



## ORCA: Oregon Coast Alliance

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### *Protecting the Oregon Coast*

David Pratt  
Planning Director, Curry County  
Public Services Department  
94235 Moore Street  
Gold Beach, Oregon 97444

August 16, 2011

Sent via Electronic Mail

Re: AD-1106, Request for a Conditional Use Permit

Dear Mr. Pratt,

The Oregon Coast Alliance (ORCA) submits these comments on behalf of itself and its members in Curry County on the application of Tidewater Contractors, Inc. ("Tidewater") for a renewable three-year conditional use permit to mine up to 36,000 cubic yards of aggregate each year on a portion of the millsite property located in the Forestry-Grazing (FG) zone, with a Shoreland (SO) and Natural Hazard (NH) floodplain overlays. ORCA is an Oregon nonprofit organization whose mission is to protect coastal natural resources and work with coastal residents to create sustainable communities.

#### Introduction

The Rogue River is a nationally renowned river, known for its whitewater, salmon runs and scenic beauty. It is one of twelve original Wild and Scenic Rivers recognized by Congress in 1968, and people travel from all over the world to experience it. It is also a significant Goal 5 resource, providing essential fish habitat. It provides outstanding recreation opportunities based on the diverse fish, wildlife, and biological resources. It contains listed Coho Salmon under the Endangered Species Act.

Tidewater was previously permitted to engage in scalping at the millsite under permit AD-0910, and mining was permitted for one year. Tidewater subsequently requested a renewal of the permit, but on Feb. 1, 2011, the Planning Commission denied the renewal, principally because Tidewater engaged in trench mining, which was outside

the scope of their permit. It is currently unclear what portion of Tidewater's mining consisted of permitted scalping and what portion consisted of illegal trenching. On May 2, 2011, the Board of Commissioners affirmed the denial, stating that Tidewater would need to submit a new application in order to continue mining at this site, because their mine plans had changed from the original approval.

Tidewater proposes to excavate gravel from point bar deposits adjacent to the Rogue River. The entire millsite property (i.e. the proposed site) consists of 152 acres, bisected by Jerry's Flat Road. Tidewater is requesting to mine on 43 acres; they propose to trench in the proposed mining area, digging trenches 1,000 feet long, with an average width of 50-75 feet.

The millsite has been the subject of a cursory industrial waste inspection, but there has been no hydrologic study. The millsite is listed on DEQ's Environmental Contaminated Site Index (ECSI) as the former Gold Beach Plywood Inc., Site ID 781. The ECSI report states that there are two contaminated log ponds. There are spill reports for Garlon 4, a herbicide, in 1984. In 1991, a fire destroyed the plant, and asbestos and transformers containing PCBs were found. In addition, the berm, which protects the mining area, has experienced significant erosion.

Most important for the Planning Commission's consideration, Tidewater's new application proposes to mine using trenching, rather than bar scalping. Trenching is generally held to be the most invasive and damaging form of instream gravel mining, and is also very damaging in floodplain areas such as the millsite gravel bar. Tidewater describes its trenches as being 5-15 feet *deep*, 500-1,000 feet *long* and 50-75 feet *wide*. They will be slightly back from the river's edge, somewhere between 50 to 75 feet; but as the entire area is hydrologically connected to the nearby river, and routinely covered by water in the winter season, this will not help much. The National Marine Fisheries Service (NMFS) National Gravel Extraction Guidance document from 2006 lists the various problems with dry pit and wet pit mining in floodplains. Among the problems are reductions in groundwater elevation that then results in decreased streamflow, which is hazardous to fish during low flow periods. Also, since pits and streams are often (as in this case) hydrologically connected, stream temperatures can increase when pit water is heated by the sun and then eventually returns to the stream. This harms salmonids, who depend on cold water. Other problems can occur depending on reclamation results.

