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To Philip Mancusi-Ungaro/R4/USEPA/US@EPA

cc Ann Campbell/DC/USEPA/US@EPA, Brian
Frazer/DC/USEPA/US@EPA, David
Evans/DC/USEPA/US@EPA, Gregory

bcc

Subject Re: Fw: Appeal of PCS 401 certification 

Oops here is the petition and the 401.



03-12-09 - Petition for Contested Case Hearing.pdf

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United States Environmental Protection Agency
Phone - 404-562-9519, Fax - 404-562-9486

PLEASE PRINT CLEARLY OR TYPE

STATE OF NORTH CAROLINA

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

COUNTY OF (1) Wake

(2) Pamlico-Tar River Foundation, North Carolina Coastal Federation, Environmental Defense Fund, and Sierra Club

(your name) PETITIONERS,

v.

(3) North Carolina Department of Environment and Natural Resources - Division of Water Quality

RESPONDENT.

(The State agency or board about which you are complaining)

PETITION FOR A CONTESTED CASE HEARING

I hereby ask for a contested case hearing as provided for by North Carolina General Statute § 150B-23 to challenge the actions of the Department of Environment and Natural Resources - Division of Water Quality in issuing Water Quality Certification No. 3771 to PCS Phosphate Company on January 15, 2009. The Water Quality Certification authorizes an expansion of PCS's phosphate mine in violation of water quality standards and the designated existing uses within the affected area. (Please see attached statement)

This petition challenges the Division of Water Quality's issuance of Water Quality Certification No. 3771 to PCS Phosphate's Aurora operation, the permitted facility in the recent contested case U.S. Department of the Interior v. N.C. Department of Environment and Natural Resources (08 EHR 1067-Morrison).

(If more space is needed, attach additional pages.)

(4) Because of these facts, the State agency or board has: (check at least one from each column)
deprived me of property;
ordered me to pay a fine or civil penalty; or
X otherwise substantially prejudiced my rights;
AND
X exceeded its authority or jurisdiction;
X acted erroneously;
X failed to use proper procedure;
X acted arbitrarily or capriciously; or
X failed to act as required by law or rule.

(5) Date: March 12, 2009 (6) Your phone number: (919) 967-1450

(7) Print your full address: 200 W. Franklin St., Suite 330 Chapel Hill, NC 27516
(street address/p.o. box) (city) (state) (zip)

(8) Print your name: Geoff Gisler

(9) Your signature: [Handwritten Signature]

You must mail or deliver a COPY of this Petition to the State agency or board named on line (3) of this form. You should contact the agency or board to determine the name of the person to be served.

CERTIFICATE OF SERVICE

I certify that this Petition has been served on the State agency or board named below by depositing a copy of it with the United States Postal Service with sufficient postage affixed OR by delivering it to the named agency or board:

(10) Mary Penny Thompson (name of person served) (11) N.C. Department of Environment and Natural Resources (State agency or board listed on line 3)
(12) 512 North Salisbury Street, 14th Floor Raleigh NC 27604
(street address/p.o. box) (city) (state) (zip code)

(13) This the 12th day of March, 2009

(14) [Handwritten Signature] (your signature)

When you have completed this form, you MUST mail or deliver the ORIGINAL AND ONE COPY to the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714.

I. INTRODUCTION

The Pamlico-Tar River Foundation, North Carolina Coastal Federation, Environmental Defense Fund, and Sierra Club (collectively "Citizen Groups") respectfully submit this Petition for a Contested Case Hearing ("Petition") to formally object to a final action of the North Carolina Division of Water Quality ("DWQ") approving and issuing Water Quality Certification No. 3771 ("Water Quality Certification" or "401 Certification") to PCS Phosphate, Inc. ("PCS") for its proposed expansion of its strip-mining operation northwest and west of Aurora in Beaufort County. The Citizen Groups respectfully file this petition because the Water Quality Certification authorizes PCS to expand its mining operation into nearly 4,000 acres of wetlands and approximately 5 miles of streams in violation of state water quality standards. A copy of the Water Quality Certification issued on January 15, 2009 is included as Exhibit 1 to this Petition.

II. JURISDICTION AND STANDING

A. **This Petition is Timely**

The North Carolina Administrative Procedure Act sets forth a 60-day general limitation for filing a petition in a contested case, which "shall commence when notice is given of the agency decision." N.C. Gen. Stat. § 150B-23(f). DWQ approved the Water Quality Certification on January 15, 2009. Therefore, Citizen Groups timely file this Petition for a Contested Case Hearing within the 60-day limitation prescribed by N.C. Gen. Stat. § 150B-23(f) and stated within the terms of the Water Quality Certification.

B. **Citizen Groups are Entitled to Bring this Contested Case as "Persons Aggrieved" Within the Meaning of North Carolina's Administrative Procedure Act**

North Carolina's Administrative Procedure Act, N.C. Gen. Stat. §150B-23, provides that a contested case may be brought by a "person aggrieved." The Act defines "person aggrieved" as "any person or group of persons of common interest directly or indirectly affected substantially in his or its person, property, or employment by an administrative decision." N.C. Gen. Stat. § 150B-2(6). A "person" is defined to include "any natural person, partnership, corporation, body politic and any unincorporated association, organization, or society." N.C. Gen. Stat. § 150B-2(7). As alleged in further detail below, DWQ has substantially prejudiced Citizen Groups' rights by issuing the Water Quality Certification for the mine expansion.

1. Pamlico-Tar River Foundation

The Pamlico-Tar River Foundation, Inc. ("PTRF") is a North Carolina non-profit corporation founded in 1981. For generations, the Tar-Pamlico River has supported life in the watershed, and its future health is directly tied to impacts from future development.

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Attachment to Form H-06

PTRF strives to preserve the high quality of life of residents in the Tar-Pamlico watershed by protecting the river's environmental resources.

PTRF has approximately 2,000 members, most of whom live and work on or near the Pamlico and Tar Rivers. PTRF has its principal office in Washington, Beaufort County, North Carolina. Many PTRF members visit, recreate, fish, hunt, boat, swim, view wildlife, and otherwise use and enjoy the waters of the Pamlico River.

Protecting the quality of the nutrient-sensitive waters of the Pamlico River is one of PTRF's central missions. The organization is involved in educational initiatives, documenting environmental impacts on the river, legislative efforts, and submitting comments during regulatory rulemaking. PTRF has sought to protect the water quality of the Pamlico River during the process leading to this 401 Certification by participating in the Review Team that provided input during the environmental impact statement ("EIS") process as well as commenting on the draft EIS, supplemental EIS, final EIS, and 401 Certification application.

The 401 Certification would substantially affect the interests of PTRF and its members in protecting the water quality of the Tar-Pamlico River basin. Specifically, the Water Quality Certification would allow destruction of wetlands, surface waters, and riparian buffers that are integral to PTRF's efforts to protect basin-wide water quality and would impair the use of waters in the Tar-Pamlico River basin and downstream for commercial and recreational fishing, recreational boating, wildlife, and fish and aquatic life propagation and survival.

2. North Carolina Coastal Federation

The North Carolina Coastal Federation ("Coastal Federation") is a non-profit corporation dedicated to the promotion of better stewardship of coastal resources. The Coastal Federation was founded in 1982 and has approximately 8,500 members, including numerous members who live near, shellfish or fish in, or regularly visit the Pamlico River estuary, Pamlico Sound, and nearby coastal waters.

Part of the Coastal Federation's purpose is to protect coastal waters and estuaries for the use and enjoyment of all of the citizens of the state. As part of this work, the Coastal Federation has played a lead role in investigating, documenting, publicizing, and seeking enforcement of violations of state and federal sedimentation, stormwater, water quality, and wetlands laws. In addition, to protect coastal waters from degradation from stormwater-borne pollutants, the Coastal Federation is working extensively through the state regulatory process to improve and strengthen the State's stormwater control program applicable to coastal areas.

The Coastal Federation has actively participated in the deliberations and rulemaking proceedings initiated by the Coastal Resources Commission and the Environmental Management Commission that relate to wetlands, stormwater, water quality, coastal outstanding resource waters, and shellfish issues, and has been a party to

several administrative and judicial appeals related to these matters. Through regular participation in informal and formal proceedings and through its broader public education efforts, the Coastal Federation represents its members' interests in the appropriate stewardship of North Carolina's coastal resources, including its public trust waters.

To further those environmental protection goals, the Coastal Federation joined PTRF, Environmental Defense Fund, and other organizations as intervenors in PCS's variance request before the Water Quality Committee in September 2008. That challenge built on the Coastal Federation's long track record of direct participation in permit decisions involving the phosphate mining operations now managed by PCS. In the mid-1980s it was instrumental in identifying, and pushing for adoption of, significant enhancements to the operation's National Pollution Discharge Elimination System wastewater permit. DWQ required the facility to implement the recycling technology that the Coastal Federation advocated for, resulting in reduced pollution discharges from the site.

The 401 Certification would substantially affect the interests of the Coastal Federation and its members in protecting the water quality, wetlands, and nursery areas that are essential to a productive coastal ecosystem. The impacts to wetlands, streams, and riparian buffers approved by the 401 Certification will have long-term impacts on finfish and shellfish in the Pamlico River, Pamlico Sound, and coastal North Carolina. Those impacts will impair Coastal Federation members' use of waters downstream for fishing, recreational boating, wildlife, and fish and aquatic life propagation and survival.

