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05/13/2009 02:32 PM

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Subject Fw: PCS Phosphate: USACE response to EPA elevation

Folks:

In case you have not seen this, attached is a letter from SELC to EPA's AA for OW regarding Army's 3-6-09 response to the PCS Phosphate elevation.

-Palmer

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--- Forwarded by Palmer Hough/DC/USEPA/US on 05/13/2009 02:30 PM ---

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Date: 05/12/2009 09:40 AM
Subject: PCS Phosphate: USACE response to EPA elevation

Mr. Shapiro,

Please accept the attached submitted on behalf of the Pamlico-Tar River Foundation, Environmental Defense Fund, Sierra Club, and North Carolina Coastal Federation. The letter addresses the Army Corps of Engineers' response to EPA's elevation of the Wilmington District's permit decision on the PCS Phosphate mine expansion. As noted in the letter, the Corps's response fails to adequately address the unacceptable adverse effects identified by EPA in its 404(q) action and therefore action under 404(c) is necessary to prevent long-term

environmental damage to the Albemarle Pamlico Estuary system.

Thank you for your consideration of these comments,

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05-12-09 Response to Corps's elevation decision.pdf

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May 12, 2009

Michael H. Shapiro
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Re: *USACE Response to EPA Elevation of PCS Phosphate Mine Expansion Permit*

Mr. Shapiro,

We submit this letter on behalf of the Pamlico-Tar River Foundation, Environmental Defense Fund, Sierra Club, and North Carolina Coastal Federation to address the Corps's May 6, 2009 response to the request by the Environmental Protection Agency that the Secretary review the Wilmington District's decision to issue a Clean Water Act Section 404 permit to PCS Phosphate to mine and destroy wetlands and streams as part of its mine advance in Beaufort County, North Carolina. The Corps's response fails to rebut EPA's concerns that the proposed project will result in unacceptable adverse impacts to the aquatic environment and fails to rebut the regulatory presumption in the 404(b) guidelines that practicable alternatives exist which have less impact on the aquatic environment. EPA should proceed with a 404(c) veto of this project based on its unacceptable adverse impacts to aquatic resources of national importance.

The proposed project would result in unacceptable adverse effects to Aquatic Resources of National Importance

The Corps states: "We do not believe the aquatic resources within the project area, either individually or cumulatively, qualify as [aquatic resources of national importance]." This statement generally explains why the Corps proceeded to propose issuance of a permit that will result in destruction of 3,961 acres of wetlands and nearly five miles of streams and cause long-term degradation of water quality, fisheries productivity, and economic uses of the Pamlico River and estuary. The Corps simply does not believe the wetlands, streams, tidal creeks, fish nursery areas, and adjacent estuarine waters warrant protection. The Corps and PCS are alone in contending the proposed mining area does not contain aquatic resources of national importance. The Environmental Protection Agency, U.S. Fish and Wildlife Service, National Marine Fisheries Service, North Carolina Marine Fisheries Commission, North Carolina Wildlife Resources Commission, and South Atlantic Fisheries Management Council all have concluded aquatic resources on the tract and those that would be affected by the project are vital

to the estuary system and that greater avoidance of impacts is required to prevent unacceptable adverse impacts.

The Corps attempts to minimize the significance of the aquatic resources by noting the project area is less than 1% of the watershed of the Albemarle Pamlico Estuary, which covers most of eastern North Carolina and much of southern Virginia. The implication of this statement is that it is of no consequence to degrade the aquatic resources of the estuary, so long as it occurs 1% at a time. The Corps fails to consider the proximity of the wetlands and waters that would be destroyed to the estuary, or the significance of the four primary nursery areas that would be degraded.

Further, the analysis crumbles under scrutiny. There are only 80,144 acres of primary nursery area in the entire state of North Carolina. Those primary nursery areas comprise far less than 1% of the State's coastal waters but are essential to the health of North Carolina's fisheries. The Corps could not contend that the loss of all primary nursery areas in the state of North Carolina would not have an adverse impact on fisheries, even though they represent much less than 1% of the overall watershed, yet attempts to marginalize the potentially devastating impacts proposed by PCS by a meaningless referral to the overall watershed size. Even though the impacts are less than 1% of the overall watershed, the nature of the impacts and their landscape location make them critical for the overall health of the Albemarle Pamlico Estuary.

