

1                                   BEFORE THE LAND USE BOARD OF APPEALS

2   OF THE STATE OF OREGON

3  
4                                   OREGON SHORES CONSERVATION COALITION,  
5   KALMIOPSIS AUDUBON SOCIETY and  
6   CURRY SPORT FISHING ASSOCIATION,  
7   *Petitioners,*

8  
9   vs.

10  
11   CURRY COUNTY,  
12   *Respondent,*

13  
14   and

15  
16   TIDEWATER CONTRACTORS, INC.,  
17   *Intervenor-Respondent.*

18  
19   LUBA No. 2009-128

20  
21   FINAL OPINION  
22   AND ORDER

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23  
24                                   Appeal from Curry County.

25  
26                                   Courtney Johnson, Portland, filed the petition for review and argued on behalf of  
27 petitioners. With her on the brief was the Crag Law Center.

28  
29                                   No appearance by Curry County.

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31                                   Daniel A. Terrell, Eugene, filed the response brief and argued on behalf of intervenor-  
32 respondent. With him on the brief were Bill Kloos and the Law Office of Bill Kloos, PC.

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34                                   BASSHAM, Board Chair; HOLSTUN, Board Member; RYAN, Board Member,  
35 participated in the decision.

36  
37   AFFIRMED

03/12/2010

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39                                   You are entitled to judicial review of this Order. Judicial review is governed by the  
40 provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioners appeal county approval of a conditional use permit for gravel mining on property adjacent to the Rogue River.

**MOTION TO INTERVENE**

Tidewater Contractors, Inc. (intervenor), the applicant below, moves to intervene on the side of the respondent in this appeal. There is no opposition to the motion and it is granted.

**FACTS**

The subject property is a split-zoned parcel located adjacent to the Rogue River. Jerry's Flat Road divides the property northeast to southwest. East of the road is an industrially-zoned portion that is the site of a former plywood mill and two mill ponds, located above the floodplain. The eastern portion of the property is within the City of Gold Beach Urban Growth Boundary (UGB). The city's water treatment plant is located on adjacent property to the north, and its water intake is located approximately 625 feet north of the subject property.

The proposed mining site is on a 57-acre portion of the parcel west of Jerry's Flat road that is zoned Forestry-Grazing (FG) and Estuary Resource (ER), with Shoreland and Natural Hazard (floodplain) overlay zones. The proposed mining site is a deposit situated on an elevated terrace located next a secondary channel of the Rogue River, a channel that is typically dry during summer months. The subject property is located on the "head of tide," which marks the inland boundary of the tidally-influenced estuary, with the southern portion of the property below the head of tide, and the northern portion above the head of tide. Winter flooding partially inundates the proposed mine site. Between 1971 and 1995, gravel mining occurred on or near the mine site under a permit issued by the Division of State Lands, to obtain material used for mill operations.

1           In 2008, the county denied intervenor’s application to mine a portion of the river bar  
2 adjacent to the mining site. Following that denial, intervenor filed the present application,  
3 which proposed mining only the upland terrace. Under the proposal, excavation would start  
4 at the southern end of the property, at an elevation of 10 feet above mean sea level and  
5 proceed landward and upward toward Jerry’s Flat Road, leaving a slight upward slope so that  
6 flood waters rising into the cut during winter would drain back into the channel. After the  
7 first excavation is complete at the southern end of the property, remediation would  
8 commence, and similar excavations would begin to the north, moving phase by phase toward  
9 the northeastern end of the mining area. No aggregate processing would occur on site.

10           The county planning commission denied the application, concluding that intervenor  
11 failed to meet its burden of proof with respect to permit standards concerned with impacts on  
12 water quality and fish habitat. Intervenor appealed to the county board of commissioners,  
13 which reversed the planning commission denial and approved the conditional use permit,  
14 with conditions.

#### 15 **FIRST ASSIGNMENT OF ERROR**

16           Petitioners argue that the county exceeded its jurisdiction and erred in finding that the  
17 Oregon Department of Geology and Mineral Industries (DOGAMI), rather than the Oregon  
18 Division of State Lands (DSL), would have jurisdiction to issue required state agency permits  
19 for mining the proposed site. According to petitioners, DOGAMI has jurisdiction over  
20 upland mining activities, while DSL has jurisdiction over mining activities within estuaries  
21 and tidal rivers to the elevation of the highest measured tide. Petitioners argue that the record  
22 suggests that DSL rather than DOGAMI may have jurisdiction over all or a portion of the  
23 mining area. If so, petitioners argue, the county erred in relying in part on intervenor  
24 complying with DOGAMI permit requirements to establish that the proposed mining will  
25 also comply with county approval standards.

