



TO: DEQ Director Leah Feldon
CC: Governor Kotek, Attorney General Rosenblum, and Portland City Auditor Rede
FROM: Breach Collective, Willamette Riverkeeper, Portland Audubon, Portland Harbor Community Coalition, and Columbia Riverkeeper
DATE: August 21, 2023
RE: Zenith Energy Air Contaminant Discharge Permit Application

Director Feldon,

We are writing to you regarding Zenith Energy Terminal Holdings LLC (“Zenith”)’s current Air Contaminant Discharge Permit (“ACDP”) application. As you know, on November 11, 2022, Zenith Vice President of HSE and Regulatory Affairs Shannon Caldwell submitted an ACDP application to the Department of Environmental Quality (“DEQ”)’s Air Quality Manager Josh Alexander, noting that “Zenith is eager to have the ACDP issued expeditiously.” If approved, the conditional Land Use Compatibility Statement (“LUCS”) attached to the ACDP application specifies that Zenith may continue transporting, handling, transloading, and storing crude oil at its NW Portland site until “the fifth anniversary of the Approval [of the LUCS application.]”¹

In October, 2022, the Portland Bureau of Development Services (“BDS”) approved Zenith Energy’s application for a city-level LUCS for this ACDP application (“2022 LUCS approval”).² However, the circumstances surrounding the 2022 LUCS approval were highly irregular. Specifically, the 2022 LUCS approval was an abrupt and complete reversal of course by the City of Portland (“the City”), which occurred in the midst of the City successfully defending its previous denial of Zenith’s LUCS in August, 2021 (“2021 LUCS denial”) from a legal challenge by Zenith. **Perplexingly, the 2022 LUCS approval was supported by many of the same findings that were initially invoked to deny the LUCS in 2021.**³ The 2022 LUCS approval also occurred just three days before the Oregon Supreme Court declined to review an Oregon

¹ Land Use Compatibility Statement 22-182133, CITY OF PORTLAND, p. 2 (issued Oct. 3, 2022), [https://portlandor.govqa.us/WEBAPP/_rs/\(S\(knue5auxzafbcnwhn0pbsxi\)\)/DownloadFile.aspx?sSessionID=&aid=247783&fid=400619](https://portlandor.govqa.us/WEBAPP/_rs/(S(knue5auxzafbcnwhn0pbsxi))/DownloadFile.aspx?sSessionID=&aid=247783&fid=400619)

² *Id.*

³ The BDS’ 2021 denial of Zenith’s LUCS application cited over a dozen sections of the Comprehensive Plan as being incompatible with Zenith’s “fossil fuel activity and potential adverse impact on the environment and historically marginalized groups.” However, the BDS’ 2022 approval of Zenith’s LUCS application cited the same Plan sections, finding that the policies either “do not apply” or that they *are* in fact compatible with Zenith’s “Repositioned Facility”: Goal 3B. A climate and hazard resilient urban form; Policy 3.3. Equitable development; Policy 4.33. Off-site impacts; Policy 4.36. Air quality impacts; Policy 4.62. Seismic and energy retrofits; Policy 4.79. Natural hazards and climate change risks and impacts; Policy 4.80. Geological hazards; Policy 4.81. Disaster-resilient development; Policy 4.82. Portland harbor facilities [reduced natural hazard risks]; Policy 4.83. Urban heat islands; Policy 6.47. Clean, safe, and green [industrial development and freight corridors]; Policy 6.48. Fossil fuel distribution [limits industry to what is needed “to serve regional market”]; Policy 7.2. Environmental equity; Policy 7.14. Natural hazards; Policy 8.74. Pollution prevention; Policy 9.34. Sustainable freight system. See the City of Portland’s “Zenith Energy Oil Terminal” public records web page for access to both documents, [https://portlandor.govqa.us/WEBAPP/_rs/\(S\(dss5sspxxsxxmxfto1cc5r52\)\)/BusinessDisplay.aspx?sSessionID=&did=35&cat=0](https://portlandor.govqa.us/WEBAPP/_rs/(S(dss5sspxxsxxmxfto1cc5r52))/BusinessDisplay.aspx?sSessionID=&did=35&cat=0).

Court of Appeals ruling that had upheld the City’s authority to deny a LUCS based on the comprehensive plan alone.⁴

In the wake of the decision, Commissioner Carmen Rubio announced that “[t]he decision made regarding the Zenith storage facility [...] was processed in the same manner as every other Land Use Compatibility Statement.”⁵ However, internal City communications obtained from public records requests reveal that the City’s engagement with Zenith included new and unprecedented activities when compared to a typical LUCS review.⁶ These exchanges show that elected officials, political staff, City attorneys, and Bureau staff worked behind closed doors to engineer a preordained outcome that would protect Zenith’s constantly expanding crude oil transloading operations in exchange for promises for a future transition to so-called “renewable fuels.” Notes obtained through records requests further suggest that a crucial *ex parte* negotiation between the City and Zenith was conducted in secret at Zenith’s terminal site while litigation was ongoing between the two parties.

For the reasons that follow, DEQ should utilize its existing legal authority to deny Zenith’s pending ACDP permit application. First, the City’s LUCS process was not legally sufficient. In reaching its formal decision to approve the LUCS, the City ignored a ruling from LUBA that required it to treat the LUCS as a quasi-judicial decision; conducted undisclosed *ex parte* negotiations with Zenith regarding the LUCS application while actively litigating against Zenith over the same matter; blatantly disregarded legislated procedures for quasi-judicial decisions and its own rules and standards; attempted to withhold important information from the public; and otherwise acted arbitrarily and capriciously. Second, Zenith’s activities — both its oil and “renewable fuels” transport and storage operations — pose a serious danger to public health, safety, and the environment.⁷

I. THE CITY OF PORTLAND’S LUCS DECISION WAS NOT LEGALLY SUFFICIENT

Pursuant to Or. Admin. R. 340-018-0050(2)(a)(C), if DEQ “concludes a local government LUCS review and determination may not be legally sufficient, the Department may deny the permit application and provide notice to the applicant.”⁸ As the following sections demonstrate, the City of Portland’s October 2022 approval of Zenith Energy’s LUCS application was not legally sufficient.

⁴ *Zenith Energy Terminal Holdings LLC. v. City of Portland*, LUBA No. 2021-083 (2022), *aff’d*, 319 Or App 538 (2022), *rev den*, 370 Or 303 (2022).

⁵ Abe Asher, *Despite New Leadership, Portland Officials Decline to Reconsider Zenith Energy Deal*, The Portland Mercury (Jan. 30, 2023), <https://www.portlandmercury.com/news/2023/01/30/46328013/despite-new-leadership-portland-officials-decline-to-reconsider-zenith-energy-deal>.

⁶ Records acquired through public record requests are available in a public facing Google Drive folder here: <https://shorturl.at/jEP02>. An annotated “Public Records Timeline” is available here: <https://shorturl.at/dpCMZ>. These public facing pages are updated as the City releases records.

⁷ Zenith’s oil storage and transport activities also contribute to climate change. Multnomah County – the local public health authority in the jurisdiction relevant to Zenith’s ACDP application – just declared climate change a public nuisance and filed suit against oil companies. See Multnomah County Resol. No. 2023-065 (June 22, 2023), <https://www.multco.us/node/411725>. See also *Greenhouse Gas Reporting*, OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY (July 19, 2023, 8:31 AM) (Zenith emitted 5,455 metric tons of carbon dioxide equivalent (mtCO₂e) in 2019, 5,224 mtCO₂e in 2020, and 4,041 mtCO₂e in 2021, not including upstream greenhouse gas emissions nor the emissions at the time of combustion of its fuels), <https://www.oregon.gov/deq/ghgp/Pages/GHG-Emissions.aspx>.

⁸ The rest of the rule reads “[i]n the alternative, when the applicant and local government express a willingness to reconsider the land use determination, the Department may hold the permit application in abeyance until the reconsideration is made[.]” As this letter will demonstrate, the actions by the City in the Summer and Fall of 2022 in coordinating Zenith’s LUCS approval make it

A. New facts from records requests reveal significant undisclosed *ex parte* communications between the City and Zenith regarding Zenith's second LUCS submission

The City of Portland's official story is that Zenith submitted a second LUCS application on September 6, 2022, and the City then reviewed the application and approved the LUCS on October 3. The timing and abruptness of the City's 2022 LUCS approval raised suspicions among Portland residents and safety advocates, prompting a series of public records requests. Based on communications uncovered by these records requests, we learned that elected officials (Commissioners Dan Ryan and Carmen Rubio), their staff members, Bureau staff, and City attorneys began conducting *ex parte* communications with Zenith about a second LUCS in the Summer of 2022.

