Pamlico-Tar River Foundation, North Carolina Coastal Federation, Environmental Defense Fund and Sierra Club, Petitioners
v.
NC DENR, DWQ, Respondent and
PCS Phosphate Company, Inc., Respondent-Intervenor
09 EHR 1839
OAH Record

I. ALJ Decision 04-26-12

II. Petitions and Prehearing Statements
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Petitioners' Tar-Pamlico Prehearing Statement 04-23-09
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PCS's Prehearing Statement 04-23-09

III. Motions

1a. PCS's Consent Motion to Intervene 04-06-09
1b. Affidavit of Ross Smith 04-06-09
1c. Order Granting Consent Motion to Intervene 04-07-09

2a. Petitioners' Motion for Partial Summary Judgment 02-08-10
2b. Petitioners' Memorandum of Support for Motion for Partial Summary Judgment and Exhibits 02-08-09
2c. DWQ's Brief Opposition to Motion for Summary Judgment 03-18-10
2d. DWQ's Affidavit in Response to Motion for Summary Judgment 06-04-10
2e. Petitioners' Reply to DWQ's Opposition to Motion for Summary Judgment 05-10-10
2f. PCS's Response to Motion Summary Judgment 03-19-10
see also Section III. 4. PCS's Brief in Support
2g. Petitioners' Exhibits for Hearing on Motions 08-05-10 **(See F Page A-7)**
2h. PCS's Exhibits for Summary Judgment Hearing 08-05-10 **(See E Page A-7)**
2i. Petitioners' Memo Additional Authority for Pets' Motion 02-07-11
2j. PCS's Reply to Pets' Memo Additional Authority 03-01-11
2k. Petitioners' Notice of Supplemental Authority Pets' Motion Summary Judg. 08-03-11
2l. DWQ and PCS's Joint Response to Petitioners' Notice of Supplemental Authority 08-12-11
2m. Petitioners' Motion to Supplement Record 01-20-12
2n. PCS's Response in Opposition to Pets' Motion to Supp Record 01-31-12

3a. PCS's Motion to Dismiss 02-25-10
and PCS's Second Affidavit of Ross Smith and Exhibits 1 – 9 (**See A Page A-2**)
3b. PCS's Brief in Support of Motion to Dismiss 02-25-10
and Exhibits 1 – 48 **(See B Page A-3)**
3c. Petitioners' Brief Opposition to PCS's Motion to Dismiss 03-10-10

3d. PCS's Notice of Submission of Materials in Support of Motion 07-02-10
Exhibits 1 – 38 **(See C Page A- 5)**
3e. Order Denying Motion to Dismiss 07-16-10

4a. PCS's Motion for Summary Judgment 03-19-10
4b. PCS's Brief Support Motion Summary Judgment 03-19-10
and Opposition to Pets' Motion Partial Summary Judgment
and Affidavits: J. Gregory, Ross Smith 3rd, S. Cooper
and Exhibits 1 – 58 03-19-10 **(See D Page A-6)**
4c. Petitioners' Brief in Opposition to PCS's Motion Summary Judgment
and Reply in Support Pets' Motion Partial Summary Judgment 05-10-10
4d. PCS's Reply Brief Support PCS's Motion Summary Judgment 06-07-10
4e. Respondent's Memorandum Additional Authority 09-13-10
4f. PCS's Submission of Materials Supplement Motion Summary Judgment 09-13-10

IV. General Motions, Orders, and Scheduling Matters

1. Case Assignment and Scheduling Orders
2. DWQ, PCS Motion Extension Time Respond Summary Judgment 02-17-10
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Tab

A. Notice of Deposition of Environmental Defense Fund and Deposition of Sam Pearsall, PhD

B. Amended Notice of Deposition of NC Coastal Federation and Deposition of Todd L. Miller, Designee

C. Notice of Deposition of Sierra Club and Deposition of Molly Diggins

D. Notice of Deposition of Pamlico-Tar River Foundation and Deposition of Heather Deck

Exhibits to 2nd Affidavit of Ross Smith

1. Review Team
2. Entrix Report
3. FEIS Excerpts
4. 401 Renewal Application
5. Entrix Memo April 24, 2009
6. Entrix Memo April 26, 2009
7. Elevation Decision:

