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01/14/2009 03:50 PM

Please respond to
riverkeeper@ptrf.org

To Rebecca Fox/R4/USEPA/US@EPA

cc

bcc

Subject letter to DWQ re 401

History:

This message has been replied to.

Hi Becky,

Exemption 6 personal privacy

Just tried to call, but got your message. I'm at home, if you get a chance before 4:30, can call at [REDACTED]. If not, I will try to catch you tomorrow or Friday-- I'm in the office both days.

Attached is the letter we sent to John last week re: PCS request for 401 modification.

Thanks,

Heather

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01-06-09 SELC-PTRF comments on PCS 401.pdf

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January 6, 2009

Via Electronic Mail and U.S. Mail

Mr. John Dorney
N.C. Division of Water Quality
1650 Mail Service Center
Raleigh, N.C. 27699-1650

Re: *PCS Phosphate Mine Expansion, Beaufort County*
DWQ #2008-0868, version 2.0; USACE Action ID No. 200110096

Dear Mr. Dorney:

Please accept these comments on the 401 Certification, No. 3771, issued to PCS Phosphate on December 5, 2008 and the company's subsequent request that the 401 be rescinded and modified. We submit these comments on behalf of the Pamlico-Tar River Foundation ("PTRF").¹ We appreciate the opportunity to provide input during the 401 process.

Condition 7: Buffer Mitigation

PCS has been unable to demonstrate that it can adequately compensate for substantial buffer impacts under its proposed mining alternative.² The company projects that it will fall more than 100 acres short of the buffer mitigation required under the rules.³ Thus, any buffer mitigation proposal by the company should be carefully reviewed for compliance with the rules and future mitigation proposals should initiate an opportunity for public review.

The Tar-Pamlico Buffer Rules require that buffer mitigation take place "closer to the estuary than the impact" for which the mitigation is required.⁴ PCS has not

¹ We do not, by submitting these comments, concede any of the issues raised in our original comments on PCS's 401 Certification application that we submitted on July 7, 2008. PCS's proposed project will significantly degrade the aquatic environment and cannot be adequately mitigated, as evidenced by the company's inability to find sufficient buffer mitigation and subsequent reliance on future regulatory changes.

² See Environmental Management Commission - Water Quality Committee: PCS Phosphate Company, Inc. request for Major Variance from the Tar-Pam Buffer Rules (Sept. 10, 2008);
Id.

³ 15A NC AC 02B .0260(6). The rules also require that the mitigation be as close to the location of the impact as feasible. Id. These dual requirements are joined with an "and," indicating separate purposes.

demonstrated that its mitigation meets that requirement. Nor could it, since the majority of buffer impacts are located adjacent to the estuary in the NCPC and Bonnerton tracts and the majority of its proposed 23.2 acres of buffer mitigation are farther from the Pamlico River than those tracts.⁵ In the 401, DWQ accepted this acreage of mitigation without condition, apparently in reliance on a draft policy statement released for public comment on December 4, 2008.⁶ That draft policy states that any mitigation site within the same eight digit hydrologic unit as the proposed impact satisfies the rule's requirement that buffer mitigation be located closer to the estuary than the impact site. DWQ is accepting comments on that policy until January 23, 2009. Should that policy be modified in response to comments, be found unlawful as rulemaking, or otherwise altered, PCS Phosphate's proposed mitigation would be unlawful and the company's mining impacts would have to be restricted to comply with state law. The 401 should reflect the uncertainty surrounding the portion of accepted buffer mitigation that relies on this draft policy and must condition the 401 on avoidance of buffer impacts dependent on that policy interpretation until it is finalized. Further, to ensure clarity, DWQ should refrain from reissuing the 401 until comments on the draft policy are received and reviewed and the policy is finalized or rescinded.

The 401 Certification's buffer mitigation requirements should be further revised to provide for public review and comment of PCS's anticipated proposals for flexible buffer mitigation if such a program is approved and implemented. As the 401 is currently written, no public notice would be given of PCS's submission, or DWQ's approval, of flexible buffer mitigation measures. Any proposed mitigation, by flexible buffer mitigation or other means, which was not included in PCS's application for this 401 must trigger public notice and include an opportunity for public comment.