3. Environmental Defense Fund

The Environmental Defense Fund ("EDF"), representing a national board and membership of more than 300,000 individuals, is dedicated to protecting the integrity and function of important ecosystem resources and processes, including wetlands and other aquatic systems. With more than 9,000 members in North Carolina, EDF has had a formal presence in the state since 1987. Since the establishment of the North Carolina office, EDF has been intimately engaged in the environmental affairs of eastern North Carolina and specifically with the issues related to protection of wetlands and water quality at the PCS facility site.

Since 1987, EDF has been directly engaged in multi-agency discussions relating to proposed mining advance scenarios, which would disrupt thousands of acres in the central Pamlico watershed. EDF has reviewed and commented on a series of mine advance and mitigation documents, including those produced in the inter-agency discussions held by the U.S. Army Corps of Engineers ("Corps") since 2001. EDF has been a member of the Corps' Review Team convened to provide input during PCS's Clean Water Act permit process and the development of the environmental impact statement. EDF submitted substantive comments on the draft EIS for the proposed mine expansion and has consistently expressed reservations about the company's most recent alternative which is the basis for the current 401 Certification.

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This involvement by EDF fits within the organization's overall goal to protect the health of the Albemarle-Pamlico estuary. An essential ingredient in this effort is to protect habitats and water quality that serve as the nurseries for juvenile finfish and shellfish that supply the commercial and recreational fisheries on the North Carolina coast and beyond. The plan also includes promoting efforts to control nutrient inputs into the Tar-Pamlico River basin.

The mine expansion approved by the 401 Water Quality Certification includes the destruction of wetlands, streams, and buffers in locations and on a scale that will thwart EDF's efforts to protect this estuarine system. Moreover, the impacts of the mine expansion will impair use of waters downstream for fishing, recreational boating, wildlife, and fish and aquatic life propagation and survival. These impacts will adversely affect both EDF's organizational purpose and the interests of its members in fishing, swimming, paddling, and recreating in the Pamlico River.

4. Sierra Club

The Sierra Club is a national grassroots conservation organization with over 1.3 million members nationally and approximately 16,500 members in North Carolina. The organization has a three tier structure, with national, state, and local bodies. The Sierra Club has had a statewide chapter in North Carolina for over 20 years and a chapter office in North Carolina since 1997. That statewide chapter oversees 13 local groups, including the Greenville-based Cypress Group. The Cypress Group represents more than 1,000 members in the 23 counties of northeastern North Carolina, including Beaufort County.

The mission of the Sierra Club is to protect "communities, wild places, and the planet itself." At the state level, the organization advocates for strong water quality and coastal protection through the development of policy positions, education of the public and the media, grassroots organizing, and direct advocacy to elected and appointed officials. At a local level, the Cypress Group educates members and local citizens through educational programs; monthly meetings; and hiking, kayaking, and wildlife viewing trips, including trips on the Pamlico River in the vicinity of the PCS site.

The 401 Certification authorizes impacts to wetlands, surface waters, and riparian buffers that will adversely affect the efforts of the national, state, and local levels of the Sierra Club. As permitted, the mine expansion will have significant impacts to water quality, wildlife habitat, and downstream fisheries and will consequently impede the purpose of the national, state, and local levels of the Sierra Club as well as substantially affecting the interests of its members.

This substantial harm to PTRF's, NCCF's, EDF's, Sierra Club's, and their respective members' interests can only be redressed by a decision vacating the 401 Water Quality Certification issued to PCS Phosphate and remanding consideration of the permit to the Division of Water Quality.

III. GROUNDS FOR OBJECTION

In issuing the 401 Certification, DWQ exceeded its authority, acted erroneously, failed to use proper procedure, acted arbitrarily and capriciously, and failed to act as required by law or rule. Thus, DWQ issued a Water Quality Certification for the destruction of nearly 4,000 acres of wetlands and close to 5 miles of streams that will not protect water quality or existing uses of the Pamlico River and its watershed. Because Citizen Groups and their members live, work, and recreate in the area affected by the 401 Certification, DWQ's final agency decision will substantially prejudice Citizen Groups' rights. Therefore, Citizen Groups object to DWQ's issuance of the Water Quality Certification on the following non-exclusive grounds:

A. Factual Background

The Pamlico River carries the freshwater of the Tar River into the Pamlico Sound, where it joins with the Albemarle Sound to create the nation's second largest estuary system. In addition to its great scenic beauty and widespread recreational opportunities, the Pamlico River hosts commercially and recreationally important fish and shellfish species as well as waterfowl, shorebirds, and other migratory birds. The Albemarle-Pamlico estuary system functions as a nursery for more than 90 percent of the commercial seafood species caught in North Carolina, a \$1 billion annual industry. The stretch of the Pamlico River within Beaufort County alone contributes nearly \$3 million annually in commercial fish and shellfish.

In the Water Quality Act of 1987, Congress identified the Albemarle-Pamlico Sound as an estuary in need of priority actions to address water quality problems. 33 U.S.C. § 1330(2)(B). In October 1987, the State of North Carolina and the U.S. Environmental Protection Agency ("EPA") designated the Albemarle-Pamlico estuary as an estuary of national significance and convened a management conference to assess water quality and recommend measures to control sources of pollution. Albemarle/Pamlico Sounds: State/EPA Conference Agreement for National Estuary Program Designation Under the Water Quality Act of 1987 (Oct. 20, 1987). In designating the Albemarle-Pamlico estuary, the state and EPA identified wetland loss, excessive nutrients, decline in fisheries productivity, and fish diseases as major sources of environmental stress.

PCS applied to expand its strip-mining operation along the Pamlico River in Beaufort County in November 2000 and modified that permit application the following August to request a mine expansion into 3,500 acres, including 2,400 acres of wetlands and 7 miles of streams, as well as 3 creeks identified as primary nursery areas for juvenile finfish and shellfish. The site of the proposed expansion is immediately adjacent to the Pamlico River and South Creek, a special secondary nursery area. Because of the project's proposed impacts to wetlands and streams, the U.S. Army Corps of Engineers initiated the development of an environmental impact statement in early 2001. That evaluation compared PCS's preferred 15-year mine expansion to other alternatives in a draft EIS released in October 2006. That draft was supplemented in November 2007 to

add two new alternatives, including Alternative L. The Corps released the final EIS ("FEIS") on May 23, 2008.

One month before the final EIS was released, in April 2008, PCS abandoned its 15-year preferred alternative and requested a 37-year permit for mine expansion from the Corps. That 37-year mine expansion alternative, Alternative L, was also the subject of the company's 401 Water Quality Certification application to DWQ. In it, the company requested authorization to mine more than 11,000 acres, including 4,135 acres of wetlands and approximately 5 miles of streams.

DWQ granted PCS's 401 Certification request on December 5, 2008, authorizing the destruction of 3,789 acres of wetlands, 3.5 miles of streams, and 28 acres of streamside, riparian buffers. That Certification is attached as Exhibit 2. PCS objected to that Certification, requesting that DWQ relax its terms to allow additional mining. DWQ issued a modified 401 Certification on January 15, 2009 incorporating PCS's requested modifications.

That Certification, which Citizen Groups challenge in this petition, authorizes PCS to destroy 3,953 acres of wetlands, 4.9 miles of streams, and 48 acres of riparian buffers that are protected under the Tar-Pamlico Riparian Buffer Rules. Within those wetland acres, the 401 Certification approves the destruction of more than 50 acres of a hardwood wetlands forest that is a nationally significant natural heritage area as defined by the N.C. Natural Heritage Program. The remaining parts of the forest would be bisected by a 1,200 foot wide corridor as part of a plan that includes mining on three sides of both of the remaining forest segments.

B. Legal Framework

1. Water Quality Certification Requirements

This case arises under Clean Water Act § 401 and North Carolina's water quality and pollution control regulations. Under § 401 of the Clean Water Act, the Corps cannot issue a § 404 permit for impacts to surface waters and wetlands unless DWQ first certifies that the project will comply with all applicable water quality standards. Section 401(a)(1) provides:

Any applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . that any such discharge will comply with the applicable provisions of [the Clean Water Act].

33 U.S.C. § 1341(a)(1).

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According to the federal Clean Water Act and North Carolina law, DWQ must ensure compliance with all applicable state water quality standards before issuing a § 401 water quality certification. If expansion of PCS's strip-mine would violate water quality standards and cannot reasonably be expected to meet water quality standards through remedial actions, DWQ must deny certification. See 33 U.S.C. § 1341(a)(1), (3). The federal Clean Water Act also authorizes DWQ to conditionally approve a § 401 certification by imposing any conditions or "any other appropriate requirement of State law" necessary to ensure compliance with water quality standards. See 33 U.S.C. § 1341(d).

The North Carolina Environmental Management Commission has adopted rules that control DWQ's issuance of 401 certifications. Those procedures require DWQ to evaluate specific factors before issuing a 401 certification for wetland and stream impacts. Before issuing the certification, the state must find that the project:

- 1) has no practical alternatives;
- 2) will minimize adverse impacts to surface waters;
- 3) does not result in the degradation of groundwaters and surface waters;
- 4) does not result in cumulative impacts that will cause a violation of water quality standards;
- 5) protects downstream water quality standards with on-site stormwater control measures; and
- 6) provides for replacement of existing uses through wetland or stream mitigation.

