



Geoff Gisler
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06/08/2009 02:01 PM

To Stan Meiburg/R4/USEPA/US@EPA
cc Mike Shapiro/DC/USEPA/US@EPA, Jim
Giattina/R4/USEPA/US@EPA, Gregory
Peck/DC/USEPA/US@EPA, Suzanne
bcc

Subject Response to Corps's PCS Permit decision

History: This message has been forwarded.

Stan,
We have had the opportunity to review the Corps's ROD and permit issued to PCS Phosphate last week. As described in the attached letter, we do not believe the Corps has adequately responded to EPA's previous determination that Modified Alt. L would result in unacceptable adverse effects to aquatic resources of national importance. The minimal reduction in wetland impacts, approximately 1%, does little to address the concerns identified in EPA's elevation package regarding the scale and intensity of direct and indirect impacts. The monitoring provisions, though improved, will document, rather than avoid, the significant degradation EPA's analysis identified and were presented in the elevation package as part of an overall program centered on additional avoidance. We do not believe that the information presented in the ROD or the conditions in the permit support any decision other than initiation of veto proceedings under Section 404(c). Thank you for considering this letter and we look forward to further discussing these issues with you.

Sincerely,
Geoff

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June 8, 2009

A. Stanley Meiburg
Acting Regional Administrator
EPA Region 4
Sam Nunn Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, GA 30303

Re: PCS Phosphate – June 3, 2009 permit approving Modified Alt. L

Dear Mr. Meiburg:

We submit this letter on behalf of the Pamlico-Tar River Foundation, Environmental Defense Fund, Sierra Club, and North Carolina Coastal Federation and in response to the U.S. Army Corps of Engineers issuance of a permit to PCS Phosphate on June 3, authorizing the company to expand its mining operation near Aurora, North Carolina. That permit approves impacts to 3,927 acres of wetlands and 22,435 linear feet of streams essentially mirroring the proposed expansion that EPA elevated on April 3, 2009. At that time, EPA concluded that because of the scale of the project and the sensitivity of the wetlands and waters that would be impacted, that the expansion “would fail to comply with the [404(b)(1)] Guidelines” and result in unacceptable adverse impacts to aquatic resources of national importance. We continue to believe that the permit, which varies little from the elevated mine expansion, would violate the 404(b)(1) Guidelines. In fact, the additional avoidance of wetlands is so far short of what EPA determined to be necessary to have an acceptable level of impacts, we see no justification for any decision except for a veto. We therefore respectfully request that EPA initiate proceedings under 404(c) of the Clean Water Act to veto the proposed mine expansion.

We urge this action in the shadow of Administrator Jackson’s recent letter to Sen. Boxer reaffirming that EPA and other federal agencies “need to identify opportunities to expand protection of wetlands and other aquatic resources that are especially vulnerable or critical to sustaining the health of these systems.” This is not only an opportunity to protect critical wetland resources; EPA has a duty protect these wetlands. The key concerns raised by EPA in elevating the previous permit proposal – extensive wetland impacts, drainage basin reduction around tidal creeks and primary fishery nursery areas, direct impacts to rare wetlands, and inadequate mitigation – have not been satisfactorily addressed in the permit. EPA can partially veto the project by designating specific areas unsuitable for discharge of dredge and fill material, allowing 29 years of uninterrupted

mining while preserving those wetlands and waters that are essential to the health of the Pamlico River.

EPA has already determined that impacts under Modified Alternative L will result in “unacceptable adverse effects.”

On February 24, 2009, the U.S. Army Corps of Engineers issued a Notice of Intent to issue a Section 404 permit to PCS Phosphate authorizing a mine expansion plan that would impact 11,454 acres along the Pamlico River, including 3,953 acres of wetlands and 25,727 linear feet of streams.¹ EPA elevated that permit decision under Section 404(q) of the Clean Water Act on the grounds that it “would result in substantial and unacceptable impacts to waters of the United States, including wetlands, in the Albemarle Pamlico River estuary system.”² That objection was based on findings by the EPA that the proposed permit would violate the 404(b)(1) guidelines because the project’s direct and indirect impacts would result in significant degradation of waters of the U.S., less environmentally damaging practicable alternatives exist, and appropriate steps to minimize and compensate for impacts have not been taken.

In concluding that mining 3,953 acres of wetlands and 25,727 linear feet of streams would cause “unacceptable adverse effects” to waters of the United States, EPA made the following findings:

- “it is EPA’s determination that the direct impacts of mining the 271 acre Significant Natural Heritage Area on the Bonnerton tract does not comply with Subparts C-F of the Guidelines, specifically Subpart C – Impacts on physical characteristics of the aquatic ecosystem, Subpart D – Impacts on the biological characteristic of the aquatic ecosystem, Subpart E – Impacts to special aquatic sites and Subpart F – Effects on human use characteristics (SNHA designation).”³
- “We believe the potential effect of Drainage Basin Reduction (DBR) on the production of marine fisheries resources is significant.”⁴ “EPA believes the data presented do not overcome the large body of scientific information showing that mining through the headwaters of estuarine streams and their riverine habitat will have a significant negative impact on the functioning and structure of the creeks impacted by the proposed mining activities. There is, however, a large amount of scientific data supporting the importance of headwater streams and wetlands on downstream water quality.”⁵

¹ EPA Detailed Comments at 1.

² *Id.*

³ *Id.* at 12.

⁴ *Id.* at 13.

⁵ *Id.* at 15.

- “EPA believes that impacts to these ecological functions at the scale associated with this project would cause or contribute to significant degradation . . . of the Nation’s waters. Further, as discussed below, we do not believe the proposed compensatory mitigation would reduce these adverse impacts to an acceptable level.”⁶

To further illustrate the basis of its rejection of Elevated Alternative L, EPA made clear that even “SCRA and SCRB alternatives [evaluated in the FEIS] would allow an unacceptable level of 1) direct impacts to the site’s Nationally Significant Natural Heritage Area and 2) indirect impacts to the site’s tidal and creeks,” even though those alternatives would reduce the mine’s impacts to 3,506 acres of wetlands and 14,360 linear feet of streams.⁷ Based on these analyses together, EPA determined that any alternative must include fewer impacts than either Elevated Modified Alt. L or the SCR alternatives to avoid unacceptable adverse effects that require a veto.

In an effort to identify an alternative that would not result in significant degradation of waters of the U.S., and would not have unacceptable adverse effects, EPA introduced an alternative that would allow 29 years of uninterrupted mining while allowing 2,787 acres of wetland impacts.⁸ The agency found that even that impact “continues to be extraordinarily large . . . amplifying the need to pay very close attention to the execution, monitoring and adaptive management of the project’s compensatory mitigation so that the Nation’s waters are not significantly degraded.”⁹

The permit issued to PCS Phosphate on June 3, 2009 authorizes impacts to 3,927 acres of wetlands and 22,435 linear feet of streams. Thus, it represents only a 1% reduction in wetland impacts from the Elevated Modified Alt. L that EPA determined to have unacceptable adverse effects. It represents a 12% increase in wetland impacts and a 56% increase in stream impacts from the SCR alternatives that EPA has determined would have unacceptable adverse effects. Finally, the permit authorizes an additional 1,140 acres of wetland impact compared to the EPA alternative that EPA’s elevation package describes as an “extraordinarily large” impact that must be closely monitored and carefully carried out to avoid significant degradation.

EPA has evaluated three alternatives to determine whether they would have unacceptable adverse effects on waters and wetlands of the U.S. For the Modified Alt. L that EPA elevated and the SCR alternatives, the agency determined that the scale and location of impacts would cause unacceptable adverse effects. EPA concluded that its avoidance alternative offered initially in January 2007 and formalized in the elevation proceedings would not. The chart below summarizes the effects of those mine expansion plans and compares them to the issued permit.

⁶ *Id.* at 16.

⁷ *Id.* at 21.

⁸ *Id.* at 21.

⁹ *Id.* at 21.

Summary of EPA Evaluation of Alternatives

Mine Plan Alternative	Wetland Loss (ac)	Wetland Loss Above EPA Alternative	Loss of Wetlands of National Ecological Significance	Elimination of Tidal Creeks Watersheds	EPA Determination
Elevated Alt. L	3,953	1,166	Yes	~ 70% ¹⁰	Unacceptable adverse effects
Permitted Alt. L	3,927	1,140	Yes	~ 70% ¹¹	
SCR Alts.	3,506	719	Yes	~ 70% ¹²	Unacceptable adverse effects
EPA Alt.	2,787	N/A	No	No permitted drainage basin reduction in Jacks, Jacobs, Drinkwater Creeks watersheds ¹³	Avoids significant degradation

The Corps approved impacts that are nearly identical to impacts allowed by the previously rejected mine expansion and therefore EPA must conclude that Permitted Alt. L will have unacceptable adverse effects on waters of the U.S.

The impacts approved in the June 3 permit are nearly identical to the earlier proposed expansion that EPA found would have unacceptable adverse effects – and substantially more damaging than either of the SCR alternatives or the EPA alternative – leaving EPA no choice but to find that the permitted expansion will result in unacceptable adverse effects. EPA based its earlier elevation and rejection of the proposed permit on four points, none of which can be satisfied by this permit:

¹⁰ EPA Detailed Comments at 1, 13, 15, 16.

¹¹ Calculations are based on cumulative impacts to Porter Creek, Jacks Creek, Jacobs Creek, Drinkwater Creek, Tooley Creek, and Huddles Cut as described in the Corps's Record of Decision at 11. Porter Creek, Jacks Creek, Jacobs Creek, and Tooley Creek are designated as Primary Nursery Areas by the State of North Carolina.

¹² Calculations are based on cumulative impacts to Porter Creek, Jacks Creek, Jacobs Creek, Drinkwater Creek, Tooley Creek, and Huddles Cut as described on page 6-60 of the Final Environmental Impact Statement.

¹³ The EPA Alternative would not allow any additional drainage basin reductions in Jacks, Jacobs, and Drinkwater Creeks. It would allow some drainage basin reduction in Tooley and Porter Creeks, but would require additional avoidance compared to Elevated Modified Alt. L or the permitted mine expansion.

- The Elevated Modified Alt. L would have authorized 3,953 acres of wetland impacts and, according to EPA's evaluation, would cause significant degradation of waters of the U.S. Further, EPA held that the SCR alternatives, which would impact 3,506 acres of wetlands, would result in unacceptable adverse effects. The June 3 permit authorizes destruction of 3,927 acres of wetlands, a reduction of just 1% of wetland impacts from Elevated Modified Alt. L and 421 acres of wetland impacts more than the SCR alternatives.
- The Elevated Modified Alt. L included an approximate 70% drainage basin reduction to the watersheds of tidal creeks and primary nursery areas. EPA requested additional avoidance in the watersheds of Porter, Jacks, Jacobs, Drinkwater, and Tooley Creek. The June 3 permit authorizes an approximate 70% drainage basin reduction to the watersheds of these same creeks.
- The Elevated Modified Alt. L would have resulted in direct impacts to the Nationally Significant Natural Heritage Area in the Bonnerton tract that would cause significant degradation of waters of the U.S. EPA required avoidance in these wetlands of national ecological significance. The June 3 permit does not reduce the direct impacts to the Nationally Significant Natural Heritage Area that EPA found violated the 404(b)(1) guidelines.
- The Elevated Modified Alt. L relied on a practicability analysis that "effectively obscure[s] identification of the least environmentally damaging practicable alternative (LEDPA) as required by the Guidelines."¹⁴ The June 3 permit does not alter the practicability analysis that EPA found to violate the 404(b)(1) guidelines.
- The Elevated Modified Alt. L included mitigation that "will not adequately offset impacts"¹⁵ in violation of the Guidelines. PCS has not proposed any additional mitigation to offset the impacts approved in the June 3 permit.

In light of EPA's recent evaluations of the Elevated Modified Alt. L, SCRA, SCRB, and the proposed EPA alternative, EPA must conclude that PCS's permit authorizing the destruction of 3,927 acres of wetlands and 22,435 linear feet of streams will cause unacceptable adverse effects and significant degradation of waters of the U.S., thereby violating the 404(b)(1) Guidelines. The changes to impacts made by the Corps in this permit are minimal, fail to address entirely or do not address adequately the concerns EPA identified in its elevation package, and cannot alter the EPA's previous determination that "impacts to these ecological functions at the scale associated with this project would cause or contribute to significant degradation . . . of the Nation's waters."¹⁶

¹⁴ EPA Detailed Comments at 16.

¹⁵ *Id.* at 20.

¹⁶ *Id.* at 16.

The EPA Alternative will allow for continued mining while preventing significant degradation of waters of the U.S.

EPA has presented an alternative that will allow PCS to profitably mine for approximately 29 years while substantially reducing wetland impacts, maintaining critical watersheds around sensitive fishery nursery areas, and protect the nationally significant nonriverine wet hardwood swamps in the Bonnerton tract. PCS has not demonstrated that this alternative is not practicable. Instead, the Corps relied on a practicable alternatives analysis that EPA found to “effectively obscure identification of the least environmentally damaging practicable alternative (LEDPA) as required by the Guidelines.”

The June 3 permit’s monitoring and management provisions do not offset the direct and indirect impacts approved or replace the need for significant additional wetland avoidance included in the EPA Alternative. EPA must prevent, rather than monitor, significant degradation of aquatic resources of national importance and assure compliance with the 404(b)(1) Guidelines. The permit includes monitoring and “adaptive management” provisions to document the environmental and water quality degradation that will result from the authorized activities. These provisions cannot substitute for EPA’s duty to prevent that degradation. Since the tidal creek wetlands will be mined within the first few years of the permit, adaptive management is of no value as a substitute for avoidance. The damage will have been done, and the impacts largely irreversible.

Moreover, EPA recognized that even with monitoring and adaptive management, substantial additional wetland avoidance was necessary to avoid significant degradation. Even the EPA Alternative, which avoided 1,140 more acres of wetlands than the Permitted Alt. L was “extraordinarily large” and would, by EPA’s evaluation, require intense monitoring and adaptive management to avoid significant degradation.¹⁷

The Corps has failed in its responsibility to protect the Nation’s waters. By vetoing the most damaging parts of the permit to correspond with EPA’s proposed alternative, EPA can protect the most sensitive areas within the project area without preventing less damaging mining. The health of the Pamlico River depends on EPA exercising its authority to veto the most destructive aspects of the permit – aspects it has already determined will cause unacceptable adverse effects.

EPA’s discretion under 404(c) is limited to determining whether a project would have unacceptable adverse effects.

Under the Clean Water Act the EPA is a critical backstop in the protection of wetlands and waters of the United States when the U.S. Army Corps of Engineers issues a permit that would cause unacceptable adverse effects. The Act provides that when the U.S. Army Corps of Engineers authorizes impacts that will “have an unacceptable

¹⁷ *Id.* at 21.

adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas," the EPA has the responsibility to limit those impacts.¹⁸ The regulations implementing that section empower the Administrator of the EPA "to prohibit or otherwise restrict a site whenever he determines that the discharge of dredged or fill material is having or will have an 'unacceptable adverse effect'" or violate the 404(b)(1) Guidelines.¹⁹

When making that determination whether to initiate 404(c) proceedings, the Administrator's discretion is limited to evaluating whether a project will have unacceptable adverse effects. Although EPA has discretion in the 404(c) process, "it is not a roving license to ignore the statutory text . . . but a direction to exercise discretion within defined statutory limits."²⁰ Here, those statutory limits require that "the Administrator must base his decision of whether or not to make a determination that issuance of a permit has unacceptable adverse effects, and therefore veto the permit, on whether he believes the issuance of the permit is likely to have unacceptable adverse effects."²¹ If it finds that unacceptable adverse effects will occur, EPA cannot refuse to veto a permit based on "factors Congress has not intended it to consider."²² EPA's determination must be based on "whether or not the [Project] complied with the Guidelines promulgated by EPA pursuant to section 404(b) of the Clean Water Act."²³

After the EPA finds that a project will have "unacceptable adverse effects," its duty under Section 404(c) of the Clean Water Act to prevent discharges to wetlands that is non-discretionary.²⁴ EPA's determination that a project will have unacceptable adverse effects requires the agency to exercise its non-discretionary duty to initiate 404(c) proceedings.

EPA previously determined that the impacts approved by the June 3 permit will have unacceptable adverse effects and must act under 404(c).

In its elevation package, EPA correctly determined that Modified Alt. L as presented at that time would result in significant degradation of the aquatic environment, was based on a biased practicability analysis, and could not be mitigated through the proposed mitigation package. That mine plan would have had unacceptable adverse effects. In response, the Corps issued a permit that reduces wetland impacts by a meager 1%, relies on the same biased practicability analysis, and depends on the same inadequate mitigation to offset those nearly identical impacts. Rather than altering the impacts that EPA has determined will have unacceptable adverse effects, the Corps has required PCS

¹⁸ 33 U.S.C. § 1344(c).

¹⁹ 40 C.F.R. §§ 231.1(b), 231.2(e).

²⁰ *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007).

²¹ *Alliance to Save the Mattaponi v. U.S. Army Corps of Engineers*, 1:06-cv-01268-HHK at 33 (D.D.C. 2009).

²² *Motor Vehicle Manufacturer's Ass'n v. State Farm*, 463 U.S. 29, 43 (1983).

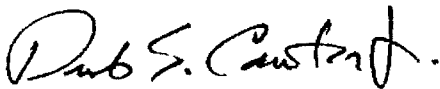
²³ *Alliance to Save the Mattaponi v. U.S. Army Corps of Engineers*, 1:06-cv-01268-HHK at 32 (D.D.C. 2009).

²⁴ See *Environmental Defense Fund v. Tidwell*, 837 F. Supp. 1344 (E.D.N.C. 1992).

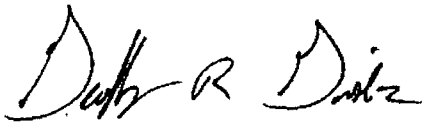
to monitor the significant degradation of waters of the U.S and restated the violations of the 404(b)(1) Guidelines EPA identified in its elevation package. Those unaltered violations of the 404(b)(1) Guidelines and the unacceptable adverse effects of Permitted Alt. L that EPA has identified demand initiation of veto proceedings under Section 404(c).

We appreciate your consideration of these comments. We look forward to discussing these issues further.