1           Moreover, petitioners contend that where a local government finds that local approval  
2 criteria will be met if certain conditions are imposed, and those conditions require the  
3 applicant to obtain state agency permits, the local government must find based on substantial  
4 evidence in the record that the applicant is not precluded from obtaining such agency permits  
5 as a matter of law. *Miller v. City of Joseph*, 31 Or LUBA 472, 479 (1996); *Bouman v.*  
6 *Jackson County*, 23 Or LUBA 628, 646-47 (1992). According to petitioners, DSL and the  
7 U.S. Army Corps of Engineers have currently suspended issuance of new operating permits  
8 for gravel mining on the Rogue River. Therefore, petitioners argue, had the county correctly  
9 determined that DSL rather than DOGAMI has jurisdiction, the county could only have  
10 concluded that a DSL permit is precluded as a matter of law, and therefore the county could  
11 not have relied on actions that would be taken to comply with DSL permits in part to satisfy  
12 the county’s conditional use permit standards.

13           To the extent petitioners argue that the county “exceeded its jurisdiction” in  
14 attempting to determine which state agency has jurisdiction, we disagree. While the county’s  
15 views on DSL and DOGAMI’s jurisdiction are in no way binding on those agencies, the  
16 county could not possibly evaluate whether it should impose conditions requiring the  
17 applicant to obtain a state permit, in order to assure compliance with local approval  
18 standards, unless it first formed some idea about which agency has jurisdiction to issue the  
19 permit, and what the applicable state agency permit requirements are. Petitioners concede as  
20 much by arguing that the county should have concluded that DSL rather than DOGAMI has  
21 jurisdiction to issue the required state permit.

22           Petitioners cite the fact that DSL previously issued permits for the former mill owner  
23 to mine some part of the subject property, and argue that DSL therefore retains jurisdiction  
24 over the entire proposed mining site. The county rejected that argument.<sup>1</sup> We agree with the

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<sup>1</sup> The county’s findings state, on this issue:

1 county that petitioners' reliance on the former DSL permits is unavailing. It is not clear what  
2 portion of the property was subject to the former DSL permits, but even assuming that the  
3 pre-1995 DSL permits authorized mining of areas that are or were upland of the jurisdictional  
4 line, wherever it was located at that time, that does not mean that the 57-acre mining area  
5 proposed in this application is still subject to DSL jurisdiction, as a matter of fact or law. For  
6 purposes of the present application, the question is whether the proposed mining area or some  
7 portion of it is *currently* within DSL's jurisdiction.

8 On that point, the county relied on testimony from intervenor's engineer regarding a  
9 site visit by DOGAMI and DSL representatives, who verbally agreed that the proposed  
10 mining area is upland of the jurisdictional boundary, and therefore within DOGAMI's  
11 exclusive jurisdiction.<sup>2</sup> Petitioners argue that the engineer's testimony is not substantial

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"Opponents contend that the proposed aggregate mining site is in DSL jurisdiction instead of DOGAMI jurisdiction for purposes of mining permits and that fact changes how the proposal should be viewed. They rely on the fact that the former mill operators had obtained permits from DSL to mine this site to support their argument.

"Whether DOGAMI or DSL is the proper permitting agency for a mine permit is a matter of law, to be determined through the application of the relevant administrative rules. Generally, DSL jurisdiction lies below the mean higher high water mark/ordinary high water mark of estuaries and rivers/streams. DOGAMI has jurisdiction over upland sites, even along rivers.

"In this instance, Robert Elayer with Tidewater Contractors has walked the proposed mining site with DOGAMI and DSL officials. See Dan Terrill's August 25, 2009 letter, Exhibit C. That letter explains that there was no dispute between the two agency representatives that the mining activity will take place on land that is in DOGAMI jurisdiction. The only question was the precise location of DSL jurisdiction, the need to survey the area and to obtain DSL concurrence with the jurisdictional line.

"Opponents' argument that the previous DSL permits somehow bind the matter is simply false. The law does not require perpetuating an error. If the proposed mining site were in DSL jurisdiction, or even if there was some question about it, DSL and DOGAMI representatives would have spoken up during the recent site visit conducted for this proposal. They did not." Record 57.

<sup>2</sup> The testimony relied upon is a letter from intervenor's engineer stating, in relevant part:

"[T]estimony has been given to the effect that the proposed mining area is in fact under DSL jurisdiction, not DOGAMI. I have walked the site with representatives from both agencies \* \* \*. On that site visit, the discussions with DSL and DOGAMI personnel was not about whether or not the mining area is located within DSL's jurisdiction, it was over how to

1 evidence, and that without conclusive written confirmation from DOGAMI or DSL regarding  
2 the jurisdictional boundary, no reasonable decision maker could conclude that the mining  
3 area is exclusively within DOGAMI's jurisdiction.

4 Absent some countervailing evidence in the record, we believe a reasonable decision  
5 maker could rely upon the engineer's letter relating the verbal agreement of DOGAMI and  
6 DSL representatives that the mining area is upland of the jurisdictional line, to conclude that  
7 the proposed mining area is subject to DOGAMI's jurisdiction rather than DSL's. Petitioners  
8 cite no countervailing evidence, other than the fact that DSL once issued permits for gravel  
9 mining somewhere on the subject property. As discussed above, that fact does not indicate  
10 that the proposed mining area is currently subject to DSL's jurisdiction, or undermine the  
11 evidence relied upon by the county.

