[13]

The Corps approved the dock in this case by issuing a "letter of permission," which is a categorical exclusion that doesn't require public notice.[14] But the dock didn't qualify for a letter of permission or any other categorical exclusion.

The Corps adopted regulations to implement NEPA at 33 C.F.R. Pt. 230 and 33 C.F.R. Pt. 325, App. B.

33 C.F.R. Pt. 230 applies to the Corps' civil works program.[15] Under this program, the Corps plans and implements water related projects such as flood control, water supply, hydropower, and providing recreational opportunities.

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[12] *Hill v. Boy,* 144 F.3d 1446, 1449 (11th Cir. 1998).

[13] 40 C.F.R. §§ 1501.4, 1508.4 (2016) (the CEQ amended its NEPA regulations in 2020, but the version cited here applied when the Corps reviewed the dock application).

[14] 33 C.F.R. § 325.2(e)(1); 33 C.F.R. Pt. 325, App. B (6)(a).

[15] 33 C.F.R. § 230.1.

33 C.F.R. Pt. 325, App. B applies to the Corps' regulatory program under which the Corps reviews applications for construction in or over navigable waters (Section 10 of the Rivers and Harbors Act of 1899)[16] and for the discharge of dredge or fill material (Section 404 of the Clean Water Act).[17]

In this case, 33 C.F.R. Pt. 325, App. B applies because the Corps issued the letter of permission under Section 10 of the Rivers and Harbors Act.[18]

But the categorical exclusions listed at both 33 C.F.R. § 230.9 and 33 C.F.R. Pt. 325, App. B (6)(a) are instructive to understanding the types of activities "categorically excluded from NEPA documentation."[19] According to the Corps, "the categorical exclusions for Corps activities and private permit applicants should be of the same general magnitude."[20]

Section 230.9 lists 18 categorical exclusions for Corps activities under the civil works program such as studies, boundary line agreements, replacement of existing structures, installing utilities and roads in developed areas, and

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[16] 33 U.S.C. § 403.

[17] 33 U.S.C. § 1344.

[18] AR00019.

[19] 33 C.F.R. Pt. 325, App. B (6)(a).

[20] *Environmental Quality; Procedures for Implementing the National Environmental Policy Act (NEPA)*, 53 FR 3120, 3126 (Feb. 3, 1988) (final rule for 33 C.F.R. Parts 230 and 325).

real estate grants for rights-of-way which involve minor disturbances for boat ramps. Constructing a new dock is not listed.[21]

Part 325, App. B (6)(a) lists the following categorical exclusions for permit applicants:

(1) Fixed or floating small private piers, small docks, boat hoists and boathouses

(2) Minor utility distribution and collection lines including irrigation

(3) Minor maintenance dredging using existing disposal sites

(4) Boat launching ramps

(5) All applications which qualify as letters of permission (as described at 33 CFR 325.5(b)(2))

Before showing why the dock doesn't meet the criteria for a letter of permission under subsection (5), it helps to understand that the dock doesn't meet the criteria for a "small dock" under subsection (1).

In 1991, the Corps published a proposed "nationwide permit" for small docks.[22] Nationwide permits are a type of "general permit" that authorize certain activities without an individual permit.[23]

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[21] 33 C.F.R. § 230.9.

[22] *Proposal To Amend Nationwide Permit Program Regulations and Issue, Reissue, and Modify Nationwide Permits*, 56 FR 14598, 14616 (April 10, 1991).

[23] 33 C.F.R. § 325.5(c)(2).

The Corps decided not to issue a nationwide permit for small docks, but when it published the final rule, the Corps "encouraged" district engineers to develop regional permits "and/or to utilize the Letter of Permission process to authorize small docks and piers."[24]

The proposed rule for small docks specified that the total length of all segments could "not exceed 100 feet" and the surface area could "not exceed 600 square feet."[25] In contrast, the total length of the Cumberland Island dock is 296 feet, and the surface area is 2,084 square feet.[26]

The administrative record doesn't provide any rational explanation for why the Corps categorically excluded this dock when: a) the agency's only categorical exclusion specific to docks is for *small* docks, and b) the agency characterized small docks as three times smaller than what was approved in this case.

