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BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CASCADE GEOGRAPHIC SOCIETY,
Petitioner,

vs.

OREGON DEPARTMENT OF
ENVIRONMENTAL QUALITY,
Respondent,

and

OREGON DEPARTMENT OF TRANSPORTATION,
Intervenor-Respondent.

LUBA No. 2008-092

FINAL OPINION
AND ORDER

Appeal from Oregon Department of Environmental Quality.

James J. Nicita, Oregon City, represented petitioner.

Lynne Perry, Assistant Attorney General, Portland, represented respondent.

Kathryn A. Lincoln, Senior Assistant Attorney General, and Bonnie E. Heitsch, Assistant Attorney General, Salem, represented intervenor-respondent.

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

DISMISSED

08/20/2008

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

NATURE OF THE DECISION

Petitioner appeals an Erosion and Sediment Control Plan (ESCP) that governs control and discharge of storm water from temporary construction activities associated with an Oregon Department of Transportation (ODOT) highway project.

MOTION TO DISMISS

Respondent Oregon Department of Environmental Quality (DEQ) moves to dismiss this appeal, arguing that the ESCP is not a “land use decision” as defined in ORS 197.015(10)(a)(B), because it is not “[a] final decision or determination of a state agency * * * with respect to which the agency is required to apply the goals[.]” DEQ argues that it made no “decision” whatsoever with respect to the challenged ESCP. According to DEQ, its only involvement with the challenged ESCP was to forward it to petitioner’s counsel by e-mail on May 30, 2008, the date DEQ received an electronic copy of the ESCP from ODOT. DEQ contends that under its state agency coordination rules and other applicable regulations, it is not required to review or approve ODOT’s ESCP, and it did not even have a copy of the ESCP in its possession until it requested one from ODOT, in response to petitioner’s public records information request.

Petitioner responds in relevant part that DEQ was obligated to review and approve the ESCP, and the agency’s failure to do so does not deprive LUBA of jurisdiction over the appeal. According to petitioner, DEQ cannot use its own “failure of process” to argue lack of jurisdiction. Response to Motion to Dismiss 3 (*citing Comrie v. City of Pendleton*, 45 Or LUBA 758, 772-75 (2003), *Tarjoto v. Lane County*, 137 Or App 305, 310-11, 904 P2d 641 (1995), *Flowers v. Klamath County*, 98 Or App 384, 386-90, 780 P2d 227 (1989), and *League of Women Voters v. Coos County*, 82 Or App 673, 680-81, 729 P2d 588 (1986)).

However, none of the cited cases involve circumstances where the respondent made no decision whatsoever. Assuming without deciding that petitioner is correct that DEQ is

1 obligated under the applicable administrative rules to review and approve ODOT’s ESCP—a
2 proposition that petitioner has not established—we fail to understand how DEQ’s failure to
3 review and make a decision regarding the ESCP could possibly constitute a “land use
4 decision” of any kind.¹ To constitute a “land use decision” under ORS 197.015(10)(a)(B),
5 there must be “[a] final decision or determination of [a] state agency[.]” DEQ made no
6 decision or determination, final or otherwise, regarding ODOT’s ESCP. To the extent
7 petitioner seeks a judicial determination that DEQ is obligated to review ODOT’s ESCP, that
8 determination must be sought in a different forum.

9 Petitioner has not established that DEQ’s non-decision constitutes a statutory land use
10 decision as defined by ORS 197.015(10), or any other kind of decision subject to our
11 jurisdiction. Accordingly, this appeal must be dismissed.

12 **OTHER MOTIONS**

13 Pending before the Board are objections to the record and petitioner’s motion to stay.
14 Because we conclude that we lack jurisdiction over the appeal, these motions are denied as
15 moot.²

16 The appeal is dismissed.

¹ It is unnecessary to set out or discuss the applicable administrative rules, but it suffices to observe that petitioner’s theory for why DEQ must review and approve ODOT’s ESCP is based on expansive interpretations of several rule and permit provisions.

² Putting aside the difficulty of “staying” a non-decision, we note that the injury petitioner seeks to prevent in the motion for stay is grading and timber removal in the existing right-of-way. However, as we understand it, the ESCP does not authorize grading or timber removal. The ESCP merely sets out the required design of temporary erosion and sediment control measures, such as berms and swales, and does not authorize the highway project itself or any grading or timber removal. Whatever authority, if any, ODOT requires for such activities is presumably found elsewhere.