12 Petitioners further argue that the county misunderstood the limit of DSL's  
13 jurisdiction, citing OAR 141-085-0515, which sets DSL's jurisdiction below the head of tide  
14 at the "highest measured tide," and above the head of tide at the "ordinary high water line," or  
15 OHWL.<sup>3</sup> We understand petitioners to contend that there is no evidence in the record

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properly delineate the jurisdictional line. In the field, they both verbally agreed that the jurisdiction should be DOGAMI, not DSL. I have conducted a survey to locate the line according to the DSL guidelines. This was included in the original application to the county. If needed, an independent determination of the line can be done." Record 931.

<sup>3</sup> Petitioners cite to OAR 141-085-0515, an administrative rule describing the extent of DSL's jurisdiction for purposes of removal-fill permits, which provides in relevant part:

“(2) Estuaries, Tidal Bays and Tidal Rivers. Estuaries, tidal bays and rivers below the head of tide are jurisdictional to the elevation of the highest measured tide (excluding storm surge), or to the upper edge of wetland, whichever is higher. The head of tide is the farthest point upstream where a river is affected by tidal fluctuations. The highest measured tide elevation on a parcel may be determined by a land survey referenced to the closest tidal benchmark based upon the most recent tidal epoch and reference to both the tidal datum (MLLW) and the fixed geodetic datum (NAVD88).  
\* \* \*

“\* \* \* \* \*

“(3) Waters, Including Rivers, Intermittent and Perennial Streams, Lakes and Ponds. These waters are jurisdictional to the ordinary high water line (OHWL). The OHWL can be determined by direct observation of the annual high water event, using local

1 regarding the “highest measured tide” on the tidally-influenced southern portion of the  
2 property, and that the county erred instead in using the mean higher high water (MHHW)  
3 line, which does not necessarily correspond to the line of the “highest measured tide.”

4 MHHW is a mean, or average, of the higher high tides over a 19-year period of time.  
5 Record 174. OAR 141-085-510(39) defines “highest measured tide” for purposes of  
6 OAR 141-085-0515 as “the highest tide projected from actual observations within an estuary  
7 or tidal bay.” It certainly could be the case that at a particular location the MHHW might be  
8 lower in elevation than the “highest” measured tide. There is apparently no evidence in the  
9 record regarding actual observations of the highest measured tide on the southern portion of  
10 the property, or whether it differs from the MHHW. But there is also no evidence cited to us  
11 suggesting that the highest measured tide, assuming one has been measured on the property,  
12 would differ much from the MHHW.

13 As the county’s findings note, DOGAMI and DSL representatives visited the site with  
14 intervenor’s engineer and, despite some uncertainty over the precise location of the  
15 jurisdictional line, the representatives agreed that the proposed mining area is upland of the  
16 jurisdictional line, and within DOGAMI’s jurisdiction. The DSL representative was  
17 presumably familiar with how DSL’s rules describe the agency’s jurisdiction. Further, the  
18 engineer submitted a survey “based on DSL guidelines” delineating the OHW/MHHW lines  
19 on the subject property, and the application proposed a setback of 50 horizontal feet from the  
20 OHW/MHHW lines for all mining activity. The county imposed a condition requiring that  
21 “[a]ll mining and activity connected to mining and processing shall be limited to an area  
22 separated from the mean higher high water line of the Rogue River by a one foot vertical, or  
23 fifty feet horizontal (whichever is greater) distance.” Record 62. As a final backstop, the  
24 county also imposed a condition requiring intervenor to obtain and maintain all required state

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gauge data to estimate bankfull stage, and/or by using readily identifiable field  
indicators. \* \* \*

1 agency permits, specifically including both DOGAMI and DSL. In our view, the finding that  
2 DOGAMI and DSL agree that the proposed mining area is upland of the jurisdictional line,  
3 combined with the above conditions, is sufficient to ensure that any uncertainty over the  
4 precise location of the jurisdictional line on the southern portion of the property does not  
5 undermine the county’s conclusion that DOGAMI has jurisdiction over the proposed mining  
6 area, and not DSL.

7 Finally, although we need not reach the issue, we question petitioners’ assertion that  
8 even if DSL has jurisdiction over part or whole of the proposed mining area that because  
9 DSL has currently suspended issuance of gravel mining permits in the estuary that obtaining  
10 a DSL permit is precluded “as a matter of law” under the reasoning in *Bouman* and *Miller*.  
11 As far as we are informed, the suspension is a temporary measure so that DSL can study the  
12 effects of in-water gravel mining and develop a mechanism for issuing regional gravel  
13 mining permits. Nothing cited to us in the record suggests that the suspension is permanent  
14 or that, when it is lifted, intervenor would be precluded from obtaining a DSL permit, if  
15 required.