Sincerely,



Derb S. Carter, Jr.
Director, NC/SC Office



Geoffrey R. Gisler
Staff Attorney



"Walker, William T SAW"
 <William.T.Walker@usace.army.mil>
 06/08/2009 02:38 PM

To Rebecca Fox/R4/USEPA/US@EPA
 cc Jim Giattina/R4/USEPA/US@EPA, "Moyer, Jennifer A HQ02"
 <Jennifer.A.Moyer@usace.army.mil>, Stan
 Meiburg/R4/USEPA/US@EPA, Palmer
 bcc
 Subject RE: PCS ROD

Becky,

As stated in the Modified Alternative L description found in the
 ROD (Section 5.b.5), the current boundary will provide for approximately 14 years
 of minning north of NC 33.

Thanks
 Tom

-----Original Message-----

From: Fox.Rebecca@epamail.epa.gov [mailto:Fox.Rebecca@epamail.epa.gov]
 Sent: Monday, June 08, 2009 8:24 AM
 To: Walker, William T SAW
 Cc: Giattina.Jim@epamail.epa.gov; Moyer, Jennifer A HQ02;
 Meiburg.Stan@epamail.epa.gov; Hough.Palmer@epamail.epa.gov;
 Mancusi-Ungaro.Philip@epamail.epa.gov; Jolly, Samuel K SAW;
 Welborn.Tom@epamail.epa.gov; Derby.Jennifer@epamail.epa.gov;
 Frazer.Brian@epamail.epa.gov; Evans.David@epamail.epa.gov;
 Campbell.Ann@epamail.epa.gov
 Subject: RE: PCS ROD

Thanks Tom for the additional information. We have one more information
 request. The June 3 document with the proposed additional avoidance
 statistics states that the additional avoidance results in an additional loss
 of 0.64 years of mining. Could you provide us with what the exact years of
 mining North of 33 will now be with the proffered permit?

Thanks,

Becky

Becky Fox
 Wetland Regulatory Section
 USEPA
 Phone: 828-497-3531
 Email: fox.rebecca@epa.gov

"Walker, William
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06/05/2009 04:54
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Palmer Hough/DC/USEPA/US@EPA To
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Stan Meiburg/R4/USEPA/US@EPA, Tom
Welborn/R4/USEPA/US@EPA

Subject

RE: PCS ROD

Palmer,

I asked CZR put together graphics for the portions of Cypress Run and Porter Creek outside the actual project area (see attached). There is a couple hundred feet at the mouth of the NCPC Tract Creeks (all totaled probably 5 ac.) that is technically outside the project area as well. According to PCS, they own all the acreage to be placed under conservation easement inside the project area and over 90% of the area outside. Again,
feel free to call with any further questions.

Thanks

Tom
910-251-4631

-----Original Message-----

From: Hough.Palmer@epamail.epa.gov [mailto:Hough.Palmer@epamail.epa.gov]

Sent: Friday, June 05, 2009 1:11 PM

To: Walker, William T SAW
Cc: Lamson, Brooke SAW; Lekson, David M SAW; Messier.Dawn@epamail.epa.gov;
Ryscavage, Jefferson COL SAW; Moyer, Jennifer A HQ02;
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Samuel K SAW; Meiburg.Stan@epamail.epa.gov; Welborn.Tom@epamail.epa.gov
Subject: RE: PCS ROD

Tom:

Thank you again, this is very helpful. We are attempting to answer the four questions below. Your email indicates that the answer to #1 is: 174 acres all of which is on the Bonnerton tract. We agree with you that it is not necessary to do the wetland/upland breakout for the new easement areas but we would like to have the on-site/off-site acreage estimates broken out so that we can answer questions #2 and #3. Question #4 is more challenging. As you know, there is a caveat in the

6-2-09 PCS offer that appears to apply only to some portion of the 228 acres to be protected in the Porter Creek watershed. Question #4 is designed to get some clarity on that caveat.

We greatly appreciate anything you can do to help us expeditiously answer questions 2-4.

Thanks, Palmer

- 1) In the February 24, 2009, Proposed Permit (i.e., the project described in the Corps' 2-24-09 NOI letter to R4), what amount of the avoided acreage on each of the site's three tracts (i.e., on the project site) was required to be protected via conservation easement?
- 2) In the June 3, 2009, Proffered Permit, what amount of the avoided acreage on each of the site's three tracts (i.e., on the project site) is required to be protected via conservation easement?
- 3) In the June 3, 2009, Proffered Permit, what amount of acreage adjacent to each of the site's three tracts (i.e., off the project site) is required to be protected via conservation easement?
- 4) In the June 3, 2009, Proffered Permit, how much of this "on-site" and "off-site" protection is unlikely to happen due to PCS's "inability to place restrictions on non-owned properties"?

Palmer F. Hough
US Environmental Protection Agency
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From: "Walker, William T SAW" <William.T.Walker@usace.army.mil>

To: Palmer Hough/DC/USEPA/US@EPA

Cc: "Lamson, Brooke SAW" <Brooke.Lamson@usace.army.mil>, "Lekson,

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Messier/DC/USEPA/US@EPA, Philip Mancusi-Ungaro/R4/USEPA/US@EPA

Date: 06/05/2009 11:55 AM

Subject: RE: PCS ROD

Palmer,

As indicated in our 2/24/09 letter, discussions between the Corps, DWQ and the applicant had resulted in further minimizing impacts of Alternative L from 4,140 acres of Waters of the US to 3,972 acres of Water of the US. At that time total avoidance of waters of the US within the project area was 2,408 acres (1,696 acres further reduced from the EAP boundary, 168 acres further reduced from Alternative L as presented in the FEIS). Through its 401 certification NCDWQ required that all of the avoided area of the SNHA in Bonnerton be put in conservation easement (approximately 174 ac.) along with the area of the "mining corridor" once it is satisfactorily reclaimed. All of that 174 acres is wetland.

Through and after the elevation process, PCS agreed to avoid an additional approximately 111 acres including approximately 51 acres of waters of the US. PCS further agreed to place conservation easements or deed restrictions on an additional 456 acres (630 acres total) in the watersheds of several creeks. The majority but not all of the acreage included in these additional easements was wetland. The proffered permit authorizes impacts to 3,927 acres of Water of the US (3,922 acres within the mining footprint and 5 acres associated with the NC 306 road relocation) including 3,909 acres of wetlands.

We have not broken out acreages of uplands vs. wetlands within these conservation easement areas since the goal of the minimization efforts was to further protect total watershed area and minimize secondary effects on downstream waters. Additionally, we have not broken out acreage inside vs. outside the actual project area boundary since again, minimization of future impacts to these same watersheds was the intent of the easements.

CZR can likely generate these numbers. If you would like us to make this request of them, please let me know. Also, if you have any further questions, feel free to give me a call.

Thanks
Tom Walker
(910) 251-4631

-----Original Message-----

From: Hough.Palmer@epamail.epa.gov [mailto:Hough.Palmer@epamail.epa.gov]

Sent: Thursday, June 04, 2009 3:49 PM
To: Walker, William T SAW
Cc: Lamson, Brooke SAW; Lekson, David M SAW; Ryscavage, Jefferson COL SAW; Moyer, Jennifer A HQ02; Giattina.Jim@epamail.epa.gov; Gaffney-Smith, Margaret E; Fox.Rebecca@epamail.epa.gov; Jolly, Samuel K SAW; Meiburg.Stan@epamail.epa.gov; Welborn.Tom@epamail.epa.gov; Messier.Dawn@epamail.epa.gov; Mancusi-Ungaro.Philip@epamail.epa.gov
Subject: RE: PCS ROD

Tom:

Thanks this is very helpful.

We have also been struggling with one other issue, namely how to accurately characterize just how much acreage on the project site is being preserved via conservation easement and how that compares to what was already preserved on the project site by the State 401 cert before the elevation started. We have not been able to find this data in the ROD. Here is what we have cobbled together based on BPJ. Is there any way to come up with a more definitive estimate of this? Again, we just want to make sure that we are on the same page with the Corps.

-- As of the 2-24-09 proposed permit approximately 174 out of 2333 acres of avoided wetlands were protected via conservation easement
-- As of the 6-3-09 proffered permit approximately 606 out of 2384 acres of avoided wetlands will be protected via conservation easement

Explanation for the 174: this number reflects the areas protected by the State 401 (SNHA on Bonnerton) according to the ROD.

Explanation for the 606: this number reflects the 174 acres already protected by the State's CWA Section 401 Water Quality Certification as well as the additional acreage PCS has offered to put under easement in response to EPA's elevation which includes approximately 354 acres on the NCPC Tract, 54 acres on the Bonnerton Tract, and 24 acres on the S33 Tract. The Bonnerton and S33 values are an estimate because the Applicant's June 2, 2009, offer includes 1) 228 acres of proposed easement protection along Porter Creek, but the majority of this proposed acreage is not on the Bonnerton Tract and 2) of the 48 acres of proposed easement protection along Cypress Run Creek (S33 Tract), only approximately half of this acreage is on the S33 Tract.

Thanks, Palmer

Palmer F. Hough
US Environmental Protection Agency
Wetlands Division
Room 7231, Mail Code 4502T
1200 Pennsylvania Avenue, NW

Washington, DC 20460
Office: 202-566-1374
Cell: 202-657-3114
FAX: 202-566-1375
E-mail: hough.palmer@epa.gov

Street/Courier Address
USEPA
Palmer Hough
EPA West -- Room 7231-L
Mail Code 4502T
1301 Constitution Avenue, NW
Washington, DC 20460

From: "Walker, William T SAW" <William.T.Walker@usace.army.mil>

To: Palmer Hough/DC/USEPA/US@EPA, "Jolly, Samuel K SAW"
<Samuel.K.Jolly@usace.army.mil>

Cc: "Lamson, Brooke SAW" <Brooke.Lamson@usace.army.mil>,
"Lekson,
David M SAW" <David.M.Lekson@usace.army.mil>, "Ryscavage, Jefferson COL SAW"
<Jefferson.Ryscavage@us.army.mil>, "Moyer, Jennifer A HQ02"
<Jennifer.A.Moyer@usace.army.mil>, Jim
Giattina/R4/USEPA/US@EPA, "Gaffney-Smith,
Margaret E" <Meg.E.Gaffney-Smith@usace.army.mil>, Rebecca
Fox/R4/USEPA/US@EPA,
Stan Meiburg/R4/USEPA/US@EPA, Tom Welborn/R4/USEPA/US@EPA

Date: 06/04/2009 03:16 PM

Subject: RE: PCS ROD

Palmer,

Thanks, we have corrected the map date of the "Conservation
Easement
- Jacks Creek - Modified Alternative L _ NCPC" to 5/28/09 (see attached) and
included the Cypress Run reference. The 22,435 linear feet of stream impact

is correct and includes the most recent avoidance efforts. We will send the corrected conditions to everyone shortly.

Thanks
Tom

-----Original Message-----

From: Hough.Palmer@epamail.epa.gov [mailto:Hough.Palmer@epamail.epa.gov]

Sent: Thursday, June 04, 2009 1:29 PM

To: Jolly, Samuel K SAW

Cc: Lamson, Brooke SAW; Lekson, David M SAW; Ryscavage, Jefferson COL SAW; Moyer, Jennifer A HQ02; Giattina.Jim@epamail.epa.gov; Gaffney-Smith, Margaret E; Fox.Rebecca@epamail.epa.gov; Meiburg.Stan@epamail.epa.gov; Welborn.Tom@epamail.epa.gov; Walker, William T SAW

Subject: Re: PCS ROD

Ken:

Thanks for sharing this so quickly. We are reviewing the ROD and have a few quick questions to make sure we are on the same page.

- 1) Condition "DD" in the ROD and proffered permit appears to have omitted reference to the conservation easement for Cypress Run promised by the company in its 6-2-09 proposal. Has this been included somewhere else?
- 2) Condition "DD" also refers to maps "all dated May 18, 2009". Didn't the company's 6-2-09 proposal increase the amount of acreage protected in the Jacks Creek watershed by 82 acres, necessitating an updated map for that creek?
- 3) Condition "DD" also noted that the conservation easement maps have been attached. However, we have not been able to locate them in the ROD package.
- 4) Also the ROD estimates total remaining stream impacts to be 22,435 linear feet which is consistent with the number EPA came up with based on the company's 6-2-09 proposal, however, the Corps' Press Release yesterday reported total remaining stream impacts at 22,082 linear feet. Which is the correct number according to the Corps?

Thanks, Palmer

Palmer F. Hough
US Environmental Protection Agency
Wetlands Division
Room 7231, Mail Code 4502T
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Office: 202-566-1374
Cell: 202-657-3114
FAX: 202-566-1375
E-mail: hough.palmer@epa.gov

Street/Courier Address
USEPA
Palmer Hough
EPA West -- Room 7231-L
Mail Code 4502T
1301 Constitution Avenue, NW
Washington, DC 20460

From: "Jolly, Samuel K SAW" <Samuel.K.Jolly@usace.army.mil>

To: Stan Meiburg/R4/USEPA/US@EPA

Cc: Rebecca Fox/R4/USEPA/US@EPA, Jim Giattina/R4/USEPA/US@EPA,
Tom

Welborn/R4/USEPA/US@EPA, Palmer Hough/DC/USEPA/US@EPA, "Moyer,
Jennifer A HQ02"
<Jennifer.A.Moyer@usace.army.mil>, "Gaffney-Smith, Margaret E"
<Meg.E.Gaffney-Smith@usace.army.mil>, "Smith, Chip R HQDA"
<SmithCR@HQDA.Army.Mil>, "Ryscavage, Jefferson COL SAW"
<Jefferson.Ryscavage@us.army.mil>, "Walker, William T SAW"
<William.T.Walker@usace.army.mil>, "Lekson, David M SAW"
<David.M.Lekson@usace.army.mil>, "Lamson, Brooke SAW"
<Brooke.Lamson@usace.army.mil>

Date: 06/04/2009 10:53 AM

Subject: PCS ROD

<<PCS ROD.pdf>>
Mr. Meiburg,

Attached find a copy of the signed, proffered permit and ROD for PCS Phosphate. PCS has requested we remove condition "EE" which states no work authorized by the permit may begin until 10 days after the ROD is provided to EPA. We will not remove that condition unless you provide written concurrence with such an action.

Ken Jolly
Chief, Regulatory Division
Wilmington District
910-251-4630

[attachment "Proffered Permit.pdf" deleted by Palmer Hough/DC/USEPA/US]

[attachment "PCS ROD.pdf" deleted by Palmer Hough/DC/USEPA/US]

[attachment "EPA-ASA Modified Alt L 06-02-09 Exclusion Easement graphics.pdf" deleted by Palmer Hough/DC/USEPA/US]

(See attached file: BON PORTER CRK CONSERV EASE OUTSIDE BASE.pdf) (See attached file: S33 CYPRESS RUN CONSERV EASE OUTSIDE BASE.pdf)



Derb Carter
<derbc@selcnc.org>

06/09/2009 11:35 AM

To Stan Meiburg/R4/USEPA/US@EPA

cc 'Sam Pearsall' <SPearsall@edf.org>, 'Heather Main'
<ergotrack@netpath.net>, 'David Emmerling'
<david.emmerling@ptrf.org>, 'Molly Diggins'

bcc

Subject meeting re PCS

History:

📧 This message has been replied to.

Stan,

We have received no response from EPA regarding our acceptance of your offer of a meeting to discuss the Corps's ROD and permit for PCS. We asked that to be meaningful the meeting occur before EPA responds to the Corps's ROD, if EPA plans to respond. We can meet in NC, Atlanta, or Washington. You suggested Washington and said you planned to be there Monday through Wednesday. Can you give us an update?

Derb Carter
Derb S. Carter, Jr.
Director, Carolinas Office
Southern Environmental Law Center
200 W. Franklin Street, Suite 330
Chapel Hill, NC 27516
(919)967-1450 Phone
(919)929-9421 Fax
derbc@selcnc.org
www.SouthernEnvironment.org

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Stan Meiburg /R4/USEPA/US
06/09/2009 11:50 AM

To "Derb Carter" <derbc@selcnc.org>
cc
bcc Bob Sussman/DC/USEPA/US@EPA
Subject Re: meeting re PCS

Derb, thanks for your note, because it shows a flaw in my assumptions. There is a meeting set up for 1:00 on Thursday, here in Washington, which I believe EDF set up in response to Bob Sussman's same offer. I had assumed--and here's my error--that you and they had been in communication about this.

I am going to stay over in DC for that meeting. Jim Giattina will be on the phone

Could you check with EDF to be sure I have my facts straight? If you cannot make that meeting in person, I'm sure we could tie you in by phone. If that doesn't work, let's talk.

Best regards,

Stan

A. Stanley Meiburg
Acting Regional Administrator
EPA Region 4
Sam Nunn Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, GA. 30303

Office: (404) 562-8357
Fax: (404) 562-9961
Cell: (404) 435-4234
Email: meiburg.stan@epa.gov

Sent using Blackberry

From: Derb Carter [derbc@selcnc.org]
Sent: 06/09/2009 11:35 AM AST
To: Stan Meiburg
Cc: 'Sam Pearsall' <SPearsall@edf.org>; 'Heather Main' <ergotrack@netpath.net>; 'David Emmerling' <david.emmerling@ptrf.org>; 'Molly Diggins' <Molly.Diggins@sierraclub.org>; 'Todd Miller' <toddm@nccoast.org>; Geoff Gisler <ggisler@selcnc.org>
Subject: meeting re PCS

Stan,

We have received no response from EPA regarding our acceptance of your offer of a meeting to discuss the Corps's ROD and permit for PCS. We asked that to be meaningful the meeting occur before EPA responds to the Corps's ROD, if EPA plans to respond. We can meet in NC, Atlanta, or Washington. You suggested Washington and said you planned to be there Monday through Wednesday. Can you give us an update?

Derb Carter
Derb S. Carter, Jr.

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"Elgie Holstein"
<eholstein@edf.org>
06/09/2009 01:17 PM

To Gregory Peck/DC/USEPA/US@EPA, Bob
Sussman/DC/USEPA/US@EPA
cc Georgia Bednar/DC/USEPA/US@EPA, Jim
Giattina/R4/USEPA/US@EPA, Mike
Shapiro/DC/USEPA/US@EPA, Stan
bcc
Subject RE: Mtg on PCS Permit Early Next Week?

Greg,

What is the status of our request? I'm hearing that there is a mtg
scheduled for Thursday -- did I miss an email?

