

September 19, 1996

WATER
RESOURCES
DEPARTMENT

REC'D SEP 23 11

Dick Angstrom
Oregon Concrete and Aggregate
Producers Association
707 13th St. SE #115
Salem, OR 97301

Dear Dick:

Thank you again for arranging the July meeting between our staff and OCAPA members. We appreciated the opportunity to learn more about the water-related concerns of aggregate producers. At the close of the meeting, you kindly "volunteered" me to prepare this written summary of our discussions and some of the options we identified. I'm sorry it has taken me so long to respond, but hope the following is useful:

During our discussions, we identified three general types of water needs for the industry: dewatering related to material extraction; consumptive use to mix aggregate; and nonconsumptive use to wash gravel.

We understand the industry is eager to comply with water rights requirements for these uses, but that further clarification is needed as to when, and under what circumstances, water rights would be required. At our meeting on July 12, we identified a number of possible options, which are described below.

First, we agreed that a water right is not required for dewatering activities when no additional use is being made of the water removed from a site and the water is eventually returned to the same source. For example, the act of temporarily pumping the water from an exposed ground water source, followed by a return of the water to the same aquifer, would not require a water right. The question of whether a water right would be needed if the water were returned to a different aquifer or surface water source is less clear. Arguably, no water right would be required so long as there were no beneficial use, but this is not a situation we have previously confronted, so we would want to conduct a more thorough analysis and obtain legal advice before offering a definitive response. Please let us know if you think this is a fact situation which we will need to address. We will be happy to work with you to obtain the needed legal advice.



Commerce Building
158 12th Street NE
Salem, OR 97310-0210
(503) 378-3739
FAX (503) 378-8130

Using water to mix aggregate or wash gravel is a "beneficial use" under Oregon law, and would generally require a water right. We understand that in many cases the source of water for these purposes would be the water removed during the dewatering process described above. In such instances, the operator would be making beneficial use of the water and the water right would be required. (See discussion below.) However, other options may also exist. For example, when an aggregate plant is served by a municipal water provider, the relatively small amount of water needed for mixing aggregate could be taken from that municipal source. In that case, the plant would not be required to have its own independent water right. This approach may not be as feasible for gravel washing, which requires more water.

In instances where municipal water is not available or where that option is not feasible, the plant would be required to obtain a water right for mixing aggregate and washing gravel. Where either surface or ground water is available and the use is allowed under the applicable basin program, it should not be a problem for the plant to apply for and obtain a water right.

However, we discussed the specific problems presented by sand and gravel operations in the Willamette Basin, where new uses of surface water are severely restricted. New industrial uses, such as sand and gravel operations, are not authorized in many areas because of water availability and resource protection concerns. These restrictions would also apply to the use of ground water which is determined to be "hydraulically connected" to the surface water. In such instances, the operator would have several options:

- 1) The operator could seek an exception to the basin plan classification. This process is authorized under ORS 536.295, which allows the Water Resources Commission to grant an exception to the basin plan under certain circumstances. The list of circumstances in the statute includes uses which are largely "non-consumptive" or uses necessary to avoid extreme economic hardship. The finding of non-consumptive use should be easy to make for gravel washing purposes. The small amounts of water needed for mixing aggregate could probably be justified on a case-by-case showing of hardship. We would encourage your members to work directly with the department staff in evaluating whether the facts in a given case are adequate to make these types of findings.

- 2) New wells could be drilled into deep basalt layers which would not be determined to be hydraulically connected to surface waters in the basin. In most cases, it should not be difficult to obtain a water right for use of this type of ground water. The exception would be for new uses in designated "ground water limited areas." If this is the case, the operator may need to focus on some of the other alternatives we discussed.

- 3) New storage sites (reservoirs) could be developed to provide a source of water for the new use or stored water could be purchased from existing reservoirs.

Dick Angstrom
September 19, 1996
Page 3

4) Some operators may be able to secure existing water rights through the transfer process.

In summary, there seem to be several options which could be utilized to ensure a reliable and adequate water supply for your members. Please feel free to call us if you have further questions or need additional information about how any of these options might be used in any given case. Our local watermasters would be a good first contact for your members to discuss specific concerns.

I hope this adequately summarizes our meeting in July. Please feel free to call or write if you have questions or additional concerns. As always, we appreciate your willingness to work cooperatively with us and we will try to provide whatever assistance we can.

Sincerely,



Martha O. Pagel
Director

b1:660

c: Steve Applegate
Fred Lissner
Greg Nelson
Kevin Alltucker
KC Kosterman
Ric Linares

STOEL RIVES LLP

A T T O R N E Y S

STANDARD INSURANCE CENTER
900 SW FIFTH AVENUE, SUITE 2300
PORTLAND, OREGON 97204-1268
Phone (503) 224-3380 Fax (503) 220-2480
TDD (503) 221-1045
Internet: www.stoel.com

REC'D DEC 10

December 9, 1996

GAIL L. ACHTERMAN
Direct Dial
(503) 294-9123
email glachterman@stoel.com

Mr. Richard L. Anstrom
Managing Director
Oregon Concrete & Aggregate Producers Association, Inc.
707 13th St. S.E. #115
Salem, Oregon 97301

Re: Water Rights

Dear Dick:

I have reviewed the letter you received from Martha Pagel on the subject of water rights for sand and gravel operations. This letter provides you with my response to the Water Resources Department ("WRD") analysis and recommends a course of action for the Oregon Concrete & Aggregate Producers Association ("OCAPA") to follow.

