

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

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

Petitioners, )

v. )

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

Respondents, )

and )

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

Intervenors. )

LUBA NO. 82-075

FINAL OPINION  
AND ORDER

Appeal from Oregon Department of Fish and Wildlife and Oregon Fish and Wildlife Commission.

Terry Morgan, Lake Oswego, filed a petition for review and reply brief and argued the cause for Petitioners. With him on the brief were Morgan & Shonkwiler.

David A. Rhoten, Salem filed a brief and argued the cause for Respondents-Intervenors. With him on the brief were Rhoten, Rhoten & Speerstra.

Mary Diets, Salem, filed a brief and argued the cause for Respondent. With her on the brief was Dave Frohnmayer, Attorney General and Stanton F. Long, Deputy Attorney General.

Cox, Board Member; Bagg, Board Member; participated in the decision.

Remanded

2/03/83

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a), as amended by Oregon Laws 1981, ch 748.

1 Oregon Shores Conservation Coalition, Daniel S. Pickthorn and  
2 the Oregon Environmental Council, this Board finds there have  
3 been sufficient allegations made by petitioners to confer  
4 standing upon them. The above identified petitioners allege in  
5 the petition for review that they were admitted as "parties" to  
6 the proceedings before the Oregon Fish and Wildlife  
7 Commission. Those petitioners also allege that the decision  
8 being appealed was the result of a contested case hearing  
9 conducted pursuant to ORS Chapter 183. The term "party" is  
10 defined in ORS 183.310(6)(c) as

11 "any person requesting to participate before the  
12 agency as a party or in a limited party status which  
13 the agency determines either has an interest in the  
outcome of the agency's proceeding or represents a  
public interest in such result."

14 Respondent Oyster Growers do not contest the allegation made by  
15 petitioners that each of them was afforded party status. Since  
16 there is no contest as to the above named petitioners party  
17 status, we find the Fish and Wildlife Commission has in effect  
18 determined, pursuant to Oregon Laws 1979, ch 772, sec 4(3), as  
19 amended by Oregon 1981, ch 748, that not only did the  
20 petitioners appear before the state agency but also that they  
21 were entitled as of right to notice and hearing prior to the  
22 decision to be reviewed. As is stated in ORS 183.415(1)

23 "In a contested case, all parties shall be afforded an  
24 opportunity for hearing after reasonable notice served  
personally or by registered or certified mail."

25 See also Lemmon v. Clemens, 57 Or App 583, 646 P2d 633 (1982)  
26 affirming Clemens v. Lane County, 4 Or LUBA 63 (1981).

1 follows:

2 "Commission's order violates Goals 2 and 16 in failing  
3 to make appropriate management unit designations; in  
4 failing to adequately evaluate the adverse impacts and  
5 to balance the costs of the application of Sevin  
6 against the purported gain; and in failing to  
7 coordinate the decision with affected units of local  
8 and state government."

6 FACTS

7 On May 28, 1982, Intervenors (Oyster Growers) applied to  
8 the Oregon Fish and Wildlife Commission (Commission) for a  
9 permit, pursuant to ORS 509.140, to allow them to treat  
10 approximately 140 acres of Tillamook Bay estuary lands with the  
11 insecticide Sevin.<sup>2</sup> The 140 acres fall within land which was  
12 dedicated by the Oregon Legislature as "oyster lands," subject  
13 to the rights of the public to the use of public waterways.  
14 Oyster Growers seek to apply the Sevin to the subject lands in  
15 order to reduce the population of mud shrimp and ghost shrimp  
16 on the lands. The allegation made by the oyster growers is  
17 that the mud and ghost shrimp interfere with a technique for  
18 raising of oysters known as bottom culture. Some of the  
19 subject areas have been previously treated with a form of  
20 carbaryl (its not clear whether it was Sevin) sometime in  
21 1963. Areas in the vicinity of Plats 2A and 2B of the subject  
22 property were treated with Sevin on May 24, 1982 resulting in  
23 the issuance of a citation for violation of Oregon Law.