Nor does the administrative record explain how a letter of permission can be used to approve new construction in Cumberland Island National Seashore. For projects subject to section 10 of the Rivers and Harbors Act, letters of permission may be used when, in the opinion of the district engineer, the proposed work:

- would be minor

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[24] *Final Rule for Nationwide Permit Program Regulations and Issue, Reissue, and Modify Nationwide Permits*, 56 FR 59110, 59128 (Nov. 22, 1991).

[25] *Proposal To Amend Nationwide Permit Program*, 56 FR at 14616.

[26] AR00015.

- would not have significant individual or cumulative impacts on environmental values, and
- should encounter ***no appreciable opposition***[27]

"Appreciable" means "[c]apable of being measured or perceived."[28]

The Corps found that the dock "should encounter no opposition."[29] This finding was a clear error in judgment because the "public has a strong interest in preserving Cumberland Island in a primitive state . . . ."[30]

In reviewing whether the Corps properly issued a letter of permission to modify an existing bridge, the Eastern District of Arkansas found it "instructive" that the other categorical exclusions for permit applicants — i.e., small docks, minor utility lines, minor maintenance dredging using existing disposal sites, and boat ramps — authorize only "non-intrusive" activities.[31]

The court concluded that the "repetitive use of the words 'small and minor' indicates the limited impact expected" by categorically excluded

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[27] 33 C.F.R. § 325.2(e)(1)(i) (emphasis added).

[28] APPRECIABLE, Black's Law Dictionary (11th ed. 2019); *See also*, Oxford English Dictionary: "Capable of being recognized by the senses; perceptible" and Merriam-Webster: "capable of being perceived or measured" https://www.merriam-webster.com/dictionary/appreciable

[29] AR00048.

[30] *United States v. Jenkins*, 714 F. Supp. 2d 1213, 1224 (S.D. Ga. 2008).

[31] *Arkansas Nature All., Inc. v. U.S. Army Corps of Engineers*, 266 F. Supp. 2d 876, 885 (E.D. Ark. 2003) *citing* 33 C.F.R.§ 325, App. B (6)(1)-(4).

activities.[32] The court stated it was "[o]bvious" that the "drafters intended the categorical exclusions, including the 'letter of permission,' to cover the same types of non-intrusive projects . . . ."[33]

The letter of permission in that case authorized the applicant to modify an existing 150-foot bridge across the White River in Arkansas. The district court stated that this section of river was "one of the most attractive trout fishing areas in the United States," and found the "Corps' assumption that the proposed action would encounter no appreciable opposition" to be "unreasonable" because "the Corps either knew or should have known that there would be appreciable opposition."[34]

The Corps similarly knew or should have known that new construction in Cumberland Island National Seashore would encounter opposition. Cumberland Island "features some of the last remaining undeveloped land on the barrier islands along the Atlantic coast . . . ."[35]

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[32] *Id.*

[33] *Id.*

[34] *Id.* at 886-90.

[35] *Wilderness Watch & Pub. Emps. for Env't Resp. v. Mainella*, 375 F.3d 1085, 1088 (11th Cir. 2004).

The Corps overlooked the public's "strong interest in preserving Cumberland Island in a primitive state"[36] and abused its discretion by determining the project "should encounter no opposition."[37]

B. Even if the Dock Fit within a Categorical Exclusion, its location in Cumberland Island National Seashore is an Extraordinary Circumstance Precluding the Use of a Categorical Exclusion

Agencies adopting categorical exclusions "shall provide for extraordinary circumstances in which a normally excluded action *may* have a significant environmental effect."[38]

The fact that construction within a National Seashore may have a significant environmental effect is supported by the Department of Interior's categorical exclusions list, which does not include construction and does not include new structures.[39] Instead, the categorical exclusions for actions on public lands include activities such as personnel actions, routine financial transactions, and nondestructive data collection. The only categorical exclusions authorizing structures without an EA or EIS are to replace fencing

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[36] *United States v. Jenkins*, 714 F. Supp. 2d 1213, 1224 (S.D. Ga. 2008).

[37] AR00048.

[38] 40 C.F.R. § 1508.4 (2016) (emphasis added).

[39] 36 C.F.R. § 46.210.

after a fire, and to repair roads, trails, and damage to minor facilities such as campgrounds after a fire.[40]

This is because the Department of Interior recognizes that new construction on public lands may have significant environmental effects, which at least need to be subject to public notice and reviewed under an EA to determine whether the action agency should prepare an EIS or a finding of no significant impact.[41]

The Corps' list of categorical exclusions is not specific to public lands. For this reason, it was especially important for the agency to determine whether the project's location in a National Seashore was an extraordinary circumstance that precluded issuing a letter of permission.

