



US Army Corps
Of Engineers
Wilmington District

PUBLIC NOTICE

Issue Date: January 25, 2007
Comment Deadline: February 9, 2007
Corps Action ID No. 200600366

All interested parties are hereby advised that the Wilmington District, Corps of Engineers (Corps) has received an application for work within jurisdictional waters of the United States. Specific plans and location information are described below and shown on the attached plans. This Public Notice and all attached plans are also available on the Wilmington District Web Site at www.saw.usace.army.mil/wetlands

Applicant: Red Apple Group, LLC
Attn: J. R. Triplett
Post Office Box 689
Shallotte, North Carolina 28459

AGENT (if applicable): Charles F. Riggs
Charles F. Riggs and Associates, Inc.
202 Warlick Street
Jacksonville, North Carolina 28541

Authority

The Corps will evaluate this application and decide whether to issue, conditionally issue, or deny the proposed work pursuant to applicable procedures of Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899.

Location

The proposed Peninsula at Topsail Island Subdivision project site is 8.8 acres in size and is located adjacent to the Intracoastal Waterway, at the end of Atkinson Road, off NC Highway 50, approximately 1.6 miles south of the traffic light at the intersection of NC Highway 210 and 50, in Surf City, Pender County, North Carolina. (34.4149 N, 77.5672 W).

(Attachment A)

Existing Site Conditions

The property is a peninsula of land extending into the inter-tidal marsh area of Topsail Sound, which consists of 4.016 acres of uplands, 1.904 acres of jurisdictional Section 404 Wetlands, and 0.921 acres of delineated Coastal Wetlands regulated under Section 10 of the Rivers and Harbors Act of 1899. Man-made canals averaging approximately 50-60 feet in width border the property to the north and south. Approximately 2 acres of the recorded tract is below the normal high water line of the adjacent man-made canals. The western tip of the peninsula is bordered by Topsail Sound and the landward (eastern) end of the property is bordered by an existing residential subdivision. The site is currently undeveloped.

The North Carolina Division of Water Quality classifies the waters of Topsail Sound and the man-made canals, in the vicinity of the project area, as "SA". The area is not designated as a Primary Nursery Area by the North Carolina Division of Marine Fisheries and is open to the harvesting of shellfish.

The peninsula was created, between the late 1960s and early 1970s, by excavating two canals through marsh and discharging the excavated material within the marsh area between the two canals. The canals were constructed under a permit from the U.S. Army Corps of Engineers (Corps) issued on May 6, 1969 (AID 196900042), and from the State of North Carolina's Division of Coastal Management in 1970. The Corp's permit expired on December 31, 1972. Based on the review of the Division of Coastal Management's file records, the State permit was renewed in December of 1971 and reviewed again in February 1973 for a second renewal. Correspondence from the Division of Commercial and Sports Fisheries, dated November 6, 1973, stated, "Since the original overall project involved considerable additional fill being placed in important marsh species, the renewal was objected to by the Division and was denied in February 1973". This permit denial in 1973 appears to be the reason the center of the peninsula was not filled and remains as wetlands today. This area, although vegetated with coastal wetland species, is not considered coastal wetlands by the Division of Coastal Management. This is due to the fact that the center portion of the peninsula, having been cut off by deposition of excavated material, is no longer under tidal influence. However, the Corps of Engineers has exerted jurisdiction over the wetlands in the interior of the tract. A copy of the approved wetland delineation, signed by the Corps is included with this public notice as Attachment B.