Thanks,

Elgie Holstein
VP Land, Water and Wildlife
Environmental Defense Fund

-----Original Message-----

From: Peck.Gregory@epamail.epa.gov [mailto:Peck.Gregory@epamail.epa.gov]

Sent: Friday, June 05, 2009 6:15 PM

To: Sussman.Bob@epamail.epa.gov

Cc: Elgie Holstein; Bednar.Georgia@epamail.epa.gov;

Giattina.Jim@epamail.epa.gov; Shapiro.Mike@epamail.epa.gov;

Meiburg.Stan@epamail.epa.gov

Subject: Re: Mtg on PCS Permit Early Next Week?

Bob:

I'll work with Elgie and Georgia to get this meeting scheduled for early
next week.

Best,
Greg

Gregory E. Peck
Chief of Staff
Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

202-564-5778

|----->
| From: |
|----->

>-----
| Bob Sussman/DC/USEPA/US |
|----->

To:

"Elgie Holstein" <eholstein@edf.org>

Cc:

Gregory Peck/DC/USEPA/US@EPA, Stan Meiburg/R4/USEPA/US@EPA, Jim
Giattina/R4/USEPA/US@EPA, Mike Shapiro/DC/USEPA/US@EPA, Georgia

Bednar/DC/USEPA/US@EPA

Date:

06/05/2009 05:38 PM

Subject:

Re: Mtg on PCS Permit Early Next Week?

Elgie -- thanks for getting back in touch. Monday may be a bit difficult but Tuesday may be workable. I'll try to join but the key thing is to get the key EPA players at the meeting, who are copied on this e-mail. Greg -- could you coordinate with Elgie on arrangements for the meeting (perhaps with Georgia's assistance)?

Robert M. Sussman
Senior Policy Counsel to the Administrator Office of the Administrator
US Environmental Protection Agency

>
>----->
From: |
>----->

>
>----->
"Elgie Holstein" <eholstein@edf.org> |
|

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>----->
To: |
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>
>----->
Bob Sussman/DC/USEPA/US@EPA |
|

>
>----->
Date: |
>----->

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>----->
06/05/2009 05:33 PM |
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>----->
Subject: |
>----->

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>----->
Mtg on PCS Permit Early Next Week? |
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>
>----->
>----->

Hi Bob,

Do you think we could meet on Monday or Tuesday afternoon sometime?

Elgie

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Stan Meiburg /R4/USEPA/US
06/09/2009 02:48 PM

To Georgia Bednar/DC/USEPA/US@EPA
cc
bcc
Subject Re: Mtg on PCS Permit Early Next Week?☐

Thanks, Georgia. I had assumed that the Thursday meeting was the one with the environmental groups--is that correct?

Stan
A. Stanley Meiburg
Acting Regional Administrator
EPA Region 4
Sam Nunn Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, GA. 30303

Office: (404) 562-8357
Fax: (404) 562-9961
Cell: (404) 435-4234
Email: meiburg.stan@epa.gov

Sent using Blackberry
Georgia Bednar

----- Original Message -----

From: Georgia Bednar
Sent: 06/09/2009 01:35 PM EDT
To: "Elgie Holstein" <eholstein@edf.org>
Cc: Bob Sussman; Gregory Peck; Jim Giattina; Mike Shapiro; Stan Meiburg
Subject: RE: Mtg on PCS Permit Early Next Week?

Oh no... I apologize Elgie. I didn't realize you were to be involved in this meeting. I thought it was another one down the line. I will send out the invite to you shortly. Please advise once getting it that this will work for your schedule as well.

Much thanks for your patience,
Ga-

Georgia Lynn Bednar
Office of the Administrator
U.S. Environmental Protection Agency
(202) 564-9816
(202) 251-8468 Cell

"It takes courage to grow up and turn out to be who you really are." - e.e. cummings

"Elgie Holstein" Greg. What is the status of our request? I'm he... 06/09/2009 01:17:35 PM

From: "Elgie Holstein" <eholstein@edf.org>
To: Gregory Peck/DC/USEPA/US@EPA, Bob Sussman/DC/USEPA/US@EPA
Cc: Georgia Bednar/DC/USEPA/US@EPA, Jim Giattina/R4/USEPA/US@EPA, Mike Shapiro/DC/USEPA/US@EPA, Stan Meiburg/R4/USEPA/US@EPA
Date: 06/09/2009 01:17 PM

Subject: RE: Mtg on PCS Permit Early Next Week?

Greg,

What is the status of our request? I'm hearing that there is a mtg scheduled for Thursday -- did I miss an email?

Thanks,

Elgie Holstein
VP Land, Water and Wildlife
Environmental Defense Fund

-----Original Message-----

From: Peck.Gregory@epamail.epa.gov [mailto:Peck.Gregory@epamail.epa.gov]

Sent: Friday, June 05, 2009 6:15 PM
To: Sussman.Bob@epamail.epa.gov
Cc: Elgie Holstein; Bednar.Georgia@epamail.epa.gov;
Giattina.Jim@epamail.epa.gov; Shapiro.Mike@epamail.epa.gov;
Meiburg.Stan@epamail.epa.gov
Subject: Re: Mtg on PCS Permit Early Next Week?

Bob:

I'll work with Elgie and Georgia to get this meeting scheduled for early next week.

Best,
Greg

Gregory E. Peck
Chief of Staff
Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

202-564-5778

|----->
| From: |
|----->

>----->
|----->
| Bob Sussman/DC/USEPA/US
|

>----->
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|----->
| To: |
|----->

>----->
|----->
| "Elgie Holstein" <eholstein@edf.org>

>

| Cc: |
----->

>

| Gregory Peck/DC/USEPA/US@EPA, Stan Meiburg/R4/USEPA/US@EPA, Jim
Giattina/R4/USEPA/US@EPA, Mike Shapiro/DC/USEPA/US@EPA, Georgia
| Bednar/DC/USEPA/US@EPA
|

>

| Date: |
----->

>

| 06/05/2009 05:38 PM
|

>

| Subject: |
----->

>

| Re: Mtg on PCS Permit Early Next Week?
|

>

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but Tuesday may be workable. I'll try to join but the key thing is to
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(perhaps with Georgia's assistance)?

Robert M. Sussman
Senior Policy Counsel to the Administrator Office of the Administrator
US Environmental Protection Agency

>

| From: |
----->

| "Elgie Holstein" <eholstein@edf.org>
|
>-----

|----->
| To: |
|----->

>-----
Bob Sussman/DC/USEPA/US@EPA
>-----

|----->
| Date: |
|----->

>-----
06/05/2009 05:33 PM
>-----

|----->
| Subject: |
|----->

>-----
Mtg on PCS Permit Early Next Week?
>-----

Hi Bob,

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Elgie

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Stan Meiburg /R4/USEPA/US
06/09/2009 03:14 PM

To "Derb Carter" <derbc@selcnc.org>
cc
bcc
Subject Re: meeting re PCS

I think Elgie Holstein has heard back this afternoon. I think there was some confusion up here. Thanks for asking!

Stan
A. Stanley Meiburg
Acting Regional Administrator
EPA Region 4
Sam Nunn Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, GA. 30303

Office: (404) 562-8357
Fax: (404) 562-9961
Cell: (404) 435-4234
Email: meiburg.stan@epa.gov

Sent using Blackberry

From: Derb Carter [derbc@selcnc.org]
Sent: 06/09/2009 11:35 AM AST
To: Stan Meiburg
Cc: 'Sam Pearsall' <SPearsall@edf.org>; 'Heather Main' <ergotrack@netpath.net>; 'David Emmérling' <david.emmerling@ptrf.org>; 'Molly Diggins' <Molly.Diggins@sierraclub.org>; 'Todd Miller' <toddm@nccoast.org>; Geoff Gisler <ggisler@selcnc.org>
Subject: meeting re PCS

Stan,

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Derb Carter
Derb S. Carter, Jr.
Director, Carolinas Office
Southern Environmental Law Center
200 W. Franklin Street, Suite 330
Chapel Hill, NC 27516
(919)967-1450 Phone
(919)929-9421 Fax
derbc@selcnc.org
www.SouthernEnvironment.org

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Derb Carter
<derbc@selcnc.org>
06/12/2009 06:06 PM

To Stan Meiburg/R4/USEPA/US@EPA
cc
bcc
Subject PCS elevation

History:  This message has been replied to.

Stan,

On our call yesterday you said EPA is drafting a letter to the Corps responding the PCS permit and ROD. Could you please send me a copy of that letter when it is transmitted. I expect to have several inquiries about EPA's decision and it would be helpful to have the letter to better understand the decision.

Derb

Derb S. Carter, Jr.
Director, Carolinas Office
Southern Environmental Law Center
200 W. Franklin Street, Suite 330
Chapel Hill, NC 27516
(919)967-1450 Phone
(919)929-9421 Fax
derbc@selcnc.org
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Stan Meiburg /R4/USEPA/US
06/12/2009 06:11 PM

To: Derb Carter <derbc@selcnc.org>
cc
bcc
Subject: Re: PCS elevation

Derb, I'll be happy to. It's not done yet--I expect, or at least hope, it will be Monday or Tuesday of next week.

Thanks again for being on the call yesterday, and I look forward to seeing you again soon.

Stan

A. Stanley Meiburg
Acting Regional Administrator
EPA Region 4
Sam Nunn Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, GA 30303

Office: (404) 562-8357
Fax: (404) 562-9961
Cell: (404) 435-4234
Email: meiburg.stan@epa.gov

Derb Carter <derbc@selcnc.org>



Derb Carter
<derbc@selcnc.org>
06/12/2009 06:06 PM

To: Stan Meiburg/R4/USEPA/US@EPA
cc
Subject: PCS elevation

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Derb

Derb S. Carter, Jr.
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Wilson_Laney@fws.gov
06/13/2009 08:00 AM

To Thomas_Sinclair@fws.gov, Linda_Kelsey@fws.gov,
Cynthia_Dohner@fws.gov, Sam_Hamilton@fws.gov,
Jon_Andrew@fws.gov, Jeff_Weller@fws.gov,
cc Pete_Benjamin@fws.gov, Mike_Wicker@fws.gov,
Tom_Augspurger@fws.gov, John_Ellis@fws.gov,
Howard_Phillips@fws.gov, Mike_Bryant@fws.gov,
bcc

Subject Fw: SAFMC Comment Letter on PCS Phosphate Permit

History: This message has been forwarded.

All:

FYI. The PCS permit issue was raised during the meeting of the South Atlantic Fishery Management Council's Ecosystem-Based Management Committee meeting in Hutchinson Island (Stuart), FL, on Thursday, June 10. After explanation to the Council of the issue, NC Marine Fisheries Commission chairman Mac Currin, who also sits on the South Atlantic Fishery Management Council as the recreational representative from NC, made the motion that the council send a letter to EPA, recommending EPA veto the issued permit. The motion was seconded by Council Chairman Duane Harris (GA). There was no opposition to the motion. The letter was approved for transmittal by the full Council during their meeting June 11. There was no further discussion and no opposition to the wording of the letter.

My understanding is that EPA, as of Friday afternoon, appears to have made a decision not to veto the issued permit. So, the letter may have no effect, but we shall see.

Many thanks are due to the South Atlantic Fishery Management Council for forthrightly expressing their long-standing commitment to the conservation and sustainability of our coastal habitats, especially those designated Essential Fish Habitat (EFH) and Habitat Areas of Particular Concern (HAPC).

/s/ Wilson

R. Wilson Laney, Ph.D., Coordinator
South Atlantic Fisheries Coordination Office
U.S. Fish and Wildlife Service
P.O. Box 33683
Raleigh, North Carolina 27636-3683
Voice: 919-515-5019
Fax: 919-515-4454
e-mail: Wilson_Laney@fws.gov

----- Forwarded by Wilson Laney/R4/FWS/DOI on 06/13/2009 07:14 AM -----

"Roger Pugliese"
<roger.pugliese@safmc
.net>

To<Shapiro.mike@epa.gov>

cc<wilson_laney@fws.gov>

06/12/2009 10:37 PM

Subject SAFMC Comment Letter on PCS Phosphate
Permit

Attn: Michael H. Shapiro
Acting Assistant Administrator for Water
USEPA Headquarters
Ariel Rios Building
1200 Pennsylvania Avenue, N. W.
Mail Code: 4101M
Washington, DC 20460

The South Atlantic Fishery Management Council at their meeting on June 11 in Hutchinson Island, Florida approved sending the attached letter providing comments on the proposed expansion of mining operations by the Potash Company of

Saskatchewan, Inc. (PCS). Thank you for your consideration of these comments.

Roger Pugliese

Roger Pugliese
Senior Fishery Biologist
South Atlantic Fishery Management Council
4055 Faber Place Drive, Suite 201
North Charleston, SC 29405
Tel: 843-571-4366
Fax: 843-769-4520
Email: Roger.Pugliese@safmc.net
(See attached file: *SAFMCCommPCStoEPAJune1109.pdf*)



SOUTH ATLANTIC FISHERY MANAGEMENT COUNCIL

4055 FABER PLACE DRIVE, SUITE 201
NORTH CHARLESTON, SOUTH CAROLINA 29405
TEL 843/571-4366 FAX 843/769-4520
Toll Free 1-866-SAFMC-10
email: safmc@safmc.net web page: www.safmc.net

Duane Harris, Chairman
David Cupka, Vice Chairman

Robert K. Mahood, Executive Director
Gregg T. Waugh, Deputy Executive Director

June 11, 2009

Michael H. Shapiro
Acting Assistant Administrator for Water
USEPA Headquarters
Ariel Rios Building
1200 Pennsylvania Avenue, N. W.
Mail Code: 4101M
Washington, DC 20460

Dear Mr. Shapiro:

The South Atlantic Fishery Management Council (SAFMC) previously provided (2007) comments on the proposed expansion of mining operations by the Potash Company of Saskatchewan, Inc. (PCS) in response to the Environmental Impact Statement and presented under Action ID 200110096. Subsequent to the provision of the Council's comments, the U.S. Army Corps of Engineers, Wilmington District, recently issued a permit (effective June 13, 2009) for a modification of the originally proposed mine expansion.

The expansion of mining operations, as proposed in the issued permit, will impact areas identified as Essential Fish Habitat (EFH) and EFH Habitat Areas of Particular Concern (HAPCs) in the SAFMC's Comprehensive Habitat Amendment to Fishery Management Plans (coral, coral reef and live bottom habitat, red drum, shrimp, spiny lobster, coastal migratory pelagic species, and the snapper-grouper complex). Specifically in North Carolina, the Council has designated state established Primary Nursery Areas as HAPCs.

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The SAFMC concurs with the conclusions of multiple federal and state natural resource management agencies (NC Division of Marine Fisheries, NC Marine Fisheries Commission, NC Wildlife Resources Commission, National Marine Fisheries Service and U.S. Fish and Wildlife Service) that the proposed project will result in significant and unacceptable impacts to EFH and

aquatic resources that depend on those habitats. Therefore, the SAFMC recommends that the U.S. Environmental Protection Agency veto the issued permit for this project.

Thank you for the opportunity to provide comments on this project. Please direct questions or comments to Roger Pugliese (Roger.Pugliese@safmc.net) or Myra Brouwer (Myra.Brouwer@safmc.net) at the SAFMC office, (843) 571-4366.

Sincerely,

A handwritten signature in black ink, appearing to read "Duane Harris". The signature is fluid and cursive, with a large initial "D" and "H".

Duane Harris

SAFMC Chair

Cc: (via electronic mail)
Council members and staff
Habitat AP

Stan Meiburg /R4/USEPA/US
06/13/2009 08:58 AM

To "Sam Hamilton" <sam_hamilton@fws.gov>
cc
bcc
Subject Fw: SAFMC Comment Letter on PCS Phosphate Permit

I gather this letter does not reflect the official position of FWS.

We're working on our final letter to the Corps and we're using the language you supplied last week. The letter will be from Mike Shapiro to Rock Salt. Also, just FYI, we had a conference call with EDF and SELC last Thursday and told them we were not going to proceed under 404(c).

Stan
A. Stanley Meiburg
Acting Regional Administrator
EPA Region 4
Sam Nunn Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, GA. 30303

Office: (404) 562-8357
Fax: (404) 562-9961
Cell: (404) 435-4234
Email: meiburg.stan@epa.gov

Sent using Blackberry

From: Wilson_Laney
Sent: 06/13/2009 08:00 AM AST
To: Thomas_Sinclair@fws.gov; Linda_Kelsey@fws.gov; Cynthia_Dohner@fws.gov; Sam_Hamilton@fws.gov; Jon_Andrew@fws.gov; Jeff_Weller@fws.gov; Roy.Crabtree@noaa.gov; Miles.Croom@noaa.gov
Cc: Pete_Benjamin@fws.gov; Mike_Wicker@fws.gov; Tom_Augspurger@fws.gov; John_Ellis@fws.gov; Howard_Phillips@fws.gov; Mike_Bryant@fws.gov; Pete_Campbell@fws.gov; Scott_Lanier@fws.gov; Dennis_Stewart@fws.gov; Jean_Richter@fws.gov; John_Stanton@fws.gov; Ron.Sechler@noaa.gov; Fritz.Rohde@noaa.gov; Pace.Wilber@noaa.gov; Prescott.Brownell@noaa.gov; Stephania.Bolden@noaa.gov; KornegayJW@mchsi.com; Sara.Winslow@ncdenr.gov; Katy.West@ncdenr.gov; Louis.Daniel@ncdenr.gov; Anne.Deaton@ncdenr.gov; Gordon.Myers@ncwildlife.org; Mallory.Martin@ncwildlife.org; Robert.Curry@ncwildlife.org; David.Cobb@ncwildlife.org; Perry.Sumner@ncwildlife.org; Shannon.Deaton@ncwildlife.org; Carol.Price@ncwildlife.org; Linda.Pearsall@ncdenr.gov; SPearsall@edf.org; DRader@edf.org; WCole1976@triad.rr.com; JBoreman@nc.rr.com; MGantt2@nc.rr.com; MCurrin1@bellsouth.net; seageorg@bellsouth.net; palmettobooks@bellsouth.net; brian.cheuvront@ncdenr.gov; miridon@ec.rr.com; boylesr@dnr.sc.gov; GeorgeJGeiger@bellsouth.net; VOShea@asmfc.org; JThomas@asmfc.org; RBeal@asmfc.org; T Berger@asmfc.org; Mark.Robson@myfwc.com; SShipman@dnr.state.ga.us; Brian.A.Sullivan@uscg.mil; Tom@capticks.com; Ga_shrimp@darientel.net; Chuck_Hunter@fws.gov; Susan_Cielinski@fws.gov; Laura_Brandt@fws.gov; Cynthia_Bohn@fws.gov; ENickens@nc.rr.com; Patty_Matteson@fws.gov; Stan Meiburg; Jim Giattina; Gregory Peck; Suzanne Schwartz; Palmer Hough; Tom Welborn; David Evans; wood.robert@edf.gov; Dawn Messier; Jennifer Derby; Rebecca Fox; rock.salt@us.army.mil; todd.semonite@us.army.mil; Jefferson.Ryscavage@us.army.mil; ggisler@selcnc.org; derbc@selc.org; jtripp@edf.org; mkelly@edf.org; eholstein@edf.org
Subject: Fw: SAFMC Comment Letter on PCS Phosphate Permit

All:

FYI. The PCS permit issue was raised during the meeting of the South Atlantic Fishery Management Council's Ecosystem-Based Management Committee meeting in Hutchinson Island (Stuart), FL, on Thursday, June 10. After explanation to the Council of the issue, NC Marine Fisheries Commission chairman Mac Currin, who also sits on the South Atlantic Fishery Management Council as the recreational representative from NC, made the motion that the council send a letter to EPA, recommending EPA veto the issued permit. The motion was seconded by Council Chairman Duane Harris (GA). There was no opposition to the motion. The letter was approved for transmittal by the full Council during their meeting June 11. There was no further discussion and no opposition to the wording of the letter.

