

Date: May 13, 2024
To: Environmental Quality Commission
From: Leah Feldon, Director
Subject: Agenda item G, Action item: Petition for Declaratory Ruling
May 23, 2024, EQC meeting

Purpose of item The purpose of this item is to determine if the commission will exercise its discretion to issue a declaratory ruling to determine that the City of Portland’s 2022 conditional Land Use Compatibility Statement (“LUCS”) for Zenith Energy is inadequate.

The Northwest Environmental Defense Center, Columbia Riverkeeper, Breach Collective, the Linnton Neighborhood Association, and Willamette Riverkeeper (collectively “Petitioners”), jointly submitted a petition for a declaratory ruling, pursuant to the Oregon Administrative Procedures Act, to the commission on April 8, 2024. The petition asks the commission to declare that the City’s LUCS issued to Zenith “may not be legally sufficient,” as that term is used in OAR 340-018-0050(2)(a)(C), and to direct DEQ either to deny Zenith’s application for an Air Contaminant Discharge Permit, or to remand the LUCS to the City for a new land use decision.

The commission is required to notify Petitioners within 60 days of receiving the petition (by June 7, 2024) if they will issue a ruling. The commission has discretion to give or refuse to give a declaratory ruling.

Background Zenith Energy Terminal Holdings, LLC is a fuel products transloading facility. The company accepts crude oil, diesel, renewable fuels and other fuel products from one mode of transportation, like railcars, and passes them along to another, such as marine vessels. In the interim, fuel products are stored at the facility in above-ground tanks. Zenith Energy is located at 5501 NW Front Avenue in northwest Portland.

The Zenith facility was previously operated as an asphalt plant, and it holds an administratively extended Title V permit from DEQ to authorize such operations. Zenith is currently operating in compliance with its expired Title V permit. Zenith may continue operating under the expired permit because it filed a timely permit renewal application. Zenith has applied for an Air Contaminant Discharge Permit to authorize fuel transloading operations and cease its authority to operate an asphalt plant. Such new operations would no longer require a Title V permit.

In 2021, when considering Zenith’s Title V permit renewal application, DEQ determined that, due to a change in Zenith’s operations, it needed to provide

DEQ with an updated LUCS from the City of Portland. The City initially denied Zenith's application for a LUCS, and on that basis DEQ proposed to deny Zenith's application for renewal of its Title V permit. Zenith appealed both of those decisions. DEQ agreed to put Zenith's permit denial decision on hold pending its appeal of the City's denial of the LUCS. The Oregon Land Use Board of Appeals upheld the City's authority to deny the LUCS, but remanded the matter back to the City to make certain required findings in support of its denial.

While that original LUCS decision was on remand, Zenith applied to the City of Portland for a new LUCS, including adding several conditions to limit its operations. Most notably, Zenith committed to stop transloading crude oil within five years of the issuance of the LUCS. The City approved Zenith's new application and issued it a LUCS on Oct. 3, 2022.

Zenith provided the LUCS to DEQ, and on that basis DEQ agreed to withdraw its proposed decision denying Zenith's Title V permit renewal application. Zenith subsequently filed its ACDP application on Nov. 11, 2022. DEQ has been processing that application since that time.

Petitioners request the EQC to review and issue a declaratory ruling in this case primarily because they assert that the City of Portland's process for issuing the LUCS was unlawful, and they think that DEQ (and here, the EQC) should substantively review the legal validity of the City's land use decision-making process that resulted in the issuance of this LUCS.

Declaratory rulings The Oregon Administrative Procedures Act, ORS 183.410, allows an agency, in this case the commission, to issue a ruling about how a regulation that it enforces applies to any certain person, property or facts. The authority to make declaratory rulings is intended to allow certain parties to obtain an official opinion from an agency on a legal issue as applied to a specific set of facts.¹

The rules that provide the process for a petition for a declaratory ruling (OAR chapter 137, Division 002) require the commission to decide within 60 days of receiving the petition if they will issue a ruling on the petition, i.e., whether to hold a hearing to consider the substance of the petition. The commission has full discretion whether to hear the petition and whether to give or refuse to give a declaratory ruling.² If the commission decides to issue a ruling it must appoint a presiding officer, provide written notice to all interested persons named in the petition, and schedule a hearing at which the petition will be considered. Any interested person may move to intervene and participate as a party to that hearing. Applicable rules further describe the process and requirements for

¹ See *Forelaws on Board v. Energy Fac. Siting Council*, 311 Or 350, 359 (1991) (also stating "The statute does not appear to be designed to provide declaratory rulings in cases in which the facts are complex or are in dispute.")