24 In July, 1980, Intervenor Sam Hayes applied to the Oregon  
25 Department of Fish and Wildlife (ODFW) for permission to use  
26 Sevin on his property (a portion of the total area covered by

1 exception of treatment area 2C (8.3 acres). Area 2C was not  
2 inspected because it was inundated by the incoming tide. The  
3 biologists inspected areas 2A (3.8 acres), 2B (6.2 acres), 3B  
4 (21.8 acres), and 4A (99.2 acres). The biologists described in  
5 general the entire area proposed for treatment as being cut  
6 with small channels draining into larger channels, flat, with a  
7 firm to soft substrate of sandy mud. Shrimp holes were  
8 described as moderate to dense and a moderate to dense growth  
9 of eelgrass covered much of the ground. The biologists noted  
10 that some of the grounds contained oysters.

11 According to exhibit 21, some oyster beds near some of the  
12 treatment areas were inspected. That inspection went to  
13 viewing the health of the oysters. The July 24, 1982, staff  
14 report of the Department of Fish and Wildlife to the Oregon  
15 Fish and Wildlife Commission (Exhibit 21) states in reference  
16 to water quality in Tillamook Bay:

17 "The proposed action would cause some contamination of  
18 Tillamook Bay waters with carbaryl and its  
19 decomposition products. This problem, and its  
20 biological affects in the water column has not been  
21 thoroughly investigated through field study. Previous  
22 use in Tillamook Bay was not associated with major  
23 observed biological affects outside treatment areas.  
24 (Emphasis added).

25 The staff report, in another portion regarding significant  
26 wildlife habitat, indicates that treatments could temporarily  
limit forage items for shorebirds until repopulation occurs.  
It also indicates that the oyster beds established subsequent  
to treatment, however, would, it was believed, provide foraging

1 millions of these organisms in an area sprayed will reduce the  
2 quantity of food for economically viable species of fish. The  
3 ODFW staff biologists stated in their July 24, 1982 report that:

4 "Estuarine Food Chain. The fishery productivity of  
5 Tillamook Bay, which includes rearing of anadromous  
6 fish, crab and numerous marine species, rests on  
7 production of invertebrate life. Department studies  
8 of juvenile chinook in Tillamook Bay have revealed  
9 that larval fish, insects, and crustacea such as  
10 amphipods and isopods are important diet items while  
11 the chinook rear for several weeks to months on their  
12 way to the ocean. There is indirect evidence that  
13 growth of juvenile chinook in Tillamook Bay is  
14 slightly food limited. The size juvenile chinook  
15 achieve before they leave an estuary is regarded as an  
16 important factor influencing ocean survival. The  
17 proposed action could directly affect the food supply  
18 of juvenile chinook and other marine fishes.

12 "The shrimp themselves provide food for fish but may  
13 figure more importantly in the nutrient cycle upon  
14 which the food chain ultimately rests. Burrowing of  
15 the shrimp exposes buried sediments to aeration and  
16 biological action, increasing nutrient supply to the  
17 estuarine ecosystem." (Exhibit 21, Page 16)

16 Further, testimony by biologists indicates there is another  
17 indirect result of use of Sevin. That result, which was not  
18 evaluated by ODFW, is that some of the bait fish which feed on  
19 the organisms susceptible to Sevin then go out into the ocean  
20 environment and are consumed by other economically viable  
21 species including the salmon. (TR 148-178)

22 In the 1963 observations referred to above, the predecessor  
23 to the Department of Fish and Wildlife conducted an experiment  
24 with a carbaryl insecticide in Tillamook Bay. In addition to  
25 mortality of mud and ghost shrimp, it was found the chemical  
26 caused "mortality and distress of non-target species

1 years." The report states the Washington Department staff's  
2 preliminary data shows little, if any, recent difference in  
3 numbers of "invertebrates from some ground treated in 1978  
4 with its control." (Exhibit 21, page 4).

5 The ODFW staff report does indicate that at least one study  
6 was made in Washington regarding contamination of tidewater as  
7 it flooded a treated area after application of Sevin at a rate  
8 of ten pounds active ingredient per acre. It was concluded by  
9 the person conducting those trials in Washington that dilution  
10 of the insecticide in a six-inch depth of water resulted in  
11 values too low to definitely identify the presence of Sevin in  
12 either surface or bottom layers. It was also noted in that  
13 study that although "some wind and tidal drift of the  
14 insecticide occurs, it seldom was observed to traverse the  
15 untreated buffer zone. The buffer width in that study was 200  
16 feet."

