



1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioner appeals a decision of the Department of  
4 Environmental Quality (DEQ) entitled "Selection of Sites For  
5 Feasibility Analysis." The decision became final on October 7,  
6 1986 and is about siting of a landfill for the Portland  
7 Metropolitan Area.

8 The DEQ decision is the product of a study required by 1979  
9 Oregon Laws, Chapter 679. The law directs DEQ to conduct a  
10 study of appropriate sites for solid waste disposal in  
11 Clackamas, Multnomah, and Washington Counties. 1985 Or Laws,  
12 Ch 679, Sec. 3(1). Recommendations are then submitted to the  
13 Environmental Quality Commission (EQC). After evaluation, EQC,  
14 has the power to order establishment of a disposal site:

15 "Sec. 5. (1) The commission, not later than July 1,  
16 1987, shall issue an order directing the Department of  
17 Environmental Quality to establish a disposal site  
18 under this 1985 Act within Clackamas, Multnomah or  
19 Washington County or, subject to subsection (2) of  
20 section 3 of this 1985 Act, within another county.

18 "(2) In selecting a disposal site under this section,  
19 the commission shall review the study conducted under  
20 section 3 of this 1985 Act and the locations for  
21 disposal sites recommended by the department under  
22 section 3 of this 1985 Act."

21 MOTION TO DISMISS

22 Respondent DEQ argues the report issued under the above  
23 provision of Oregon Laws is not a final land use decision  
24 subject to our review. According to the agency, the DEQ site  
25 feasibility analysis simply constitutes a narrowing of many  
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1 potential sites. No decision of DEQ authorizes the  
2 establishment of a landfill at a site or the acquisition of  
3 property for a landfill site. The choice of which (if any) of  
4 the sites is up to the Environmental Quality Commission.

5 DEQ argues that the scheme does not result in a "final"  
6 decision to which DEQ is required to apply statewide planning  
7 goals. ORS 197.015(10)(a)(B). DEQ argues the case here is  
8 like our case, NOPE in Mulino v. Port of Portland, 2 Or LUBA  
9 243 (1980) wherein we said a study about a future airport  
10 improvment was not a "final" decision subject to our review.

11 "There is no finality with respect to respondent's  
12 decision to proceed with further studies of the Mulino  
13 site in terms of the decision's effect on the  
14 immediate or prospective use of land." NOPE in  
15 Mulino, 2 Or LUBA at 244.

16 DEQ adds that Section 6 of the new law clearly provides  
17 that review of any decision of the Environmental Quality  
18 Commission about establishment or siting of the disposal site  
19 is vested in the Supreme Court.

20 "Section 6. (1) Notwithstanding ORS 183.400,  
21 183.482, 183.484 and 197.825, exclusive jurisdiction  
22 for review of any decision made by the Environmental  
23 Quality Commission under this 1985 Act relating to the  
24 establishment or siting of a disposal site, any order  
25 to the Department of Environmental Quality to  
26 establish or complete such a site or any findings made  
by the department under section 5 of this 1985 Act is  
conferred upon the Supreme Court.

"(2) Proceedings for review shall be instituted when  
any person adversely affected or aggrieved by the order  
of the commission files a petition with the Supreme  
Court. The petition shall be filed within 30 days  
following the date on which the order upon which the  
petition is based is served. The petition shall state  
the nature of the order or decision the petitioner

1 desires reviewed and shall, by supporting affidavit,  
2 state the facts showing how the petitioner is  
3 adversely affected or aggrieved. Copies of the  
4 petition shall be served by registered or certified  
5 mail upon the commission. Within 30 days after  
6 service of the petition, the commission shall transmit  
7 to the Supreme Court the original or a certified copy  
8 of the entire record of the proceeding under review.  
9 Review under this section shall be confined to the  
10 record, and the court shall not substitute its  
11 judgment for that of the commission as to any issue of  
12 fact or agency discretion. Upon review, the Supreme  
13 Court may affirm, reverse, or remand the order of the  
14 commission if the court finds that the order is not  
15 supported by substantial evidence in the record or is  
16 unconstitutional. Proceedings for review under this  
17 section shall be given priority over all other matters  
18 before the Supreme Court.