15A N.C. Admin. Code 02H .0506(b), (c). In addition to these factors, if the applicant proposes impacts to wetlands of exceptional state or national significance, the state must find that those impacts are necessary to meet a demonstrated public need before a 401 certification can issue. 15A N.C. Admin. Code 02H .0506(e).

Because of the location of PCS's proposed project, the Tar-Pamlico Buffer Rules also apply to this 401 Certification. Those rules, implemented to protect water quality in the Tar-Pamlico River, provide protection for 50-foot streamside, riparian buffers within the Tar-Pamlico watershed. See 15A N.C. Admin. Code 02B .0259. Under those rules, PCS's proposed mine plan requires buffer mitigation for every acre of buffer impacted according to established ratios. Buffers that are destroyed within the 30 feet closest to the surface water must be mitigated at a 3:1 ratio. When the section of buffer from 30 to 50 feet from the surface water is impacted, it must be mitigated at a 1.5:1 ratio. 15A N.C. Admin. Code 02B .0259(4). Further, the rules specify that mitigation must be done at least as close to the Pamlico estuary as the proposed impact and as close to the impact as feasible. 15A N.C. Admin. Code 02B .0260(4).

2. Federal and North Carolina Law Require Restoration and Protection of Water Quality and Existing and Designated Uses

Congress enacted the Clean Water Act not merely to preserve existing water quality, no matter how degraded, but to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). One of the goals of the Act is to achieve, “wherever attainable . . . water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water.” *Id.* at § 1251(a)(2).

The Act further requires states to develop standards and measures to meet these goals. Under § 303 of the Clean Water Act, state water quality standards must “consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based on such uses.” 33 U.S.C. § 1313(c)(2)(A). The U.S. Supreme Court has made clear that “§ 303 is most naturally read to require that a project be consistent with *both* components, namely the designated use *and* the water quality criteria.” PUD No. 1 of Jefferson County v. Washington Dept. of Ecology, 511 U.S. 700, 715 (1994) (emphasis in original). Thus, “a project that does not comply with a designated use of the water does not comply with the applicable water quality standards.” *Id.* It is therefore beyond question that DWQ is prohibited from approving a water quality certification for a project that will not protect water quality and designated uses.

North Carolina’s General Assembly has acted to protect the water quality and beneficial uses of the State’s waters by declaring “the public policy of this State to provide for the conservation of its water and air resources.” N.C. Gen. Stat. § 143-211(a). Further, “[i]t is the public policy of the State to maintain, protect, and *enhance* water quality within North Carolina.” N.C. Gen. Stat. § 143-211(b) (emphasis added). The EMC has promulgated regulations to implement the General Assembly’s mandate to develop “[s]tandards of water and air purity . . . designed to protect human health, to prevent injury to plant and animal life, to prevent damage to public and private property, to insure the continued enjoyment of the natural attractions of the State . . . and to secure for the people of North Carolina, now and in the future, the beneficial uses of these great natural resources.” N.C. Gen. Stat. § 143-211(c).

To ensure protection of the existing uses as well as designated uses based on a water’s classification, the regulations further provide that any “sources of water pollution which preclude any of these uses on either a short-term or long-term basis shall be considered to be violating a water quality standard.” 15A N.C. Admin. Code 02B .0211(2). In the 401 certification process, DWQ must ensure that “existing uses are not removed or degraded” for waters and wetlands. 15A N.C. Admin. Code 02B .0506(b), (c), (e).

C. Practical Alternatives Exist to the 35-Year Mine Expansion Plan Authorized by the Water Quality Certification

The Division of Water Quality can only approve a 401 certification if it finds there are no practical alternatives to the proposed project, yet issued this 401 Certification for a 35-year project that has practical alternatives. Because the 401 Certification issued to PCS relies on the fundamentally flawed economic analysis presented in the Corps' FEIS, DWQ's analysis of practical alternatives is both incomplete and erroneous.

It is undisputed that DWQ did not conduct a practical alternatives analysis for the last 20 years of mining that is authorized by the 401 Certification. Because DWQ must find that no practical alternatives with less adverse impact to surface waters or wetlands exist for the entire project, DWQ cannot approve a project based on a practical alternatives analysis of only part of that project. But in issuing this 401 Certification, DWQ relied on the practicability analysis in the FEIS, an analysis that only considered potential reconfiguration of the first 15 years of PCS's mine expansion. Based on that analysis – and absent any evaluation of alternative mine plans in years 16 through 35 – the 401 Certification authorizes 35 years of mine expansion. Moreover, when compared to the original 401 Certification, the modified 401 Certification approved additional wetland and stream impacts during this time period without any evaluation of the practical alternatives to that expanded impact.

DWQ's reliance on the FEIS's analysis of practical alternatives over the first 15 years is also erroneous. The Corps's economic analysis that is at the heart of the FEIS's practicability analysis is arbitrarily limited to 15 years, relies on erroneous analyses, and omits important factors. Because of these flaws, the analysis favors more environmentally destructive mine plans at the expense of reasonable alternatives. DWQ's reliance on the fundamentally flawed analysis in the FEIS is misplaced.

Indeed, practical alternatives to the 35-year mine expansion exist. Economic analyses submitted during the EIS process both identified the flaws of the FEIS's practicability analysis and demonstrated that PCS can economically mine substantially fewer acres of waters and wetlands by implementing alternative mine plans to avoid the most sensitive environmental areas.

D. The 401 Certification Approves Buffer Impacts That Are Not Mitigated as Required by the Tar-Pamlico Buffer Rules

The 401 Certification must, but does not, provide reasonable assurance that PCS's mine expansion complies with state water quality standards, including the Tar-Pamlico Buffer Rules. See 15A N.C. Admin. Code 02B .0259, *et seq.* The 401 Certification authorizes 48 acres of riparian buffer impacts, which require more than 100 acres of mitigation, yet does not include any mitigation that complies with the state water quality standards established by the rules.

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It is undisputed that PCS cannot provide adequate mitigation to offset the buffer impacts authorized by the 401 Certification under existing mitigation rules. The Certification fails to disclose the amount of mitigation required under existing rules, but PCS has conceded that it cannot comply with existing riparian buffer mitigation requirements by twice requesting a variance from the Environmental Management Commission that would allow the company to bypass the requirements. PCS's initial request was denied and the second request was withdrawn. The 401 Certification acknowledges this violation, conditioning the approved impacts on anticipated rulemaking by the EMC and PCS's future compliance with these currently nonexistent rules through the eventual submission of plans and DWQ's approval of those plans under authority that will presumably be granted by the to-be-developed rules. DWQ's conditioning of the 401 Certification on compliance with standards that do not yet exist violates the basic purpose of the certification process, to assure federal permitting agencies that the project complies with state water quality standards, and in fact confirms that the project does not comply with state law.

Even the buffer mitigation DWQ approved fails to meet the requirements of the Tar-Pamlico Buffer Rules. Those rules require all buffer mitigation to be done at least as close to the estuary as the proposed impacts. Despite this requirement, DWQ did not assess the proximity of the 24.4 acres of buffer mitigation accepted in the 401 Certification or determine whether the proposed buffer mitigation is at least as close to the estuary as the impact as required by the rules. Instead, DWQ relied on a new draft interpretation of the buffer mitigation rules released for public comment one day before the original 401 Certification was issued. That draft interpretation, however, conflicts with both the enabling legislation for riparian buffer mitigation and the history of the Tar-Pamlico Buffer Rules. Without this unlawful interpretation, none of PCS's proposed buffer mitigation meets the rule's location requirements.

E. The 401 Certification Authorizes the Destruction of Wetlands of Exceptional National Significance Without the Required Determination of Public Need

The Division of Water Quality failed to make the mandatory public need determination before authorizing impacts to wetlands of exceptional national ecological significance in the 401 Certification. The nonriverine wet hardwood forest that is within the proposed mine expansion represents one of the top five examples of nonriverine wet hardwood forests that remain in the nation. The N.C. Natural Heritage Program has designated the forest a nationally significant natural heritage area. Thus, under the elevated standards for wetlands of exceptional national ecological significance, DWQ must conduct an analysis of the public need for mining impacts to the wet hardwood forest. DWQ did not conduct that analysis. There is no public need for the impact to these wetlands of exceptional ecological significance and authorizing these impacts therefore violated water quality standards.

F. The 401 Certification Would Impair Existing Uses of Surface Waters and Wetlands

The impacts approved by the 401 Certification will degrade existing uses of surface waters and wetlands in violation of water quality standards. As described above, the Pamlico River plays an important role in the entire coastal ecosystem of North Carolina. The tributaries to the Pamlico River are integral to the river's natural and economic value. The mine expansion authorized by the 401 Certification will reduce the drainage basins of nine creeks within the project area by at least half of their existing basins, including four creeks that the N.C. Wildlife Resources Commission has identified as primary nursery areas because of the habitat they provide for juvenile finfish and shellfish. Three of those primary nursery areas, as well as other creeks that will be affected by mining, flow into a special secondary nursery area, South Creek.

Impacts to these sensitive areas will affect food webs within the estuarine ecosystem, alter the rate of nutrient loading into the estuary, and reduce important freshwater inputs from the drainage basins. The mine expansion will have significant adverse impacts to public trust waters, fish habitat, and water quality. The indirect effects of the project include negative impacts associated with heavy metal contamination, drainage basin reductions, long-term water quality impacts from mining, and loss of wetland functions. Because of these significant adverse impacts to natural resources, the N.C. Division of Marine Fisheries, N.C. Wildlife Resources Commission, U.S. Fish and Wildlife Service, National Marine Fisheries Service, and South Atlantic Fisheries Management Council recommended denial of a permit for the mine expansion authorized by the 401 Certification.