17 The Washington experience was rebutted by a University of  
18 Oregon biologist familiar with Oregon's estuaries and the  
19 Washington studies. Dr. Paul Rudy, Director of the Charleston,  
20 Oregon marine lab was asked: "Basically do you think they [the  
21 Washington studies] are adequate studies on which Oregon can  
22 base its decisions in this situation." Dr Rudy answered:  
23 "Absolutely not. They have none of the long-term baseline  
24 monitoring which is necessary to establish the . . . what you  
25 have in your bay. They look at a few large animals like crabs,  
26 things like this."

1 management unit; (2) determination of the appropriate  
2 management unit (Conservation or Natural) can be made solely on  
3 evaluations of property within the borders of the treatment  
4 areas or must include considerations of surrounding areas and  
5 the estuary as a whole; and (3) there was a sufficient  
6 inventory made of the organisms and their habitat within the  
7 target areas.

8 Respondents, on the other hand, take the position that the  
9 Fish and Wildlife Commission was correct in designating this  
10 property as a Conservation rather than a Natural management  
11 unit because: (1) the legislature under ORS 511.640 had  
12 specifically designated the use of this area of the estuary as  
13 "oyster lands";<sup>4</sup> (2) Goal 16 specifically provides that  
14 "oyster beds" shall be included in the conservation management  
15 unit; and (3) the commission's findings effectively address all  
16 of petitioners' concerns.<sup>5</sup>

17 Statewide Goal No. 16 states in pertinent part:

18 "Comprehensive plans and activities for each estuary  
19 shall provide for appropriate uses (including  
20 preservation) with as much diversity as is consistent  
21 with the overall Oregon Estuary Classification, as  
22 well as the biological, economic, recreational, and  
23 aesthetic benefits of the estuary. Estuary plans and  
24 activities shall protect the estuarine ecosystem,  
25 including its natural biological productivity,  
26 habitat, diversity, unique features and water  
27 quality. Dredge, fill, or other reduction or  
28 degradation of these natural values by man shall be  
29 allowed only:

30 "(1) if required for navigation or other  
31 water-dependent uses that require an estuarine  
32 location; and

1 location, as consistent with the overall Oregon  
2 Estuarine Classification;

3 "(3) Water-related uses which do not degrade or reduce  
4 the natural estuarine resources and values; and

5 "(4) Non-dependent, non-related uses which do not  
6 alter, reduce or degrade the estuarine resources  
7 and values." (Emphasis added).

8 Finally, under the heading of "Implementation Requirements"  
9 in Statewide Goal 16, Item 1 states:

10 "Unless fully addressed during the development and  
11 adoption of comprehensive plans, actions which would  
12 potentially alter the integrity of the estuarine  
13 ecosystem shall be preceded by a clear presentation of  
14 the impacts of the proposed alteration, and a  
15 demonstration of the public's need and gain which  
16 warrant such modification or loss." (Emphasis added)

17 With the foregoing Statewide Goal 16 considerations in  
18 mind, we find it unnecessary to get into the specific question  
19 of whether the areas involved in the spraying fit within the  
20 Natural or Conservation Management Unit designation. We find  
21 it impossible to resolve that issue in this review proceeding  
22 because the Fish and Wildlife Commission has neither generated  
23 enough facts nor made sufficient findings to comply with the  
24 various Goal 16 provisions above quoted such as a proper  
25 inventory, a cost-benefit analysis, and application of the  
26 required priorities.

As the general language of the goal indicates and the  
specific wording in the "priority" section requires, the  
highest priority consideration to be given decisions affecting  
estuaries is that uses of the estuary must first and foremost  
"maintain the integrity of the estuarine ecosystem." The LCDC

1 juvenile sole have been observed to suffer some mortalities in  
2 the Oregon and Washington experiments."

3 In light of the evidence that was before the Commission and  
4 its own findings, there is little to indicate the Commission  
5 has considered the use of Sevin in relation to its effect on  
6 the entire estuarian ecosystem. The record and findings reveal  
7 the Commission considered merely the effect of Sevin on some  
8 life forms in Tillamook Bay, with concentration on the larger  
9 estuarian inhabitants (shrimp, clams, oysters), and then only  
10 those which inhabited the direct treatment area and not the  
11 surrounding ecosystem. The effect killing of some life forms  
12 has on the overall balance of life in the estuary was not given  
13 concerned attention. As was discussed in the "facts" section  
14 of this opinion, at best only cursory observations were made of  
15 surrounding areas. Those observations only discussed the  
16 presence of oysters, not other life forms.