Applicant's Stated Purpose

The applicant's purpose for this project is to develop a 28 lot residential subdivision. (Attachment C)

Project Description

The following is a brief history of past permit activities at this site. In 1989, Ruth A. King filed an application for a CAMA Major Permit and a Corps Regional General Permit, requesting authorization to bulkhead the perimeter of the property and to fill the entire tract, raising the elevation by 2 feet. The application requested permission to fill approximately two acres of wetlands in the center of the peninsula. The §401 Water Quality Certification and CAMA

Permit were subsequently denied. As a result of the State's denial, the Corps denied the application without prejudice on October 11, 1990 (AID 19900428). Ms. King reapplied after making modifications to her proposal, and in November 1991, CAMA Major Permit #142-91 was issued to Ms. King conditional upon the applicant receiving all required permits and approvals, including a §401 Water Quality Certification. The Division of Water Quality later denied the Certification, and accordingly, the Corps denial without prejudice remained. Mrs. King filed a takings claim against both the Environmental Management Commission and the Coastal Resources Commission. The claim was based on: (1) the EMC's denial of her application for a §401 Water Quality Certification to fill wetlands for the purposes of constructing an access road for a residential subdivision; and (2) the CRC's issuance of a CAMA Permit for the project that was conditioned on Mrs. King obtaining the §401 Certification prior to construction. By an order dated of June 6, 1997, the North Carolina Supreme Court denied Ruth King's petition for discretionary review. The Court of Appeals upheld the summary judgment in favor of the State agencies on Mrs. King's takings claim.

On February 3, 1999, Mrs. King's son, Mr. Walter A. Warren, filed an application for a CAMA Major Permit and a Corps Regional General Permit for the development of the eight-acre tract of land into a 46-lot residential subdivision. This proposal included the filling of approximately 0.39 acres of wetlands within the center of the property for access road and driveway construction. The Division of Coastal Management's State Permit No. 129-99 was issued on December 22, 1999, authorizing the development as proposed. The North Carolina Division of Water Quality issued Water Quality Certification No. 990169 for the project on September 13, 1999, and the Corps authorized the project issuing GP 198000291 on February 11, 2000 (AID 199900928). In accordance with the conditions of the Water Quality Certification, State Permit No. 129-99 required that a conservation easement be placed on all lots with remaining jurisdictional wetlands and waters preventing future wetland impacts. The permit required that these mechanisms be put in place within 30 days of the issuance of the permit. This permit was renewed by the State on October 29, 2002 and by the Corps on November 8, 2002. Both Federal and State permits expired on December 31, 2004.

In February 2000, a one-lane gravel access road measuring approximately 10 feet in width was constructed on the property, resulting in the filling of a portion of the §404 Wetlands authorized for fill. The property was sold to the Red Apple Group, LLC on July 27, 2004. On August 27, 2004, the North Carolina Division of Water Quality issued a Notice of Violation to Red Apple Group, LLC and to Mr. Walter A. Warren for the failure to comply with the conditions of the §401 Water Quality Certification dated September 13, 1999, which required that a conservation easement to be placed on the property within 30 days of the date of the §404 Permit, issued by the U.S. Army Corps of Engineers. On May 11, 2005, the Division of Coastal Management received an application from Red Apple Group, LLC for the development of the subject property. On June 6, 2005, the Division of Coastal Management issued a Notice of Violation to Mr. Walter A. Warren for violating the terms and conditions of State Permit No. 129-99, for the failure to record conservation easements on all lots with remaining jurisdictional wetlands and waters and for the construction of the gravel road approximately 10-15 feet northeast of the permitted alignment. On June 10, 2005, a letter was sent to Red Apple Group, LLC's agent, Charles Riggs, notifying him that the permit application, received on May 11, 2005, would not be processed until the Notice of Violation was resolved. After consultation with the U.S. Army

Corps of Engineers and the North Carolina Division of Water Quality, it was determined that the removal of the gravel road way and wetland fill would be sufficient for resolving the Notice of Violation. Red Apple Group, LLC in early August 2005, removed the gravel road and wetland fill.