My understanding is that EPA, as of Friday afternoon, appears to have made a decision not to veto the issued permit. So, the letter may have no effect, but we shall see.

Many thanks are due to the South Atlantic Fishery Management Council for forthrightly expressing their long-standing commitment to the conservation and sustainability of our coastal habitats, especially those designated Essential Fish Habitat (EFH) and Habitat Areas of Particular Concern (HAPC).

/s/ Wilson

R. Wilson Laney, Ph.D., Coordinator
South Atlantic Fisheries Coordination Office
U.S. Fish and Wildlife Service
P.O. Box 33683
Raleigh, North Carolina 27636-3683
Voice: 919-515-5019
Fax: 919-515-4454
e-mail: Wilson_Laney@fws.gov

----- Forwarded by Wilson Laney/R4/FWS/DOI on 06/13/2009 07:14 AM -----

"Roger Pugliese"
<roger.pugliese@safmc.net>

To<Shapiro.mike@epa.gov>

cc<wilson_laney@fws.gov>

06/12/2009 10:37 PM

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June 11, 2009

Michael H. Shapiro
Acting Assistant Administrator for Water
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Sincerely,



Duane Harris

SAFMC Chair

Cc: (via electronic mail)
Council members and staff
Habitat AP



Geoff Gisler
<ggisler@selcnc.org>
06/15/2009 11:28 AM

To Stan Meiburg/R4/USEPA/US@EPA
cc Mike Shapiro/DC/USEPA/US@EPA, Jim
Giattina/R4/USEPA/US@EPA, Gregory
Peck/DC/USEPA/US@EPA, Suzanne
bcc

Subject SAFMC Comment Letter on PCS Phosphate Permit

Stan,

Attached is a June 11, 2009 letter from the South Atlantic Fisheries Management Council restating its concerns about the impacts of the PCS permit on fisheries and essential fish habitats. The SAFMC was established by the Magnuson Stevens Act to coordinate fisheries management and conservation on the southern Atlantic coast. Regional Fishery Management Councils are established "to exercise sound judgment in the stewardship of fishery resources." The Regional Councils are charged by Congress with developing fishery management plans "necessary and appropriate for the conservation and management of the fishery to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery." The South Atlantic Council has identified primary nursery areas that will be affected by the PCS mine expansion as Essential Fish Habitat (EFH) and EFH Habitat Areas of Particular Concern in the Council's Comprehensive Habitat Amendment to Fishery Management Plans.

The South Atlantic Council submitted comments earlier in the PCS permit process, stating the permit will result in unacceptable adverse impacts to EFH. The Council stated that the project "poses a significant risk to the coastal ecosystem as a whole through alteration of food web dynamics and severely diminished water quality. Areas adjacent to the project area serve as habitat for a large portion of the shellfish and fish that North Carolina commercial and recreational fishermen harvest." The Council concluded that the expansion "will result in significant and unacceptable impacts to EFH and aquatic resources that depend on those habitats."

The letter adopted by the Council last week states the permit authorizing the PCS mine expansion, as modified by the Corps June 3, "will result in significant and unacceptable impacts to essential fish habitat and aquatic resources that depend on those habitats." The Council requests that EPA exercise its 404(c) authority to veto the permit. Our understanding is the decision to send the letter was a unanimous decision of the Council, which includes by statute the regional director of the National Marine Fisheries Service or his designee.

Derb Carter

Geoff Gisler

Geoff Gisler
Staff Attorney
Southern Environmental Law Center
200 W. Franklin St. Suite 330
Chapel Hill, NC 27516
Ph: (919) 967-1450
Fax: (919) 929-9421

www.southernenvironment.org

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June 11, 2009

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Acting Assistant Administrator for Water
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Washington, DC 20460

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Sincerely,

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Duane Harris

SAFMC Chair

Cc: (via electronic mail)
Council members and staff
Habitat AP

Stan Meiburg /R4/USEPA/US
06/17/2009 05:11 PM

To: Derb Carter <derbc@selcnc.org>
cc
bcc
Subject: Re: PCS elevation

Derb, just so you'll know that we're not holding out on you, the letter hasn't been signed yet, to the best of my knowledge, as of 5:10 p.m. today. I am expecting it very soon. It will be a letter from Mike Shapiro to Rock Salt. Once we make sure the Corps actually has it, we'll get you a copy.

Best regards,

Stan

A. Stanley Meiburg
Acting Regional Administrator
EPA Region 4
Sam Nunn Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, GA 30303

Office: (404) 562-8357
Fax: (404) 562-9961
Cell: (404) 435-4234
Email: meiburg.stan@epa.gov

Stan Meiburg /R4/USEPA/US
06/17/2009 06:20 PM

To terry.carl@epa.gov, wise.allison@epa.gov,
giattina.jim@epa.gov, Tom Welborn, Philip
Mancusi-Ungaro/R4/USEPA/US@EPA,
cc cover.rebecca@epa.gov
bcc

Subject Fw: PCS Closeout Letter

OK--here is the letter. I will forward it on tonight to Col. Ryscavage, Gen. Semonite, and Les Dixon at SAD, as well as Sam Hamilton at FWS and Roy Crabtree at NMFS.

Stan

A. Stanley Meiburg
Acting Regional Administrator
EPA Region 4
Sam Nunn Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, GA 30303

Office: (404) 562-8357
Fax: (404) 562-9961
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Email: meiburg.stan@epa.gov

----- Forwarded by Stan Meiburg/R4/USEPA/US on 06/17/2009 06:11 PM -----

Gregory Peck /DC/USEPA/US

06/17/2009 06:02 PM

To Arvin Ganesan/DC/USEPA/US@EPA, Stan
Meiburg/R4/USEPA/US@EPA, Suzanne
Schwartz/DC/USEPA/US@EPA
cc Mike Shapiro/DC/USEPA/US@EPA, Adora
Andy/DC/USEPA/US@EPA, Eneasta
Jones/DC/USEPA/US@EPA, Jim
Giattina/R4/USEPA/US@EPA, Christina
Moody/DC/USEPA/US@EPA, David
Evans/DC/USEPA/US@EPA, Steven
Neugeboren/DC/USEPA/US@EPA
Subject PCS Closeout Letter

Here's the final letter that Mike signed this afternoon.

1. I'll send a copy this evening to Rock on behalf of Mike.
2. Arvin - will OCIR ensure the right Hill people, including the NC delegation folks, receive this as soon as possible.
3. Region 4 will send to the District and Division also this evening ?

If we can take each of these steps this evening then we'll be in a position to release the letter more broadly tomorrow. Anything we're forgetting?

Thanks everyone!

Greg



Final PCS Mine Closeout Letter.pdf

Gregory E. Peck
Chief of Staff
Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

202-564-5778



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 17 2009

Terrence "Rock" Salt
Acting Assistant Secretary (Civil Works)
Department of the Army
108 Army Pentagon
Room 3E446
Washington, DC 20310-7401

OFFICE OF
WATER

Dear Acting Assistant Secretary Salt:

I am writing to inform you that the U.S. Environmental Protection Agency (EPA) has decided not to seek additional review of the Section 404 permit to the Potash Corporation of Saskatchewan Phosphate Division (PCS or the Applicant) to expand an existing phosphate mining operation (Action ID: AID 200110096) in Beaufort County, North Carolina (NC). EPA Headquarters and Region 4 have jointly made this decision after thoroughly reviewing the U.S. Army Corps of Engineers Wilmington District's (the Corps) June 3, 2009, proffered permit and Record of Decision (ROD), received on June 4, 2009. The 15,100 acre project area is located adjacent to the Pamlico River which is part of the nationally significant Albemarle Pamlico Estuary Complex. The project area is composed of three tracts identified as the NCPC, Bonnerton, and South of NC Highway 33 (S33) tracts which collectively contain 6,293 acres of wetlands and 115,843 linear feet of streams that support the Albemarle Pamlico Estuary. The mine advance described in the proffered permit involves mining and mining related activities within approximately 11,343 total acres, resulting in direct adverse impacts to approximately 3,909 acres of wetlands and 22,435 linear feet of streams.

On April 3, 2009, EPA elevated an earlier version of the proposed permit (February 24, 2009, proposed permit) to the Assistant Secretary of the Army - Civil Works (ASA-CW) for review pursuant to Part IV of the 1992 Memorandum of Agreement (MOA) between EPA and the Department of the Army under Section 404(q) of the CWA. In response to this permit elevation, a number of changes have been made to the proposed project to reduce the scope of its environmental impacts, particularly in the most valuable and sensitive areas, and reflect additional conditions designed to improve site reclamation practices and the monitoring and adaptive management of both the impact and compensatory mitigation sites. EPA has fully considered the revised project in the context of CWA Section 404 (q) and 404(c), including assessment under relevant portions of the CWA Section 404(b)(1) Guidelines. Based on the revisions made to the proposed permit as well as the other factors discussed below, and after close consultation, EPA Headquarters and Region 4 have decided that the Section 404(q) process has been resolved, and EPA has decided not to pursue review of the project pursuant to Section 404(c) at this time.

Internet Address (URL) • <http://www.epa.gov>

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Impact Avoidance

The first step of the section 404(b)(1) review is to avoid impacts to waters of the U.S. Under the Guidelines, an alternative is practicable if it is "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." The Applicant is currently operating under a CWA Section 404 permit issued by the Corps in 1997 that authorized impacts to approximately 1,268 acres of wetlands at the project site. Rather than continuing to permit impacts to the site's valuable aquatic resources in a "piecemeal" manner, the Corps is approaching the current permit more holistically and issuing what it has referred to as a "life of mine" permit. Consistent with this approach, the project's Environmental Impact Statement (EIS) classifies and maps aquatic resources across the entire 15,100 acre project area. The revised permit authorizes impacts to approximately 11,343 acres of uplands and wetlands and avoids impacts to the approximately 2,445 acres of waters of the United States (see ROD permit Special Condition DD) that the Corps, EPA and the other federal and state resource agencies agree represent the site's most ecologically important aquatic resources.

In this case, the Corps Wilmington District determined that economic practicability of the project turns on the availability of approximately 15 years of mining in the two tracts north of Highway 33 (the NCPC and Bonnerton tracts). In our elevation we raised concerns with the economic analysis used by the Corps in determining practicability. The District's analysis was reviewed by Corps HQ and confirmed by the ASA-CW in his response to EPA's Section 404(q) elevation. Although EPA continues to have questions regarding this specific analysis, we recognize that economic viability is an important part of the alternatives analysis. The Applicant has stated that at this time, given the current state of the phosphate market, it would not be economically feasible to move to S33 in the near future. Further, PCS has emphasized that the phosphate ore in the northern tracts is of higher value, and more cost-effective to mine, than that in the southern tract. The Applicant has stated that, as a result of these factors, mining in the southern tract would not be cost-effective in the absence of a substantial improvement in the market. (It should be noted that the Applicant did not originally apply for a permit for S33; the Corps required that tract to be included as part of the "life of mine" permit process.) Therefore, the Applicant has asserted that there must be significant mining north of S33 in order for the project to be viable. The Applicant has also reiterated that the project which was the subject of the 404(q) elevation, and would provide about 14 years of mining in the two northern tracts, is marginally practicable under current market conditions.

In our elevation we looked to the statement in the FEIS that an alternative would be reasonable if it provided "the applicant with the certainty of practicable costs for at least 15 years." Based on that statement, our analysis of what the least environmentally damaging practicable alternative would be used the assumption that 15 years of mining on any combination of the three tracts would make the project viable. However, after considering the company's analysis and conclusions on this matter, we now are

convinced that mining on S33 can not be considered to provide the "certainty of practicable costs" in the near future. While we are not able to determine exactly how many years of mining would be required on the two northern tracts to make a project economically viable, we now accept that something closer to 15 years on the northern tract is appropriate.

Subsequent to our elevation we suggested that avoidance of approximately 450 acres would be practicable. However, just as we have strongly argued throughout this process that not all waters are of equal value, similarly not all mining configurations are of equal value (or practicability). The Corp has determined that achieving that level of avoidance would make the project impractical. It is important to note that it can be particularly difficult to determine practicability of alternatives in situations such as this, where mining can occur only where the resource is located, and not all resources are equal in value or cost-effectiveness. The revised permit does in fact provide for less than the original goal of 15 years of mining in the northern tracts (by about a year and a half).

The FEIS identified Alternative L as the applicant's modified permit request. This proposed permit request was subsequently reduced in impacts on NCPC and S33 tracts through discussions between the Corps District and the applicant. The proposed impacts for the original Alternative L were for 4120 acres of wetlands and 29,288 linear feet of stream. The State of North Carolina further reduced the impacts through the State's Section 401 certification. EPA proposed additional avoidance in its permit elevation. In response to additional avoidance sought by EPA, a number of changes have been made to the proposed project to reduce the scope of its environmental impacts, including additional impact avoidance to approximately 111 acres of wetlands, waters, and uplands, including 3,293 linear feet of streams. EPA, along with FWS and NMFS believe these additional changes protect the most valuable resources that were minable under the revised permit, and thus reduce the expected over-all environmental impact.

Our April 3, 2009, elevation request emphasized the importance of permanently protecting, via conservation easements, those wetlands and streams avoided under the proposed permit from the adverse effects of future mining. In response to this recommendation, the Applicant has agreed to expand the amount of avoided areas protected via conservation easements from 174 acres to 598¹ acres on the proposed site. These additional easements are along the 4 tidal creeks on the NCPC tract and one tidal creek on the Bonnerton tract discussed below under Significant Degradation, and one creek on the S33 tract. This will ensure that some of the highest value aquatic resources on the NCPC and Bonnerton tracts are protected from future mining and other development. The Applicant has also agreed to place conservation easements on approximately 206 acres of the Porter Creek and Cypress Run Creek watersheds that are

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adjacent to the project site.² In light of the high quality of the remaining avoided areas not subject to conservation easements, and the expectation that this is a life-of-mine permit, future requests to impact the over 1,800 acres of avoided wetlands and other waters not protected from future mining by conservation easements could trigger review pursuant to CWA Section 404(c).

In light of the information provided by the Applicant, the avoidance described above (and in greater detail below under Significant Degradation), and the difficulty inherent in this determination, EPA accepts that the current configuration is the least environmentally damaging, economically feasible, and practicable alternative.

Impact Minimization

The second step in the Section 404(b)(1) analysis concerns minimizing the unavoidable impacts to waters of the U.S. In addition to highlighting the need for additional impact avoidance, our April 3, 2009, elevation request also stressed the need to incorporate additional measures into the permit to minimize project impacts by improving post-mining land reclamation practices at the site. In response to this request, the revised permit includes new reclamation measures that require: 1) stockpiling and reuse of topsoil for the reclaimed areas, especially in the drainage areas; 2) planting of agency-specified tree species; and 3) development of a plan to monitor and manage water within the reclamation area to optimize the amount and quality of water being released.

Impact Compensation

The third step in the Section 404(b)(1) analysis is to provide compensatory mitigation to offset the impacts to waters of the U.S. To compensate for the ecosystem services lost over the life of the project, the Applicant has developed a comprehensive mitigation plan that involves multiple sites and strategies. The proposed restoration efforts primarily focus on croplands and drained forested wetlands underlain by hydric soils that are expected to be good candidates for wetland restoration. Targeting mitigation in these areas is expected to have a positive benefit for water quality in the Pamlico River which is designated as nutrient sensitive water and is currently listed as impaired for chlorophyll a. Achieving further reductions in nutrient loadings from agricultural lands will support the State's implementation of actions to restore the nutrient sensitive waters of the Pamlico River. The proposed mitigation would not occur on-site but rather at sites further south of the Pamlico River, and at sites north of the Pamlico River.

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Finally, the Section 404(b)(1) Guidelines require a determination that significant degradation will not occur to waters of the U.S. Our April 3, 2009, elevation package highlighted our concerns regarding the magnitude of the proposed impacts associated with the February 24, 2009, proposed permit, specifically the direct impacts to portions of a nonriverine hardwood wetland forest on the Bonnerton tract designated as a Nationally Significant Natural Heritage Area (SNHA) by the NC Natural Heritage Program (NCNHP), and the indirect impacts associated with the large reduction in the drainage basins of the site's tidal creeks, four of which have been designated as Primary Nursery Areas (PNAs)³ by the NC Wildlife Resources Commission.

Significant Natural Heritage Area: The SNHA is an approximately 272 acre area on the Bonnerton tract. The Corps' February 24, 2009, notice of intent letter to EPA Region 4 indicated that, as part of the NC Division of Water Quality's (NCDWQ) CWA Section 401 water quality certification, 174 acres of this 272 acre area would be avoided. The State certification allows a 1,145 foot wide mining and utility corridor through the connecting area with a requirement for this area to be restored pursuant to a State approved reclamation and revegetation plan, and monitored for at least 10 years post mining in order to ensure that restoration has established reference hydrology for this area. In addition, a reclamation and revegetation plan for this area is required for State approval. The State's certification also requires the avoided area to be protected in perpetuity with a conservation easement. The 174 acre area protected by the State's certification represents the most mature portions of the SNHA.