17 INVENTORY

18 The above discussion also relates to the petitioners'  
19 allegation that an inadequate inventory was made of the life  
20 forms existing in the Tillamook Bay. We agree with petitioners  
21 and the respondents do not convincingly confront the  
22 allegation. An adequate inventorying of the life forms in the  
23 area of the proposed spraying, as well as the estuary as a  
24 whole, is required by Goal 16. As the goal states under  
25 "Inventory Requirements:"

26 //

1 and decapods. They are extensively used as food for  
2 juvenile salmon, trout, and a variety of marine fish.  
3 These small organisms are very numerous in estuaries.  
4 \* \* \* The density of a species composition and  
5 diversity of these organisms has not adequately been  
6 studied in Tillamook Bay. Oregon has in, together  
7 with cooperation with the U.S. Fish and Wildlife  
8 Service, has done some excellent studies on clams,  
9 Dungeness crab, ghost shrimp, and mud shrimp  
10 distribution and fish, some of the food organisms used  
11 by fish, but the smaller invertebrate organisms have  
12 largely been passed over. You can be assured that in  
13 the Columbian and Tillamook estuaries, chinook salmon  
14 consume amphipods, diptera larvae, which are fly and  
15 cladocerans. A coho salmon will eat amphipods, crab  
16 larvae, and insects and apparently in the Tillamook  
17 Bay estuary, they also eat these ghost shrimp larvae.  
18 Trout will eat amphipods, chum salmon, \_\_\_\_\_  
19 amphipods, \_\_\_\_\_ amphipods, specific \_\_\_\_\_  
20 consume \_\_\_\_\_ shellfish and mysis. Specific herring  
21 eat call \_\_\_\_\_ copepods, \_\_\_\_\_ and American shad  
22 consume amphipods and the point, I guess, we are  
23 trying to get across is that you know it's nothing all  
24 that peculiar to understand that anadromous fish,  
25 salmon and trout coming downstream into the ocean feed  
26 on these organisms but something that isn't widely  
appreciated is the fact that a number of marine fish  
as juvenile flatfish and baitfish do come into the  
estuary and do graze in the estuary and the reason  
they do is because of these crustaceans. Obviously,  
crustaceans are important food, therefore, elimination  
of millions of these organisms in an area sprayed will  
reduce quantity of food for economically valuable  
species. There is an indirect factor as well since  
some of these bait fish which are consuming cladocera  
in the estuary then go out into the ocean environment  
and are consumed by other economically valuable  
species including the salmon. We should also be  
concerned with the effect of Sevin in the primary  
trophic level, that is, the bacteria in the estuary,  
the algae in the estuary, the diatoms, and the, we  
just have no real knowledge of what is going on there  
from the use of this material. Finally, we should be  
concerned with the impact of Sevin where death does  
not occur to an organism. On most, crustaceans die in  
less than .2 parts per million, others survive. How  
well do these survivors grow? How well do they  
reproduce? Is their longevity reduced? Are they more  
susceptible to stress? One accepted definition of  
pollution is any substances that adversely affects  
life processes, and this means simply that organisms

1 COST-BENEFIT ANALYSIS

2 As Mr. Durkin's and Dr. Rudy's testimony and ODFW  
3 biologists' report indicate, Sevin application could harm  
4 portions of the economy of Oregon dependent on types of  
5 aquaculture other than oyster raising. Specifically the record  
6 indicates salmon and bottom fish that would be eating the  
7 contaminated invertebrates and the target shrimp larvae could  
8 be harmed by the spray to the detriment of those portions of  
9 Oregon's economy. The same is true of the dungeness crab  
10 industry which would be directly affected because Sevin kills  
11 crabs. One of the requirements of Goal 16 is "based upon  
12 inventories...plans for coastal areas shall describe and  
13 maintain the diversity of important and unique environmental,  
14 economic and social features within the estuary." (Emphasis  
15 added). The implementation requirements of Goal 16 also  
16 require the demonstration of "the gain which warrant[s] such  
17 modification." The Commission's findings fail to address those  
18 economic issues other than to say Sevin spraying will benefit  
19 the oyster growing business. The Commission found that:

20 "The proposed use of Sevin will result in the  
21 continued diversification of the economy of the State  
22 and will have an overall positive impact on the  
23 economy in that the production of oysters in the area  
may continue. Adverse economic impact, if any, such  
as to the bait shrimp industry, is limited."  
(Ultimate Finding of Fact #10).