Further, the authorized mine expansion would degrade existing uses within the nationally significant nonriverine wet hardwood forest. The 401 Certification approves mining on three sides of the remnant segments of this forest, an excavation scheme that will disturb the existing hydrological structure that supports this rare forest.

Rather than modifying the mine plan to avoid these impacts, the 401 Certification requires monitoring to confirm these adverse effects. But monitoring for the loss of existing uses, and therefore violations of water quality standards, does not fulfill DWQ's obligation to provide reasonable assurance that the project will not violate water quality standards.

In addition, the proposed mitigation will not replace existing uses that will be eliminated by the mine expansion. A substantial portion of the proposed mining impacts will occur adjacent to the Pamlico River, eliminating wetlands and surface waters that currently buffer the river from the impacts of PCS's mine operation. The location of these wetlands and tidal creeks is important in determining the uses they provide. PCS's proposed mitigation sites are not near the estuary, will not perform the same functions as the existing streams and wetlands, and cannot replace the existing uses that will be lost under this 401 Certification.

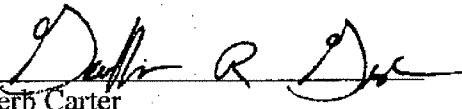
**G. The Modified 401 Certification Was Issued Without Public Notice
Required by the Original 401 Certification**

The 401 Certification that DWQ issued on December 5, 2008 required DWQ to provide public notice under the standards established in 15A N.C. Admin. Code 02H .0503. That rule requires that the agency follow established procedures before taking action on a 401 certification. Those procedures require DWQ to inform the public of the specific plan under consideration and provide a minimum of 15 days of notice before taking agency action. Despite this requirement, the agency issued the modified 401 Certification on January 15, 2009 without public notice.

IV. CONCLUSION

For the foregoing reasons, DWQ exceeded its authority, acted erroneously, failed to use proper procedure, acted arbitrarily and capriciously, and failed to act as required by law or rule in approving and issuing the Water Quality Certification. Accordingly, the Water Quality Certification for PCS Phosphate's mine expansion must be vacated and remanded to DWQ.

Respectfully submitted this 12th day of March, 2009.



Derb Carter

Geoff Gisler

SOUTHERN ENVIRONMENTAL LAW CENTER

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Attorneys for the PAMLICO-TAR RIVER FOUNDATION,
NORTH CAROLINA COASTAL FEDERATION,
ENVIRONMENTAL DEFENSE FUND, and SIERRA CLUB



Beverly Eaves Perdue, Governor

Doe Freeman, Secretary
North Carolina Department of Environment and Natural Resources

Coleen H. Sullins, Director
Division of Water Quality

January 15, 2009

Mr. Ross M. Smith, Manager
Environmental Affairs
PCS Phosphate Company, Inc.
P.O. Box 48
Aurora, NC 27808

Re: PCS Phosphate Mine Expansion, Beaufort County
DWQ #2008-0868, version 2.0; USACE Action ID. No. 200110096
MODIFIED APPROVAL of 401 Water Quality Certification with Additional Conditions

Dear Mr. Smith:

Attached hereto is a copy of Certification No. 3771 issued to PCS Phosphate Company, Inc. of Aurora, NC, dated January 15, 2009. In addition, you must get any other federal, state or local permits before you proceed with your project including (but not limited to) Solid Waste, Sediment and Erosion Control, Stormwater, Dam Safety, Mining, Non-discharge and Water Supply Watershed regulations. This Certification completely replaces one issued to you on December 6, 2008.

If we can be of further assistance, do not hesitate to contact us.

Sincerely,

Coleen H. Sullins

CHS/jrd

Attachments: Certificate of Completion

cc: Mr. Tom Walker, U.S. Army Corps of Engineers, Asheville Regulatory Field Office
Dave Lekson, US Army Corps of Engineers, Washington Regulatory Field Office
Scott McLendon, Wilmington District, USACOE
Kyle Barnes, DWQ, Washington Regional Office
Al Hodge, DWQ, Washington Regional Office
DLR Washington Regional Office
File Copy
Matt Matthews, DWQ Wetlands and Stormwater Branch
Cyndi Karoly, DWQ
John Payne, NC Attorney General's Office, Environmental Division
Mike Schafele, NC Natural Heritage Program

Linda Pearsall, NC Natural Heritage Program
Jimmie Overton, DWQ
Jeff Fumess, PCS Phosphate
Stephen Rynas, NC Division of Coastal Management
Shannon Deaton, NC Wildlife Resources Commission
Derb Carter, Southern Environmental Law Center
Geoffrey Gisler, Southern Environmental Law Center
Heather Jacobs, Pamlico Tar River Foundation
Sean McKenna, NC Division of Marine Fisheries
Eric Kulz, DWQ
Tammy Hill, DWQ
Becky Fox, US Environmental Protection Agency
Tom Welborn, US Environmental Protection Agency – Region 4 Atlanta
Melba McGee, DENR
Dee Freeman, DENR
Coleen Sullins, DWQ
Chuck Wakitd, DWQ
Paul Rawls, DWQ
Ted Strong, Washington Daily News
Susan Massengale, DWQ
Julia Berger, CZR
George House, Brooks, Pierce, McLendon, Humphrey and Leonard, LLP
Jim Stanfill, EEP
Mary Penny Thompson, DENR
Susan Massengale, DWQ
Ann Deaton, NC Division of Marine Fisheries
John Hennessy, DWQ
Ted Strong, Washington Daily News
Wade Rawlins, News and Observer

NORTH CAROLINA 401 WATER QUALITY CERTIFICATION

THIS CERTIFICATION is issued in conformity with the requirements of Section 401 Public Laws 92-500 and 95-217 of the United States and subject to the North Carolina Division of Water Quality (DWQ) Regulations in 15 NCAC 2H, Section .0500 to PCS Phosphate Company, Inc. of Aurora, NC based on an application to fill 4,124 acres of jurisdictional wetlands, 29,288 linear feet of streams, 19 acres of ponds and 55.14 acres of stream buffers in the Pamlico River Basin, associated with the expansion of PCS Phosphate's mining operation including the relocation of Highway 306 and Sandy Landing Road in Beaufort County, North Carolina, pursuant to an application filed on the 22nd day of May of 2008 through the published Public Notice by the US Army Corps of Engineers, and in additional correspondence received September 5, 2008 (dated September 4, 2008), November 3, 2008 (received November 5, 2008), December 19, 2008 (received December 22, 2008) and proposed impact maps dated January 6, 2009.

The application and supporting documentation provide adequate assurance that the proposed work will not result in a violation of applicable Water Quality Standards and discharge guidelines. Therefore, the State of North Carolina certifies that this activity will not violate the applicable portions of Sections 301, 302, 303, 306, 307 of PL 92-500 and PL 95-217 if conducted in accordance with the application, the supporting documentation, the additional correspondence noted above and conditions hereinafter set forth.

This approval is only valid for the purpose and design submitted in the application materials, additional correspondence and as described in the Public Notice. If the property is sold after the Certification is granted, the new owner must be given a copy of the Certification and approval letter and is thereby responsible for complying with all conditions of this Certification. Any new owner must notify the Division and request the Certification be issued in their name. Should wetland, buffer or stream fill be requested in the future, additional compensatory mitigation may be required as described in 15A NCAC 2H .0506 (h) (6) and (7). If any plan revisions from the approved site plan result in a change in stream, buffer or wetland impact or an increase in impervious surfaces, the DWQ shall be notified in writing and a new application for 401 Certification may be required and a modified 401 Certification may be required. For this approval to be valid, compliance with all the conditions listed below is required.

Conditions of Certification:

1. Impacts Approved

The following impacts are hereby approved as long as all of the other specific and general conditions of this Certification are met. No other impacts are approved including incidental impacts other than listed in this table. Also, please note that these impacts are those approved by DWQ and are only a portion of the impacts that were originally applied for and listed in the Public Notice. These impacts are depicted on maps entitled "PCS Phosphate Mine Continuation - Modified Alt. L - NPCS, Bonneron and South of 33 Proposed Impact" dated January 6, 2009.

