



Oregon

Tina Kotek, Governor

Department of Environmental Quality

Agency Headquarters

700 NE Multnomah Street, Suite 600

Portland, OR 97232

(503) 229-5696

FAX (503) 229-6124

TTY 711

October 6, 2023

Josie Moberg
Breach Collective
P.O. Box 5291
Eugene, OR 97405

Nick Caleb
Breach Collective
P.O. Box 5291
Eugene, OR 97405

Travis Williams
Willamette Riverkeeper
1210 Center Street
Oregon City, OR 97045

Micah Meskel
Portland Audubon
5151 NW Cornell Road
Portland, OR 97210

Cassie Cohen
Portland Harbor Community Coalition
4815 7th Avenue
Portland, OR 97211

Audrey Leonard
Columbia Riverkeeper
1125 SE Madison Street, Ste. 103A
Portland, OR 97214

To: Breach Collective, Willamette Riverkeeper, Portland Audubon, Portland Harbor Community Coalition, and Columbia Riverkeeper

Thank you for sharing your concerns and analyses regarding Zenith's Air Contaminant Discharge Permit application in your August 21, 2023 letter. The information outlined in your letter is helpful as DEQ continues its evaluation of Zenith's permit application. I want to respond, and hopefully address, some of the key points raised in your letter.

DEQ Background with Zenith

The Zenith facility currently operates under a Title V air quality operating permit, which must periodically be renewed. In January 2021, upon reviewing Zenith's renewal application, DEQ determined that it required an updated land use compatibility statement (LUCS) reflecting the facility's transition from an asphalt refining facility to a facility primarily engaged in the trans-loading of liquid fuels and other materials. In response, Zenith submitted a LUCS application to the City of Portland reflecting its current activities at the site. On August 27, 2021, the City denied Zenith's LUCS application, which meant Zenith did not have a complete Title V permit application submitted to DEQ. Therefore, on September 1, 2021, DEQ proposed to deny renewal of the Title V permit. Zenith appealed DEQ's decision not to renew the permit, which meant the denial of permit coverage was not final until the appeal could be resolved.

Zenith submitted a revised LUCS application to the City, which was approved on October 3, 2022. Zenith then submitted the approved LUCS to DEQ. With a LUCS that matched the activities described in Zenith's Title V permit application, DEQ determined the application was complete and withdrew its proposed denial of the permit renewal.

The LUCS approved by the City of Portland includes conditions requiring Zenith to immediately cease using eight rail car spots for unloading crude oil, and to cease all storage and handling of crude oil at the facility by 2027, remove 30 storage tanks, and construct new storage tanks only if related to renewable fuels and non-fuel projects. The LUCS also required Zenith to apply for an Air Contaminant Discharge Permit with a lower (40 tons/year) plant site emission limit for volatile organic compounds. Zenith submitted the ACDP application to DEQ on November 11, 2022 and it is currently under review. If an ACDP is issued by DEQ, the Title V permit will be terminated and Zenith will no longer have authorization to operate the asphalt refinery—the activity that required a Title V permit due to its higher emissions.

LUCS Sufficiency Determination

You have asserted the most recent LUCS issued to Zenith Energy was not legally sufficient and have requested DEQ deny Zenith’s application for an ACDP on that basis, citing DEQ’s authority under OAR 340-018-0050(2)(a)(C). As background, the Environmental Quality Commission adopted the rules in OAR chapter 340, division 018 to comply with the requirement, as provided in ORS 197.180(1) and OAR 660-030-0045 (adopted by the Land Conservation and Development Commission (LCDC)), that each state agency adopt a coordination program to ensure that actions it takes that affect land use are made in compliance with statewide land use planning goals and rules, including acknowledged local government comprehensive plans and land use regulations. LCDC rules further provide, in OAR 660-030-0070(2)(e), that an acceptable way for land use compatibility to be demonstrated when issuing permits is to issue them in compliance with OAR chapter 660, Division 31. DEQ’s ACDP permits are identified in OAR 660-031-0012(2) as “Class B” permits. Under OAR 660-031-0026(2)(b)(B), an applicant may demonstrate compliance with the required land use review process by obtaining a determination of land use compliance that includes written findings from the affected local government. That is the provision DEQ relies on, in the vast majority of cases, to demonstrate its permitting decisions are consistent with land use requirements. In this situation, Zenith has provided the land use approval and findings from the City of Portland (the LUCS), in compliance with that requirement.

One of the basic premises of DEQ’s state agency coordination program, and particularly its reliance on LUCS, is that the interpretation and application of local land use laws is primarily a responsibility of local governments. There is an established system of local government land use decision making in Oregon, including an appeals process designed to ensure those decisions comply with applicable statewide requirements and are made consistent with applicable local comprehensive plans, zoning and other land use requirements. Those who believe a local government land use decision is unlawful, and who either participated in the local process or are adversely affected by the decision, may appeal the decision to the Land Use Board of Appeals (LUBA) as provided in ORS 197.830(2).

