

Or. Op. Atty. Gen. OP-6368 (Or.A.G.), 1990 WL 519210

Office of the Attorney General

State of Oregon

Opinion Request OP-6368

May 16, 1990

*1 Donald A. Hull
State Geologist
Department of Geology and Mineral Industries
910 State Office Building
Portland, OR 97201

Dear Mr. Hull:

You have asked several questions regarding the authority of the Department of Geology and Mineral Industries (DOGAMI) and of the Water Resources Commission (WRC or commission) to restrict surface mining (other than nonaggregate mineral surface mining)¹ to protect the quantity or quality of ground water. Those questions relate to quarrying both in designated critical ground water areas and in areas that have not been declared to be critical ground water areas. Your questions distill to two essential issues:

- (1) Under what circumstances may DOGAMI restrict surface mining to protect the quantity or quality of ground water?²
- (2) Under what circumstances may the WRC restrict surface mining to protect the quantity or quality of ground water?

We conclude that in areas subject to ORS 517.750-.955 and ORS 517.990 (the reclamation law), DOGAMI has broad authority, and often the duty, to restrict surface mining to protect the quantity or quality of ground water. That authority exists regardless whether the site is in a critical ground water area. Pursuant to OAR 632-30-035, DOGAMI lawfully may modify operating permits to restrict quarrying to protect ground water, even where no such restrictive conditions appeared in an original operating permit.

The WRC may not directly regulate surface mining. However, the WRC has expansive authority to control and prevent the contamination and depletion of ground water. This authority applies both to designated critical ground water areas and to areas that have not been so designated, or where an existing critical ground water order is not specific. Through the exercise of this authority, the WRC may regulate surface mining indirectly, by setting restrictions with which all state agencies and persons, including surface mine owners and operators, must comply. Further, WRC restrictions apply whether or not a surface mining operation is subject to DOGAMI's oversight.

Our opinion also focuses on ways in which DOGAMI and the WRC may work cooperatively to achieve the legislature's goal of protecting ground water.

Discussion

1. DOGAMI Authority

The reclamation law applies to all surface mining activities on land not surface mined on July 1, 1972, and to horizontal extensions of activity begun prior to July 1, 1972. ORS 517.770, 517.790(1). Surface mining requires an operating permit.

ORS 517.790(1). To obtain an operating permit, an owner or operator must submit a proposed reclamation plan that is acceptable to and approved by DOGAMI. ORS 517.790(2).

The keys to DOGAMI's authority to restrict surface mining to protect ground water are the definitions of "reclamation" and "reclamation plan." ORS 517.750(12) defines "reclamation" to mean:

"[T]he employment in a surface mining operation or exploration of procedures, reasonably designed to minimize as much as practicable the disruption from the surface mining operation or exploration and to provide for the rehabilitation of any such surface resources adversely affected by such surface mining operations or exploration through the rehabilitation of plant cover, soil stability, water resources and other measures appropriate to the subsequent beneficial use of such explored or mined and reclaimed lands." (Emphasis added.)

*2 Ground water unquestionably is part of the state's "water resources." See ORS 536.007(12), (13). Moreover, ground water often may aid the "subsequent beneficial use of * * * mined and reclaimed" lands. Therefore, it is reasonable to conclude that the legislature intended protection and rehabilitation of ground water to be a part of "reclamation."

The definition of "reclamation plan" supports this conclusion. A "reclamation plan" is, in relevant part:

"[A] written proposal, submitted to the department as required by ORS 517.750 to 517.955 and subsequently approved by the department as provided in ORS 517.750 to 517.955, for the reclamation of the land area adversely affected by a surface mining operation or exploration and including, but not limited to the following information:

"(a) Proposed measures to be undertaken by the operator in protecting the natural resources of adjacent lands.

"(b) Proposed measures for the rehabilitation of the explored or surface-mined lands and the procedures to be applied.

"(c) The procedures to be applied in the surface mining operation or exploration to control the discharge of contaminants * * *"

ORS 517.750(13).

All three of the quoted subsections indicate the legislature's intent that a reclamation plan protect ground water from contamination from surface mining, and prevent the dewatering of aquifers.

First, subsection (a) calls for "protecting the natural resources of adjacent lands." Aquifers sometimes spread under vast areas of land. Thus, an aquifer underlying land being surface mined also may lie under adjacent lands. Such an aquifer is among the natural resources of those adjacent lands, to be protected not only from contamination but from total destruction through dewatering.