16 The first assignment of error is denied.

17 **SECOND ASSIGNMENT OF ERROR**

18 Curry County Zoning Ordinance 7.040(9)(c) is a conditional use standard that in  
19 relevant part requires the county to identify any potentially conflicting uses within 250 feet of  
20 a mining site, determine the economic, social, environmental and energy consequences of the  
21 conflicting uses, and develop methods to resolve the conflict.<sup>4</sup>

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<sup>4</sup> CCZO 7.040(9)(c) provides:

“The County will define an area around the specific removal site which includes all lands within 250 feet of the site, based on the site map for a state mining or gravel permit. The applicant shall provide findings which identify the existing uses on those lands included within this area. The Commission shall evaluate the applicant’s findings with regard to the potentially conflicting uses identified in the area based on the factors below:



1 As noted, the City of Gold Beach water intake is located approximately 625 feet  
2 upriver of the northeastern boundary of the subject property. The city expressed concerns  
3 that the former mill ponds across Jerry’s Flat Road from the mining area may be  
4 hydrologically linked to the river, that the ponds contain toxic contamination from the mill,  
5 and that the proposed mining might accelerate release of contaminated groundwater to the  
6 river, and thereby possibly impact the city’s upriver water intake facility. In response, the  
7 county adopted findings that the proposed mining will begin above the MHHW and move up  
8 the slope, there would be no “pit” that could affect groundwater, and therefore the proposal  
9 will not increase the likelihood that contaminated groundwater from the mill site, if any  
10 exists, will move to the river.<sup>5</sup> The county declined to require intervenor to provide a  
11 hydrological study of the groundwater on the property. However, as a precaution, the county  
12 imposed a condition requiring that mining operations shall be halted if evidence of ground  
13 contamination or of dumped material from the mill site is exposed during mining operation.

14 Further, with respect to the city’s water intake facility, the county found that there is  
15 no evidence that any contaminated groundwater from the mill site, assuming it reached the  
16 river, could possibly flow upstream against the current, above the head of tide, to the city’s

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- “1) If the mining activity can be sited on an alternate site; and
  - “2) where conflicting uses are identified the economic, social, environmental and energy consequences of the conflicting uses shall be determined and methods developed to resolve the conflict.”

<sup>5</sup> The county’s findings state, in relevant part:

“[T]he type of mining activity proposed here is not the type of activity that promotes the movement of groundwater. This is not a proposal to dig a pit in the ground that would then fill with groundwater, thereby accelerating groundwater movement from the mill site to the river. The proposed mining activity begins above the MHHW mark, above the groundwater level, and moves upward in elevation at a 0.5 to 1.0% slope. It does not go downward in elevation. It is not an in-stream pit; it is not even an upland pit. No mining activity will extend down to the water table. Consequently, the proposed activity will have no impact on groundwater movement. The proposal will not increase the likelihood that contaminated groundwater from the mill site, if any exists, will move towards the river and contaminate it. A hydrological study of the site is not warranted. \* \* \*” Record 50 (underline in original).

1 water intake facility. Record 56. Nonetheless, the county imposed a condition prohibiting  
2 any mining activity within 3,500 feet of the water intake.

3 Petitioners challenge those findings and conditions, arguing that there is no evidence  
4 in the record supporting the county's finding that the mining operation will have no impact  
5 on groundwater movement. According to petitioners, there is no evidence regarding the  
6 depth of groundwater on the site, other than a statement in a Department of Environmental  
7 Quality (DEQ) report that the two mill ponds are "hydraulically connected," with the larger  
8 west pond "draining to the Rogue River." Record 777. Petitioners contend that this  
9 statement indicates that there is water movement, presumably groundwater movement,  
10 between the west pond and the river, and that there is no evidence that the proposed mining  
11 operation may not accelerate that movement.

12 Intervenor does not cite to any evidence in the record supporting the county's finding  
13 that the proposed mining operation will not impact groundwater on the site. There is  
14 apparently no evidence in the record regarding the depth or location of groundwater on the  
15 site. The county's findings appear to presume that groundwater on the site could not be  
16 higher in elevation than MHHW, and that may indeed be the case, but there is apparently no  
17 evidence on that point.

18 However, petitioners have not demonstrated that any lack of evidence on that point  
19 provides a basis for reversal or remand. The focus of CCZO 7.040(9)(c) is on impacts of  
20 mining on conflicting uses within 250 feet of the subject property. The only conflicting use  
21 identified by petitioners is the City of Gold Beach's water intake, which as conditioned is  
22 located 3,500 feet upstream of any mining activity, above the head of tide. Petitioners offer  
23 no theory that we can understand how any contaminated groundwater that might reach the  
24 river from the subject property could possibly migrate upstream a considerable distance,  
25 above the head of tide, to the water intake. Petitioners cite to no testimony or evidence in the  
26 record suggesting how contaminated groundwater from the site could reach the water intake.

1 Petitioners do not acknowledge or challenge the county’s finding at Record 56 that rivers  
2 flow generally downstream, even in flood conditions, and that nothing in the record indicates  
3 that the river ever flows upstream in this area. Based on those unchallenged findings, the  
4 county did not err in concluding that the water intake is not a potential conflicting use for  
5 purposes of CCZO 7.040(9)(c). Because petitioners identify no other conflicting uses within  
6 250 feet of the subject property that could be affected by any contaminated groundwater,  
7 petitioners’ arguments under CCZO 7.040(9)(c) regarding the impact of mining on other uses  
8 do not provide a basis for reversal or remand.

