



# Oregon

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## Department of State Lands

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### State Land Board

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## MEMORANDUM

Date: November 1, 2010

To: Senate Interim Committee on Environment and Natural Resources  
House Interim Committee on Agriculture, Natural Resources  
and Rural Communities  
The Honorable Deborah Boone, HB 2929 Sponsor

From: Louise Solliday, Director   
Department of State Lands

Subject: **Report on the feasibility of creating a single permit for the removal of sand and gravel for the waters of this state**

I am pleased to provide you with a copy of the report developed by the Department as directed by House Bill 2929 (2009). The report addresses the feasibility of creating a single permit for the removal of sand and gravel from waters of this state. Currently, sand and gravel operations may require separate permits from the Department of State Lands, Department of Environmental Quality and Department of Geology and Mineral Industries.

We would welcome the opportunity to meet with you to go over the report and answer any questions you may have.



**Sand and Gravel Removal  
Regulatory Process Improvement Study  
(HB 2929)**

Oregon Department of State Lands  
November 1, 2010

## **Introduction**

Oregon House Bill 2929 SECTION 4. (1) states:

“The Department of State Lands, after consultation with the Department of Environmental Quality and the State Department of Geology and Mineral Industries, shall study the feasibility of creating a single permit for the removal of sand and gravel from the waters of the state, as that term is defined in ORS 196.800.”

Section 4 also requires the Department of State Lands (DSL) to submit a final report regarding the study, including recommendations for legislation, to the interim legislative committees on the environment and natural resources on or before November 1, 2010.

This report fulfills the above requirements.

## **Study Purpose and Efforts to Streamline Regulatory Process**

The purpose behind the study was to identify ways to relieve the regulatory burden for the removal of sand and gravel from waters of the state for use by the concrete and aggregate industry. DSL has for several years pursued ways to streamline regulatory permitting for sand and gravel removal in partnership with multiple state and federal partner agencies. Oregon state agencies include the Department of Environmental Quality (DEQ), Department of Geology and Mineral Industries (DOGAMI), Oregon Department of Fish and Wildlife (ODFW), Oregon Department of Forestry (ODF), Oregon Department of Agriculture (ODA), Oregon Parks and Recreation Department (OPRD), and Water Resources Department (WRD). Federal partner agencies include the U.S. Army Corps of Engineers (USACE), National Marine Fisheries Service (NMFS), and U.S. Fish and Wildlife Service (USFWS).

Experience with past projects and prior efforts to streamline regulatory process have made clear that efforts to relieve regulatory burdens will provide the greatest benefits if they address both state and federal regulatory requirements. DSL, with support from the Oregon Concrete and Aggregate Producers Association (OCAPA), has focused its efforts on gravel extraction from coastal rivers and streams via the Regional Gravel Initiative (RGI). Gravel extraction operations in Oregon coastal rivers and streams have nearly come to a standstill due to presence of salmon runs protected by the federal Endangered Species Act (ESA). The RGI is co-led by DSL and USACE. It includes local, state, and federal agencies along with industry partners, and has been working through in-water gravel mining issues over the last four years. The goal is to make more informed decisions concerning gravel extraction, i.e. bar scalping from dry beds, as those activities may impact habitat for salmon runs listed by the federal ESA, and to provide a coordinated permitting process allowing gravel extraction that meets the requirements of DSL, USACE and DEQ as the lead regulatory agencies.

The DSL and USACE strategy is to develop new streamlined permits covering gravel extraction in coastal systems - starting first with operations in the Chetco River as a pilot project. Industry is concerned the new programmatic permits being developed for these systems will result in significantly decreased amounts of material allowed for extraction relative to historic quantities. This will have an impact as well on the availability and cost of material required for local road and development projects – a ripple effect through the economy and community. On the other side, the natural resource agencies – NMFS and DEQ in particular – are concerned that continued bar scalping operations will negatively affect habitat, species of concern, and water quality. The goal of DSL and USACE has been to find a balance between these competing interests.

DSL and the USACE have developed a coordinated permitting process meeting the requirements of DSL, USACE, DEQ and NMFS and allowing ongoing extraction of gravel from the Chetco River in a sustainable manner. The USACE's process has recently been challenged by a lawsuit from the Northwest Environmental Defense Center. USACE and DSL are adjusting their processes in response to the lawsuit, and anticipate the coordinated state and federal permitting process will be in effect in time for gravel extraction in the Chetco River during the 2011 in-water work season.

