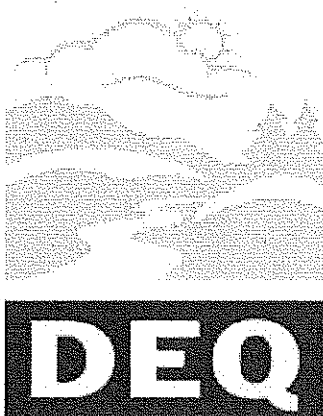


10/2/1987

OREGON
ENVIRONMENTAL QUALITY
COMMISSION MEETING
MATERIALS



State of Oregon
Department of
Environmental
Quality

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OREGON ENVIRONMENTAL QUALITY COMMISSION

NOTICE OF SPECIAL MEETING

OCTOBER 2, 1987

Room 602
Multnomah County Courthouse
1021 S. W. Fourth Avenue
Portland, Oregon

8:00 a.m.

AGENDA

8:00 Hearings Officer's Report and EQC Questions

8:15 DEQ Analysis and Recommendations

8:30 Oral Argument

Primary Parties (15 minutes each):

Helvetia/Mountaindale Preservation Coalition
Washington County

Parties with Limited Issues (10 minutes each):

City of Banks
City of Vernonia
Ed Martiszus
Waste Management of Oregon
City of Portland
Port of Portland
METRO

10:10 EQC Deliberations and Decision

NO PUBLIC TESTIMONY
WILL BE TAKEN AT THIS MEETING

The Commission may, however, wish additional information and may call on interested persons to answer questions.

MINUTES ARE NOT FINAL UNTIL APPROVED BY THE EQC

ENVIRONMENTAL QUALITY COMMISSION

Minutes of the October 2, 1987, Special Meeting

Multnomah County Courthouse
Room 602
1021 S. W. Fourth Avenue
Portland, Oregon

Commission Members Present:

James Petersen, Chairman
Arno Denecke, Vice Chairman
Mary Bishop
Sonia Buist
Wallace Brill

Department of Environmental Quality Staff Present:

Fred Hansen, Director
Michael Huston, Assistant Attorney General
David Ellis, Former Assistant Attorney General
Division Administrators and Program Staff Members

The special meeting was held so that the Environmental Quality Commission could hear objections to the Hearings Officer's findings in the landfill siting selection of the Bacona Road site.

Judge Ed Howell, the Hearings Officer for the contested case hearing of the landfill site selection, spoke about the findings submitted by the Department of Environmental Quality. Judge Howell had reservations about the Department's findings on noise, wetlands and fires. However, Judge Howell felt those issues could be resolved.

Judge Howell said that he could not agree on landslide and underground water concerns. He felt the tests performed did not establish an adequate amount of monitoring. Concluding, Judge Howell said the evidence produced at the contested case hearing was insufficient to allow either acceptance or rejection of the Bacona Road site.

Chairman Petersen thanked Judge Howell for serving as Hearings Officer and for his willingness, time and patience.

Steve Greenwood, manager of the Department's Solid Waste Division, told the Commission about the Department's recommendations and why the siting process should continue. Mr. Greenwood discussed the leachate, landslide and groundwater issues raised by Judge Howell.

Because an error was made by the consulting firm about leachate amounts, the Department agrees with the Hearings Officer's recommendation. This recommendation would be that the contested case hearing be continued on that issue, and that the Department would further investigate leachate volumes and treatment.

In reference to the landslide issue, Mr. Greenwood felt some confusion had occurred about the different types of landslide testing. He said that there was conclusive evidence there was no potential for a deep-seated slide. While shallow or localized slides could occur in the natural course of events in the development phases of the landfill, the slides would not impact the feasibility of the site. Mr. Greenwood agreed that additional testing was needed around the site only to ensure that excavation and construction proceed without landslide problems.

Mr. Greenwood cited the tests that had been done at the site to determine groundwater characteristics. He said that in addition to the natural protective rock, direction of the ground flow and flow patterns, state-of-the-art lining systems, leachate collection systems and leak detection systems would be used.

Dave Ellis, former Assistant Attorney General, represented the Department in the contested case hearing. Mr. Ellis spoke about the legal obligations of the Commission and issues raised by the petitioners of the contested case hearing. He said there was no legal requirement for the Commission to postpone their decision while further evidence is gathered on the groundwater and landslide issues. Further information on the leachate issue should be brought before the Hearings Officer before the Commission's decision was made final.

Mr. Ellis discussed the petitioners' belief that the Hearings Officer applied the incorrect standard to the statewide land use goals. The Hearings Officer's findings demonstrate compliance with land use goals as well as due consideration. He spoke about the issues raised about the cost and site life at the Bacona Road site. Further study of the site may change cost estimates and that the site-life estimate the Commission decided upon was acceptable. In reference to the Commission deciding on the site based upon a feasibility analysis, Mr. Ellis said to go beyond

feasibility in a siting decision would be impracticable from a cost point of view.

Mr. Ellis reminded the Commission that the purpose of the landfill siting process was to provide a local solution to a local problem. He said that the proposal to establish a site on the other side of the mountains may not be a practicable solution. Concluding, Mr. Ellis felt the Bacona Road site met statutory criteria, and the site could be developed in an environmentally sound manner.

John Junkin, counsel to Washington County and legal counsel to the Unified Sewerage Agency (USA), told the Commission that the County had raised issues about planning, land development and transportation. Mr. Junkin discussed the location of the proposed landfill and the boundaries of USA. The County concurs with Judge Howell's finding about leachate treatment. He said the Department assumed the leachate would be handled by USA. Mr. Junkin indicated that the timetable outlined by the Department for leachate treatment was very ambitious. For this timetable to occur, an extension of service and boundary would need to be made. Additionally, USA is concerned with the water quality of the Tualatin River.

Edward Sullivan, representing the Helvetia/Mountaindale Preservation Coalition, presented objections to the Hearings Officer's findings. Mr. Sullivan objected to testimony provided at this hearing, to the role of the Department of Justice, to the Department's interpretation of due consideration and compliance, to the site selection process and to the conditions imposed in the process. Mr. Sullivan further discussed groundwater, landslide and noise issues. He asked the Commission to adopt the Helvetia/Mountaindale Preservation Coalition petitioners' exceptions and terminate the Bacona Road proceedings.

Henry Kane, city attorney for the City of Banks, told the Commission he accepted and adhered to Mr. Sullivan's position. Mr. Kane said the site was not in compliance with enabling statutes. Additionally, he spoke about the leachate issue and how it could affect the City of Bank's water supply.

Ed Martiszus, who lives on the Nehalem River, said he agreed with Judge Howell's findings for the most part. Mr. Martiszus expressed concern for the Nehalem River, health protection and waste reduction.

Jay Waldron, attorney with Schwabe, Williamson, representing Waste Management of Oregon, spoke to the Commission about wetland requirements. Mr. Waldron asked the Commission to consider Waste Management's proposed site as further investigation occurs of the Bacona Road site.

Stephen Janik, representing the Port of Portland, told the Commission that the Port supported the Department's recommendation.

After hearing the above statements, Commissioner Denecke moved that the Commission close their deliberations; Commissioner Buist seconded the motion. The motion passed unanimously. Representatives of Channel 8, THE OREGONIAN and the HILLSBORO ARGUS were present during the closed session.

The Commission returned to open session, and then Chairman Petersen stated that the Commission was unwilling to make a decision about the suitability of the site in the areas of landslides and groundwater. They indicated that they needed to independently and to individually review the contested case transcript on those issues and asked the Department to provide them with a copy of the transcript on the issues of landslide and groundwater testimony. At the October 10 EQC meeting to be held in Bend, the Commission will make their determination.

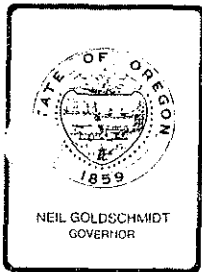
The following motion was made:

The Commission would affirm the existence of sufficient information to demonstrate compliance with Chapter 679 in all areas where the Hearings Officer made positive findings, except for the areas of landslide and groundwater, to direct the Department to generate additional information on the availability of facilities to properly treat and dispose of leachate generated by the Bacona Road landfill, to direct the Department to provide the Commission copies of transcript relating to the landslide and groundwater issue immediately or as soon as possible, to continue the contested case hearing to consider the sufficiency of additional information generated on leachate treatment and disposal, to direct the Department to include the Hearings Officer's recommendations for fire protection, highway lighting and noise mitigation in the Neighborhood Protection Plan and adopt Attachment A, which would keep in effect the Attorney General's model rules for purposes of continued contested case hearing.

Commissioner Bishop moved acceptance of the motion, it was seconded by Commissioner Buist and the motion passed unanimously.

There was no further business, and the special meeting was adjourned at 11:00 a.m.

Payne



Environmental Quality Commission

811 SW SIXTH AVENUE, PORTLAND, OR 97204 PHONE (503) 229-5696

MEMORANDUM

To: Environmental Quality Commission
From: Director
Subject: Agenda Item, October 2, 1987, EQC Special Meeting

Informational Report: Hearings Officer's Proposed Findings and Conclusions and Interim Order, and DEQ's Recommendation Regarding Establishment of a Landfill Site at Bacon Road

BACKGROUND

This report has been prepared at the Director's initiative to:

- (1) Provide the Environmental Quality Commission (EQC) with background for review of the Hearings Officer's Proposed Findings and Conclusions as well as written arguments and exceptions filed by parties to the contested case hearing;
- (2) Inform the Commission of their options in response to the Hearings Officer's Findings and Conclusions; and
- (3) Outline the Department's recommendation that:
 - (a) exception be taken with the Proposed Findings which conclude that insufficient information exists to make a determination on whether landslide potential and groundwater conditions will allow compliance with provisions of 1985 Oregon Laws, Chapter 679 (chapter 679); and
 - (b) additional study of leachate treatment and disposal be undertaken and the contested case hearing be continued on this topic.

In response to the imminent solid waste disposal crisis posed by the anticipated closure of the St. Johns landfill, the 1985 legislature passed SB 662 directing the EQC and the Department of Environmental Quality (DEQ) to site a new disposal facility to serve the Portland Metropolitan area. Over the last 20 months this mandate has been carried out through an extensive site identification, evaluation and selection process.

In response to the legislature's requirement that the EQC order establishment of a site by July 1, 1987, the Commission, on June 19, approved an order, subject to a contested case hearing, directing establishment of the Bacona Road site as a regional landfill. The question before the contested case proceeding was whether sufficient evidence exists to demonstrate that selection of the Bacona Road site complies with chapter 679. The primary requirements of the law are found in Section 4, which provides:

"SECTION 4. (1) Subject to subsections (3) and (4) of section 5 of this act, the Environmental Quality Commission may locate and order the establishment of a disposal site under this 1985 act in any area, including an area of forest land designated for protection under the state-wide planning goals, in which the commission finds that the following conditions exist:

- (a) The disposal site will comply with applicable state statutes, rules of the commission and applicable federal regulations;
- (b) The size of the site is sufficiently large to allow buffering for mitigation of any adverse effects by natural or artificial barriers;
- (c) Proposed traffic will not significantly contribute to dangerous intersections or traffic congestion, considering road design capacities, existing and projected traffic counts, speed limits and number of turning points;
- (d) Facilities necessary to serve the disposal site can be available or planned for the area: and
- (e) The proposed disposal site is designed and operated to the extent practicable so as to mitigate conflicts with surrounding uses. Such conflicts with surrounding uses may include, but are not limited to:
 - (A) Visual appearance, including lighting and surrounding property.
 - (B) Site screening.
 - (C) Odors.
 - (D) Safety and security risks.
 - (E) Noise levels.
 - (F) Dust and other pollution.
 - (G) Bird and vector problems.
 - (H) Damage to fish and wildlife habitats."

The contested case hearing was conducted by Judge Edward Howell from July 13 through July 30, 1987. On September 3, 1987, Judge Howell issued proposed Findings and Conclusions and an Interim Proposed Order.

In summary, the Judge found sufficient evidence existed to demonstrate compliance with chapter 679 in the following areas contested during the hearing, including noise, fire protection, wetlands, the City of Banks water supply, the proposed Hamill Observatory, hazardous waste, air quality, and traffic. It was his determination, however, that insufficient information exists in the record to determine statutory compliance in three

areas: potential landslides, groundwater, and leachate treatment and disposal. The Hearings Officer's Findings and Conclusions recommend continuation of the contested case hearing until additional information can be acquired in these areas.

Additionally, the Hearings Officer suggested the following conditions be placed on final site development:

- (1) A fire protection plan be developed and implemented;
- (2) A luminary light be installed at the intersection of Highways 47 and 26; and
- (3) Noise mitigation actions included in the existing Neighborhood Protection Plan be made mandatory.

Rules of procedure give all parties to the contested case hearing until September 21, 1987, to file written exceptions and arguments to the Hearings Officer's proposed Findings and Conclusions, and Interim Order. At its October 2nd meeting, the EQC will be asked to review these documents and give direction to the Department regarding further action.

The DEQ's written exceptions and argument to the Hearings Officer's proposed Findings and Conclusions, and Interim Order are filed with this Informational Report.

EQC OPTIONS

In light of the Hearings Officer's proposed Findings and Conclusions, that in three areas insufficient information is available to determine compliance with the applicable legal standards of chapter 679, the Commission is presented with three options which allow continued consideration of the Bacona Road site.

Option One. Taking exception to the Hearings Officer's conclusions. If the Commission judges that sufficient information exists to demonstrate compliance with applicable provisions of chapter 679, in the areas of landslide potential, groundwater, and leachate treatment and disposal, the Commission could:

- (1) Close the contested case hearing;
- (2) Direct the Department to prepare findings to this effect; and
- (3) Order establishment of the Bacona Road site. (See Potential Addition to the Final Order)

Option Two. Accepting the Hearings Officer's Findings with Exceptions. If the Commission judges that sufficient information exists to demonstrate compliance with chapter 679 in one or two, but not all three of the areas named, the Commission, by motion, could direct the Department to:

- (1) Investigate further the area(s) where insufficient information is noted; and
- (2) Continue the contested case hearing process until further information is developed in this area(s). (See Potential Additions to the Final Order)

Option Three. Accepting the Hearings Officer's Findings and Conclusions without exception. If the Commission judges that insufficient information is available to determine compliance with chapter 679 - in the areas of landslide potential, groundwater, and leachate treatment and disposal, the Commission could, by motion, direct the Department to:

- (1) Investigate further issues related to landslide potential, groundwater and leachate treatment and disposal; and
- (2) Continue the contested case hearing process on new findings developed in these areas.

Should the Commission select Option Three, results of the continued contested case hearing could be available in September 1988. Testing to gather additional information on landslide characterization must occur during the winter - wet weather months, and would be complete in May 1988.

As part of either Option Two or Option Three, the contested case hearing would have to be continued, and the Attorney General's Model Rules should be kept in effect for this purpose. The Commission initially adopted the model rules by a temporary rule that will expire in late November. The model rules can be kept in effect by a simple motion of the commission, because under ORS 183.341, agencies do not have to go through rulemaking procedures to adopt the Attorney General's model rules.

It is recognized that opposing parties to the contested case may recommend other options ranging from making findings of insufficient information in areas other than groundwater, landslide potential and leachate, to termination of consideration of this site for failure to demonstrate compliance with chapter 679. It is the Department's judgement that sufficient information for a positive finding exists in all areas except leachate treatment and disposal and that continued consideration of the Bacona Road site under chapter 679 is appropriate.

RECOMMENDATION

It is recommended that the Commission approve a motion to:

- (1) Affirm the existence of sufficient information to demonstrate compliance with chapter 679 in all areas where the Judge made positive findings, in addition to areas of landslide potential and groundwater;
- (2) Direct the Department to generate additional information on the availability of facilities to properly treat and dispose of leachate generated by the Bacona Road landfill;
- (3) Continue the contested case hearing to consider the sufficiency of additional information generated on leachate treatment and disposal; (Option Two)
- (4) Direct the Department to include the Hearings Officer's recommendations for fire protection, highway lighting, and noise mitigation, in the Neighborhood Protection Plan; and
- (5) Adopt Attachment A, which would keep in effect the Attorney General's Model Rules for purposes of the continued contested case hearing.

DISCUSSION OF RECOMMENDATION

It is the Department's opinion that a landfill at Bacona Road, as proposed, will comply with all provisions of chapter 679. Regulations specific to groundwater essentially require that introduction of any landfill substance into an underground drinking water source or aquifer shall not result in violation of applicable drinking water quality standards or the beneficial use of an aquifer. The Department's determination of compliance with this standard as detailed in the attached Exceptions Document, is based on a clear understanding of the natural characteristics of the site and the capabilities of properly engineered facilities and site construction.

Evidence to support this conclusion was generated as part of a study of the hydrogeologic characteristics of the site that included extensive geologic mapping, shallow and deep groundwater aquifer analysis, evaluation of soil permeability, and groundwater volume and flow direction analysis - often conducted in the most sensitive areas of the site from a groundwater perspective.

Sufficiency of Groundwater Information

It was determined that a strong groundwater discharge condition exists onsite with predominant flow to the Denny Creek Drainage. This condition, coupled with lower permeability materials generally throughout the site, and the existence of only one downgradient groundwater user within one mile from the site, reflects good natural conditions for groundwater protection. Because fracture systems and high permeability materials were also discovered, the site design was enhanced to include a sophisticated leachate leak prevention system. This system includes a double composite liner, and a leachate detection, collection and removal system. This system was found by the Hearings Officer to be the best design available to protect groundwater. Department investigations revealed no evidence of faulting onsite.