There is little in Tidewater's history, at this site or the Wedderburn site, to indicate that the company will act sensitively and appropriately in further mining the millsite gravel bar. A history of two Notices of Violation at Wedderburn; continuing erosion of the riverbanks at the Wedderburn site due to Tidewater's past illegal and/or careless activity; sediment plugging the upper estuary due in part to the Rogue capturing Tidewater's illegal pit at Wedderburn; two Violations at the millsite topped off with a Stop Work order; illegal trenching at the millsite down to groundwater, as was expressly forbidden in 2010 operating permits; mining without a 1200A stormwater permit at the millsite in 2010 – all this adds up to a picture of a mining company that should not be allowed to continue its activity on the Rogue River. In addition this same upper estuarine area is the site of the water intakes for both the City of Gold Beach and the Ophir-Nesika Water District. Curry County should not allow Tidewater to mine at this site.

## Jurisdiction

The Oregon Department of State Lands (“DSL”) and the Army Corps of Engineers (“Corps”) have jurisdiction over mining that occurs from the riverbed to the MHHW line or the OHW line, *see* OAR 141-085-0515, and the Oregon Department of Geology and Mineral Industries (“DOGAMI”) has jurisdiction over mining above the MHHW line or OHW line. The Plan delegates authority to DSL to determine the location of the boundary line on a case-by-case basis during permit review. Under current law, DSL and the Corps share jurisdiction over permits for gravel mining between the river bed and the MHHW line or OHW line. Tidewater alleges to have determined the location of the OHW line in consultation with the Corps. However, DOGAMI has not yet received confirmation from DSL or the Corps accepting the location of the OHW line. In addition, Tidewater has submitted a wetlands delineation and an identification of the OHW line to the Corps, but the Corps has not indicated that it has accepted the wetlands delineation or the location of the OHW line. *See* Exhibit A (8.10.11 DOGAMI Memo).

In the absence of confirmation from the DSL or the Corps, ORCA encourages the Planning Commission to deny the application, or, in the alternative, to limit the permit for mining operations to one year.

ORCA also urges the Planning Commission to deny the application on another ground. The trench mining will lower the flood level: “[b]y the very nature of sand and gravel extraction, this development would logically not result in a flood level rise, but actually lower the level due to the fact that material has been removed.” (Tidewater application, p. 35). In addition to removing significant amounts of aggregate and other material, which will lower the flood level, the “bottom of the mined area will be graded to slopes of 0.5 to 1 percent toward the river to promote flood water drainage out of the excavated area and to avoid fish entrapment as flood waters withdraw.” While Tidewater’s actions may be aimed at extracting aggregate and avoiding fish entrapment, they have the practical effect of raising the OHW line. That is, removing significant amounts of material and grading the flood plain will *raise the OHW line* by lowering the flood level. Tidewater has ignored whether this will result in mining occurring below the OHW line, and, as a result, the application should be denied until the Corps has addressed this issue.

Furthermore, it is undisputed that Tidewater will trench into groundwater. It is also undisputed, as Tidewater concedes, that the groundwater is hydrologically connected to the Rogue River: “Flow direction of groundwater, if known: “to river.” Exhibit C at 4. As a result, when Tidewater trenches and reaches groundwater, that groundwater constitutes “waters of the United States.” Although the incidental fallback from removing the material does not trigger the Corps’ section 404 jurisdiction, the redeposit of that material *does* require a section 404 permit. *Nat’l Assoc. of Home Builders v. US Army Corps of Engineers*, 01-0274 (JR), January 30, 2007, D.C. District Court. Therefore, Tidewater must obtain a section 404 permit from the Corps prior to commencing any mining activity.

## Endangered Species Act

The Rogue river contains ESA-listed Coho Salmon. Tidewater concedes that impacts to fish may occur as a result of mining operations: “Indirect impacts of fish could, however, come from pollution or turbidity introduced into the river from the mining operation, but this is not likely considering that BMPs incorporated in the design.” (Tidewater application, p. 31). While Tidewater relies only on Best Management Practices to prevent a taking from pollution or turbidity, Tidewater ignores that settling of the in-filled area may result in ponding that can entrap salmon. Tidewater relies heavily on its past mining reclamation to ensure that future mining reclamation will not result in settling and ponding. As noted above, it is unknown how much of Tidewater’s former activity was trenching (i.e. illegal) or scalping (i.e. permitted). If it was primarily scalping, then an analogy to the more intensive trenching is erroneous.