The remaining 98 acres of the SNHA that was not protected by the NCDWQ's CWA Section 401 certification consists of the northwest portion of the SNHA and a connecting area between this portion and the southwest portion. In response to questions from the NCDWQ concerning this portion of the SNHA, the NCNHP responded that this area is the least ecologically significant of the three portions of the SNHA because the patch size is smaller and the forest is less mature. We note that a study conducted for the Applicant similarly concludes that this area was less ecologically significant. The NCNHP concluded that the SNHA would still be considered to be a "nationally" SNHA without the northwest portion unless, in the unlikely circumstance, another better area

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Primary Nursery Areas: In our April 3, 2009, elevation request we highlighted our concerns regarding the proposed project's potential indirect impacts to the site's ten tidal creeks, four of which have been designated as PNAs for fisheries by the NC Wildlife Resources Commission (i.e., Jacks, Jacobs, Tooley and Porter Creeks). The functions of the PNAs most critical to supporting fisheries are their ability to provide refuge for the larval and juvenile life stages of important commercial and recreational species, to maintain adequate water quality to ensure survival of these life stages, and to provide sufficient input of organic carbon and nutrients to drive the detrital food web needed to support these life stages. Maintenance of adjacent areas in the watershed is critical to the streams being able to support these functions.

The additional wetland and stream impact avoidance reflected in the revised permit has been targeted to maximize protection of the four PNAs as well as a fifth tidal creek, Drinkwater Creek, which although not formally designated as a PNA, provides similar functions. With the additional impact avoidance in the revised permit, based on the most recent estimates provided in the ROD, the cumulative percent of the watershed for each of these five tidal creeks that will be impacted by mining has been reduced. EPA continues to have concerns that reductions in watershed area of this magnitude could potentially impair functions, particularly by affecting the hydrology and the delivery of organic carbon and nutrients. The Corps, however, has asserted that, for these PNAs, hydrology and delivery of organic carbon and nutrients are tidally driven as opposed to headwater/watershed driven. Therefore, the Corps has concluded that the reduction in watershed area will not have a significant adverse effect. The May 2008 final EIS and June 2009 ROD point to site-specific data collected on the NCPC Tract to support this position. However, this remains a continuing concern for EPA, and we are pleased that Special Condition S in the proffered permit incorporates additional scientific review on this subject.

Following the elevation to the ASA (CW), EPA held further discussions with the FWS and the NMFS to ensure that we fully understood their concerns and considered their recommendations with respect to further avoidance actions at the permit site. The FWS stated that while avoidance of additional wetlands at the site would have been desirable; based on the information currently available it is not possible to clearly quantify the impacts to the Albemarle-Pamlico Estuary, which according to the FWS is a nationally significant resource. FWS recommended that the permit contain a robust and enforceable adaptive management component that would provide a structured process for addressing the uncertainty inherent in this decision and to provide decision support tools for determining needed avoidance, restoration, remediation, and monitoring measures through the life of the permit.

We also discussed the project further with the NMFS. These discussions were especially important because some of the most significant concerns which EPA raised in its elevation and which the ASA-CW cited in his referral to the District focused on the PNAs in the tidal creek area on the NCPC and Bonnerton tracts. In response to our concerns, NMFS informed us that the modifications adopted by the Applicant and the Corps following EPA's elevation bolstered NMFS' conclusion that direct impacts to these PNAs would be unlikely. NMFS agreed with FWS on the importance of strong restoration, remediation, and monitoring measures to promote adaptive management at the site.

Adaptive Management: We are pleased that to address scientific uncertainty and EPA, FWS, and NMFS concerns, the Corps is requiring an extensive monitoring and adaptive management program of both the impact and mitigation sites. According to the revised permit, this plan will be carried out by the Applicant, with federal oversight, as a safeguard, to modify or prohibit mining that would be allowed under the permit should monitoring data reveal that direct and indirect impacts are greater than expected.

The Applicant will be required to monitor ground water within and surrounding the reclamation areas to ensure that heavy metal/toxic pollutants including cadmium are not entering the groundwater. In addition to these ground water monitoring requirements, the Applicant will be required to develop a Plan of Study to address the effects of the reduction in headwater wetlands on the utilization of Porter Creek, Tooley Creek, Jacobs Creek, Drinkwater Creek, and Jacks Creek as nursery areas by resident fish and appropriate invertebrate species. According to the revised permit, this plan will be submitted to the Corps and NCDWQ for approval within 1 year of the issuance of this permit.

The monitoring will be required to commence immediately upon approval of the monitoring plan by the Corps and the State and continue for 10 years following the completion of all reclamation work in the subject headwater creeks. The monitoring provisions also require the establishment of an independent panel of scientists to provide input on the design, study methods and data analysis included in the Plan of Study and to annually evaluate whether direct and indirect impacts from mining and benefits from the compensatory mitigation are in accordance with expectations at the time of permitting.

The challenge to implementing an effective adaptive management program will be to successfully achieve early detection of unacceptable adverse impacts on the streams and functions of the PNAs. As previously noted, there is uncertainty regarding the degree to which mining significant portions of a watershed will impact the hydrodynamics, water quality, nursery habitat and other ecological processes and functions of the site's tidal creeks. The changes to the monitoring provisions adopted by the Corps at the request of the NMFS are designed to provide for the early detection of unacceptable impacts. Should the monitoring and adaptive management reveal that the proposed levels of watershed impacts are indeed adversely impacting the functions of the site's tidal creeks to an "unacceptable" level and the Corps does not take appropriate

compliance action, then EPA would consider the project as a candidate for review pursuant to 404(c).

Conclusion

EPA has fully considered the revised project in the context of CWA Section 404(c), including consideration of relevant portions of the CWA Section 404(b)(1) Guidelines. Based on the revisions made to the proposed permit as well as the other factors discussed above, EPA has decided that the Section 404(q) elevation process has been resolved and has decided not to pursue review of the project as currently permitted pursuant to Section 404(c) at this time.

We appreciate your efforts and the efforts of your staff to coordinate with EPA on the review of this project. If you have any questions, please contact me, or Stan Meiburg at 404-562-8357 or Jim Giattina at (404) 562-9470.

Sincerely,



Michael H. Shapiro
Acting Assistant Administrator

Cc: Stan Meiburg, Administrator, EPA Region 4
Brigadier General Todd Semonite, South Atlantic Division, U.S. Army Corps of Engineers
Sam Hamilton, U.S. Fish and Wildlife Service
Dee Freeman, NC Department of Environment and Natural Resources
Coleen H. Sullins, NC Department of Environment and Natural Resources, Division of Water Quality
Jim Giattina, EPA Region 4

Stan Meiburg /R4/USEPA/US
06/17/2009 06:31 PM

To Jefferson.Ryscavage@us.army.mil,
todd.semonite@us.army.mil,
Lester.S.Dixon@usace.army.mil, Roy.Crabtree@noaa.gov,
cc shapiro.mike@epa.gov, peck.gregory@epa.gov, Suzanne
Schwartz/DC/USEPA/US@EPA, giattina.jim@epa.gov,
cox.williaml@epa.gov, Tom Welborn
bcc cover.rebecca@epa.gov; gordon.scott@epa.gov;
banister.beverly@epa.gov
Subject Final EPA closeout letter on PCS

Dear Colleagues,

We have just received the attached copy of a letter signed late this afternoon from Acting Assistant Administrator Michael Shapiro to Acting ASA Salt which closes out EPA's elevation of the 404 permit for PCS Phosphates in North Carolina. We are anticipating a more widespread release of this letter in the morning, so I wanted you to have it right away as I am sure it will be of interest.

Thank you to you and your staff for your collaboration on this challenging project.

With best regards,

Stan Meiburg



Final PCS Mine Closeout Letter.pdf

A. Stanley Meiburg
Acting Regional Administrator
EPA Region 4
Sam Nunn Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, GA 30303

Office: (404) 562-8357
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 17 2009

Terrence "Rock" Salt
Acting Assistant Secretary (Civil Works)
Department of the Army
108 Army Pentagon
Room 3E446
Washington, DC 20310-7401

OFFICE OF
WATER

Dear Acting Assistant Secretary Salt:

I am writing to inform you that the U.S. Environmental Protection Agency (EPA) has decided not to seek additional review of the Section 404 permit to the Potash Corporation of Saskatchewan Phosphate Division (PCS or the Applicant) to expand an existing phosphate mining operation (Action ID: AID 200110096) in Beaufort County, North Carolina (NC). EPA Headquarters and Region 4 have jointly made this decision after thoroughly reviewing the U.S. Army Corps of Engineers Wilmington District's (the Corps) June 3, 2009, proffered permit and Record of Decision (ROD), received on June 4, 2009. The 15,100 acre project area is located adjacent to the Pamlico River which is part of the nationally significant Albemarle Pamlico Estuary Complex. The project area is composed of three tracts identified as the NCPC, Bonneron, and South of NC Highway 33 (S33) tracts which collectively contain 6,293 acres of wetlands and 115,843 linear feet of streams that support the Albemarle Pamlico Estuary. The mine advance described in the proffered permit involves mining and mining related activities within approximately 11,343 total acres, resulting in direct adverse impacts to approximately 3,909 acres of wetlands and 22,435 linear feet of streams.

On April 3, 2009, EPA elevated an earlier version of the proposed permit (February 24, 2009, proposed permit) to the Assistant Secretary of the Army - Civil Works (ASA-CW) for review pursuant to Part IV of the 1992 Memorandum of Agreement (MOA) between EPA and the Department of the Army under Section 404(q) of the CWA. In response to this permit elevation, a number of changes have been made to the proposed project to reduce the scope of its environmental impacts, particularly in the most valuable and sensitive areas, and reflect additional conditions designed to improve site reclamation practices and the monitoring and adaptive management of both the impact and compensatory mitigation sites. EPA has fully considered the revised project in the context of CWA Section 404 (q) and 404(c), including assessment under relevant portions of the CWA Section 404(b)(1) Guidelines. Based on the revisions made to the proposed permit as well as the other factors discussed below, and after close consultation, EPA Headquarters and Region 4 have decided that the Section 404(q) process has been resolved, and EPA has decided not to pursue review of the project pursuant to Section 404(c) at this time.

Internet Address (URL) • <http://www.epa.gov>

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Impact Avoidance

The first step of the section 404(b)(1) review is to avoid impacts to waters of the U.S. Under the Guidelines, an alternative is practicable if it is "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." The Applicant is currently operating under a CWA Section 404 permit issued by the Corps in 1997 that authorized impacts to approximately 1,268 acres of wetlands at the project site. Rather than continuing to permit impacts to the site's valuable aquatic resources in a "piecemeal" manner, the Corps is approaching the current permit more holistically and issuing what it has referred to as a "life of mine" permit. Consistent with this approach, the project's Environmental Impact Statement (EIS) classifies and maps aquatic resources across the entire 15,100 acre project area. The revised permit authorizes impacts to approximately 11,343 acres of uplands and wetlands and avoids impacts to the approximately 2,445 acres of waters of the United States (see ROD permit Special Condition DD) that the Corps, EPA and the other federal and state resource agencies agree represent the site's most ecologically important aquatic resources.

In this case, the Corps Wilmington District determined that economic practicability of the project turns on the availability of approximately 15 years of mining in the two tracts north of Highway 33 (the NCPC and Bonnerton tracts). In our elevation we raised concerns with the economic analysis used by the Corps in determining practicability. The District's analysis was reviewed by Corps HQ and confirmed by the ASA-CW in his response to EPA's Section 404(q) elevation. Although EPA continues to have questions regarding this specific analysis, we recognize that economic viability is an important part of the alternatives analysis. The Applicant has stated that at this time, given the current state of the phosphate market, it would not be economically feasible to move to S33 in the near future. Further, PCS has emphasized that the phosphate ore in the northern tracts is of higher value, and more cost-effective to mine, than that in the southern tract. The Applicant has stated that, as a result of these factors, mining in the southern tract would not be cost-effective in the absence of a substantial improvement in the market. (It should be noted that the Applicant did not originally apply for a permit for S33; the Corps required that tract to be included as part of the "life of mine" permit process.) Therefore, the Applicant has asserted that there must be significant mining north of S33 in order for the project to be viable. The Applicant has also reiterated that the project which was the subject of the 404(q) elevation, and would provide about 14 years of mining in the two northern tracts, is marginally practicable under current market conditions.

In our elevation we looked to the statement in the FEIS that an alternative would be reasonable if it provided "the applicant with the certainty of practicable costs for at least 15 years." Based on that statement, our analysis of what the least environmentally damaging practicable alternative would be used the assumption that 15 years of mining on any combination of the three tracts would make the project viable. However, after considering the company's analysis and conclusions on this matter, we now are

convinced that mining on S33 can not be considered to provide the "certainty of practicable costs" in the near future. While we are not able to determine exactly how many years of mining would be required on the two northern tracts to make a project economically viable, we now accept that something closer to 15 years on the northern tract is appropriate.

Subsequent to our elevation we suggested that avoidance of approximately 450 acres would be practicable. However, just as we have strongly argued throughout this process that not all waters are of equal value, similarly not all mining configurations are of equal value (or practicability). The Corp has determined that achieving that level of avoidance would make the project impractical. It is important to note that it can be particularly difficult to determine practicability of alternatives in situations such as this, where mining can occur only where the resource is located, and not all resources are equal in value or cost-effectiveness. The revised permit does in fact provide for less than the original goal of 15 years of mining in the northern tracts (by about a year and a half).

The FEIS identified Alternative L as the applicant's modified permit request. This proposed permit request was subsequently reduced in impacts on NCPC and S33 tracts through discussions between the Corps District and the applicant. The proposed impacts for the original Alternative L were for 4120 acres of wetlands and 29,288 linear feet of stream. The State of North Carolina further reduced the impacts through the State's Section 401 certification. EPA proposed additional avoidance in its permit elevation. In response to additional avoidance sought by EPA, a number of changes have been made to the proposed project to reduce the scope of its environmental impacts, including additional impact avoidance to approximately 111 acres of wetlands, waters, and uplands, including 3,293 linear feet of streams. EPA, along with FWS and NMFS believe these additional changes protect the most valuable resources that were minable under the revised permit, and thus reduce the expected over-all environmental impact.

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Adaptive Management: We are pleased that to address scientific uncertainty and EPA, FWS, and NMFS concerns, the Corps is requiring an extensive monitoring and adaptive management program of both the impact and mitigation sites. According to the revised permit, this plan will be carried out by the Applicant, with federal oversight, as a safeguard, to modify or prohibit mining that would be allowed under the permit should monitoring data reveal that direct and indirect impacts are greater than expected.

The Applicant will be required to monitor ground water within and surrounding the reclamation areas to ensure that heavy metal/toxic pollutants including cadmium are not entering the groundwater. In addition to these ground water monitoring requirements, the Applicant will be required to develop a Plan of Study to address the effects of the reduction in headwater wetlands on the utilization of Porter Creek, Tooley Creek, Jacobs Creek, Drinkwater Creek, and Jacks Creek as nursery areas by resident fish and appropriate invertebrate species. According to the revised permit, this plan will be submitted to the Corps and NCDWQ for approval within 1 year of the issuance of this permit.

The monitoring will be required to commence immediately upon approval of the monitoring plan by the Corps and the State and continue for 10 years following the completion of all reclamation work in the subject headwater creeks. The monitoring provisions also require the establishment of an independent panel of scientists to provide input on the design, study methods and data analysis included in the Plan of Study and to annually evaluate whether direct and indirect impacts from mining and benefits from the compensatory mitigation are in accordance with expectations at the time of permitting.

The challenge to implementing an effective adaptive management program will be to successfully achieve early detection of unacceptable adverse impacts on the streams and functions of the PNAs. As previously noted, there is uncertainty regarding the degree to which mining significant portions of a watershed will impact the hydrodynamics, water quality, nursery habitat and other ecological processes and functions of the site's tidal creeks. The changes to the monitoring provisions adopted by the Corps at the request of the NMFS are designed to provide for the early detection of unacceptable impacts. Should the monitoring and adaptive management reveal that the proposed levels of watershed impacts are indeed adversely impacting the functions of the site's tidal creeks to an "unacceptable" level and the Corps does not take appropriate

compliance action, then EPA would consider the project as a candidate for review pursuant to 404(c).

Conclusion

EPA has fully considered the revised project in the context of CWA Section 404(c), including consideration of relevant portions of the CWA Section 404(b)(1) Guidelines. Based on the revisions made to the proposed permit as well as the other factors discussed above, EPA has decided that the Section 404(q) elevation process has been resolved and has decided not to pursue review of the project as currently permitted pursuant to Section 404(c) at this time.

We appreciate your efforts and the efforts of your staff to coordinate with EPA on the review of this project. If you have any questions, please contact me, or Stan Meiburg at 404-562-8357 or Jim Giattina at (404) 562-9470.

Sincerely,



Michael H. Shapiro
Acting Assistant Administrator

Cc: Stan Meiburg, Administrator, EPA Region 4
Brigadier General Todd Semonite, South Atlantic Division, U.S. Army Corps of Engineers
Sam Hamilton, U.S. Fish and Wildlife Service
Dee Freeman, NC Department of Environment and Natural Resources
Coleen H. Sullins, NC Department of Environment and Natural Resources, Division of Water Quality
Jim Giattina, EPA Region 4

Stan Meiburg /R4/USEPA/US
06/17/2009 06:43 PM

To derbc@selcnc.org
cc
bcc
Subject PCS letter

Well, sure enough, not an hour after I sent my earlier email HQ sent us a copy of the letter. I cannot confirm that ASA Salt has received it, so I am going to wait until tomorrow to release it, but we'll get it to you as soon as I know he's seen it. Thanks for your patience!

Stan

A. Stanley Meiburg
Acting Regional Administrator
EPA Region 4
Sam Nunn Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, GA 30303

Office: (404) 562-8357
Fax: (404) 562-9961
Cell: (404) 435-4234
Email: meiburg.stan@epa.gov



"Ryscavage, Jefferson COL
SAW"
<Jefferson.Ryscavage@us.ar
my.mil>

06/17/2009 06:46 PM

To Stan Meiburg/R4/USEPA/US@EPA

cc "Semonite, Todd T BG SAD"
<Todd.T.Semonite@usace.army.mil>, "Dixon, Lester S SAD"
<Lester.S.Dixon@usace.army.mil>, Jim

bcc

Subject Re: Final EPA closeout letter on PCS

History:

➡ This message has been forwarded.

