UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-60053-CIV-DIMITROULEAS/SNOW

ROLLY MARINE SERVICE COMPANY,
d/b/a ROLLY MARINE SERVICE, INC.,
CABLE MARINE INC.,
ROSCIOLI YACHTING CENTER, INC., *et al.*,

Plaintiffs,

vs.

FLORIDA EAST COAST RAILWAY COMPANY, FLORIDA EAST COAST RAILWAY LLC, FLORIDA EAST COAST INDUSTRIES LLC, a Delaware Limited Liability Company, *et al.*,

Defendants.

ORDER DENYING TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

THIS CAUSE is before the Court upon Plaintiffs' Emergency Motion for Temporary Restraining Order and Preliminary Injunction (the "Motion") [DE 5], filed herein on January 10, 2017. The Court has carefully considered the Motion, the Coast Guard's Response [DE 19], All Aboard Florida's Response [DE 20], Florida East Coast Railway's Response [DE 22], the Reply to the Coast Guard [DE 27], the Reply to All Aboard Florida [DE 26], the Reply to Florida East Coast Railway [DE 25], and is otherwise fully advised in the premises.

I. BACKGROUND

Plaintiffs are businesses engaged in providing maritime services along the New River west of the Florida East Coast Railway Bridge (the "Bridge") who earn income from navigation along the river, including navigation of customers to their business locations, towing yachts up the river, and navigation of the river to service customers east of the Bridge. [DE 5 at ¶ 1].

Plaintiffs filed the instant Motion [DE 5] after learning that the Coast Guard had approved a 12-day closure of the Bridge, from 12:01 a.m. Saturday February 11 through 12:01 a.m. February 23, 2017, to facilitate repairs in preparation for All Aboard Florida's passenger train service. [DE 5 ¶2; DE 19 at 2].[1]

Plaintiffs oppose the Bridge closure because it would prohibit them from providing services to customers east of the Bridge, prevent customers from accessing Plaintiffs' business locations, and prohibit the free navigation of the river by Plaintiffs and their customers. [DE 5 ¶4]. Of particular concern to Plaintiffs is that the planned closure encompasses the entire period of the 2017 Miami Boat Show, which would prevent Plaintiffs from preparing or delivering yachts during a critical time for their businesses. *Id.* ¶ 5.

Plaintiffs claim the U.S. Coast Guard failed to adequately consider alternatives and failed to allow public input before approving the planned closure. *Id.* ¶ 8. Plaintiffs' expert issued a report, Professional Engineer Vincent N. Campisi's Report, (the "Campisi Report") providing two alternatives: (1) the repairs could be accomplished in two short-term outages of less than 24 hours each; or (2) the Bridge could be repaired in the locked up position for the 12 day period. *Id.* ¶¶ 9–10. All Aboard's project engineer presented the Coast Guard with a report disputing the efficacy of these alternatives. [DE 19 at 3]. Plaintiffs seek a temporary restraining order and preliminary injunction to prevent the Bridge closure.

On January 27, 2017, there was a hearing on the instant Motion. For the following reasons, the Motion is denied.

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[1] The Bridge has a vertical clearance of only four feet. [DE 19 at 2]. Therefore, when the Bridge is down, most maritime traffic cannot cross under the Bridge and must wait until the Bridge is raised before passing under. *Id.*

II. STANDARD OF REVIEW

In Florida, the standard for granting a preliminary injunction is the same as the standard for a temporary restraining order. *Schiavo ex. rel Schindler v. Schiavo*, 403 F.3d 1223, 1231 (11th Cir. 2005). To obtain a preliminary injunction, a party must demonstrate "(1) [there is] a substantial likelihood of success on the merits; (2) that irreparable injury will be suffered if the relief is not granted; (3) that the threatened injury outweighs the harm the relief would inflict on the non-movant; and (4) that the entry of the relief would serve the public interest." *Schiavo*, 403 F.3d at 1225–26; *see also Levi Strauss & Co. v. Sunrise Int'l. Trading Inc.*, 51 F.3d 982, 985 (11th Cir. 1995) (applying the test to a preliminary injunction in a Lanham Act case).

III. Discussion

When All Aboard began discussions with the Coast Guard regarding its request to deviate from the Bridge's standard operating schedule, the Coast Guard encouraged All Aboard to coordinate the requested bridge closure with the maritime industry, particularly the Marine Industries Association of South Florida ("MIASF"). [DE 19 at 2]. Between October 19, 2016 and November 10, 2016, representatives from All Aboard, the Coast Guard, and MIASF met to identify bridge closure dates, develop a plan to ensure wide dissemination and advance notice, and draft a Memorandum of Understanding ("MOU") to outline the scope of the work and provide plans for providing a crane to lift the bridge in case repairs were not completed on time. [DE 19 at 3].