24 The "finding" is actually a conclusion which is unsupported by  
25 the record. The conclusion ignores evidence regarding the  
26 impact on crabs, salmon and other fish. The Commission seems

1 SUBSTANTIAL EVIDENCE

2 Finally, in reference to respondents' argument that  
3 substantial evidence exists to support the Commission's  
4 findings and conclusions, this Board has held in the past that  
5 it is error for a deciding body to fail to take into  
6 consideration evidence in the record which detracts from the  
7 findings it did make. In Sane Orderly Development v. Douglas  
8 County Bd. of Comm'rs, 2 Or LUBA 196, 206 (1981) we stated:

9 "As was stated in K. C Davis, Administrative Law, 3rd  
10 ed, sec 29.03, page 531, citing Jaffe, Administrative  
11 Procedure Re-Examined: The Benjamin Report, 56 Harv L  
12 Rev 704, 733 (1943):

13 "'Obviously, responsible men would not exercise  
14 their judgment on only that part of the evidence  
15 which looks in one direction; the rationality or  
16 substantiality of a conclusion can only be  
17 evaluated in the light of the whole fact  
18 situation or so much of it as appears. Evidence  
19 which may be logically substantial in isolation  
20 may be deprived of much of its character or its  
21 claim to credibility when considered with other  
22 evidence.'

23 "See also Universal Camera Corp. v. NLRB, 340 US 474,  
24 488, 71 S Ct 456, 464, 95 L Ed 456 (1951) wherein the  
25 court stated:

26 "'The substantiality of evidence must take into  
account whatever in the record fairly detracts  
from its weight.'"

Throughout its "findings" the Commission apparently ignored  
evidence which did not support its conclusions. That evidence  
should have been evaluated and discussed more than just saying  
"no credible" evidence was introduced. Why was it not  
credible? It came from ODFW staff biologists as well as from  
informed "experts" with years of experience to rely upon.

1 yet been acknowledged by the LCDC. See ORS 197.180.<sup>7</sup>  
2 Because of the fact that the Fish and Wildlife Commission is  
3 responsible for applying the goals in the absence of an  
4 acknowledged plan of a local government, the key question in  
5 this case is whether the Fish and Wildlife Commission's order  
6 complies with the goals, not whether the Commission used the  
7 information in Tillamook County's unacknowledged comprehensive  
8 plan. This Board recognizes that Goal 2 does state:

9 "City, county, state and federal agency and special  
10 district plans and actions related to land use shall  
11 be consistent with the comprehensive plans of cities  
and counties and regional plans adopted under ORS  
197.705 through 197.795."

12 We do not believe, however, that provision should be read to  
13 require that all state agency actions relating to land use must  
14 conform to preliminary or unacknowledged comprehensive plans.  
15 For the above stated reasons, we deny petitioners' argument  
16 regarding Goal 2.

17 CONCLUSION

18 Since we find that the Fish and Wildlife Commission has  
19 improperly applied Statewide Goal 16, we remand the matter to  
20 the Commission for further proceedings not inconsistent with  
21 this opinion. It should be noted that Respondent Commission  
22 has in effect attempted to fashion its findings and its  
23 conditions in a manner to indicate only an "experiment" is  
24 being conducted. Even if this were to be considered "only an  
25 experiment" without the proper inventory of life forms and the  
26 proper analysis of the estuarine ecosystem, there can be no

FOOTNOTES

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Oregon Laws 1979, ch 772, sec 4(2), (3)(a) and (b) states:

4 "(2) Except as provided in subsection (3) of this  
5 section, any person whose interests are adversely  
6 affected or who is aggrieved by a land use decision  
7 and who has filed a notice of intent to appeal as  
8 provided in subsection (4) of this section may  
9 petition the board for review of that decision or may,  
within a reasonable time after a petition for review  
of that decision has been filed with the board,  
intervene in and be made a party to any review  
proceeding pending before the board.