² See Attorney General's Administrative Law Manual at 200, ("an agency has complete discretion to give or refuse to give a declaratory ruling. * * * The decision to refuse to give a ruling is not reviewable by a court."), citing *United Brokers, Inc. v. Department of Agriculture*, 68 Or App 44 (1984).

reaching and issuing a ruling. The final decision on a ruling would be made by the commission. Even if the commission decides to hear the petition as described here, it may at any time in the process decide not to issue a declaratory ruling.

If the commission issues a declaratory ruling, that ruling can be appealed to the Court of Appeals by any party that participates in the hearing. For this reason, declaratory rulings are typically issued when a current or prospective permit or license holder wishes to clarify how or whether a particular legal requirement applies to their activities, not to third parties wishing to challenge the application of rules to other parties.

**Questions
presented by
Petitioners**

Petitioners seek a declaratory ruling as to the following:

1. Is DEQ's proffered interpretation of its authority to review a local government's LUCS review and determination under OAR 340-018-0050 unreasonably narrow?
2. Does OAR 340-018-0050 require DEQ to consider evidence and make a conclusion that a LUCS review and determination may not be legally sufficient when the agency is presented with facially credible evidence that it was procedurally erroneous and unlawful?
3. Upon DEQ's refusal to do so, can the EQC independently assess facially credible evidence that a local government's LUCS review and determination may not be legally sufficient, and upon an affirmative finding, reject an air permit application or remand the LUCS?
4. Does the evidence presented by Petitioners to DEQ and EQC support the conclusion that the City of Portland's 2022 review and determination for Zenith's conditional LUCS may not be legally sufficient?

**DEQ
recommendation**

DEQ recommends that the commission decline to exercise its discretion to issue a declaratory ruling for the following reasons.

1. Under state land use law, DEQ's responsibility is to have and follow a process described in DEQ's state agency coordination plan to ensure that DEQ's permit decisions are consistent with state land use law. Under DEQ's state agency coordination plan, when DEQ has received a final LUCS from a local land use planning agency that is facially complete and describes the activity that DEQ is permitting, and that is subject to review under the state's land use laws, it is reasonable for DEQ to rely on the validity of such a LUCS subject only to those land use review and appeal processes. DEQ has rejected LUCS in situations where the LUCS did not adequately describe the activity that DEQ was being asked to permit or where a LUCS was issued before the local land use process was complete. This was the case when DEQ required Zenith to receive a new LUCS from the City of Portland in 2021. Those instances where DEQ has rejected a LUCS are relatively straightforward issues to

identify when reviewing the LUCS itself. But DEQ is not a land use review agency, and DEQ should not engage in its own, separate review or second-guessing of a LUCS decision subject to such land use appeal procedures. Challenges to land use decisions should be filed with the Land Use Board of Appeals for their review.

2. DEQ has not yet issued a proposed decision on Zenith's ACDP application, and when it does, that proposed decision may be challenged by any person who will be adversely affected or aggrieved by the decision. It is more appropriate for a permitting decision like this to be appealed through that standard process, rather than for the EQC to intercede with a declaratory order before DEQ proposes its permitting action.
3. The rule that is the basis of this petition delegates discretionary authority to DEQ to determine when to question the legal validity of a LUCS. Issuing a declaratory ruling interpreting and potentially limiting that discretionary authority could significantly impact DEQ workload and litigation in future permitting decisions.

Proposed motion language

I move that the Environmental Quality Commission decline to issue a ruling on the Petition for Declaratory ruling described in the staff report for this item and direct DEQ to notify the petitioner of this decision as provided in OAR 137-002-0020.

Next Steps

Following the EQC meeting on May 23, 2024, DEQ will notify the petitioner of the decision by the EQC to accept or decline to issue a ruling on the Petition for Declaratory ruling described in this staff report. If the EQC accepts the petition, then DEQ shall provide notice, schedule a hearing, and designate a presiding officer for the hearing, as provided in OAR 137-002-0020 through 137-002-0050.

*Report prepared by
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