

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

AUDUBON SOCIETY OF PORTLAND,)
a nonprofit Oregon corporation;))
JEFF GILLIGAN; THE OREGON)
SHORES CONSERVATION COALITION;)
DANIEL S. PICKTHORN; and THE)
OREGON ENVIRONMENTAL COUNCIL, a)
non-profit Oregon corporation,)

Petitioners,)

LUBA NO. 82-075

v.)

ORDER

OREGON DEPARTMENT OF FISH)
AND WILDLIFE; OREGON FISH)
AND WILDLIFE COMMISSION,)

Respondents,)

and)

BOB OLSEN, CECIL HARRIS, and)
SAM HAYES, (Oyster Growers),)

Participants.)

COX, Referee.

This matter is before the Board on Participants' Oyster
Growers motion to dismiss on the ground that this Board lacks
jurisdiction to hear this case. The decision being contested
is the grant by the Fish and Wildlife Commission of a permit
under ORS 509.140 to apply the chemical "Sevin" to
approximately three percent of the intertidal area (140 acres)
of Tillamook Bay. The purpose for application of the chemical
is to aid oyster growers to establish, reestablish or maintain
oyster "bottom culture" in the subject area. Participants move
for the dismissal under their theory that proper jurisdiction

1 lies in the Oregon Court of Appeals and that the contested
2 decision is not a "land use decision" because it does not
3 concern the adoption, amendment or application of statewide
4 goals. We disagree with participants and deny their motion to
5 dismiss.

6 APPEAL PENDING IN COURT OF APPEALS

7 Participants argue that pursuant to ORS 183.482
8 "jurisdiction for judicial review of contested cases is
9 conferred upon the Court of Appeals." Petitioners argue the
10 permit, which is the subject of the decision being contested in
11 this case, was granted by the Oregon Fish and Wildlife
12 Commission, a state agency, as a contested case. They point
13 out petitioners have, as of September 10, 1982, filed with the
14 Oregon Court of Appeals an appeal addressing issues "identical
15 to those presented before LUBA." They argue petitioners have
16 properly chosen the Court of Appeals as the forum for review in
17 accordance with the Administrative Procedures Act and LUBA has
18 no jurisdiction over this matter.

19 We can not agree with participants. As indicated below, we
20 find, after review of the order and findings in support
21 thereof, that respondent has taken an action with respect to a
22 program affecting land use and made a land use decision. The
23 fact that the decision also meets the statutory definition of a
24 contested case under ORS 183.482 does not preclude this Board
25 from reviewing the matter. As petitioners state in their
26 memorandum in opposition to participant's motion:

1 "ORS 197.180(1) provides that state agencies must make
2 land use decisions in accordance with the statewide
3 planning goals. The same decision may involve the
4 exercise of other powers vested by statute which do
5 not involve land use. * * * If the position of
6 Intervenor [participants] were adopted, the agency
7 could avoid its statutory responsibilities to apply
8 the statewide planning goals simply by providing for
9 hearings 'substantially of the character' required by
10 ORS Ch. 183 for contested cases. Since the Court of
11 Appeals could not exercise review jurisdiction over
12 issues related to the statewide goals without prior
13 action by LUBA or LCDC, aggrieved parties would be
14 unable to exercise their statutory rights of review
15 provided by Ch. 779 [772]."

9 For analysis purposes, the order issued by the Fish and
10 Wildlife Commission can be viewed as containing two decisions.
11 One decision reflects the agency's responsibility to apply,
12 pursuant to ORS 197.180, the statewide planning goals to its
13 action granting applicants their requested permit. The second
14 decision involves the application of statutory standards
15 contained in ORS 509.140.¹ The mere fact that the petitioner
16 has appealed to the Court of Appeals the portion of the order
17 involving ORS Ch 509 does not oust this Board of jurisdiction
18 over matters which fit within the definition of a "land use
19 decision," see discussion infra. City of Pendleton v. Kerns,
20 56 Or App 818, ___ P2d ___ (1982).

21 LAND USE DECISION

22 Pursuant to Oregon Laws 1979, ch 772, as amended by Oregon
23 Laws 1981, ch 748, sec 4, the Land Use Board of Appeals has
24 exclusive jurisdiction to review any land use decision of a
25 state agency. In pertinent part, a "land use decision" is
26 defined by ORS 197.015(10) as:

1 "(b) A final decision or determination of a
2 state agency other than the commission [LCDC] with
3 respect to which the agency is required to apply the
4 goals."

5 The question to be answered is whether the Fish and
6 Wildlife Commission was required to apply the statewide goals
7 to this decision. To answer the question we must first look to
8 ORS 197.180(1) which states:

9 "(1) Except as provided in ORS 527.722, state
10 agencies shall carry out their planning duties, powers
11 and responsibilities and take actions that are
12 authorized by law with respect to programs affecting
13 land use."