The Corps' regulations instruct district engineers to "be alert for extraordinary circumstances where normally excluded actions *could* have substantial environmental effects and thus require an EA or EIS."[42]

The Corps acknowledged the significance of the project location when addressing how large of an area the applicant must survey for archeological resources.[43] But the Corps didn't address how the dock may affect the

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[40] 36 C.F.R. §§ 46.205(b) and 210.

[41] 40 C.F.R. § 1508.9(a)(1) (2016).

[42] 33 C.F.R. Pt. 325, App. B (6)(b) (emphasis added).

[43] AR00199.

National Seashore's primitive state and didn't explain why new construction in Cumberland Island National Seashore wasn't an extraordinary circumstance that warranted public notice before final agency approval.

The application identified the project tract as 90 acres, and the Corps initially found that "there is considerable reason from the public interest review factor" to survey the entire tract for archeological resources.[44] The Corps later accepted the applicant's contentions that it planned to construct only one house, and that the archeological survey could be limited to a 7.3-acre study area because that was more than it will need for any potential future development.[45]

These contentions by the applicant turned out to be false, or no longer true. Less than five months after the Corps approved the dock — and before constructing the dock — the applicant sought a hardship variance from Camden County to construct a ten-house subdivision on the entire 87.51-acre parcel (even though it purchased the parcel more than 25 years after Congress established the National Seashore).[46]

Even if 7.3-acres was a large enough archeological survey area based on what impacts the Corps could reasonably foresee before approving the dock, the applicant's survey methodology was flawed:

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[44] AR00199.

[45] AR00169; AR00189.

[46] AR00246-251.

> Eight shovel tests over a 7.3-acre tract amounts to roughly 1 shovel test per acre, which is extremely minimal even for a reconnaissance level survey. One would think that at least three times that number would be expectable for an area of this size. [47]

But the Corps accepted this flawed survey without further explanation, and later concluded the project would have "no effect" on archeological resources.[48]

Georgia Historic Preservation Division's finding that the project won't affect properties "listed or eligible for listing in the National Register of Historic Places" didn't remedy the flawed survey because land disturbance can affect archeological resources regardless of whether the project affects properties eligible for listing in the National Register.[49]

Statements about the area to be surveyed by the Corps' project manager showed awareness of the public's interest in Cumberland Island:

- There is, and has been for decades a strong interest on the part of the archaeological and historic community . . . as it is an area where some of the earliest contacts between European Explorers and Native American Indians occurred
- There are a number of Spanish Mission period sites on Cumberland [I]sland, which is one reason that it has drawn considerable archaeological interest over the decades
- there is considerable reason from the public interest review factor, that the entire project site (tract) should be surveyed[50]

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[47] AR00082.

[48] AR00039.

[49] AR00056.

[50] AR00199.

If the Corps anticipates any "appreciable opposition" — i.e., any opposition "[c]apable of being . . . perceived" — it cannot issue a letter of permission.[51] The project manager's recognition of "a strong interest on the part of the archaeological and historic community" and "considerable . . . public interest" refute the Corps' claim that the dock and consequent upland development "should encounter no opposition."[52]

The dock's location in Cumberland Island National Seashore affects whether the project may have a significant environmental effect that required an EA or EIS.[53]

Under NEPA, the term significantly "requires considerations of both context and intensity."[54] An action's significance "must be analyzed in several contexts," including "the affected interests" and "the locality."[55] Significance "varies with" the action's setting.[56]

To evaluate intensity, agencies should consider factors including:

- Unique characteristics of the geographic area such as proximity to historic or cultural resources and park lands

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[51] 33 C.F.R. § 325.2(e)(1)(i); APPRECIABLE, Black's Law Dictionary (11th ed. 2019).

[52] AR00048.

[53] 33 C.F.R. Pt. 325, App. B (6)(b); 40 C.F.R. § 1508.4 (2016).

[54] 40 C.F.R. § 1508.27 (2016).

[55] *Id.* at § 1508.27(a).

[56] *Id.*

- The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration

- Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment[57]

The administrative record doesn't support the Corps' failure to recognize the project location in a National Seashore as an "extraordinary circumstance" that "*could* have substantial environmental effects" requiring an EA or EIS.[58]

The record doesn't include any comment on Cumberland Island National Seashore's primitive character.