It is acknowledged that additional groundwater characterization must occur prior to final site design to properly locate future groundwater monitoring wells and ensure safe excavation and construction of the landfill. This information is not necessary for the Commission to conclude that the site meets the statutory requirements of chapter 679, or other applicable laws, to order the establishment of the Bacona Road site.

Sufficiency of Information Regarding Landslide Potential

The Department further believes that sufficient evidence exists to confirm that a landfill at Bacona Road can be developed and its natural groundwater protection characteristics and engineered systems preserved without interference from landsliding. As detailed in the attached Exceptions Document, a distinction is required between deep-seated landslides which can threaten the feasibility of a site, and shallow, localized landslides which only impact the design and construction techniques at a site. Geologic analysis, including deep coring and inclinometer testing, revealed no evidence or indication of major active landslides in the area. Shallow slide areas identified do not present an unsolvable problem for landfill operation or the integrity of technological onsite systems. If the foundation preparation and actual construction is conducted properly, the proposed design of the site will have the effect of stabilizing shallow ground movement.

Leachate Treatment and Disposal Information

The Department believes that sufficient information is available to support a finding that leachate treatment and disposal facilities necessary to serve the site can be available or planned for the area. However, due to a Final Feasibility Study Report error, and the subsequent identification of a new recommended alternative for pretreatment - described only orally during the contested case hearing process, the Department believes additional study to confirm this information is warranted to make a clear finding relative to chapter 679. Concerns raised regarding whether the Unified Sewage Agency would choose to accept properly pretreated leachate, also need to be addressed.

Per the Hearings Officer's proposal, it is recommended that this matter be the subject of a continued contested case hearing. Staff anticipates that additional leachate treatment and disposal analysis, including the following, would be sufficient to address these outstanding concerns:

- (1) Additional calculations, including sensitivity analysis, of anticipated leachate volumes.
- (2) Further analysis of anticipated leachate constituents.
- (3) Detailed review and analysis of leachate treatment and disposal alternatives including POTW and onsite disposal including:
 - (a) examination of constituent removal effectiveness under varying treatment conditions & leachate constituencies;
 - (b) documentation of system use and effectiveness at other industrial operations;
 - (c) ability of system to treat varying volumes and types of leachate to meet disposal requirements of POTW's;
 - (d) description of treatment byproducts and their disposal requirements;
 - (e) assessment of system treatment efficiencies given receipt of different leachate volumes over landfill life; and
 - (f) cost estimates.

This additional work could be completed by the end of November and a contested case hearing conducted during December 1987 or January 1988. Given this schedule, a final Hearings Officer's recommendation could be made to the Commission in February or March 1988. At that time, a Final EQC Order could be approved directing establishment of the site, with any appropriate conditions.

Potential Addition to the Final Order

In selecting Option One or Option Two, the Commission may wish to be assured that additional work in areas of concern to the Hearings Officer will be completed prior to site development. During the hearing the Department noted that much of the additional information sought by the Hearings Officer will be developed as a matter of prudent engineering practice in the final phases of design, over the life of the project. It is the Department's judgement that this work actually relates more to the

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Page 7

specifics of detailed construction planning to assure effective and safe excavation and construction of the landfill, than to assessment of overall site feasibility and evidence of compliance with the provisions of chapter 679. Assurance that this work will be completed could be accomplished by including a provision in the Final Order that conditions site permitting and development upon successful completion of a specific predevelopment scope of work. The Department anticipates that a scope of work could be written requiring further characterization of site stability/potential for landslide movement and identification of appropriate remedial measures, isolation of groundwater divides, and additional testing to determine the appropriate location of future groundwater monitoring wells.

Attachment: Attachment A
Steve Greenwood:m
SM1265
229-5782
September 22, 1987

Attachment A

OAR 340, Division 11, Title - Procedures for Conduct of Contested Case on Order of Environmental Quality Commission selecting a land fill disposal site under authority of 1985 Oregon Laws, chapter 679.

340-11-141. Rules/Applicability. (a) The Environmental Quality Commission hereby adopts the Attorney General's Model Rules numbered OAR 137-03-001 through 137-03-093 and OAR 137-04-010 (Model Rules) for application to any contested case conducted by or for the commission on its order selecting a landfill disposal site pursuant to 1985 Oregon Laws, chapter 679.

(b) The Model Rules shall only apply to the contested case (or cases) described in subsection 340-11-141(a). The commission's rules for conduct of contested cases, OAR 340-11-097 through 340-11-140, shall continue to apply in all other cases. These rules shall become effective upon filing of the adopted rule with the Secretary of State.

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BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

In the Matter of the Establishment) DEQ'S EXCEPTIONS TO
of a Solid Waste Disposal Site to) HEARINGS OFFICER'S
Serve Clackamas, Multnomah and) PROPOSED FINDINGS,
Washington Counties.) CONCLUSIONS AND INTERIM
ORDER

I.

INTRODUCTION

The Hearings Officer concluded in his Proposed Findings and Conclusions that more information is necessary in the areas of landslide potential, groundwater, and leachate treatment and disposal in order to comply with 1985 Oregon Laws, chapter 679 (chapter 679). DEQ believes that the level of work performed to date and evidence in the record concerning groundwater and landslides satisfy the requirements of chapter 679. However, DEQ agrees that certain information concerning leachate treatment and disposal should be obtained to ensure compliance with chapter 679.

The Bacona Road facility has not reached a preliminary or final design stage. Further study is necessary, and will include further work in the areas of groundwater and landslide potential. DEQ has always acknowledged this fact and is committed to seeing that necessary additional work is performed in a responsible manner. EQC has the authority to make performance of particular work or studies a condition of selection of Bacona Road under Section 5(5) of chapter 679.

Responsible engineering of this type of facility would dictate

1 the necessity for a clear understanding of landslide potential
2 and onsite groundwater characteristics, even without such
3 conditions.

4 The work conducted by DEQ during the feasibility study
5 will be briefly discussed, followed by explanation of what is
6 known about groundwater and landslides and why the present
7 level of study satisfies chapter 679.

8 1. The DEQ Study.

9 The geological studies performed by DEQ and its
10 consultants were designed to obtain information concerning
11 groundwater and landslide potential. The work completed to
12 date at Bacona Road goes beyond the level of study normally
13 conducted at the feasibility stage of investigation. Although
14 additional study will be required during preliminary and final
15 design stages, that work should in no way affect site
16 feasibility.

17 The work conducted during the feasibility analysis
18 included the following detailed hydrogeologic investigations:

19 In areas where there was limited surface exposure of
20 geologic units, test pits (41 in all) were excavated to depths
21 up to 21 feet to further refine the department's understanding
22 of the geology and soil beneath the site.

23 Nine borings of up to 68' were completed at selected
24 locations around the site to provide information on subsurface
25 materials and geologic and hydrogeologic conditions.

26 Monitoring wells, or piezometers, were installed to monitor

1 aquifer characteristics including groundwater flow directions
2 and permeabilities of the geologic material around the
3 drillings.

4 Eight air rotary borings were completed to evaluate deeper
5 geologic and groundwater conditions at depths ranging from
6 57'-299'. These monitoring wells provided information on
7 groundwater flow direction in the deeper geologic units,
8 permeabilities of those same units and indirectly provided data
9 for the slope stability evaluation.

10 Two drill holes were advanced using a diamond core
11 drilling machine to provide a continuous record of the
12 lithified geologic materials below the site. Boring C-1 was
13 completed to a depth of 286' in an area where ancient landslide
14 materials had been tentatively identified. In addition, a
15 slope inclinometer casing was installed in C-1 to provide long
16 term information regarding the stability of the area. The
17 other core boring (C-2) was drilled to provide direct visual
18 evidence of the degree of fracturing and rock types in what was
19 judged to be the area where the greatest degree of fracturing
20 occurred.

21 Permeability testing was completed in 18 wells to evaluate
22 the degree of natural groundwater protection that soils and
23 rock units under the site provide. These tests were completed
24 in all of the geologic units underlying the site.

25 An aquifer pump testing program was conducted in an area
26 of the site where groundwater production was higher than

1 expected. The program included construction of four additional
2 test wells and the completion of two different pumping tests.
3 The tests provided detailed information on groundwater
4 conditions including the direction and nature of groundwater
5 flow, permeability characteristics of the rock and soil units,
6 and aquifer interconnectedness.

7 2. Groundwater

8 The hearings officer found that

9 "The the volume and extent of the underground
10 water, whether a divide or divides exist, and the
11 direction of the flow are important because if the
lining in the landfill would break it could
contaminate the underground water.

12 "Everyone seems to agree that more underground
13 tests are needed, both on and off the site. Cordell
14 testified that it will be necessary to drill
15 additional wells, both shallow and deep, to better
16 define the groundwater flow. He stated that it would
17 be necessary to "conduct aquifer tests to better
define groundwater flow direction and groundwater
flow systems to geologic limits, and the degree of an
aquifer partitioning and hydraulic
interconnectedness."

18 Hearings Officer's Proposed Findings at 58-59.

19 DEQ agrees that this further work should be conducted.
20 However, there is no statutory requirement that such work be
21 conducted prior to the site's selection.

22 A. Statutory Requirements.

23 In selecting a site, EQC is required to find that the site
24 "will comply with applicable state statutes, rules of the
25 commission and applicable federal regulations." Chapter 679,
26 § 4(1)(a). State and federal law prohibit contamination of an

1 underground drinking water source beyond the solid waste
2 boundary, or an alternative boundary specified by DEQ.
3 OAR 340-61-040(4)(a)(A); 40 CFR 257.3-.4(a). The hearings
4 officer has not said what section of chapter 679 is not
5 complied with by the groundwater studies and protection
6 measures already performed and proposed. Rather, the hearings
7 officer's conclusion concerning groundwater simply states:

8 "The hearings officer concludes that there is
9 not sufficient information presently available
10 concerning . . . the volume and flow of underground
11 water . . .

12 "The hearings officer therefore concludes that
13 because of the lack of such information, he cannot
14 presently determine whether the Bacona Road site does
15 or does not meet the statutory requirements of
16 chapter 679, Oregon Laws 1985."

17 Hearings Officer's Proposed Findings at 61-62.

18 Groundwater will be protected by the double composite
19 liner and leachate collection, detection and treatment
20 system. The system is designed to prevent contamination of
21 groundwater and thus assure compliance with applicable water
22 quality laws. Further characterization of groundwater by
23 additional studies is necessary for monitoring purposes, but
24 not to prevent contamination. Prevention, and applicable laws,
25 are addressed by the linear and leachate collection system.

26 B. Groundwater Divides.

 Location of the groundwater divide is important to
determine where downgradient monitoring wells should be
located. Onsite hydrologic monitoring data indicates that much

1 of the precipitation falling on the Bacona Road site is
2 discharged through springs and seeps onsite as part of the
3 shallow groundwater discharge system. Shallow groundwater
4 beneath the site flows toward the center of the site, and is
5 ultimately discharged into Denney Creek. Similarly, deep
6 completion wells show that the flow direction of the deeper
7 aquifer beneath a majority of the site is also toward Denney
8 Creek.

9 The groundwater divide to the north of the active landfill
10 area between Denney Creek and the Pebble Creek drainages has
11 been located to within several hundred feet. For ease of
12 monitoring, the active landfill has been designed to lie in
13 only the Denney Creek drainage basin. Additional testing will
14 allow more accurate location of the divide to ensure that the
15 active landfill area is limited to the Denney Creek drainage.

16 C. Aquifer Connections.

17 Understanding aquifer interconnectedness is important in
18 designing the monitoring well program and to identify the
19 direction of migration of potential pollutants. Much of the
20 shallow groundwater at the site is discharged on site through
21 seeps and springs. This is a favorable natural protection
22 feature of the site. It is probable that some of the
23 groundwater in this shallow flow system may discharge to a
24 deeper intermediate flow system. Interconnection between
25 shallow water bearing layers and layers to a depth of 195' has
26 been demonstrated under one portion of the site. However, the

1 same aquifer test showed that the shallow flow system is not
2 connected with a deep flow system identified at 296'.

3 D. Fracturing.

4 The presence of a fractured bedrock aquifer beneath
5 portions of the site was identified in the early stages of site
6 evaluation. The aquifer test further indicated the possibility
7 of groundwater flow along a fracture system beneath a portion
8 of the site.

9 Better understanding of these systems is necessary only to
10 provide for adequate monitoring, not as a condition of
11 selection. If further study confirms the presence of a linear
12 fracture system beneath the site, it will not impact project
13 feasibility. Rather, such information will be used to design
14 the best possible groundwater monitoring system.

15 E. Natural Protection.

16 Understanding the groundwater under the site is important
17 in designing the facility to best protect the resource.
18 However, the site's natural groundwater protection
19 characteristics are also important factors. The DEQ studies
20 showed that several natural protection characteristics,
21 including a strong local groundwater discharge condition, low
22 permeability materials beneath the site, and only one
23 downgradient groundwater user within a mile of the proposed
24 landfill are present at the Bacona Road site.

25 An overview of the permeability testing results show that
26 12 of the 18 tests identified permeabilities of the 10^{-5}

1 cm/sec range or lower, which will provide good natural
2 protection. Six tests revealed higher permeabilities than
3 10^{-5} and additional testing described in the final
4 Feasibility Study Report focused on these areas with higher
5 permeabilities.

6 The long-term aquifer pump test completed at the site and
7 described at page six of the Hydrologic and Geologic Addendum
8 to the Feasibility Study revealed permeabilities in the deeper
9 (up to 200 feet) geologic units of 2.9×10^{-4} to 6.2×10^{-4}
10 cm/sec. These values are not considered unusual and provide
11 moderate natural protection.

12 The most important designed mitigation measure for this
13 site is the double composite liner with leachate collection and
14 leak detection system. This type of liner is considered to be
15 a state of the art, prevent system, and exceeds current federal
16 and state standards for hazardous waste disposal facilities.

17 E. Banks Water System.

18 Considerable testimony was presented concerning the
19 potential impact of landfilling operations on the water supply
20 for the City of Banks. Onsite reconnaissance was conducted of
21 the water supply and conductivity and pH measurements were
22 taken. These measurements helped to determine the total
23 dissolved solids (TDS) present in water. This, in turn,
24 indicated how long water has been underground -- the more time
25 water is underground, the more solids will dissolve into it.
26 TDS are a good indication of whether a spring source, such as

1 the Banks Springs, is a deep or shallow source. From the
2 measurements taken at the Banks Springs, it was shown that this
3 is a shallow water source. The site survey further indicated
4 that the geology of the site points to a surface water source
5 for the springs. Based on these studies (described in the
6 Feasibility Study), DEQ and its consultants concluded that the
7 landfill will not have any impact on the water quality in the
8 Banks' springs located approximately five and one-half miles
9 south of the landfill or on the city's well located
10 approximately nine miles south of the landfill site.

11 3. Landslide Potential.

12 The issue of potential landsliding was raised by opponents
13 of the site. The hearings officer concluded that additional
14 work on characterizing the potential for landslides must be
15 done to comply with chapter 679.

16 A. Statutory Requirements.

17 The hearings officer did not rest his conclusion on any
18 specific statutory requirement. However, he did indicate that
19 the importance of the landsliding issue was tied to the
20 potential impact on the landfill's protective measures (liners,
21 leachate collection systems, etc.) and, therefore, on impacts
22 to groundwater resources. See Proposed Findings and
23 Conclusions, page 57. The landsliding issue should be
24 evaluated on the basis of whether there is sufficient evidence
25 to conclude that the applicable state and federal groundwater
26 regulations, particularly OAR 340-61-040(4), can be met.

1 Considerable work was conducted on the site to evaluate
2 the potential for landslides. This work is discussed on page
3 10 of the Hydrologic and Geologic Addendum to the draft
4 Feasibility Study, dated May 18, 1987, and located at
5 Appendix B of the final Feasibility Study.

6 The department and its consultants conducted detailed
7 geologic mapping of the site, examined data from more than ten
8 borings on the site, and had a team of geologists specializing
9 in landslides conduct a five day geologic reconnaissance of the
10 Bacona site to evaluate landslide potential.

11 Finally, the department installed an inclinometer to
12 measure any potential ground movement in an area of ancient
13 landsliding on the site . The inclinometer was installed in
14 boring C-1, located in an area where DEQ felt that the
15 potential for movement or instability was the greatest. Two
16 readings of that inclinometer in March 1987 and April 1987 and
17 a third reading in July 1987 resulted in no apparent movement
18 being measured. The unanimous conclusion of the project's
19 eight geologists and engineering consultants was that no
20 evidence of active deep landslides existed on the site, and
21 that the potential for shallow, localized sliding did not pose
22 a danger to the development of the site or its groundwater
23 protection features.

24 B. Shallow and Deep Landslide Potential Must be
25 Distinguished.

26 There are two types of potential landslides that were

1 studied by the department and discussed during the contested
2 case hearing. The first is a deep-seated slide, similar to the
3 slide identified at the Wildwood site. It is this type of
4 slide, with movement of a large mass of material, which, if
5 found, could pose a threat to the groundwater protection
6 facilities. The department has provided more than sufficient
7 evidence that there is no potential for such a slide at the
8 Bacona Road site. Evidence suggests that such a slide did
9 occur millions of years ago. A slide plane was found at a
10 depth of 253' near boring C-1. This was the landslide that
11 essentially filled up the bowl at Bacona Road. In reviewing
12 other borings, however, specifically boring C-2 in the northern
13 portion of the site, no evidence at all was found to suggest a
14 deep slide moving to the north. In this 198' boring, no slide
15 material was found below 28' under the surface.

