

U.S. Army Corps of Engineers
Regulatory Branch
Caila Heintz
P.O. Box 2946
Portland, Oregon 97208-2946

February 22, 2021

RE: U.S. Army Corps of Engineers (Corps) Public Notice for a Permit Application: NWP-2020-065; Knife River Company; Columbia County.

Dear Ms. Heinz,

This letter is in response to the above cited public notice soliciting comments per your review and authority under Section 404, Clean Water Act (33 U.S.C. 1344) of a permit application to mine gravel on Liberty Hill in Columbia County north of St. Helens, Oregon (45.870642, -122.824835). My comments are provided as a private citizen and an interested party with a long standing commitment and involvement in the protection of the area in and around the vicinity of the proposed gravel mining operations.

Pacific Habitat Services (PHS) completed a wetland delineation for the proposed project site in 2019. This delineation identified 34 wetlands, two intermittent streams, and two ephemeral streams within the proposed 132-acre expansion area. Of the freshwater wetlands identified, about 12.22 acres are in the proposed project impact area. Within the impact area, the delineation identified a total of 0.52 acres of PEM wetland, 4.71 acres of Palustrine Forested (PFO) wetland, and 7.08 acres of Palustrine Emergent/Palustrine Forested (PEM/PFO) wetland. Approximately 1.12 acres of these impacted wetlands are also classified as a wet-prairie wetland type, an Aquatic Resource of Special Concern (ARSC) as defined under Oregon Administrative Rules (OAR) 141-085-510(3). The hydrogeomorphic (HGM) classifications of these wetlands break down as 1.1 acres of slope wetlands, 1.43 acres of depressional wetlands, and 9.69 acres of depressional outflow wetlands.

Pre-project Oregon Rapid Wetland Assessment Protocol (ORWAP) wetland functions and values for each of the assessment area wetlands are provided in the permit application. The following wetland functions were evaluated at the impact site: 1) water storage and delay, 2) sediment retention and stabilization, 3) anadromous fish habitat, 4) amphibian and reptile habitat, and 5) water cooling. Except for anadromous fish habitat, each function received a 'Higher' assessed rating.

Three intermittent streams (about 0.063 acres) in the proposed impact area are assessed using Oregon Stream Functional Analysis Method (SFAM) as having 'Higher' to 'Moderate' ratings for 1) flow variation, 2) sediment mobility, 3) sustain trophic structure, and 4) chemical regulation. All of the streams in the impact area drain toward the Columbia River, a Traditional Navigable Water (TNW) of the United States.

In addition to direct impacts, the proposed project would also indirectly impact approximately 0.85 acre of wetlands and 0.03 acre of intermittent streams through the disruption of surface and subsurface hydrology. Wetlands and other waters indirectly affected by the proposed project include the off-site portions of Wetlands M, DD, and EE, and the off-site portion of Intermittent

Stream B, including both its main channel and tributary. Intermittent Stream D, which is located completely off site, would also likely be affected by hydrology disruptions from the proposed project. All of these wetlands and streams are located downgradient from the proposed mining operation, which would disrupt the downslope movement of surface and subsurface flows that provide an important hydrology source for these areas. While some of these areas would still receive direct precipitation, it would unlikely be sufficient to support hydrophytic plant communities. These wetlands are expected to dry up over time such that they no longer meet wetland characteristics. Any wetland functions and value associated with these areas would likely eventually be lost.

Juvenile rearing, juvenile and adult migrating, and adult spawning Lower Columbia River Threatened Coho, Chinook, Chum salmon and Steelhead¹ may be seasonally present in the Milton Creek (a tributary to the Columbia River and likely also a TNW) portion of the proposed project's action area downslope and downstream from the proposed mining activity.