DSL also engaged in the Water-Related Resources Permit Process Improvement Team effort (WRPPIT) with the Office of Regulatory Streamlining seeking to streamline permitting processes for multiple state agencies and to assist applicants in planning their water-related project to avoid last-minute “surprises” that may result in project delays.

### **Study Findings**

DSL's study and experience with multi-agency permitting resulted in the following findings.

**Permitting removal of sand and gravel from waters of the state requires authorization from multiple state and federal regulatory agencies.** This is particularly true in rivers and streams that support protected salmon runs. Approvals typically required include:

Oregon Department of State Lands

- Removal-Fill permit

Oregon Department of Fish and Wildlife

- In-water work period review
- Habitat mitigation review
- Fish passage review

Oregon Department of Environmental Quality

- Federal Clean Water Act Section 401 certification
- Federal Clean Water Act Section 402 1200-C construction storm water permit

Department of Land Conservation and Development

- Coastal Zone Management Act consistency determination

Department of Geology and Mining Industries

- Operating Permit

U.S. Army Corps of Engineers

- Federal Clean Water Act Section 404 permit

National Marine Fisheries Service

- Federal Endangered Species Act consultation (may or may not result in a take permit)

**The relationship between state and federal statutory authorities is complex.** State and Federal regulatory agencies often have overlapping jurisdictions. For example, the USACE regulates discharges of fill material into “waters of the U.S.” DSL regulates both fill and removal of material within “waters of the state.” “Waters of the U.S.” and “waters of the state” both cover the majority of streams, rivers, lakes and wetlands in Oregon, but there are significant differences in the jurisdictions of USACE and DSL that can confuse permit applicants.

There is also crossover between state and federal agencies. For example, DEQ regulates state water quality through Section 401 of the Federal Clean Water Act via delegation of authority by the federal Environmental Protection Agency. DEQ’s Section 401 regulatory authority does not extend to DSL’s removal-fill permitting process, but it does apply to the USACE’s Clean Water Act Section 404 permits.

**In general, state regulations and regulatory agencies are more protective of Oregon’s natural resources than federal regulations.** State regulations are tailored to the specific conditions in Oregon. Federal regulations address national and sometimes regional natural resource issues. State agencies’ staffs are generally more knowledgeable regarding local resources and environmental conditions and are more responsive and accountable to local needs than their federal counterparts.

**Regulatory process and government processes in general favor large companies with the resources to navigate permitting requirements.** Smaller operators lack the resources to do so as effectively. DSL is working with DEQ, DOGAMI and OCAPA to provide process and technical assistance to help small aggregate producers.

**DSL and DOGAMI do not have overlapping jurisdictions.** DSL regulates removal and fill of material in waters of the state. This includes sand and gravel mining with the “bed and banks” of rivers and streams as defined by the limit of “ordinary high water.” DOGAMI regulates mining activities in upland areas – areas above “ordinary high water.” DSL and DOGAMI do not have overlapping jurisdictions; however, a single

sand and gravel excavation project that occurs in both waters of the state and uplands would require authorization from both agencies.

**DEQ and DSL do have some jurisdictional overlap.** Both are charged with protection of the beneficial uses of state waters. DSL through state law; DEQ through a combination of assumption of federal statutory authorities and state law. A detailed overview of each agency's authorities is provided in the attached *State Water-Related Permit User Guide* developed by the Water-Related Permit Process Improvement Team.

DSL is charged with the protection, conservation and best use of water resources of the state through regulation of the removal and fill of material (ORS 196.805). DEQ protects the beneficial uses of Oregon's waters through implementation of the 401 water quality certification program the intent of which is to provide reasonable assurance that permitted activities will not violate state water quality standards, as approved by U.S. Environmental Protection Agency (EPA), and therefore will not impair water quality or beneficial uses of waters of the state (ORS 468B.020, 025, and 035 and Federal Clean Water Act Section 402). DEQ also regulates sediment discharges from storm water into surface waters from construction projects through its 1200-C construction storm water National Pollutant Discharge Elimination System (NPDES) permit program (ORS 468B.025 and Federal Clean Water Act Section 402). Both the 401 water quality certification and 1200-C construction permits are required by federal law. DEQ has delegated authority for these actions from the federal Environmental Protection Agency. These permit programs are not directly linked to DSL's removal-fill permits.