On January 6, 2006 the Wilmington District received an application from the Red Apple Group for a Department of the Army permit to fill in all remaining wetlands (1.904 acres) for the construction of a street, sidewalks, utility lines, and lots for the proposed subdivision. To mitigate for the proposed wetland impacts, the applicant proposed to restore/create approximately 1.992 acres of wetlands along the perimeter of the peninsula between the proposed dwellings and the coastal wetland line. A public notice was issued March 3, 2006 to solicit public comment on this proposal. In response to comments received on this public notice the applicant submitted a revised application dated August 23, 2006 (received by this office on October 2, 2006). By letter dated November 16, 2006, the applicant submitted its final response to the comments received on its permit application. The revisions to the proposed project, in response to public comments, submitted by the applicant are summarized below:

- a. Reduced the number of lots to be developed from 37 to 28.
- b. Reduced the proposed wetland impacts from 1.9 acres to 0.399 ac.
- c. Revised the compensatory mitigation proposal to restore 0.698 acres of coastal wetlands located onsite. These areas will be excavated and graded to elevations consistent with adjacent coastal marsh as described in the applicant's letter dated August 23, 2006 (Attachment D). In addition, these areas will be recorded within a deed-recorded Conservation Area to preserve these wetlands in perpetuity. The applicant's original proposal to create 1.992 acres of wetlands on the southwest side of the peninsula was revised at the request of the NC Division of Water Quality.
- d. Relocated the central road and sidewalk to the south and west to reduce wetland impacts.
- e. Relocated the sewer lift station from wetlands to an upland lot at the east end of the peninsula.
- f. Reduced development density of built-upon area to 21.8 percent.
- g. Reduced potential impacts to water quality in the adjoining canals by designing all lots to slope toward the center of the peninsula and direct stormwater sheet flows from lots, streets, and sidewalks to wetlands in the interior and along the north side of the peninsula. Stormwater sheetflow to the south side of the peninsula has been eliminated.
- g. Eliminated all bulkhead and piers from the proposal. Future permits for these structures will be the responsibility of the individual property owners. The Red Apple Group also proposes to restrict property owners to one boat slip per lot via the Declaration of Restrictive Covenants for the development to restrict the maximum number of boat slips to 28 for the development.

In summary, the current application from the Red Apple Group for a Department of the Army permit to fill in 0.399 acres of wetlands for the construction of a street, sidewalks, utility lines, and lots for the proposed subdivision. To mitigate for the proposed wetland impacts, the applicant proposed to restore/create approximately 0.698 acres of wetlands along the perimeter of the peninsula between the proposed dwellings and the coastal wetland line.

Other Required Authorizations

This notice and all applicable application materials are being forwarded to the appropriate State agencies for review. The Corps will generally not make a final permit decision until the North Carolina Division of Water Quality (NCDWQ) issues, denies, or waives State certification required by Section 401 of the Clean Water Act (PL 92-500). The receipt of the application and this public notice in the NCDWQ Central Office in Raleigh serves as application to the NCDWQ for certification. A waiver will be deemed to occur if the NCDWQ fails to act on this request for certification within sixty days of the date of the receipt of this notice in the NCDWQ Central Office. Additional information regarding the Clean Water Act certification may be reviewed at the NCDWQ Central Office, 2321 Crabtree Boulevard, Raleigh, North Carolina 27604-2260. All persons desiring to make comments regarding the application for certification under Section 401 of the Clean Water Act should do so in writing delivered to the North Carolina Division of Water Quality (NCDWQ), 2321 Crabtree Boulevard, Suite 250, Raleigh, North Carolina 27609-2260 Attention: Ms. Cyndi Karoly by February 9, 2007.

The applicant has not provided to the Corps, a certification statement that his/her proposed activity complies with and will be conducted in a manner that is consistent with the approved North Carolina Coastal Zone Management Program. Pursuant to 33 CFR 325.2(b)(2), the Corps can not issue a permit for the proposed work until the applicant submits such a certification to the Corps and the North Carolina Division of Coastal Management (NCDCM), and the NCDCM notifies the Corps that it concurs with the applicant's consistency certification.