10 "(3) Any person who has filed a notice of intent to  
11 appeal as provided in subsection (4) of this section  
may petition the board for review of a quasi-judicial  
land use decision if the person:

12 "(a) Appeared before the city, county or special  
13 district governing body or state agency orally or in  
writing; and

14 "(b) Was a person entitled as of right to notice and  
15 hearing prior to the decision to be reviewed or was a  
16 person whose interests are adversely affected or who  
was aggrieved by the decision."

17 2

18 ORS 509.140 states:

19 "Placing explosives or harmful substances in waters in  
20 course of lawful work; permit. (1) Whenever in the  
21 course of removing any obstruction in any waters of  
22 this state, or in constructing any foundations for  
23 dams, bridges or other structures, or in carrying on  
24 any trade or business, any person, municipal  
25 corporation, political subdivision or governmental  
agency desires to use explosives or any substances  
deleterious to fish, such person, municipal  
corporation, political subdivision or governmental  
agency shall make application to the commission for a  
permit to use the explosives or substances in such  
waters.

26 "(2) If the commission finds it necessary that the

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2 ORS 511.640 states:

3 "All the tidelands and lands under the waters of  
4 Tillamook Bay in Tillamook County which are located as  
5 oyster claims as provided by law, are withdrawn from  
6 the lands of this state which may be sold, are  
7 designated as oyster lands, and are set aside for the  
8 location of artificial oyster claims. However, all  
9 such lands are subject to the provisions of ORS  
10 622.210 to 622.300 and 622.320."

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5

9 A natural management unit is described in the goal as

10 "(1) Natural -- In all estuaries, areas shall be  
11 designated to assure the protection of  
12 significant fish and wildlife habitats, of  
13 continued biological productivity within the  
14 estuary, and of scientific, research, and  
15 educational needs. These shall be managed to  
16 preserve the natural resources in recognition of  
17 dynamic, natural, geological and evolutionary  
18 processes. Such areas shall include, at a  
19 minimum, all major tracts of salt marsh,  
20 tideflats, and seagrass and algae beds.

16 "Permissible uses in natural areas shall be  
17 undeveloped low-intensity water-dependent  
18 recreation; research and educational observation;  
19 navigational aides, such as beacons and buoys,  
20 protection of habitat, nutrient, fish, wildlife  
21 and aesthetic resources; and passive restoration  
22 measures; and where consistent with the resource  
23 capabilities of the area and the purposes of this  
24 management unit, aquaculture, communication  
25 facilities, and active restoration measures."

21 In the conservation management unit, the goal instructs

22 "in all estuaries, except those in the overall Oregon  
23 Estuary Classification which are classed for  
24 preservation, areas shall be designated for long-term  
25 uses of renewable resources that do not require major  
26 alteration of the estuary, except for the purpose of  
27 restoration. \* \* \* These shall include areas needed  
28 for maintenance and enhancement of biological  
29 productivity, recreational and aesthetic uses and  
30 aquaculture. They shall include tracts of significant

1 the basis for specific implementation measures. These  
2 measures shall be consistent with and adequate to  
3 carry out the plans. Each plan and related  
implementation measure shall be coordinated with the  
plans of affected governmental units."

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5 ORS 197.180 states:

6 "State agency planning responsibilities; certain  
7 information to be submitted to department;  
8 determination of compliance with goals and plans. (1)  
9 Except as provided in ORS 527.722, state agencies  
shall carry out their planning duties, powers and  
responsibilities and take actions that are authorized  
by law with respect to programs affecting land use:

10 "(a) In compliance with goals adopted or amended  
11 pursuant to ORS 197.005 to 197.430 and 197.605 to  
197.650; and

12 "(b) Except when a finding is made under ORS  
13 197.640(2)(c), in a manner compatible with:

14 "(A) Comprehensive plans and land use regulations  
initially acknowledged under ORS 197.251; and

15 "(B) Amendments to acknowledged comprehensive plans or  
16 land use regulations or new land use regulations  
acknowledged under ORS 197.625(2) or 197.630(1)  
and (4)."



STATE OF OREGON

INTEROFFICE MEMO

6.5

TO: MEMBERS OF THE LAND CONSERVATION AND DEVELOPMENT COMMISSION      DATE: 1/11/83

FROM: THE LAND USE BOARD OF APPEALS

SUBJECT: AUDUBON SOCIETY OF PORTLAND, et al v. OREGON DEPARTMENT OF FISH AND WILDLIFE, et al, LUBA NO. 82-075

Enclosed for your review is the Board's proposed opinion and order in the above captioned appeal.