The record doesn't disclose whether the Corps anticipates the dock or housing may establish a precedent for future development on Cumberland Island.

The record includes no consideration of whether the project threatens to violate the Seashore Act, nor does it even acknowledge that Congress specified the seashore's primitive state shall be permanently preserved.

The Corps' regulations require the agency to evaluate the effect of proposed structures on scenic and conservation values associated with parks, including National Seashores.[59] This regulation requires that Corps action on

[57] 40 C.F.R. §§ 1508.27(b)(3), (6), and (10) (2016).

[58] 33 C.F.R. Pt. 325, App. B (6)(b) (emphasis added).

[59] *Id*. at § 320.4(e); AR00197-198.

permit applications, "insofar as possible, be consistent with" land use classifications, controls, or policies "and avoid significant adverse effects on the values or purposes for which those classifications, controls, or policies were established."

The administrative record doesn't identify any land use classifications, controls, or policies established to preserve the seashore's primitive state. Nor does the record state whether this is because no such classifications, controls, or policies exist for the affected area — or because the Corps overlooked them.

The Corps referred to "aesthetic values" in a *Case Document and Environmental Assessment* ("Environmental Assessment" or "EA").[60] But the administrative record doesn't mention the seashore's primitive character. These terms have different meanings:

- Aesthetic means "attractive, of pleasing appearance."[61]
- Primitive means "Of or relating to the first age, period, or stage of development; relating to early times; early, ancient."[62]

The EA states:

> The proposal would result in the construction of a proposed dock facility in Fancy Bluff Creek; Presently, numerous docks of similar layout and style exist. Therefore, the Corps has determined that

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[60] AR00034.

[61] Oxford English Dictionary; *See also*, Merriam-Webster: "pleasing in appearance" https://www.merriam-webster.com/dictionary/aesthetic

[62] Oxford English Dictionary; *See also*, Merriam-Webster: "of or relating to the earliest age or period." https://www.merriam-webster.com/dictionary/primitive

> the proposed work would have a negligible effect on aesthetic values within the project area.[63]

The administrative record doesn't say whether these other docks were built before or after Congress established the National Seashore, and if any were built after, the record doesn't say whether it was new construction or replaced an existing dock.

The record doesn't say whether the existing docks are on private property, on public lands managed by the National Park Service, or on property occupied by retained rights holders.[64] Nor does the record explain that the Park Service intends to remove structures as retained rights expire.

The applicant's "Supporting Documentation" referred to "the future house"[65] and the Corps project manager stated that the "applicant plans to construct a single family residential structure in the future, after dock access is approved."[66] The administrative record doesn't state whether any other houses have been constructed on Cumberland Island since Congress established the National Seashore.

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[63] AR00039, 41.

[64] *See*, 16 U.S.C.A §§ 459i-3(a) and 459i-5(b).

[65] AR00236.

[66] AR00198.

The project site is "within a densely forested saw palmetto forest with an oak overstory."[67] Historic maps of the site "did not identify any past structures, buildings, or historic cultural land uses."[68]

After the Corps project manager found that the applicant plans to construct a house on the upland — and after he acknowledged "that in all likelihood" the applicant would not construct a house "if the dock were not permitted"[69] — the Corps issued an EA stating that the proposed project "is not expected to change the existing land uses" and "that the proposed work would have no effect on land use within the vicinity of the project."[70]

The Corps failed to explain the inconsistency between this finding and the prior conclusion that constructing the dock would likely lead to clearing the dense live oak forest for a house.

The Corps issued a finding of no significant impact.[71] But an agency "must be able to make a convincing case" for its finding of no significant impact.[72] This requires identifying the "relevant environmental concerns" and

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[67] AR00165; AR00150-153.

[68] AR00165.

[69] AR00198-199.

[70] AR00039, 41.

[71] AR00047.

[72] *Hill v. Boy*, 144 F.3d 1446, 1451 (11th Cir. 1998)

taking a "'hard look' at the potential adverse environmental consequences,"[73] including any reasonably foreseeable upland development.[74]

The administrative record in this case does not support the Corps' decision to use a letter of permission to approve new construction in Cumberland Island National Seashore.