DEQ’s state agency coordination rules include provisions that provide DEQ generally defers to local governments’ LUCS decisions. For example, OAR 340-018-0050(2)(a)(B) provides DEQ “shall rely on an affirmative LUCS as a determination of compatibility” with land use requirements. That process also anticipates appeals of LUCS to LUBA, in OAR 340-018-0050(2)(a)(G), providing direction in cases where a LUCS is appealed to LUBA and LUBA invalidates the local action. You have correctly cited another paragraph in that same rule, OAR 340-018-0050(2)(a)(C), which provides that DEQ may deny a permit application if DEQ “concludes [that a LUCS] may not be legally sufficient.” DEQ occasionally relies upon that provision if, for example, DEQ receives a LUCS that on its face is legally insufficient, such as one that makes it clear there is still local government land use process yet to be completed before it is considered a final decision, or where the activity described in the LUCS does not fully include the activity being permitted by DEQ. DEQ evaluated the LUCS issued by the City of Portland to Zenith on October 3, 2022 on that basis and

determined it did not raise any such insufficiencies. Where the LUCS includes findings and a complete project description, DEQ does not use that provision to undertake its own review of whether a local government has properly applied its own ordinances in issuing its LUCS, instead allowing such land use compliance questions to be determined within the standard land use planning process—by appeal to LUBA.

For these reasons, DEQ has accepted the LUCS issued by the City of Portland in this matter as sufficient to demonstrate that, if DEQ determines to issue an ACDP to Zenith, such action will be in compliance with applicable land use requirements, as required by law. To the extent you believe the City's land use decision was unlawful, the proper venue for such assertions is LUBA.

Denial of Permit Renewal

DEQ's air permitting authority generally is limited to an assessment of a facility's air pollutant emissions and a determination of what conditions are necessary to regulate, control and limit such emissions under applicable rules. To our knowledge, DEQ has never invoked the authority under OAR 340-216-0082(5)(b) to revoke or refuse to renew a permit based on the potential for a future event to subject persons to serious danger. Although DEQ will evaluate that authority as it may apply to future decisions when they may arise, DEQ concludes it would not be appropriate to invoke such authority here, based on the possibility a future event may occur, such as the potential for a spill of hazardous material.

That said, DEQ shares concerns regarding environmental and human health hazards associated with spills, releases and other potentially catastrophic events. In recent years, DEQ has worked with the legislature to strengthen laws and programs to address these issues, such as for risks associated with fuel tank systems vulnerable to seismic activity and oil transport by railroads.

In 2022, Senate Bill 1567 gave the DEQ the authority to develop a program to evaluate the vulnerability of fuel tank systems to earthquakes and requires facilities in Lane, Multnomah and Columbia counties to develop a plan to minimize risk. On September 14, 2023, the Environmental Quality Commission adopted new rules requiring facilities to develop plans that include actions to protect public health, life safety, and environmental safety within the facility, in areas adjacent to the facility, and in other areas that may be affected as a result of damages to the facility. Facilities must conduct vulnerability assessments, reviewed and approved by DEQ, and take actions to mitigate those vulnerabilities. Zenith is among the facilities regulated under this new program.

In 2019, the Oregon Legislature passed House Bill 2209, giving DEQ authority to create rules requiring railroads transporting oil to prepare spill response plans. These rules apply to railroads considered to be "high hazard rail" because they are within a quarter mile of waters of the state and have trains traveling over them with:

- More than 20 tank cars loaded with oil in a continuous block, or
- 35 tank cars loaded with oil distributed through the length of a train.

In Oregon, the definition of oil includes gasoline, crude oil, bitumen, synthetic crude oil, natural gas well condensate, fuel oil, diesel oil, lubricating oil, sludge, oil refuse and any other petroleum related product; and liquefied natural gas. Implementing rules were adopted in May 2021.

Both BNSF and Union Pacific, which own all of the high hazard rail areas in Oregon, have submitted plans to DEQ. DEQ has reviewed and approved those plans. The plans were also reviewed by Tribes along the high hazard rail routes as well as the Oregon Department of Fish and Wildlife, Oregon State Fire Marshal and Oregon Department of Land Conservation and Development. DEQ has been testing the plans through spill drills and exercises.

Additionally, the High Hazard Rail program is working on creating geographic response plans along the rail corridors. These plans are meant to address geographically specific areas and identify ahead of time, important resources that must be protected in the event of a spill.

As I noted above, DEQ is currently reviewing Zenith's ACDP application. Once the technical work is complete, a draft permit will be shared for public input. All comments DEQ receives will be evaluated and considered before a final decision is made.

I appreciate your interest in DEQ's work to protect human health and the environment in Oregon.

Sincerely,



Leah Feldon
Director

cc

Governor Tina Kotek
Attorney General Ellen Rosenblum
Portland City Auditor Simone Rede
Goeff Huntington, Office of Governor Kotek, Senior Natural Resources Policy Advisor
Christine Svetkovich, DEQ NW Region Administrator
Matt Davis, DEQ Policy and External Affairs Manager