9 The second assignment of error is denied.

10 **THIRD ASSIGNMENT OF ERROR**

11 CCZO 7.040(9)(a) is a conditional use approval standard requiring in relevant part  
12 that the county consider the impact of the proposed use on water quality, fish habitat and  
13 wildlife habitat.<sup>6</sup> The code does not prohibit such impacts, or even require the applicant to  
14 minimize impacts, but only requires that the applicant submit sufficient information to allow  
15 the county to “review and set siting standards[.]”<sup>7</sup> Under this assignment of error, petitioners  
16 challenge the county’s findings regarding the (1) impacts of storm water runoff on water

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<sup>6</sup> CCZO 7.040(9)(a) provides, in relevant part:

“Plans and specifications submitted to the Commission for approval must contain sufficient information to allow the Commission to review and set siting standards related to the following standards:

“\* \* \* \* \*

“(2) The impact of the proposed use on water quality, water flow, or fish habitat on affected rivers or streams;

“(3) The impact of the proposed use on overall land stability, vegetation, wildlife habitat and land or soil erosion[.]”

<sup>7</sup> CCZO 7.040(9)(a) is thus largely an information standard. It is not clear under CCZO 7.040(9)(a) how the county would go about setting “siting standards,” or what those standards would look like. In the present case, as far as we can tell, the county did not purport to set any “siting standards” under CCZO 7.040(9)(a) governing the proposed mine.

1 quality, (2) potential entrapment of fish and the effects of turbid water on fish habitat, and (3)  
2 impacts of the mining activity on upland wildlife habitat.

3 **A. Water Quality**

4 Intervenor submitted an operating and reclamation plan and a consultant's report  
5 addressing impacts on water quality, among other things. Based on that information, the  
6 county concluded that as designed the mining operation will cause only minimal impacts to  
7 water quality, in part because the mining site is located above MHHW and will be mined  
8 only in the dry season, and the design of the operation will minimize water quality impacts  
9 during winter floods.<sup>8</sup> In addition, the county noted that storm water impacts on water

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<sup>8</sup> The county found, in relevant part:

"The proposed mine Operating and Reclamation Plan incorporates best management practices (BMPs) to eliminate or minimize impacts to the water quality, water flow, or fish habitat of the Rogue River, as discussed in the review of the Operating and Reclamation Plan prepared by Newton Consultants, Inc., the March 20, 2009 letter from ODFW, and in federal agency guidelines and materials contained in the record.

"Maps submitted with the application materials show that the mine site is located above the OHW level and equivalent MHHW level so the mine area should not impact water flow of the Rogue River or be inundated during normal summer and fall flows.

"Winter freshets, however, may bring floods that can inundate the mine area to some extent. The Newton Consultants report shows how the mine site will see low-velocity backwater encroachment only after river stage elevations rise above the eight (8) foot level. That report also shows encroachment diagrams for flooding of 10 feet, 13 feet, 16 feet and 24 feet. The 13 feet elevation is the expected annual flood elevation. As discussed in the Newton Consultants report, the operating plan begins mining at the southern, downstream, end of the site, and maintains a 'leave strip' along the bank of the river to minimize alteration of the river flow and to prevent higher flow velocities over the mining site under most scenarios. These types of measures are consistent with the best management practices described in federal materials included in the record. Impacts to water flow under typical flood conditions will be minimal.

"In the event of a 100-year flood event, the flood level is projected to reach an elevation of 33 feet as identified by FEMA records in the record. The Newton Report explains that during such extreme flood events, the mine site will be totally inundated, as it would be if the site were not developed. The mine site is designed so that the water will flood into the mine area, but that the design of the mine will not cause channeling and that stream capture will not take place. As the operating plan and Newton Consultants materials explain, the floor of the mining area will be sloped toward the river so that ponding and fish capture do not occur during flood events.

1 quality will also be addressed as part of the DOGAMI permit process, which the county  
2 found will require intervenor to obtain a storm water pollution control permit (SWPCP) from  
3 the Department of Environmental Quality (DEQ).

4 Petitioners argue that the county erred in relying on the possibility that intervenor will  
5 obtain a SWPCP, as an additional basis to demonstrate compliance with CCZO 7.040(9)(a).  
6 First, petitioners contend that it is not clear that DOGAMI will in fact require intervenor to  
7 obtain a SWPCP. According to petitioners, whether DOGAMI requires an applicant for a  
8 DOGAMI operating permit to also obtain a SWPCP is a matter for DOGAMI's discretion.  
9 However, the county found that intervenor will be required to obtain a SWPCP, and  
10 petitioners cite nothing in the record suggesting the contrary. Indeed, petitioners point out  
11 that DOGAMI informed intervenor that "[a] detailed storm water control plan will be  
12 necessary for the site," which presumably would be needed to obtain a SWPCP. Record 428.  
13 As far as the record reflects it appears that DOGAMI has exercised its discretion to require  
14 intervenor to obtain a SWPCP.