Essential Fish Habitat

This notice initiates the Essential Fish Habitat (EFH) consultation requirements of the Magnuson-Stevens Fishery Conservation and Management Act. The Corps' initial determination is that the proposed project will not adversely impact EFH or associated fisheries managed by the South Atlantic or Mid Atlantic Fishery Management Councils or the National Marine Fisheries Service.

Cultural Resources

The Corps has consulted the latest published version of the National Register of Historic Places and is not aware that any registered properties, or properties listed as being eligible for inclusion therein are located within the project area or will be affected by the proposed work. Presently, unknown archeological, scientific, prehistoric, or historical data may be located within the project area and/or could be affected by the proposed work.

Endangered Species

The Corps has reviewed the project area, examined all information provided by the applicant and consulted the latest North Carolina Natural Heritage Database. Based on available information, the Corps has determined pursuant to the Endangered Species Act of 1973, that the proposed

project will have no effect on federally listed endangered or threatened species or their formally designated critical habitat.

Evaluation

The decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity on the public interest. That decision will reflect the national concern for both protection and utilization of important resources. The benefit, which reasonably may be expected to accrue from the proposal, must be balanced against its reasonably foreseeable detriments. All factors which may be relevant to the proposal will be considered including the cumulative effects thereof; among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, flood plain values (in accordance with Executive Order 11988), land use, navigation, shoreline erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership, and, in general, the needs and welfare of the people. For activities involving the discharge of dredged or fill materials in waters of the United States, the evaluation of the impact of the activity on the public interest will include application of the Environmental Protection Agency's 404(b)(1) guidelines.

Commenting Information

The Corps is soliciting comments from the public; Federal, State and local agencies and officials, including any consolidate State Viewpoint or written position of the Governor; Indian Tribes and other interested parties in order to consider and evaluate the impacts of this proposed activity. Any comments received will be considered by the Corps to determine whether to issue, modify, condition or deny a permit for this proposal. To make this decision, comments are used to assess impacts on endangered species, historic properties, water quality, general environmental effects and the other public interest factors listed above. Comments are used in the preparation of an Environmental Assessment (EA) and/or an Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act (NEPA). Comments are also used to determine the need for a public hearing and to determine the overall public interest of the proposed activity.

Any person may request, in writing, within the comment period specified in this notice, that a public hearing be held to consider the application. Requests for public hearings shall state, with particularity, the reasons for holding a public hearing. Requests for a public hearing shall be granted, unless the District Engineer determines that the issues raised are insubstantial or there is otherwise no valid interest to be served by a hearing.

Written comments pertinent to the proposed work, as outlined above, will be received by the Corps of Engineers, Wilmington District, until 5pm, February 9, 2006. Comments should be submitted in writing to Dave Timpy, delivered to 69 Darlington Avenue, Wilmington, North Carolina 28402. Mr. Timpy may be contacted at (910) 251-4634.

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ATTORNEYS AT LAW

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August 23, 2006

VIA OVERNIGHT OR HAND DELIVERY

Mr. Jim Gregson
District Manager
N.C. Division of Coastal Management
127 Cardinal Drive Extension
Wilmington, NC 28405-3845

RE: Amended Permit Applications
Peninsula at Topsail Island Project
Topsail Township, Pender County
Surf City, North Carolina
Our File 050823-00005-001

Dear Mr. Gregson:

Enclosed is an Amended CAMA Application for development of the Peninsula at Topsail Island project in Surf City, North Carolina. We are submitting this on behalf of Red Apple Group, LLC.

Also enclosed for your information only is a copy of a Stormwater Permit Application for this project. The official Stormwater Permit Application will be submitted under separate cover to Linda Lewis.