C. The Corps Violated NEPA by Preparing an Environmental Assessment Without Public Notice

Even though the Corps claimed the dock application was "categorically excluded from NEPA documentation"[75] — and could be approved by a letter of permission — the agency also prepared a *Case Document and Environmental Assessment* ("Environmental Assessment" or "EA").[76]

In addition to the errors in fulfilling its NEPA responsibilities, as identified in the preceding section, the Corps didn't provide public notice or an opportunity for the public to comment before approving the dock.[77]

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[73] *Id.*

[74] 33 C.F.R. Pt. 325, App. B (7)(b); 40 C.F.R. § 1508.8(b) (2016).

[75] 33 C.F.R. Pt. 325, App. B (6)(a); AR00036; AR00048.

[76] AR00034.

[77] *Federal Defendants' Answer*, Doc. No. 49 at 11, ¶ 55; *See also administrative record without any public notice.*

NEPA's "fundamental purpose" is to ensure that agencies "take a 'hard look' at the environmental consequences of their actions."[78] This is accomplished "by focusing government *and public attention*" on proposed agency action so that "important environmental consequences will not be 'overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.'"[79]

The Council on Environmental Quality's NEPA regulations in effect when the Corps prepared the EA stated that agencies "must insure that environmental information is available to public officials and citizens *before* decisions are made . . . ."[80]

These regulations specified that agencies shall: facilitate public involvement in decisions,[81] involve the public in preparing environmental

[78] *Wilderness Watch & Pub. Emps. for Env't Resp. v. Mainella*, 375 F.3d 1085, 1094–95 (11th Cir. 2004) (citations omitted).

[79] *N. Buckhead Civic Ass'n v. Skinner*, 903 F.2d 1533, 1540 (11th Cir. 1990) *citing Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (reviewing adequacy of EIS).

[80] 40 C.F.R. § 1500.1(b) (2016) (emphasis added).

[81] 40 C.F.R. §1500.2(d) (2016).

assessments,[82] provide public notice of documents,[83] and solicit information from the public.[84]

The Corps' NEPA implementation regulations require the agency to provide public notice and an opportunity to comment before completing an Environmental Assessment:

> The district engineer should complete an EA as soon as practicable after all relevant information is available (i.e., after the comment period for the public notice of the permit application has expired.[85]

This requirement was further explained when the Corps published the final rule for these regulations:

> The EA is prepared after all comments are received on the public notice and the district commander has had an opportunity to evaluate those comments.[86]

The Eleventh Circuit has recognized the Corps is "required" by its own regulations to "widely disseminate" notice of permit applications before completing an Environmental Assessment.[87] The Corps' failure to provide

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[82] 40 C.F.R. § 1501.4(b) (2016).

[83] 40 C.F.R. § 1506.6(b) (2016).

[84] 40 C.F.R. § 1506.6(d) (2016).

[85] 33 C.F.R. § Pt. 325, App. B (7).

[86] *Procedures for Implementing the National Environmental Policy Act (NEPA)*, 53 FR 3120, 3127 (Feb. 3, 1988).

[87] *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 545 (11th Cir. 1996) *citing* 33 C.F.R. § 325.3(a) (finding that the Corps provided adequate notice). *See also, Sierra Club v. Martin*, 168 F.3d at 4: "courts must overturn agency actions

notice and comment before completing the Environmental Assessment was arbitrary, capricious, and contrary to the agency's own regulations.

The Corps seeks to justify this failure by "aver[ring] that the proper name for the Corps' review document is not an Environmental Assessment, but a Case Document."[88]

The "Case Document and Environmental Assessment" at AR00034-00049 didn't fulfill the agency's obligation to take a "hard look" at the dock's environmental impacts. These defects included overlooking the Congressional directive that the seashore shall be permanently preserved in its primitive state and failing to explain inconsistencies between its findings and other material in the record.

But other than the quality of the information, and lack of public notice, the document is comparable to the agency's Environmental Assessments.[89] Several cases challenging Environmental Assessments confirm that the Corps commonly uses the phrase "Case Document and Environmental Assessment" to mean an Environmental Assessment.

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which do not scrupulously follow the regulations and procedures promulgated by the agency itself."

[88] *Federal Defendants' Answer*, Doc. No. 49 at 11, ¶ 55.

[89] *See,* 33 C.F.R. Pt. 325, App. B (7); 40 C.F.R. § 1508.9 (2016).