16 The second type of slide is much shallower, localized
17 landsliding. No evidence of significant shallow sliding
18 exists. However, shallow sliding is not uncommon during
19 excavation in this type of area. Shallow landsliding does not
20 pose a threat to the environmental protection facilities of the
21 landfill. If potential shallow instability is found to exist,
22 as each cell is designed and prepared, it can be avoided
23 through shallower excavation, buttressing, or modifying the
24 design of the cell.

25 C. Distinction From Wildwood Site.

26 The Wildwood site was eliminated because of slope

1 instability and the potential for landsliding. Opponents argue
2 that the same potential should eliminate the Bacona Road site.

3 The conditions at the Bacona Road site are decidedly
4 different. At Wildwood, the department discovered a large,
5 deep-seated slide which had very high potential for movement.
6 That slide plane was determined to be moving (slowly) toward
7 the Columbia Channel, with no intervening topographical feature
8 to block the movement. The Bacona Road site is in a natural
9 bowl in which ancient landsliding moved toward the middle of a
10 canyon to form a bowl. The base of the ancient deep-seated
11 slide is buttressed by the canyon itself and, in contrast to
12 the Wildwood landslide, has nowhere to move.

13 D. Additional Work.

14 The department's consultants have recommended that
15 additional work be done to further characterize the slope
16 stability at the site prior to construction of the landfill.
17 It is expected that this work would be conducted over the life
18 of the site, as each cell is designed and constructed. None of
19 this work will impact the ability of the commission to
20 determine either overall site feasibility or compliance with
21 the requirements of chapter 679. However, the commission may
22 wish, in its final order, to require this work as a
23 prerequisite to construction and operation of the site.

24 4. Leachate.

25 Leachate is the liquid which results from percolation of
26 precipitation through the solid waste. Leachate will be

1 channeled to an onsite collection and pretreatment or treatment
2 facility by the leachate collection system.

3 The hearings officer concluded that more information is
4 necessary concerning

5 "whether leachate can or will be accepted by USA
6 [Unified Sewerage Agency] and if not how the leachate
7 will be disposed of, and whether the Tualatin River
8 presently meets state and federal water quality
standards and if not will it be able in the future to
do so."

9 Hearing Officer's Proposed Findings at 62.

10 (a) Statutory Requirements.

11 The statutory standard requires that "facilities necessary
12 to serve the disposal site can be available or planned for the
13 area." Chapter 679, § 4(1)(d), (emphasis added). The Final
14 Feasibility Study identified treatment for onsite discharge as
15 a feasible option. Assuming that onsite treatment and disposal
16 is technically possible, the USA facility is not "necessary to
17 serve the disposal site." Rather, it is simply the option
18 recommended and preferred by DEQ's consultants. Furthermore,
19 the statute merely requires that such facilities "can be
20 available or planned for the area." This is a burden short of
21 requiring that contractual arrangements be fully made before
22 selection of the site.

23 Washington County's potential unwillingness to accept
24 Bacona Road leachate is not a "fatal flaw" in EQC's selection
25 of Bacona Road. Similarly, nothing in the law (chapter 679)
26 will prevent DEQ or MSD from selecting a different leachate

1 treatment option than those already identified. Changing
2 technologies and political forces require flexibility and
3 chapter 679 cannot be read to strip the agencies of that
4 necessary discretion.

5 If USA will not, or the Tualatin River cannot, accept the
6 Bacona Road leachate, either now or 20 years from now, DEQ and
7 MSD must be free to change methods for treatment. Certainly,
8 in the face of some new technology, DEQ and MSD should remain
9 free to explore and use treatment options not reviewed during
10 the contested case.

11 DEQ's staff report to the commission recommends a further
12 scope of work suggested to satisfy leachate treatment and
13 disposal concerns. That scope of work includes examination of
14 various options for leachate treatment. Several options may be
15 technically and politically viable and EQC is free to select
16 one or leave that decision to DEQ.

17 CONCLUSION

18 For the reasons set forth above, DEQ recommends EQC
19 respectfully reject the Hearings Officer's Proposed Findings
20 and Conclusions and Interim Order, direct DEQ staff to prepare
21 findings and conclusions demonstrating that groundwater and
22 landslide studies done to date satisfy the standards of chapter
23 679, and continue the contested case for the limited purpose of

24 ////

25 ////

26 ////

1 performing further work and hearing evidence on leachate
2 treatment and disposal.

3 Respectfully submitted,

4
5 David G. Ellis OSB #83191
6 Special Assistant Attorney
7 General
8 Of Attorneys for Department of
9 Environmental Quality
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CERTIFICATE OF SERVICE

I certify that on September , 1987, I served the foregoing DEQ's Exceptions to Hearing Officer's Proposed Findings, Conclusions and Interim Order upon the parties listed in the attached Amended Service List by mailing, first class mail, postage prepaid, a true, exact and full copy thereof.

DAVID G. ELLIS
Attorney for the Environmental
Quality Commission and
Hearings Officer

AMENDED SERVICE LIST
(9-18-87)

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(0235H)

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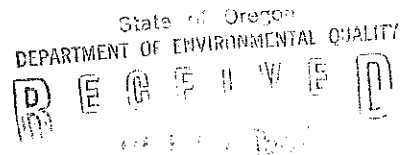
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October 7, 1987



OFFICE OF THE DIRECTOR

Mr. James Petersen, Chair
Environmental Quality Commission
811 SW Sixth Avenue
Portland, OR 97204

Re: Bacona Road Site/Open Meeting Requirements

Dear Mr. Petersen:

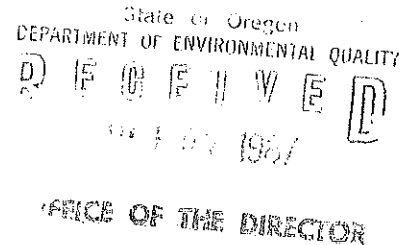
We represent KGW-TV Channel 8. KGW is interested in providing the fullest appropriate coverage of the Environmental Quality Commission's actions regarding the proposed Bacona Road landfill site.

At the October 2, 1987 EQC meeting dealing with this issue, there was substantial uncertainty as to whether the meeting or parts of it would be open to the public and media, closed, or conducted in executive session. It is KGW's position that all hearings in connection with this matter and all discussions between the EQC and any hearing officer or others who are not EQC members must be open to the public and the media. The only discussions that may be "closed" to the public are those involving the EQC's internal deliberations towards a decision following a hearing.

There was some discussion at the October 2 meeting about conducting the meeting in executive session. As you know, the Public Meetings Law defines a meeting as the convening of a body such as the EQC "to make a decision or to deliberate toward a decision on any matter." O.R.S. 192.610(5). Even a meeting held solely for the purpose of receiving information is subject to the statute. 38 Op. Atty. Gen. 1471 (1977). All meetings must be open unless the matter discussed is such that the executive session rules apply.

The EQC may hold an executive session only if it is discussing certain matters specifically identified in O.R.S. 192.660--none of which apply to any hearing, deliberation,

LINDSAY, HART, NEIL & WEIGLER



Mr. James Petersen
October 7, 1987
Page 2

or decision related to the Bacona site. "Executive session" thus is not an option for the EQC in this matter.

The Public Meetings Law, with its requirement of open access to the public and the media, O.R.S. 192.630, even applies to contested case proceedings before the EQC as a whole. The only exception is a very narrow one: the Public Meetings Law does not apply "to the deliberations . . . of state agencies in conducting hearings on contested cases in accordance with the provisions of [the Oregon Administrative Procedure Act]." O.R.S. 192.690(1) (emphasis added). The Attorney General has emphasized that "agency hearings in contested cases are not excluded [from the Public Meetings Law]; the exclusion relates only to agency deliberation toward a decision following the hearing." Attorney General's Public Records and Meetings Manual at II-2 (1985) (emphasis in original).

The bottom line is that all of the EQC's hearings and deliberations in connection with the Bacona Road site should be open to the public and the media, with the only possible exception being deliberations toward a decision among EQC members. The Oregon Legislature has described the openness that is to characterize state government:

The Oregon form of government requires an informed public aware of the deliberations and decisions of governing bodies and the information upon which such decisions were made. It is the intent of [the Public Meetings Law] that decisions of governing bodies be arrived at openly.

O.R.S. 192.620. We trust that you and the Commission will ensure that the EQC's decisionmaking complies with the letter and spirit of Oregon law.

Sincerely,


Thomas A. Balmer

TABki1002

cc KGW-TV Channel 8
ATTN: Bob Kerns

STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY

INTEROFFICE MEMO

TO: Fred Hansen

DATE: September 28, 1987

FROM: Mary Lou Perry

Mary Lou Perry

DEPARTMENT OF ENVIRONMENTAL QUALITY
RECEIVED
SEP 28 1987

SUBJECT: Special Meeting of the EQC, October 1, 1987

OFFICE OF THE DIRECTOR

Last week, I talked with all the lawyers for the parties in the contested case proceeding. They indicated their intentions for taking part in the oral argument segment of the EQC meeting on Friday, Oct. 2.

Parties who thought that they would participate and seemed satisfied with the proposed time limits:

Ed Sullivan for the Bacona Road Group, H/MPC, Inc.
Cheyenne Chapman for Washington County
Henry Kane for the City of Banks
Tom Kohl for the City of Vernonia said that his law firm would not be present, but that Wally Vaughn, the Vernonia Mayor, would be giving the arguments.

Parties who thought they would not be presenting any statements, but would probably attend:

Stephen Janik for the Port of Portland
Peter Kasting for the City of Portland
Daniel Cooper for METRO

Ed Martiszus seemed rather agitated over the time limit and indicated that he would take as long as he wanted to for his comments and that he would bring others to speak. I assured him that it was up to the discretion of the EQC to impose the limits and he responded that he would deal with them directly during the meeting. His main concern seems to be the potential for toxic chemicals to intermingle and then pollute his well, ten miles away. He likened DEQ to big industry in that both were out to destroy the world with chemicals that should not be produced. You may wish to alert Jim Petersen of the potential for problems.

I have attached all the comments submitted on Sept. 21. They should give you an idea of what to expect in the way of arguments on Oct. 2.

MLP:f

YF2494

cc: Michael Huston
Dave Ellis
Steve Greenwood



METRO

2000 S.W. First Avenue
Portland, OR 97201-5398
503/221-1646

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

RECEIVED
SEP 21 1987

OFFICE OF THE DIRECTOR

September 21, 1987

Metro Council

Richard Waker
Presiding Officer
District 2

Jim Gardner
Deputy Presiding
Officer
District 3

Mike Ragsdale
District 1

Corky Kirkpatrick
District 4

Tom DeJardin
District 5

George Van Bergen
District 6

Sharron Kelley
District 7

Mike Bonner
District 8

Tanya Collier
District 9

Larry Cooper
District 10

David Knowles
District 11

Gary Hansen
District 12

Executive Officer
Rena Cusma

Hand Delivered

The Honorable Edward H. Howell
c/o Mr. Steve Greenwood
Department of Environmental Quality
811 S. W. Sixth Avenue
Portland, OR 97204

Dear Judge Howell:

Enclosed are the Comments of the Metropolitan Service
District of Oregon on the Proposed Interim Order submitted
to the Commission.

Very truly yours,

Daniel B. Cooper
General Counsel

gl
8201C/D3

Enclosure -- Amended Service List

RECEIVED
SEP 21 1987

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

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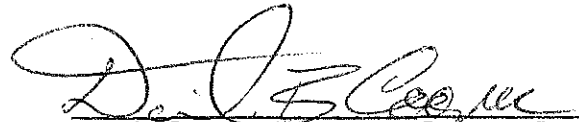
IN THE MATTER OF THE ESTABLISH-)
MENT OF A SOLID WASTE DISPOSAL)
SITE TO SERVE CLACKAMAS, MULTNO-)
MAH AND WASHINGTON COUNTIES.)

OFFICE OF THE DIRECTOR
COMMENTS OF METROPOLITAN
SERVICE DISTRICT OF OREGON
ON PROPOSED INTERIM ORDER

The Metropolitan Service District of Oregon (Metro) at
this time does not submit any proposed changes to the proposed
Interim Order prepared by the Hearings Officer in this matter.

Metro reserves the right to continue to participate in
this matter, to participate in any further proceedings, and to
participate in any oral argument on the proposed Interim Order.

Respectfully submitted,

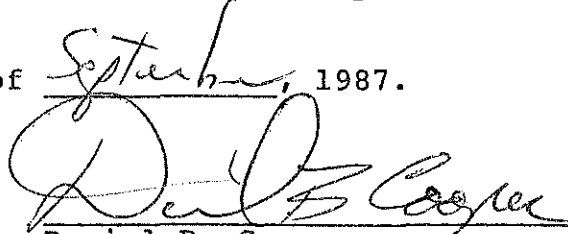

Daniel B. Cooper, General Counsel
Metropolitan Service District

8202C/510

CERTIFICATE OF SERVICE

I hereby certify that on Sept 21, 1987, I served a true copy of the foregoing Comments of Metropolitan Service District of Oregon on Proposed Interim Order on each of the persons listed on the attached Amended Service List by depositing an envelope containing the copies in the U. S. Mail at Portland, Oregon, with first class postage prepaid thereon, addressed, respectively.

Dated this 21 day of September, 1987.


Daniel B. Cooper

8202C/510

AMENDED SERVICE LIST
(9-2-87)

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(0235H)

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION OF

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

THE STATE OF OREGON

RECEIVED
SEP 21 1987

IN THE MATTER OF THE)	
SELECTION OF A SOLID WASTE)	OBJECTIONS TO HEARINGS OFFICER'S PROPOSED
DISPOSAL SITE FOR MULTNOMAH)	FINDINGS AND CONCLUSIONS
WASHINGTON, AND CLACKAMAS)	AND INTERIM ORDER
COUNTIES PURSUANT TO)	
CH. 679, OREGON LAWS, 1985.)	

Petitioner Helvetia/Mountaindale Preservation Coalition objects to the proposed findings and conclusions¹, and the proposed Interim Order, presented by the Hearings Officer in the above matter on the grounds and for the reasons set forth below.²

The Application of Waste Management of Oregon, Inc.

Because the Hearings Officer's report recommends that additional work be done at the Bacona Road site "over the winter," there is no longer any reason for not considering the Waste Management of Oregon application as a part of this siting process. Given that work on the three sites originally considered by the Commission began after the Department's recommendations in October, 1986 and were completed before May,

¹. Petitioner does not consider Section II of the Hearings Officer's Proposed Findings and Conclusions to be part of the operative portions of the order, but to be a summary of later parts of that document. Petitioner waives nothing by its failure to object to the summary.

². The Hearings Officer has not proposed a "Final Order" in this case. Petitioner has not, therefore, prepared the exhaustive listing of objections which would otherwise be filed if a final order were to be the subject of these proceedings and reserves its right to do so at the appropriate time.

1 1987, the work can be done in the time available. Indeed, most
2 of the work has already been seen by the Department and can be
3 considered by the Commission and any "practicable alternative"
4 for the use of wetlands will be before the Corps of Engineers
5 and the Division of State Lands in any event. Petitioner moves
6 for an expansion of the siting process so as to include the
7 Waste Management of Oregon application.

8 The Motion to Disqualify. Petitioner filed a Motion to
9 Disqualify, regarding the legal and ethical ability of the
10 Oregon Department of Justice representing the Hearings Officer,
11 the Department, and the Commission. As is apparant from the
12 record of these proceedings, Messrs. Michael Huston, who
13 represented the Hearings Officer during the Contested Case
14 Proceedings, and David Ellis, who represented the Department
15 during those proceedings, were both involved in the site
16 selection proceedings earlier. (Tr. 301-304). Petitioner also
17 filed a Motion for Reconsideration of the denial of that
18 motion, attached. The Hearings Officer overruled the Motions.
19 (See Tr. 17-21, 150-151 and 298-300.) The Department of
20 Justice did concede later that week, for the purposes of this
21 case, that its two representatives would not speak to each
22 other about the case from that point on. See transcript
23 attached.

24 Petitioner does not know what discussions regarding this
25 case were held among Department of Justice personnel before
26 this concession was made, halfway during the hearing.

1 Petitioner does not know what advice the Department gave to the
2 Hearings Officer on matters of fact and law at issue before
3 him. Petitioner again asks the Hearings Officer, and the
4 Commission, for the prophylactic protection of requiring the
5 Department personnel, Mr. Huston, Mr. Ellis, and any other
6 lawyer or employee of the Department of Justice who
7 participated in this case, to reveal the substance of any
8 contacts with the Hearings Officer or with other members of the
9 Department, either by way of deposition or other suitable
10 means.

11 Although requested, the Hearings Officer did not ask those
12 representatives about their previous contacts or
13 understandings, nor did he provide for a process under which
14 affidavits would be prepared at the completion of the contested
15 case proceedings to demonstrate that there were no contacts or
16 to indicate what contacts had been made. A similar process is
17 used under DR 5-105 to protect the process from allegations
18 that conflicts would prevent a fair process. The proposed
19 interim order and its supporting findings and conclusions do
20 not address these issues. Petitioner objects to the
21 insufficiency of the action on its Motion to Disqualify and
22 moves the Commission to require both representatives of the
23 Department of Justice, Messrs. Huston and Ellis and other
24 involved employees, to reveal in detail all their contacts on
25 the matters at issue in these proceedings, both written and
26 oral. After such revelation, Petitioner further moves for a

1 reasonable time to review such contacts and ask those
2 representatives (or other members of the Department of Justice,
3 if necessary) further questions about such contacts or
4 directions to take further action as may be necessary to
5 guarantee the fairness of this siting process.