The majority of these *ex parte* communications appear to have occurred after the Oregon Court of Appeals affirmed LUBA's decision about the 2021 LUCS denial,⁹ and after Zenith chose to appeal LUBA's decision to the Oregon Supreme Court,¹⁰ but outside of settlement negotiations and before the Oregon Supreme Court declined to review. **No notice of these *ex parte* communications was given to the intervenors in Zenith's litigation over the 2021 LUCS denial (Willamette Riverkeeper and Columbia Riverkeeper) or to any other potentially aggrieved or interested party in the decision, and these *ex parte* negotiations were not disclosed in the record of the 2022 LUCS approval.** The content of these *ex parte* communications between the City and Zenith demonstrates that the City prejudged Zenith's second LUCS application, and indeed coordinated closely with Zenith to ensure its approval. **Furthermore, the manner of these *ex parte* communications and the City's conduct in responding to public records requests are evidence of a concerted effort to conceal the extent of these *ex parte* communications from interested members of the public and potentially aggrieved parties.** The key moments in the timeline of presently known communications between Zenith and the City, as evidenced in the City's responses to public records requests, are therefore worth recounting in some detail.

The earliest record of City officials communicating with Zenith is an email on February 3, 2022 from Pac/West Communications ("Pac/West"), Zenith's lobbyists, to schedule a meeting with Commissioner Ryan and Mayor Wheeler.¹¹ City officials were initially cautious about meeting with Zenith.¹² On March 3, 2022, Portland City Council released a statement about Zenith's appeal of LUBA's decision saying "the

impossible for the public to have any trust that a reconsideration will be fair or impartial. The proper course is to use discretion to deny Zenith's ACDP application.

⁹ LUBA issued its ruling on Feb. 3, 2022.

¹⁰ Zenith petitioned for Oregon Supreme Court review on June 15, 2022. See "6.22.2022 - Krawczuk" ([Link](#))

¹¹ See 2.3.22. - Gardner ([Link](#)).

¹² See, i.e. "2.22.22 - Gardner" ([Link](#)) (Karen Guillen-Chapman: "I think we should first consult with our Land Use City Attorney, Lauren King, before committing to any meetings with Pac/West and their client Zenith (we may want our City attorney present at any meeting with commissioners and this group)"; "3.3.22 - Guillen-Chapman" ([Link](#)) (Guillen-Chapman: "I'm surprised, but Commissioner Rubio's office has not received this request to tour the site (her office oversees the BP&S which writes our planning and zoning codes that BDS uses to approve/deny a LUCS, which in this case Zenith is appealing). Mona and I were discussing, maybe we offer a staff level meeting rather than a meeting/tour with electeds").

City cannot take further action on LUBA’s decision until the Court [of Appeals] issues its decision.”¹³ Mayor Ted Wheeler likely toured Zenith’s oil terminal facility on April 26, 2022.¹⁴ Commissioner Carmen Rubio likely met with Zenith sometime prior to May 2, 2022.¹⁵ No notes have been produced from either of these meetings. Rubio’s staff members, including Chief of Staff Jillian Schoene and Mona Schwartz, were in communication with representatives of Pac/West in the beginning of May 2022 and perhaps earlier.¹⁶ On July 12, 2022, Schoene had a phone call with Chris West from Pac/West about an upcoming visit to Zenith’s physical site in NW Portland. On July 29, 2022, Commissioners Rubio and Ryan, their senior staff members Schoene and Karen Guillen-Chapman, respectively, Patricia Diefenderfer from the Bureau of Planning and Sustainability (“BPS”), and Terry Whitehall from the Bureau of Development Services (“BDS”) met with Zenith Vice President of U.S. Operations West Grady Reamer and Zenith’s Portland Terminal Manager JT Hendrix, along with Paul Phillips and Chris West from Pac/West, at the Zenith oil terminal site where they discussed Zenith’s operations, future plans, and “next steps.”¹⁷ Representatives of Pac/West Communications, agents of Zenith Energy, appear to have organized the visit.¹⁸

When asked for notes from the tour, Schoene responded to a public records inquiry by asserting that her office did not have any notes about Zenith related meetings, and that “no notes were taken” during the Zenith site visit.¹⁹ Similarly, Ryan’s office responded to a record request that they could not locate any notes.²⁰ However, through additional records requests, we discovered that Patricia Diefenderfer from BPS took handwritten notes of the meeting.²¹ **These notes show that all of the major conditions in the 2022 LUCS approval were discussed at this meeting, over a month before Zenith formally submitted its LUCS to BDS.**²² In addition, Zenith presented to the City officials its vision of turning Portland into a major West Coast “renewable fuels” hub.²³ Consistent with this vision, the notes show that Zenith intends to seek permission to expand pipeline capacity near its site and build another rail track within five years.²⁴

¹³ Joint Council Statement on Zenith Energy Appeal, CITY OF PORTLAND (March 3, 2022), <https://www.portland.gov/ryan/news/2022/3/3/joint-council-statement-zenith-energy-appeal>; see, also “6.23.22 - Armstrong” ([Link](#)) (“The City cannot take further action until the Oregon Supreme Court decides whether to accept review on that appeal”).

¹⁴ See “Public Records Request #C297547-081423 response” ([Link](#)) (“[t]he only thing I could find that could be applicable was a calendar entry from the Mayor’s calendar on 4/26/2022 for a “Zenith Tour”. It was just a calendar event with no attached documents or notes.”).

¹⁵ See “5.2.22 - Weekly All Staff Meeting” ([Link](#))

¹⁶ See “5.2.22 - Weekly All Staff Meeting” ([Link](#)); “5.5.22 - Quinn” ([Link](#)) (referencing a Zoom call from the day before and requesting an in-person Zenith terminal tour); “6.8.22 - Quinn” ([Link](#)); “8.8.2022 - West” ([Link](#)) (confirming Pac/West represents Zenith).

¹⁷ See “7.22.22 - West” ([Link](#)); “8.2.22 Rubio” ([Link](#)); “8.4.22 - Reamer (Zenith VP)” ([Link](#)).

¹⁸ See Commissioner Ryan’s public calendar July 25 - 31, 2022 ([Link](#)).

¹⁹ Public Records Request #C293791-072023 response ([Link](#)) (“Please note, I spoke with the Chief of Staff for the Commissioner. She advised that they do not have any notes about there [sic] meetings. She also said during the tour no notes were taken either.”).

²⁰ Public Records Request #C293794-072023 response ([Link](#)) (“[T]he staff member confirmed that he did not locate any notes.”).

²¹ See “7.29.22 - Diefenderfer” ([Link](#)); see also “7.29.22 - Diefenderfer (transcription)” ([Link](#)).

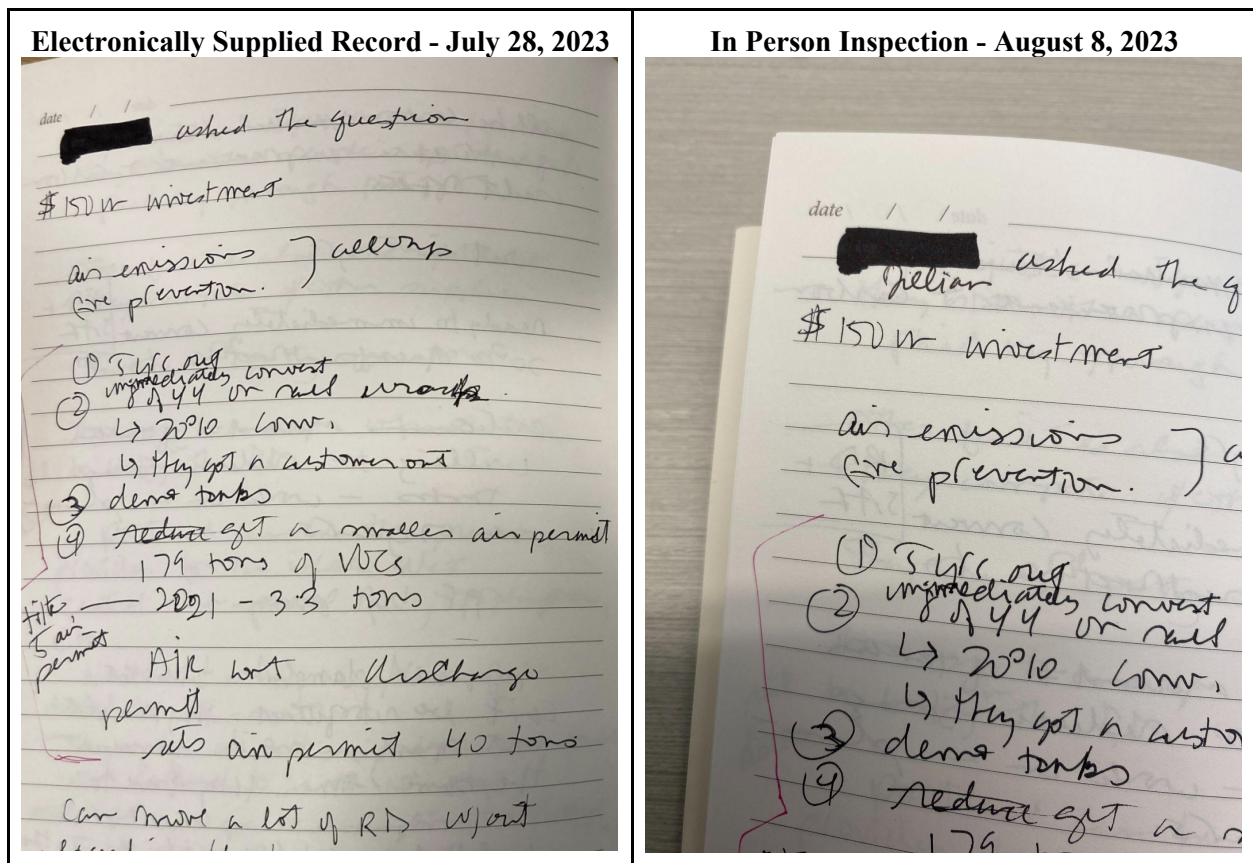
²² *Id.*

²³ *Id.*

²⁴ *Id.*

Zenith also communicated its desire to enter into a “partnership [with] the city to achieve its renewable goals.”²⁵