Second, under subsection (b) a reclamation plan must contain measures for the "rehabilitation of the * * * surface-mined lands." As noted above in discussing the definition of "reclamation," an adequate quantity of uncontaminated ground water often is important for the beneficial use of lands. Consequently, rehabilitation of surface-mined lands may require protection of ground water against depletion and pollution.

Third, subsection (c), which requires "procedures * * * to control the discharge of contaminants" shows the legislature's intent that a reclamation plan include measures to prevent contamination of ground water.

Thus, the definitions of "reclamation" and "reclamation plan" both demonstrate that DOGAMI may regulate surface mining operations subject to the reclamation law to protect ground water against depletion and contamination. ORS 517.790(1)(g) also supports that reading of the reclamation law. That provision requires an application for an operating permit to include information on "[t]he type of monitoring well abandonment procedures." *Id.* Typical uses

of monitoring wells include measuring the quantity and purity of ground water. Additionally, improper abandonment of a monitoring well may lead to ground water contamination or depletion. This reference to monitoring wells shows that the legislature contemplated that DOGAMI would regulate surface mining to protect ground water.

*3 Other statutes also plainly exhibit the legislature's intent that DOGAMI regulate surface mining to protect ground water. State agencies must conform to the statements of the Water Resources Commission, and may not exercise any power or duty in a manner that would derogate from or interfere with state water resources policy. ORS 536.360. Therefore, every DOGAMI operating permit and reclamation plan must conform with state water resources policy. Preservation of the quantity and quality of ground water is a prominent aspect of Oregon's water resources policy. See ORS 537.525(5) (assuring “[a]dequate and safe supplies of ground water for human consumption”); (7) (determining and maintaining “[r]easonably stable ground water levels”); (8) (preventing and controlling, within practicable limits, “[d]epletion of ground water supplies below economic levels [and] impairment of natural quality of ground water by pollution”); (9) (Water Resources Commission authority to control, *inter alia*, “declining ground water levels” and “overdrawing of ground water supplies or pollution of ground water”). Under ORS 516.135(1), DOGAMI also must comply with the goal to “prevent contamination of Oregon's ground water resource while striving to conserve and restore this resource and to maintain the high quality of Oregon's ground water resource for present and future uses.” ORS 468.692.³

DOGAMI's surface mine permitting process enables DOGAMI to apply these state water resources policies. The cited authorities leave it beyond question that DOGAMI may impose on surface mining operations conditions designed to protect ground water from being depleted or contaminated.

We are aware that the definition of “reclamation” for purposes of the statutes governing nonaggregate mineral surface mines specifically refers to “the use of measures to protect the surface and subsurface water resources.” ORS 517.910(1) (emphasis added). One could attempt to argue that the specific reference in this statute to “subsurface” or ground water, contrasted with the general reference in ORS 517.750(12) to “water resources,” indicates the legislature's intent to exclude ground water from the latter statute. That argument, however, lacks merit. First, the term “water resources” is the broadest possible term the legislature could have used; it includes both surface and ground water. Thus, the statutory language defeats any possible inference that the legislature intended ORS 517.750(12) not to cover ground water. Second, such a reading would fly in the face of the statutes cited above, which so clearly show that in granting operating permits DOGAMI must comply with state policy to protect ground water. Third, ORS 517.910(1) was enacted 10 years after ORS 517.750(12), so the language used in the more recent statute logically has no bearing on the legislature's intent in enacting the earlier provision. DOGAMI has the authority to regulate all surface mining--not only nonaggregate mineral surface mining--to protect ground water.

*4 As already noted, DOGAMI may include in an original operating permit or reclamation plan provisions designed to protect ground water. Because of technological limitations and other reasons, however, it sometimes is unknown at the time a plan is approved and permit is issued that the surface mining operation will threaten ground water. The issue has arisen whether, to respond to such unforeseen conditions, DOGAMI may modify an operating permit or reclamation plan to include provisions to protect ground water. We conclude that DOGAMI lawfully may do so.

Pursuant to its general rulemaking authority, see ORS 517.840(1)(d), DOGAMI has adopted OAR 632-30-035. That rule allows DOGAMI to modify an operating permit to comply with existing laws or to “accommodate unforeseen developments which may affect the reclamation plan as previously approved.” Under this rule DOGAMI could amend an operating permit to insert provisions to protect ground water, where it was originally unforeseen that the surface mining operation would endanger the ground water.