This opinion requires LCDC review of LUBA's determination that the Fish and Wildlife Commission failed to properly apply Statewide Goal 16 before allowing applicants (oyster growers) to spray "Sevin" on portions of the Tillamook Bay estuary. We find that the Fish and Wildlife Commission did not properly address Goal 16's provisions relating to inventories and economic consequences, as well as the goal's overall instruction to "protect the estuarian ecosystem." We determine that the decision should be remanded.

A second allegation, that Statewide Goal 2 has been violated, we dismiss. We find that the Fish and Wildlife Commission was not required to address Tillamook County's unacknowledged comprehensive plan. Rather it was required to address the goals itself since Tillamook County has no acknowledged comprehensive plan.

The Board is of the opinion that oral argument would not assist the commission in its understanding or review of the statewide goal issues involved in this appeal. Therefore, the Board recommends that oral argument before the commission not be allowed.



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  )                               LUBA NO. 82-075  
7                       Petitioners,                                )  
  )                                )  
8                       v.    )  
  )                                )  
9 OREGON DEPARTMENT OF FISH )                               PROPOSED OPINION  
AND WILDLIFE; OREGON FISH )                               AND ORDER  
10 AND WILDLIFE COMMISSION, )  
  )                                )  
11                       Respondents,                               )  
  )                                )  
12                       and    )  
  )                                )  
13 BOB OLSEN, CECIL HARRIS, and )  
SAM HAYES, (Oyster Growers), )  
14    )  
  )                                )  
15                       Intervenors.                                )

16           Appeal from Oregon Department of Fish and Wildlife and  
Oregon Fish and Wildlife Commission.

17  
18           Terry Morgan, Lake Oswego, filed a petition for review and  
reply brief and argued the cause for Petitioners. With him on  
the brief were Morgan & Shonkwiler.

19  
20           David A. Rhoten, Salem filed a brief and argued the cause  
for Respondents-Intervenors. With him on the brief were  
Rhoten, Rhoten & Speerstra.

21  
22           Mary Diets, Salem, filed a brief and argued the cause for  
Respondent. With her on the brief was Dave Frohnmayer,  
Attorney General and Stanton F. Long, Deputy Attorney General.

23  
24           Cox, Board Member; Bagg, Board Member; participated in the  
decision.

25           Remanded   1/11/83

26           You are entitled to judicial review of this Order.

BEFORE THE LAND CONSERVATION AND DEVELOPMENT COMMISSION  
BOARD OF APPEALS  
OF THE STATE OF OREGON

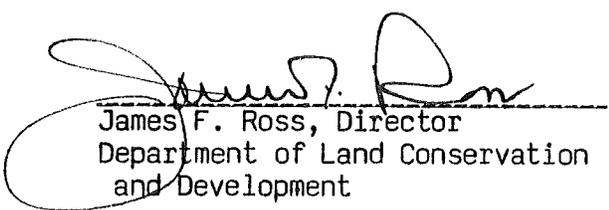
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AUDUBON SOCIETY OF PORTLAND, a	)	
nonprofit Oregon corporation,	)	
JEFF GILLIGAN; THE OREGON SHORES	)	LUBA Nos. 82-075
CONSERVATION COALITION; DANIEL S.	)	
PICKTHORN; and the OREGON	)	LCDC DETERMINATION
ENVIRONMENTAL COUNCIL, a non-	)	
profit Oregon corporation,	)	
	)	
Petitioners,	)	
	)	
v.	)	
	)	
OREGON DEPARTMENT OF FISH AND	)	
WILDLIFE; OREGON FISH AND	)	
WILDLIFE COMMISSION,	)	
	)	
and	)	
	)	
BOB OLSEN, CECIL HARRIS, and	)	
SAM HAYES, (Oyster Growers),	)	
	)	
Intervenors.	)	

The Land Conservation and Development Commission hereby approves the recommendation of the Land Use Board of Appeals in LUBA 82-075.

DATED THIS 2 DAY OF FEBRUARY 1983.

FOR THE COMMISSION:

  
 \_\_\_\_\_  
 James F. Ross, Director  
 Department of Land Conservation  
 and Development

JFR:RE:11t  
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