Sir,

Thanks for the memo. We appreciate the heads-up and your coordination and communication throughout this process.

V/r,
COL Jeff Ryscavage

Message sent via my BlackBerry Wireless Device

----- Original Message -----

From: Meiburg.Stan@epamail.epa.gov <Meiburg.Stan@epamail.epa.gov>
To: Ryscavage, Jefferson COL SAW; todd.semonite@us.army.mil <todd.semonite@us.army.mil>; Dixon, Lester S
SAD; Roy.Crabtree@noaa.gov <Roy.Crabtree@noaa.gov>; sam_hamilton@fws.gov <sam_hamilton@fws.gov>
Cc: shapiro.mike@epa.gov <shapiro.mike@epa.gov>; peck.gregory@epa.gov <peck.gregory@epa.gov>;
Schwartz.Suzanne@epamail.epa.gov <Schwartz.Suzanne@epamail.epa.gov>; giattina.jim@epa.gov
<giattina.jim@epa.gov>; cox.williaml@epa.gov <cox.williaml@epa.gov>; Welborn.Tom@epamail.epa.gov
<Welborn.Tom@epamail.epa.gov>
Sent: Wed Jun 17 17:31:07 2009
Subject: Final EPA closeout letter on PCS

Dear Colleagues,

We have just received the attached copy of a letter signed late this afternoon from Acting Assistant Administrator Michael Shapiro to Acting ASA Salt which closes out EPA's elevation of the 404 permit for PCS Phosphates in North Carolina. We are anticipating a more widespread release of this letter in the morning, so I wanted you to have it right away as I am sure it will be of interest.

Thank you to you and your staff for your collaboration on this challenging project.

With best regards,

Stan Meiburg

(See attached file: Final PCS Mine Closeout Letter.pdf)

A. Stanley Meiburg
Acting Regional Administrator
EPA Region 4
Sam Nunn Atlanta Federal Center

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"Dixon, Lester S SAD"
<Lester.S.Dixon@usace.army.mil>

06/17/2009 07:05 PM

To Stan Meiburg/R4/USEPA/US@EPA

cc

bcc

Subject Re: Final EPA closeout letter on PCS

History:

☞ This message has been replied to.

Stan

Thx for your help and leadership on this one.

Les

----- Original Message -----

From: Meiburg.Stan@epamail.epa.gov <Meiburg.Stan@epamail.epa.gov>
To: Ryscavage, Jefferson COL SAW; todd.semonite@us.army.mil <todd.semonite@us.army.mil>; Dixon, Lester S SAD; Roy.Crabtree@noaa.gov <Roy.Crabtree@noaa.gov>; sam_hamilton@fws.gov <sam_hamilton@fws.gov>
Cc: shapiro.mike@epa.gov <shapiro.mike@epa.gov>; peck.gregory@epa.gov <peck.gregory@epa.gov>; Schwartz.Suzanne@epamail.epa.gov <Schwartz.Suzanne@epamail.epa.gov>; giattina.jim@epa.gov <giattina.jim@epa.gov>; cox.williaml@epa.gov <cox.williaml@epa.gov>; Welborn.Tom@epamail.epa.gov <Welborn.Tom@epamail.epa.gov>
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With best regards,

Stan Meiburg

(See attached file: Final PCS Mine Closeout Letter.pdf)

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Tom Welborn /R4/USEPA/US

06/17/2009 08:38 PM

To Jennifer Derby/R4/USEPA/US@EPA, Rebecca
Fox/R4/USEPA/US@EPA, Philip
Mancusi-Ungaro/R4/USEPA/US@EPA, "Jeff Weller"

cc

bcc

Subject Fw: Final EPA closeout letter on PCS

[1 Attachment]

Sent by EPA Wireless E-Mail Services
Stan Meiburg

----- Original Message -----

From: Stan Meiburg

Sent: 06/17/2009 06:31 PM EDT

To: Jefferson.Ryscavage@us.army.mil; todd.semonite@us.army.mil;
Lester.S.Dixon@usace.army.mil; Roy.Crabtree@noaa.gov; sam_hamilton@fws.gov

Cc: shapiro.mike@epa.gov; peck.gregory@epa.gov; Suzanne Schwartz;
giattina.jim@epa.gov; cox.williaml@epa.gov; Tom Welborn

Subject: Final EPA closeout letter on PCS

Dear Colleagues,

We have just received the attached copy of a letter signed late this afternoon from Acting Assistant Administrator Michael Shapiro to Acting ASA Salt which closes out EPA's elevation of the 404 permit for PCS Phosphates in North Carolina. We are anticipating a more widespread release of this letter in the morning, so I wanted you to have it right away as I am sure it will be of interest.

Thank you to you and your staff for your collaboration on this challenging project.

With best regards,

Stan Meiburg



Final PCS Mine Closeout Letter.pdf

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 17 2009

Terrence "Rock" Salt
Acting Assistant Secretary (Civil Works)
Department of the Army
108 Army Pentagon
Room 3E446
Washington, DC 20310-7401

OFFICE OF
WATER

Dear Acting Assistant Secretary Salt:

I am writing to inform you that the U.S. Environmental Protection Agency (EPA) has decided not to seek additional review of the Section 404 permit to the Potash Corporation of Saskatchewan Phosphate Division (PCS or the Applicant) to expand an existing phosphate mining operation (Action ID: AID 200110096) in Beaufort County, North Carolina (NC). EPA Headquarters and Region 4 have jointly made this decision after thoroughly reviewing the U.S. Army Corps of Engineers Wilmington District's (the Corps) June 3, 2009, proffered permit and Record of Decision (ROD), received on June 4, 2009. The 15,100 acre project area is located adjacent to the Pamlico River which is part of the nationally significant Albemarle Pamlico Estuary Complex. The project area is composed of three tracts identified as the NCPC, Bonneron, and South of NC Highway 33 (S33) tracts which collectively contain 6,293 acres of wetlands and 115,843 linear feet of streams that support the Albemarle Pamlico Estuary. The mine advance described in the proffered permit involves mining and mining related activities within approximately 11,343 total acres, resulting in direct adverse impacts to approximately 3,909 acres of wetlands and 22,435 linear feet of streams.

On April 3, 2009, EPA elevated an earlier version of the proposed permit (February 24, 2009, proposed permit) to the Assistant Secretary of the Army - Civil Works (ASA-CW) for review pursuant to Part IV of the 1992 Memorandum of Agreement (MOA) between EPA and the Department of the Army under Section 404(q) of the CWA. In response to this permit elevation, a number of changes have been made to the proposed project to reduce the scope of its environmental impacts, particularly in the most valuable and sensitive areas, and reflect additional conditions designed to improve site reclamation practices and the monitoring and adaptive management of both the impact and compensatory mitigation sites. EPA has fully considered the revised project in the context of CWA Section 404 (q) and 404(c), including assessment under relevant portions of the CWA Section 404(b)(1) Guidelines. Based on the revisions made to the proposed permit as well as the other factors discussed below, and after close consultation, EPA Headquarters and Region 4 have decided that the Section 404(q) process has been resolved, and EPA has decided not to pursue review of the project pursuant to Section 404(c) at this time.

Internet Address (URL) • <http://www.epa.gov>

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Impact Avoidance

The first step of the section 404(b)(1) review is to avoid impacts to waters of the U.S. Under the Guidelines, an alternative is practicable if it is "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." The Applicant is currently operating under a CWA Section 404 permit issued by the Corps in 1997 that authorized impacts to approximately 1,268 acres of wetlands at the project site. Rather than continuing to permit impacts to the site's valuable aquatic resources in a "piecemeal" manner, the Corps is approaching the current permit more holistically and issuing what it has referred to as a "life of mine" permit. Consistent with this approach, the project's Environmental Impact Statement (EIS) classifies and maps aquatic resources across the entire 15,100 acre project area. The revised permit authorizes impacts to approximately 11,343 acres of uplands and wetlands and avoids impacts to the approximately 2,445 acres of waters of the United States (see ROD permit Special Condition DD) that the Corps, EPA and the other federal and state resource agencies agree represent the site's most ecologically important aquatic resources.

In this case, the Corps Wilmington District determined that economic practicability of the project turns on the availability of approximately 15 years of mining in the two tracts north of Highway 33 (the NCPC and Bonnerton tracts). In our elevation we raised concerns with the economic analysis used by the Corps in determining practicability. The District's analysis was reviewed by Corps HQ and confirmed by the ASA-CW in his response to EPA's Section 404(q) elevation. Although EPA continues to have questions regarding this specific analysis, we recognize that economic viability is an important part of the alternatives analysis. The Applicant has stated that at this time, given the current state of the phosphate market, it would not be economically feasible to move to S33 in the near future. Further, PCS has emphasized that the phosphate ore in the northern tracts is of higher value, and more cost-effective to mine, than that in the southern tract. The Applicant has stated that, as a result of these factors, mining in the southern tract would not be cost-effective in the absence of a substantial improvement in the market. (It should be noted that the Applicant did not originally apply for a permit for S33; the Corps required that tract to be included as part of the "life of mine" permit process.) Therefore, the Applicant has asserted that there must be significant mining north of S33 in order for the project to be viable. The Applicant has also reiterated that the project which was the subject of the 404(q) elevation, and would provide about 14 years of mining in the two northern tracts, is marginally practicable under current market conditions.

In our elevation we looked to the statement in the FEIS that an alternative would be reasonable if it provided "the applicant with the certainty of practicable costs for at least 15 years." Based on that statement, our analysis of what the least environmentally damaging practicable alternative would be used the assumption that 15 years of mining on any combination of the three tracts would make the project viable. However, after considering the company's analysis and conclusions on this matter, we now are

convinced that mining on S33 can not be considered to provide the "certainty of practicable costs" in the near future. While we are not able to determine exactly how many years of mining would be required on the two northern tracts to make a project economically viable, we now accept that something closer to 15 years on the northern tract is appropriate.

Subsequent to our elevation we suggested that avoidance of approximately 450 acres would be practicable. However, just as we have strongly argued throughout this process that not all waters are of equal value, similarly not all mining configurations are of equal value (or practicability). The Corp has determined that achieving that level of avoidance would make the project impractical. It is important to note that it can be particularly difficult to determine practicability of alternatives in situations such as this, where mining can occur only where the resource is located, and not all resources are equal in value or cost-effectiveness. The revised permit does in fact provide for less than the original goal of 15 years of mining in the northern tracts (by about a year and a half).

The FEIS identified Alternative L as the applicant's modified permit request. This proposed permit request was subsequently reduced in impacts on NCPC and S33 tracts through discussions between the Corps District and the applicant. The proposed impacts for the original Alternative L were for 4120 acres of wetlands and 29,288 linear feet of stream. The State of North Carolina further reduced the impacts through the State's Section 401 certification. EPA proposed additional avoidance in its permit elevation. In response to additional avoidance sought by EPA, a number of changes have been made to the proposed project to reduce the scope of its environmental impacts, including additional impact avoidance to approximately 111 acres of wetlands, waters, and uplands, including 3,293 linear feet of streams. EPA, along with FWS and NMFS believe these additional changes protect the most valuable resources that were minable under the revised permit, and thus reduce the expected over-all environmental impact.

Our April 3, 2009, elevation request emphasized the importance of permanently protecting, via conservation easements, those wetlands and streams avoided under the proposed permit from the adverse effects of future mining. In response to this recommendation, the Applicant has agreed to expand the amount of avoided areas protected via conservation easements from 174 acres to 598¹ acres on the proposed site. These additional easements are along the 4 tidal creeks on the NCPC tract and one tidal creek on the Bonnerton tract discussed below under Significant Degradation, and one creek on the S33 tract. This will ensure that some of the highest value aquatic resources on the NCPC and Bonnerton tracts are protected from future mining and other development. The Applicant has also agreed to place conservation easements on approximately 206 acres of the Porter Creek and Cypress Run Creek watersheds that are

¹ This number reflects the 174 acres (as stated in the Corps' February 24, 2009 notice of intent letter to EPA Region 4 and in the June 3, 2009, ROD) already protected by the State's CWA Section 401 Water Quality Certification as well as the additional acreage PCS has offered to put under easement in response to EPA's elevation which includes approximately 354 acres on the NCPC Tract, 42 acres on the Bonnerton Tract, and 28 acres on the S33 Tract.

adjacent to the project site.² In light of the high quality of the remaining avoided areas not subject to conservation easements, and the expectation that this is a life-of-mine permit, future requests to impact the over 1,800 acres of avoided wetlands and other waters not protected from future mining by conservation easements could trigger review pursuant to CWA Section 404(c).

In light of the information provided by the Applicant, the avoidance described above (and in greater detail below under Significant Degradation), and the difficulty inherent in this determination, EPA accepts that the current configuration is the least environmentally damaging, economically feasible, and practicable alternative.

Impact Minimization

The second step in the Section 404(b)(1) analysis concerns minimizing the unavoidable impacts to waters of the U.S. In addition to highlighting the need for additional impact avoidance, our April 3, 2009, elevation request also stressed the need to incorporate additional measures into the permit to minimize project impacts by improving post-mining land reclamation practices at the site. In response to this request, the revised permit includes new reclamation measures that require: 1) stockpiling and reuse of topsoil for the reclaimed areas, especially in the drainage areas; 2) planting of agency-specified tree species; and 3) development of a plan to monitor and manage water within the reclamation area to optimize the amount and quality of water being released.

Impact Compensation

The third step in the Section 404(b)(1) analysis is to provide compensatory mitigation to offset the impacts to waters of the U.S. To compensate for the ecosystem services lost over the life of the project, the Applicant has developed a comprehensive mitigation plan that involves multiple sites and strategies. The proposed restoration efforts primarily focus on croplands and drained forested wetlands underlain by hydric soils that are expected to be good candidates for wetland restoration. Targeting mitigation in these areas is expected to have a positive benefit for water quality in the Pamlico River which is designated as nutrient sensitive water and is currently listed as impaired for chlorophyll a. Achieving further reductions in nutrient loadings from agricultural lands will support the State's implementation of actions to restore the nutrient sensitive waters of the Pamlico River. The proposed mitigation would not occur on-site but rather at sites further south of the Pamlico River, and at sites north of the Pamlico River.

Under the plan, 7,968; 756; and 2,472 acres of wetlands would be restored, enhanced, and preserved, respectively. Wetland replacement-to-loss ratios used by the Corps are 2:1 for restoration, 3:1 for enhancement, and 8:1 to 10:1 for preservation. Also

² The Applicant has stated that protection of this off-site acreage is subject to its "inability to place restrictions on non-owned properties" and it indicated to the Corps on June 5, 2009, that it owns approximately 90 percent of this off-site acreage.

under the plan, 44,043; 7,994; and 32,851 linear feet of streams would be restored, enhanced and preserved, respectively. The ratio for linear feet of stream impact will meet the requirements of the 2003 NC Stream Mitigation Guidelines (1:1 for poor quality streams, 2:1 for good quality streams and 3:1 for excellent quality streams).

Significant Degradation

Finally, the Section 404(b)(1) Guidelines require a determination that significant degradation will not occur to waters of the U.S. Our April 3, 2009, elevation package highlighted our concerns regarding the magnitude of the proposed impacts associated with the February 24, 2009, proposed permit, specifically the direct impacts to portions of a nonriverine hardwood wetland forest on the Bonnerton tract designated as a Nationally Significant Natural Heritage Area (SNHA) by the NC Natural Heritage Program (NCNHP), and the indirect impacts associated with the large reduction in the drainage basins of the site's tidal creeks, four of which have been designated as Primary Nursery Areas (PNAs)³ by the NC Wildlife Resources Commission.

Significant Natural Heritage Area: The SNHA is an approximately 272 acre area on the Bonnerton tract. The Corps' February 24, 2009, notice of intent letter to EPA Region 4 indicated that, as part of the NC Division of Water Quality's (NCDWQ) CWA Section 401 water quality certification, 174 acres of this 272 acre area would be avoided. The State certification allows a 1,145 foot wide mining and utility corridor through the connecting area with a requirement for this area to be restored pursuant to a State approved reclamation and revegetation plan, and monitored for at least 10 years post mining in order to ensure that restoration has established reference hydrology for this area. In addition, a reclamation and revegetation plan for this area is required for State approval. The State's certification also requires the avoided area to be protected in perpetuity with a conservation easement. The 174 acre area protected by the State's certification represents the most mature portions of the SNHA.

The remaining 98 acres of the SNHA that was not protected by the NCDWQ's CWA Section 401 certification consists of the northwest portion of the SNHA and a connecting area between this portion and the southwest portion. In response to questions from the NCDWQ concerning this portion of the SNHA, the NCNHP responded that this area is the least ecologically significant of the three portions of the SNHA because the patch size is smaller and the forest is less mature. We note that a study conducted for the Applicant similarly concludes that this area was less ecologically significant. The NCNHP concluded that the SNHA would still be considered to be a "nationally" SNHA without the northwest portion unless, in the unlikely circumstance, another better area

³ The State of North Carolina was the first state to designate nursery areas to protect the salt marshes and estuaries along the coast that serve as nursery grounds for 90 percent of the State's fisheries. Primary Nursery Areas (PNAs) are located in the upper portions of creeks and bays. These are usually shallow with soft muddy bottoms and surrounded by marshes and wetlands. The low salinity and abundance of food in these areas is ideal for young fish and shellfish. There are 80,144 acres designated as PNAs in North Carolina. (www.ncfisheries.net/habitat/pna.htm). Tidal creeks and streams that are not formally designated PNAs may still provide similar functions.

was discovered in North Carolina or Virginia. [Email correspondence from Mike Schafale (NCNHP) to John Dorney (NCDWQ) dated April 23, 2009]. Based on this information it does not appear that the mining impacts to the remaining 98 acres would cause or contribute to significant degradation of the SNHA.

Primary Nursery Areas: In our April 3, 2009, elevation request we highlighted our concerns regarding the proposed project's potential indirect impacts to the site's ten tidal creeks, four of which have been designated as PNAs for fisheries by the NC Wildlife Resources Commission (i.e., Jacks, Jacobs, Tooley and Porter Creeks). The functions of the PNAs most critical to supporting fisheries are their ability to provide refuge for the larval and juvenile life stages of important commercial and recreational species, to maintain adequate water quality to ensure survival of these life stages, and to provide sufficient input of organic carbon and nutrients to drive the detrital food web needed to support these life stages. Maintenance of adjacent areas in the watershed is critical to the streams being able to support these functions.