The rule, and such an application of the rule, are consistent with the governing statutes. ORS 517.840(1)(d) empowers DOGAMI's governing board, see ORS 517.750(2), to adopt rules “considered by the board to be necessary in carrying

out the provisions of” the reclamation law. As stated, DOGAMI must regulate surface mining to protect ground water. It is not always foreseeable at the outset that a surface mining operation will deplete or pollute ground water. DOGAMI's board, therefore, reasonably could consider it necessary to provide for modification of existing permits where, as a result of unforeseen circumstances, a surface mining operation threatens ground water. The rule in question furthers DOGAMI's statutory mission and is lawful.

ORS 517.830(4) does not require a contrary conclusion. That statute requires every operating permit to provide that the reclamation plan may be modified “upon agreement between the department and the permittee.” We do not read ORS 517.830(4) to limit DOGAMI's authority to modify operating permits and reclamation plans unilaterally. Through that statute the legislature has encouraged permittees and DOGAMI to work cooperatively whenever possible. The legislative desire for such cooperation in no way negates DOGAMI's authority to act on its own where necessary to carry out the legislative policy, including the protection of Oregon's water resources. Accordingly, where conditions unforeseen at the time of the original reclamation plan threaten ground water, DOGAMI has the authority unilaterally to modify both operating permits and reclamation plans.⁴

In order to protect ground water, DOGAMI lawfully may impose a variety of restrictions on surface mining, either in an original operating permit and reclamation plan or as an amendment to a permit and plan. DOGAMI's enabling statutes do not limit the agency merely to requiring an owner or operator to remedy harm done after termination of a surface mining operation. Rather, both ORS 517.750(12) (defining “reclamation”) and (13) (defining “reclamation plan”) refer to “procedures” to be used in the surface mining operation. Moreover, subsections (13)(a), (c), and (d) plainly indicate that a reclamation plan may cover the actual conduct of surface mining, not merely rehabilitative work after mining has ceased. Therefore, DOGAMI also may regulate a surface mining operation's ongoing activities in order to avoid harm to ground water.

*5 DOGAMI may choose from numerous regulatory alternatives. For instance, DOGAMI may limit the depth of a surface mine in order to avoid reaching an aquifer. DOGAMI also may prohibit or restrict the discharge of contaminants into ground water. See ORS 517.750(13)(c). If the surface mining operation will deplete the amount of ground water, DOGAMI may require the owner or operator to recharge the aquifer under conditions approved by the WRC. See ORS 537.135. Alternatively, if it is impracticable to conduct the surface mining operation while protecting ground water, or to rehabilitate the ground water after the mining operation is over, DOGAMI may refuse to issue an operating permit. This list of DOGAMI's options is merely illustrative, not complete.

DOGAMI may regulate surface mining to protect ground water regardless whether the mining will be or is being conducted in an area that the WRC has declared to be a critical ground water area. Where the WRC has issued a critical ground water order, however, DOGAMI may not permit surface mining that would deplete the ground water supply in violation of the WRC's order. See ORS 536.360 (every state agency must conform to the WRC's statements, and no state agency may exercise power in derogation of state water resources policy). It would be appropriate in those circumstances for DOGAMI to include in an operating permit or reclamation plan a requirement that the permittee conduct its operation so as not to decrease ground water contrary to a critical ground water order.⁵ DOGAMI also may not permit surface mining where the adverse effects on ground water quality or quantity would violate any other WRC policy or order. Id. Again, DOGAMI properly may condition an operating permit or reclamation plan on the permittee's compliance with the relevant policy or order.

ORS chapter 517 creates remedies for violation of the conditions of an operating permit or reclamation plan. DOGAMI may order an operator to halt surface mining being conducted in violation of the conditions of an operating permit. ORS 517.880. Additionally, the Attorney General, at DOGAMI's request, shall initiate any necessary legal proceeding to enjoin the operation and to provide for the completion of the reclamation of the lands affected by the operation. Id. Further, violation of the conditions of an operating permit issued under ORS 517.830 is punishable by a fine of up to

\$1,000. ORS 517.990(3). Violation of the conditions of an operating permit for a nonaggregate surface mining operation is punishable by a fine of up to \$10,000. ORS 517.990(4).

Next, we discuss more specifically how the WRC's authority over the state's ground water effectively may limit surface mining operations.

2. WRC Authority

a. Critical Ground Water Areas

The Water Resources Commission has no power to regulate surface mining directly. However, the commission has broad authority over the state's water resources, including ground water. See generally ORS chs 536, 537. Through its exercise of this authority the commission effectively, albeit indirectly, may regulate surface mining that adversely affects ground water supplies.