While helpful in showing some of the content of discussion, the notes are an inadequate and incomplete record of these apparent *ex parte* negotiations, and at least one name was physically redacted.²⁶ That is, upon physical inspection of the notebook on August 8, 2023, a name was visibly blacked out with both black pen and a black marker and thus illegible. The name “Jillian” (presumably in reference to “Jillian Schoene”) was written under the blacked out section,²⁷ although this name was absent from the electronically produced records previously disclosed. It is unclear why this name was redacted in the first place, and why the name was (re-)entered into the notebook in the time between this record being disclosed electronically and the date of physical inspection 11 days later.²⁸ It is also unclear why Schoene responded to initial records requests by asserting that no notes from the Zenith site visit were taken, when such records in fact existed. The public deserves full information about this meeting, and the City officials who were present have not been forthcoming about details.



²⁵ *Id.*

²⁶ *Id.* The blacked out name is followed by the words “asked the question” but it is unclear what question was asked. In general, Diefenderfer’s notes appear detailed with regard to Zenith’s representations, but likely omit questions or comments from City officials.

²⁷ See “8.8.23 Caleb physical inspection of Diefenderfer notes from 7.29.22” ([Link](#)).

²⁸ The City did not claim a statutory rationale for the original redaction, nor was any explanation provided by City records staff as to when or why the name was added.

On August 3, 2022, a substantial number of City officials – including Ryan, Rubio, their staffers, BPS staff, BDS staff, and City attorney Lauren King – met on Zoom for a “[f]ollow up from 7/29 Zenith Tour.”²⁹ Notes from this meeting have not been disclosed in response to records requests because of claimed attorney client privilege, but “Commissioner Ryan's Office informed [public records staff] this was set up by Commissioner Rubio's Office[.]”³⁰ The next day, August 4, 2022, Zenith’s Vice President of U.S. Operations West Grady Reamer emailed Commissioners Rubio and Ryan and staff members about the July 29 site visit, writing

Zenith’s intent [is] to submit a new LUCS application and apply for a new lower-tiered air permit with DEQ that would replace the Title V permit that has governed the facility for over two decades. There are a lot of things that need to fall into place for this plan to happen and we hope we can continue to have an open dialog and a shared vision to meet our mutual goals.³¹

This email’s content and timing are strong evidence that the City and Zenith brokered an *ex parte* resolution to the LUCS dispute at Zenith’s physical site on July 29, 2022 or in the days immediately thereafter. Given that the City and Zenith were still litigating the 2021 LUCS denial, it is highly unlikely that Zenith would submit a second LUCS covering much of the same content as the first if City officials had not signaled their support for Zenith’s plans. Because we are being denied full information about the site visit and the City’s follow up meeting, we can only speculate on the finer details and motivations for the City’s conduct, but it is clear that the July 29, 2022 meeting at Zenith was a major turning point, afterwhich the City worked diligently on Zenith’s behalf toward a LUCS approval even while litigation over the 2021 LUCS denial was still ongoing.

On August 23, 2022, Grady Reamer sent an email to Kellie Torres from Commissioner Ryan’s office with a “working draft” LUCS application and offered to answer questions in person at an upcoming boat tour.³² After Reamer sent the “working draft” LUCS to the City, City officials remained in regular communication with Zenith and one another about the impending LUCS decision, and made at least one more site visit to Zenith.³³ **On August 29, 2022, Schoene sent an email to City Attorney Lauren King asking “[s]o who tells Zenith to hold off until we give them the green light to send to us officially the new LUCS?”**³⁴ The next day, there was a meeting about Zenith, and BPS Supervising Planner Tom Armstrong’s notes demonstrate that staff members at BPS were already fully apprised of the details of the forthcoming LUCS application.³⁵ **In these notes, there is also a curious entry – “Attorney communication - City/DEQ/Zenith alignment before submittal” – that seems to indicate that staff, elected officials, City attorneys, and possibly the Department of Environmental Quality were all on board with the negotiated deal for LUCS approval well prior to a formal administrative review of Zenith’s**

²⁹ “8.2.22 - Rubio” ([Link](#)).

³⁰ “Public Records Request #C296770-080823 response” ([Link](#)).

³¹ “8.4.22 - Reamer (Zenith VP)” ([Link](#)).

³² “8.23.22 - Torres” ([Link](#)).

³³ See public records, *supra* note 6; “8.23.22 - Torres” ([Link](#)) “8.26.22 - Harbor Industrial Tour Itinerary” ([Link](#)).

³⁴ “9.1.22 - Schoene” ([Link](#)) (a reminder update about a message to Lauren King sent three days earlier).

³⁵ See “8.30.22 - Armstrong” ([Link](#)).

application’s merits by BDS.³⁶ Together, these emails are strong evidence that a decision had already been made to approve the LUCS, and that the official process was just a formality and matter of timing.

City staff, including BDS Director Rebecca Esau, then further finessed the outcome of the application by working directly with Zenith on their draft LUCS to “summarize[] the clarifications we’d need to see in the LUCS,” and reported these activities directly to Commissioners Ryan and Rubio.³⁷ Before and after the formal submission of the LUCS application, Esau worked to facilitate Tribal outreach on behalf of Zenith.³⁸ Esau and King also met with Zenith representatives and attorneys to “go over what we still need [Zenith] to submit” and discussed the pending Oregon Supreme Court decision outside of settlement negotiations.³⁹ The City even coordinated media strategy with Zenith before it completed its formal review of the LUCS application.⁴⁰ On October 3, 2022, BDS approved Zenith’s LUCS application.

Taken together, these exchanges show that elected officials, political staff, City attorneys, and Bureau staff worked behind closed doors to engineer a predetermined outcome to grant Zenith the permissions it sought. The City knew about the details of the upcoming LUCS submission as early as July 29, 2022, and from that date forward worked closely with Zenith to prepare their formal submission and expedite approval.⁴¹ To achieve the outcome of an approved conditional LUCS, City officials continued *ex parte* coordination with Zenith, in the midst of litigation, and both before and after the second LUCS was formally submitted, so that BDS could promptly approve the LUCS without public scrutiny.⁴² Rather than acting in a regulatory capacity to protect the public trust, City officials acted more like agents of Zenith: ushering the company through the regulatory process, and taking its technical claims and market forecasts at face value, despite past instances of dishonest behavior from Zenith representatives.⁴³ Furthermore, while internal communications indicate that approval of the LUCS was a foregone conclusion by mid-September, 2022, the City represented itself to the media (with “city attorney approved” language) as though it had only just become aware of Zenith’s second LUCS submission, and was conducting an arms-length evaluation of judging its compatibility with the Comprehensive Plan.⁴⁴

Simultaneously, Zenith began branding itself to the public as a “renewable fuels” company, including by running television and internet advertisements in Portland about its plans to transition its terminal to 100%

³⁶ *Id.*

³⁷ See “9.1.22 - Esau” ([Link](#)).

³⁸ See “9.1.22 - Esau(2)” ([Link](#)); “9.12.22 - BDS Update to Ryan” ([Link](#)); “Combined Files - Records requests to and from Grady Reamer” 9/2/22 entries ([Link](#)); “9.26.22 - BDS Update to Ryan” ([Link](#)); “9.27.22 - Esau” ([Link](#)).

³⁹ See “Combined Files - Records requests to and from Grady Reamer” 9/19/22, 9/20/22, 9/22/22, and 9/26/22 entries (text messages between Reamer and Esau scheduling time with those two plus city attorney King) ([Link](#)); “9.26.22 - BDS Update to Ryan” ([Link](#)).

⁴⁰ See “Combined Files - Records requests to and from Grady Reamer” 9/29/22 entry ([Link](#)) (text message from Esau to Reamer about message coordination and disclosing that “Lauren [King] and Andy are still working on the findings”) ([Link](#)).

⁴¹ See “7.29.22 - Diefenderfer” ([Link](#)); see also “7.29.22 - Diefenderfer (transcription)” ([Link](#)).

⁴² And likely concurrent with the City’s preferred timeline for adopting the Renewable Fuel Standard Code Update. *About the RFS Code Update*, City of Portland (July 27, 2023, 10:10 AM) (Portland City Council adopted the Renewable Fuel Standard Code Update on Dec. 7, 2022), <https://www.portland.gov/bps/climate-action/renewable-fuel-standard/rfs-code-update/about-rfs>.