The specialized wet-prairie found here² is extremely difficult if not impossible to replace using compensatory mitigation. In 2013 Dr. Kenton Chambers, Oregon State University Herbarium botanist, and John Christy, Oregon Natural Heritage Program ecologist, considered the proposed project area as "one of the best examples of intact camas meadow and Oregon White Oak/Oregon Ash mixed woodlands in the Pacific Northwest."³ Less than 2% of the pre-European settlement wet-prairie remains in the Willamette Valley Ecoregion today.⁴ This mosaic of interdigitated wetlands and uplands results in a complicated linkage of functions and values. In other words, the functions and values of the wetlands should not be separated from their surrounding uplands. They should instead be evaluated comprehensively as a wetland/upland complex.⁵ Using this logic, the direct impact footprint is closer to the full size of the mining operation, over 131-acres.

This project may have substantial and unacceptable impacts to Aquatic Resources of National Importance (ARNI) including but not necessarily limited to Federal species of concern, high value forested wetlands and functionally associated uplands, migratory birds, unique and rare prairie plant communities persisting on basalt rock surfaces and intercepted by an intermittent and ephemeral hydrology at the northwestern range of the Willamette Valley Ecoregion.

¹ Listing Notices 70 FR 37160, 64 FR 14308, , 64 FR 14507, 63 FR 13347.

² The precise acreage of wet-prairie delineated in the proposed impact area has recently become the subject of a debate that to the best of my knowledge has not yet been resolved on the date of this letter.

³ Source: Friends of Liberty Hill

⁴ John A. Christy, Oregon Biodiversity Information Center, Institute for Natural Resources, Portland State University, P.O. Box 751, Portland, Oregon 97207 Edward R. Alverson, The Nature Conservancy, 87200 Rathbone Road, Eugene, Oregon 97402

⁵ Precedence for considering upland/wetland mosaics as inextricably integrated units can be found in the Agate Desert Vernal Pool Regional General Permit (RGP-5) in Jackson County, Oregon where such complexes are considered so valuable their protection in perpetuity is considered a focal compensatory mitigation strategy. Here the interdigitated uplands are considered particularly important with regard to protecting the vernal pool habitat from disruptions in water supply and hydrology, and degradation of the quality of the water within the vernal pool habitats.

There is a rebuttable presumption that, for projects that are non-water dependent, upland alternatives are available (40 CFR 230.10(a)(3)). This means the burden of proof of determining that there are no viable upland alternatives to mining on Liberty Hill falls onto the applicant. Additionally, the applicant must demonstrate to the Corps that, among other things, the proposed project is the least environmentally damaging practicable alternative (LEDPA) to achieve the project's purpose. In order to determine the LEDPA, the applicant must work with the Corps to conduct a 404(b)(1) alternatives analysis.

Except as provided under section 404(b)(2), no discharge of dredged or fill material can be permitted if a practicable alternative to the proposed discharge can be found that would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have *other significant adverse environmental consequences* (40 CFR 230.10(a)). This means the Corps must also consider the impacts into the adjacent associated uplands if their destruction would result in *significant adverse environmental consequences*. This is exactly the case at the proposed mining site.

The purpose of the proposed project is stated in the permit application as:

“ . . . to expand the existing aggregate mining site at Watters Quarry into an area approved for aggregate mining to allow the applicant to continue to provide an uninterrupted dependable supply of high-quality aggregate for the County and the nearby Portland metropolitan area.”

The purpose statement in the permit application is so narrowly defined that it prematurely excludes potentially less damaging practicable alternatives outside of an adjacent expansion to Knife River's existing Watters Quarry. The Corps' *Old Cutler* decision stated that the Corps may not so narrowly define the project's basic purpose "so as to unduly restrict a reasonable search for potential practicable alternatives." *Old Cutler* also stated that the project purpose must be defined so that the "applicant is not in the position to direct, or attempt to direct, or appear to direct the outcome of the Corps evaluation" under the 404(b)(1) Guidelines.⁶ Therefore, it is the Corps' responsibility to consider a broader more inclusive purpose statement when evaluating this proposed project's eligibility for a permit.