15 Petitioners next argue that the county erred in relying on approval of an SWPCP,  
16 unless the county has before it a specific storm water control plan to evaluate, citing *Gould v.*  
17 *Deschutes County*, 216 Or App 150, 171 P3d 1017 (2007). In *Gould*, the county found a

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"The Newton Consultants report also discusses water quality issues. In the summer months, the site will be above the water level of the river. As discussed above, in all but the most extreme flood events, water encroachment will be by low-velocity backwater flow, achieved through the use of a leave strip retained to maintain the current river flow through the secondary channel and to prevent erosion within the mining site. The Newton Consultants report also discusses the location and grading of vegetated leave areas and the placement of large woody debris on the slopes of the leave areas to limit the potential for erosion which would degrade water quality. \* \* \*

"Water quality issues will further be addressed in the DOGAMI application process through the SWPCP that will be developed as part of the 1200-A NPDES stormwater permitting process. Tidewater will be committed to following the Best Management Practices (BMPs) as detailed in the SWPCP. These plans must be approved by the DEQ and Tidewater will be obligated to follow them verbatim. The BMPs will prevent or minimize any pollution originating from the mine site from entering the river and impacting the water quality." Record 15-16.

1 proposed destination resort complied with a conditional use permit approval standard  
2 requiring that any negative impact on fish and wildlife resources be completely mitigated,  
3 based entirely on a memorandum of understanding between the applicant and state and  
4 federal agencies, reflecting agreement to develop at some point in the future a mitigation plan  
5 and to obtain agency approval for that plan. The Court of Appeals held that without knowing  
6 the specifics of proposed mitigation measures, the county was in no position to conclude that  
7 the mitigate-all-negative-impacts standard was met.

8         Intervenor responds, and we agree, that *Gould* is distinguishable. In *Gould*, the only  
9 evidence submitted to demonstrate compliance with the county’s strict mitigate-all-negative-  
10 impacts standard was the applicant’s promise to develop a mitigation plan at a future date.  
11 Here, CCZO 7.040(9)(a) is largely an informational standard, and the applicant submitted a  
12 considerable amount of information, including the operating and reclamation plan with  
13 proposed best management practices, the consultant’s report, ODFW letters, and federal  
14 agency guidelines, to demonstrate that water quality impacts would be eliminated or  
15 minimized, even though CCZO 7.040(9)(a) does not necessarily impose such a standard.<sup>9</sup>  
16 With respect to impacts to water quality from stormwater run-off, the county relied in part on  
17 the DOGAMI permit process and the fact that DOGAMI indicated it would require  
18 intervenor to obtain a SWPCP, which in turn will require intervenor to comply with DEQ’s  
19 stormwater best management practices.

20         Where an applicant has submitted sufficient information to allow the local  
21 government to determine that the applicable standard is satisfied, but the local government

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<sup>9</sup> For this reason, the present case is distinguishable from *Rasmussen v. Baker County*, 17 Or LUBA 1185 (1989), which petitioners also cite. In *Rasmussen*, the county code required the mining applicant to submit plans and specifications sufficient to allow the county to evaluate a number of considerations, including impacts on fish and wildlife habitat and post-mining rehabilitation, much like CCZO 7.040(9)(a). The applicant submitted no operating or reclamation plans at all, or any similar information, and we held that the applicant’s promises to develop operating and reclamation plans and provide other specifications at some future date were insufficient to allow the county to make the evaluations required by the code.

1 for extra assurance also requires the applicant to obtain a state agency permit and comply  
2 with state agency regulations, we do not think *Gould* requires the applicant to submit its state  
3 agency application materials to the local government for review under the local approval  
4 standard.

5 Likewise, we disagree with petitioners that the county was required in these  
6 circumstances to find that it is “feasible” to obtain a SWPCP. Petitioners cite *Gould v.*  
7 *Deschutes County*, 227 Or App 601, 612, 206 P3d 1106 (2009) for that proposition, but that  
8 case simply held that when a local government chooses to *defer* a finding of compliance with  
9 a local approval standard to a subsequent review proceeding rather than deny the application  
10 for insufficient evidence of compliance with the standard, the local government must find  
11 that compliance with the local standard is feasible, *i.e.*, that it is possible for the applicant to  
12 submit evidence at the subsequent review proceeding demonstrating compliance with the  
13 local standard. The present case does not involve deferral of a finding of compliance with  
14 CCZO 7.040(9)(a). As discussed under the first assignment of error, in the present  
15 circumstances the county might at most be required to find that obtaining a SWPCP is not  
16 precluded as a matter of law, under the reasoning in *Bouman* and *Miller*, but petitioners do  
17 not offer any reason to believe that DEQ issuance of a SWPCP for the proposed operation is  
18 precluded as a matter of law.