⁴³ See Section II.A. below.

⁴⁴ See “9.26.22 - Weeke” ([Link](#)) (describing the “attorney-approved language” for the press); “9.26.22 - Schoene” ([Link](#)) (“We also got the request. Was just going to give her the process answer for now”); “9.27.22 - Weeke” ([Link](#)) (failing to directly respond to Isabella Garcia’s questions).

renewable fuels in five years.⁴⁵ The timing of these advertisements – while the second LUCS application was being workshopped with the City, but its existence still unknown to the public – further indicates deep coordination between the City and Zenith to align messaging and influence public opinion about an already agreed-upon outcome.⁴⁶ **Also, despite apparent extensive communications between Zenith representatives and City officials, and time spent preparing materials, neither Zenith nor Pac/West appear to have filed lobbying reports with the City Auditor in the Third or Fourth Quarters of 2022.**⁴⁷

In the wake of the 2022 LUCS approval, advocates expressed concern about the decision, especially the fact that transporting, storing and transloading so-called “renewable fuels” poses the same risks to the community and environment as storing and transporting fossil oil.⁴⁸ In response to calls for a reconsideration of the decision and a public hearing, BDS Rebecca Esau responded, in part:

A LUCS is a form developed by state agencies to determine whether a state agency permit or approval, sought by a business, will be consistent with a local government’s comprehensive plan and land use regulations. The applicable state agency determines when the LUCS is required. The City completes the LUCS as an administrative matter. Consistent with Oregon law and the City of Portland’s Zoning Code, there is no required notice or hearing on a LUCS. The City reviews all LUCS in the same manner and does not establish new processes or procedures based on individual applications.⁴⁹

Many unanswered questions about timelines and the conduct of City officials remain, but the above evidence demonstrates the existence of significant procedural abnormalities surrounding the 2022 LUCS approval. At a minimum – and contrary to Esau’s contention that “[t]he City reviews all LUCS in the same manner” – many aspects of the interactions between the City and Zenith around the 2022 LUCS approval were exceptional to and inconsistent with previous *de facto* City procedures for LUCS decisions, and in violation of legal requirements for quasi-judicial decisions.

B. The City’s grant of a LUCS was a quasi-judicial decision, for which the City denied due process

In *Zenith v. City of Portland*, LUBA categorized Zenith’s LUCS as a quasi-judicial decision:

⁴⁵ “Advancing Portland’s Climate Goals” and “Investing in Renewable Fuels” videos available on Zenith Energy’s “Portland Terminals” site at <https://zenithterminals.com/terminals/portland-terminal>.

⁴⁶ Anecdotally, it was an open secret at city hall that Commissioner Dan Ryan resented having the Zenith decision identified with his office. *See, i.e.* “9.20.22 - Ryan” ([Link](#)) (Ryan complaining about Oregon state legislators sending a letter asking him to deny Zenith’s LUCS application in Fall 2021).

⁴⁷ Under Portland City Code, entities that spend more than 8 hours or more or at least \$1000 during any calendar quarter lobbying City of Portland officials must register with the City Auditor and file a report. Portland City Code §2.12 (2006). Under City code, “lobbying” means “attempting to influence the official action of City officials” and “includes time spent preparing emails and letters and preparing for oral communication with a City official.” None of the exceptions for lobbying in PCC 2.12.020(G) apply to Zenith’s activities. Zenith’s attempts to get a second LUCS constitute lobbying under city code.

⁴⁸ *See, i.e.* Monica Samayoa, “Portland approves Zenith Energy’s renewable fuels plan,” OPB (Oct. 3, 2022), available at: <https://www.opb.org/article/2022/10/03/portland-oregon-zenith-energy-crude-oil/>.

⁴⁹ Letter from Director of the Portland Bureau of Development Services Rebecca Esau to “coalition members” (November 21, 2022) (*italics added*), https://drive.google.com/file/d/1qdRjXzvQxoTmNEqNd02hrTEgNt5OLUCD/view?usp=drive_link.

In *Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm.*, the Supreme Court established a three-factor test to determine whether a land use matter is quasi-judicial or legislative:

1. Is the process bound to result in a decision?
2. Is the making of the decision bound to apply preexisting criteria to concrete facts?
3. Is the matter directed at a closely circumscribed factual situation or a small number of persons? 287 Or 591, 602-03, 601 P2d 769 (1979).

No factor is determinative, but answering two or three of those questions in the affirmative suggests that the matter is quasi-judicial in nature. *See id.* Here, there is no dispute that the city could not decline to reach a decision on the LUCS application or that the city applied existing criteria to the specific facts regarding petitioner's operation (though it is disputed which criteria the city was allowed to apply). It is also clear that the LUCS is directed only at the petitioner's operation. Accordingly, we conclude that, under state law, the city's decision must be viewed as a quasi-judicial decision.⁵⁰

Neither the City nor Zenith sought to appeal LUBA's finding on this issue, and indeed it was Zenith who made the argument that the LUCS was a quasi-judicial decision, in support of its contention that the reasons the City gave for denying the LUCS were inadequate. LUBA didn't even contemplate that Zenith's LUCS application could be an administrative decision, analyzing whether it was quasi-judicial or legislative. For LUBA, there was no question that a LUCS was at least quasi-judicial.

Yet, when questioned by advocates regarding the lack of transparency and public process in the decision, Rebecca Esau, Director of BDS, sought to characterize the LUCS as "a form developed by state agencies," which "The City completes[...] as an administrative matter."⁵¹ This characterization of the LUCS as purely "an administrative manner" is a distinction without a difference: "All acts of agencies and administrative officers are, in one sense or another, administrative. The question is whether this particular administrative action is quasi-judicial."⁵² To the extent that Esau's characterization suggested that the grant of a LUCS is an executive or purely ministerial decision, this is preposterous. Determining whether an individual facility's operations are consistent with local land use laws is fundamentally different to typical executive decisions of City governments, such as hiring an employee or entering into a contract for services.⁵³ Regardless, LUBA's decision in *Zenith v. City of Portland* is unambiguous that a LUCS decision is quasi-judicial, and the City was bound to follow that decision.

⁵⁰ *Zenith v. City of Portland*, *supra* note 4, LUBA No. 2021-083 at pages 25-26.

⁵¹ Esau, *supra* note 49

⁵² *Koch v. City of Portland*, 306 Or 444, 448 (1988).

⁵³ For a comparison of different types of city government decisions, see League of Oregon Cities, *FAQ on Legislative, Administrative and Quasi-Judicial Decisions* (Sep. 2017), <https://www.oregocities.org/application/files/3715/6036/1447/FAQ-Legislative-Admin-Quasi-JudicialCouncilDecisions9-8-17.pdf>.

Given that the 2022 LUCS approval was a quasi-judicial decision, the manner by which the City made that decision is very likely in violation of several laws. First, under Portland City Code, all quasi-judicial decisions require notice to neighborhood associations and neighbors within a certain distance of the subject property.⁵⁴ Despite this, the City simply ignored LUBA's decision in *Zenith v. City of Portland*, apparently did not provide notice of the application to any party, and instead asserted that "[t]here is not required notice or hearing on a LUCS."⁵⁵ The Linnton Neighborhood Association, whose boundaries include the subject property and surrounding impacted area, confirmed it did not receive any notice from the City. Second, the City's LUCS review and determination ignored ORS 197.797's requirements for local quasi-judicial land use hearings, notice requirements, and hearings procedures.⁵⁶ Third, failure to provide for public process and participation is also likely a violation of Statewide Planning Goal 1,⁵⁷ and the Due Process protections of Fourteenth Amendment.⁵⁸ These multiple violations, arising from the City's failure to properly characterize the 2022 LUCS approval as a quasi-judicial decision, are each grounds for finding that the LUCS review and determination was not legally sufficient.

C. The City's undisclosed *ex parte* communications with Zenith and general conduct regarding the second LUCS application exhibited prejudgment bias regarding a quasi-judicial decision

Oregon law – both common law and statutory schemas – is clear in its aims to ensure impartiality in land use decision making. The purpose of the impartiality requirement is “to counteract the ‘dangers of the almost irresistible pressures that can be asserted by private economic interests on local government.’”⁵⁹ Quasi-judicial decisions require “a tribunal which is impartial in the matter—i.e., having had no pre-hearing or *ex parte* contacts concerning the question at issue[.]”⁶⁰ “Impartiality can be destroyed in several ways, including acts of self-dealing, bias, and pre-hearing or *ex parte* contacts.”⁶¹

There are two recognized categories of bias: prejudgment and personal interest.⁶² Prejudgment bias invalidates quasi-judicial decisions where “actual bias” is established, which requires “explicit statements, pledges, or commitments that the elected local official has prejudged the specific matter before the tribunal.”⁶³ *Ex parte* contacts, similarly, may destroy impartiality, but not if those contacts “(1) were with

⁵⁴ PORTLAND CITY CODE §33.730.014 *et seq.*

⁵⁵ Esau, *supra* note 49.