Section 10 of the ESA provides a procedure by which a private party may obtain a permit to engage in the incidental taking of a listed species provided the “taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.” 16 USC 1539(a)(2)(B)(iv). If the private party complies with the requirements of the incidental take permit, any taking of a listed species will not violate ESA Section 9. *See* 16 USC 1539(a)(1)(B). A habitat conservation plan must accompany an application for an incidental take permit. The habitat conservation plan ensures that the effects of the authorized incidental take are adequately minimized and mitigated. Therefore, Tidewater must obtain an incidental take permit.

## Groundwater is regulated under the Clean Water Act

Courts have largely held that groundwater connectivity establishes jurisdiction under the Clean Water Act when a clear connection between a discharge of pollutants and navigable waters is evident. *See Friends of the Coast Fork v. Turner*, 1996 U.S. DIST. LEXIS 22083, 11-12 (D.Or. 1996) (groundwater comes within the purview of the CWA when pollutants are traced from their source through the groundwater and into protected surface waters); *Williams Pipe Line v. Bayer*, 964 F.Supp. 1300, 1319-1320 (S.D. Iowa 1997) (holding that “[t]he majority of courts have held that groundwaters that are hydrologically connected to surface waters are regulated waters of the United States”).

EPA’s most thorough discussion of hydrologic connectivity between surface and ground waters explicitly eschews “establish[ing] any specific criteria beyond confining the scope of the regulation to discharges to surface water via a ‘direct’ hydrologic connection.” 66 Fed. Reg. 2,960, 3,017 (Jan. 12, 2001). *See also Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (holding that weight to be accorded agency’s judgment “will depend upon the thoroughness evident in its consideration”). Instead, EPA sought to establish a clear boundary, for purposes of applying the CWA’s discharge requirements, between “a general hydrologic connection between *all* waters” and “a ‘direct’ hydrologic connection to the surface waters at issue.” 66 Fed. Reg. at 3,017. While EPA recognized that “time and distance” may be appropriate factors to consider in determining whether a direct hydrologic connection exists, the agency ultimately did not elevate any criterion over “directness” in the CWA analysis. *See id.*; *see also id.* at 3,018

("[T]he Agency has determined that when it is reasonably likely that such discharges [via groundwater] will reach surface waters, the goals of the CWA can only be fulfilled if those discharges are regulated.").

The EPA's position, which was reached after a thorough discussion of the CWA's statutory language and legislative history and relevant case law, is persuasive and therefore warrants deference. See *id.* at 3,015- 18; see also *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (holding that informal agency pronouncements "are 'entitled to respect' ... to the extent that those interpretations have the 'power to persuade'" (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944))); *Vigil v. Leavitt*, 381 F.3d 826, 834-35 (9th Cir. 2004) (according Skidmore deference to EPA statutory interpretation advanced in Federal Register notice).

As noted previously, Tidewater concedes that the groundwater is moving in the direction of the river. It is also notable that Tidewater carried out its trenching activity in 2010 without authorization from the County or a permit from the Corps. Groundwater will be exposed in the mining area: "[a]s the trench is excavated, the first sign of standing water in the bottom of the trench will define the water level." Exhibit A at 3; see also Exhibit A at 5 ("Contact DOGAMI within 48 hours of interception of groundwater in the excavation areas"). In essence, Tidewater will trench until it reaches groundwater. Exhibit A at 3 ("When that groundwater is intercepted the permittee will partially backfill the trench to at least the level of the groundwater"). If Tidewater does, in fact, dredge or fill exposed groundwater, then Tidewater will be liable under the Clean Water Act without a section 404 permit or applicable state permit.