In *Hill v. Boy*, the Corps "prepared an Environmental Assessment ('EA')"[90] but failed to take "hard look" at potential environmental impacts and "did not make a convincing case for its finding of no significant impact."[91] Although not stated in the Eleventh Circuit's decision, the name of the EA, as identified in an Eleventh Circuit brief, was "Case Document and Environmental Assessment."[92]

The same document name was used in *Preserve Endangered Areas of Cobb's History Inc. v. U.S. Army Corps of Engineers*.[93] The Eleventh Circuit upheld the agency's "Environmental Assessment ('EA')," which the district court called a "case document and EA."[94]

And in *Georgia River Network v. U.S. Army Corps of Engineers*, this Court reviewed a challenge to an Environmental Assessment which the complaint referred to as a "Case Document and Environmental Assessment."[95]

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[90] *Hill v. Boy*, 144 F.3d 1446, 1448 (11th Cir. 1998)

[91] *Hill v. Boy*, 144 F.3d 1446, 1451 (11th Cir. 1998)

[92] See, Appellant's Reply Brief, Case No. No. 97-8872, 1998 WL 34193517, * 11.

[93] *Pres. Endangered Areas of Cobb's Hist., Inc. v. U.S. Army Corps of Engineers*, 916 F. Supp. 1557, 1564 (N.D. Ga. 1995).

[94] *Pres. Endangered Areas of Cobb's Hist., Inc. v. U.S. Army Corps of Engineers*, 916 F. Supp. 1557, 1567 (N.D. Ga. 1995).

[95] *Georgia River Network v. U.S. Army Corps of Engineers*, No. 4:10-CV-267, 2012 WL 930325, at *34 (S.D. Ga. Mar. 19, 2012), *aff'd,* 517 F. App'x 699 (11th Cir. 2013). *See, Complaint,* Doc. No. 67 at 2, ¶ 5 (2010WL5604187).

It's understandable the Corps doesn't want to acknowledge it completed an Environmental Assessment without public notice because the agency did so "without observation of procedure required by law."[96]

III. The Corps Violated the Seashore Act by Approving Construction of a Dock on Cumberland Island National Seashore

A. The Seashore Act Unambiguously Requires that the "Seashore Shall be Permanently Preserved in its Primitive State"

The Seashore Act prohibits acts that may compromise Cumberland Island National Seashore's primitive state:

> (b) Preservation in primitive state; recreational activities exception
>
> Except for certain portions of the seashore deemed to be especially adaptable for recreational uses, particularly swimming, boating, fishing, hiking, horseback riding, and other recreational activities of similar nature, which shall be developed for such uses as needed, ***the seashore shall be permanently preserved in its primitive state*** . . . .[97]

This text unambiguously prohibits construction that diminishes the seashore's primitive state. But the Corps overlooked this impact. The administrative record doesn't even include the word "primitive" or refer to the Seashore Act.

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[96] 5 U.S.C. § 706 (2).

[97] 16 U.S.C. § 459i-5(b) (emphasis added).

Statutory construction starts with the language of the statute.[98] Courts can "look beyond the plain language of a statute" only if:

- the statute's language is ambiguous
- applying it according to its plain meaning would lead to an absurd result, or
- there is clear evidence of contrary legislative intent[99]

Even when the words are ambiguous, courts must interpret them to carry out the statutory purpose.[100] This Court recognized that the Seashore Act's "public policy goal" is "the maintenance of Cumberland Island in a primitive state."[101]

B. Prior Legislation Creating National Seashores Show that the Corps Was Required to Comply with the Enabling Act for Cumberland Island National Seashore

The language in the Cumberland Island National Seashore enabling act is different than legislation creating other National Seashores, such as Point Reyes, Cape Lookout, and Gulf Islands. The enabling acts for these National Seashores are expressly and solely directed at the Secretary of Interior:

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[98] *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

[99] *Harrison v. Benchmark Elecs. Huntsville, Inc.*, 593 F.3d 1206, 1212 (11th Cir. 2010).

[100] *Reves v. Ernst & Young*, 494 U.S. 56, 73 (1990).

[101] *United States v. Jenkins*, 714 F. Supp. 2d 1213, 1224 (S.D. Ga. 2008) *citing* 16 U.S.C. § 459i–5.