The Corps does note that four of the tidal creeks have been identified as primary nursery areas by the State and Habitat Areas of Particular Concern by the South Atlantic Fisheries Management Council, affording them the highest level of protection under federal fisheries management laws. Yet, by approving the proposed impacts, the Corps fails to recognize that federal and state goals are to restore the water quality, productivity and fisheries of the estuary, not to supervise its incremental degradation.

The Corps notes that all direct impacts to the perennial reaches of the primary nursery areas have been avoided. These direct impacts have been avoided, not at the Corps's insistence, but because the State of North Carolina refused to process a permit that would result in mining the tidal creeks. PCS unsuccessfully sued the State challenging its refusal to permit destruction of the tidal creeks. The Corps, on the other hand, included this "applicant preferred alternative" to mine the tidal creeks as a reasonable alternative through the NEPA process, and continues even in this most recent document to claim avoidance of wetland impacts comparing the current plan to the now abandoned illegal "applicant preferred" plan.

Critically, the Corps has not required PCS to avoid direct impacts to the intermittent headwaters of the primary nursery areas or the wetlands that maintain water quality and nutrient cycling within these systems. There is a strong body of scientific support demonstrating that headwater streams and

their attendant wetlands are critical in maintaining stream health.¹ PCS's efforts to overcome that body of scientific understanding with the Entrix report fails because it: (1) distorts the findings of the studies summarized; (2) fails to account for scale of the proposed impacts; and (3) relies on incomplete data sets assessing the impacts of Jacks Creek drainage basin reduction.

With respect to indirect effects, the wetlands and streams that would be destroyed are proximate and integrally linked to the estuarine waters and primary nursery areas. The Corps's proposed plan would result in irreversible destruction of 55-84% of the entire watersheds of the tidal creeks and primary nursery areas. The Corps concludes "many", but not all, will continue to function as primary nursery areas with the proposed project in place. The Corps proposes to "adaptively manage" this degradation through a permit special condition requiring ten years of monitoring of the impacts of mining most of the watersheds of these creeks. Under the proposed mine plan, the watersheds of Tooley, Jacobs, Drinkwater, and Jacks Creeks will largely be mined within a 3-4 year period (years 2-6). There will be no time to quantify impacts and implement corrective actions. Even if there were time to quantify impacts, the conditions do not require additional avoidance of wetland impacts even if both the scientific panel and the Wilmington District conclude that mining is causing "significant adverse environmental impacts." This monitoring and adaptive management requirement is largely worthless in terms of preventing the water quality and fisheries degradation it anticipates, and will merely serve to require the Corps and PCS to keep a record of the degradation caused.

While it could be considered a tragic scientific study, this special condition monitoring of the degradation of the tidal creeks and primary nursery areas cannot, and does not, relieve the Corps of its obligation to avoid significant degradation to aquatic resources. While the special condition and required monitoring may document the degradation, the Corps's obligation is to prevent the degradation.

Nationally significant nonriverine wet hardwood forests must be protected

PCS proposes to destroy areas of the nationally significant nonriverine wet hardwood forest on the Bonnerton Tract. The North Carolina Natural Heritage Program has identified this forest as one of

¹ Meyer J.L. and J.B. Wallace, Lost linkages and lotic ecology: Rediscovering small streams, In *Ecology: Achievement and Challenge*, M.C. Press, N.J. Huntly, and S. Levin (Editors), Blackwell Science, Malden, Massachusetts, pp 295-317 (2001); Gomi, T., Sidle, R.C., and J.S. Richardson, Understanding processes and downstream linkages of headwater systems, *BioScience* 52(10): 905-916 (2002); Alexander, R.B., Boyer, E.W., Smith, R.A., Schwartz, G.E., and R.B. Moore, The role of headwater streams in downstream water quality, *Journal of the American Water Resources Association* 43(1): 41-59 (2002); Meyer, J.L., Strayer, D.L., Wallace, B., Eggert, S.L., Helfman, G.S., and N.E. Leonard, The contribution of headwater streams to biodiversity in river networks, *Journal of the American Water Resources Association* 43(1): 86-103 (2007); Wipfli, M.S., Richardson, J.S., and R.J. Naiman, Ecological linkages between headwaters and downstream ecosystems: Transport of organic matter, invertebrates, and wood down headwater channels, *Journal of the American Water Resources Association* 43(1): 72-85 (2007); Freeman, M.C., Pringle, C.M., and C.R. Jackson, Hydrologic connectivity and the contribution of stream headwaters to ecological integrity at regional scales, *Journal of the American Water Resources Association* 43(1): 5-14 (2007).

the best five remaining examples of this globally imperiled wetland community. Dr. Schafale, community ecologist with the Natural Heritage Program, has examined the site and considers it an outstanding example of a nonriverine wet hardwood forest. He concludes it is of national ecological significance, and his view is supported by Drs. Peet, Weakley, White, and Christianson, nationally recognized community ecologists in North Carolina.