	Amount Approved (Units)	Plan Location or Reference
Streams	25,727 feet	Final EIS, page e as well as June 6, 2008 and December 19, 2008 submittals to DWQ
404/CAMA Wetlands	3,953 acres	Final EIS, page e as well as June 6, 2008 and December 19, 2008 submittals to DWQ
Waters	19 acres	Final EIS, page e as well as June 6, 2008 and December 19, 2008 submittals to DWQ
Buffers	47.87 acres	Final EIS, page e as well as June 6, 2008 and December 19, 2008 submittals to DWQ

Sediment and Erosion Control:

2. Erosion and sediment control practices must be in full compliance with all specifications governing the proper design, installation and operation and maintenance of such Best Management Practices in order to protect surface waters standards:
 - a. The erosion and sediment control measures for the project must be designed, installed, operated, and maintained in accordance with the most recent version of the *North Carolina Sediment and Erosion Control Planning and Design Manual*.
 - b. The design, installation, operation, and maintenance of the sediment and erosion control measures must be such that they equal, or exceed, the requirements specified in the most recent version of the *North Carolina Sediment and Erosion Control Manual*. The devices shall be maintained on all construction sites, borrow sites, and waste pile (spoil) projects, including contractor-owned or leased borrow pits associated with the project.
 - c. For borrow pit sites, the erosion and sediment control measures must be designed, installed, operated, and maintained in accordance with the most recent version of the *North Carolina Surface Mining Manual*.
 - d. The reclamation measures and implementation must comply with the reclamation in accordance with the requirements of the Sedimentation Pollution Control Act or Mining Act of 1971 (as amended).
3. No waste, spoil, solids, or fill of any kind shall occur in wetlands, waters, or riparian areas beyond the footprint of the impacts depicted in the 404/401 Permit Application. All construction activities, including the design, installation, operation, and maintenance of sediment and erosion control Best Management Practices, shall be performed so that no violations of state water quality standards, statutes, or rules occur.
4. Sediment and erosion control measures shall not be placed in wetlands or waters without prior approval by the Division. If placement of sediment and erosion control devices in wetlands and waters is unavoidable, design and placement of temporary erosion control measures shall not be conducted in a manner that may result in disequilibrium of wetlands or stream beds or banks, adjacent to or upstream and down stream of the above structures. All sediment and erosion control devices shall be removed and the natural

grade restored within two (2) months of the date that the Division of Land Resources or locally delegated program has released the project.

Continuing Compliance:

5. PCS Phosphate Company, Inc. shall conduct construction activities in a manner consistent with State water quality standards (including any requirements resulting from compliance with section 303(d) of the Clean Water Act), the 401 Water Quality Certification rules (15A NCAC 2H .0500) and any other appropriate requirements of State law and federal law. If the Division determines that such standards or laws are not being met (including the failure to sustain a designated or achieved use) or that State or federal law is being violated, or that further conditions are necessary to assure compliance, the Division may reevaluate and modify this Certification to include conditions appropriate to assure compliance with such standards and requirements in accordance with 15A NCAC 2H .0507(d). Before modifying the Certification, the Division shall notify PCS Phosphate Company, Inc. and the US Army Corps of Engineers, provide public notice in accordance with 15A NCAC 2H.0503 and provide opportunity for public hearing in accordance with 15A NCAC 2H.0504. Any new or revised conditions shall be provided to PCS Phosphate Company, Inc. in writing, shall be provided to the United States Army Corps of Engineers for reference in any Permit issued pursuant to Section 404 of the Clean Water Act, and shall also become conditions of the 404 Permit for the project. This condition is intended to conform with the provisions of 15A NCAC 2H .0507 (d).

Mitigation:

6. Wetland and stream mitigation shall be done as follows and in accordance with mitigation as approved by the US Army Corps of Engineers. DWQ shall be copied on all draft mitigation plans and copied on all annual reporting on mitigation success. In addition, buffer mitigation shall be done in accordance with condition 7 below. In addition, DWQ shall be copied on a final accounting of the amount and type of proposed wetland, stream and buffer mitigation within 60 days of the issuance of the 404 Permit from the US Army Corps of Engineers. Any mitigation done outside the 8-digit HUC where PCS is located should follow the guidance for out of HUC mitigation as described in "Guidance on the Use of Compensatory Mitigation in Adjacent Cataloging Units" dated May 20, 2005 or its update by DWQ. Conservation easements or similar mechanisms to protect these mitigation sites shall be recorded on all mitigation sites to the written satisfaction of the US Army Corps of Engineers.
7. Buffer mitigation shall be conducted by PCS Phosphate at those mitigation sites with riparian buffer credit which total about 24.4 acres of buffer credit. If the Environmental Management Commission approves a flexible buffer mitigation program, then PCS Phosphate may submit a list and description of those sites to DWQ for written approval. If no additional riparian buffer mitigation sites and no flexible buffer mitigation sites are approved by DWQ and/or the NC Environmental Management Commission, then disturbance of buffers in the NCPC, Bonnerton or South of 33 tracts shall not be done beyond the limits of the 2014 impact area shown on PCS' Project Impact Schedule Year 2008-2016 (generally south of Drinkwater Creek) (see Attachment One). DWQ shall be copied on all buffer mitigation site plans and written approval from DWQ is required for these plans before planting or land grading occurs.

8. Porter Creek enhancement – Additional written approval is required from DWQ for a wetland enhancement and stream restoration plan as well as a monitoring plan for the stream, headwater forest and hardwood flat at the upper end of Porter Creek. This plan shall include plugging or filling the existing ditch in order to reestablish surface flow into the wetland and stream channel. DWQ acknowledges wetland functional uplift for the 3.4 acre hardwood flat that is located between the stream and existing ditch and will count 1.7 acres of functional uplift of these non-riparian wetlands in order to account for DWQ's mitigation requirement in 15A NCAC 2H .0506 (h)(6). Stream mitigation credits are also available for the restoration of flow into the existing channel with appropriate monitoring and wetland mitigation for the functional uplift of the headwater forest if additional analysis documents that uplift.

Additional Minimization of impact:

9. Hardwood Flat Avoidance and Minimization – Impact to the 135 acre ("135 A" on Attachment Two) portion, the 58 acre ("58 A" on Attachment Two) portion and the 20 acre secondary connection between these two locations ("20 acre connect" on Attachment Two) of the Bonnerton Road Non-Riverine Wet Hardwood Forest as depicted on Exhibit A of the letter dated October 20, 2008 from George House of Brooks, Pierce, McLendon, Humphrey and Leonard, LLP to Paul Rawls of the NC Division of Water Quality shall be avoided and the area not mined or cleared since this wetland is a "wetland of exceptional state or national ecological significance" in accordance with 15A NCAC 2H .0506(e) except that a 1,145 foot wide mining and utility corridor is allowed in the narrowest part of the Bonnerton Road Non-Riverine Wet Hardwood Forest. Mining is also allowed in the northeast triangle of "58A" WHR area as outlined in exhibit 14 of PCS's December 19, 2008 letter. In order to protect the uses of this Non-Riverine Wet Hardwood Forest wetland that will not be mined, a conservation easement shall be placed on the wetland and restored mining and utility corridor to preclude impacts including mining, logging and any other disturbance of the vegetation or soils that would result in its delisting as a state or nationally significant wetland area. This conservation easement shall be sent to DWQ within 60 days of the issuance of the 404 Permit and the Division must review and approve this easement before it is recorded. Eventual donation to a local land trust or similar organization is acceptable to DWQ with DWQ's written approval.

The exact location of this 1,145 foot wide mining corridor shall be submitted to DWQ and the Corps of Engineers for written approval. A detailed stratigraphy study shall be done on both sides and throughout the area to be mined in order to determine the presence, extent and permeability of any aquitards and aquicludes (mainly clay-based) within the mining corridor. A plan for restoration of each of these aquitards and aquicludes shall be included with the revegetation plan in order to ensure that pre-mining hydrology is reestablished in the mining corridor. Additional written approval is needed from DWQ before this stratigraphic study is done or restoration is initiated. Groundwater monitoring shall be done before, during and after mining and restoration for at least 10 years post-mining in order to ensure that restoration has established reference hydrology for this site. In addition, a reclamation and revegetation plan for the mining corridor shall be submitted to DWQ for written approval. The reclamation plan for the mining corridor shall include the installation of appropriate topsoil on the site within the rooting zone of the restored hardwood flat. The width of the reclamation zone shall ensure that a continuous hardwood flat is restored to reconnect the two undisturbed hardwood flats with a width similar to the width of the remnant, undisturbed hardwood flats. Revegetation shall be done with native tree species. The mining corridor shall be restored and replanted within ten (10) years of the initiation of mining preparation

- for the area. DWQ shall be copied on a letter once that mining preparation begins on the mining corridor in order to establish this ten year clock.
10. Additional minimization of appx. 3 acres of wetland impact shall be provided for the NCPC tract as depicted on the letter from PCS Phosphate dated November 3, 2008 to John Dorney of the NC Division of Water Quality.
 11. South of 33 tract – The impact boundaries for the South of 33 tract shall be as outlined in an email from Mr. Tom Walker of the US Army Corps of Engineers dated August 19, 2008 (forwarded to Mr. John Dorney of the Division of Water Quality on December 13, 2008).

Monitoring

12. Groundwater monitoring – Additional written approval is required from DWQ for a final groundwater monitoring plan that supplements and compliments the existing groundwater monitoring that is being conducted by PCS for various state and federal agencies. In addition to other parameters subject to groundwater standards, cadmium and fluoride shall be monitored in the final groundwater monitoring plan. This plan shall include groundwater monitoring of the protected portion of the Bonnerton Road Non-Riverine Wet Hardwood Forest as noted in condition 9 above in order to ensure that the existing hydrology of this site is maintained. This monitoring shall focus on the "58A" area of the Bonnerton Road Non-Riverine Wet Hardwood Forest to ensure that its groundwater hydrology is maintained.
13. Stream and watershed monitoring – The existing water management and stream monitoring plan for water quality, water quantity and biology (macroinvertebrates and fish) shall be continued for the life of the Permit by the applicant. Additional monitoring shall be proposed by the applicant and approved by DWQ for tributaries in the Bonnerton and South of 33 tracts before land clearing or impacts occur to those locations. This additional monitoring plan shall collect data from a representative number of streams in each tract and be designed to assure the protection of downstream water quality standards including Primary and Secondary Nursery Area functions in tributaries to South Creek, Porter Creek, Durham Creek and the Pamlico River adjacent to the mine site. Monitoring locations shall include the upper end of Porter Creek in the "58A" portion of the Bonnerton Road Non-Riverine Wet Hardwood Forest in order to ensure that hydrology of this wet hardwood forest is maintained.