   7A. Letter from Dept. of Army to EPA May 6, 2009
   7B. Depart. of Army Memo April 28, 2009
   7C. HQ Analysis of Options Paper April 28, 2009

8. Record of Decision
9. 404 Permit

B Exhibits 1 - 48 to PCS's Brief Motion to Dismiss

INDEX OF DEPOSITION EXHIBITS

Exhibit #	**Document Description**
1.	Petition for a Contested Case Hearing (09 EHR 1839)
2.	Petitioners' Prehearing Statement
3.	Appendices of the Draft EIS for PCS, Aurora, NC
4.	PTRF Handwritten notes re: telephone call with EPA on *3/10/08*
5.	Letter to PTRF Members re: rationale and action in contesting 401 Cert
6.	Questions to PCS re: mine expansion
7.	Email (memo?) from Mary Alsentzer re: PCS
8.	Email from Joe Rudek to Heather re: flexible buffer mitigation June 27, 2008
9.	Modified Alt L — Federal Agency Line
10.	Notice of Rule 30(b)(6) Deposition of Environmental Defense Fund
11.	PCS Mine Continuation DEIS August 2006 Figures — page 3

12. PCS Mine Continuation DEIS August 2006 Figures — page 2
13. PCS Mine Continuation — Alt L — proposed impact boundaries 1/5/09
14. Notice of Rule 30(b)(6) Deposition of Sierra Club
15. Amended Notice of Rule 30(b)(6) Deposition of NC Coastal Federation
16. (Unknown)
17. Jan. 30, 2009 email from Heather Deck to Stephenson re: Timeline of Events
18. 15A NCAC 02B.0255 — Tar-Pamlico River Basin- NSW Management Strategy
19 June 6, 2008 letter from Smith to Karoly (DWQ) re: applicant for a 401 WQC
20. Appendix 1 (PCS) Draft Conceptual Mitigation Plan
21. May 15, 2008 email R. Smith to Dorney re: 401 WQ Cert with buffer condition
22. June 24, 2008 email from Dorney to Heather Jacobs stating that the EMC will
23. June 30, 2008 memo from Dorney to McGee re: DWQ Comments on Final EIS
24. Handwritten notes re: DWQ/PCS meeting on July 9, 2008
25. Memo July 17, 2008 from Hill and Eric Kula to Dorney re: Comments Plan
26. August 4, 2008 email, from Ross Smith to Dorney reports were received
27. Letter August 7, 2008 from DWQ to Ross Smith asking for more information
28. Letter September 4, 2008 from Ross Smith to Dorney request for add info
29. EMC — WQ Committee September 11, 2008 PCS's red for major variance
30. Letter November 3, 2008 from Ross Smith to John Dorney supplying further
31. Letter December 5, 2008 from DWQ to Ross Smith approving the401 WQC
32. Letter January 15, 2009 from DWQ to Ross Smith modeling approval of 401
33. Working draft Memo from DWQ December 3, 2008 stating stance on location of the buffer mitigation for restoration and enhancement credit
34. Letter December 10, 2008 from Aim Matthews to Dan Oakley of DENR re:
35. News Release from DWQ December 18, 2008 re: SL 2008-152
36. Copies of emails July 10, 2008 from John Dorney to Michael Schafale re: mtg
37. Letter December 19, 2008 from Ross Smith to Sullins re withdraw of 401
38. PCS/SELC January 23, 2009 meeting notes - handwritten
39. Memorandum to File from John Dorney January 14, 2009 re PCS mine expansion
40. DWQ/PCS January 12, 2008 meeting notes — handwritten
41. Email from Jimmie Overton to John Dorney February 12, 2008 and Fleek's comments
42. Letter from SELC to Paul Rawls, DWQ, November 7, 2008 requesting that PCS
43. Letter from SELC to Paul Rawls, DWQ, November 26, 2008 re to PCS's letters
44. Email from Heather Jacobs Deck to John Dorney December 16, 2008 suggesting
45. Letter from SELC to Frank Crawley January 6, 2009 offering comments to DWQ's
46. Letter from SELC to John Dorney, DWQ, January 6, 2009 offering comments on
47. Letter from SELC to Colleen Sullins January 9, 2009 PCS's revised mining plan
48. Letter from DWQ to SELC January 14, 2009 no meeting offering public comment