⁵⁶ See also *Farrell v. Jackson County*, 39 Or LUBA 149 (2000) (describing a LUCS as a permit governed by ORS 215.416). The City equivalent to ORS 215.416 is ORS 227.175. Under ORS 227.175(10)(a)(A), a city could only not hold a hearing on a permit if it provided notice of decision governed by ORS 197.797 and opportunity for appeal.

⁵⁷ Or. Admin. R. 660-015-0000(1) (ensuring that the public has the opportunity to be involved in all phases of the planning process).

⁵⁸ See League of Oregon Cities, FAQ on Legislative, Administrative and Quasi-Judicial Decisions (Sep. 2017), 4 (“7. Do Citizens Have Any Legal Rights When the Council Makes a Quasi-Judicial Decision? Yes. The Fourteenth Amendment to the U.S. Constitution guarantees all people the right to ‘due process.’”), <https://www.orcities.org/application/files/3715/6036/1447/FAQ-Legislative-Admin-Quasi-JudicialCouncilDecisions9-8-17.pdf>.

⁵⁹ *Columbia Riverkeeper v. Clatsop Cnty.*, 341 P3d at 803, citing *Eastgate Theatre v. Bd. of County Comm'rs*, 37 Or App 745 at 754 (1978).

⁶⁰ *Fasano v. Washington Co. Comm.*, 264 Or 574, 588 (Or. 1973)

⁶¹ *Columbia Riverkeeper v. Clatsop Cnty.*, 341 P3d 790, 800 n.11 (Or Ct App 2014) (emphasis added), citing *1000 Friends of Oregon v. Wasco Co. Court*, 304 Or. 76, 81, 742 P2d 39 (1987), *cert. den.*, 486 US 1007, 108 S Ct 1733, 100 LEd2d 197 (1988).

⁶² *1000 Friends of Oregon v. Wasco Co. Court*, 304 Or 76, 83 (Or 1987).

⁶³ *Columbia Riverkeeper v. Clatsop Cnty.*, 341 P3d at 808.

disinterested persons, (2) amounted to an investigation of the merits of the proposed change, and ‘most importantly,’ (3) were made a matter of record so that the applicants had an opportunity to respond.”⁶⁴

As demonstrated in Section I.A., the City engaged in a substantial degree of *ex parte* communication with Zenith well prior to and after the submission of the conditional LUCS, actively sought to keep these communications out of the public record through actions designed to prevent transparency, and publicly represented its process as being free of such communications while coordinating media strategy with the Zenith. The record demonstrates that City officials functionally reached a decision to approve the LUCS well before the formal LUCS submission; most likely on or immediately after the July 29, 2022 Zenith site visit. Subsequent *ex parte* communications and conduct by City officials, including providing Zenith with line edits to a draft of its LUCS application prior to submission, and telling Zenith to “hold off” on formal submission until agency alignment could be reached, further exhibit actual bias to approve the LUCS.

Willamette Riverkeeper and Columbia Riverkeeper’s intervention in the litigation to support the City’s 2021 LUCS denial provides a potential explanation for why City officials and Zenith pursued *ex parte* communications about the submission of a second LUCS application while litigation over the 2021 LUCS denial was still pending. That is, even though entering into settlement negotiations could have yielded a similar outcome, Columbia Riverkeeper and Willamette Riverkeeper would presumably have been aware of and able to participate in those negotiations. **Instead, by conducting *ex parte* negotiations with Zenith, the conditions of the 2022 LUCS approval could be negotiated without the input or knowledge of either intervenor, and then submitted and approved in too short a window for proper public scrutiny.**

The City’s *ex parte* communications with Zenith were not with a disinterested party, were not placed on the record of decision, and no other interested party was given notice of, or an opportunity to respond to, those communications. On the contrary, City officials frustrated disclosure of and transparency around these communications in multiple ways. As mentioned above, Jillian Schoene responded to public records requests by asserting that there were no notes from the July 29, 2022 tour of Zenith.⁶⁵ After the existence of written notes was discovered, Schoene’s name was apparently physically redacted then re-entered into the notes, without explanation.⁶⁶ At least one member of City staff gave instructions to leave Zenith out of subject headings in intra-City communications.⁶⁷ The City has refused, on the basis of attorney-client privilege, to disclose records of communications between City Attorney Lauren King and Zenith’s counsel and/or representatives, indicating that further *ex parte* communication

⁶⁴ *Columbia Riverkeeper v. Clatsop Cnty.*, 341 P3d at 802, citing *Tierney v. Duris, Pay Less Properties*, 21 Or App 613, 629 (1975). ORS 215.422(3) further provides that:

“No decision or action [...] shall be invalid due to *ex parte* contact or bias resulting from *ex parte* contact with a member of the decision-making body, if the member of the decision-making body receiving the contact:

“(a) Places on the record the substance of any written or oral *ex parte* communications concerning the decision or action; and

“(b) Has a public announcement of the content of the communication and of the parties’ right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication related.”

⁶⁵ See Public Records Request #C293791-072023 response ([Link](#)).

⁶⁶ See “7.29.22 - Diefenderfer” ([Link](#)); see also “7.29.22 - Diefenderfer (transcription)” ([Link](#)); “8.8.23 Caleb physical inspection of Diefenderfer notes from 7.29.22” ([Link](#)).

⁶⁷ See “9.26.22 - Guillen-Chapman” ([Link](#)) (“Topic, communication for Zenith’s revised LUCS, but for the subject heading only use “LUCS Communication.”).

between the City and Zenith exists beyond what has been disclosed.⁶⁸ The City was also asked directly by a journalist whether they were “aware of Zenith’s proposal prior to public announcement on September 15[, 2022],” and refused to respond directly. Instead, the City responded on September 27 that “[t]he City is reviewing the submittal and will consider whether the proposal is consistent with the 2035 Plan.”⁶⁹ This response was communicated less than one week before the LUCS was issued, and after records show City officials were already discussing approval of the LUCS as *fait accompli*. The extent to which City officials attempted to avoid transparency and withhold disclosure of *ex parte* communications regarding Zenith’s second LUCS application undermines any semblance that the 2022 LUCS approval was made impartially, and is further evidence of prejudgment bias.

D. The City failed to adhere to its own (vague) LUCS precedent and processes

In a letter to “coalition members” on November 21, 2022, Rebecca Esau, Director of BDS asserted that “The City reviews all LUCS in the same manner and does not establish new processes or procedures based on individual applications.”⁷⁰

As mentioned above, the assertion that the City did not establish new processes and procedures for Zenith’s second LUCS application is plainly false and contradicted by evidence uncovered during records requests. Beyond calling the decision “administrative” in the LUCS approval document, neither Esau or BDS identified the review procedure in City Code that was utilized for the Zenith LUCS decision. As far as we are aware, there is no provision of Portland City Code that describes a process for LUCS review.⁷¹ Regardless, the City’s insistence that Zenith’s LUCS was reviewed in an “administrative” manner is undermined by the City’s own explainer for how to use its Comprehensive Plan, where “administrative process” is described as follows:

Administrative decisions are those made under clear and objective standards without exercise of discretion. An example includes application of numerical setback standards in the Zoning Code, or the determination of needed public improvements based on street classification maps in the Comprehensive Plan, and published engineering standards.

⁶⁸ On Aug. 14, 2023, the City responded to a request of City attorney communications with Zenith’s attorneys by asserting exemptions to disclosure under ORS 192.355(9)(a) and incorporating ORS 40.225 (OEC 503(2)). For records that suggest the content of these communications may not fall under attorney-client privilege, *see, i.e.*, “9.1.22 - Esau” ([Link](#)) (labeling communications about *ex parte* Zenith negotiations as “Attorney-Client Communication”); “9.26.22 - BDS Update to Ryan” ([Link](#)) (acknowledging that negotiations with Zenith have been taking place outside of the context of settlement negotiations); “9.27.22 - King” ([Link](#)) (city attorney communicating directly with Zenith about a second LUCS outside of the context of settlement negotiations while litigation is ongoing). On Aug. 14, 2023, the City responded to a request of City Attorney communications with Zenith’s attorneys by asserting exemptions to disclosure under ORS 192.355(9)(a) and incorporating ORS 40.225 (OEC 503(2)).

⁶⁹ “9.27.22 - Weeke” ([Link](#)).

⁷⁰ Esau, *supra* note 49.

⁷¹ When one downloads the City’s 2022 LUCS approval (available [here](#)) and opens it in a web browser, the words “Notice of a type II decision on a proposal in your neighborhood” appear in the upper left corner of the page. There’s no evidence that the City gave notice to anyone about its process or the decision. Also, the text of the decision does not reference a type II process. Screenshot available [here](#). Based on the repeated use of the word “administrative” by BDS and the fact that the City’s 2022 LUCS approval uses the words “type II decision” in the file header, the City appears to have attempted to align its rhetoric or used a template from a Type II decision. According to Portland City Code 33.730.020, a Type II decision is an “administrative process” made by bureau staff (“[t]he Type II procedure is the shortest and simplest of the other three quasi-judicial reviews. It is intended for reviews which involve lesser amounts of discretion, lower potential impacts, or both.”).