The additional wetland and stream impact avoidance reflected in the revised permit has been targeted to maximize protection of the four PNAs as well as a fifth tidal creek, Drinkwater Creek, which although not formally designated as a PNA, provides similar functions. With the additional impact avoidance in the revised permit, based on the most recent estimates provided in the ROD, the cumulative percent of the watershed for each of these five tidal creeks that will be impacted by mining has been reduced. EPA continues to have concerns that reductions in watershed area of this magnitude could potentially impair functions, particularly by affecting the hydrology and the delivery of organic carbon and nutrients. The Corps, however, has asserted that, for these PNAs, hydrology and delivery of organic carbon and nutrients are tidally driven as opposed to headwater/watershed driven. Therefore, the Corps has concluded that the reduction in watershed area will not have a significant adverse effect. The May 2008 final EIS and June 2009 ROD point to site-specific data collected on the NCPC Tract to support this position. However, this remains a continuing concern for EPA, and we are pleased that Special Condition S in the proffered permit incorporates additional scientific review on this subject.

Following the elevation to the ASA (CW), EPA held further discussions with the FWS and the NMFS to ensure that we fully understood their concerns and considered their recommendations with respect to further avoidance actions at the permit site. The FWS stated that while avoidance of additional wetlands at the site would have been desirable; based on the information currently available it is not possible to clearly quantify the impacts to the Albemarle-Pamlico Estuary, which according to the FWS is a nationally significant resource. FWS recommended that the permit contain a robust and enforceable adaptive management component that would provide a structured process for addressing the uncertainty inherent in this decision and to provide decision support tools for determining needed avoidance, restoration, remediation, and monitoring measures through the life of the permit.

We also discussed the project further with the NMFS. These discussions were especially important because some of the most significant concerns which EPA raised in its elevation and which the ASA-CW cited in his referral to the District focused on the PNAs in the tidal creek area on the NCPC and Bonnerton tracts. In response to our concerns, NMFS informed us that the modifications adopted by the Applicant and the Corps following EPA's elevation bolstered NMFS' conclusion that direct impacts to these PNAs would be unlikely. NMFS agreed with FWS on the importance of strong restoration, remediation, and monitoring measures to promote adaptive management at the site.

Adaptive Management: We are pleased that to address scientific uncertainty and EPA, FWS, and NMFS concerns, the Corps is requiring an extensive monitoring and adaptive management program of both the impact and mitigation sites. According to the revised permit, this plan will be carried out by the Applicant, with federal oversight, as a safeguard, to modify or prohibit mining that would be allowed under the permit should monitoring data reveal that direct and indirect impacts are greater than expected.

The Applicant will be required to monitor ground water within and surrounding the reclamation areas to ensure that heavy metal/toxic pollutants including cadmium are not entering the groundwater. In addition to these ground water monitoring requirements, the Applicant will be required to develop a Plan of Study to address the effects of the reduction in headwater wetlands on the utilization of Porter Creek, Tooley Creek, Jacobs Creek, Drinkwater Creek, and Jacks Creek as nursery areas by resident fish and appropriate invertebrate species. According to the revised permit, this plan will be submitted to the Corps and NCDWQ for approval within 1 year of the issuance of this permit.

The monitoring will be required to commence immediately upon approval of the monitoring plan by the Corps and the State and continue for 10 years following the completion of all reclamation work in the subject headwater creeks. The monitoring provisions also require the establishment of an independent panel of scientists to provide input on the design, study methods and data analysis included in the Plan of Study and to annually evaluate whether direct and indirect impacts from mining and benefits from the compensatory mitigation are in accordance with expectations at the time of permitting.

The challenge to implementing an effective adaptive management program will be to successfully achieve early detection of unacceptable adverse impacts on the streams and functions of the PNAs. As previously noted, there is uncertainty regarding the degree to which mining significant portions of a watershed will impact the hydrodynamics, water quality, nursery habitat and other ecological processes and functions of the site's tidal creeks. The changes to the monitoring provisions adopted by the Corps at the request of the NMFS are designed to provide for the early detection of unacceptable impacts. Should the monitoring and adaptive management reveal that the proposed levels of watershed impacts are indeed adversely impacting the functions of the site's tidal creeks to an "unacceptable" level and the Corps does not take appropriate

compliance action, then EPA would consider the project as a candidate for review pursuant to 404(c).

Conclusion

EPA has fully considered the revised project in the context of CWA Section 404(c), including consideration of relevant portions of the CWA Section 404(b)(1) Guidelines. Based on the revisions made to the proposed permit as well as the other factors discussed above, EPA has decided that the Section 404(q) elevation process has been resolved and has decided not to pursue review of the project as currently permitted pursuant to Section 404(c) at this time.

We appreciate your efforts and the efforts of your staff to coordinate with EPA on the review of this project. If you have any questions, please contact me, or Stan Meiburg at 404-562-8357 or Jim Giattina at (404) 562-9470.

Sincerely,



Michael H. Shapiro
Acting Assistant Administrator

Cc: Stan Meiburg, Administrator, EPA Region 4
Brigadier General Todd Semonite, South Atlantic Division, U.S. Army Corps of Engineers
Sam Hamilton, U.S. Fish and Wildlife Service
Dee Freeman, NC Department of Environment and Natural Resources
Coleen H. Sullins, NC Department of Environment and Natural Resources, Division of Water Quality
Jim Giattina, EPA Region 4

Stan Meiburg /R4/USEPA/US
06/18/2009 09:49 AM

To derbc@selcnc.org
cc
bcc
Subject PCS letter



Final PCS Mine Closeout Letter.pdf

A. Stanley Meiburg
Acting Regional Administrator
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 17 2009

Terrence "Rock" Salt
Acting Assistant Secretary (Civil Works)
Department of the Army
108 Army Pentagon
Room 3E446
Washington, DC 20310-7401

OFFICE OF
WATER

Dear Acting Assistant Secretary Salt:

I am writing to inform you that the U.S. Environmental Protection Agency (EPA) has decided not to seek additional review of the Section 404 permit to the Potash Corporation of Saskatchewan Phosphate Division (PCS or the Applicant) to expand an existing phosphate mining operation (Action ID: AID 200110096) in Beaufort County, North Carolina (NC). EPA Headquarters and Region 4 have jointly made this decision after thoroughly reviewing the U.S. Army Corps of Engineers Wilmington District's (the Corps) June 3, 2009, proffered permit and Record of Decision (ROD), received on June 4, 2009. The 15,100 acre project area is located adjacent to the Pamlico River which is part of the nationally significant Albemarle Pamlico Estuary Complex. The project area is composed of three tracts identified as the NCPC, Bonnerton, and South of NC Highway 33 (S33) tracts which collectively contain 6,293 acres of wetlands and 115,843 linear feet of streams that support the Albemarle Pamlico Estuary. The mine advance described in the proffered permit involves mining and mining related activities within approximately 11,343 total acres, resulting in direct adverse impacts to approximately 3,909 acres of wetlands and 22,435 linear feet of streams.

On April 3, 2009, EPA elevated an earlier version of the proposed permit (February 24, 2009, proposed permit) to the Assistant Secretary of the Army - Civil Works (ASA-CW) for review pursuant to Part IV of the 1992 Memorandum of Agreement (MOA) between EPA and the Department of the Army under Section 404(q) of the CWA. In response to this permit elevation, a number of changes have been made to the proposed project to reduce the scope of its environmental impacts, particularly in the most valuable and sensitive areas, and reflect additional conditions designed to improve site reclamation practices and the monitoring and adaptive management of both the impact and compensatory mitigation sites. EPA has fully considered the revised project in the context of CWA Section 404 (q) and 404(c), including assessment under relevant portions of the CWA Section 404(b)(1) Guidelines. Based on the revisions made to the proposed permit as well as the other factors discussed below, and after close consultation, EPA Headquarters and Region 4 have decided that the Section 404(q) process has been resolved, and EPA has decided not to pursue review of the project pursuant to Section 404(c) at this time.

Impact Avoidance

The first step of the section 404(b)(1) review is to avoid impacts to waters of the U.S. Under the Guidelines, an alternative is practicable if it is "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." The Applicant is currently operating under a CWA Section 404 permit issued by the Corps in 1997 that authorized impacts to approximately 1,268 acres of wetlands at the project site. Rather than continuing to permit impacts to the site's valuable aquatic resources in a "piecemeal" manner, the Corps is approaching the current permit more holistically and issuing what it has referred to as a "life of mine" permit. Consistent with this approach, the project's Environmental Impact Statement (EIS) classifies and maps aquatic resources across the entire 15,100 acre project area. The revised permit authorizes impacts to approximately 11,343 acres of uplands and wetlands and avoids impacts to the approximately 2,445 acres of waters of the United States (see ROD permit Special Condition DD) that the Corps, EPA and the other federal and state resource agencies agree represent the site's most ecologically important aquatic resources.

In this case, the Corps Wilmington District determined that economic practicability of the project turns on the availability of approximately 15 years of mining in the two tracts north of Highway 33 (the NCPC and Bonnerton tracts). In our elevation we raised concerns with the economic analysis used by the Corps in determining practicability. The District's analysis was reviewed by Corps HQ and confirmed by the ASA-CW in his response to EPA's Section 404(q) elevation. Although EPA continues to have questions regarding this specific analysis, we recognize that economic viability is an important part of the alternatives analysis. The Applicant has stated that at this time, given the current state of the phosphate market, it would not be economically feasible to move to S33 in the near future. Further, PCS has emphasized that the phosphate ore in the northern tracts is of higher value, and more cost-effective to mine, than that in the southern tract. The Applicant has stated that, as a result of these factors, mining in the southern tract would not be cost-effective in the absence of a substantial improvement in the market. (It should be noted that the Applicant did not originally apply for a permit for S33; the Corps required that tract to be included as part of the "life of mine" permit process.) Therefore, the Applicant has asserted that there must be significant mining north of S33 in order for the project to be viable. The Applicant has also reiterated that the project which was the subject of the 404(q) elevation, and would provide about 14 years of mining in the two northern tracts, is marginally practicable under current market conditions.

In our elevation we looked to the statement in the FEIS that an alternative would be reasonable if it provided "the applicant with the certainty of practicable costs for at least 15 years." Based on that statement, our analysis of what the least environmentally damaging practicable alternative would be used the assumption that 15 years of mining on any combination of the three tracts would make the project viable. However, after considering the company's analysis and conclusions on this matter, we now are

convinced that mining on S33 can not be considered to provide the "certainty of practicable costs" in the near future. While we are not able to determine exactly how many years of mining would be required on the two northern tracts to make a project economically viable, we now accept that something closer to 15 years on the northern tract is appropriate.

Subsequent to our elevation we suggested that avoidance of approximately 450 acres would be practicable. However, just as we have strongly argued throughout this process that not all waters are of equal value, similarly not all mining configurations are of equal value (or practicability). The Corp has determined that achieving that level of avoidance would make the project impractical. It is important to note that it can be particularly difficult to determine practicability of alternatives in situations such as this, where mining can occur only where the resource is located, and not all resources are equal in value or cost-effectiveness. The revised permit does in fact provide for less than the original goal of 15 years of mining in the northern tracts (by about a year and a half).

The FEIS identified Alternative L as the applicant's modified permit request. This proposed permit request was subsequently reduced in impacts on NCPC and S33 tracts through discussions between the Corps District and the applicant. The proposed impacts for the original Alternative L were for 4120 acres of wetlands and 29,288 linear feet of stream. The State of North Carolina further reduced the impacts through the State's Section 401 certification. EPA proposed additional avoidance in its permit elevation. In response to additional avoidance sought by EPA, a number of changes have been made to the proposed project to reduce the scope of its environmental impacts, including additional impact avoidance to approximately 111 acres of wetlands, waters, and uplands, including 3,293 linear feet of streams. EPA, along with FWS and NMFS believe these additional changes protect the most valuable resources that were minable under the revised permit, and thus reduce the expected over-all environmental impact.

Our April 3, 2009, elevation request emphasized the importance of permanently protecting, via conservation easements, those wetlands and streams avoided under the proposed permit from the adverse effects of future mining. In response to this recommendation, the Applicant has agreed to expand the amount of avoided areas protected via conservation easements from 174 acres to 598¹ acres on the proposed site. These additional easements are along the 4 tidal creeks on the NCPC tract and one tidal creek on the Bonnerton tract discussed below under Significant Degradation, and one creek on the S33 tract. This will ensure that some of the highest value aquatic resources on the NCPC and Bonnerton tracts are protected from future mining and other development. The Applicant has also agreed to place conservation easements on approximately 206 acres of the Porter Creek and Cypress Run Creek watersheds that are

¹ This number reflects the 174 acres (as stated in the Corps' February 24, 2009 notice of intent letter to EPA Region 4 and in the June 3, 2009, ROD) already protected by the State's CWA Section 401 Water Quality Certification as well as the additional acreage PCS has offered to put under easement in response to EPA's elevation which includes approximately 354 acres on the NCPC Tract, 42 acres on the Bonnerton Tract, and 28 acres on the S33 Tract.

adjacent to the project site.² In light of the high quality of the remaining avoided areas not subject to conservation easements, and the expectation that this is a life-of-mine permit, future requests to impact the over 1,800 acres of avoided wetlands and other waters not protected from future mining by conservation easements could trigger review pursuant to CWA Section 404(c).

In light of the information provided by the Applicant, the avoidance described above (and in greater detail below under Significant Degradation), and the difficulty inherent in this determination, EPA accepts that the current configuration is the least environmentally damaging, economically feasible, and practicable alternative.

Impact Minimization

The second step in the Section 404(b)(1) analysis concerns minimizing the unavoidable impacts to waters of the U.S. In addition to highlighting the need for additional impact avoidance, our April 3, 2009, elevation request also stressed the need to incorporate additional measures into the permit to minimize project impacts by improving post-mining land reclamation practices at the site. In response to this request, the revised permit includes new reclamation measures that require: 1) stockpiling and reuse of topsoil for the reclaimed areas, especially in the drainage areas; 2) planting of agency-specified tree species; and 3) development of a plan to monitor and manage water within the reclamation area to optimize the amount and quality of water being released.

Impact Compensation

The third step in the Section 404(b)(1) analysis is to provide compensatory mitigation to offset the impacts to waters of the U.S. To compensate for the ecosystem services lost over the life of the project, the Applicant has developed a comprehensive mitigation plan that involves multiple sites and strategies. The proposed restoration efforts primarily focus on croplands and drained forested wetlands underlain by hydric soils that are expected to be good candidates for wetland restoration. Targeting mitigation in these areas is expected to have a positive benefit for water quality in the Pamlico River which is designated as nutrient sensitive water and is currently listed as impaired for chlorophyll a. Achieving further reductions in nutrient loadings from agricultural lands will support the State's implementation of actions to restore the nutrient sensitive waters of the Pamlico River. The proposed mitigation would not occur on-site but rather at sites further south of the Pamlico River, and at sites north of the Pamlico River.

Under the plan, 7,968; 756; and 2,472 acres of wetlands would be restored, enhanced, and preserved, respectively. Wetland replacement-to-loss ratios used by the Corps are 2:1 for restoration, 3:1 for enhancement, and 8:1 to 10:1 for preservation. Also

² The Applicant has stated that protection of this off-site acreage is subject to its "inability to place restrictions on non-owned properties" and it indicated to the Corps on June 5, 2009, that it owns approximately 90 percent of this off-site acreage.

under the plan, 44,043; 7,994; and 32,851 linear feet of streams would be restored, enhanced and preserved, respectively. The ratio for linear feet of stream impact will meet the requirements of the 2003 NC Stream Mitigation Guidelines (1:1 for poor quality streams, 2:1 for good quality streams and 3:1 for excellent quality streams).

Significant Degradation

Finally, the Section 404(b)(1) Guidelines require a determination that significant degradation will not occur to waters of the U.S. Our April 3, 2009, elevation package highlighted our concerns regarding the magnitude of the proposed impacts associated with the February 24, 2009, proposed permit, specifically the direct impacts to portions of a nonriverine hardwood wetland forest on the Bonnerton tract designated as a Nationally Significant Natural Heritage Area (SNHA) by the NC Natural Heritage Program (NCNHP), and the indirect impacts associated with the large reduction in the drainage basins of the site's tidal creeks, four of which have been designated as Primary Nursery Areas (PNAs)³ by the NC Wildlife Resources Commission.

Significant Natural Heritage Area: The SNHA is an approximately 272 acre area on the Bonnerton tract. The Corps' February 24, 2009, notice of intent letter to EPA Region 4 indicated that, as part of the NC Division of Water Quality's (NCDWQ) CWA Section 401 water quality certification, 174 acres of this 272 acre area would be avoided. The State certification allows a 1,145 foot wide mining and utility corridor through the connecting area with a requirement for this area to be restored pursuant to a State approved reclamation and revegetation plan, and monitored for at least 10 years post mining in order to ensure that restoration has established reference hydrology for this area. In addition, a reclamation and revegetation plan for this area is required for State approval. The State's certification also requires the avoided area to be protected in perpetuity with a conservation easement. The 174 acre area protected by the State's certification represents the most mature portions of the SNHA.

The remaining 98 acres of the SNHA that was not protected by the NCDWQ's CWA Section 401 certification consists of the northwest portion of the SNHA and a connecting area between this portion and the southwest portion. In response to questions from the NCDWQ concerning this portion of the SNHA, the NCNHP responded that this area is the least ecologically significant of the three portions of the SNHA because the patch size is smaller and the forest is less mature. We note that a study conducted for the Applicant similarly concludes that this area was less ecologically significant. The NCNHP concluded that the SNHA would still be considered to be a "nationally" SNHA without the northwest portion unless, in the unlikely circumstance, another better area

³ The State of North Carolina was the first state to designate nursery areas to protect the salt marshes and estuaries along the coast that serve as nursery grounds for 90 percent of the State's fisheries. Primary Nursery Areas (PNAs) are located in the upper portions of creeks and bays. These are usually shallow with soft muddy bottoms and surrounded by marshes and wetlands. The low salinity and abundance of food in these areas is ideal for young fish and shellfish. There are 80,144 acres designated as PNAs in North Carolina. (www.ncfisheries.net/habitat/pna.htm). Tidal creeks and streams that are not formally designated PNAs may still provide similar functions.

was discovered in North Carolina or Virginia. [Email correspondence from Mike Schafale (NCNHP) to John Dorney (NCDWQ) dated April 23, 2009]. Based on this information it does not appear that the mining impacts to the remaining 98 acres would cause or contribute to significant degradation of the SNHA.