C <u>Exhibits 1 – 38 to PCS's Notice of Submission</u>

JUNE 30, 2010 HEARING On Intervenor PCS's Motion to Dismiss

Index of PCS Exhibits

1. Permit Project Area, April 22, 2008 (Exhibit 59)
2. Permit Project Area with Bonnerton, NCPC, April 22, 2008 (Exhibit 59A)
3. Bing Map of Immediate Area (Exhibit 60)
4. Bing Map of Pamlico River Area (Exhibit 61)
5. Bing Map of Arca with Pamlico Sound (Exhibit 62)
6. Albemarle Pamlico Estuarine System with River Basins color coded (Exhibit 63)
7. NCPC Alternative L Boundary Reclamation Plan, May 9, 2008 (Exhibit 64)
8. Bonnerton Alternative L Boundary Reclamation Plan, May 9, 2008 (Exhibit 65)
9. South NC 33 Alternative L Boundary Reclamation Plan, May 9, 2008 (Exhibit 66)
10. Notice of Rule 30(b)(6) Deposition of Pamlico-Tar River Foundation (Exhibit 67)
11. Intervenor's First Set of Interrogatories and Request for Production to Petitioner
12. Affidavit of David Emmerling (PTRF) dated May 14, 2009 (Petitioner's Exhibit 1)
13. Affidavit of Todd Miller (NCCF) dated May 11, 2009 (Petitioner's Exhibit 2)
14. Affidavit of Samuel Pearsall (EDE) dated May 13, 2009 (Petitioner's Exhibit 3)
15. Affidavit of Molly Diggins (Sierra Club) dated May 19, 2009 (Petitioner's Exhibit 4)
16. Affidavit of Richard M. Leach dated October 7, 2009 (Petitioner's Exhibit 6)
17. Tax Information and Property Details owned by Richard McPhail Leach at (Exhibit 69)
18. Google Map Local (Exhibit 70A)
19. Google Map Area (Exhibit 70B)
20. Google Map proximity to PCS (Exhibit 70C)
21. Summary (Exhibit 70D)
22. Affidavit of Charles P. Adams, Jr. dated March 1, 2010 (Petitioner's Exhibit 5)
23. Tax Information and Property Details owned by Charles P. Adams, Jr. (Exhibit 71)
24. Google Map Local (Exhibit 72A)
25. Google Map Area (Exhibit 72B)
26. Google Map proximity to PCS (Exhibit 72C)
27. Summary (Exhibit 72D)
28. Affidavit of David C. Schwartz dated March 1, 2010 (Petitioner's Exhibit 7)
29. Tax Information and Property Details owned by David C. Schwartz (Exhibit 73)
30. Google Map Local (Exhibit 74A)
31. Google Map Area (Exhibit 74B)
32. Google Map proximity to PCS (Exhibit 74C)
33. Summary (Exhibit 74D)
34. Articles of Organization Cardinal Canoe LLC filed with NC Sec of State July 30, 2009
35. LLC Annual Report for Cardinal Canoe dated March 24, 2010 (Exhibit 76)
36. City of Greenville Privilege License information (Exhibit 77)
37. Excerpts from SELC Brief in Opposition to Motion to Dismiss
38. Neuse River Foundation, Inc. v. Smithfield Foods, Inc. quote

D Exhibits 1 – 58 to PCS's Brief Support Motion Summary Judgment

1. Review Team
2. Entrix Report
3. FEIS Excerpts
4. 401 Renewal Application
5. Entrix Memo April 24, 2009
6. Entrix Memo April 26, 2009

7. Elevation Decision:
    - 7A. Letter from Dept. of Army to EPA May 6, 2009
    - 7B. Depart. of Army Memo April 28, 2009
    - 7C. HQ Analysis of Options Paper April 28, 2009
8. Record of Decision
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10. FEIS Excerpts
    - 10A. Public Notice
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    - 10E. FEIS Parts 1-4
    - 10F. FElS Part 5 (excerpts)
    - 10G. Compensatory Section 404/40 1 Mitigation Plan
11. Review Team Minutes
12. DWQ Memo to File January 14, 2009
13. EPA Memo August 1993
14. PCS Letter to Corps August 31, 2007
15. Clarification Statement by DWQ Director
16. Bonnerton NWIJF Site Survey Report
17. Sparrow Road NWHF Site Survey Report
18. SELC letter to Corps July 7, 2008
19. E-mail, Walker to Smith November 27, 2007
20. EPA letter to Corps April 30, 2008
21. Attorney General Opinion Letter March 21, 1995
22. Curtis Brown Affidavit July 7, 2008
23. Environmental Services Letter July 7, 2008
24. PCS letter to DWQ December 19, 2008
25. NHP Biennial Protection Plan (2009)
26. NHP Case: DENR's Motion to Dismiss June 1, 2009
27. NHP Regional Inventory dated September 1992
28. Schafale Field Notes January 2005
29. NHP Inventory Guideline
30. Schafale Field Notes April 2005
31. Schafale Email to Fox April 7, 2009
32. Schafale Emails to Fox
33. NHP Biennial Protection Plan (2005)
34. NHP Website Disclaimer