19 Finally, petitioners offer one argument that the information submitted by intervenor  
20 under CCZO 7.040(9)(a) is insufficient to allow the county to evaluate water quality impacts.  
21 As noted, petitioners cite to a DOGAMI letter stating that intervenor’s DOGAMI permit  
22 application is incomplete and requesting additional information, including a storm water  
23 control plan. The DOGAMI letter commented on the storm water measures proposed in  
24 intervenor’s operating and reclamation plan, which relied in part on the slope of the mining  
25 floor draining rainwater to the river, that “[t]his may work fine during the dry season but this  
26 would cause turbid water to reach the river during periods of heavy rain.” Record 428.

1 Petitioners argue that this testimony about “turbid water” is evidence of water quality impacts  
2 from stormwater that the county failed to address, and that testimony undermines the  
3 county’s conclusion that the measures proposed by intervenor will minimize water quality  
4 impacts.

5 However, this concern is addressed by requiring intervenor to obtain a DOGAMI  
6 operating permit, which will turn require intervenor to obtain a SWPCP. Petitioners do not  
7 offer any reason to believe that compliance with those permit requirements will be  
8 insufficient to protect water quality from stormwater runoff impacts, for purposes of CCZO  
9 7.040(9)(a). In addition, the county relied on proposed and required measures such as  
10 vegetated leave strips and retention of woody debris to minimize erosion and protect water  
11 quality. Petitioners have not established that the evidence submitted is insufficient to allow  
12 the county to evaluate compliance with CCZO 7.040(9)(a), or that the county’s findings are  
13 inadequate or unsupported by substantial evidence.

14 **B. Fish and Wildlife Habitat**

15 The county’s findings explain that due to the elevation of the mine, the operation  
16 would not impact fish habitat during the dry summer months, and that due to the design of  
17 the mine winter flooding would not result in fish entrapment. *See* n 8. However, petitioners  
18 cite again to the statement in the DOGAMI letter that “turbid water” will reach the river  
19 during periods of heavy rain, and contend that the county’s findings regarding fish habitat fail  
20 to address sediment and turbidity from the mine site during winter storms and flooding, and  
21 resulting impacts on fish habitat.

22 Intervenor responds that ODFW reviewed the operation and reclamation plan and  
23 testified that the proposed mining minimizes impacts to fish and wildlife habitat. For the  
24 reasons set out above, we agree with intervenor that petitioners have not demonstrated any  
25 inadequacy or lack of evidentiary support for the county’s findings regarding impacts on fish  
26 habitat.



1 With respect to wildlife habitat, the county found that the vegetated “leave strip” and  
2 revegetation required by conditions of approval would minimize impacts to wildlife, noting  
3 that the ODFW testified that the operating and reclamation plan met all its concerns with  
4 respect to wildlife habitat. Petitioners argue, however, that the county’s findings do not  
5 specifically describe the anticipated impacts on wildlife habitat, and are therefore inadequate.  
6 However, the findings clearly explain that mining will remove a certain amount of vegetation  
7 currently used by wildlife, and that required revegetation will ensure that habitat disturbance  
8 is only temporary in nature. Record 17; *see also* findings at Record 24-25 below, describing  
9 vegetation and upland habitat on the property. Petitioners do not explain why a more specific  
10 description of impacts on wildlife habitat is required for purposes of CCZO 7.040(9)(a).

11 The third assignment of error is denied.

12 **FOURTH ASSIGNMENT OF ERROR**

13 CCZO 7.040(14)(a) requires for conditional uses in the estuarine resource zone  
14 “findings of consistency with the resource capabilities of the area,” based on several factors.<sup>10</sup>

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<sup>10</sup> CCZO 7.040(14) provides, in relevant part:

“The following criteria and conditions are applied to specific uses and activities in the Estuarine Resource (ER) zone.

“a) Resource Capability Test. Certain uses in estuarine areas require findings of consistency with the resource capabilities of the area.

“(1) A determination of consistency with resource capability shall be based on:

“(a) Identification of all resources existing at the site and factors relating to the resource capabilities of the area.

“(b) Evaluation of impacts on those resources by the proposed use.

“(c) Determination of whether any or all of the identified resources can continue to achieve the purpose of the management unit if the use is approved.

“(2) In determining the consistency of a proposed use or activity with the resource capabilities of the area, the county shall utilize information from federal or state resource agencies regarding any regulated activities in estuarine areas.”

1 Similarly, the Curry County Comprehensive Plan (CCCP) Goal 16 element, policy 11,  
2 requires the county to analyze the impacts of proposed actions that would potentially alter the  
3 estuarine ecosystem, including impacts on water quality, recreation and aesthetic uses, and  
4 navigation.<sup>11</sup> Finally, CCCP Goal 16, policy 13 requires the county to consider the potential  
5 cumulative impacts of proposed activity with other development activities in the estuary.  
6 Under this assignment of error, petitioners challenge the county’s findings under CCZO  
7 7.040(14)(a) and CCCP policies 11 and 13.