PCS's Proposed Modifications

The remainder of these comments will focus on the modifications proposed by PCS on December 19, 2008. These proposed modifications would not only increase the impacts to the nationally significant natural heritage areas on the Bonnerton tract, they would reduce monitoring for deleterious effects of mining. As such, DWQ should not accept PCS's proposed modifications.

PCS failed to adequately describe a Bonnerton corridor that does not include mining ore.

In Condition 9 of the 401, DWQ required PCS to transport equipment from the northern end of the Bonnerton tract to the southern end of the Bonnerton tract through a surface corridor not to exceed 250 feet in width. PCS objected to that condition, claiming that it would cost approximately \$6 million to extract mining equipment from the mine bench, walk the equipment through the surface corridor, and then open the southern mine pit. In an effort to account for those costs, yet hasten reclamation of the corridor so as to

⁵ FEIS, Appendix I at 7.

⁶ The "Working Draft" memorandum describing this interpretation and call for comments was included in DWQ's December 4, 2008 public notice announcement sent to the 401 Water Quality Certification Mailing List.

not degrade the significant natural heritage area. PTRF recommended that PCS evaluate the practicability of extending the mine bench, but not mining, through the corridor. DWQ requested that PCS include a discussion of that recommendation in its response to the 401 on December 16, 2008. PCS's flippant dismissal of the recommendation does not provide adequate information for DWQ to modify and reissue the 401 Certification.

PCS's response to the requested corridor fails to provide any useful information. PCS notes that (1) utility corridors will still be required and that (2) excavation width will be more than 250 feet across.⁷ Based on those statements, the company concludes that "there is minimal difference between [its preferred mining corridors] and the PTRF concept."⁸ But that conclusion is insufficient without factual support. The company failed to specify the width of a pit required to relocate equipment, a fact it provided for its preferred mining corridor routes.⁹ That width is almost certain to be substantially narrower than the pit necessary to allow mining,¹⁰ since the draglines used to mine ore are less than 70 feet wide¹¹ but require a mine bench nearly 600 feet wide to operate.¹² As noted in the FEIS, the bucket wheel excavators are used to reach the mine bench.¹³ Therefore, the operational requirements of the draglines are irrelevant for calculating the width of a corridor intended for equipment relocation rather than ore extraction. PCS's refusal to calculate the width of the corridor, and the corresponding acreage of SNHA avoided, must be explored and the 401 must not issue until the company provides a reasonable description of this corridor.

PCS must monitor impacts to all tributaries impacted by the mining process.

DWQ should reject PCS's suggested modification limiting monitoring to a "representative number of streams." This vague phrase fails to account for the scale of the proposed impact. The mine expansion that would be approved by this 401 has caused substantial concern among state and federal resource agencies because of the anticipated impacts to water quality and aquatic communities. Short of avoiding the impacts, the only safeguard against this degradation is to monitor the impacted tributaries so that any deleterious effects will be detected and appropriate action can be taken. This monitoring of all impacted streams is essential: Condition 13 should not be modified to reduce monitoring requirements.

⁷ Letter from Ross Smith, PCS, to Colleen Sullins, DWQ, of December 19, 2008 at 8.

⁸ *Id.*

⁹ It should be noted that the "minimum safety width" that PCS cites in its response

¹⁰ See DEIS Appendix B at 16 (showing general U shape of pit indicating the wide surface opening necessary for a deep mining pit).

¹¹ FEIS at 5-9.

¹² DEIS Appendix B, pp. 6.

¹³ FEIS at 2-2.

Please do not hesitate to contact me at (919) 967-1450 if I can provide any additional information related to these comments.

Sincerely,


Geoffrey R. Gisler
Staff Attorney

cc:

Robin Smith, DWQ
Colleen Sullins, DWQ
Paul Rawls, DWQ
Cyndi Karoly, DWQ
Matt Matthews, DWQ
Kyle Barnes, DWQ
Heather Jacobs Deck, Pamlico-Tar River Foundation