The compromised legal foundation for the applicant's alternatives analysis notwithstanding, the off-site alternatives considered appear to not have been thoroughly considered in a manner that can be defended for their comprehensive veracity in site selections nor within the context of comparing the relative magnitude of their respective impacts to Waters of the United States (WOTUS). In other words, while economic screening criteria appear to be actively engaged, environmental criteria were either outright neglected or only barely cursorily analyzed.

The Corps should facilitate on-going negotiations between Knife River Company and the stakeholders involved in this project review. To facilitate the review effort, the Corps should evaluate the significance of impact under the National Environmental Policy Act (NEPA) (33 CFR Part 325). If the Corps determines a Finding of Significant Impact (FOSI), the Corps should help the applicants prepare a Draft Environmental Impact Statement (DEIS) to facilitate a

⁶ *Old Cutler*, *supra* note 9, at 13-14, 6; *see also Hartz Mountain*, *supra* note 9, at 4 and *Sylvester v. U.S. Army Corps of Engineers*, 882 F.2d 407, 409 (9th Cir. 1986) (stating that an applicant cannot define their project so as to preclude the possibility of alternative sites, making impossible what is practicable).

legally defensible alternatives analysis that ensures the selection of the least environmentally damaging practicable alternative (LEDPA) consistent with the CWA 404(b)(1) Guidelines.⁷ It is also important to note that in order to be in compliance with these Guidelines, where projects are non-water dependent, the Corps' Record of Decision (ROD) should also disclose how the applicant has demonstrated they have rebutted the presumption that there are LEDPA upland mining sites available that continue to meet the proposed project's purpose and need.

Once a preferred alternative for the LEDPA mining site has been determined, on-site mitigation planning can commence using a hierarchical sequence of considerations: 1) Avoidance, 2) Minimization, and 3) Compensation.⁸ Compensatory mitigation is the last step only to be used after all other efforts have been made to avoid and minimize impacts have left unavoidable areal and functional losses. However, it is premature at this time to plan detailed on-site mitigation and compensatory mitigation since a proper alternatives analysis has yet to be completed.

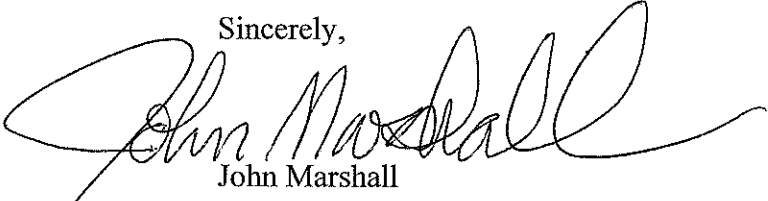
Until these tasks are completed, the applicant will have failed to meet their burden to demonstrate the LEDPA has been selected. Therefore, the Corps should hold this permit in abeyance. If after completion of these tasks the Corps determines the results will substantively change the content of the permit application, an appropriately revised new Public Notice should be prepared and circulated for public comment. In addition, given the level of public concern, the magnitude of potential direct and indirect and cumulative adverse effects, and the public trust resources at stake in this permit application, the Corps should schedule a public hearing to receive oral comments during the revised public review process.

If the Corp chooses to disregard these recommendations and to proceed using the applicant's currently submitted alternatives analysis, on-site mitigation logic, and compensatory mitigation plan, please be advised that as an interested party I am obliged to request for my files a complete administrative record on the proposed Knife River project. Therefore, I respectfully request that the Corps send me copies of the following documents as they are completed:

1. A copy of the completed record of decision for this permit application; and
2. A copy of the permit, if issued (including any attachments).

Thank you for the opportunity to provide these comments.

Sincerely,



John Marshall

⁷ Per 40 CFR 230.5 and February 6, 1990 Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines determining the least environmental damaging alternative cannot include any aspect of compensatory mitigation.

⁸ 1990 Memorandum of Agreement (MOA) between the Environmental Protection Agency (EPA) and the Department of Army establishes a three-part process, known as the mitigation sequence, to help guide mitigation decisions and determine the type and level of mitigation required under Clean Water Act Section 404 regulations.