However, in the Staff Report Tidewater alleges that it does not propose dredging or dredge material disposal; the Staff Report explicitly states that all excavated material will either be removed from the site or used for recontouring the surface prior to reclamation (p. 33).

Because Tidewater will be trenching into groundwater, 33 CFR 323.2(c) ("dredged" material as "material that is excavated or dredged from the waters of the United States"), removing material, and then subsequently redepositing the material in the trench, Tidewater must obtain a section 404 permit for dredge and fill material. Because groundwater is considered a "waters of the United States," redepositing the material to "recontour" the surface constitutes "fill." "Fill" material is defined as "material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody." 33 C.F.R. 323.2(c). The amount of time between trenching and redepositing is highly relevant to whether the redeposit of material entails fill. See *Nat'l Assoc. of Home Builders v. US Army Corps of Engineers*, 01-0274 (JR), January 30, 2007, D.C. District Court.

### Groundwater Depth

Tidewater and the associated reviews of Tidewater's application present conflicting evaluations of the depth of the groundwater in the proposed mining area.

- Bill Mason of DEQ says that there is "shallow groundwater" in the proposed mine site (Tidewater application, p. 66).

- DOGAM states that the mine area has a maximum depth of 15 feet, and states that depth to the water table fluctuates seasonally. *See* 8.10.11 DOGAMI Memo (Exhibit A).
- “The revised 2011 Plan states that trenches will not be excavated below the depth of ground water at the time of excavation. This suggests that trench depths could be in the range of 5 to 15 feet, or more, depending on ground surface elevations in the mining area. Based on the 2010 mining, average depths appear to be in the 7 to 10 feet range.” Exhibit B at 2.
- The Operating and Reclamation Plan states that the groundwater depth is “about 7 ft.” Exhibit C at 4.
- “Based on the 2010 mining, average depths appear to be in the 7 to 10 feet range.” Exhibit B at 2.

Based on pictures of Tidewater’s previous illegal trenching, Tidewater probably trenched in excess of 15 feet, exposing groundwater in the project area. Given that the company has mined so heavily into the floodplain and into groundwater, they are, in essence, mining well below the OHW line, and a section 404 permit is required.

The failure to accurately predict groundwater depth is due in part to lack of knowledge. Even though the area at issue is an ECSI site, there is no hydrological study available. Without such a study, Tidewater will be digging in the dark. Therefore, a hydrological study should be required as a condition prior to mining.

#### Ambiguity regarding Tidewater’s previous activities

Either Tidewater only trenched during 2010, in which case it acted illegally throughout the entire previous year; or Tidewater trenched only part of the time, in which case relying on last year’s mining to predict environmental effects is in error. Trenching is dramatically different than scalping, with significant attendant environmental impacts. Proceeding under the assumption that Tidewater did not act outside of its authority the entire year, then Tidewater errs in relying on past actions.

For example, Tidewater alleges that

- “[o]verburden quantities are relatively small based on Newton observations during previous site investigation.” (Tidewater application, p 79). This is based on the previous application, which consisted primarily of scalping.
- Tidewater also alleges that “[b]ased on the 2010 mining, this technique worked quite successfully and there has been no apparent settling in the mined area.” Exhibit B at 3. Again, last year’s mining season consisted of a different mining method, at least on paper, and different extent of trenching than is currently proposed, and therefore the County cannot conclude, based on the previous mining, that similar effects will occur.
- Although the mining method is different from the 2009 Mining Plan, the overall operation described in the revised 2011 Plan is consistent with the

original plan relative to provisions for reclamation and grading of the mined area intended to avoid ponding of flood waters, fish entrapment, concentration of flood waters and velocity increases, and increased flood elevation. Exhibit B at 4.