6 "Due Consideration". The Hearings Officer interprets
7 subsection 2 (2) (a), Ch. 679, Or. Laws, 1985, suggesting that
8 statewide planning goals need not be met, but only "thought
9 of." Proposed Findings and Conclusions, p. 10, line 11 to p.
10 11, line 3 and p. 24, lines 1-3.³ That interpretation is
11 incorrect and has no basis in Ch. 679, Or. Laws, 1987.

12 While there is language in section 5 (3) (b), Ch. 679, Or.
13 Laws 1985, which could be read to allow for the siting of such
14 a facility, notwithstanding the provisions of local
15 comprehensive plans and zoning ordinances, no such parallel
16 language exists by which the goals may be overridden,
17 especially in view of the strong legislative policy in favor of
18 Oregon's land use planning system in general and the goals in
19 particular. See ORS 197.005 to 197.013; ORS 197.015 (8),
20 197.040 (1) (c) and (2) (e), 197.180, 197.225, 197.250, and
21 197.732. Compliance with these statutes (and therefore the
22 goals) is necessary, in the absence of pre-emptive language in
23 the enabling legislation, to meet section 4 (1) (a) of Ch. 679,
24

25 ³. This "house of cards" argument is all-dependent on the
26 language of section 2 (2), Ch. 679, Or. Laws 1985, which is
merely an expression of legislative intent.

1 Or. Laws 1985. In view of the lack of any language exempting
2 the site selection process from the goals⁴, the consideration
3 "due" the goals means compliance.

4 Similarly, the Hearings Officer's determination that Goal
5 4 need not be met is mistaken. Section 4, Ch. 679, Or. Laws
6 1985 merely states that the Commission may locate and order the
7 establishment of a disposal site "in any area, including an
8 area of forest land designated for protection under the state-
9 wide planning goals." The language does not override Goal 4.⁵
10 All it does is allow for consideration of forest land as a
11 candidate site. It does not do away with the exceptions
12 process of Goal 2, nor preserve the other values of that Goal.
13 Shadybrook Environmental Protection Assn. v. Washington County,
14 61 Or. App. 474, 658 P.2d 1158 (1982), rev. den. 294 Or. 682
15 (1983). See also 1000 Friends of Oregon v. LCDC (Lane County),
16 83 Or. App. 278, 731 P.2d 457 (1987).

17 Further, if "due consideration" be interpreted in the way
18 suggested by the Hearings Officer, it must be applied across

19
20 ⁴. The Legislature apparently knew how to exempt the siting
21 process from local planning and zoning requirements. Sec. 5 (3)
22 (a) and (b), Ch. 679, Or. Laws 1985. If findings of local
23 standards determined equivalent to those contained in section 4,
24 Ch. 679, Or. Laws 1985 were made by the Department by July 1,
1986, then the local plan and regulations must be used; if not,
it is the local standards which are no longer applicable. If the
Legislature intended exemption from the state wide Planning
Goals, it could easily have said so.

25 ⁵. In the light of 1000 Friends v. Land Conservation and
26 Development Commission, 303 Or. 430, 737 P.2d 607 (1987), it is
apparent that the only protection of such lands is under the
Oregon Forest Practices Act, not the statewide planning goals.

1 the board. There is no analysis of information received during
2 consultation with local governments or from public comments and
3 hearings, either in the Commission's Order of June 19, 1987, or
4 in the Hearing Officer's Proposed Findings and Conclusions or
5 Interim Order to demonstrate that any level of consideration
6 were given. For judicial review purposes alone (if not for
7 considerations of the integrity of the process) such
8 considerations must be articulated and weighed under subsection
9 2 (2) (b) and (c), Ch. 679, Or. Laws 1985.

10 Only two other factors were considered relevant by the
11 Hearings Officer under subsection 2 (2) (d), Ch. 679, Or. Laws
12 1985 -- cost and site life.⁶ The cost factor must obviously be
13 reconsidered, due to consultant error⁷. The site life factor
14 must also be re-evaluated in the light of leachate treatment
15 decisions, redesign of the active area due to greater
16 information on landslide activity, determination of the final
17 location of the hydrological divide, and matters arising out of
18 wetland permit proceedings. Petitioner again moves that any

19
20 ⁶. The Commission will note that Petitioner requested that
21 the Commission establish such "considerations" by rule, so that
22 all actual and potential parties could know what the Commission
23 deemed relevant. The Commission declined the suggestion.
24 Instead, it established those standards for the first time in its
25 order of June 19, 1987. Both those standards were articulated in
a way which favored the rejection of the only alternate site
under consideration by the Commission. In view of the changes in
cost estimates for leachate treatment facilities, the Commission
must, at the very least, reevaluate this "phantom factor" against
the other alternative of Ramsay Lake.

26 ⁷. See the admission of Mr. Gill at Tr. 891-892.

1 factor used by the Commission be stated in rule form.

2 Finally, sec. 5 (2), Ch. 679, Or. Laws 1985 requires a
3 review of the Department's study under section 5 (3) and the
4 sites recommended by the Department. There is no indication,
5 save for a bare recitation, that the Commission actually
6 reviewed anything. There is no indication that the Commission
7 reviewed the infinite number of sites originally considered by
8 the Department's contractor, the 142 sites designated for
9 further Department review, or the three sites selected for
10 later intensive review by the Department and its consultants.

11 "Feasibility". Petitioner strongly disagrees with the
12 Hearings Officer's use of the non-statutory term "feasibility"
13 to describe the function of these proceedings, found at
14 Proposed Findings and Conclusions p. 11, line 20 to p. 13, line
15 2 and refers the Commission to its discussion of the term found
16 in its MEMORANDUM TO HEARINGS OFFICER, p. 4, line 18 to p. 5,
17 line 20.⁸

18 Petitioner notes that, in the only place where the term
19 "feasibility study" is used in state regulations governing
20

21 ⁸. The Hearings Officer was also clearly troubled by the
22 Department's assertions. Tr. 1358. The record in this case
23 indicates a discussion on this matter on January 31, 1986 between
24 the Department's project manager, Mr. Greenwood, and the lead
25 consultant's project manager, Mr. Kennedy. (Ex. 22 and Tr. 208-
26 210 and 245-247). Mr. Greenwood's determination was that the
site must be at the "permissible," rather than the "preliminary
approval" stage. To do more, he explained, would go outside the
Department's budget (Tr. 209, l. 23 to 210, l. 7) and bring in
the consultant to do a greater level of work than anticipated
(Tr. 210, ll. 17-25). Petitioner suggests that neither of those
considerations are relevant to the statutory standard.

1 landfills, even the minimal requirements for such a study under
2 OAR 340-61-030 have not been met, much less those requirements
3 under other laws and regulations.

4 Even if one accepts the Department's argument and
5 concludes that no compliance be necessary with local plans and
6 ordinances, and that federal requirements are generally
7 mirrored in state requirements, and that costs and site life
8 need only be "acceptable" (without further elaboration or
9 comparison), only then may one generally limit the
10 "feasibility" inquiry to state requirements. If the only thing
11 the Department need do is wave its wand and incant that it is
12 possible to meet state requirements and end the inquiry, one
13 wonders what the three weeks of depositions and eight days of
14 hearings, plus countless hours of preparation time, was all
15 about. The siting proceedings become empty and there is no
16 opportunity to review critical issues in site permitting. The
17 Department's approach was expressly rejected in West Hills and
18 Island Neighbors v. Multnomah County, LUBA No. 83-018, aff'd 68
19 Or. App. 782, 683 P.2d 1032, rev. den. 298 Or. 150 (1984).
20 That an application is "feasible" is not equivalent to saying
21 it "will comply" with applicable laws.

22 A review of the statutory scheme for most permits referred
23 to by the Hearings Officer underscores this point. There is no
24 opportunity for a contested case hearing on the state permits
25 under present law. A "contested case" arises only in four
26 circumstances set out in ORS 183.310 (2). For an application

1 for a solid waste disposal site permit, there is no right to be
2 heard on the part of anyone but the applicant.⁹

3 Under ORS 197.180, relating to state agency coordination,
4 which would allow for a challenge for violation of the goals,
5 that challenge is triggered by the filing of a timely objection
6 with the local government. Schreiner's Gardens v.
7 Environmental Quality Commission, 71 Or. App. 381, 692 P.2d 660
8 (1984). Such an opportunity does not exist in the
9 circumstances in this case.

10 Similarly, as indicated by the Hearings Officer, ORS Ch.
11 527, relating to the Forest Practices Act, has been amended and
12 establishes a new set of priorities for forest land protection.
13 The administrative rules to implement the new scheme have not
14 been adopted. Even so, there must be more discussion of
15 compliance with the new structure than is found in the proposed
16 interim order and its supporting findings and conclusions.

17 Petitioner also objects to the treatment of the noise
18 issue in the proposed findings and conclusions, pp. 39-40.
19 Simply stated, the Hearings Officer accepts the Department's
20 position that a variance not yet applied for nor discussed in
21 the proceedings, or the compulsory purchase of the property of
22 sensitive noise receptors will meet the statutory standards.

23

24 ⁹. Under OAR Ch. 340, Div. 61, the only "hearing" mentioned
25 is an "informational" hearing. See OAR 340-61-023 and 340-61-025
26 (6). Nor is there any hearing provided under 40 C.F.R. 257.
Other permits do not require a hearing at all, such as those
relating to fire and noise.

1 The evidence has shown that Oregon statutes and regulations
2 relating to noise cannot be met in the present circumstances if
3 the landfill were established today. "Buying off" potential
4 plaintiffs is not equivalent to compliance.¹⁰

5 Regarding ORS Ch. 477 and the rules thereunder
6 (particularly the State Fire Code), the Hearings Officer also
7 accepts the Department's position that, whatever the rules are,
8 the site will comply with them. The burden is on the
9 Department to show compliance, not for Petitioner to disprove
10 the same. There is no discussion of the applicable fire
11 regulations, nor any demonstration in the record that
12 compliance shall be achieved. Regarding ORS 541, NEPA and the
13 requirements of the Army Corps of Engineers, it is not
14 sufficient for the Hearings Officer to conclude at pp. 25-33
15 that the proposal will comply with wetlands and related
16 environmental requirements. For one thing, the process
17 allegedly demonstrating satisfaction of NEPA and wetland permit
18 requirements is not in the record. For another, the Corps and
19 the Division of State Lands need not accept the limited study
20

21 ¹⁰. The fact that noise regulations are administered by the
22 Department and Commission indicates that it was not impossible to
23 deal sooner with the variance question now. Petitioner also
24 notes that the variance proceedings are not designated as
25 contested case hearings, so that Petitioner has no opportunity
26 for notice and hearing before action by the Commission. See OAR
340-35-100. Moreover, the use of condemnation as proposed as a
noise mitigation method, relates not to a facility to be
constructed, but rather to affected adjacent property. Neither
the Department, nor Metro, are shown to have specific statutory
powers to undertake acquisition for such a purpose.

1 of alternative uses suggested by the Department, which excludes
2 Eastern Oregon.

3 The Department or Hearings Officer may disagree with the
4 wetland permitting and Environmental Impact Statement
5 processes, with their requirements that one cannot choose a site
6 first and justify it later. Both processes must be
7 "meaningful," i.e. the decision must follow the process, not
8 precede it. The burden also may not be shifted to Petitioner
9 to disprove the Commission's decision, but that burden remains
10 on the Commission to demonstrate compliance with applicable
11 law. To shuffle these considerations off to another day, after
12 the site be chosen, with a condition that the law (whatever it
13 is) be met, revisits the Wildwood case. The Commission cannot
14 have a viable decision if it turns the compliance requirement
15 into a redundant condition of later compliance.¹¹ How is
16 Petitioner assured of compliance if they cannot participate in
17 the "real" decisions when state and federal approvals are
18 accomplished?

19 The Site Selection Process. The Commission has attempted
20 to limit the scope of the contested case proceedings to focus
21 solely on the Bacona Road site by adoption of amendments to its
22

23 ¹¹. The scheme of Ch. 679, Or. Laws 1985 sets up three
24 categories of legal requirements:

- 25 a. Those allegedly pre-empted (local zoning regulations);
- 26 b. Those which may be mitigated; and
- c. Those requiring a showing of compliance.

If there be no need for compliance with anything, the process
becomes indeed empty.

1 draft order dated June 19, 1987. Petitioner has contended
2 throughtout these proceedings that the entire site selection
3 process must be reviewed in these proceedings. This is so
4 because:

5 1. The Department, acting with the tacit consent of the
6 Commission and at its direction, adopted de facto rules by the
7 adoption of the three sets of criteria for choosing a
8 metropolitan solid waste disposal facility, i.e the "pass/fail"
9 criteria, the "site evaluation" criteria, and the "final
10 decision" criteria.

11 2. The Department unlawfully changed those rules during
12 the site selection process without going through rulemaking
13 procedures. Burke v. Childrens Services Division, 288 Or. 533,
14 607 P.2d 141 (1980).

15 3. The Commission did not consider, and according to its
16 staff, could not feasibly consider, sites other than the three
17 chosen by the Department for more intensive study.

18 4. The Department did not look at sites dropped in
19 previous stages to determine whether changed criteria would
20 have made a site more acceptable in terms of amended criteria.

21 Petitioner will deal with each stage in the site selection
22 process and the errors at each, noting that it has placed the
23 documents relating to that process in the record of this case.

24 Stage One (March to May, 1986) (Tr. 109-120, 152, 156).

25 The Department used the "pass/fail" criteria and 18 of the
26 41 "site evaluation" criteria to reduce the number of candidate

1 sites in the Metropolitan Area from an infinite number to
2 142.¹². The Department allowed its consultant, Brown and
3 Caldwell, to subcontract out the site selection process to a
4 California firm, but did not review the computer program for
5 the process.

6 Stage Two (April and May, 1986) (Tr. 120-130, 152, and
7 429).

8 The Department reduced the number of sites to be
9 considered from 142 to 19 using the "pass/fail" and the 41
10 "site evaluation" criteria. No site dropped in the previous
11 stage was added.

12 Stage Three (June-October, 1986) (Tr. 130-167 and 429).

13 The Department again used the "pass/fail" and "site
14 evaluation" criteria to reduce the number of candidate sites
15 from 19 to 3, but did not add any site dropped in the previous
16 two stages. It was at this stage that the Department used the
17 "criteria rating guidelines" assembled between August and
18 October, 1986. The public was not aware of them before this
19 use and the public hearings on the 19 sites were conducted
20 without reference to them. The effect of these "guidelines"
21 was to amend the site evaluation criteria. Petitioner objected
22 when it did find out (Ex. 17) but the Commission did not deal
23

24 ¹². The 18 criteria are found at Ex. 6 at pp. 5-7. Tr. 152.
25 As late as February, 1986, the site evaluation criteria and their
26 weights were described as "flexible and can be altered to reflect
public comment." Ex. 229, Facility Siting Advisory Committee
Minutes of February 12, 1986, p. 1.

1 with the matter in its June 19, 1987 order.

2 Mr. Greenwood, the Department's project manager, described
3 the guidelines as "interpolative" (i.e., filling in values
4 between previously established higher and lower values in an
5 intermediate situation) and "interpretive" (defining terms more
6 precisely). Tr. 144-145. Mr. Greenwood denied that there were
7 any changes accomplished by this process (Tr. 147-148) but the
8 record is otherwise (Tr. 159-167).

9 Fourth Stage (October, 1986 to June, 1987) (Tr. 167-196,
10 429).

11 The Department and Commission then undertook a more
12 intense review of the three candidate sites, dropping Wildwood
13 in March, 1987, but adding no other site previously considered.
14 It specifically declined to consider the Eastern Oregon sites,
15 but could have done so. Nor did the Commission review the DEQ
16 record made at the previous stage. Tr. 203-204.

17 The staff and consultant team made no recommendation,
18 though their report compared the two remaining sites. Ramsay
19 Lake ranked higher in the Commission's final selection criteria
20 for technology and environment. Both sites met, according to
21 staff and consultants, sec. 4, ch. 679, Or. Laws 1985. The
22 Department's Landfill siting criteria (April, 1986), p. 67 said
23 of this stage:

24 "Site costs will be estimated during this final phase
25 of the work. Criterion No. 200, Cost, was included
26 in this section of the report but was not weighted
like the other criteria. When all information is
gathered, the EQC will select a site or sites using

1 the total Final Decision Criteria Score for each
2 site, the estimated costs of the site, and the
3 determination of each site's compliance with the
4 provisions of Senate Bill 662."

5 Mr. Greenwood testified that this was the process followed.
6 Tr. 181, 183.¹³ It follows that cost was the only difference
7 between the two sites and that a comparison, now denied by the
8 Commission and erased from its original order as a
9 consideration, was certainly undertaken. The Hearings Officer
10 declined to allow Petitioner to put in any further evidence on
11 a comparison, even under "the rule in equity." Tr. 189-190.