Administrative decisions are typically made by City staff and are not individually reviewed against the goals and policies of the Comprehensive Plan.⁷²

The City individually reviewed Zenith’s first and second LUCS applications against the goals and policies of the Comprehensive Plan. Furthermore, as demonstrated above, evidence acquired through public records requests demonstrates that this decision was subject to intense and overt influence by elected officials and their staff. The City’s own description of “administrative process” is clearly inconsistent with how it actually assessed Zenith’s LUCS, with an enormous amount of discretion in the form of *ex parte* negotiations and accommodations from elected officials, City attorneys, and City staff. The classification of this process is also at odds with LUBA’s conclusion that a LUCS is a quasi-judicial decision involving discretion and requiring review against the goals and policies of the Comprehensive Plan.⁷³ The evidence shows an arbitrary and capricious LUCS review process that was designed to arrive at a result that was determined well before Zenith submitted its formal LUCS application.

Regardless of how many times City officials assert that the 2022 LUCS approval process merely followed precedent, as a practical matter, it is not possible that each previous LUCS process involved the same degree of close coordination with and handholding of applicants. Indeed, to our knowledge, the level of coordination and pre-submission communication with Zenith far exceeds that of the denied 2021 application. Nor could each previous LUCS process have involved *ex parte* communications outside of the context of settlement negotiations with a litigant regarding the same subject matter that was being litigated. On the contrary, this process was *unprecedented* and did not adhere to any formal rule or established precedent.

To our knowledge, the City had never previously conducted a review of a conditioned LUCS. Furthermore, Oregon statutes and administrative rules do not appear to contemplate the use of a conditioned LUCS, especially one that stipulates changes to *future* activities. A LUCS is intended to judge whether a facility’s *existing* activity complies with a city’s comprehensive plan; the standard by which the City denied Zenith’s 2021 LUCS.⁷⁴ Instead of a review procedure to determine the compatibility of Zenith’s existing operations with its acknowledged Comprehensive Plan, the City and Zenith treated the conditional LUCS more like a contract negotiation with Zenith offering terms for future performance in exchange for authorization.⁷⁵ The existence of any proposed conditions in a LUCS presupposes significant discretion and further distances the 2022 LUCS approval from an “administrative” decision. Furthermore, the legality of this arrangement has never been tested and it is possible that the terms of the conditional LUCS would be unenforceable

⁷² See *How to Use the Plan*, CITY OF PORTLAND, p. 4 (March, 2020) (emphasis added), https://www.portland.gov/sites/default/files/2019-08/00_how_to_use.pdf.

⁷³ PORTLAND CITY CODE §33.730.010.

⁷⁴ See, *i.e.* PR 21-048534 LUCS, CITY OF PORTLAND (Aug 27, 2021) (“[w]hile some of the changes at the site include a move toward bio-fuels, and needed safety measures, the extent of the fossil fuel activity and potential adverse impact on the environment and historically marginalized groups is not compatible with the following Comprehensive Plan policies[.]”), [https://portlandor.govqa.us/WEBAPP/rs/\(S\(gz2h0jutzgokm0iurd4i1xmd\)\)/DownloadFile.aspx?sSessionID=&aid=192252&fid=268695](https://portlandor.govqa.us/WEBAPP/rs/(S(gz2h0jutzgokm0iurd4i1xmd))/DownloadFile.aspx?sSessionID=&aid=192252&fid=268695)

⁷⁵ The Oregon Court of Appeals has interpreted state administrative rules as not foreclosing local government LUCS withdrawals or alterations even after a DEQ permit is granted, implying that a local government cannot bargain away its future regulatory authority through a conditional LUCS. *Grabhorn v. Wash. Cnty.*, 279 Or App 197, 221-22 (2016) (“the rule [OAR 340-018-0050(2)(a)] is designed to ensure state agency compatibility with local comprehensive plans and land use regulations, not to restrict the local government’s ability to alter those plans and regulations).

should Zenith fail to follow through on its commitments. In contrast to the unprecedented use of a conditional LUCS to specify future activities, the City correctly utilized the LUCS process in 2021 by determining that Zenith’s actually existing operations violated its acknowledged Comprehensive Plan, only erring in the level of detail provided in its denial rationale.⁷⁶

Finally, in the City’s 2021 LUCS denial decision, Commissioner Dan Ryan cited the lack of consultation with Tribal governments as a rationale for denial.⁷⁷ By basing the 2021 LUCS denial, in part, on a lack of Tribal outreach, the City arguably established the precedent of a new criteria for review that it then failed to incorporate in its 2022 LUCS approval. Internal communications show that City officials treated Tribal outreach as binding precedent from the 2021 LUCS denial, and tried to coordinate an outreach process on Zenith’s behalf, but the City instead appears to have sent a letter requesting that DEQ perform outreach instead when it could not complete that outreach within the City’s apparently arbitrary expedited internal timeline to issue the approval.⁷⁸ Again, this unprecedented activity clearly contradicts Rebecca Esau’s statement that “[t]he City reviews all LUCS in the same manner and does not establish new processes or procedures based on individual applications.”⁷⁹

E. Summary

Recently acquired evidence shows that elected officials, their staff, City attorneys, and Bureau staff at the City negotiated a backroom deal with Zenith over its conditional LUCS application while litigation over the denial of Zenith’s previous LUCS application was pending. In reaching its formal decision to approve the LUCS, the City ignored a ruling from LUBA that required it to treat the LUCS as a quasi-judicial decision; conducted undisclosed *ex parte* negotiations with Zenith regarding the LUCS application, while actively litigating against Zenith over the same matter; blatantly disregarded legislated procedures for quasi-judicial decisions, and its own rules and standards; attempted to withhold important information from the public; and otherwise acted arbitrarily and capriciously. This clear legal insufficiency warrants a denial of Zenith’s ACDP permit application, a stern rebuke to City officials for their activities, and a further investigation into the coordination between Zenith and City officials.

⁷⁶ *Zenith v. City of Portland*, supra note 4, LUBA No. 2021-083 at 29 (“the city must explain why petitioner's use is "not allowed under" the goal and policies in the 2035 Plan that the city found apply and why the use is not "capable" of existing "without discord or disharmony" with those provisions.”). Although this letter is primarily about procedural deficiencies, it makes sense to include at least a brief mention that the “potential adverse impact on the environment and historically marginalized groups” that motivated the 2021 LUCS denial is not qualitatively or quantitatively reduced in the 2022 LUCS approval. This glaring inconsistency is inadequately justified by the City’s findings in the 2022 LUCS approval. And, the City’s secretive activities combined with a lack of a public hearing mean that the public was denied an important opportunity to present important facts about the harms posed by Zenith’s operations described in the conditional LUCS proposal and demonstrate that the majority of Zenith’s supposed concessions are illusory.

⁷⁷ Commissioner Ryan’s Statement on the City of Portland’s Denial of Zenith’s Land Use Compatibility Statement (Aug. 27, 2021) (“The journey to this decision was essential—building the appropriate foundation of understanding and consensus, and the need to consult with tribal governments in the region.”). <https://www.portland.gov/ryan/news/2021/8/27/commissioner-ryans-statement-city-portlands-denial-zeniths-land-use>.

⁷⁸ See “9.12.22 - BDS Update to Ryan” ([Link](#)); “9.26.22 - BDS Update to Ryan” ([Link](#)).

⁷⁹ Esau, supra note 49.

II. ZENITH'S ACTIVITIES POSE A SERIOUS DANGER TO PUBLIC HEALTH, SAFETY, AND THE ENVIRONMENT

Pursuant to Or. Admin. R. 340-216-0082(5)(b), “[i]f DEQ finds there is a serious danger to the public health, safety or the environment caused by a permittee’s activities, DEQ may immediately revoke or refuse to renew the permit without prior notice or opportunity for a hearing.” For the following reasons, Zenith Energy’s activities clearly pose a serious danger to public health, safety, and the environment.