The plan shall identify any deleterious effects to riparian wetland functions including by not limited to water storage, pollutant removal, streambank stabilization, as well as resident wetland-dependent aquatic life and resident wetland-dependent wildlife and aquatic life in wetlands and streams tributary to the Pamlico River in the NCPC, Bonnerton and South of 33 tracts. If necessary, management activities to protect or restore these uses will be required for all the tributaries of these three tracts.

PCS shall notify DWQ in writing at least one month in advance of any biological sampling so DWQ biologists can accompany PCS biologists as needed. Also a certified lab is required for the identification of freshwater benthic macroinvertebrate samples. For estuarine samples, a knowledgeable lab shall be used until such time as DWQ certifies laboratories for estuarine analysis and after that time, only suitably certified labs shall be used. Finally a fish monitoring plan shall be included in the final monitoring plan submitted to DWQ for written approval.

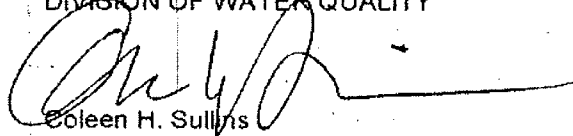
January 15, 2009

This stream and watershed monitoring plan shall be submitted to DWQ for written approval within six months of the issuance of the 404 Permit. Seven copies (two hard copies and five CD's) of the draft plan and annual reports shall be submitted to DWQ for circulation and review by the public and other federal and state agencies.

Expiration of Certification – This approval to proceed with your approved impacts or to conduct impacts to waters as depicted in your application shall expire upon expiration of the 404 Permit with the proviso that changes to this Certification may be made in accordance with condition 5 (Continuing Compliance) above.

If this Certification is unacceptable to you, you have the right to an adjudicatory hearing upon written request within sixty (60) days following receipt of this modified Certification. Since as noted above, this Certification completely replaces the one issued to you on December 6, 2008, the sixty (60) day appeal period is for all the conditions of this modified Certification. Any request for adjudicatory hearing must be in the form of a written petition conforming to Chapter 150B of the North Carolina General Statutes and filed with the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, N.C. 27699-6714. If modifications are made to an original Certification, you have the right to an adjudicatory hearing on the modifications upon written request within sixty (60) days following receipt of the Certification. Unless such demands are made, this Certification shall be final and binding.

This the 15th day of January 2009
DIVISION OF WATER QUALITY



Coleen H. Sullins

CHS/jrd



Michael F. Easley, Governor

William G. Ross Jr., Secretary
North Carolina Department of Environment and Natural Resources

Coleen H. Sullins, Director
Division of Water Quality

December 5, 2008

Mr. Ross M. Smith, Manager
Environmental Affairs
PCS Phosphate Company, Inc.
P.O. Box 48
Aurora, NC 27808

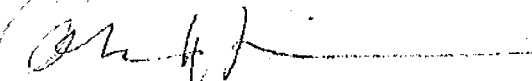
Re: PCS Phosphate Mine Expansion, Beaufort County
DWQ #2008-0868, version 2.0; USACE Action ID. No. 200110096
APPROVAL of 401 Water Quality Certification with Additional Conditions

Dear Mr. Smith:

Attached hereto is a copy of Certification No. 3771 issued to PCS Phosphate Company, Inc. of Aurora, NC, dated December 5, 2008. In addition, you must get any other federal, state or local permits before you proceed with your project including (but not limited to) Solid Waste, Sediment and Erosion Control, Stormwater, Dam Safety, Mining, Non-discharge and Water Supply Watershed regulations.

If we can be of further assistance, do not hesitate to contact us.

Sincerely,



Coleen H. Sullins

CHS/jrd

Attachments: Certificate of Completion

cc: Mr. Tom Walker, U.S. Army Corps of Engineers, Asheville Regulatory Field Office
Dave Lekson, US Army Corps of Engineers, Washington Regulatory Field Office
Scott McLendon, Wilmington District, USACOE
Kyle Barnes, DWQ, Washington Regional Office
Al Hodge, DWQ, Washington Regional Office
DLR Washington Regional Office
File Copy
Matt Matthews, DWQ Wetlands and Stormwater Branch
Cyndi Karoly, DWQ
John Payne, NC Attorney General's Office, Environmental Division
Mike Schafele, NC Natural Heritage Program
Linda Pearsall, NC Natural Heritage Program

401 Oversight/Express Review Permitting Unit
1650 Mail Service Center, Raleigh, North Carolina 27699-1650
2321 Crabtree Boulevard, Suite 250, Raleigh, North Carolina 27604
Phone: 919-733-1786 / FAX 919-733-6893 / Internet: <http://h2o.enr.state.nc.us/newetlands>

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EXHIBIT 2

Jimmie Overton, DWQ
Jeff Furness, PCS Phosphate
Stephen Rynas, NC Division of Coastal Management
Shannon Deaton, NC Wildlife Resources Commission
Derb Carter, Southern Environmental Law Center
Geoffrey Gisler, Southern Environmental Law Center
Heather Jacobs, Pamlico Tar River Foundation
Sean McKenna, NC Division of Marine Fisheries
Eric Kulz, DWQ
Tammy Hill, DWQ
Becky Fox, US Environmental Protection Agency
Tom Welborn, US Environmental Protection Agency – Region 4 Atlanta
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Mary Penny Thompson, DENR
Susan Massengale, DWQ
Ann Deaton, NC Division of Marine Fisheries
John Hennessy, DWQ

Filename: 20080868v2PCSPHosphate(Beaufort) 401

NORTH CAROLINA 401 WATER QUALITY CERTIFICATION

THIS CERTIFICATION is issued in conformity with the requirements of Section 401 Public Laws 92-500 and 95-217 of the United States and subject to the North Carolina Division of Water Quality (DWQ) Regulations in 15 NCAC 2H, Section .0500 to PCS Phosphate Company, Inc. of Aurora, NC based on an application to fill 4,124 acres of jurisdictional wetlands, 29,288 linear feet of streams and 55.14 acres of stream buffers in the Pamlico River Basin, associated with the expansion of PCS Phosphate's mining operation in Beaufort County, North Carolina, pursuant to an application filed on the 22nd day of May of 2008 through the published Public Notice by the US Army Corps of Engineers, and in additional correspondence received September 5, 2008 (dated September 4, 2008) and November 3, 2008 (received November 5, 2008).

The application and supporting documentation provide adequate assurance that the proposed work will not result in a violation of applicable Water Quality Standards and discharge guidelines. Therefore, the State of North Carolina certifies that this activity will not violate the applicable portions of Sections 301, 302, 303, 306, 307 of PL 92-500 and PL 95-217 if conducted in accordance with the application, the supporting documentation, the additional correspondence noted above and conditions hereinafter set forth.

This approval is only valid for the purpose and design submitted in the application materials, additional correspondence and as described in the Public Notice. If the property is sold after the Certification is granted, the new owner must be given a copy of the Certification and approval letter and is thereby responsible for complying with all conditions of this Certification. Any new owner must notify the Division and request the Certification be issued in their name. Should wetland, buffer or stream fill be requested in the future, additional compensatory mitigation may be required as described in 15A NCAC 2H .0506 (h) (6) and (7). If any plan revisions from the approved site plan result in a change in stream, buffer or wetland impact or an increase in impervious surfaces, the DWQ shall be notified in writing and a new application for 401 Certification may be required and a modified 401 Certification may be required. For this approval to be valid, compliance with all the conditions listed below is required.

Conditions of Certification:

1. Impacts Approved

The following impacts are hereby approved as long as all of the other specific and general conditions of this Certification are met. No other impacts are approved including incidental impacts other than listed in this table. Also, please note that these impacts are those approved by DWQ and are only a portion of the impacts that were originally applied for and listed in the Public Notice.

	Amount Approved (Units)	Plan Location or Reference
Streams	18,621 feet	Final EIS, page e and June 6, 2008 submittal to DWQ
404/CAMA Wetlands	3,789 acres	Final EIS, page e and June 6, 2008 submittal to DWQ
Waters	19 acres	Final EIS, page e and June 6, 2008 submittal to DWQ
Buffers	28.14 acres	Final EIS, page e and June 6, 2008 submittal to DWQ

Sediment and Erosion Control:

2. Erosion and sediment control practices must be in full compliance with all specifications governing the proper design, installation and operation and maintenance of such Best Management Practices in order to protect surface waters standards:
 - a. The erosion and sediment control measures for the project must be designed, installed, operated, and maintained in accordance with the most recent version of the *North Carolina Sediment and Erosion Control Planning and Design Manual*.
 - b. The design, installation, operation, and maintenance of the sediment and erosion control measures must be such that they equal, or exceed, the requirements specified in the most recent version of the *North Carolina Sediment and Erosion Control Manual*. The devices shall be maintained on all construction sites, borrow sites, and waste pile (spoil) projects, including contractor-owned or leased borrow pits associated with the project.
 - c. For borrow pit sites, the erosion and sediment control measures must be designed, installed, operated, and maintained in accordance with the most recent version of the *North Carolina Surface Mining Manual*.
 - d. The reclamation measures and implementation must comply with the reclamation in accordance with the requirements of the Sedimentation Pollution Control Act or Mining Act of 1971 (as amended).
3. No waste, spoil, solids, or fill of any kind shall occur in wetlands, waters, or riparian areas beyond the footprint of the impacts depicted in the 404/401 Permit Application. All construction activities, including the design, installation, operation, and maintenance of sediment and erosion control Best Management Practices, shall be performed so that no violations of state water quality standards, statutes, or rules occur.
4. Sediment and erosion control measures shall not be placed in wetlands or waters without prior approval by the Division. If placement of sediment and erosion control devices in wetlands and waters is unavoidable, design and placement of temporary erosion control measures shall not be conducted in a manner that may result in disequilibrium of wetlands or stream beds or banks, adjacent to or upstream and down stream of the above structures. All sediment and erosion control devices shall be removed and the natural grade restored within two (2) months of the date that the Division of Land Resources or locally delegated program has released the project.