The Corps concludes the national significance of this tract is "negligible." Although the Corps cites and uses the definition of this natural community developed by staff of the North Carolina Natural Heritage Program, it then questions the ability of Dr. Schafale, the Program's community ecologist and co-author of the definition, to identify the natural community or ascribe significance. Instead, the Corps relies on PCS's hired opinion from its consultant Dr. Gregory, who is a forester and not a community ecologist and unqualified to offer a scientifically credible opinion on natural community ecology or the ecological significance of the tract. Dr. Gregory's opinion of the timber value of the nonriverine wet hardwood forests on the Bonnerton Tract is of no relevance to its ecological significance.

Moreover, the Corps's assessment fails entirely to consider the overall rarity of this natural community. Only a few thousand acres remain, and it is classified as a globally imperiled natural community. Dr. Gregory's failure to account for the rarity of this community type – instead focusing on it in isolation – belies his claimed expertise on this wetland type. There is no evidence that the complex hydrology and vegetation of a nonriverine wet hardwood forest has been restored successfully anywhere. If PCS is permitted to directly destroy much of this forest on the Bonnerton Tract, and indirectly and permanently degrade the remainder, a nationally significant part of the aquatic ecosystem will be lost.

EPA should not take the silence of Dr. Schafale, the expert community ecologist that in part crafted the definition Dr. Gregory applies, as evidence that Dr. Gregory's analysis is valid. On April 15, 2009, PCS filed a lawsuit challenging the very operation of the N.C. Natural Heritage Program, Dr. Schafale's employer, as a result of the Program's identification of the rare wetlands on PCS's site. Although the lawsuit is baseless, its apparent attempt to silence Dr. Schafale and the Natural Heritage Program during the pendency of this permit elevation may be successful.

EPA has the authority under section 404(c) to protect this rare wetland tract. This broad wetland tract is bordered by Durham Creek and Porter Creek – a primary nursery area – and provides buffering functions to those creeks, benefitting fisheries downstream. Further, the open understory that is characteristic of these community types, and rare in the coastal plain, provides wildlife habitat. Finally, PCS has not demonstrated that there are no less environmentally damaging practicable alternatives that would avoid this site. Since EPA can base a 404(c) action on any violation of the 404(b)(1) guidelines, the applicant's failure to establish that these nationally significant wetland sites are unavoidable provides a basis for EPA to protect this area from destruction under 404(c). See James City County v. EPA, 955 F.2d 254, 257 (4th Cir. 1992)(citing 40 C.F.R. § 231.2(e)).

The EPA/USFWS/NMFS alternative is practicable

Perhaps the most important part of the Corps's response is the failure to meet its burden to explain why the mining alternative proposed by EPA, USFWS, and NMFS is not a practicable alternative with less impact on the aquatic environment. The Corps is required under the 404(b) Guidelines to permit only the least environmentally damaging practicable alternative. "[T]he applicant and the [Corps] are obligated to determine the feasibility of the least environmentally damaging alternatives that serve the basic project purpose. If such an alternative exists . . . the CWA compels that the alternative be considered and selected unless proven impracticable." Utahns for Better Transp. v. U.S. Dept. of Transp., 305 F.3d 1152, 1188-1189 (10th Cir. 2002). Since phosphate mining is not water dependent, the burden is on the applicant to demonstrate, and the Corps to verify, that an alternative is not the least environmentally damaging alternative.

The Corps's analysis suffers from a fatal internal inconsistency. In the DEIS and SDEIS, the Corps solely relied on an amortized cost model ("Cost Model A"). The SDEIS introduced a cash-cost model ("Cost Model B"), but did not accept that model. In its response to comments, the Corps states that "no rationale" supports the use of Cost Model B. Yet, it relies on the principal conclusion of Cost Model B – that all costs must be recovered within the 15-year window of analysis – as the basis for the requirement that practicable alternatives provide 15 years of mining north of Hwy 33 at a minimum. In short, the Corps relies on the data from Cost Model A, but accepts the conclusion of Cost Model B. This internal inconsistency improperly excludes reasonable alternatives – like the proposed EPA/FWS/NMFS alternative – that would be practicable if evaluated under Cost Model A.