A. Zenith has uniquely dangerous operations and a track record of dishonesty

Zenith is the only terminal in the Portland Harbor accepting Canadian crude oil shipments and transloading them for export.⁸⁰ After acquiring title to the terminal property in 2017, Zenith immediately, and without any public review or authorization, began intensifying petroleum activity. In 2018, Zenith reportedly moved 240,000 barrels of Canadian heavy crude oil directly to China.⁸¹ Since then, its crude oil throughput (based on figures for marine throughput) has continued to increase by a substantial rate each year; in 2020, Zenith moved a total of 234,864,638 gallons of crude oil; in 2021, Zenith moved 312,226,754 gallons of crude oil and 24,563,058 gallons of diesel; and in 2022 Zenith moved 346,411,926 gallons of crude oil.⁸²

Zenith has failed to comply with important regulations throughout its time in operation. In 2018, Zenith performed a cleanup exercise under DEQ’s oil spill cleanup program, but used diesel rather than the harder-to-clean-up Canadian heavy crude oil it was actually transporting.⁸³ Zenith claimed it made the decision to use diesel in the exercise because it was transitioning to diesel transloading. However, at the time, Zenith only had three small tanks in use for diesel, and as records show, it has continued to expand its crude oil transloading.⁸⁴

Moreover, in 2021, Zenith’s construction activities took place for at least eight months without required coverage under the NPDES Construction Stormwater General Permit.⁸⁵ DEQ noted that their failure to obtain coverage under the permit and employ the necessary sediment controls posed a risk of harm to the Willamette River, possibly discharging dangerous sediment into the waterway.⁸⁶ Zenith’s consistently poor track record in complying with environmental regulations undermines any confidence that Zenith will

⁸⁰ Tony Schick, *Canadian Crude Oil Is Going By Rail To Portland Before Shipping Off To Asia*, OREGON PUBLIC BROADCASTING (March 16, 2018), <https://www.opb.org/news/article/crude-oil-rail-portland-oregon-canada-ship-china/>; Monica Samayoa, *Zenith Energy to Phase Out Crude Oil at Portland Terminal*, OREGON PUBLIC BROADCASTING (Sept. 16, 2022), <https://www.opb.org/article/2022/09/16/zenith-energy-to-phase-out-crude-oil-at-portland-terminal/>.

⁸¹ *Id.*

⁸² 26-2025-TV-01 2020 Annual Report, https://www.deq.state.or.us/AQPermitsonline/26-2025-TV-01_AR_2020.PDF; 2021 Annual Report, https://www.deq.state.or.us/AQPermitsonline/26-2025-TV-01_AR_2021.PDF; 2022 Annual Report, https://www.deq.state.or.us/AQPermitsonline/26-2025-TV-01_AR_2022.PDF; see also Gosia Wozniacka, *Zenith Energy is moving more crude, diesel through Portland*, THE OREGONIAN (Feb. 22, 2023), <https://www.oregonlive.com/environment/2023/02/zenith-energy-is-moving-more-crude-diesel-through-portland.html>.

⁸³ Gordon R. Friedman, *Oregon Exporter Dodged Crude Oil Preparedness Drill*, THE OREGONIAN (April 14, 2019), <https://www.oregonlive.com/portland/2019/04/oregon-exporter-dodged-crude-oil-spill-preparedness-drill.html>.

⁸⁴ *Id.*

⁸⁵ Notice of Civil Penalty Assessment and Order, OREGON DEQ OFFICE OF COMPLIANCE AND ENFORCEMENT (July 7, 2021), <https://www.oregon.gov/deq/nr/0721ZenithEnergy.pdf>.

⁸⁶ *Id.*

comply with the conditions of the 2022 LUCS approval, and therefore should caution state regulators against any additional permitting for their operations.

Reports filed with Oregon's DEQ in previous years show steady increases in fuel moved since 2019,⁸⁷ despite Zenith's 2018 promise to Oregon regulators in its permit application that a planned expansion of its terminal would not lead to such an increase.⁸⁸ Thus, Zenith submitted false information in official forms to DEQ.

B. Zenith poses serious public health and safety risks to Oregonians and our environment

Oil-by-rail operations like Zenith pose serious health and safety risks to the communities in which they operate. These risks include everything from the highly toxic and carcinogenic chemicals released during loading, transport, and unloading of the crude oil, to the risk of train derailments that can cause deadly explosions and leave behind residues containing heavy metals.⁸⁹

a. Risk of continued air and water pollution from daily operations

The air pollution from oil train traffic and daily terminal facility operations can increase local residents' risk of cancer and childhood neurodevelopmental disorders.⁹⁰ Exposure to diesel particulate matter, another substance transported by Zenith, is linked to infant bronchitis, asthma, lung disease, heart disease, and death.⁹¹ There are also strong concerns that oil-loading accidents or oil storage leaks may pollute drinking water systems. Chemicals in crude oil can damage organs in several ways, and in some cases they can lead to cancer and reproductive health risks.⁹² Oil contamination of seafood is of significant concern as well, as is pollution of subsistence and tribal fishing resources; nearly all of the 29 federally recognized tribes of Washington State have the potential to be impacted by rail or marine incidents associated with crude oil transportation.⁹³

b. Risk of oil train derailments and acute exposure to toxic chemicals

According to the Office of the National Rail Safety Regulator's 2019-2020 Rail Safety Report, between 2019 and 2020 there were 36 running line derailments involving freight trains, 152 rail-related serious injuries and 84 rail-related fatalities, 190 instances of freight trains exceeding the limit of their authorized

⁸⁷ Air Quality Permit Data, OREGON DEPT. OF ENV. QUALITY (July 19, 2023, 9:26 AM), <https://www.deq.state.or.us/aq/aqpermitsonline/SearchResult.asp?sourcenummer=&sourcename=&streetaddress=5501+NW+Fro nt&city=Portland&zip=&county=&deqregion=&permitnumber=&permitttype=&documenttype=&yearissued=¤tdocument only=1>.

⁸⁸ Zenith Energy Off Permit Change Notification, OREGON DEPT. OF ENV. QUALITY (July 19, 2023, 9:27 AM), <https://www.documentcloud.org/documents/23687436-zenith-no-new-throughput-doc>.

⁸⁹ Diane Bailey and Danielle Droitsch, *Tar Sands Crude Oil: Health Effects of a Dirty and Destructive Fuel*, NATURAL RESOURCES DEFENSE COUNCIL (February 2014), <https://www.nrdc.org/sites/default/files/tar-sands-health-effects-IB.pdf>.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

movement, and 83 train fires, including both passenger and freight trains.⁹⁴ Between 2013 and 2021, North America had seen at least 21 major oil train accidents.⁹⁵ In February 2023, the Norfolk Southern Railway train derailment in East Palestine, Ohio included eleven tank cars carrying hazardous materials that subsequently ignited, fueling fires that damaged an additional twelve non-derailed railcars.⁹⁶ Oregon is not immune to these derailments. In 2016, a Union Pacific 96-car unit train carrying Bakken crude oil derailed in Mosier, Oregon adjacent to Highway 30, Interstate-84, and the Columbia River.⁹⁷ Sixteen cars derailed in total, with three of the rail cars catching fire and four discharging oil.⁹⁸ Emergency management officials had to evacuate 147 residents from an adjacent neighborhood and put the rest of the town on a precautionary alert.⁹⁹ Moreover, crude oil from the derailment threatened to discharge into nearby Rock Creek, an adjacent wetland, and the Columbia River.¹⁰⁰

The Oregon and Washington chapters of Physicians for Social Responsibility recently analyzed 125 peer-reviewed medical journal articles and other reliable medical sources, finding over 300 medical professionals who describe crude oil by rail buildout in the Northwest as “an unacceptable threat to human health and safety.”¹⁰¹ The Multnomah County Office of Sustainability assessed the community risk of shipping crude oil by train car rail through Multnomah County in 2016, finding a variety of concerns.¹⁰² First, more than a quarter of the Multnomah County population lives within the half-mile “evacuation zone” around the oil transport route, including 108 schools and a 100 child care facilities.¹⁰³ Additionally, the impact from a major incident involving an oil train would extend beyond the immediately impacted area due to toxic smoke pluming.¹⁰⁴ Finally, the report found that the rapid increase of oil by rail has eclipsed the response capabilities of the local emergency responders and funding for those capabilities has not kept pace.¹⁰⁵

In the case of an oil tank or train accident, community members could likely be exposed to chemical substances such as crude oil diluted bitumen, which contains benzene, polycyclic aromatic hydrocarbons, and n-hexane, all toxins that can affect the human central nervous systems.¹⁰⁶ This means individuals in the

⁹⁴ 2019-2020 Rail Safety Report, OFFICE OF THE NATIONAL RAIL SAFETY REGULATOR (June 2020), <https://nraspricms01.blob.core.windows.net/assets/documents/Publication/ONRSR-2019-2020-Rail-Safety-Report.pdf>.

⁹⁵ Zane Gustafson and Eric de Place, *Timeline of Oil Train Derailments*, SIGHTLINE INSTITUTE (February 2021), <https://www.sightline.org/2021/02/26/a-timeline-of-oil-train-derailments-in-pictures/#:~:text=Since%202013%2C%20North%20America%20has,oil%20train%20accidents%E2%80%94and%20counting&ext=The%20Northwest%20dodged%20a%20bullet,train%20derailed%20and%20caught%20fire>.

⁹⁶ Preliminary Report on the February 3, 2023 Norfolk Southern Railway Train Derailment with Subsequent Hazardous Material Release and Fires in East Palestine, Ohio, UNITED STATES NATIONAL TRANSPORTATION SAFETY BOARD (February 2023), <https://www.nts.gov/investigations/Documents/RRD23MR005%20East%20Palestine%20OH%20Prelim.pdf>.