Primary Nursery Areas: In our April 3, 2009, elevation request we highlighted our concerns regarding the proposed project's potential indirect impacts to the site's ten tidal creeks, four of which have been designated as PNAs for fisheries by the NC Wildlife Resources Commission (i.e., Jacks, Jacobs, Tooley and Porter Creeks). The functions of the PNAs most critical to supporting fisheries are their ability to provide refuge for the larval and juvenile life stages of important commercial and recreational species, to maintain adequate water quality to ensure survival of these life stages, and to provide sufficient input of organic carbon and nutrients to drive the detrital food web needed to support these life stages. Maintenance of adjacent areas in the watershed is critical to the streams being able to support these functions.

The additional wetland and stream impact avoidance reflected in the revised permit has been targeted to maximize protection of the four PNAs as well as a fifth tidal creek, Drinkwater Creek, which although not formally designated as a PNA, provides similar functions. With the additional impact avoidance in the revised permit, based on the most recent estimates provided in the ROD, the cumulative percent of the watershed for each of these five tidal creeks that will be impacted by mining has been reduced. EPA continues to have concerns that reductions in watershed area of this magnitude could potentially impair functions, particularly by affecting the hydrology and the delivery of organic carbon and nutrients. The Corps, however, has asserted that, for these PNAs, hydrology and delivery of organic carbon and nutrients are tidally driven as opposed to headwater/watershed driven. Therefore, the Corps has concluded that the reduction in watershed area will not have a significant adverse effect. The May 2008 final EIS and June 2009 ROD point to site-specific data collected on the NCPC Tract to support this position. However, this remains a continuing concern for EPA, and we are pleased that Special Condition S in the proffered permit incorporates additional scientific review on this subject.

Following the elevation to the ASA (CW), EPA held further discussions with the FWS and the NMFS to ensure that we fully understood their concerns and considered their recommendations with respect to further avoidance actions at the permit site. The FWS stated that while avoidance of additional wetlands at the site would have been desirable; based on the information currently available it is not possible to clearly quantify the impacts to the Albemarle-Pamlico Estuary, which according to the FWS is a nationally significant resource. FWS recommended that the permit contain a robust and enforceable adaptive management component that would provide a structured process for addressing the uncertainty inherent in this decision and to provide decision support tools for determining needed avoidance, restoration, remediation, and monitoring measures through the life of the permit.

We also discussed the project further with the NMFS. These discussions were especially important because some of the most significant concerns which EPA raised in its elevation and which the ASA-CW cited in his referral to the District focused on the PNAs in the tidal creek area on the NCPC and Bonnerton tracts. In response to our concerns, NMFS informed us that the modifications adopted by the Applicant and the Corps following EPA's elevation bolstered NMFS' conclusion that direct impacts to these PNAs would be unlikely. NMFS agreed with FWS on the importance of strong restoration, remediation, and monitoring measures to promote adaptive management at the site.

Adaptive Management: We are pleased that to address scientific uncertainty and EPA, FWS, and NMFS concerns, the Corps is requiring an extensive monitoring and adaptive management program of both the impact and mitigation sites. According to the revised permit, this plan will be carried out by the Applicant, with federal oversight, as a safeguard, to modify or prohibit mining that would be allowed under the permit should monitoring data reveal that direct and indirect impacts are greater than expected.

The Applicant will be required to monitor ground water within and surrounding the reclamation areas to ensure that heavy metal/toxic pollutants including cadmium are not entering the groundwater. In addition to these ground water monitoring requirements, the Applicant will be required to develop a Plan of Study to address the effects of the reduction in headwater wetlands on the utilization of Porter Creek, Tooley Creek, Jacobs Creek, Drinkwater Creek, and Jacks Creek as nursery areas by resident fish and appropriate invertebrate species. According to the revised permit, this plan will be submitted to the Corps and NCDWQ for approval within 1 year of the issuance of this permit.

The monitoring will be required to commence immediately upon approval of the monitoring plan by the Corps and the State and continue for 10 years following the completion of all reclamation work in the subject headwater creeks. The monitoring provisions also require the establishment of an independent panel of scientists to provide input on the design, study methods and data analysis included in the Plan of Study and to annually evaluate whether direct and indirect impacts from mining and benefits from the compensatory mitigation are in accordance with expectations at the time of permitting.

The challenge to implementing an effective adaptive management program will be to successfully achieve early detection of unacceptable adverse impacts on the streams and functions of the PNAs. As previously noted, there is uncertainty regarding the degree to which mining significant portions of a watershed will impact the hydrodynamics, water quality, nursery habitat and other ecological processes and functions of the site's tidal creeks. The changes to the monitoring provisions adopted by the Corps at the request of the NMFS are designed to provide for the early detection of unacceptable impacts. Should the monitoring and adaptive management reveal that the proposed levels of watershed impacts are indeed adversely impacting the functions of the site's tidal creeks to an "unacceptable" level and the Corps does not take appropriate

compliance action, then EPA would consider the project as a candidate for review pursuant to 404(c).

Conclusion

EPA has fully considered the revised project in the context of CWA Section 404(c), including consideration of relevant portions of the CWA Section 404(b)(1) Guidelines. Based on the revisions made to the proposed permit as well as the other factors discussed above, EPA has decided that the Section 404(q) elevation process has been resolved and has decided not to pursue review of the project as currently permitted pursuant to Section 404(c) at this time.

We appreciate your efforts and the efforts of your staff to coordinate with EPA on the review of this project. If you have any questions, please contact me, or Stan Meiburg at 404-562-8357 or Jim Giattina at (404) 562-9470.

Sincerely,



Michael H. Shapiro
Acting Assistant Administrator

Cc: Stan Meiburg, Administrator, EPA Region 4
Brigadier General Todd Semonite, South Atlantic Division, U.S. Army Corps of Engineers
Sam Hamilton, U.S. Fish and Wildlife Service
Dee Freeman, NC Department of Environment and Natural Resources
Coleen H. Sullins, NC Department of Environment and Natural Resources,
Division of Water Quality
Jim Giattina, EPA Region 4

Stan Meiburg /R4/USEPA/US
06/18/2009 09:58 AM

To dee.freeman@ncdenr.gov
cc
bcc wise.allison@epa.gov; gordon.scott@epa.gov;
terry.carl@epa.gov
Subject PCS letter

Dee, here is the final "closeout" letter on PCS which Mike Shapiro sent to Rock Salt late yesterday. We have sent this letter to the 4 NC Congressional offices which had written in earlier (Senators Burr and Hagan, and Congressmen Jones and Butterworth). We've also sent it to Col. Ryscavage.

EPA is not issuing a press release, and we in Region 4 are referring press questions to HQ. We have a desk statement, which is below, but for most inquiries we are simply going to send them the letter, which speaks for itself.

Thank you for your continued help and support on this project.

Stan



Final PCS Mine Closeout Letter.pdf

EPA Desk Statement:

"EPA will not seek additional review of the Corps of Engineers permit to the Potash Corporation of Saskatchewan Phosphate Division to expand an existing phosphate mining operation. EPA concluded that the revised permit, which includes additional environmental protections required by EPA, complies with the requirements of the Clean Water Act, and if properly implemented, would not cause unacceptable adverse impacts to aquatic resources."

A. Stanley Meiburg
Acting Regional Administrator
EPA Region 4
Sam Nunn Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, GA 30303

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under the plan, 44,043; 7,994; and 32,851 linear feet of streams would be restored, enhanced and preserved, respectively. The ratio for linear feet of stream impact will meet the requirements of the 2003 NC Stream Mitigation Guidelines (1:1 for poor quality streams, 2:1 for good quality streams and 3:1 for excellent quality streams).

Significant Degradation

Finally, the Section 404(b)(1) Guidelines require a determination that significant degradation will not occur to waters of the U.S. Our April 3, 2009, elevation package highlighted our concerns regarding the magnitude of the proposed impacts associated with the February 24, 2009, proposed permit, specifically the direct impacts to portions of a nonriverine hardwood wetland forest on the Bonnerton tract designated as a Nationally Significant Natural Heritage Area (SNHA) by the NC Natural Heritage Program (NCNHP), and the indirect impacts associated with the large reduction in the drainage basins of the site's tidal creeks, four of which have been designated as Primary Nursery Areas (PNAs)³ by the NC Wildlife Resources Commission.

Significant Natural Heritage Area: The SNHA is an approximately 272 acre area on the Bonnerton tract. The Corps' February 24, 2009, notice of intent letter to EPA Region 4 indicated that, as part of the NC Division of Water Quality's (NCDWQ) CWA Section 401 water quality certification, 174 acres of this 272 acre area would be avoided. The State certification allows a 1,145 foot wide mining and utility corridor through the connecting area with a requirement for this area to be restored pursuant to a State approved reclamation and revegetation plan, and monitored for at least 10 years post mining in order to ensure that restoration has established reference hydrology for this area. In addition, a reclamation and revegetation plan for this area is required for State approval. The State's certification also requires the avoided area to be protected in perpetuity with a conservation easement. The 174 acre area protected by the State's certification represents the most mature portions of the SNHA.

The remaining 98 acres of the SNHA that was not protected by the NCDWQ's CWA Section 401 certification consists of the northwest portion of the SNHA and a connecting area between this portion and the southwest portion. In response to questions from the NCDWQ concerning this portion of the SNHA, the NCNHP responded that this area is the least ecologically significant of the three portions of the SNHA because the patch size is smaller and the forest is less mature. We note that a study conducted for the Applicant similarly concludes that this area was less ecologically significant. The NCNHP concluded that the SNHA would still be considered to be a "nationally" SNHA without the northwest portion unless, in the unlikely circumstance, another better area

³ The State of North Carolina was the first state to designate nursery areas to protect the salt marshes and estuaries along the coast that serve as nursery grounds for 90 percent of the State's fisheries. Primary Nursery Areas (PNAs) are located in the upper portions of creeks and bays. These are usually shallow with soft muddy bottoms and surrounded by marshes and wetlands. The low salinity and abundance of food in these areas is ideal for young fish and shellfish. There are 80,144 acres designated as PNAs in North Carolina. (www.ncfisheries.net/habitat/pna.htm). Tidal creeks and streams that are not formally designated PNAs may still provide similar functions.

was discovered in North Carolina or Virginia. [Email correspondence from Mike Schafale (NCNHP) to John Dorney (NCDWQ) dated April 23, 2009]. Based on this information it does not appear that the mining impacts to the remaining 98 acres would cause or contribute to significant degradation of the SNHA.

Primary Nursery Areas: In our April 3, 2009, elevation request we highlighted our concerns regarding the proposed project's potential indirect impacts to the site's ten tidal creeks, four of which have been designated as PNAs for fisheries by the NC Wildlife Resources Commission (i.e., Jacks, Jacobs, Tooley and Porter Creeks). The functions of the PNAs most critical to supporting fisheries are their ability to provide refuge for the larval and juvenile life stages of important commercial and recreational species, to maintain adequate water quality to ensure survival of these life stages, and to provide sufficient input of organic carbon and nutrients to drive the detrital food web needed to support these life stages. Maintenance of adjacent areas in the watershed is critical to the streams being able to support these functions.

The additional wetland and stream impact avoidance reflected in the revised permit has been targeted to maximize protection of the four PNAs as well as a fifth tidal creek, Drinkwater Creek, which although not formally designated as a PNA, provides similar functions. With the additional impact avoidance in the revised permit, based on the most recent estimates provided in the ROD, the cumulative percent of the watershed for each of these five tidal creeks that will be impacted by mining has been reduced. EPA continues to have concerns that reductions in watershed area of this magnitude could potentially impair functions, particularly by affecting the hydrology and the delivery of organic carbon and nutrients. The Corps, however, has asserted that, for these PNAs, hydrology and delivery of organic carbon and nutrients are tidally driven as opposed to headwater/watershed driven. Therefore, the Corps has concluded that the reduction in watershed area will not have a significant adverse effect. The May 2008 final EIS and June 2009 ROD point to site-specific data collected on the NCPC Tract to support this position. However, this remains a continuing concern for EPA, and we are pleased that Special Condition S in the proffered permit incorporates additional scientific review on this subject.

Following the elevation to the ASA (CW), EPA held further discussions with the FWS and the NMFS to ensure that we fully understood their concerns and considered their recommendations with respect to further avoidance actions at the permit site. The FWS stated that while avoidance of additional wetlands at the site would have been desirable; based on the information currently available it is not possible to clearly quantify the impacts to the Albemarle-Pamlico Estuary, which according to the FWS is a nationally significant resource. FWS recommended that the permit contain a robust and enforceable adaptive management component that would provide a structured process for addressing the uncertainty inherent in this decision and to provide decision support tools for determining needed avoidance, restoration, remediation, and monitoring measures through the life of the permit.

We also discussed the project further with the NMFS. These discussions were especially important because some of the most significant concerns which EPA raised in its elevation and which the ASA-CW cited in his referral to the District focused on the PNAs in the tidal creek area on the NCPC and Bonnerton tracts. In response to our concerns, NMFS informed us that the modifications adopted by the Applicant and the Corps following EPA's elevation bolstered NMFS' conclusion that direct impacts to these PNAs would be unlikely. NMFS agreed with FWS on the importance of strong restoration, remediation, and monitoring measures to promote adaptive management at the site.

Adaptive Management: We are pleased that to address scientific uncertainty and EPA, FWS, and NMFS concerns, the Corps is requiring an extensive monitoring and adaptive management program of both the impact and mitigation sites. According to the revised permit, this plan will be carried out by the Applicant, with federal oversight, as a safeguard, to modify or prohibit mining that would be allowed under the permit should monitoring data reveal that direct and indirect impacts are greater than expected.

The Applicant will be required to monitor ground water within and surrounding the reclamation areas to ensure that heavy metal/toxic pollutants including cadmium are not entering the groundwater. In addition to these ground water monitoring requirements, the Applicant will be required to develop a Plan of Study to address the effects of the reduction in headwater wetlands on the utilization of Porter Creek, Tooley Creek, Jacobs Creek, Drinkwater Creek, and Jacks Creek as nursery areas by resident fish and appropriate invertebrate species. According to the revised permit, this plan will be submitted to the Corps and NCDWQ for approval within 1 year of the issuance of this permit.

The monitoring will be required to commence immediately upon approval of the monitoring plan by the Corps and the State and continue for 10 years following the completion of all reclamation work in the subject headwater creeks. The monitoring provisions also require the establishment of an independent panel of scientists to provide input on the design, study methods and data analysis included in the Plan of Study and to annually evaluate whether direct and indirect impacts from mining and benefits from the compensatory mitigation are in accordance with expectations at the time of permitting.

The challenge to implementing an effective adaptive management program will be to successfully achieve early detection of unacceptable adverse impacts on the streams and functions of the PNAs. As previously noted, there is uncertainty regarding the degree to which mining significant portions of a watershed will impact the hydrodynamics, water quality, nursery habitat and other ecological processes and functions of the site's tidal creeks. The changes to the monitoring provisions adopted by the Corps at the request of the NMFS are designed to provide for the early detection of unacceptable impacts. Should the monitoring and adaptive management reveal that the proposed levels of watershed impacts are indeed adversely impacting the functions of the site's tidal creeks to an "unacceptable" level and the Corps does not take appropriate

compliance action, then EPA would consider the project as a candidate for review pursuant to 404(c).

Conclusion

EPA has fully considered the revised project in the context of CWA Section 404(c), including consideration of relevant portions of the CWA Section 404(b)(1) Guidelines. Based on the revisions made to the proposed permit as well as the other factors discussed above, EPA has decided that the Section 404(q) elevation process has been resolved and has decided not to pursue review of the project as currently permitted pursuant to Section 404(c) at this time.

We appreciate your efforts and the efforts of your staff to coordinate with EPA on the review of this project. If you have any questions, please contact me, or Stan Meiburg at 404-562-8357 or Jim Giattina at (404) 562-9470.

Sincerely,



Michael H. Shapiro
Acting Assistant Administrator

Cc: Stan Meiburg, Administrator, EPA Region 4
Brigadier General Todd Semonite, South Atlantic Division, U.S. Army Corps of Engineers
Sam Hamilton, U.S. Fish and Wildlife Service
Dee Freeman, NC Department of Environment and Natural Resources
Coleen H. Sullins, NC Department of Environment and Natural Resources, Division of Water Quality
Jim Giattina, EPA Region 4



"Freeman, Dee"
<dee.freeman@ncdenr.gov>
06/18/2009 10:30 AM

To Stan Meiburg/R4/USEPA/US@EPA
cc
bcc
Subject RE: PCS letter

Thanks Stan. I appreciate your follow up. - Dee

Dee Freeman, Secretary
N.C. Dept. of Environment and Natural Resources
1601 MSC, Raleigh, NC 27699-1601
(919) 715-4102; fax (919) 715-3060

Please note: my e-mail address has changed to dee.freeman@ncdenr.gov .

E-mail correspondence to and from this address may be subject to the North Carolina Public Records Law and may be disclosed to third parties.

-----Original Message-----

From: Meiburg.Stan@epamail.epa.gov [mailto:Meiburg.Stan@epamail.epa.gov]
Sent: Thursday, June 18, 2009 9:58 AM
To: Freeman, Dee
Subject: PCS letter

Dee, here is the final "closeout" letter on PCS which Mike Shapiro sent to Rock Salt late yesterday. We have sent this letter to the 4 NC Congressional offices which had written in earlier (Senators Burr and Hagan, and Congressmen Jones and Butterworth). We've also sent it to Col. Ryscavage.

EPA is not issuing a press release, and we in Region 4 are referring press questions to HQ. We have a desk statement, which is below, but for most inquiries we are simply going to send them the letter, which speaks for itself.

Thank you for your continued help and support on this project.

Stan

(See attached file: Final PCS Mine Closeout Letter.pdf)

EPA Desk Statement:

"EPA will not seek additional review of the Corps of Engineers permit to the Potash Corporation of Saskatchewan Phosphate Division to expand an existing phosphate mining operation. EPA concluded that the revised permit, which includes additional environmental protections required by EPA, complies with the requirements of the Clean Water Act, and if properly implemented, would not cause unacceptable adverse impacts to aquatic resources."

A. Stanley Meiburg
Acting Regional Administrator
EPA Region 4

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