Our client has carefully considered each of the comments received on the original CAMA Permit Application and has performed several iterations on the design of the project in order to respond to the concerns expressed by the various regulatory agencies. In particular, Charles Riggs and our client met with representatives of the Division of Water Quality ("DWQ") and U.S. Army Corps of Engineers ("Corps") on June 28, 2005. Subsequently, Charles Riggs and I met with you, Noelle Lutheran, and Linda Lewis on March 16, 2006, to review project plans and solicit your suggestions concerning recommended design modifications. Charles Riggs met with Noelle Lutheran on June 1, 2006 to review additional project changes. Charles Riggs also met with Lillette Granade of the Corps on June 1, 2006 to request her feedback on several proposed design modifications that might address the Corps' concerns. After each conference, further

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modifications were made to the project's design to respond to comments and suggestions dealing with density, stormwater, wetlands, built-upon area, and other issues.

Summary of Design Modifications Made in Response to Comments. Specifically, the project originally consisted of 37 lots, whereas the final development plan reduces the density to 28 lots. In fact, most of the lots on the northeast side of the development have been eliminated. The central road and concrete sidewalk (required by the Town) have been moved to the south and west to reduce the amount of jurisdictional wetlands potentially impacted. The sewer lift station has been moved to an upland lot at the east end of the peninsula, further reducing potential impacts on wetlands. The lots will all be graded so that stormwater will sheet flow to the opposite (northeast) side of the peninsula. A substantial area of upland running down the opposite (northeast) side of the peninsula will be converted to wetlands, thus providing an additional level of filtering for sheet flows draining off the residential lots. The total amount of wetlands to be filled has been reduced from 1.904 acres to 0.399 acres and the total amount of wetlands to be created has been increased to 0.698 acres. Existing coastal wetlands along both the southwest and northeast sides of the peninsula will be preserved. With these changes, total built-upon area has been reduced to 21.8%.

With reference to Lillette Granade's letter of April 4, 2006 and various other comment letters received in response to the original development plan, allow me to describe the measures proposed to address agency concerns and regulatory requirements.

1. Avoidance of Wetland Impacts. The developer examined all possible on-site alternatives for avoiding impacts to jurisdictional wetlands. Complete avoidance is impossible, given the central location of the wetlands down the spine of the peninsula. These wetlands are the product of side-casting of spoil when the adjoining canals on either side were dredged in the early 1970s by the previous owner. The previous owner originally applied for a CAMA Permit calling for a total of 47 lots. Density initially was reduced by Red Apple Group from that number to 37 lots, and subsequently to 28 lots in response to agency comments. The project now meets the DWQ requirements for a Low Density Development. The street and sidewalk serving the development has been moved to the south and west to avoid impacting the jurisdictional wetlands located down the spine of the peninsula. Please note that Charles Riggs officially requested approval by Surf City for payment in lieu of constructing a 5' sidewalk. That request was denied. Also, it should be noted that a 20' wide street is the minimum street width required by Surf City subdivision rules. This requirement necessitates the filling of at least some wetlands in order to devise a feasible development plan. Further, the sewer lift station was moved to an uplands lot, thus further avoiding wetlands impacts.

2. Minimization of Wetland Impacts. The applicant is requesting permission to fill a total of 0.399 acres of wetlands. This includes:

Street = 12,339 sq. ft. - required by Surf City

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Sidewalk = 809 sq. ft. - required by Surf City

Drives = 1,309 sq. ft.

Dwellings = 431 sq. ft.

Other areas (e.g. lawns or landscaping on lots) = 2,484 sq. ft.

Total Wetland Fill Request = 17,372 sq. ft. or 0.399 acres.

Of this request, 13,148 sq. ft. or 75% is required by Surf City rules.

3. Mitigation. Red Apple Group proposes to create a total of 30,423 sq. ft. of new wetlands representing 0.698 acres. This area will function as an additional filter for stormwater sheet-flowing off the residential lots to the northeast side of the peninsula. The combination of this band of newly-created wetlands extending the length of the peninsula and the existing coastal wetlands along the northeast perimeter will serve to filter the majority of stormwater runoff from the peninsula before it reaches the adjoining canal to the northwest. [Note that the proposed creation of wetlands on the southwest side of the peninsula was eliminated at DWQ request in favor of re-contouring the lots and directing all surface flow to the opposite side.] The newly-created wetlands will be included within a deed-recorded Conservation Area that will preserve these wetlands in perpetuity. With this feature, the ratio of wetland mitigation is 1.75:1.