*6 Of particular relevance here is the WRC's power (delegable to the Director of the Water Resources Department, see ORS 536.025(2)) to declare an area to be a "critical ground water area." See ORS 537.730, 537.735. The critical ground water statutes, part of the Ground Water Act of 1955, were designed "to assure a reasonably stable, adequate water supply which may be beneficially used only within the capacity of the available resource and is protected against overdraw, declining water levels, and interference among wells. ORS 537.525." Doherty v. Oregon Water Resources Director, 308 Or 543, 555, 783 P2d 519 (1989).

The WRC may declare an area to be a critical ground water area if it finds that "[g]round water levels in the area in question are declining or have declined excessively," ORS 537.730(1)(a), and that "the public welfare, health and safety require that any one or more corrective controls be adopted." ORS 537.735(1). Upon declaration of a critical ground water area, the commission may impose "corrective control provisions." ORS 537.735(4). For instance, the commission may determine "the permissible total withdrawal of ground water in the critical area each day, month or year," ORS 537.735(4)(b), and "apportion such permissible total withdrawal among the appropriators holding valid rights to the ground water in the critical area." Id.

If the critical ground water order limits the total withdrawal in the critical area, and apportions that withdrawal only among appropriators holding valid water rights (where the operator lacks a water right to withdraw water for surface mining), the practical effect is to bar surface mining that would cause withdrawal of any ground water.⁶

In a critical ground water order, the WRC also may accord preference, without regard to relative priorities, to withdrawals of ground water for residential and livestock watering purposes. ORS 537.735(4)(c). Further, the WRC may set preferences for other beneficial uses "in such order as the commission considers advisable under the circumstances." Id. Consequently, even if a surface mine operator held a water right with sufficient priority otherwise to permit withdrawal,⁷ the preferences established by statute and the WRC effectively could bar surface mining that would withdraw water from the aquifer.

The terms of an existing critical ground water order might not protect against potential overdraft of ground water caused by surface mining. In those circumstances, the WRC may modify the order to provide the necessary protection. See ORS 537.740(2).

Surface mining that withdraws ground water in violation of a critical ground water order may be enjoined. See ORS 537.780(6). In addition, the WRC may impose civil penalties upon any person who withdraws ground water contrary to the terms of a critical ground water order. See ORS 537.787(1), (2)(c). Thus, where DOGAMI has conditioned an

operating permit or reclamation plan on compliance with a critical ground water order, both DOGAMI and the WRC have administrative and judicial enforcement tools at their disposal to enjoin and penalize violations.

*7 b. Areas other than Critical Ground Water Areas

Even absent a critical ground water order, the WRC has the power under the Ground Water Act to protect ground water against overdraft or contamination.

First, ORS 537.525(9), part of the Act's policy statement, grants the WRC broad authority to prevent undue depletion of ground water supplies:

“The Legislative Assembly recognizes, declares and finds that the right to reasonable control of all water within this state from all sources of water supply belongs to the public, and that in order to insure the preservation of the public welfare, safety and health it is necessary that:

“* * * * *

“(9) Whenever * * * declining ground water levels * * * [or] * * * overdrawing of ground water supplies * * * exists or impends, controlled use of the ground water concerned be authorized and imposed under voluntary joint action by the Water Resources Commission and the ground water users concerned whenever possible, but by the commission under the police power of the state * * * when such voluntary joint action is not taken or is ineffective.”

Unlike most policy statements, including the other subsections of ORS 537.525, subsection (9) appears affirmatively to grant authority to the WRC to control the use of ground water to halt or prevent decline in ground water levels or overdraft of ground water supplies. Nothing in subsection (9) suggests that the WRC may wield that power only through a critical ground water order.

Even if subsection (9) were not viewed as an affirmative grant of authority, the Ground Water Act provides such authority elsewhere. ORS 537.780(3)(a) states:

“In the administration of ORS 537.505 to 537.795, the Water Resources Commission may:

“* * * * *

“(3)(a) Adopt by rule and enforce when necessary to protect the ground water resource, standards for the construction, maintenance, abandonment or use of any hole through which ground water may be contaminated[.]”

A surface mine is a “hole through which ground water may be contaminated.” ORS 537.780(3)(a).⁸ Therefore, when necessary to protect ground water against contamination, the WRC may adopt and enforce rules governing the construction, maintenance, abandonment and use of surface mines.