⁹⁷ Mosier Oil Train Derailment, U.S. ENVIRONMENTAL PROTECTION AGENCY (June 2016), https://response.epa.gov/site/site_profile.aspx?site_id=11637.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Report on NW Doctors Opposing OBR Development, PHYSICIANS FOR SOCIAL RESPONSIBILITY (2015), <https://www.sightline.org/2015/09/02/why-northwest-doctors-oppose-oil-by-rail-development/>.

¹⁰² Multnomah County Oil-By-Rail Cargo Movement Briefing, MULTNOMAH COUNTY OFFICE OF SUSTAINABILITY (January 2016), <https://www.multco.us/sustainability/briefing-oil-rail-cargo-movement-multnomah-county>.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Anthony Swift, Susan Casey-Lefkowitz, and Elizabeth Shope, *Tar Sands Pipelines Safety Risks*, NATURAL RESOURCES DEFENSE COUNCIL, ET. AL (Feb. 2011), <https://pstrust.org/docs/TarSandsPipelineSafetyRisksFINALFINAL.pdf>.

immediate vicinity of an oil train derailment would be at risk of respiratory, gastrointestinal, and neurological symptoms consistent with acute exposure to benzene and other petroleum related chemicals.¹⁰⁷ Long-term exposure to benzene and polycyclic aromatic hydrocarbons has also been known to cause cancer.¹⁰⁸ The oil diluted bitumen also contains vanadium, nickel, arsenic, and other heavy metals with a variety of toxic effects, all of which are not biodegradable and can accumulate in the environment to become health hazards to people as well as wildlife.¹⁰⁹

c. Heightened risk of accidents given seismic vulnerability

Zenith's Portland terminal is especially vulnerable to these hazards given its location, as determined by The Multnomah County Office of Sustainability and the City of Portland Bureau of Emergency Management's recent seismic risk study.¹¹⁰ The study characterized and quantified the anticipated damages from the CEI Hub in the event of the Cascadia Subduction Zone (CSZ) Earthquake. The study found that there is an estimated 26% likelihood of a major seismic event in the next 50 years.¹¹¹ The total potential releases from the materials stored in tanks at the CEI Hub range from 94.6 million to 193.7 million gallons—potentially larger than the spill of 134 million gallons at the BP Deepwater Horizon oil spill disaster in the Gulf of Mexico that was the country's largest oil spill to date.¹¹² Because the CEI Hub is so close to the Willamette River and the dense urban core in the City of Portland, the risk of an accident, spill, or major infrastructure failure is particularly concerning. The monetized costs could range up to \$2.6 billion and based on prior spills, total costs and damages would likely be many multiples of the monetized amount.¹¹³

d. Disproportionate risk along racial and class lines

Findings on the health and safety impacts of Zenith's operations are compounded when factoring in racial and class-specific impacts. Research analyzing air pollution data from the Cleaner Air Oregon program shows people of color are more likely to live near Portland's biggest polluters—38% of people of color in the city live within two kilometers (1.24 miles) of the city's top-ten polluters compared with 33% of the white population.¹¹⁴ Moreover, of all the historically redlined areas, 42% are within one kilometer (0.62 miles) of the city's top-ten industrial polluters.¹¹⁵

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ CEI Hub Seismic Risk Analysis, MULTNOMAH COUNTY OFFICE OF SUSTAINABILITY & CITY OF PORTLAND BUREAU OF EMERGENCY MANAGEMENT (Feb. 2022), <https://www.multco.us/sustainability/cei-hub-seismic-risk-analysis>.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Cassandra Profita, *Study: More People Of Color Live Near Portland's Biggest Air Polluters*, OREGON PUBLIC BROADCASTING (April 2020), <https://www.google.com/url?q=https://www.opb.org/news/article/oregon-portland-study-people-of-color-polluted-neighborhoods-redlining-covid-19/&sa=D&source=docs&ust=1680111789753603&usg=AOvVaw2fysgdBAjC61ICqDM2CIV>.

¹¹⁵ *Id.*

e. So-called “renewable fuels” contain the same risks in storage and transport

Although so-called renewable alternatives to traditional diesel, gasoline, and oil have certain benefits in terms of air emissions when combusted,¹¹⁶ their functional operation and risks from storage and transport are quite similar. Although this is convenient for petroleum fuel companies like Zenith who have invested in the infrastructure to store and transport such liquid fuels, it also means that the use of these renewable alternatives poses many of the same health and safety risks to the local community.

Biodiesel production involves highly flammable chemicals such as methanol and sodium methylate, which makes Zenith’s promise to move only renewable fuels meaningless in terms of the risk of fires and explosions.¹¹⁷ Trains transporting renewable fuels also derail, catch fire, and explode, and in the case of an earthquake, the tanks carrying these substances would be at risk of combusting as well. Biodiesel production also often includes other harmful chemicals such as sulfuric acid, posing additional hazards to public safety in terms of chemical reactivity and toxicity.¹¹⁸ Again, trains transporting renewable fuels also derail and spill, and tanks carrying these substances can crack and leak as well, especially in areas of seismic vulnerability.

Unsurprisingly, several accidents involving biodiesel plants have occurred in the U.S. in recent years.¹¹⁹ Biodiesel-related accidents have included fatalities and injuries from burns, explosions, and chemical exposures.”¹²⁰ Therefore, even in the best-case-scenario where Zenith complies with their promised conversion to fully renewable fuel, 1) the continued tank storage of Zenith’s fuel on the Willamette riverfront directly below Forest Park means that an explosion or spill could fill the river with pollutants and set fire to Portland’s largest forested area and 2) the continued train transport of Zenith’s fuel means that an explosion or spill could injure or kill local Oregonians who live, work, or commute near a rail line. Each end of Zenith’s operations poses a very real public health and safety threat, and the conversion from petroleum-based to renewable fuels does not meaningfully mitigate the risk. In fact, the risk could be enhanced if quantities of liquid fuel storage and transloading continue to increase.

As recent public record disclosures indicate that Zenith plans to significantly increase its operations and become a major biofuels hub for the entire West Coast, the City should have considered (and DEQ should consider) the increased inherent risks with these types of fuels. Increased storage and transport of renewable fuels does not mean that Portland communities will see any air emissions benefits from combustion. In addition, increased quantities of renewable fuels could undermine the climate argument for the LUCS approval (renewable fuels are still CO₂/GHG intensive – i.e. their carbon intensity is not zero – such that greater quantities of biofuels will have similar GHGs to lesser quantities of conventional fuels).

¹¹⁶ Biodiesel vs. Diesel: Everything You Need to Know, CAR AND DRIVER MAKES AND MODELS (August 10, 2023, 12:58 PM), caranddriver.com/research/a31883731/biodiesel-vs-diesel/.

¹¹⁷ Luca Marmo, Fire and explosion risk in biodiesel production plants: a case study, ICHEM (2017), <https://www.icheme.org/media/15470/paper-20.pdf>.

¹¹⁸ Safety and Health Topics Green Job Hazards, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR (August 10, 2023, 9:27 AM), <https://www.osha.gov/green-jobs/biofuels>.

¹¹⁹ Luca Marmo, Fire and explosion risk in biodiesel production plants: a case study, ICHEM (2017), <https://www.icheme.org/media/15470/paper-20.pdf>

¹²⁰ Safety and Health Topics Green Job Hazards, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR (August 10, 2023, 9:27 AM), <https://www.osha.gov/green-jobs/biofuels>

C. CONCLUSION

Recently acquired evidence shows that elected officials, their staff, City attorneys, and Bureau staff at the City negotiated a backroom deal with Zenith over its conditional LUCS application while litigation over the denial of Zenith's previous LUCS application was pending. In reaching its formal decision to approve the LUCS, the City ignored a ruling from LUBA that required it to treat the LUCS as a quasi-judicial decision; conducted undisclosed *ex parte* negotiations with Zenith regarding the LUCS application, while actively litigating against Zenith over the same matter; blatantly disregarded legislated procedures for quasi-judicial decisions, and its own rules and standards; attempted to withhold important information from the public; and otherwise acted arbitrarily and capriciously. DEQ should not legitimize a LUCS process that is clearly not legally sufficient. The proper course of action is to deny Zenith's ACDP under Or. Admin. R. 340-018-0050(2)(a)(C).

Zenith's threat to Oregonians' health and safety – from the transport, storage, and transloading of fossil fuels and “renewable fuels” – is not confined to those risks directly adjacent to its existing terminal at 5501 NW Front Ave in Portland. The various risks associated with oil trains are imposed on cities along railroads throughout the state, in addition to the many Oregon residents who will suffer from air and water pollution as well as contributions to climate change. The City of Portland ignored these and other risks in granting Zenith's LUCS. Zenith is a statewide polluter, a statewide threat to public health and safety, and a statewide responsibility. DEQ should deny Zenith's ACDP application under Or. Admin. R. 340-216-0082(5)(b).

Thank you for your consideration. We are eager to discuss these matters further at your convenience.

Sincerely,

Nick Caleb, Climate and Energy Attorney with Breach Collective

Josie Moberg, Climate Movement Legal Fellow with Breach Collective

Travis Williams, Executive Director & Riverkeeper, Willamette Riverkeeper

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