Wetlands occurring on the property have been historically impacted via dredging and disposal activities. In 1970, a Corps dredge and fill permit authorized the excavation of two large canals extending perpendicular from the Atlantic Intra-coastal Waterway (AIWW) along the northeast and southwest property lines. Disposal material from the excavation was side-cast into the adjacent area. This served to alter the elevation of the immediate area as well as hydrologically disconnect the interior wetland pockets from the fringe coastal marsh. Coastal marsh wetlands (as defined by NC Division of Coastal Management regulations) continue to occur adjacent to the open water canals. Interior of the coastal marsh is an area of contiguous uplands extending around the perimeter of the property. Section 404 wetlands occur within the interior portion of the property down the spine of the peninsula. These wetlands areas are not inundated by regular or occasional tides, but have retained the hydrology and vegetation sufficient to be delineated as Section 404 wetlands. The dominant species occurring in these areas is *Phragmites australis* - a species indicative of site disturbance. Other species occurring in these area include *Spartina patens*, *Typha latifolia*, *Polygonum* spp., and *Juncus effuses*. Wetland areas have been historically impacted by site activities and characteristics functions of the coastal marsh have been compromised.

Typical functions associated with natural, relatively undisturbed coastal marsh systems include high primary productivity, detrital export, and feeding and refuge habitat for benthic and aquatic species. Based upon the level of disturbance that has already occurred on the site, it is apparent

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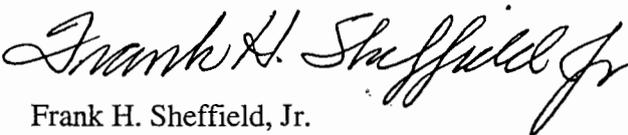
that the interior pocket of wetlands do not provide quality habitat for characteristic estuarine fauna. In addition, the lack of a regular tidal connection severely limits and/or removes the detrital export function. These wetland areas do still provide some level of primary productivity and likely serve as nutrient sinks.

Red Apple Group proposes to restore coastal wetlands on-site via the removal of the upland berm located along the northeast canal of the property. Restoration of 0.698 acres of coastal wetlands will occur, corresponding to a compensatory mitigation ratio of 1.75:1. These areas are of slightly higher topography and restrict tidal inundation. Mitigation efforts will include the excavation and grading of this area to elevations consistent with adjacent coastal high marsh. These restoration elevations range from 2.5' to 3.5', NGVD 1929.

The restoration is intended to restore high marsh, coastal wetlands located above the normal high water line. As such, the target vegetative community will consist of *Spartina patens*, *Distichlis spicata*, *Juncus roemerianus*, *s. cynosuroides*, *Iva frutescens* and *Borrchia frutescens*. Restoration of 0.698 acres of former coastal marsh will occur via the re-establishment of the tidal hydrology and the characteristic high marsh vegetation. The characteristic high marsh will recruit naturally into the restored area; however, Red Apple Group proposes to plant herbaceous seedlings on 2-ft. centers. This corresponds to approximately 4,400 seedlings. In addition, shrub species, such as *frutescens* and *B. frutecens* will be planted on 8-ft. centers along the perimeter of the restoration area.

Conclusion. In conclusion, Red Apple Group requests approval of a CAMA Major Development Permit to develop this property. We believe our client has gone to extraordinary lengths to respond to concerns expressed by the various regulatory agencies. We look forward to your providing notice of this Amended CAMA Permit Application and the receipt of any further agency and public comments.

Yours very truly,



Frank H. Sheffield, Jr.

FHS-FHS:fhs
NBMAIN\693064\1
Enclosures

cc: Mr. J. R. Triplett
Mr. Parrish Sasser
Mr. Charles F. Riggs
J. Troy Smith, Jr., Esq.

ATTACHMENT 1