12 The process used throughout these proceedings was flawed.
13 The rules were changed, scores were adjusted, programs went
14 unchecked, and the Commission asserted the power to ignore what
15 had been done before and make a "free choice" without
16 justification in terms of its own promulgated criteria.

17 Adequacy of Those Conditions Imposed. The Hearings
18 Officer agreed with Petitioner that the conditions imposed with
19 regard to noise were not adequate to meet applicable standards.
20 That statement is equally applicable to most of sections 3 and
21 4 of the Final Feasibility Report.

22 Section 3 deals with a "conceptual site plan" for the
23 facility. "Conceptual" plans are not binding by their very
24 nature.

25 ¹³. See also Facilities Siting Advisory Committee Minutes of
26 June 14, 1986, Ex. 229, p. 2, which indicates that the existing
criteria had cost factors built into them, and April 20, 1986, p.
2, which is consistent with the language in the text.

1 nature¹⁴ and the language of this section and section 4 (which
2 relates to the Neighborhood Protection Plan) adds to the
3 concern of those who would be affected by the facility under
4 this scheme.

5 The conceptual site plan specifically does not set final
6 design criteria, though its vague terms are the supposed basis
7 for future "levels of practice"¹⁵ (p. 3-1).

8 The drafters of Chapters 3 and 4 of the Final Feasibility
9 Report have a predilection for using the word "will" where
10 "shall" must be used if the conditions are to have any teeth.
11 The "conditions" must be binding.

12 With respect to Chapter 3, Petitioner has the following
13 comments:

14 1. The "Regulatory" section (p. 3-2) states, in effect,
15 that the facility will comply with every conceivable
16 regulation, without stating the regulations or the manner of

17
18 ¹⁴. It should be noted that one of the purposes of the
19 "conceptual site plan" was to "Provide information for a
20 comparative analysis of the sites under consideration." The
21 Commission, upon request of the Port of Portland, deleted any
22 comparative analysis from its order of June 18, 1987. Compare
23 the draft and finally adopted versions of that order. If a
24 comparison was a purpose of the conceptual site plan, then it
25 provides no basis for the comparison.

26
¹⁵. Like any good contract of adhesion, the small print in
the "constraints" section at pp. 3-1 and 3-2, set out a number of
easy outs for later use. The "conceptual" site plan is based on
these constraints which, in the case of geology, surface water
and leachate treatment, the Hearings Officer found, were
incompletely considered. The site plan "constraints" are no
better than the (inadequate) information base upon which it is
predicated.

1 compliance.

2 2. The "conceptual design criteria" indicate (pp. 3-2 to
3 3-3) that assumptions and criteria were established "by
4 Oregon regulations, good engineering practice, or guidance from
5 DEQ." This alternative basis is not consistent with Ch. 679,
6 Or. Laws 1985.

7 3. The design criteria (p. 3-3) are merely "indicated" by
8 DEQ, rather than being binding and the "basic design criteria"
9 (p. 3-3) are described as "used" in the development of the
10 "conceptual site plan." Again, the criteria are not binding.

11 4. The only "alternative technology" considered is
12 incineration. Other such technologies exist. No explanation
13 was given why they were not considered and what impacts, if
14 any, would occur on the assumptions used. (P. 3-4 and 3-51 to
15 3-59).

16 5. The proposed interim order requires further work in
17 three areas -- leachate control, groundwater, and landslides.
18 The following sections cannot be evaluated adequately until the
19 necessary levels of detail are provided to supplement the
20 information contained in Chapter 3 of the Final Feasibility
21 Study Site Plan (pp. 3-7 to 3-8), Groundwater Protection (p. 3-
22 8), Leachate Control (p. 3-17 to 3-34)¹⁶, Groundwater
23

24 ¹⁶. It also should be noted that the proposed leachate
25 pipeline route to the Hillsboro Sewage Treatment Plant is only a
26 "recommended" route, done without the benefit of borings or
detailed investigations. (Final Feasibility Study, p. 3-18).
Nothing binds the Department or its contractor to any route.

Similarly, it is stated at p. 3-35 of the same document that

1 Monitoring Wells (p. 3-35), Evaluation of Multiple Use of Ponds
2 (p. 3-36 to 3-41), Excavation and Surface Preparation (p. 3-41
3 to 3-43)¹⁷, Main Access Road (p. 3-45 to 3-51 and 3-59),
4 Temporary Surface and Groundwater Collection (p. 3-60 to 3-61),
5 Lining and Leachate Control System (p. 3-61), Groundwater
6 Monitoring Wells (p. 3-61 and 3-82).

7 6. The failure of Metro to locate a transfer station
8 leaves open an essential predicate to the impact on the area
9 surrounding the proposed site, as indicated at p. 3-75.
10 Similarly, at p. 44 of the Proposed Findings and Conclusions,
11 the Hearings Officer rejects the effects on the transportation
12 system of the area by the addition of traffic entering the site
13 from North of the proposed access road. As the record is
14 devoid of information regarding traffic impacts north of the
15 access road, compliance with section 4 (1) (c), Ch. 679, Or.
16 Laws 1985 cannot be shown.

17 7. The Hazardous Waste-Detection Plan is a cruel joke on
18 the area. Rules will not prevent contamination of the area's

19
20 detention ponds "may also be necessary" to reduce peak storm
21 water flows. There is no certainty as to what level of detail
22 was used to deal with storm water to meet legal requirements, to
23 reduce risk of harm to adjacent users, and to meet public
24 facilities and services requirements.

25 ¹⁷. Typical of the discomfort felt by Petitioner's members
26 with this proposal is the statement found at p. 3-42 of the Final
Feasibility Report, which states that "Consideration will be
given to use of a deeper intermediate cover over areas where
subsequent filling will not occur for more than 6 to 9 months."
That kind of statement is not binding but rather raises false
hopes to be dashed later.

1 drinking water, nor will a visual "once over" (if that were
2 possible) at a transfer station or the site. This is not a
3 "Plan" but a series of empty assurances. (Pp. 3-83 and 3-84).

4 8. The sections on "inclement weather operations" and
5 "waste disposal site contingency" are similarly vague and
6 empty. (Pp. 3-83 and 3-88).

7 9. The "monitoring program" (pp. 3-84 to 3-88), which is
8 "proposed" by DEQ (but not made a condition of approval)
9 purports to be a summary of existing DEQ rules, but really
10 illustrates the amount of discretionary work which must be done
11 on the site, including the gathering and evaluation of
12 information and the multiple criteria which are made a
13 conditions of approval, without any real chance for those
14 affected to have a voice in whether those conditions are met.

15 10. The hours of operation (p. 3-79) are also made
16 sufficiently vague to allow operations to occur at any time
17 without violation of conditions of approval.

18 With respect to Chapter 4, Petitioner has the following
19 comments:

20 1. The description of Neighborhood Protection Plan
21 ("NPP") elements is stated such that they "will be incorporated
22 into the landfill design and/or become specific permit
23 conditions" without any further commitment. The function of
24 the NPP is to "eliminate or minimize" impacts. Petitioner
25 suggests that "minimizing" is equivalent to "lessening," a term
26 which affords scant protection to neighbors. No discussion

1 justifying the level of "protection" suggested is contained in
2 any document.

3 2. Under "Air Quality" at p. 4-24, first full paragraph,
4 it is stated that mutual agreements "would also be made" with
5 other landfills in the event that the proposed site were closed
6 due to inclement weather. On that same page, the second item
7 under "Particulates and Exhaust" the words "should be" must be
8 changed to "shall be." At p. 4-26, under "inclement weather,"
9 last item, the words "will be" must be changed to "shall be."

10 3. Water Quality (pp. 4-26 to 4-31) must be reviewed in
11 the light of the Hearings Officer's determination that
12 additional work must be done in groundwater, landslides and
13 leachate treatment.

14 On p. 30, NPP item 7, there is no determination of the
15 terms or the amount of the "water quality contingency fund."
16 At p. 4-31, item 1 under the heading "If leaks occur in the
17 lining system" requires "liner repairs." The testimony was
18 that such repair was impossible if the cell were full. Item 3
19 is incomplete in view of the additional groundwater
20 characterization work to be done. Item 4 does not describe the
21 cost or means of alternative water supply systems.

22 4. The sections dealing with landfill gas at p. 4-45, is
23 framed in terms of unbinding obligations (e.g. "Forests in the
24 vicinity of the landfill should be monitored to detect signs of
25 stress or outright tree death that may result from emissions
26 from the landfill gas combuster."). The conditions must be

1 binding.

2 5. Under the "Wildlife" section at p. 4-47, the
3 Neighborhood Protection Plan is characterized in terms of
4 "suggestions."

5 6. Under "Transportation" at p. 4-78, the Neighborhood
6 Protection Plan is characterized in terms of "recommendations."

7 7. Under "Noise," (pp. 4-58 to 4-69), Petitioner has set
8 out its objections to the conditions and the Hearings Officer
9 has disposed of some of the noise conditions objections. What
10 remains is the adequacy of the analysis of "buying out" the
11 noise sensitive properties or the variance.

12 8. Under "land use" (pp. 4-69 to 4-72), the NPP elements
13 are vague and unenforceable. At p. 4-71, second paragraph
14 under the NPP, lighting alternatives are not stated in
15 mandatory terms. In the fourth paragraph, "it would be
16 possible" to meet Northwest Astronomy Group ("NWAG") objections
17 by ceasing gas flaring, but no commitment is made. The NWAG
18 objections on the following page is simply not answered. Nor
19 is the issue of the linear park in the last paragraph of the
20 NPP.

21 9. Under "sewerage" at p. 4-89 and 4-90, the NPP must be
22 re-evaluated in the light of the leachate treatment system
23 used.

24 10. There are two further general objections to the
25 statement of conditions in the NPP. In the first place, the
26 directions are incomplete. There are no complete sentences

1 requiring application of any conditions and the conditions are
2 often framed in terms of the more directory word "will" than
3 the mandatory word "shall." Further, the conditions often
4 merely recite either existing law or direct that a problem be
5 taken care of, without any analysis of the cost or the
6 comparative means by which the problem must be addressed.

7 The Applicable Law. The Hearings Officer appears to
8 follow the Department's suggested language very closely in
9 preparing the Final Order, because he did not address many
10 statutes which Petitioner understands apply to these
11 circumstances. The Hearings Officer left open the question of
12 hazardous waste receipt by the proposed facility, and therefore
13 leaves open state and federal hazardous waste laws. The
14 Hearings Officer does not address ORS 468.710 to 468.720, which
15 are applicable to these proceedings. He does not address the
16 disposal of leachate brine and sludge, which Mr. Smith
17 described as having hazardous waste content. He does not
18 address RCRA Parts (C) and (D), the Water Pollution Control Act
19 and its implementing regulations, nor the consent decree
20 involving the Tualatin River. He does not address the legal
21 obstacles in having the Unified Sewerage Agency of Washington
22 County extend its facilities under ORS Chs. 199 and 451.

23 CONCLUSION

24 For all the reasons listed above, the Commission should
25 delete the Bacona Road Site from consideration for a
26 Metropolitan Solid Waste Disposal Site in these proceedings.

1 clerk." With great respect to the Hearings Officer,
2 Petitioners are concerned over the actuality of transmission of
3 strategy or confidential material from one member of the
4 Department of Justice to another member in that same office.
5 Mr. Huston has represented and advised the Commission
6 previously in this matter and his continued representation and
7 advice to the Commission presents the appearance of impropriety
8 and impairs or may impair the professional judgment of Mr.
9 Huston in giving of legal advice to the Hearings Officer (and
10 presumably the Commission.)

11 Moreover, the requirement of zealous representation
12 concerns the willingness to do all that is legally necessary to
13 advance the interests of the client. Petitioner submits this
14 goal cannot be advanced by playing a game of "musical lawyers,"
15 both of whom advised and represented the Department and
16 Commission in this very same matter in previous proceedings,
17 and who now separate into prosecutor and judicial advisor for
18 the purposes of these proceedings. If the Hearings Officer is
19 in any doubt as to the previous participation of Messrs. Huston
20 and Ellis in this matter, Petitioner is prepared to present
21 evidence on the matter. The Hearings Officer is bound to
22 insure that the record developed in this proceeding reflects a
23 full and fair inquiry into the facts necessary for
24 consideration of all issues properly before him. ORS 183.415
25 (10). Petitioner submits the issue of the fairness of the
26 proceedings are at issue and that the Hearings Officer must

1 inquire into past contacts between Mr. Huston, who heads the
2 Natural Resource Division at the Department of Justice, and Mr.
3 Ellis, his subordinate.

4 Petitioner asserts that there is no means by which these
5 two attorneys can purge themselves of the violation of the
6 aforementioned disciplinary rules and remain in their
7 respective present capacities in this case.

8 If the reconsideration prayed for is denied, Petitioner
9 submits that the Hearings Officer must ask these attorneys not
10 to communicate with each other on matters pertaining to this
11 case and inquire at the completion of this case as to the
12 nature of any communication between these individuals. See, by
13 analogy, DR 5-105 (F).

14 Respectfully submitted,
15 MITCHELL, LANG & SMITH

16 Edward J. Sullivan
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TRANSCRIPT

CONFERENCE CALL (July 24, 1987)

Participants: Judge Edward H. Howell
William Gary, Deputy Attorney General
Dave Ellis, Assistant Attorney General
Michael Huston, Assistant Attorney General
Fred Hansen, Director, Oregon Department of
Environmental Quality
Edward J. Sullivan
Greg H. Brown

Operator: Sullivan?

Ed: Yes.

Operator: Fred Hansen?

Hansen: Yes.

Operator: Bill Gary?

Gary: Yes.

Operator: O.K. If You need any further assistance, dial back to your local operator and ask for Portland, Oregon (unintelligible).

Gary: Thank you.

Operator: You're welcome.

Gary: Here, this is Bill Gary. In my office is Judge Howell and Don Arnold.

Mike: Hi Bill, in Portland at DEQ, we have Fred Hansen and myself, Michael Huston.

Ellis: And also in Portland at CH2M Hill is Ed Sullivan, Dave Ellis, and two of Ed's clients.

Sullivan: And we're also taping the call.

Gary: O.K. I guess I will start at this, I'm not sure whether I called it but I have an idea of what I would like to accomplish here and perhaps we could be fairly brief. We, that is, the Attorney General's office, is, as all of you know, concerned about the Judge's concerns with regard to our role in the administrative hearing. And I know that there were motions

filed opposed by Mr. Sullivan and Henry Kane in that regard. We understand that the Judge has asked that the two attorneys involved in representing the Environmental Quality Commission in the case agree not to discuss the case outside of the presence of the other parties during the pendency of the hearing. As I'm sure you are aware, that is a view of our role that we do not share and it raises very serious concerns in terms of our role in the administrative process, not only in this case but in cases across state government. And we have a cluster of concerns. On the one hand we are very interested in not either delaying or further complicating what is already a very complicated matter that we want to assist our client agency in getting results as quickly and efficiently as possible. On the other hand, we do not want our agreement to abide by the "no communications between our attorney" request as a waiver or a stipulation that that is an appropriate way for us to perform our role. I think we have puzzled through this in a way that will be acceptable to everyone, with the understanding, of course, that the private parties that are represented reserve whatever right they have to challenge our role either before the hearing officer, or in whatever other form they hear this matter in the future. What we propose, is that we will agree for purposes of this hearing only that our attorneys will abide by the judge's request that they not discuss the matters involved in the hearing outside the presence of other parties in the context of the hearing itself. We will abide by that request as a means of facilitating the continuation of the hearing and in order to assure that we are able to address the broader question in a way that will let everyone know the parties to this case, our clients and other client agencies and their hearings officers know what our view of our role is and ought to be, we would suggest that it is appropriate for the Environmental Quality Commission or the DEQ to ask for our opinion on the subject so that, apart from this hearing, we will have an opportunity to present our views in a fairly detailed and considered way. I think that will resolve the immediate problem and get us off the line with respect to the hearing but enable us also to state our views as clearly as we can so that everyone will know where we stand and frankly give everyone something to shoot at if they want to disagree with it.

Hansen: Gary, maybe I should mention, this is Fred Hansen at DEQ, it is my intent to be able to seek an opinion along the lines what we talked about there are a number of issues that I do feel regardless of this issue, the issue that have been raised by this case that need to be clarified in that relationship between Department, Commission and Hearings Officer (unintelligible) I think we need to address from the funding issues but that's between us. They've got a mechanical (unintelligible) But, yes, I do intend to be able to ask for

those, for clarification on those issues.

Gary: I appreciate that and I would like to speak with you about the cost issue and we can do that in a separate conversation.

Hansen: Right. That will not alter my request.

Gary: Anyone else want to comment?

Ellis: We're getting a negative on comments here from Dave Ellis and Ed Sullivan.

Howell: This is Judge Howell, My only comment is that I think we have the problem, at least for this hearing, resolved and I'll expect to see you all tomorrow morning at 9 o'clock.

?: Right, Judge. We'll see you there, Judge.

Gary: Thank you very much.

?: Bye bye.

?: Thank you.

?: Thank you.

Brown: Do you really want that recorded?

Sullivan: There's nothing, but let's keep it on there.

Ellis: Keep it for posterity.

1 CERTIFICATE OF FILING AND SERVICE

2 I, Edward J. Sullivan, hereby certify that on the 21st day
3 of September, 1987, the original of the OBJECTION TO HEARINGS
4 OFFICER'S PROPOSED FINDINGS AND CONCLUSTIONS AND INTERIM ORDER
5 was hand delivered to Fred Hansen, Director, Department of
6 Environmental Quality, 811 S.W. Sixth Avenue, Portland, Oregon
7 97204.