35. Schafale "Nonriverine Wet Hardwood Forests" 2008
36. EPA/Corps Silvicultural Guidance Memo February 27, 1996
37. DWQ letter to PCS August 7, 2008
38. DWQ Memo June 30, 2008
39. NCDENR Press Release December 5, 2008
40. Email, DWQ Notice of 401 Certification December 5, 2008
41. PCS-DWQ Meeting Notes December 12, 2008
42. Email, Deck to Dorney December 16, 2008
43. Email, PCS to DWQ December 19, 2008 (transmitting Exhibit 24)
44. Email, Deck forwarding Dorney email December 19, 2008
45. Emails, Deck to Dorney and response January 5, 2009
46. SELC letter to DWQ January 6, 2009
47. SELC letter to EMC January 6, 2009
48. SELC letter to DWQ January 9, 2009
49. DWQ letter to SELC January 14, 2009
50. Corps' Public Notice of Initial Applications (401 and 404) Jan 9,2001
51. Corps' Public Notice of Revised Applications (401 and 404) Oct 4, 2001
52. PCS letter to DWQ, September 4, 2008
53. PCS letter to DWQ, November 3, 2008
54. Revised Proposed Impact Maps, January 6, 2009
55. Dorney Deposition Excerpts
56. PCS letter to DWQ March 2, 2010
    56A. Stream Buffer Impact and Mitigation Calculations
57. 401 Certification December 5, 2008
58. 401 Certification January 15, 2009

Deposition of Michael Schafale June 30, 2009

Deposition of Linda Pearsall June 29, 2009

Exhibits to Depositions

E PCS's Exhibits for Summary Judgment Hearing 08-05-10

unnumbered: Powerpoint Presentation pages 1 – 40
unnumbered: Tar-Pamlico River Basinwide WQ Management Plan

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1.	Albermarle Region	Pet. Ex. 38
2.	Mine Continuation FEIS 5-3	Pet. Ex. 39
3.	Mine Continuation FEIS 5-12	Pet. Ex. 5
4.	Map — Alternative L Dragline	Pet. Ex. 40
5.	NC Gen. Statute 150B-23	Pet. Ex. 41
6.	33 US § 1341	Pet. Ex. 42

