

ADMINISTRATIVE APPEAL DECISION

FILE NO. 200100224

WILMINGTON DISTRICT

July 30, 2002

Review Officer: Arthur L. Middleton, U.S. Army Corps of Engineers (USACE),
South Atlantic Division, Atlanta, Georgia.

Appellant Representative: Mr. William Krompegal, Daytona Beach Shores, Florida.

Receipt of Request For Appeal (RFA): July 27, 2001.

Appeal Conference Date: November 6, 2001. **Site Visit Date:** November 6, 2001.

Background Information: The site is approximately 1.7 acres on the east side of River Road, of Rockledge Road, adjacent to the Cape Fear River, approximately 2 miles south of Wilmington, New Hanover County, North Carolina. By Notification of Jurisdictional Determination dated February 26, 2001, the Wilmington District (District) informed Mr. Krompegal that the property described above contains jurisdictional wetlands.

River Road binds the site on the west and Rockledge Road on the south. According to Mr. Krompegal, the site consists of 1.54 acres. A very small upland area is located adjacent to Rockledge Road, but tapers off and does not continue to River Road. A culvert (storm drain) goes under River Road just north of the intersection of River Road and Rockledge Road and connects with a larger marsh to the west. As noted above, the William Krompegal appeal site visit occurred on November 6, 2001. Attendees were Mr. William Krompegal, Angie Pennock (SAW – Project Manager), Keith Harris (SAW), Scott McClendon (SAW), and Arthur Middleton (SAD – Appeal Review Officer). During the site visit, standing water was observed on Mr. Krompegal's property in the vicinity of the culvert. From River Road looking east there is an extensive marsh bounded by cypress trees. There is a narrow strip of uplands along the extreme eastern side of the property.

Summary of Decision: I find that the appeal does not have merit. I find that the District properly evaluated and documented their approved jurisdictional determination dated February 26, 2001. The change in the height of the drainage structure installed by the city was fully considered by the District.

Appeal Evaluation, Findings and Instructions to the Wilmington District Engineer (DE):

Reason 1: "Told verbally that we would be denied a permit to fill and level certain sections of this property because of the wetland areas on the property...Also, the city has now installed sewers and storm drains in the area of...the property. The storm drain is considerably lower than

the property, allowing additional runoff. We would like these new conditions considered in the review of this appeal, believing there is incorrect application of identifying this as delineating wetlands.”

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

DISCUSSION: The Administrative Record includes a record of a conversation, January 16, 2001, between the Project Manager and Mr. Krompegal which stated “[Mr. Krompegal] asked how he could get a permit to grub and fill 1.78 acres in the tract...told him he could apply for an IP [Individual Permit], but without a project purpose (such as plans w[ith] a house footprint) an alternatives analysis could not be performed and the permit [application] considered denied/withdrawn due to insufficient information ...explained avoid, minimize, mitigation...Also indicated that he [Mr. Krompegal] should contact CAMA [North Carolina Coastal Area Management Act] as our permit had to be in compliance w[ith] the state certifications/permits...gave him ...name and number.” According to the Project Manager, the District was aware of the new storm drains when the jurisdictional determination was approved. The Administrative Record also includes a note, September 12, 2000, in which another representative of the District stated, “I looked at this [site] years ago, most of it is wet. With storm drains and other improvements recently put in, he’s [Mr. Krompegal] hoping [the] JD will have less 404 [hoping that the jurisdictional area would be reduced].” Emphasis added. The old storm drain, according to Mr. Krompegal, was a raised drop box with a grate on top that was located adjacent to Rockledge Road that turns off River Road. This former outlet was approximately two to three feet higher than the new storm drain that consists of a culvert under River Road and connects to the large marsh on the other side of River Road from Mr. Krompegal’s property. According to the District representatives, Mr. Krompegal’s property is tidally influenced. The Review Officer observed there is a clear connection between Mr. Krompegal’s property and the large marsh on the other side of River Road. When asked about his statement “incorrect application” regarding regulatory policy, Mr. Krompegal stated, “the district should have taken into consideration that the changes have made the site wetter.” As noted above, Wilmington District was aware that the new storm drain had been installed when the jurisdictional determination was approved.

Reason 2: “[The Project Manager’s] comments reference numerous changes in the regulations governing this area, one of which was that if we pursued this application to fill nine months prior the property would have been able to be filled without a permit or any other complications due [to] those regulations which have recently changed. The continual changes [i]n the regulations have convoluted this entire matter in regards to the regulation of numerous ambiguities over the years [with] reference [to] this property, and ... falls under the officially promulgated properties issue.”

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

DISCUSSION: According to the Project Manager, with regard to Mr. Krompegal's reference to changes in the regulations, she had explained about the use of the old Nationwide Permit 26, which has now been replaced. The Federal Register /Vol. 65, No. 47/ Thursday, March 9, 2000/ Notices (page 12818) issued the final notice, "[t]he Corps of Engineers...is issuing 5 new Nationwide Permits (NWPs) and modifying 6 existing NWPs to replace NWP 26 which expires..." The Federal Register /Vol. 65, No 52/ Thursday, March 16, 2000/Notices (page 14255) clarified that NWP 26 would expire on June 7, 2000 and that June 7, 2000 would be the effective date of the new and modified NWPs. When the Review Officer asked Mr. Krompegal if he has applied for a permit to fill the property, he replied, "Have not pursued a permit because I always knew the property was wet."

Reason 3: "...over the years we have attempted to get a ruling to make the property buildable, to no avail."

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

DISCUSSION: At the Appeal Conference on November 6, 2001 when asked by the Appeal Review Officer from who had he attempted to get a ruling, Mr. Krompegal said that he had approached the county and was told he "will need something from the Corps." Mr. Krompegal said that he has not approached the state. As noted above in Reason 1, the Administrative Record includes a note, September 12, 2000, in which another representative of the Wilmington District stated, "I looked at this [site] years ago, most of it is wet. With storm drains and other improvements recently put in, he's [Mr. Krompegal] hoping [the] JD will have less 404 [hoping that the jurisdictional area would be reduced]."

Information Received and its Disposition During the Appeal Review:

The Wilmington District furnished a copy of the administrative record.



Peter T. Madsen
Brigadier General, US Army
Commanding