MIASF suggested the 12-day period during the Miami Boat Show, but MIASF and All Aboard were unable to agree on a MOU, and on December 19, 2016, a representative from MIASF called the Coast Guard to inform them that the February closure was no longer acceptable. *Id.* On the same day, Plaintiffs emailed the Coast Guard asserting that they had not

been kept informed about the Bridge closure and included the Capisi Report. *Id.* On December 20, 2016, All Aboard submitted the required written request to the Coast Guard for the Bridge closure, containing dates and reasons for the requested temporary change to the bridge operating schedule pursuant to 33 C.F.R. § 117.35[2]. *Id.* at 3. All Aboard also presented the Coast Guard with its project engineer's response to the Capisi Report, which disputed many of the assertions in the Capisi Report. *Id.* On December 27, 2016, the Coast Guard approved the request for temporary deviation to the Bridge's operating schedule. [DE 19 at 5]. The general drawbridge opening schedule is set by 33 C.F.R § 117.313.

A. **Whether the Court has jurisdiction to review the Coast Guard's action under the APA**

Under the Administrative Procedures Act (APA), 5 U.S.C. § 706(2), a court may only set aside an agency's decision if it is determined to be arbitrary, capricious, an abuse of discretion, or contrary to law. 5 U.S.C. § 706(2). A decision is arbitrary and capricious "where the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Defenders of Wildlife v. United States Dep't of the Navy*, 733 F.3d 1106, 1115 (11th Cir. 2013) (quoting *Miccosukee Tribe of Indians of Fla. v. United States*, 566 F.3d 1257, 1264 (11th Cir. 2009)).

The Eleventh Circuit elaborated on the standard for arbitrary and capricious, "the reviewing court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens for Smart Growth v.*

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[2] The Court need not determine if the request for deviation was properly filed within 90 days before the start of the proposed closure because 33 C.F.R § 117.35(c)(3) provides that while it is preferable that the request be submitted within 90 days, the "District Commanders have discretion to accept requests submitted less than 90 days before a needed change if those requests can be processed before the date of the needed change." 33 C.F.R. § 117.35(c)(3).

Secretary, Dept. of Transportation, 669 F.3d 1203, 1210 (11th Cir. 2012).

> This inquiry must be searching and careful, but the ultimate standard of review is a narrow one. Along the standard of review continuum, the arbitrary and capricious standard gives an appellate court the least latitude in finding grounds for reversal; administrative decisions should be set aside in this context only for substantial procedural or substantive reasons as mandated by statute, not simply because the court is unhappy with the result reached. *Id.* at 1210 (citing *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 541- 42 (11th Cir. 1996).

Before determining if the agency action was arbitrary, capricious, an abuse of discretion, or contrary to law, the court must first determine if it has the right to review the agency action. This Court does not have jurisdiction to review agency action if "agency action is committed to agency discretion by law." *See* 5 U.S.C. § 701(a)(2). Agency discretion is implied when "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). If Congress prescribed "no judicially manageable standards . . . for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for 'abuse of discretion.'" *Id.* at 830.

i. Applicable Statutes and Regulations

The question is whether the governing statute provides the courts with "law to apply." *Forsyth Cty. v. U.S. Army Corps of Engineers*, 633 F.3d 1032, 1040–41 (11th Cir. 2011). Courts look to the enabling statute and ask whether "Congress has provided us with 'law to apply.' If it has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion, there is 'law to apply'" and courts may require that the agency follow that law; if it has not, then the agency decision is "committed to agency discretion by law" and not subject to judicial review. *Heckler*, 470 U.S. at 834–35.

Plaintiffs contend that Defendants failed to follow the dictates of 33 C.F.R § 115.60

(Coast Guard procedures for issuance of bridge permits) and 33 U.S.C. § 512 (prohibiting the unreasonable obstruction of navigable waterways). [DE 5 ¶¶21–23, 28]. The Coast Guard argues that § 115.60 is inapplicable to these circumstances as no application for bridge permit was required; instead, All Aboard Florida requested a temporary change in drawbridge operation schedule to make repairs, which is governed by 33 C.F.R § 117.35 (temporary deviation in operating schedules of bridges). [DE 19 at 8]. The Court agrees.