Continuing Compliance:

5. PCS Phosphate Company, Inc. shall conduct construction activities in a manner consistent with State water quality standards (including any requirements resulting from compliance with section 303(d) of the Clean Water Act), the 401 Water Quality Certification rules (15A NCAC 2H .0500) and any other appropriate requirements of State law and federal law. If the Division determines that such standards or laws are not being met (including the failure to sustain a designated or achieved use) or that State or federal law is being violated, or that further conditions are necessary to assure compliance, the Division may reevaluate and modify this Certification to include conditions appropriate to assure compliance with such standards and requirements in accordance with 15A NCAC 2H .0507(d). Before modifying the Certification, the Division shall notify PCS Phosphate Company, Inc. and the US Army Corps of Engineers,

provide public notice in accordance with 15A NCAC 2H.0503 and provide opportunity for public hearing in accordance with 15A NCAC 2H.0504. Any new or revised conditions shall be provided to PCS Phosphate Company, Inc. in writing, shall be provided to the United States Army Corps of Engineers for reference in any Permit issued pursuant to Section 404 of the Clean Water Act, and shall also become conditions of the 404 Permit for the project. This condition is intended to conform with the provisions of 15A NCAC 2H .0507 (d).

Mitigation:

6. Wetland and stream mitigation shall be done as follows and in accordance with mitigation as approved by the US Army Corps of Engineers. DWQ shall be copied on all draft mitigation plans and copied on all annual reporting on mitigation success. In addition, buffer mitigation shall be done in accordance with condition 7 below. In addition, DWQ shall be copied on a final accounting of the amount and type of proposed wetland, stream and buffer mitigation within 60 days of the issuance of the 404 Permit from the US Army Corps of Engineers. Any mitigation done outside the 8-digit HUC where PCS is located should follow the guidance for out of HUC mitigation as described in "Guidance on the Use of Compensatory Mitigation in Adjacent Cataloging Units" dated May 20, 2005 or its update by DWQ. Conservation easements or similar mechanisms to protect these mitigation sites shall be recorded on all mitigation sites to the written satisfaction of the US Army Corps of Engineers.
7. Buffer mitigation shall be conducted by PCS Phosphate at those mitigation sites with riparian buffer credit which total about 23.2 acres of buffer credit. If the Environmental Management Commission approves a flexible buffer mitigation program, then PCS Phosphate may submit a list and description of those sites to DWQ for written approval. If no additional riparian buffer mitigation sites and no flexible buffer mitigation sites are approved by DWQ, then disturbance of buffers in the NCPC, Bonnerton or South of 33 tracts shall not be done beyond the limits of the 2014 mining tract shown on PCS' Project Impact Schedule Year 2008-2018 (generally south of Drinkwater Creek) (see Attachment One). DWQ shall be copied on all buffer mitigation site plans and written approval from DWQ is required for these plans before planting or land grading occurs.
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Additional Minimization of impact:

9. Hardwood Flat Avoidance – Impact to the 135 acre ("135 A" on Attachment Two) portion, the 58 acre (" 58 A" on Attachment Two) portion and the 20 acre secondary connection between these two locations ("20 acre connect" on Attachment Two) of the Bonnerton Road Non-Riverine Wet Hardwood Forest as depicted on Exhibit A of the letter dated October 20, 2008 from George House of Brooks, Pierce, McLendon, Humphrey and Leonard, LLP to Paul Rawls of the NC Division of Water Quality shall be avoided and the area not mined or

cleared since this wetland is a "wetland of exceptional state or national ecological significance" in accordance with 15A NCAC 2H .0506(e). In order to protect the uses of this wetland, a conservation easement shall be placed on the wetland to preclude impacts including mining, logging and any other disturbance of the vegetation or soils that would result in its delisting as a state or nationally significant wetland area. This conservation easement shall be sent to DWQ within 60 days of the issuance of the 404 Permit and the Division must review and approve this easement before it is recorded. The only exception to this avoidance is that a dragline walkpath with a width of no more than 250 feet shall be allowed in order to allow equipment to travel from the northern part of the Bonnerton tract to the southern part of the Bonnerton tract. The exact location of this walkpath shall be submitted to DWQ for written approval. In addition, a revegetation plan for the walkpath shall be submitted to DWQ for written approval and revegetation shall be done with native tree species once the walkpath has been accessed and is no longer needed for equipment access.

10. Additional minimization of appx. 3 acres of wetland impact shall be provided for the NCPC tract as depicted on the letter from PCS Phosphate dated November 3, 2008 to John Dorney of the NC Division of Water Quality.
11. South of 33 tract – The boundaries for the SCR alternative shall be followed for the South of 33 tract.

Monitoring

12. Groundwater monitoring – Additional written approval is required from DWQ for a final groundwater monitoring plan that supplements and compliments the existing groundwater monitoring that is being conducted by PCS for various state and federal agencies. In addition to other parameters, cadmium and fluoride shall be monitored in the final groundwater monitoring plan. This plan shall include groundwater monitoring of the protected portion of the Bonnerton Road Non-Riverline Wet Hardwood Forest in order to ensure that the existing hydrology of this site is maintained.
13. Stream and watershed monitoring – The existing water management and stream monitoring plan for water quality, water quantity and biology (macroinvertebrates and fish) shall be continued for the life of the Permit by the applicant. This plan shall be designed to assure the protection of downstream water quality standards including Primary and Secondary Nursery Area functions in all tributaries to South Creek, Porter Creek, Durham Creek and the Pamlico River adjacent to the mine site. Additional monitoring shall be proposed by the applicant and approved by DWQ for tributaries in the Bonnerton and South of 33 tracts before land clearing or impacts occur to those locations.

The plan shall identify any deleterious effects to riparian wetland functions including by not limited to water storage, pollutant removal, streambank stabilization, as well as resident wetland-dependent aquatic life and resident wetland-dependent wildlife and aquatic life in streams tributary to the Pamlico River in the NCPC, Bonnerton and South of 33 tracts. If necessary, management activities to protect or restore these uses will be required for all the tributaries of these three tracts.

PCS shall notify DWQ in writing at least one month in advance of any biological sampling so DWQ biologists can accompany PCS biologists as needed. Also a certified lab is required for the identification of freshwater biological samples. For estuarine samples, a

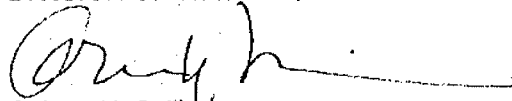
knowledgeable lab shall be used until such time as DWQ certifies laboratories for estuarine analysis and after that time, only suitably certified labs shall be used. Finally a fish monitoring plan shall be included in the final monitoring plan submitted to DWQ for written approval.

This stream and watershed monitoring plan shall be submitted to DWQ for written approval within six months of the issuance of the 404 Permit. Seven copies (two hard copies and five CD's) of the draft plan and annual reports shall be submitted to DWQ for circulation and review by the public and other federal and state agencies.

Expiration of Certification – This approval to proceed with your proposed impacts or to conduct impacts to waters as depicted in your application shall expire upon expiration of the 404 Permit with the proviso that changes to this Certification may be made in accordance with condition 5 (Continuing Compliance) above.

If this Certification is unacceptable to you, you have the right to an adjudicatory hearing upon written request within sixty (60) days following receipt of this Certification. This request must be in the form of a written petition conforming to Chapter 150B of the North Carolina General Statutes and filed with the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, N.C. 27699-6714. If modifications are made to an original Certification, you have the right to an adjudicatory hearing on the modifications upon written request within sixty (60) days following receipt of the Certification. Unless such demands are made, this Certification shall be final and binding.