- "the property acquired by the Secretary . . . shall be administered by the Secretary without impairment of its natural values . . . ."[102]

- "The Secretary shall administer the Cape Lookout National Seashore for the general purposes of public outdoor recreation, including conservation of natural features contributing to public enjoyment."[103]

- "the Secretary shall administer such lands so as to recognize, preserve, and interpret their national historical significance . . . ."[104]

Unlike Point Reyes, Cape Lookout, and Gulf Islands National Seashores, the statutory mandate to preserve Cumberland Island's primitive state is not qualified with language such as, "*the Secretary shall administer* Cumberland Island National Seashore to permanently preserve its primitive state." Instead, the act states that "the seashore shall be permanently preserved in its primitive state . . . ."

Congress created Point Reyes, Cape Lookout, and Gulf Islands National Seashores before Cumberland Island National Seashore.[105] If "the words of a

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[102] 16 U.S.C. § 459c-6(a) (Point Reyes National Seashore).

[103] 16 U.S.C. § 459g-4(a) (Cape Lookout National Seashore).

[104] 16 U.S.C. § 459h-4(a) (Gulf Islands National Seashore).

[105] Pub.L. 87-657, § 1, Sept. 13, 1962, 16 U.S.C. § 459c (Point Reyes); Pub.L. 89-366, § 1, Mar. 10, 1966, 16 U.S.C. § 459g (Cape Lookout); Pub.L. 91-660, § 1, Jan. 8, 1971, 16 U.S.C. § 459h (Gulf Islands); Pub.L. 92-536, § 1, Oct. 23, 1972, 16 U.S.C. § 459i (Cumberland Island)

later statute differ from those of a previous one" on a related subject, Congress "must have intended them to have a different meaning."[106]

The enabling acts for Point Reyes, Cape Lookout, and Gulf Islands National Seashores impose obligations on the Secretary while the enabling act for Cumberland Island affords protection for the island's primitive state regardless of which agency may threaten the maintenance of that primitive state. The different phrasing in the enabling acts for these other seashores compared to Cumberland Island "convey differences in meaning."[107]

C. Other Sections and Subsections of the Cumberland Island National Seashore Enabling Act Show that the Corps was Required to Comply with the Act

The language specifying that Cumberland Island National Seashore "shall be permanently preserved in its primitive state" is at § 459i-5(b). This subsection is titled "Preservation in primitive state; recreational activities exception."

This is distinct from § 459i-5(a), which is titled "Applicability of provisions; utilization of statutory authorities." Subsection (a) states that the seashore shall be administered, protected, and developed in compliance with certain sections of the National Park Service Organic Act of 1916.[108] Under

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[106] *DIRECTV, Inc. v. Brown*, 371 F.3d 814, 817 (11th Cir. 2004) (citation omitted).

[107] *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2071, 201 L. Ed. 2d 490 (2018) (citation omitted).

[108] 16 U.S.C.A § 459i-5(a).

the Organic Act, the Park Service must conserve park resources and provide for their use and enjoyment "in such a manner and by such means as will leave them unimpaired" for future generations.[109]

But the enabling act's statement in subsection (a) that the seashore shall be administered, protected, and developed in compliance with the NPS Organic Act doesn't mean that the Corps had discretion to ignore subsection (b).

The Organic Act applies to all park units while the legislation creating individual parks and seashores impose additional requirements specific to each area. Here, subsection (b) of the enabling act seeks to preserve Cumberland Island's primitive state, and it does so without reference to subsection (a), the NPS Organic Act, the Secretary of Interior, or the Park Service.

Similarly, the reference in § 459i-5(a) to the seashore being "administered, protected, and developed" in compliance with the NPS Organic Act — and the absence of any reference to the Organic Act in § 459i-5(b) — creates a presumption that Congress "intentionally and purposely" omitted this language from subsection (b)'s unambiguous mandate that the seashore's primitive state shall be preserved.[110]

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[109] 54 U.S.C.A. § 100101 (recodified from 16 U.S.C. § 1).

[110] *Allison Engine Co. v. U.S. ex rel. Sanders*, 553 U.S. 662, 671 (2008) *citing Barnhart v. Sigmon Coal Co.,* 534 U.S. 438, 452 (2002).