Plaintiff is correct that the procedural requirements of 33 C.F.R § 115.60 were not followed in this case, including public hearings and issuance of report and recommendations; however, the Court finds these procedures are not necessary because § 115.60 does not apply to a temporary deviation in bridge schedule to make repairs.[3] Rather, § 115.60 is triggered by a request to "construct, modify, or replace" a bridge, at which point permitting application procedures must be followed. No such request was made in this instance. Instead, All Aboard Florida seeks to repair the existing bridge including "rehabilitation of the existing bridge trunnions." [DE 19 Ex. F "Bridge Pre-Construction Checklist"]. The regulation under which the Coast Guard approved the temporary deviation in schedule, 33 C.F.R 117.35, was created under 33 U.S.C. § 499.

Neither 33 C.F.R § 117.35 nor its enabling legislation 33 U.S.C. § 499 provide for APA review because the text of neither the regulation nor the statute provide "judicially manageable standards . . . for judging how and when an agency should exercise its discretion." *See Hecler*, 470 U.S. at 830. Section 117.35 provides discretion to the Coast Guard concerning deviations in bridge schedules, indicating that the Coast Guard "may" issue a deviation to a drawbridge

[3] The Court recognizes that the Coast Guard has authority under 33 C.F.R. § 117.35 to approve deviations in a bridge's operating schedule lasting less than or equal to 180 days. Plaintiffs argue that there should be public comment, reports and recommendations, and more procedures conducted in light of day before they are essentially put out of business for twelve days. The Court agrees that would be preferable, but the Court does not have the authority to make or modify regulations. On its face, it is clear that 33 C.F.R. § 117.35 provides the Coast Guard with the discretion to grant a twelve-day deviation in the bridge's schedule.

operating schedule that lasts less than or equal to 180 days. 33 C.F.R § 117.35(a). Rulemaking procedures, including publishing a temporary rule in the Federal Register, are not necessary unless the deviation in schedule exceeds 180 days. 33 C.F.R 117.35(b). Plaintiffs may rightfully question whether the Coast Guard should have discretion to close a bridge for nearly six months without procedures to ensure protection for aggrieved parties, including the ability of judicial review; however, that is a question for the legislature, not the courts. Further, the statute, 33 U.S.C. § 499, provides no limitations on agency action; § 499 provides that regulations related to drawbridges have the force of law and describes civil and criminal penalties and enforcement mechanisms for violations of the regulations. 33 U.S. C. § 499. Since the relevant statute and regulation does not provide any criteria to judge the agency's actions, the Court lacks the authority to review the agency's action under the APA.

In Reply, Plaintiffs make several compelling policy arguments, none of which confer jurisdiction on this Court to review agency action where there are no meaningful standards to measure the reasonableness of the agency action. For example, Plaintiffs point to 33 C.F.R. § 117.313, which provides specific regulations for the New River, specifying that "[t]he bridge shall not be closed more than 60 minutes combined for any 120 minute time period beginning at 12:01 a.m. each day[,]" and "[t]he bridge shall remain open to maritime traffic when trains are not crossing." 33 C.F.R. § 117.313(9c)(9)-(10). However, Plaintiffs concede that the Coast Guard has authority to modify or deviate from these regulations. Plaintiffs also point to 33 C.F.R. § 114.10 to bolster their policy argument that maritime traffic should not be disrupted. Section 114.10 states, in relevant part, that the decision whether to issue a "bridge permit or drawbridge operation regulation" depends "primarily upon the effect of the proposed action on navigation to assure that the action provides for the reasonable needs of navigation after full

consideration of the effect of the proposed action on the human environment." 33 C.F.R. § 114.10. Even if the temporary deviation in schedule could be construed as a "bridge permit or drawbridge operation regulation," the Court has no basis to determine that the Coast Guard failed to consider the closure's impact on navigation.

Even if the Court had jurisdiction to review the Coast Guard's action under the APA, it is unclear whether the Coast Guard's decision to allow the bridge to remain closed for 12 days to facilitate repairs is arbitrary, capricious, an abuse of discretion, or contrary to law. The Coast Guard required Defendants to confer and coordinate with the MIASF in selecting the dates for closure; however, it is now clear that MIASF does not represent all constituencies in the South Florida maritime industry. It appears the Coast Guard did consider the proposed action's impact on navigation, weighed the conflicting reports of two experts, considered the proposed solutions, and simply reached a decision that will harm Plaintiffs.[4]

Plaintiffs attempt to identify judicially manageable standards that would bring the Coast Guard's action within the purview of this Court's ability to second-guess agency action under the APA, but these attempts fall short. Plaintiffs point to cases, mostly from the D.C. Circuit, for the proposition that if a statute sets forth any limitations on agency discretion "however slight, judicial review is available." *See, e.g.*, *Cody v. Cox*, 509 F.3d 606, 610 (D.C. Cir. 2007). However, the cases cited by Plaintiffs are distinguishable from the instant matter because in those cases the statute provided at least *some* limitation on agency discretion; in this instance, there are no such limitations.