- While the staff report recognizes extra mitigation measures necessary as a result of the “new trench mining method,” the County fails to recognize the same difference when it comes to the environmental impacts of ponding and settling. (Staff Report, p. 14). Much of what is discussed about erosion, ponding, and settling uses the 2010 mining activity to predict effects, but the two types of mining are completely different.
- Attesting to the scalping method primarily used during the 2010-2011 mining operation, the result was “no to very limited erosion.” Erosion was evident at the downriver end where wind kicked up the waves to expose gravel underlying the soil. (Staff Report, p. 32).

Though it is unclear how much illegal trenching occurred in the previous year, if only a small portion entailed trenching, then it is error to rely on the past reclamation activities to predict environmental effects from significant scalping because the two are dramatically different mining methods.

#### Operating and Reclamation Plan

Despite the fact that Tidewater proposes an entirely new method of mining, it relies on the same Operating and Reclamation Plan for reclamation. *See* Exhibit B at 2 (“The mining method in the revised 2011 Plan is trench excavation and backfilling, rather than side cutting into the sloping ground in a direction away from the river as proposed in the 2009 Plan.”). According to Newton Consultants, “[t]he revised 2011 Plan presented to Newton for review *is the same as the 2010 Plan* relative to reclamation and condition of the post-mining ground surface in the mined area.” (emphasis added). The very reason that Tidewater is seeking a permit is because it acted outside of the plan submitted to the County, yet Tidewater attempts to submit *the same* plan for reclamation as before.

#### Determine economic, social, environmental, and energy consequences of the conflicting uses CCZO 7.040(9)(c)

As noted by LUBA in the 2009 appeal of the County permit for the millsite, CCZO 7.040 “only requires that the applicant submit sufficient information to allow the county to review and set siting standards.” Without disclosing the likely impacts from trenching, the County cannot review and set siting standards.

Without a hydrological analysis, the County cannot determine the relevant economic, social, environmental, and energy consequences of the conflicting uses under CCZO 7.040(9)(c) and set informed siting standards. The GBIP Gravel mine is located on an old mill site that is listed on DEQ’s Environmental Contaminated Site Index (listed on ECSI as the former Gold Beach Plywood Inc. Site ID 781). The ECSI report states

that the two log ponds on the mill site are hydrologically connected to one another, and that one of them drains into the Rogue River:

[T]hese ponds are hydraulically connected with the larger ‘West Pond’ draining to the Rogue River. There is a report of a well on this portion of the site. Across Jerry’s Flat Road is the remainder of the property, which is undeveloped and in the river’s floodplain. The site is located in a Vulnerable Area due to several community wells and domestic wells recorded in the site vicinity. (Tidewater application, P. 62).

Because the river and the gravel bar are connected, and the river and the log ponds are connected, it is likely that trenching will disturb past pollution and lead to additional pollution of the river.

Tidewater alleges that the “project will not have a direct impact on the fish habitat of the Rogue River because the mine site is located in the uplands above the OHW level,” but this ignores the impacts from settling, ponding, and erosion. Even more, it ignores that intense trenching into groundwater may result in significant erosion.

Though there was a sample taken from a culvert and analyzed by Grants Pass Water Laboratory, the concern is not surface water, but groundwater or the sediments below the pond. A surface water sample is therefore insufficient, and groundwater samples, as well as a hydrologic study, must be completed as a condition to mining.

It is also alleged that that contaminants would not be an issue “unless groundwater was pumped from the trenches.” Regardless of whether groundwater is pumped from the site, Tidewater will breach the groundwater and groundwater will be taken up when it occurs. Tidewater’s estimates of groundwater vary considerably, and their past actions demonstrate that Tidewater trenched well over 15 feet. Groundwater will also be polluted when earth moving equipment dredges, transports, and redeposits the material in to the trench.

#### NPDES 1200-A Stormwater Permit

Tidewater’s application for a DEQ NPDES 1200-A permit is currently incomplete pending submittal of a new Land Use Compatibility Statement signed by the County Planning Department. Tidewater never received a 1200-A permit for mining at this site in 2010, though it was required. The 1200-A permit, if granted, should note that trenching is now the mining method proposed. Further, the permit must take into account that the dredge and fill process will also likely result in pollutants being added to the groundwater. In addition, it should note that pollutants will be added to groundwater via the dredging, hauling, and redeposit of the material.