8 I further certify that on the 21st day of September, 1987,
9 I served a true copy of the foregoing OBJECTION TO HEARINGS
10 OFFICER'S PROPOSED FINDINGS AND CONCLUSTIONS AND INTERIM ORDER
11 on the following by mailing them a true and correct copy
12 thereof, at the addresses shown below, and deposited in the
13 United States mail on said day with sufficient postage, in a
14 sealed envelope, at the post office at Portland, Oregon,
15 postage prepaid:

16 Michael B. Huston
17 Assistant Attorney General
18 Attorney for the Environmental
19 Quality Commission and
20 Hearings Officer
21 Department of Justice
22 100 Justice Building
23 Salem, Oregon 97310

24 James E. Benedict
25 Jay T. Waldron
26 Schwabe, Williamson et. al.
27 Of Attorneys for Waste
28 Management Inc.
29 Ste. 1600-1800 Pacwest Ctr.
30 1211 S.W. Fifth Avenue
31 Portland, Oregon 97204-3795

32 John M. Junkin
33 Cheyenne Chapman
34 Office of County Counsel
35 Washington County Adm. Bldg.
36 Room 401, 150 N. First Avenue
37 Hillsboro, Oregon 97124

38 Stephen T. Janik
39 Of Attorneys for the Port
40 of Portland
41 Ball, Janik & Novack
42 101 S.W. Main
43 Portland, Oregon 97204

44 David G. Ellis
45 Assistant Attorney General
46 Attorney for Department of
47 Environmental Quality
48 Department of Justice
49 500 Pacific Building
50 520 S.W. Yamhill
51 Portland, Oregon 97204

52 Judge Edward H. Howell
53 c/o Steve Greenwood
54 Department of Environmental
55 Quality
56 Department of Justice
57 500 Pacific Building
58 520 S.W. Yamhill
59 Portland, Oregon 97204

60 Peter Kasting
61 Attorney for the City of
62 Portland
63 City Attorney's Office
64 1220 S.W. Fifth Avenue
65 Portland, Oregon 97204

66 Mayor Wallace Vaughn
67 City Hall
68 919 Bridge Street
69 Vernonia, Oregon 97064

26

1 Ed Martiszus, R.N.
53215 Timber Road
2 Vernonia, Oregon 97064

Mary L. Deakin
1250 Texas Avenue
Vernonia, Oregon 97064

3 Henry S. Kane
Attorney for Banks City
4 12275 S.W. Second
P.O. Box 518
5 Beaverton, Oregon 97075

Dan Cooper
Metropolitan Service
District
2000 S.W. First Avenue
Portland, Oregon 97201

6 DATED this 21st day of September, 1987.

7
8 

9 Of Attorneys for Helvetia
10 Mountaindale Preservation
Coalition

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State of Oregon
 DEPARTMENT OF ENVIRONMENTAL QUALITY
RECEIVED
 SEP 21 1987

OFFICE OF THE DIRECTOR

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
 OF THE STATE OF OREGON

1 In the Matter of the Establishment)
 2 of a Solid Waste Disposal Site to)
 3 Serve Clackamas, Multnomah and)
 4 Washington Counties.)
 5)
 6 In the Matter of the Opposition of)
 7 the City of Banks, a municipal)
 8 corporation, to:)
 9 The June 19, 1987 COMMISSION ORDER)
 10 THAT THE DEPARTMENT OF ENVIRONMENTAL)
 11 QUALITY ESTABLISH A SOLID WASTE)
 12 DISPOSAL FACILITY AT THE BACONA ROAD)
 13 SITE IN WASHINGTON COUNTY, OREGON.)
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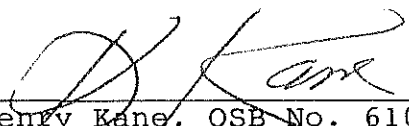
CITY OF BANKS MOTION THAT
 HEARINGS OFFICER RECOMMEND
 VACATION OF JUNE 19, 1987 ORDER,
 AND BRIEF IN SUPPORT OF MOTION

CITY OF BANKS OBJECTIONS TO
 PROPOSED INTERIM ORDER AND
 HEARINGS OFFICER'S PROPOSED
 FINDINGS AND CONCLUSIONS

MOTION THAT HEARINGS OFFICER RECOMMEND VACATION OF ORDER

Petitioner City of Banks moves the Hearings Order to recommend to the Environmental Quality Commission (EQC) that the EQC vacate the June 19, 1987 ORDER that the Department of Environmental Quality (DEQ) establish a solid waste disposal facility at the Bacon Road site in Washington County, on the ground and for the reason that the September 2, 1987 HEARINGS OFFICER'S PROPOSED FINDINGS AND CONCLUSIONS and PROPOSED INTERIM ORDER establish that said ORDER does not comply Oregon Laws 1985, ch. 679, § 4, re compliance with federal regulations and state law and regulations.

This motion is supported by the attached combined brief and objections to the Hearing Officer's proposed interim order, findings and conclusions.


 Henry Kane, OSB No. 61045
 Attorney for Petitioner City of Banks

1 Brief in Support of Motion re Vacation of Order and Objections

2 In the interest of brevity, Petitioner City of Banks ("City")
3 incorporates by this reference its August 24 and 27, 1987 briefs,
4 the memoranda of the Helvetia/Mountaindale Preservation Coalition
5 and Waste Management of Oregon, Inc., and memoranda of other petitions
6 responding to the Hearings Officer's proposed findings and conclusions
7 and interim order to the extent they are consistent with this brief.

8 The purpose of the within contested case proceeding was and is to
9 enable the City and other petitioners to challenge validity of the
10 June 19, 1987 EQC Order, and to prove by substantial evidence that
11 the EQC did not comply with Oregon Laws 1985, ch. 679 ("the 1985 Act").

12 Petitioners established at the contested case hearing that the
13 ORDER does not comply with the 1985 Act. The proposed interim order
14 so concedes at page 1, lines 21-24:

15 "This order determines that additional information
16 must be acquired before a final order can be issued
17 directing the establishment of a solid waste disposal
18 facility at the Bacona Road site. * * * (emphasis added)

19 The HEARINGS OFFICER'S PROPOSED FINDINGS AND CONCLUSIONS so
20 concedes at page 4, lines 14-18:

21 " * * * However, with respect to three topics, the
22 hearings officer concludes that there is not presently
23 sufficient information to determine compliance with
24 the applicable legal standards. Those three topics are
25 landslides, groundwater, and leachate treatment."

26 (emphasis added)

1 The Applicable Legal Standard

2 The applicable legal standard is whether there is sufficient
3 factual evidence in the record that the Bacona Road site will comply
4 with federal regulations and state law and regulations. The "will
5 comply" provision is mandatory, not precatory, and requires the EQC
6 to demonstrate that as of the June 19, 1987 Order the site "will
7 comply" with applicable law and regulations.

8 In their motion to dismiss the City's original jurisdiction petition,
9 the respondents admitted that they had not developed a record. The
10 contested case proceeding confirmed the lack of an evidentiary record
11 that would support the Order. See page 2, lines 13-26, supra.

12 The EQC was and is limited to selection of a site that complies
13 with the following mandatory provisions of the 1985 Act:

14 "(1) * * * in which the commission finds that
15 the following conditions exist:

16 "(a) The disposal site will comply with applicable
17 state statutes, rules of the commission, and applicable
18 federal regulations;

19 * * *

20 "(d) Facilities necessary to serve the disposal
21 site can be available or planned for the area; * * * "

22 (emphasis added)

23 The hearings officer's proposed findings confirms that the EQC
24 does not have a supportable record on landslides, groundwater and leachate

25 Because the Unified Sewerage Agency (USA) cannot be compelled by law
26 to accept the leachate, the EQC cannot state as a matter of law and fact

1 that Section 4(1)(d) "Facilities necessary to serve the disposal
2 site can be available or planned for the area * * * ."

3 Nor can the Hearings Officer/EQC state as a fact that the landfill
4 operator can comply with USA leachate standards.

5 Nor can the Hearings Officer/EQC state as a fact that state and/or
6 federal agencies will allow USA to discharge the treated effluent, etc.,
7 into the Tualatin river. The federal government, not the State,
8 has the last and controlling "word."

9 Therefore, the Hearings Officer should recommend entry of an
10 Order vacating the June 19, 1987 Order, without prejudice to the
11 EQC resuming work on the Bacona Road site, or any other site.

12

13 The ORS 183.464 Standard

14 ORS 183.464 governs the contested case proceeding at bar and
15 requires the Hearings Officer to make findings of fact and conclusions
16 of law and to issue a recommended order:

17 "(1)* * the hearings officer shall prepare
18 and serve on the agency and all parties to a
19 contested case hearing a proposed order,
20 including recommended findings of fact and
21 conclusions of law. * * * "

22

23 The September 2, 1987 HEARINGS OFFICER'S PROPOSED FINDINGS AND
24 CONCLUSIONS does not contain separately stated "conclusions of law."

25 To the extent that said document does not contain "conclusions
26 of law," said document does not comply with ORS 183.464(1).

1 ORS 183.464(1) requires the Hearings Officer to prepare the form
2 of "a proposed order" at the conclusion of the contested case hearing.

3 The contested case hearing ended when the parties completed
4 presentation of evidence.

5 The City was not informed whether the EQC or DEQ moved the
6 Hearings Officer to recess and continue the contested case hearing.

7 To the City's knowledge, neither EQC nor DEQ served on the City
8 a service copy of any motion to continue the contested case proceeding,
9 nor made an oral motion to continue the contested case proceeding..

10 Neither the proposed findings and conclusions nor the proposed
11 interim order makes any reference to an oral or written EQC/DEQ motion
12 to put the hearing in recess.

13 The recommended decision to continue the contested case proceeding
14 to some indefinite date in 1988 appears to be sua sponte.

15 The recommended decision to continue the contested case proceeding
16 to some unannounced date in 1988 is contrary to the spirit and
17 letter of ORS chapter 183 in general and the 1985 Act in particular.

18 ORS chapter 183 does not authorize an "interim order" in a
19 contested case.

20 The 1985 Act does not authorize an "interim order" in a contested
21 case.

22 The legislative intent and clear language of ORS 183.464 is that
23 the Hearings Officer shall issue proposed findings of fact and
24 conclusions of law as part of a final, appealable order:

25 "(1) * * * The proposed order shall become final
26 after the 30th day following the date of service of

1 the proposed order, unless the agency within
2 that period issues an amended order.

3 "(2) An agency may be rule specify a period
4 of time after which a proposed order will become
5 final that is different from that specified in
6 subsection (1) of this section.

7 "(3) If an agency determines that additional
8 time will be necessary to allow the agency
9 adequate time to review a proposed order in a
10 contested case, the agency may extend the time
11 after which the proposed order will become final
12 by a specified period of time * * * ." (emphasis added)

13 The Oregon Administrative Procedures Act contains no provision to
14 recess a contested case after the parties have presented their evidence.

15 QUERY: What is the authority, if any, for recessing a contested
16 case proceeding to an indefinite date in the following
17 calendar year (1988) when the parties on both sides of
18 the issue presented all of their evidence, no party
19 requested an extension of time to attempt to obtain and
20 present additional evidence, and most importantly, the
21 1985 Act requires an Order complying with the Act by
22 July 1, 1987?

23 -

24 The "Concise Statement of the Underlying Facts" Requirement

25 The proposed findings of fact and conclusion document does not
26 appear to comply with the ORS 183.470(2) requirement that:

1 "(2) The findings of fact shall consist of a
2 concise statement of the underlying facts
3 supporting the findings as to each contested
4 issue of fact and and as to each ultimate fact
5 required to support the agency's order."

6 (emphasis added)

7 To much of the document appears to be "paste and cut" language
8 from the proposed document prepared by DEQ/EQC, e.g., Exhibit 23,
9 without:

10 (1) a concise statement of each contested issue of fact, and

11 (2) "each ultimate fact required to support the agency's order."

12 There is inadequate identification of the contested issues of fact
13 raised by the petitioners, discussion of the evidence pertaining to
14 each such contested issue of fact, conclusions as to each contested
15 issue of fact, and statements of each ultimate fact required to
16 support the Order.

17 The above observation also applies to the issues of law raised
18 by the petitioners.

19 At the very least, the document should identify each applicable
20 statute and regulation, state the applicable facts, and then conclude
21 whether the Order complies with each statute and regulation.

22 Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3, 22, 569
23 P2d 1063 (Chief Justice Denecke, 1977) held that the findings must
24 provide an adequate basis for judicial review or the matter must
25 be remanded for further proceedings:

26 /

Page 7 - CITY OF BANKS MOTION, etc.

1 "Findings like those we have quoted do not
2 provide an adequate basis for judicial review.
3 * * * Even apart from judicial review, they do
4 not assure the identification of criteria and
5 the attention to factual assumptions that is
6 one of the main functions of findings."

7 " * * * findings must make clear what those
8 objectives are as applied in concrete situations.
9 Therefore findings must describe how or why the
10 proposed action will in fact serve these
11 objectives or policies. * * * " (Id. at 22-23)

12 "What we have said is sufficient to demonstrate
13 that the findings addressed to one of the criteria
14 for change--compliance with the unamended portion
15 of the plan--are inadequate. Most of the other
16 findings are equally conclusory. * * * As a whole,
17 we find them to be inadequate to permit a proper
18 review of the order of amendment to the plan map."

19 (Id. at 23)

20 Oregon Natural Resources Council v. Marsh, 820 F.2d 1051 (9th Cir.,
21 July 2, 1987) held, inter alia, that the Army Corps of Engineers'
22 Environmental Impact Statement ("EIS") discussion of measure to
23 mitigate a dam's adverse impact on wildlife were inadequate.

24 The matter was remanded to the District Court for further proceedings.

25 In language applicable to the proceeding at bar, the Ninth Circuit
26 rejected the "will be developed" rationale, holding, id. at 1055:

1 "An EIS must include a discussion of measures
2 to mitigate adverse environmental impacts on
3 proposed action. 40 C.F.R. § 1502.16(h). * * *
4 The mere listing of mitigation measures, however,
5 is insufficient to satisfy the NEPA requirements.
6 * * * Moreover, the EIS must analyze the mitigation
7 measures in detail and explain the effectiveness
8 of the measures. * * *

9 "Here, the mitigation plan for wildlife is not
10 yet fully developed. The mitigation plan, published
11 in 1980, states: 'Measures to compensate project-
12 caused loss of wildlife habitat associated with
13 reservoir construction will be developed * * *.'
14 No mitigation plan had been finalized as of January
15 1986. We fail to see how mitigation measures can
16 be properly analyzed and their effectiveness
17 explained when they have yet to be developed.

18 * * *

19 "Because the wildlife mitigation plan here merely
20 lists measures to be used and includes neither an
21 analysis nor an explanation of effectiveness, it is
22 inadequate to satisfy the NEPA or Council on
23 Environmental Quality mitigation guidelines.

24 * * * " (emphasis added)
ing

25 The above hold/applies to a federal issue in the proceeding at bar:
26 whether the Army Engineers will issue a Section 404 wetlands permit.

1 The general rule is that Oregon courts will be influenced by
2 federal decisions on federal issues that are before state courts.

3 Oregon Natural Resources Council v. Marsh, supra, applied to
4 the wetlands mitigation issue, an issue to be decided under federal
5 law and regulations, supports the City's objection to the Hearings
6 Officer's findings on the wetlands mitigation and other issues
7 involving compliance with federal law and regulations.

8 The EQC Order is premised on an interpretation of the 1985 Act
9 that is in clear conflict with its plain and unambiguous language.

10 Such "interpretation" was rejected in West Hills & Island Neighbors
11 v. Multnomah Co., 68 Or 782, 787, 683 P2d 1032 (1984):

12 " * * * we agree with LUBA's conclusion that
13 the county's interpretation is contrary to the
14 express language and intent of the ordinance. As
15 LUBA suggested, what the county did here was an
16 attempt to achieve by interpretation what could
17 only be accomplished by an amendment of its
18 ordinance. * * * "

19
20 The EQC appears to take a position that the Act allows EQC to
21 do what it wishes to do - approve a site with only meaningless
22 "conceptual" plans and without any showing in the record that the
23 site selected will comply with complex state and federal laws and
24 regulations.

25 That the site may do so in the indefinite future, based on plans
26 yet to be made, does not comply with the 1985 Act.

1 The EQC position appears to be that the 1985 Act should have
2 authorized the EQC to approve indefinite "conceptual" plans that
3 might or might not, in the future, prove to comply with state
4 and federal law and regulations.

5 A similar-type argument was rejected in Dennehy v. City of Portland,
6 87 Or App 33, 41, ___P2d___ (August 12, 1987):

7 " * * * All the city's brief and the dissent
8 succeed in demonstrating, however, is that
9 their authors would have enacted a different
10 law if they had been the legislature.

11 (no paragraph)

12 The statute which the legislature did adopt
13 unambiguously give county governing bodies
14 authority to approve or not approve plans,
15 and there is nothing absurd about the legislative
16 policy to allow county governing bodies to
17 prevent unilateral city action which can have
18 an effect on a county's affairs and citizens."