7.	40 CFR § 121.2	Pet. Ex. 43
8.	15A NCAC 02B.0259	Pet. Ex. 44
9.	EMC Report of Proceedings on Proposed Rules for Protection and Maintenance of Riparian Areas in the Tar-Pamlico River Basin (1999), P. 36	Pet, Ex. 3
10.	Dep't of Natural Res. & Cmty Dev., Tar-Pamlico River Basin Nutrient Sensitive Waters Designation & Nutrient Management Strategy (1989), p. 6, 7	Pet. Ex. 1
11.	EMC Report of Proceedings on Proposed Rules for Protection and Maintenance of Riparian Areas in the Tar-Pamlico River Basin (1999), p.2	Pet. Ex. 3
12.	05-23-08 FEIS p. 3-10	Pet. Ex. 45
13.	PCS Flexible Buffer Mitigation Variance Request (Feb. 20, 2006),	Pet. Ex. 11
14.	Email from Ross Smith, PCS, to John Dorney, DWQ (May 15, 2008)	Pet. Ex. 46
15.	401 Application for 401Water Quality Certification (June 6, 2008),	Pet. Ex. 8
16.	Email from John Dorney, DWQ, to Jacobs, PTRF (June 24, 2008)	Pet. Ex. 27
17.	Memorandum from Dorney, DWQ, to Melba McGee (June 30, 2008)	Pet. Ex. 17
18.	Memorandum from Tammy Hill and Eric Kulz, DWQ, to Dorney (July 17, 2008)	
19.	Ltr from Paul Rawls, DWQ, to Ross Smith, PCS (Aug. 7, 2008), p. 2, 4	Pet, Ex. 19
20.	Letter from Ross Smith, PCS to John Dorney, DWQ (Sept. 4, 2008)	Int. Ex. 52
21.	PCS Phosphate Company, Inc. Request for Major Variance from the Tar-Pam Buffer Rules (15A NCAC 2 B .0259) (Sept. 10, 2008), p. 3, 4	Pet. Ex 10
22.	Letter from Ross Smith, PCS, to John Dorney, DWQ (Nov. 3, 2008), p. 2	Int. Ex. 53
23.	NC. DWQ, Guidance tor Flexible Buffer Mitigation, Version 2.3 (Dec. 3, 2008)	Pet. Ex. 13
24.	DWQ, Buffer Interpretation/Clarification #2008-020 (Dec. 3, 2008)	Pet. Ex. 14
25.	Letter from Ann Matthews, NC DOJ, to Dan Oakley (Dec. 10, 2008)	Pet. Ex. 24
26.	NC DENR, Implementation of Session Law 2008-154 (Dec. 18, 2008)	Pet. Ex. 25
27.	Memorandum from John Dorney, DWQ to File (Jan. 14, 2009) p. 4, 5	Pet. Ex. 23
28.	401 Water Quality Certification No. 3771 (Jan. 15, 2009), p. 3-5	Pet. Ex. 4
29.	John Dorney Meeting Notes (Jan. 23, 2009)	Pet. Ex. 29
30.	Deposition of John Dorney, August 13, 2009, p. 27, 75	Pet. Ex. 12
31.	Session Law 2009-337 — Senate Bill 755, p. 3-4	Pet. Ex. 47
32.	Letter from Ross Smith, PCS, to John Dorney, (March 2, 2010)	Pet. Ex. 48
33.	Letter from John Dorney, DWQ, to Ross Smith, PCS (April 1, 2010)	Pet. Ex. 30
34.	Map of Bonnerton Hardwoods	Pet. Ex. 49
35.	15A NCAC 02H.500 Water Quality Certification	Pet. Ex. 50
36.	05-23-08 FEIS p. 3-38	Pet. Ex. 51
37.	Army Corps of Engineers Public Notice (May 22, 2008), p. 3	Pet. Ex. 52
38.	401 Water Quality Certification No. 3771 (Dec. 5, 2008) p.5-6	Pet. Ex. 6
39.	401 Water Quality Certification No. 3771 (Jan. 15, 2009), p. 6	Pet. Ex. 4
40.	Memorandum from John Dorney, DWQ, to File (Jan. 14, 2009), p. 4	Pet. Ex. 23
41.	John Dorney Meeting Notes (Jan. 23, 2009)	Pet. Ex. 29
42.	Deposition of John Dorney (August 13, 2009), p. 102, 104	Pet. Ex. 12
43.	Settlement of PCS v. NC. Natural Heritage Program (Feb. 12, 2010)	Int. Ex. 15

44.	Resp. Brief in Opposition to Pets' Motion for Partial Summary Judgment (March 18, 2010), p.24	Pet. Ex. 53
45.	15A NCAC 02H.0506	Pet. Ex. 54
46.	Deposition of John Dorney (Aug. 13, 2009), p. 98-99	Pet. Ex. 55
47.	401 Application for 401 Water Quality Certification (June 6, 2008)	Pet. Ex. 8
48.	05-23-08 FETS p. 2-28	Pet. Ex. 26
49.	Respondent's Brief in Opposition to Petitioners' Motion for Partial Summary Judgment (March 18, 2010) p.28	Pet. Ex. 56
50.	Brief in Support of Intervenor's Motion for Summary Judgment (March 18, 2010), p. 28	Pet. Ex. 57
51.	15A NCAC 02B.0259	Pet. Ex. 58
52.	Deposition of John Dorney (Aug. 13, 2009) p. 29	Pet. Ex. 12
53.	Deposition of John Dorney (Aug. 13, 2009) p. 69	Pet. Ex. 59
54.	Brief in Support of Intervenor's Motion for Summary Judgment (March 18, 2010), p. 37	Pet. Ex. 60