14 The inquiry then becomes one of whether the contested action is
15 a "program affecting land use" of the type recognized by the
16 Oregon courts as requiring goal application. Some activities
17 may technically "affect land use" but nevertheless not require
18 goal application. The Oregon Supreme Court held in West Side
19 Sanitary District v. LCDC, 289 Or 409, 614 P2d 1148 (1980),
20 that the legislature did not intend ORS 197.180(1) to apply to
21 decisions annexing land to alleviate health hazards. The court
22 held that

23 "a finding by EQC [Environmental Quality Control]
24 whether the city's plans are 'adequate' or
25 'inadequate' to remove or alleviate a health hazard
26 does not depend upon statewide land use planning
goals." 289 Or at 414.

27 See also West Side Sanitary District v. Health Division, 289 Or
28 417, 614 P2d 1151 (1980).

29 The court in both West Side cases looked to legislative
30 intent to decide whether 197.180(1) was applicable to the

1 action being taken. Here we are not directed by participants
2 to any legislative provision or history, nor do we know of any,
3 which requires us to hold the legislature did not intend that
4 ORS 197.180(1) apply to a decision such as is being contested
5 in this case. See footnote 1.

6 Such a conclusion does not end our inquiry, however. We
7 still must determine whether a "program affecting land use" is
8 involved here. We decide it is by approaching the question
9 from both a practical, factual application of ORS 197.180(1)
10 and review of statewide goal terminology.

11 From a practical sense, one need only look at what is being
12 proposed by the oyster growers to conclude that application of
13 Sevin affects the use to which the subject land will be put.
14 According to Fish and Wildlife's findings, the contested action
15 permits treatment of approximately 140 acres of oyster beds in
16 the intertidal area of Tillamook Bay with Sevin, a form of
17 carbaryl. The purpose of the treatment is to reduce the
18 populations of mud shrimp (*Upogebia pugettensis*) and ghost
19 shrimp (*Callinassa californiensis*) which interfere with the
20 growth and commercial raising of oysters by "bottom culture."
21 The commission found it is generally necessary to use carbaryl
22 on areas infested with mud and ghost shrimp every three to four
23 years in order to maintain conditions suitable for "bottom
24 culture." Sevin is a nonspecific pesticide which is toxic to a
25 number of organisms in varying degrees of severity. It is
26 toxic at low concentrations to many crustaceans such as crabs,

1 shrimp, amphipods, euphausiids and copepods. Mollusks are
2 impacted less by Sevin than crustaceans, but they are
3 nevertheless impacted to some degree. Small fish have been
4 observed to suffer some mortalities from exposure to Sevin. In
5 addition, the properties proposed for treatment are foraging
6 areas for many species of shorebirds. With the foregoing facts
7 in mind, one can reasonably conclude that the continued use of
8 the subject property for its present purposes, whether those be
9 natural or human, will certainly be affected by the Sevin
10 application program.

11 Analysis of terms in the statewide goals to determine
12 whether a governmental action affects land use was resorted to
13 by the Court of Appeals in City of Pendleton v. Kerns, 56 Or
14 818, 822 (1982). Applying the same logic to this case, we once
15 again conclude that Fish and Wildlife action is a "program
16 affecting land use." The Fish and Wildlife Commission findings
17 indicate the proposed chemical application will take place on
18 the intertidal areas in Tillamook Bay. As such, the area upon
19 which the application will take place appears to be in an
20 estuary which is defined in the statewide goals as:

21 "A body of water semi-enclosed by land, connected with
22 the open ocean, and within which salt water is usually
23 diluted by fresh water derived from the land. The
24 estuary includes: (a) Estuarine water; (b) Tidelands;
25 (c) Tidal marshes; and (d) Submerged land. Estuaries
26 extend upstream to the head of tidewater, except for
the Columbia River Estuary, which by definition is
considered to extend to the western edge of Puget
Island."

Statewide Goal 16² requires governmental actions that will

FOOTNOTES

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ORS 509.140 states:

4 "Placing explosives or harmful substances in waters in
5 course of lawful work; permit. (1) Whenever in the
6 course of removing any obstruction in any waters of
7 this state, or in constructing any foundations for
8 dams, bridges or other structures, or in carrying on
9 any trade or business, any person, municipal
10 corporation, political subdivision or governmental
11 agency desires to use explosives or any substances
12 deleterious to fish, such person, municipal
13 corporation, political subdivision or governmental
14 agency shall make application to the commission for a
15 permit to use the explosives or substances in such
16 waters.

17 "(2) If the commission finds it necessary that
18 the explosives or substances be used, it may make an
19 order granting such person, municipal corporation,
20 political subdivision or governmental agency the right
21 to use the explosives or substances and shall:

22 "(a) Designate the places and period within
23 which the explosives or substances may be used; and

24 "(b) Prescribe such precautions as will save
25 fish from injury.

26 "(3) It is unlawful to disregard such order or
27 fail to obtain such order or permit before using
28 explosives or substances deleterious to fish.

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Goal 16 states, in part:

30 "To recognize and protect the unique environmental,
31 economic and social values of each estuary and
32 associated wetlands; and

33 "To protect, maintain, where appropriate develop, and
34 where appropriate restore the long-term environmental,
35 economic, and social values, diversity and benefits of
36 Oregon's estuaries.

1 "Comprehensive management programs to achieve these
2 objectives shall be developed by appropriate local,
3 state, and federal agencies for all estuaries."
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