The Eleventh Circuit has recognized that the Seashore Act "required the island to be 'permanently preserved in its primitive state,' with the exception of development for certain public recreation activities."[111]

The "Cumberland Island Wilderness Boundary Adjustment Act of 2004" added another exception at subsection (c) which authorized the Secretary to enter concession contracts for visitor tours.[112]

Neither exception applies here. But the use of "the Secretary" in subsection (c) without limiting subsection (b) to conduct by the Secretary again shows that Congress "intentionally and purposely" used different language to convey different meanings.[113]

But even if the Seashore Act itself doesn't apply to action by the Corps, the agency's own regulation requires the agency to evaluate the effect of proposed structures on scenic and conservation values associated with parks, including National Seashores.[114] This regulation requires that Corps action on all permit applications, "insofar as possible, be consistent with" land use classifications, controls, or policies "and avoid significant adverse effects on

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[111] *High Point, LLLP v. Nat'l Park Serv.*, 850 F.3d 1185, 1189 (11th Cir. 2017) *citing* 16 U.S.C. § 459i-5(b).

[112] 16 U.S.C.A § 459i-5(c).

[113] *Allison Engine Co.*, 553 U.S. at 671 *citing Barnhart v. Sigmon Coal Co.,* 534 U.S. at 452.

[114] 33 C.F.R. § 320.4(e); AR00197-198.

the values or purposes for which those classifications, controls, or policies were established."

The administrative record doesn't reflect that the Corps, before reaching its decision, considered the Seashore Act or honored the policy underlying it. The dock and consequent housing undermine the seashore's primitive state.

Because the Corps overlooked both the Seashore Act and impacts to the seashore's primitive state, this Court can hold unlawful the Corps' dock approval without finding any substantive violation of the Act. The Corps failed to consider relevant factors, and this Court should remand the decision back to the agency for additional investigation and explanation.[115]

On remand, the Corps should investigate not only its own conclusion that the dock "would have no effect" on the parcel's land use, but also the applicant's contentions that it planned to construct only one house, and that a 7.3-acre study area was more than it will need for any potential future development.[116]

IV. The Center for a Sustainable Coast and Karen Grainey Have Standing to Challenge the Corps' Dock Approval

Standing has three elements: (1) an injury (2) that is fairly traceable to defendant's conduct, and (3) that is likely to be redressed by a favorable

[115] *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

[116] AR00189.

decision.[117] The attached Declaration of Karen Grainey supports each element.[118]

The Center's members, including Karen Grainey, visit Cumberland Island National Seashore to enjoy its serenity and its primitive character but the dock impairs the seashore's primitive state and interferes with their enjoyment of the seashore.[119]

Karen Grainey's enjoyment of Cumberland Island National Seashore is, in part, based on knowing that Congress directed that the area be permanently preserved in its primitive state. Approval of the dock, and the consequent construction of that dock, injures her interests in spending time in a tranquil ecosystem that she expected was legally protected from new construction.[120]

The Corps' failure to analyze the impacts of the dock on Cumberland Island's primitive character, and failure to provide public notice of the application, impairs the Center's interest in protecting coastal resources, and lessens Karen Grainey's enjoyment of Cumberland Island National Seashore.[121]

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[117] *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

[118] Doc. No. 68-1.

[119] *Id.* at 3, ¶ 7.

[120] Doc. No. 68-1 at 5, ¶ 11.

[121] *Id.* at 5, ¶ 12.

Plaintiffs' procedural and informational interests protected by NEPA were harmed by the failure to provide public notice. Remanding the decision back to the Corps — with instructions to provide notice to the public before making any further decision on whether to approve the dock — would remedy this injury by providing the opportunity for public comment.[122]

Harm to plaintiffs' interests in Cumberland Island's primitive character would also be remedied by a decision from this Court instructing the agency to consider how the dock may affect Cumberland Island National Seashore's primitive state before making any further decision.[123]

V. Conclusion

The Corps' approval of the dock was arbitrary and capricious because:

- the dock's location on Cumberland Island was an extraordinary circumstance precluding the use of a categorical exclusion
- the Corps was required to provide public notice before completing the Environmental Assessment, and
- the Corps completely overlooked impacts to Cumberland Island National Seashore's primitive state

[122] *Id.* at 7, ¶ 16.

[123] *Id.*

The Center for a Sustainable Coast and Karen Grainey request that the Court grant this motion for summary judgment, hold unlawful and set aside the Corps' letter of permission, and remand the decision back to the Corps for further investigation and explanation.

Respectfully submitted June 18, 2021.

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Certificate of Service

I certify I served *Plaintiffs' Motion for Summary Judgment and Supporting Memorandum* upon all counsel of record by way of the Court's electronic case filing (ECF) system this June 18, 2021.

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