1. Review of WRD Letter. The WRD letter addresses three general types of water use by sand and gravel operations: (1) dewatering; (2) aggregate mixing; and (3) gravel washing. I agree with the WRD that dewatering does not require a water right if no additional use is made of the water. The WRD believes there may be some uncertainty about this question, however, if the water is discharged to another water source. In my opinion, a water right still would not be needed, although a discharge permit would be required from the Department of Environmental Quality ("DEQ").

Use of water for aggregate mixing and gravel washing does require a water right, as noted in the WRD letter. I do not disagree with WRD's legal analysis of this issue, but I do not think their suggested alternatives are practical. First, using a municipal water supply would be expensive and municipal water is unavailable to many operations. Second, in most of the state water will not be available for industrial use in the amount needed by sand and gravel operations, even though the use may be nonconsumptive or minimal. Many of the basin plans now prohibit industrial use in the late summer (or limit it to .01 cfs like the Willamette Basin Plan). In many others, instream water rights now exist for the entire streamflow and most sand and gravel operations are hydraulically connected to surface water.

Mr. Richard L. Anstrom
December 9, 1996
Page 2

Most of the other options outlined by the WRD are not practical. The first option listed is a Basin Plan variance under ORS 536.295 and OAR Chapter 690 Division 82. Not only does this type of variance require approval by the Water Resources Commission ("WRC"), it is available only for uses that are of short duration during each year or be for a use not contemplated when the plan was adopted. The rules limit such permits to 5-year periods. I do not think this option will provide the type of right your members need.

Drilling new wells into deep basalt layers might work for some of your members, but it would be expensive to do so. Similarly, trying to acquire stored water from existing reservoirs is unlikely to be practical for most sand and gravel operators either because there is no upstream reservoir or the cost of water is too high or the test for hydraulic connection to surface water sufficient to use a groundwater diversion point cannot be met (ORS 540.531(2)). Some operators may be able to acquire other existing water rights and transfer them to their operations, especially in rapidly developing areas where irrigation rights are being abandoned. A transfer requires analysis of all available water rights in the specific area in order to identify potential sellers and the process can take up to two years to complete.

2. Recommended Course of Action. Regarding dewatering use itself, I recommend no further action. OCAPA could request a declaratory ruling under ORS 183.410. This statute permits WRD to issue a binding ruling on the application of agency law to particular facts. It takes 2 to 3 months to get a ruling. Since we agree with WRD already, however, it does not seem necessary to go to this effort.

On the issue of water rights for gravel washing and aggregate mixing, however, OCAPA should take action. There are three alternative approaches:

A. Individual Solutions. We could work with OCAPA members to address their individual situations and develop appropriate options. We could develop a fixed fee package for OCAPA members to obtain a legal analysis of their situation. The cost would be approximately \$300 per site if we could work with you to develop a checklist for the information your member would need to provide to us.

B. Basin Plan Amendments. We could work with you to identify the basins in which OCAPA members operate and then review the basin plans to see whether industrial uses are restricted in the summer. We already know that restrictions apply in most of the Willamette Basin. We could petition the WRC to amend the basin plan itself to allow industrial use for sand and gravel operations year round. This option may make sense in the Willamette Basin where water would otherwise be available, but due to instream water rights and other limitations, it may not be a solution elsewhere. Drafting a petition to amend the

Mr. Richard L. Anstrom
December 9, 1996
Page 3

Willamette Basin Plan and working with the WRD and the WRC to get it adopted is likely to cost from \$5,000 to \$7500.

C. Legislation. It may make the most sense to seek legislation in the 1997 session to allow water use for aggregate mixing and gravel washing incidental to dewatering without a water right so long as the use is permitted under a permit from the Department of Geology and Mineral Industries ("DOGAMI"). The cost for legal services would be the same as for obtaining a basin plan amendment. This approach would solve the problem for all operators statewide. The WRD supported similar legislation in 1993 to allow for water use in conjunction with wetland, stream or riparian restoration or storm water management by simply registering the use, rather than obtaining a water right, ORS 537.015 to 537.032 (1993 Or. Laws ch. 654). This year WRD will take a similar approach for use of reclaimed industrial wastewater where users have DEQ approval already.

These alternatives are not mutually exclusive and could be pursued simultaneously. The legal services cost estimates are just that and cost could rise if serious opposition to the proposed solutions developed. The estimates are based on the assumption that you or others from OCAPA would do most of the direct lobbying work with the WRD, the WRC and the Legislature.

I hope this letter provides you with the information you need. Please call me if you have any questions. We look forward to working with you on this project.

Very truly yours,


Gail L. Achterman