8 The county adopted three pages of findings under CCZO 7.040(14)(a)(1)(a),  
9 describing the estuarine “resources” existing on the site and in the area, such as vegetation,  
10 invertebrates, fish and wildlife, and explaining why the proposed mining is consistent with  
11 the area’s “resource capability.” Petitioners argue that that description is inadequate, because  
12 it fails to identify specific plant and animal species on the subject property, and instead  
13 generally relied on comprehensive plan descriptions of types of common estuarine plants and  
14 animals.

15 However, petitioners do not explain why CCZO 7.040(14)(a)(1)(a) requires a  
16 comprehensive biological survey of the subject property, or demonstrate that the county’s

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<sup>11</sup> CCCP Goal 16, Policy 11 provides:

“Curry County will analyze the impact(s) of proposed actions which would potentially alter the estuarine ecosystem. Prior to a decision regarding any proposed alteration there shall be an impact assessment which will enable reviewers to gain a clear understanding of the impacts to be expected. It shall include information on:

“(a) The type and extent of alterations expected.

“(b) The type of resource(s) affected;

“(c) The expected extent of impacts of the proposed alteration on water quality and other physical characteristics of the estuary, living resources, recreation and aesthetic use, navigation and other existing and potential uses of the estuary, and

“(d) The methods which could be employed to avoid or minimize adverse impacts.”

1 findings are inadequate without such a survey or similar detailed description of plant and  
2 animal species. With respect to site vegetation, for example, the county’s findings state that:

3 “Evidence in the record shows that the vegetation on the site consists of a  
4 range of deciduous and coniferous trees, a significant undergrowth consisting  
5 of shrubs, willows, blackberries and anise, and wild grasses. The area where  
6 mining activity will begin is generally thick with vegetation, which provides  
7 good shelter for wildlife, but also restricts wildlife movement and access due  
8 to the density of the vegetation.

9 “\* \* \* \* \*

10 “The use will remove a significant portion of the vegetative habitat in the area  
11 of each year’s mining activity. However, the area actually disturbed in any  
12 given year constitutes a relatively small percentage of the overall subject  
13 property area. This removal activity will not only affect the on-site vegetation,  
14 it will generally impact birds and mammals. Because vegetation along the  
15 MHHW mark will remain untouched, as will significant riparian vegetation,  
16 fish should not be affected by mining activity.

17 “The remaining portions of the property will be left in its current natural state  
18 until it is mined. Also, the leave areas scattered throughout the mining area  
19 will continue to provide for wildlife winter forage and shelter even during the  
20 winter months. Partial habitat restoration will begin on areas mined in  
21 previous years as the mining activity advances up the property. As habitat is  
22 removed due to mining activity, birds and mammals will need to relocate to  
23 other habitat areas located on the property or near-by. While removal of  
24 significant vegetation will remove habitat for many smaller species, that  
25 activity will open up areas with thick vegetation, making passage through  
26 those areas by large mammals easier.

27 “\* \* \* \* \*

28 “Habitat disturbance will ultimately be temporary as the site will be restored  
29 following mining operations in a manner that must satisfy both ODFW and  
30 DOGAMI requirements. Once reclaimed, the property should provide the  
31 types of vegetative cover and promote the same animal species it supports  
32 now.” Record 24-25.

33 Those findings identify the vegetative and habitat resources on the subject property, and  
34 evaluate impacts on those resources. Petitioners have not demonstrated that CCZO  
35 7.040(14)(a)(1)(a) requires more.

1 With respect to CCCP Goal 16, policy 11, petitioners argue only that the county failed  
2 to evaluate expected impacts on water quality, physical characteristics, recreation, aesthetic  
3 uses, and navigation. However, the county adopted three pages of single-space findings  
4 addressing policy 11, including an extensive discussion of impacts on those elements.  
5 Record 40-43. Petitioners do not address or challenge those findings.

6 Finally, with respect to CCCP Goal 16, policy 13, the county considered the  
7 cumulative impact of the proposed mining combined with two existing gravel mining  
8 operations in the estuary, and concluded that because one of the existing mining operations is  
9 approaching its end point, and because the proposed mining operation is subject to conditions  
10 that will minimize adverse impacts, the proposed activity will not add significantly to the  
11 cumulative impact of development activities within the estuary. Record 42-43. Petitioners  
12 disagree with that conclusion, arguing that the cumulative impact of three gravel mining  
13 operations in an estuary as small as the Rogue River estuary is significant, citing to a  
14 statement in the staff report that the three operations combined would occupy approximately  
15 28 percent of the total acreage of the estuary. Record 309. However, petitioners' mere  
16 disagreement on that point does not establish a basis for reversal or remand. Given the  
17 county's unchallenged finding that the proposed mine will essentially replace one of the  
18 existing mines, and its finding that adverse impacts are minimized, which we have sustained,  
19 the fact that the total acreage of the three mining operations represents a large proportion of  
20 the total estuary acreage does not undermine the county's conclusion that the potential  
21 cumulative impacts of proposed activity with other development activities in the estuary are  
22 not significant.

23 The fourth assignment of error is denied.

24 The county's decision is affirmed.