19 (Emphasis by Court)

20

21 The Motion to Disqualify

22 The City expressly adopts the Coalition's position on the Motion
23 to Disqualify. The HEARINGS OFFICER'S PROPOSED FINDINGS AND CONCLUSIONS
24 states at page 2, lines 21-24, said:

25 /

26 /

1 "David G. Ellis, Assistant Attorney General,
2 Department of Justice, represented DEQ at the
3 hearing. Michael B. Huston, Assistant Attorney
4 General, Department of Justice, served as
5 counsel to the hearings officer and EQC. * * * "

6 (emphasis added)

7 -
8 The above-emphasized language confirms that Mr. Huston is
9 serving, or attempting to serve, two masters. It cannot be done,
10 and said inability is codified as DR 5-105, relating to conflict
11 of interest, former, current and multiple clients, Oregon Code
12 of Professional Responsibility (1986), at pp. 500-501 of Oregon
13 Rules of Court (1987) West Publishing Company.

14 Mr. Huston's primary client is the EQC and as attorney for the
15 EQC his loyalty and dedication is to the EQC.

16 The EQC retained the Hearings Officer to conduct a contested
17 case proceeding, and as the proposed findings and conclusions
18 state at page 3, lines 23-24:

19 "The question for decision is whether selection
20 of the Bacona Road site complies with 1985 Oregon
21 Laws, chapter 679."

22 In short, the Hearings Officer decides whether Mr. Huston's
23 client, the EQC, complied with the 1985 Act.

24 And during the contested case proceeding, Mr. Huston "served
25 as counsel to the hearings officer and EQC."

26 Mr. Huston cannot serve two masters.

1 Subsection (9) of ORS 183.415 mandates:

2 "(9) The officer presiding at the hearing
3 shall place on the record a statement of the
4 substance of any written or oral ex parte
5 communications on a fact in issue made to the
6 officer during the pendency of the proceeding
7 and notify the parties of the communications
8 and of their right to rebut such communications."

9
10 ORS 183.415(9) "ex parte communications" can include communications
11 from Mr. Huston, as the EQC attorney, to the hearings officer.

12 The mandatory form of ORS 183.415(9) requires the hearings officer
13 to place on the contested case proceeding record "a statement of
14 the substance of any written or oral ex parte communications on
15 a fact in issue made to the officer * * * ."

16 If there were such ex parte, the record should reflect compliance
17 with ORS 183.415(9). Otherwise, the order may be reversed on appeal.

18 If there were no ORS 183.415(9) ex parte communications, the
19 record should so state.

20
21 The Protection of the City of Banks Water Supply Issue

22 The HEARINGS OFFICER'S PROPOSED FINDINGS AND CONCLUSIONS states
23 at page 6, lines 15-21:

24 "4. Banks Water Supply

25 "Because of the distance of the Banks springs
26 and well from the Bacona Road site, it is doubtful

1 that any contaminated waster would reach the
2 water supply. Nonetheless, because additional
3 information is needed concerning the volume
and flow of the deep aquifer, a final determination
on this matter can be made later."

4 The City of Banks respectfully submits that the above-quoted
5 conclusion does not contain the required findings of fact to
6 support the above-quoted conclusion.

7 The state's visiting geologist who purported to respond to the
8 concerns of the City did not do any geologic "mapping" of the
9 terrain between the Bacona Road landfill site and the City's watershed
10 and well. He conceded that surface features do not necessarily mean
11 that the features continue under the ground surface and that he
12 did not know whether the deep aquifer at the Bacona Road site
13 extended to the City's watershed and well.

14 Whether the "volume and flow of the deep aquifer" does or does
15 not extend to the City's watershed and well is not determinative.

16 What is determinative is whether any Bacona Road landfill site
17 pollution, by whatever underground route, can contaminate the
18 City's water supply.

19 The HEARINGS OFFICER'S PROPOSED FINDINGS AND CONCLUSIONS 6,
20 lines 19-21, concedes that the EQC has not proved as of the date
21 of the June 19, 1987 ORDER or the hearing that the City's water
22 supply will be safe:

23 " * * * because additional information is needed
24 concerning the volume and flow of the deep aquifer,
25 a final determination on this matter can be made
26 later."

1 The HEARINGS OFFICER'S PROPOSED FINDINGS AND CONCLUSIONS states
2 at page 62, lines 11-20:

3 "Banks Water Supply

4 "The water supply for the City of Banks
5 consists of two springs located approximately
6 five miles south of the Bacona Road site and
7 a well about nine miles south of the site.

8 "It is doubtful that any leachate leaking
9 into the underground water would affect the
10 the water system because of the distance
11 from the site.

12 (no paragraph)

13 However, because the volume and direction of
14 flow of the deep aquifer are unknown, it is
15 possible that a substantial break in the
16 lining system caused by a landslide could
17 affect Bank's water system."

18 (emphasis added)

19

20 "Doubtful" and "possible" are not findings of fact, particularly
21 where there are no findings as to likelihood of leakage of leachate
22 into the undground acquifer, let alone findings concerning the
23 geology of the terrain between the Bacona Road landfill site and
24 the City's watershed and well. Nor does the proposed document note
25 or refer to the fact that the Bacona Road landfill site is at a higher
26 elevation than the City's watershed and well.

Page 15 - CITY OF BANKS MOTION, etc.

1 In short, the EQC has failed to prove that the Bacona Road site
2 "will comply" with state and federal water protection laws and
3 regulations that protect the water supply of the City of Banks.

4 The HEARINGS OFFICER'S PROPOSED FINDINGS AND CONCLUSIONS notes
5 at page 17, lines 1-4:

6 "Federal and state law prohibit contamination
7 of an underground drinking water source beyond
8 the solid waste boundary, or on alternative
9 boundary specified by DEQ. 40 CFR 257.3-4(a);
10 OAR 340-61-040(4) (a) (A)."

11 The document does not state that the Bacona Road site will not
12 violate 40 CFR 257.3-4(a) and/or OAR 340-61-040(4) (a) (A).

13 Accordingly, the proposed findings and order with respect to the
14 City of Banks water supply errs in dismissing the City's objection
15 by stating that "a final determination on this matter can be made
16 later."

17 If the determination cannot be made now, after the July 1, 1987
18 deadline for issuance of an Order is long past, then the Hearings
19 Officer and EQC are required to conclude as a finding of fact and
20 conclusion of law that the Bacona Road site does not comply and
21 will not comply with Section 4 of the 1985 Act.

22 The same conclusion applies to other parts of the HEARINGS
23 OFFICER'S PROPOSED FINDINGS AND CONCLUSIONS declaring that because
24 of lack of relevant information, the Hearings Officer cannot
25 presently determine whether the site complies with state and federal
26 law and regulations, e.g., id. at page 62, lines 7-10:

Page 16 - CITY OF BANKS MOTION, etc.

1 "The hearings officer therefore concludes
2 that because of the lack of such information,
3 he cannot presently determine whether the
4 Bacona Road site does or does not meet the
5 statutory requirements of chapter 679, Oregon
6 Laws 1985." (emphasis added)

7
8 Id. at 7, lines 23-24, and 8, line 1, states with respect to
9 three controlling subjects, landslides, groundwater, and leachate
10 treatment:

11 "For three topics, there is simply not
12 sufficient information in the record to
13 determine compliance at this point. * * * "
14 (emphasis added)

15 Accordingly, the Hearings Officer should recommend vacation of
16 the Order because it is not supported by evidence, substantial or
17 otherwise.

18 Arguably, the 1985 Act requires some evidence that the Order
19 is based on evidence of compliance with state and federal law and
20 regulations.

21 It can be argued that the Act requires a showing of compliance,
22 that is, evidence that when and if a permit/license is requested,
23 the record demonstrates existence of the necessary facts/conditions
24 will lead to issuance of licenses/permits as a ministerial matter.

25 If, as the document concludes, "there is simply not sufficient
26 information in the record to determine compliance at this point,"

1 then the Order does not comply with the "will comply" requirement
2 of the 1985 Act.

3 Statutory Standards Have Not Been Met

4 Commencing at page 11 of the HEARINGS OFFICER'S PROPOSED FINDINGS
5 AND CONCLUSIONS, the document responds to objections that the site
6 does not meet Section 4 standards.

7 The document states, id. at 12, lines 11-13:

8 " * * * Second chapter 679 specifically
9 recognizes the authority of DEQ and the
10 commission to impose conditions. Sections
11 4(2), 5(5)."

12 Subsection (2) of Section 4 of the 1985 Act is not a general
13 grant of authority concerning conditions, nor does it authorize
14 a "condition" in lieu of compliance with a statute or regulation:

15 "(2) When appropriate, the conditions listed
16 in this section may be satisfied by a written
17 agreement between the Department of Environmental
18 Quality and the appropriate government agency
19 under which the agency agrees to provide facilities
20 as necessary to prevent impermissible conflict
21 with surrounding uses. If such an agreement is
22 relied on to satisfy any approval criteria, a
23 condition shall be imposed to guarantee the
24 performance of the actions specified."

25 (emphasis added)

26 It does not authorize agreements with federal agencies, only the

1 agency, presumably Metro, that would develop the regional dump site.

2 Section 4(a) of the 1985 Act does not authorize "the appropriate
3 government agency" to violate the "will comply" provision of
4 subsection (1)(a) of Section 4 of the 1985 Act.

5 Subsection (5) of Section 5 of the Act does not authorize
6 imposition of "conditions" as a substitute for compliance with
7 Section 4(1)(a) of the 1985 Act:

8 "(5) When selecting a disposal site under this
9 1985 Act, the commission may attach limitations
10 or conditions to the development, operation or
11 maintenance of the disposal site, including but
12 not limited to, setbacks, screening and landscaping,
13 off-street parking and loading, access, performance
14 bonds, noise or illumination controls, structure
15 height and location limits, construction standards
16 and periods of operation."

17 -

18 If the 1985 Legislature intended to modify the "will comply"
19 provision of Section 4 of the Act, it would have been a simple
20 matter to insert after "will comply" the words "and conditions
21 required by the commission."

22 The Legislature did not do so, hence the "conditions" provisions
23 do not modify the "will comply" requirement of Section 4 of the Act.

24 Assuming arguendo that the EQC can impose "conditions," the
25 final form of Order based on the Hearing Officer's proposed Order
26 should state the condition that the public agency must demonstrate

1 that leachate from the site will be accepted for treatment by the
2 Unified Sewerage Agency, the leachate can be processed and
3 the residue discharged into the Tualatin River without violation
4 of state/federal clean water standards and the terms of a consent
5 judgment, and that the groundwater drawn upon by the City of Banks
6 and users of wells near the Bacona Road site will not be contaminated
7 or polluted by leachate escaping from the Bacona Road landfill.

8 The final order adopted by the EQC based on the proposed order
9 should expressly require geologic exploration of the area outside
10 the Bacona Road site and between the site and the City of Banks
11 watershed and well to determine whether there is a connection between
12 the deep aquifer beneath the Bacona Road site and said watershed
13 and wells, and whether there is a fracture or other geologic
14 feature linking the Bacona Road site to the City of Banks watershed
15 and well and the waters of adjacent property owners and users.

16 The above-suggested "conditions" or without prejudice to the
17 position of the City of Banks that:

18 (1) The Hearings Officer and the EQC should vacate the June
19 19, 1987 ORDER and adopt the City's proposed Findings of Fact,
20 Conclusions of Law, and Order, and

21 (2) Apply Section 4 of the 1985 Act, West Hills & Island
22 Neighbors v. Multnomah County, 68 Or App 782, 787, 683 P2d 1032 (1984),
23 Sunnyside Neighborhood v. Clackamas Co. Comm., supra at 7-8, and
24 Oregon Natural Resources Council v. Marsh, supra at 8-9.

25 /

26 /

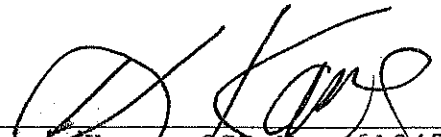
Page 20 - CITY OF BANKS MOTION, etc.

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Conclusion

The Hearings Officer should recommend adoption of the City of Banks proposed FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER, vacation of the June 19, 1987 ORDER and remand to the Environmental Quality Commission.

DATED: September 21, 1987.


Henry Kane, OSB No. 61045
Attorney for Petitioner
City of Banks

Certificate of Service

I certify that on September 21, 1987 I served true copies of the foregoing document on all parties of record either by personal service or by first class mail.


Henry Kane

SCHWABE, WILLIAMSON, WYATT, MOORE & ROBERTS
ATTORNEYS AT LAW

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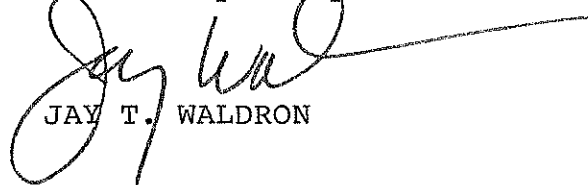
September 21, 1987

Judge Edward H. Howell
c/o Steve Greenwood
Dept. of Environmental Quality
811 SW Sixth Avenue
Portland, Oregon 97204

Dear Judge Howell:

Enclosed is the Objections to the Proposed Findings and
Conclusions filed on behalf of Waste Management of Oregon.

Yours very truly,



JAY T. WALDRON

JTW/kb
enclosure
cc: Mailing List

Hazardous & Solid Waste Division
Dept. of Environmental Quality
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1 Record as discussed below. However, the Interim Order requires
2 the DEQ to do further work on the Bacona Road site "over the
3 winter" to address groundwater, landslide, and leachate concerns.
4 Therefore, the Interim Order should be amended to direct the DEQ
5 to consider the WMO site as a "practicable alternative" under
6 federal wetland regulations prior to the issuance of any Final
7 Order.

8 Regarding the WMO site, the DEQ, presently, has far more
9 information before it than it does on the Bacona Road site. On
10 June 1, 1987 WMO presented the DEQ with a Feasibility Study
11 comparable to the DEQ's Bacona Road Feasibility Study as well as a
12 Site Evaluation done by DEQ's own consultants; and, more recently,
13 an application for a DEQ Solid Waste Permit.¹ "Over the winter"
14 provides the DEQ with ample time to examine the WMO site as a
15 "practicable alternative" which is required by federal wetland
16 regulations.

17 II. SUMMARY OF WMO'S OBJECTION.

18 The Record of this proceeding does not support the
19 Hearing Officer's Finding that the development and operation of
20 the Bacona Road site will comply with § 404 of the Federal Water
21 Pollution Control Act (the Act). To the contrary, the Record
22 demonstrates conclusively that the Bacona Road site does not

23
24 ¹The WMO application for a Solid Waste Permit was presented
25 to the DEQ on August 31, 1987. The Record in this proceeding is
26 not closed and will not be closed until next year. Accordingly,
WMO submits its Solid Waste Permit application as a part of this
Record and incorporates it by reference to these Objections. It
is not attached because it is already on file with the DEQ.

1 comply with the Act. Under the regulations enacted pursuant to
2 § 404 of the Act, DEQ cannot receive a dredge and fill permit for
3 the Bacona Road wetland until DEQ clearly demonstrates that there
4 is no "practicable alternative" to the Bacona Road site which
5 would have less adverse impact on the aquatic ecosystem. No
6 witness or document disputes that the Bacona Road site will have a
7 major adverse impact on its aquatic ecosystem. The Bacona Road
8 site will destroy at least 31 acres of prime wetland. No witness
9 or document disputes that the Record demonstrates the WMO site has
10 no wetlands and will have no adverse effect on the aquatic
11 ecosystem at the WMO site. Ineluctably, the DEQ cannot meet the
12 requirement of the federal regulations that a dredge and fill
13 permit will not be issued until DEQ clearly demonstrates the lack
14 of a practicable alternative with less adverse impact. DEQ cannot
15 make that demonstration.

16 Thus, the WMO Objection to the Proposed Findings and
17 Conclusions and the Interim Order is straightforward. Federal
18 regulations require DEQ to consider the WMO site. The DEQ
19 reviewed site in detail, but EQC chose not to consider it.
20 Therefore, DEQ cannot meet its burden under the federal
21 regulations which require DEQ to demonstrate that Bacona Road
22 clearly has less adverse impact on wetlands than the WMO site.
23 Therefore, DEQ cannot obtain a § 404 permit.

24 The federal regulations go further. They require that
25 the DEQ must presume that sites with less adverse impact are
26 available unless clearly demonstrated otherwise. The DEQ has not

1 made this demonstration. The DEQ acknowledged on the Record that
2 the WMO site was available; the federal agencies which control the
3 issuance of the wetlands fill permit flatly stated that the WMO
4 site was an alternative that DEQ must consider; inexplicably, DEQ
5 consultants testified that they only considered the final three
6 sites as alternatives to each other and not the WMO site.

7 In addition, DEQ said nothing about obtaining a federal
8 wetlands fill permit in its Bacona Road Feasibility Study. DEQ
9 presented no document or witness from any involved federal agency
10 that DEQ could ever obtain a § 404 permit. DEQ tried to obtain
11 testimony or a document from federal agencies saying that it could
12 obtain a permit, but failed. In the light of this well-documented
13 failure, DEQ offered a single witness who said he considered
14 Bacona Road "permissible." His testimony does not withstand
15 scrutiny as a "substantial evidence" basis for a Finding because
16 his opinion is unsubstantiated and contrary to the facts in the
17 Record. This DEQ consultant witness testified that the Bacona
18 Road site is "permissible" because of wetland mitigation measures
19 proposed by another consultant. As demonstrated in WMO's earlier
20 memoranda, those mitigation measures do not allow a permit to be
21 issued if there is a "practicable alternative," such as the WMO
22 site, which will cause less harm to the wetlands. Further, this
23 witness admitted that he did not consider the WMO site in
24 assessing practicable alternatives and permissibility, but
25 acknowledged that federal agencies would require such a
26 consideration. Thus, his opinion is based on a misunderstanding

1 of federal regulations and is not supported by any evidence in the
2 Record.