ORS 537.777 also grants the WRC power to control the distribution of ground water:

“(1) The Water Resources Commission shall * * * distribute ground water to secure compliance or equal and fair distribution if the commission finds that:

“(a) Any person or public agency is using or attempting to use any ground water * * * except upon compliance with ORS 537.505 to 537.795 and any applicable order or rule of the commission under ORS 537.505 to 537.795; or

“(b) It is necessary in order to secure the equal and fair distribution of ground water in accordance with the rights of the various ground water users.”

Under subsection (b), if surface mining threatens to deplete ground water supplies and thus deprive water right holders of a fair distribution of ground water, the WRC may direct the distribution of ground water and effectively bar a surface mining operation from dewatering an aquifer. Subsection (a) allows the commission to enforce such an order. Again, this authority plainly applies even absent a critical ground water order.

*8 3. DOGAMI/WRC Regulatory Interaction

As the preceding discussion has shown, the reclamation law and the Ground Water Act give DOGAMI and the WRC valuable opportunities to interact and cooperate in protecting ground water from the adverse effects of surface mining. For example, DOGAMI may condition an operating permit or reclamation plan on the permittee's compliance with a WRC critical ground water order, or any other WRC order or rule. The State Geologist of DOGAMI also may petition the WRC to initiate a critical ground water proceeding. ORS 537.730(1). Further, pursuant to ORS 190.110 (intergovernmental agreements) and 517.840(1)(b) (DOGAMI cooperation with other state agencies in administering and enforcing reclamation law), the WRC may advise and cooperate with DOGAMI in regulating surface mines to prevent the depletion and contamination of ground water. We encourage these agencies to work together to the greatest extent practicable to ensure the accomplishment of the legislature's goal to protect Oregon's ground water.

Sincerely,

Donald C. Arnold
Chief Counsel
General Counsel Division

Footnotes

- 1 Unless otherwise specified, all references in this opinion to quarrying and surface mining are to surface mining other than nonaggregate mineral surface mining.
- 2 In addressing this question, we also cover your inquiry on whether OAR 632-30-035 is within DOGAMI's statutory authority.
- 3 This goal is part of the far-reaching ground water management legislation enacted during the 1989 session. See Or Laws 1989, ch 833. The legislation includes other policy directives that apply to all state agencies. See, e.g., ORS 468.693. The 1989 statutes also envision significant roles for the Strategic Water Management Group and the Department of Environmental Quality. We have not been asked to, and therefore do not, further explore the role of these agencies as it may affect surface mining.
- 4 Arguably, every operating permit and reclamation plan contains an implied condition that, where as a result of unforeseen circumstances or a change in WRC policy, the surface mining operation would violate ground water restrictions, the mining operation must comply. We have explained in detail above how every DOGAMI operating permit and reclamation plan must comply with state policy to protect ground water. Consequently, whether or not a permit explicitly covers ground water, the law likely implies ground water protection in each permit and plan.
- 5 ORS 537.730(1) expressly empowers the WRC to initiate a critical ground water proceeding on petition by the State Geologist of DOGAMI. Thus, in addition to DOGAMI's independent authority to protect ground water, DOGAMI may enlist the WRC's regulatory aid through the critical ground water process. We discuss the WRC's authority in that process below.
- 6 This is the precise impact of the Cooper Mountain/Bull Mountain Critical Ground Water Order, dated May 17, 1974. That order covers an area in which the Baker Rock Crushing Company (Baker Rock) has been conducting a surface mining operation: the situation that prompted your inquiry. The order specifies that only 2,900 acre-feet of water per year may be withdrawn from the Cooper Mountain/Bull Mountain regional ground water table. The order also lists the appropriators who may withdraw water in order of priority. Baker Rock is not among the authorized appropriators. Thus, the order effectively and without question prohibits Baker Rock and any other operator from surface mining that would remove water from the aquifer.
DOGAMI has inserted a condition in Baker Rock's operating permit requiring Baker Rock to receive prior approval from both DOGAMI and the Water Resources Department before quarrying into the water table. For the reasons stated above, that condition is lawful and enforceable by DOGAMI both administratively and in the courts. The commission or the Water Resources Director also independently may obtain injunctive relief to prevent quarrying or any other activity in violation of

the critical ground water order. See ORS 537.780(6). Further, under ORS 537.787(1) and (2)(c), the WRC may impose a civil penalty on a surface mine operator or any other person whose activities withdraw ground water in violation of the order.

7 We need not address here whether dewatering for a surface mine operation constitutes a beneficial use of water for which an operation could obtain a water right.

8 We need not address here whether a surface mine is a "well" under ORS 537.515(9), or is a hole "other than [a] well[]," ORS 537.780(3)(b).

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