Courts have widely held that the CWA specifically regulates discharges to groundwater that are hydrologically connected to surface waters. See e.g., McLellan Ecological Seepage v. Weinberger, 707 F.Supp 1182, 1196 (E.D. Cal. 1988) (“[w]hereas it is clear that Congress did not intend to require permits for discharges to isolated groundwater, it is also clear that Congress did mean to limit discharges of pollutants that could affect surface waters of the United States”), vacated on other grounds, 47 F.3d 325 (9th Cir); Friends of Santa Fe County v. LAC Minerals, 892 F.Supp. 1333, 1357-58 (D.N.M. 1995) (expressly rejecting the argument that “the CWA does not protect groundwater with some connection to surface waters”); Washington Wilderness Coalition

v. Hecla Mining Co., 870 F.Supp. 983, 989-90 (E.D.Wash.1994) (holding that, although Congress did not intend that the CWA regulate isolated groundwater, it does apply to discharges of pollutants that reach surface waters through groundwater); Sierra Club v. Colorado Refining Co., 838 F.Supp.1428, 1434 (D.Colo 1993) (where the Judge stated “I conclude that the Clean Water Act’s preclusion of the discharge of any pollutant into ‘navigable waters’ *includes such discharges which reaches ‘navigable waters’ through groundwater.*”) (emphasis supplied) (citations omitted). As EPA has explained with regards to its NPDES regulations, “discharges to groundwater are not covered by this rulemaking (unless there is a hydrological connection between the groundwater and a nearby surface water body.)” 55 Fed. Reg. 47990, 47997 (Nov. 16 1990) (preamble, NPDES permit regulation for storm water discharges) (emphasis added).

Courts have also repeatedly recognized the connection in the non-groundwater context. See Quivara Mining Co. v. United States Environmental Protection Agency, 765 F.2d 126, 130 (10th Cir. 1985) (requiring a discharge permit for a discharge into dry arroyos because the discharge ultimately affected navigable waters); United States v. Phelps Dodge Corp., 391 F.Supp. 1181, 1187 (D.Ariz. 1975) (holding that under the CWA navigable waters includes “any waterway within the United States also including normally dry arroyos through which water may flow, where such water will ultimately end up in public waters”); Residents Against Industrial Landfill Expansion v. Diversified Systems, Inc., 804 F.Supp. 1036 (E.D.Tenn 1992) (tributary of creeks can be considered navigable waters under the CWA); United States v. Texas Pipeline Co., 611 F.2d 345, 347 (10th Cir. 1979) (“the intent of the Act was to cover all tributaries ... [i]t makes no difference that a stream was or was not at the time of the spill discharging water continuously into a river navigable in the traditional sense”).

### Conditions

ORCA urges the Planning Commission to deny Tidewater’s application for mining at the millsite. If the Commission wishes to consider this application, then ORCA urges the following conditions be imposed before any consideration of final approval:

- Require a hydrologic study prior to any approval by Curry County.
- Establish a setback of 100 feet instead of the 50 feet setback proposed by Tidewater and the 75 feet proposed by the Staff Report.
- Authorize operations between June and September only.
- If there is evidence of groundwater contamination or if dumped material from the former millsite operation is exposed during mining activity, excavation operations must be immediately halted.
- Allow only a 1-year permit with a maximum of 18,000 cubic yards (30,000 tons).

ORCA also requests that the record be left open for the introduction of other materials relevant to proceeding. ORCA requests the record remain open for two weeks. Thank you for the opportunity to testify in this matter. Please enter this testimony into the record, and notify ORCA of further activity on this application.

Sincerely,

*/s/ Cameron La Follette*

Cameron La Follette  
Land Use Director

Enclosures

Exhibit A – Dogami 8-10-11 letter

Exhibit B – Newton Consultants' letter

Exhibit C – Operating and Reclamation Plan