3 III. OBJECTIONS TO THE SUMMARY OF FINDINGS AND CONCLUSION.

4 This Summary of Findings and Conclusions does not
5 contain the Hearing Officer's Findings. It is not an operative
6 portion of the Hearing Officer's Interim Order. However, WMO will
7 address the Summary's unsupported assertions regarding wetlands in
8 the event EQC considers them in any Final Order.

9 The Summary claims that the Bacona Road Feasibility
10 Study and the testimony of DEQ consultants provide "persuasive
11 evidence" that applicable laws will be complied with regarding
12 wetland fill permits. Interim Order, pp. 5-6. Where is this
13 "persuasive" evidence? It is not in the Record before the Hearing
14 Officer. The DEQ Bacona Road Feasibility Study does not address
15 the issue of obtaining dredge and fill permits for site wetlands.
16 The Study certainly does not mention whether or not there are
17 practicable alternatives to filling the wetlands at Bacona Road.
18 Nor does the Study mention that under 40 CFR 230.10(a)(2) the DEQ
19 cannot obtain a wetland fill permit unless it can clearly
20 demonstrate that the Bacona Road site has less adverse impact on
21 wetlands than the WMO site. Obviously, DEQ cannot meet this
22 burden. Further, the Study does not mention that under 40
23 CFR 230.10(a)(2) practicable alternatives such as the WMO site to
24 the Bacona Road site are presumed available unless clearly
25 demonstrated otherwise, nor does the Study mention that under this
26 regulation the WMO site, which does not destroy a wetland, is

1 presumed, unless clearly demonstrated otherwise, to have less
2 adverse impact on wetlands.

3 The evidence in the Record on the WMO site is
4 undisputed. On May 22, the DEQ provided the EQC with the Bacona
5 Road Feasibility Study which stated that 31 acres of wetland at
6 Bacona Road would be destroyed. On May 18, 1987, WMO provided DEQ
7 and the EQC with a copy of WMO's conditional use submittal to
8 Gilliam County. This document demonstrated that there were no
9 wetlands at the WMO site. On June 1, 1987, WMO provided DEQ and
10 the EQC with a Feasibility Study which again demonstrated there
11 were no wetlands at the WMO site. The DEQ received these reports
12 and reviewed them in detail. Tr. p. 419. These documents and the
13 site became a part of the siting process. Tr. p. 419. However,
14 the EQC then did not consider the WMO site. This lack of
15 consideration is persuasive evidence that the DEQ has not
16 addressed, let alone complied with, the federal regulations
17 necessary to obtain a wetland fill permit.

18 Further persuasive evidence that the DEQ has not and
19 will not comply with federal regulations for obtaining a wetland
20 fill permit is found in meeting and telephone notes which are a
21 part of the Record.

22 On May 13, 1987, the DEQ met with its consultants. The
23 purpose of this meeting was to work together to seek some
24 "indication" from federal agencies that the Bacona Road site was
25 "permittable" under federal wetlands regulations. This meeting
26 occurred nine days before DEQ published the Feasibility Study on

1 Bacona Road. This issue of wetland permissibility had been raised
2 in hearings after the Draft Feasibility Study had been published.
3 Presumably, federal agency "indications" of "permissibility" were
4 sought to address those concerns. Those "indications" were never
5 obtained.

6 At the May 13 meeting, DEQ instructed its consultant,
7 CH₂M-Hill, to prepare a memo summarizing the ensuing meetings with
8 the agencies that would support a finding that wetland regulations
9 will be met. Ex. 86. No memo was ever prepared because no
10 federal agency, during those meetings which occurred over the next
11 week, ever indicated that the federal wetland permit regulations
12 could be met by the Bacona Road site. The Record clearly
13 demonstrates that when DEQ or its consultants met with an agency,
14 that agency refused to indicate that DEQ could comply with federal
15 regulations and that refusal was always based on DEQ's failure to
16 address the WMO site and another site in Eastern Oregon as
17 "practicable alternatives" as required by law. Cf. Ex. 86-89.

18 In a May 18, 1987, meeting with Ken Bierly of the Oregon
19 Division of State Lands, the Eastern Oregon sites are described as
20 "preferred alternative(s)" and the DEQ must look at "all
21 practicable alternatives." On May 18, 1987, DEQ also met with Jim
22 Goudswaard of the Corps of Engineers. The Corps would issue any
23 wetland fill permit. The DEQ did not receive any indication of
24 "permissibility." Tr. 1488. Instead, the DEQ was told that the
25 Corps "thinks" that the WMO site "must be considered." Ex. 87.
26 DEQ then met with the United States Department of Fish and

1 Wildlife which told the DEQ to look at alternatives beyond the
2 three county area. Tr. p. 1491.

3 Then, with no consultant memo and no indication of
4 "permittability," the Bacona Road Feasibility Study appeared on
5 May 22 with no mention of the ability of the Bacona Road site to
6 meet federal wetland permit regulations. No additional work in
7 this area has been done by DEQ or its consultants since that time.
8 This evidence is conclusive that DEQ will not comply with
9 applicable federal regulations.

10 There remains only a single comment in the Record from a
11 DEQ consultant that Bacona Road is "permissible" regarding
12 wetlands. This is hardly persuasive evidence because no factual
13 evidence was offered to support that comment. It is hardly
14 "substantial evidence." DEQ consultant Mishaga testified that he
15 did not look at any alternatives to the filling of wetlands at
16 Bacona Road. He testified that he was not involved in the
17 permitting process. Tr. p. 652 and 685. He merely examined
18 mitigation measures for the Bacona Road site if it was possible to
19 obtain a Corps permit if there were no other practicable
20 alternatives available. He did not consider the WMO site.

21 DEQ consultant Heagerty commented that Bacona Road and
22 Ramsey Lake were "permissible." He based this comment on the
23 testimony of Mishaga that mitigation measures were available for
24 the Bacona Road site. Tr. p. 1468. That reliance is misplaced
25 because mitigation measures are only relevant if there are no
26 "practicable alternatives" which have less adverse impact on

1 wetlands. This consultant's testimony applied only to the Corps
2 considering three sites - Wildwood, Ramsey Lake and Bacona Road -
3 all of which contained wetlands. Tr. p. 1473. This consultant
4 did not address the WMO site as a practicable alternative, nor did
5 he read the WMO Feasibility Study, even though EQC received it
6 almost contemporaneously with the Bacona Road Feasibility Study.
7 Tr. pp. 1476-1477. He also did not discuss any of the 142, or the
8 later 18 sites with the Corps, nor did he participate in DEQ's
9 vain attempt to obtain an "indication" that the Bacona Road site
10 was permittable. A single comment contradicted by all factual
11 evidence in the Record is not persuasive evidence.

12 The Summary also argues that "[m]ore recent
13 alternatives, including the Waste Management site, could not be
14 evaluated within the timeliness and specific process required by
15 Chapter 679." This statement is not supported in the Record. The
16 DEQ testified that it conducted a detailed review of the WMO
17 Feasibility Study - a study filed nearly contemporaneous with the
18 Bacona Road Feasibility Study. The DEQ testified that the WMO
19 site was part of the process. Tr. p. 419. Further, Ch. 679
20 states, and the DEQ acknowledges, that the WMO site could have
21 been chosen. The EQC did not consider it at the price of failing
22 to comply with the "practicable alternative" regulations necessary
23 to receive a Corps wetlands permit.

24 Finally, with no support in the Record, the Summary
25 comments that it is "questionable" that the WMO site will comply
26 with applicable federal and state laws. The only relevant

1 evidence in the Record regarding the WMO site's ability to comply
2 with applicable federal and state regulations is the WMO
3 Feasibility Study, Ex. 47, which demonstrates in detail that the
4 WMO site will comply with all such laws and the Site Evaluation,
5 Ex. 48, prepared by DEQ's consultants, Brown & Caldwell, which
6 addresses wetlands. Brown & Caldwell, in site evaluation, gave
7 Bacona Road the lowest possible score in the two categories that
8 addressed wetlands. In Ex. 48, Brown & Caldwell gave WMO the
9 highest scores in these areas. In fact, Brown & Caldwell gave the
10 WMO site a score of 1,445 out of a possible 1,950, while giving
11 Bacona Road only 1,058, which later dropped to 963. Ex. 48.
12 There is no evidence in the Record to the contrary regarding the
13 compliance of the WMO site with applicable federal and state laws.

14 IV. OBJECTION TO PROPOSED FINDING.

15 Section IV,A,1.(1.) of the Proposed Findings addresses
16 wetlands permits. The Findings acknowledge that the development
17 of the landfill at Bacona Road will require a Corps of Engineers
18 § 404 permit to destroy wetlands at the site. The Proposed
19 Findings acknowledge that "practicable alternatives" with less
20 impact on wetlands must be considered before the Bacona Road
21 permit could be obtained. The Proposed Findings fail to mention
22 that the federal regulations place the burden of proof on the DEQ
23 to demonstrate clearly that Bacona Road will have less adverse
24 impact on wetlands than the WMO site, or a permit cannot be
25 obtained. As stated earlier, there are no wetlands at the WMO
26 site so DEQ cannot meet this burden. The Proposed Findings also

1 fail to mention that under the federal regulations sites, such as
2 the WMO site, are presumed to exist unless DEQ can clearly
3 demonstrate that they do not. As shown earlier, DEQ cannot meet
4 this burden because it reviewed the WMO site in detail and federal
5 agencies told the DEQ to consider the WMO site. Because DEQ
6 cannot meet its burden under the federal regulations in order to
7 obtain a permit, the Proposed Findings simply ignore the WMO site.

8 They cannot do this. The WMO site was presented to the
9 DEQ in April, 1987, three months before the selection date
10 mandated by Ch. 679. The Record shows, as stated earlier, that
11 the WMO Feasibility Study which was presented to the EQC nearly
12 contemporaneously with the Bacona Road Feasibility Study; DEQ
13 acknowledged that it reviewed the WMO study in detail, presumably,
14 including the lack of any wetlands at the site, and acknowledged
15 that the WMO site was part of the process, and the governing
16 federal agencies told DEQ that it must consider the WMO site
17 before it could obtain a Corps wetland permit at Bacona Road. The
18 Record is thus replete with evidence in the form of detailed
19 studies that demonstrate that the WMO site is a practicable
20 alternative and that the Bacona Road site will not comply with
21 applicable federal regulations.

22 The Proposed Findings then claim that DEQ narrowed its
23 list from 142 sites to three sites, all of which contained
24 wetlands, but admits that in the narrowing process, three of the
25 final 18 sites did not. The DEQ consultants concerned with
26 meeting federal regulations testified that they did not examine

1 the three sites that did not contain wetlands; they only examined
2 the last three sites in terms of the federal regulations.
3 Moreover, obtaining a § 404 permit was not a site selection
4 criterion in evaluating the final 18 sites.

5 The Proposed Findings then concede that DEQ cannot
6 obtain a wetland permit because the federal agencies in charge of
7 approving such permit will not consider Bacona Road and Ramsey
8 Lake as the only "practicable alternatives." The federal agencies
9 want to look at the WMO site. Where, then, is the evidence that
10 the Bacona Road site will comply with these federal regulations?

11 The Proposed Findings then argue that because DEQ
12 consultants say so, a permit to destroy the wetlands on the Bacona
13 Road site can be obtained despite conceding that federal agencies
14 don't agree. As stated earlier, those comments are not supported
15 by the Record and are marred by misplaced reliance on the
16 mitigation testimony of another witness. Those comments only
17 considered the DEQ's three alternatives and ignored the express
18 federal agency statements and regulatory requirements that the WMO
19 site be considered as a practicable alternative.

20 The Proposed Findings also argue that the commission's
21 order requires DEQ to obtain all necessary permits before issuing
22 the solid waste permit. This comment is not relevant to the
23 Proposed Findings. The EQC cannot substitute a condition for
24 compliance, especially in the area of landfill siting. Such a
25 substitution has been expressly prohibited in West Hills & Island
26 Neighbors v. Multnomah County, LUBA 83-018, aff'd 68 Or App 782,

1 rev. den. 298 Or 150 (1984).

2 V. CONCLUSION

3 The Record does not support the Proposed Finding that
4 the Bacona Road site will comply with applicable federal laws and
5 regulations. The Interim Order keeps the Record open to gather
6 additional evidence "over the winter." The EQC should amend the
7 Findings to indicate that it has not been demonstrated that the
8 Bacona Road site will comply with applicable federal regulations
9 and should provide that the WMO site be considered "over the
10 winter" as a "practicable alternative" if the EQC does not reject
11 this site altogether.

12 Respectfully submitted,

13 SCHWABE, WILLIAMSON & WYATT

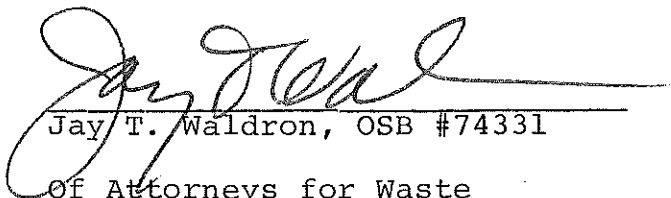
14
15 By: 

16 Jay T. Waldron
17 Of Attorneys for Waste
18 Management of Oregon
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CERTIFICATE OF MAILING

I hereby certify that on September 21, 1987, I filed or caused to be filed an original OBJECTIONS TO HEARINGS OFFICER'S PROPOSED FINDINGS AND CONCLUSIONS AND INTERIM ORDER, by hand-delivery and served a true and correct copy of this on all persons listed on the Service List by U.S. Mail, postage paid.

Dated this 21st day of September, 1987.



Jay T. Waldron, OSB #74331

Of Attorneys for Waste
Management of Oregon, Inc.



WASHINGTON
COUNTY,
OREGON

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY
RECEIVED
SEP 21 1987

OFFICE OF THE DIRECTOR

September 21, 1987

Environmental Quality Commission
Director's Office/Contested Case
811 S.W. Sixth Avenue
Portland, OR 97204

RE: In the Matter of the Selection of a Solid
Waste Disposal Site

Dear Commission Members:

Enclosed please find "Exceptions to Hearings Officer's Proposed Findings and Conclusions and Interim Order" submitted by Washington County and the Unified Sewerage Agency in the above-entitled matter.

Very truly yours,

John M. Junkin
County Counsel

A handwritten signature in cursive script, appearing to read "Cheyenne Chapman", with a long horizontal line extending to the right.

By Cheyenne Chapman
Assistant County Counsel

CC:dee

Enc.

0611d

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

OFFICE OF THE DIRECTOR

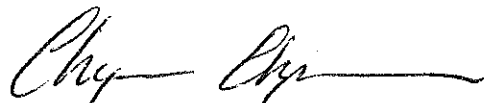
IN THE MATTER OF THE SELECTION) EXCEPTIONS BY WASHINGTON COUNTY
OF A SOLID WASTE DISPOSAL SITE) AND UNIFIED SEWERAGE AGENCY TO
FOR MULTNOMAH, WASHINGTON AND) HEARINGS OFFICER'S PROPOSED
CLACKAMAS COUNTIES) FINDINGS AND CONCLUSIONS AND
) INTERIM ORDER

Washington County and the Unified Sewerage Agency (USA) submit the following exceptions to the Hearings Officer's Proposed Findings and Conclusions and Interim Order in the above-entitled matter:

The Proposed Findings and Conclusions set forth information on "Leachate Treatment and Tualatin River" at pages 59 through 62, and State Statutes applicable to the decision at Exhibit "A". The County and USA respectfully request that reference to ORS Chapters 451 (County Service Districts) and 199 (Boundary Commission) be included in the Commission's Findings and Conclusions at page 62 and Exhibit "A", indicating a statutory basis for the Hearings Officer's conclusion that there is not sufficient information to determine whether or not the Bacon Road site meets requirements of Chapter 679, Oregon Laws 1987, with respect to leachate treatment.

Respectfully submitted,

John M. Junkin
County Counsel



By Cheyenne Chapman
Assistant County Counsel

COUNTY COUNSEL, WASHINGTON COUNTY
HILLSBORO, OREGON 648-8747

CERTIFICATE OF SERVICE

I hereby certify that on September 21, 1987, I served a true and correct copy of the EXCEPTIONS BY WASHINGTON COUNTY AND UNIFIED SEWERAGE AGENCY TO HEARINGS OFFICER'S PROPOSED FINDINGS AND CONCLUSIONS AND INTERIM ORDER on:

Michael D. Reynolds
Assistant Attorney General
Attorney General's Office
400 Justice Building
Salem, Oregon 97310

James E. Benedict
Schwabe, Williamson & Wyatt
1211 S.W. Fifth Avenue
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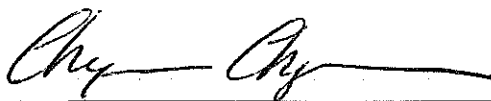
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by first-class mail and depositing the same, with postage prepaid, at the U.S. Post Office in Hillsboro, Oregon, and that the original was personally filed this date with the Environmental Quality Commission.

JOHN M. JUNKIN
COUNTY COUNSEL

By 
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