Even Plaintiff's analogy to 33 C.F.R. § 117.36 (concerning repairs of draw bridges), which is inapplicable on these facts because it applies to emergency repairs, does not help their argument

[4] A December 27 internal Coast Guard email provides that "[t]here can be no doubt that there will be impact to both sides, but I feel that [All Aboard] has been fully transparent and worked hard to get dates that would work. The Miami Boat Show is during this timeframe so it will minimize impact." [DE 19 Ex. J].

for APA review. Section 117.36 provides that repair work must be "performed with all due speed in order to return the drawbridge to operation as soon as possible." 33 C.F.R. § 117.36. The Coast Guard reviewed expert reports and agreed with the conclusion that the bridge needs to be repaired in the locked-down modality.[5] In addition, the Coast Guard agreed that the repairs will take twelve consecutive days; since the Coast Guard considered the relevant factors and circumstances, there would be no reason for a court to disrupt the Coast Guard's finding that the 12-day closure is a repair conducted with "all due speed."

The Court disagrees with Plaintiffs characterization of the Coast Guard's action. Plaintiffs allege that the Coast Guard agreed to close the river to "allow the bridge owner to make elective repairs in a manner that forecloses navigation of the river and imposes financial burden upon Plaintiffs as opposed to the bridge owner and operators is arbitrary, capricious, and an abuse of discretion." [DE 27 at 8]. Arbitrary, capricious, and an abuse of discretion are not synonyms for an outcome that burdens one group of people, even unduly. *North Buckhead Civil Ass'n v. Skinner*, 903 F.2d 1533, 1538–40 (11th Cir. 1990) ("The reviewing court is not authorized to substitute its judgment for that of the agency concerning the wisdom or prudence of the proposed action."

B. Whether the Court can grant declaratory relief

Plaintiffs seek declaratory relief under 28 U.S.C. §§ 2201–2202 that the proposed closure violates 33 U.S.C. § 512 (the "Truman-Hobbs Act"), which provides that "No bridge shall at any time unreasonably obstruct the free navigation of any navigable waters of the United States." *See* [DE 5 ¶20]. The purpose of the Truman-Hobbs Act is to provide for the use of government funds

[5] For example, the Coast Guard was persuaded by Plaintiff's expert's report indicating that it would take 7 days just to mill the trunnions. [DE 19 Ex. G]. "All Aboard's contractors will be 'working 24 hours per day, every day until the work is complete.'" [DE 20 at 5]. *See Port of Jacksonville Maritime Ad Hoc Committee, Inc. v. Hayes*, 485 F.Supp. 741 (M.D. Fla. 1980) (stating that courts will not weigh conflicting evidence already considered by the Coast Guard).

"to alter bridges which unreasonably obstruct . . . navigation." *Union Pacific Railroad Co. v. Kirby Inaland Marine, Inc. of Mississippi*, 296 F. 3d 671, 675 (8th Cir. 2002). The Act was not designed to prevent the type of injury asserted by Plaintiffs; the implementing regulations of the statute provide administrative procedures "by which the U.S. Coast Guard determines a bridge to be an unreasonable obstruction to navigation." 33 C.F.R. § 116.01(b)–(c). This statute and its implementing regulations do not apply to this case, so the request for declaratory relief is denied.[6]

C. Whether Plaintiffs meet the standard for temporary restraining order or preliminary injunction

Arriving at the merits of the instant Motion, the Court finds Plaintiffs do not meet the standard for issuing a preliminary injunction or temporary restraining order.

i. Likelihood to prevail on the merits

Plaintiffs cannot prove a likelihood of success on the merits because their claims are based on an inapplicable regulation, 33 C.F.R § 115.60. Alternatively, Plaintiff's base their claim on an inapplicable statute, the Truman-Hobbs Act. Furthermore, for the reasons already discussed, even if Plaintiffs based their suit on the applicable regulation, 33 C.F.R § 117.35, the Court lacks jurisdiction to review the agency's decision under the APA.

