



DEPARTMENT OF THE ARMY  
OFFICE OF THE ASSISTANT SECRETARY  
CIVIL WORKS  
108 ARMY PENTAGON  
WASHINGTON DC 20310-0108

MAY 06 2009

Mr. Michael Shapiro  
Acting Assistant Administrator  
United States Environmental  
Protection Agency  
Washington, DC 20460-0002

Dear Mr. Shapiro:

This is in reply to your April 3, 2009, letter requesting that I review the decision of the Army Corps of Engineers Wilmington District Commander to proffer a Department of the Army permit to Potash Corporation of Saskatchewan Phosphate Division, Aurora Operation (PCS Phosphate). Your request was made in accordance with our Clean Water Act Section 404(q) Memorandum of Agreement (MOA) of August 11, 1992.

We have carefully reviewed the concerns raised in your letter, the administrative record, including the Corps draft Record of Decision (ROD) and permit and special conditions, and information provided by the applicant. An important aspect of our review was a visit to the project site where staff from our agencies were able to observe existing mining operations, reclamation areas, completed advance compensatory mitigation projects, existing landscape conditions, and the aquatic resource areas of concern to environmental resource agencies. We found the briefings by the applicant and your staff most informative. A detailed summary of my staff's review is provided at enclosure 1.

The Corps prepared an environmental impact statement (EIS) and a supplemental EIS for public review and comment, disseminated public notices, held public meetings, and established an interagency review team consisting of applicant, State and Federal agency, and environmental advocacy group representatives. The applicant's expanded preferred alternative (EAP) would have affected 5,623 acres of wetlands, 24 acres of open water, and 89,150 linear feet of intermittent and perennial streams over a period of 50 years. As a result of the public involvement process, NEPA work, and identification of considerable avoidance and minimization measures; the project now being proposed for authorization will impact 3,961 acres of wetlands, 11 acres of open water, and 25,727 linear feet of intermittent and perennial streams over a period of 37 years. The Corps successfully worked with the applicant, Federal, and State resource agencies to significantly avoid and minimize impacts associated with the applicant's expanded preferred alternative.

In order to replace the predominantly low quality aquatic functions that would be lost as a result of mining activities, PCS Phosphate will be required to restore 44,043 linear feet of stream and 7,968 acres of wetlands, plus additionally preserve approximately 40,000 linear feet of stream and 3,200 acres of wetlands. A unique

aspect of the PCS Phosphate compensatory mitigation plan is that bottomland hardwood forest and other habitat types have already been constructed and functioning for 10-12 years. Compensatory mitigation will be accomplished prior to or concurrent with impacts for the life of the project. In addition, the mitigation sites selected for restoration and enhancement are part of a targeted watershed plan, and will provide water quality benefits to the watershed due to the reduction of agricultural runoff which has been identified by state water quality agencies to be the greatest contributor of nonpoint source pollution in the lower Tar-Pamlico River.

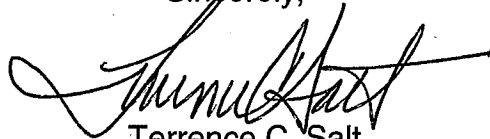
The Corps has added significant, project-specific, special conditions in response to concerns expressed by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (Enclosure 2). These special conditions to the proposed permit address your agency's concerns regarding adaptive management of the mining operation and compensatory mitigation success; reclamation site timing, capping, and re-vegetation; and indirect impacts to primary nursery areas (PNA). During my review, I considered the overall disturbed condition of the aquatic resources in the permit area, plans to avoid impacts to most of the higher quality areas, the extraordinary success of advance compensatory mitigation activities, and the amount and extent of compensatory mitigation in comparison to impacts. The Corps will require extensive monitoring and independent scientific peer review on an annual basis. Utilization of the monitoring information, which will also be made available to the public, will enable the applicant and resource agencies to manage adaptively. Based on the above, I have concluded that these impacts are neither substantial nor unacceptable.

Notwithstanding the above, I believe that additional measures to avoid impacts in some headwater areas may be possible. Therefore, I am directing the Corps to proceed with final action only after completing additional staff work and coordination. Although the applicant has worked hard to avoid and minimize impacts to aquatic resources, I have asked the Corps to continue to work with PCS Phosphate, your Region 4 staff and regional staff from USFWS and NMFS (if interested and available) over the next 10 days to look at specific opportunities to further reduce impacts to aquatic resources within Modified Alternative L, as generally described in the District's draft Record of Decision. Based on my review and discussions with agency staff, I would like the Corps to limit this effort to the headwater areas of Jacks, Jacobs, and Porter Creeks. These three locations appear to contain increments of headwater stream which are of particular concern to your agency as PNAs. The objective of this focused coordination effort is to quickly explore potential avoidance and minimization opportunities. For those that are practicable or otherwise agreed to by the applicant, the Corps will adopt them and revise their Record of Decision and other permit documentation as appropriate. Corps Headquarters will participate in these discussions as necessary and will keep me informed of the outcome of the focused coordination efforts. Once coordination is complete, the District Commander will proceed in accordance with Part IV, paragraph 3(h) of the 1992 MOA. I am confident I can rely on your support for this approach in order for a permit decision to be finalized by May 29, 2009.

I also am adopting the two recommendations made by Corps headquarters in their assessment (Enclosure 1). The first is a special condition developed to discourage future impacts to jurisdictional wetlands and streams avoided as part of this permit action. The second recommendation requires the Corps headquarters to work with the Wilmington District staff, through the South Atlantic Division office, to ensure that the Record of Decision clearly explains the aquatic resource functions being impacted at each site and how these functions are being replaced within the compensatory mitigation package.

If you have any questions or comments concerning my decision, please do not hesitate to contact me. Your staff may contact Mr. Chip Smith, my Assistant for Environmental, Tribal and Regulatory Affairs at (703) 693-3655.

Sincerely,

A handwritten signature in black ink, appearing to read "Terrence C. Salt", written in a cursive style.

Terrence C. Salt  
Acting Assistant Secretary of the Army  
(Civil Works)