Rather than addressing this fundamental flaw, the Corps chastises EPA for allegedly failing to raise its proposed alternative earlier. This argument is misleading at best, since EPA raised a substantially similar alternative for mining the NCPC tract in January 2007, a full ten months before Alternative L was introduced in the SDEIS. It was the Corps's introduction of the arbitrary "15-year" requirement in the FEIS released in late May 2008 – not any action by EPA – that prevented earlier analysis of this alternative.

The Corps erroneously states that the "District has been reasonable in determining that a practicable alternative must allow approximately 15 years of mining before requiring a move to S33." This "requirement" is unreasonable, arbitrary, and assures massive wetland destruction. Moreover, it is contrary to conclusions in the Corps's NEPA analysis which found economically practicable an alternative with only 7.5 years of mining north of Hwy 33 before moving to S33. The Corps's conclusion conflicts with its own economic analysis and determinations in the NEPA process.

The Corps defends its approach to the analysis of compliance with the 404(b) guidelines: arbitrarily requiring that a permit provide 15 years of mining in the wetland-rich area north of Hwy 33 as a baseline requirement for any practicable alternative. The Corps wrongly rejects EPA's contention that avoidance of impacts to wetlands and other waters to prevent significant degradation of aquatic resources should precede assessment of practicable alternatives, even though this sequence is precisely

what the 404(b) guidelines require. Under the guidelines, "no discharge of dredged or fill material may be permitted which will cause or contribute to significant degradation of waters of the United States." 40 C.F.R. § 230.10(c). Proposed discharges that would cause or contribute to significant degradation cannot be permitted, even if practicable alternatives to the proposal do not exist. Consequently, avoidance of wetlands and other waters required to prevent significant degradation must precede assessment of practicable alternatives, which may further reduce or eliminate entirely aquatic impacts. Unacceptable adverse environmental effects and significant degradation or waters require denial of a permit even if there are no practicable alternative means to accomplish the project's purposes. James City County v. EPA, 12 F.3d 1330 (4th Cir. 1993).

Here, both the adverse environmental effects and resulting significant degradation of waters and practicable alternatives require greater avoidance of wetlands and streams. The 15 year north of Hwy 33 requirement is simply arbitrary, not required by the project purpose, and based on the company's initial application which cannot be permitted. Under the guidelines, the applicant has the burden of "clearly" demonstrating that no practicable alternative exists, a burden it has failed to carry.

The proposed long-term protection of avoided wetlands is inadequate

The Corps proposes to address concerns about mitigation of avoided wetlands by "reserving the right" to deny a future permit application for mining in avoided areas. The Corps always "reserves a right" to deny a future permit application, if it fails to comply with the 404(b) guidelines or is not in the public interest. We are unaware of any other basis to deny a future permit application, including that the Corps decided in a previous permit to reserve the right to deny a future permit application. The Corps's assurance of reserving the right to deny a future application for avoided wetland areas is meaningless. If the avoided areas are mitigation, these areas must be legally protected by appropriate instruments, as required by Corps and EPA mitigation policy and rules.

The Corps's response has not cured the unacceptable adverse effects described in EPA's elevation of the permit decision under 404(q)

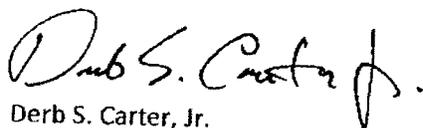
In its elevation decision, EPA identified three ways that the proposed project failed to comply with the 404(b)(1) guidelines:

- (1) There are less environmentally damaging practicable alternatives available;
- (2) Impacts to Nationally Significant Natural Heritage Areas and Primary Nursery Areas would cause or contribute to significant degradation of the Nation's waters; and
- (3) Appropriate steps to minimize and compensate for adverse impacts to waters of the United States have not been taken.

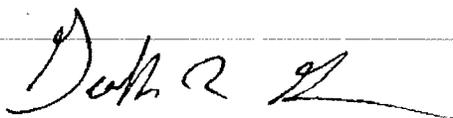
The Corps's response fails to adequately address these issues. Instead, it affirms the Wilmington District's decision as reasonable without explaining its underlying inadequacies and inconsistencies. Those flaws justified elevation of the permit under 404(q) and demand action under 404(c).

We appreciate your consideration of these comments.

Sincerely,



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



Geoffrey R. Gisler
Staff Attorney