ii. Threat of irreparable harm

[6] The Court is not persuaded that it should issue a declaration, under the All Writs Act, about the reasonableness of the 12-day closure of the bridge as it pertains to the "free navigation of" the River. The Court does not address arguments about standing as the Court declines to provide declaratory relief on other grounds. However, the Court notes that without a private right of action, declaratory relief is not available. It is now well settled that "The [DJA] is neither an extension of federal jurisdiction nor an end-run around constitutionally prohibited advisory opinions." *Bacardi USA, Inc. v. Young's Mkt. Co.*, No. 16-CV-20070-PAS, 2016 WL 3087060, at *4–5 (S.D. Fla. May 31, 2016). Declaratory relief presupposes the availability of a judicially remediable right. *Schilling v. Rogers*, 363 U.S. 666, 677 (1960); accord *Mich. Corr. Org. v. Mich. Dep't of Corr.*, 774 F.3d 895, 902 (6th Cir. 2014) ("The point of the [DJA] is to create a remedy for a preexisting right enforceable in federal court."); *Alberto San, Inc. v. Consejo De Titulares Del Condominio San Alberto*, 522 F.3d 1, 5 (1st Cir. 2008). In addition, relief under DJA is discretionary. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 136-37. This "substantial" discretion is exercised in light of the DJA's purpose as well as equitable, prudential, and policy grounds. *Id.*; *Wilton v. Seven Falls Co.,* 515 U.S. 277, 286-88 (1995).

Plaintiffs describe two primary types of harm, one economic and one safety-related. At the hearing on the Motion, all parties except the Coast Guard stipulated that Plaintiffs will suffer irreparable harm. Plaintiffs claim that the loss of revenue and potential loss of future business from the 12-day-outage amounts to irreparable harm; the Court agrees. Plaintiffs will lose income, some businesses will be shut down for 12 days, and they will be unable to recover damages from that lost income. Plaintiffs also raise the concern that fireboats and maritime rescue units would not be able to navigate the channel, if needed.

iii. Threatened injury outweighs the threatened harm the injunction may cause to defendant

Plaintiffs argue that the closure is an enhancement to the currently-functioning FEC Railway Bridge that will benefit Defendants by increasing their financial standing while harming Plaintiffs through loss of business income. [DE 26 at 9–10]. While Plaintiffs may understand that the repairs are needed for the incoming passenger trains, they point out that All Aboard has published statements indicating that the Bridge currently has "structural components . . . in good working condition." *Id.* The repairs are intended to prevent "more frequent operational performance breakdowns, particularly with the added frequency of passenger trains beginning in the summer of 2017." [DE 20 at 7]. Therefore, the planned closure will not address an exigent need for repair; rather it is intended to obviate the need for future repairs and associated closures. Plaintiffs argue that the balance of hardships weighs in their favor because "through no fault of their own [they] are being subjected to closures of their businesses [and] loss of income." *Id.* Further, Plaintiffs recognize that under the proposed closure, they "bear the entire economic brunt of the closure rather than the party who will ultimately benefit financially from the refurbishing of the railroad." *Id.* The Court recognizes that Plaintiffs will sustain an economic burden through no fault of their own, but the Court does not have jurisdiction to review this

agency decision.

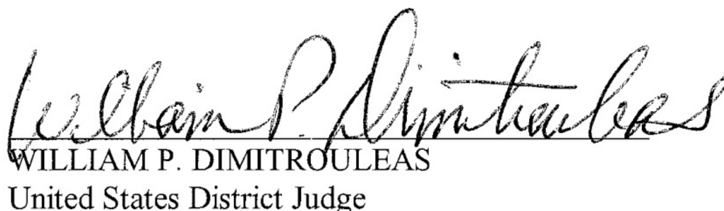
iv. Whether an injunction furthers the public interest

The public would not be best served by large-scale disruptions in freight deliveries to South Florida, nor would the interests of the public be best served by a delay in the implementation of All Aboard's passenger rail system. Though access to the New River is important to the public, the proposed closure, which allows freight trains to cross the Bridge during the repairs, is less harmful to the public at large than a disruption in the delivery of numerous freight cars filled with consumer goods and products necessary for businesses and consumers throughout South Florida. There may be alternatives to closing the bridge for 12 days in the locked-down modality, but the Court is unable to second-guess the Coast Guard's acceptance of that proposal.

IV. CONCLUSION

Accordingly, it is hereby **ORDERED AND ADJUDGED** that the Motion [DE 5] is **DENIED** as explained above.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 27th day of January, 2017.



WILLIAM P. DIMITROULEAS
United States District Judge

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