**Combining the DSL, DEQ and DOGAMI permit processes into one permit would require statutory changes.** State statutes could be changed to eliminate certain state resource protections or statutes could be changed to transfer authorities from one agency to another. Either strategy would be challenging to implement and would entail significant risks.

DEQ's state statutes are crafted to enable assumption from EPA of regulatory authority under the federal Clean Water Act. Changes to reduce protections or transfer water quality authority (e.g. to DSL or DOGAMI) would require approval from EPA and would open current statute and process to additional federal scrutiny.

DSL's statutes are not complicated by assumption of federal authorities. The Removal-Fill Law could be modified to exempt certain sand and gravel removal activities; however, such a proposal would be difficult to support given the policies in ORS 196.805 to protect and conserve water resources.

State statutes could be modified to transfer removal-fill authority to DEQ or DOGAMI; however, such a transfer would require the transfer of technical and support staff with the appropriate skills and training. Neither agency has the staff resources necessary to address waterway and wetland habitats and functions regulation required by the Removal-Fill Law.

**DSL, DOGAMI and DEQ have successfully coordinated on recent projects and initiatives.** The Regional Gravel Initiative, including the Chetco River aggregate extraction pilot permitting process, and permitting for the Oregon Resources Corporation's chromite sands mining proposal in Coos County are examples of successful coordination between the three agencies.

**There are numerous technical issues that must be addressed related to water quality and habitat effects of sand and gravel removal operations.** Permit applicants suffer from uncertainty and inconsistency from regulatory agencies regarding the permit conditions that will be imposed to protect the water resources of the state. There has been little research regarding the effects of sand and gravel operations such as dry bar scalping on water quality. This is particularly troublesome for DEQ as the agency must provide reasonable assurance that permitted activities will not violate state water quality standards, as approved by U.S. Environmental Protection Agency (EPA), and therefore will not impair water quality or beneficial uses of waters of the state. Research specific to the effects of sand and gravel operations on water temperature, turbidity and chemistry would be beneficial in identifying risks to the resource and suitable best practices to mitigate negative effects upon waters of the state.

### **Recommendations and Next Steps**

The Department of State Lands does not recommend legislative change to create a single permit for the removal of sand and gravel from the waters of the state. As described above, such legislation would be challenging to craft and pass, and would not provide adequate benefits. Such legislation would also not address the challenge of compliance with USACE and NMFS regulatory requirements.

The Department of State Lands will continue to work toward increased coordination and collaboration between state (DSL, DEQ, DOGAMI, ODFW, DLCDD), federal regulatory agencies (USACE, NMFS), industry (OCAPA) and environmental groups to streamline the regulatory process for sand and gravel removal. Continuation of the Regional Gravel Initiative will serve this purpose. Such coordination and collaboration should: strive to align regulatory requirements between regulatory agencies; synchronize permit timelines and information requirements; move towards an outcome-based rather than process-based regulatory approach; and incorporate an adaptive management approach.

DSL will continue to work with the USACE to develop aligned general permits (DSL) and regional general permits (USACE) that will provide programmatic authorizations for sand and gravel removal from waters of the state and U.S.

The Department of State Lands will work with DOGAMI to obtain additional clarity regarding the boundaries of their jurisdictions over aggregate mining activities as defined by "ordinary high water" and to maintain coordination regarding specific aggregate mining projects to ensure efficient processing of permit applications.

DSL, DEQ, DOGAMI and OCAPA continue to work closely to further improve regulatory process. Efforts are focused on integrating state agency processes, identifying and addressing procedural and technical barriers, and moving toward outcome based regulatory strategies whereby stewardship and protection of natural resources is achieved through industry standard best management practices. The focus is on water quality issues because these are largely under the control of state agencies due to DEQ's assumption of federal Clean Water Act authorities from EPA. The goal is to achieve clear agreement regarding water quality expectations thereby "front loading" the regulatory process and providing greater certainty regarding requirements and timelines to the regulated industries. The agencies plan to hold a workshop in fall/winter 2010 to identify and discuss technical challenges and to identify needed research.

### **Attachment**

*State Water-Related Permit User Guide* (Water-Related Permit Process Improvement Team, February 2008).