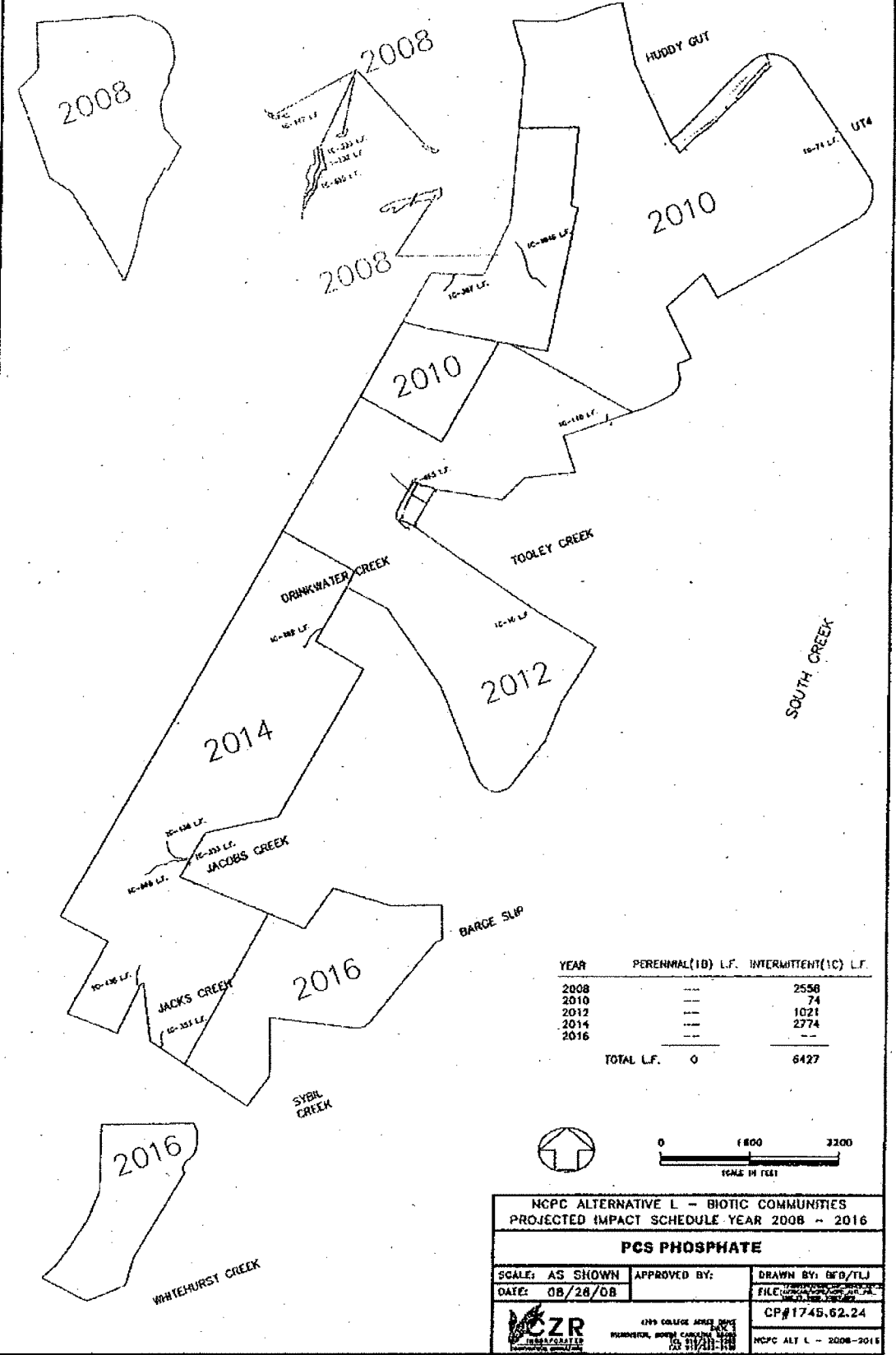
This the 5th day of December 2008
DIVISION OF WATER QUALITY



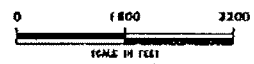
Coleen H. Sullins

CHS/jrd

**Attachment One
Riparian Buffer Mitigation
PCS Phosphate, Inc. 401 Certification
December 5, 2008**

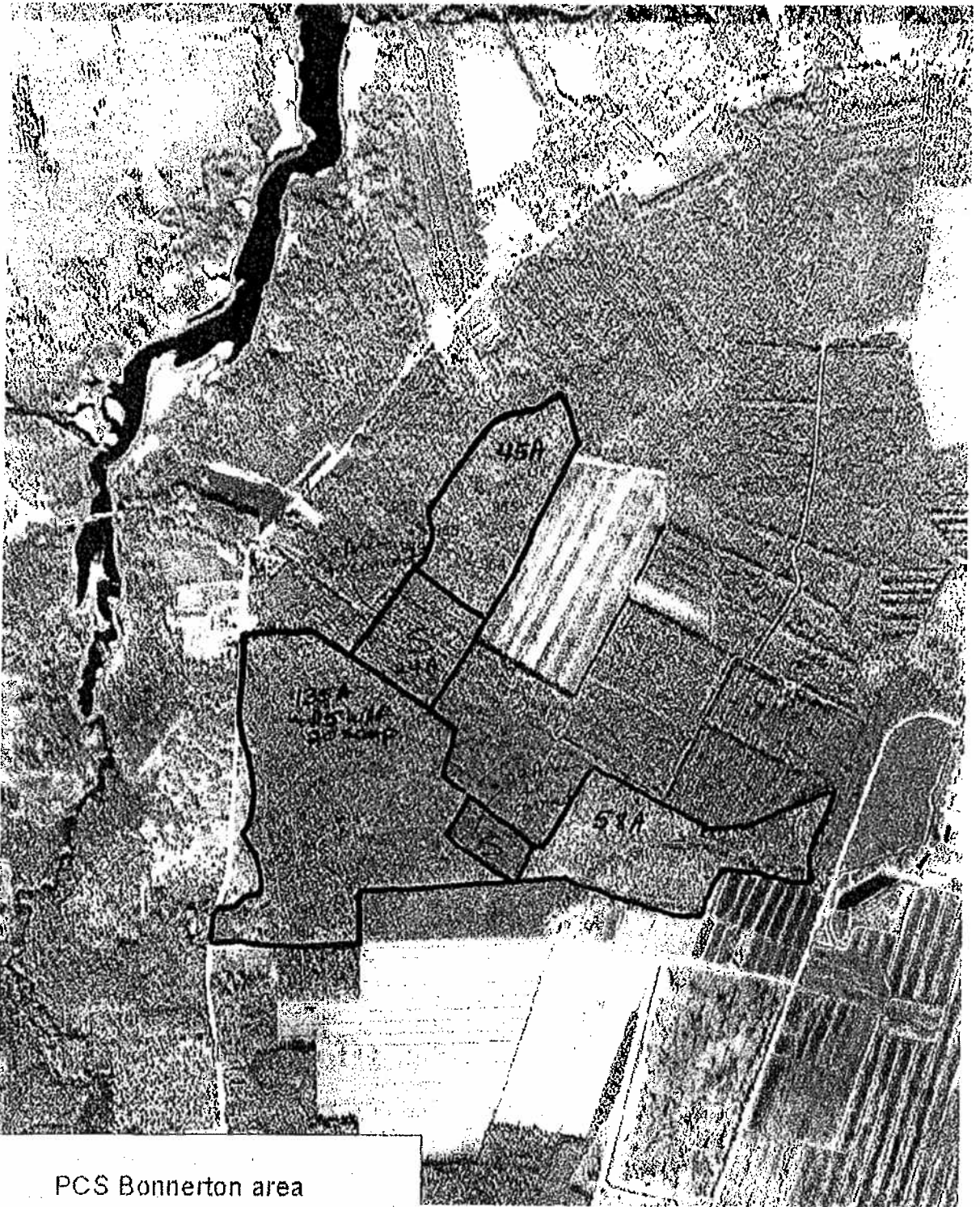


YEAR	PERENNIAL(1B) L.F.	INTERMITTENT(1C) L.F.
2008	---	2558
2010	---	74
2012	---	1021
2014	---	2774
2016	---	---
TOTAL L.F.	0	6427



NPC ALTERNATIVE L - BIOTIC COMMUNITIES PROJECTED IMPACT SCHEDULE YEAR 2008 - 2016		
PCS PHOSPHATE		
SCALE: AS SHOWN	APPROVED BY:	DRAWN BY: BFD/TLJ
DATE: 08/28/08		FILE: XXXXXXXXXX
	1275 COLLEGE AVENUE SUITE 100 HUNTERDON, NEW JERSEY 08822 TEL: 908/221-7400	CP#1745.62.24 NPC ALT L - 2008-2016

Attachment Two
Hardwood Flat Avoidance
PCS Phosphate, Inc. 401 Certification
December 5, 2008



PCS Bonnerton area

S = Secondary areas for connection
Heavy black line = SNHA (sig. nat. heritage area)

CERTIFICATE OF SERVICE

I hereby certify that I delivered the foregoing Petition for a Contested Case Hearing, with attachments, by electronic mail and by U.S. mail, first-class postage prepaid, to the following:

Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-6714
oah.clerks@oah.nc.gov

I further certify that I served the foregoing Petition for a Contested Case Hearing, with attachments, on the following in the manner indicated:

Mary Penny Thompson.
General Counsel and Registered Agent
N.C. Department of Environment and
Natural Resources
512 North Salisbury St.
14th Floor
Raleigh, NC 27604
Via certified mail


George W. House
Brooks, Pierce, McLendon, Humphrey
& Leonard
2000 Renaissance Plaza
230 North Elm Street
Greensboro, NC 27401
Via first-class mail

PCS Phosphate Company, Inc.
c/o Corporation Service Company,
Registered Agent
327 Hillsborough Street
Raleigh, NC 27603
Via certified mail

John A. Payne
Assistant Attorney General
State of North Carolina
Dept. Of Justice
PO Box 629
Raleigh, NC 27602
Via first-class mail

Ross Smith
PCS Phosphate Company, Inc.
PO Box 48
Aurora, NC 27808
Via first-class mail

This the 12th day of March, 2009.



Geoff Gistler
Southern Environmental Law Center