19 "(3) Notwithstanding ORS 197.850, jurisdiction for  
20 judicial review of a final order of the Land Use Board  
21 of Appeals issued in any proceeding arising under this  
22 1985 Act is conferred upon the Supreme Court. The  
23 procedure for judicial review of a final order under  
24 this subsection (2) of this section."<sup>1</sup> 1985 Or  
25 Laws, Ch 679, Sec. 6.

26 Respondent DEQ concludes, then, that LUBA lacks  
jurisdiction to review the DEQ decision because (1) it is not a  
final land use decision within the terms of ORS 197.015(10) and  
(2) review of any such decision is vested in the Supreme Court,  
not in this Board.

Petitioner West Hills and Island Neighbors argues that  
while it may be true that EQC makes the "final" decision to  
site a landfill at a particular location, the DEQ decision on  
review here is the final decision under DEQ's  
responsibility.<sup>2</sup> Under the 1985 law, there is no further  
determination that DEQ is required or permitted to make.  
Therefore, the DEQ action on prospective disposal sites must be

1 considered final for our purposes.<sup>3</sup>

2 Petitioner then argues DEQ's order is the last application  
3 of site selection criteria provided under the law. Petitioner  
4 argues that it will have no later opportunity to protect use of  
5 the DEQ recommended landfill site.<sup>4</sup>

6 We do not believe the DEQ is subject to our review. Under  
7 the scheme provided in Oregon Laws 1985, Ch 679, DEQ's only  
8 responsibility is to study particular landfill sites and make a  
9 recommendation to EQC. The decision about which site to use is  
10 entirely that of the EQC. We find no requirement in the law  
11 limiting EQC to the DEQ choice of site.

12 Because DEQ's action is only a recommendation, and because  
13 the ultimate land use issue is the siting of the landfill and  
14 rests with EQC, we do not believe the DEQ recommendation is a  
15 "final decision or determination" within the meaning of ORS  
16 197.015(10).

17 This review proceeding is dismissed.

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FOOTNOTES

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We agree with Respondent DEQ that Subsection 3 does not vest this Board with authority to review the proceeding under appeal here. The section simply provides that if there should be any review of an order issued by this Board, it must go directly to the Supreme Court, bypassing the Court of Appeals.

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Petitioner notes the similarity in this scheme with that in ORS Ch 222 concerning annexations of territory subject to health hazards. In reviewing such a determination, the Supreme Court noted the initial determination of the state Health Division that a health hazard existed was a separate decision from that of the Environmental Quality Commission to alleviate the health hazard. See, West Side Sanitary District v. Oregon State Health Division, 289 Or 417, 614 P2d 1151 (1980).

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Petitioner Port of Portland echoes arguments made by West Hills and Island Neighbors and adds that the decision under review qualifies as a land use decision subject to LUBA review under the "significant impact test." See, Peterson v. Klamath Falls, 279 Or 249, 566 P2d 1193 (1977) and Billington v. Polk County, 299 Or 471, 703 P2d 232 (1985). According to petitioner, EQC's decision has an important impact on land uses as it

"transforms a highly marketable, key industrial resource for the region into a vacant lot unavailable for industrial development, which eliminates the site as a location for job-producing industry." Petitioner Port of Portland's Response to Respondent's Motion to Dismiss, page 9.

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Petitioner also argues that DEQ is required by a 1985 Or Laws, Ch 679, Sec. 2(2) to give "due consideration" to statewide planning goals in the site selection proceeding.

We are mindful that the agency is required to give due consideration to statewide planning goals in considering various sites. This due consideration, however, does not make DEQ's recommendation any more final. Because EQC may choose any of the sites reviewed by EQC or, apparently, any other site

1 it pleases, we conclude the order before us is not a final land  
use decision.

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