

Environmental Quality Commission

Petition for Declaratory Ruling upon the Zenith Energy Air Contaminant Discharge Permit Land Use Compatibility Statement

May 23, 2024

Itinerary

- Zenith Energy facility overview
- Declaratory Ruling petition process overview
- Declaratory Ruling Request re: Zenith's air permit application
- DEQ Recommendation

Zenith Energy Terminal



Timeline

- 3/2012, with addendum 8/2018—Zenith’s Title V permit renewal application
- **7/2020—DEQ preliminary determination that Zenith needs a new LUCS for modified activities (Zenith objects, but seeks a new LUCS anyway)**
- 8/2021—City denies LUCS; Zenith appeals to LUBA
- 9/2021—DEQ proposes denial of Title V permit renewal; Zenith asks for Contested Case Hearing
- 2/2022—LUBA upholds City’s authority to deny LUCS, but remands for City to make additional factual findings to support it; Zenith appeals to Court of Appeals
- 5/2022—COA affirms LUBA decision without opinion
- 9/2022—Zenith submits new application for LUCS to City, with additional conditions
- **10/2022—City grants LUCS with conditions**
- 10/2022—Zenith amends Title V renewal application with new LUCS
- 10/2022—DEQ withdraws proposed Title V permit denial
- 11/2022—Zenith files ACDP application (to replace Title V permit)

Overview: Petitions for Declaratory Ruling

Per ORS 183.410

The EQC “may in its discretion issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by it.”

- Discretion as to whether to issue a ruling (and can decide not to later, even if you decide to initiate the process)

Process: Petitions for Declaratory Ruling

- Process governed by Attorney General model rules, OAR chapter 137, division 2
- If you decide to issue a ruling, then you must appoint a presiding officer and schedule a hearing
- Presiding officer would then propose a declaratory ruling for commission's consideration
- Ruling only applies to the petitioner, the EQC/DEQ and intervenors (if any)
- One previous petition to EQC in 2021 – it was from the Deschutes River Alliance and the Commission declined to issue a ruling

Overview of State Agency Coordination Planning

- State agencies required to carry out duties in compliance with Statewide Land Use Planning Goals and Acknowledged Local Comprehensive Plans, per ORS 197.180
- The Land Conservation and Development Commission has required DEQ and other agencies to adopt a State Agency Coordination Plan (SAC) to ensure such compliance, under OAR 660-030-0045, subject to review and approval by LCDC

DEQ State Agency Coordination Plan

- The EQC adopted OAR chapter 340, division 18 as DEQ's SAC, which has been approved by LCDC
- Under division 18, DEQ's SAC demonstrates compliance with land use laws, by requiring permit applications to include a land use compatibility statement from the local government that regulates land use
- A LUCS confirms that the facility for which a permit is requested has appropriate land use authority to be constructed and operate (as applicable)
- This allows DEQ to rely on the local government with expertise in land use regulation to conduct the land use review, subject to the state land use planning system

OAR 340-018-0050(2)(a)(C)

Key language in DEQ division 18 rules (the DEQ SAC):

“If the Department 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....”

Petition

- Received April 8, 2024 from the Northwest Environmental Defense Center, Columbia Riverkeeper, Breach Collective, the Linnton Neighborhood Association, and Willamette Riverkeeper (collectively “Petitioners”).
- Requested a declaratory ruling regarding the Land Use Compatibility Statement issued to Zenith Energy from the City of Portland. The request is to declare that the City’s LUCS “may not be legally sufficient” 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.

Petition (continued)

Petition presents the following questions:

- 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?
- 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 a facially credible evidence that it was procedurally erroneous and unlawful?
- 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?
- 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 Environmental Quality Commission decline to issue a declaratory ruling on this petition:

- DEQ's decision to accept the LUCS is in line with the state agency coordination plan under state land use laws.
- DEQ has not made a permit decision. When that happens, there are processes for challenging the decision.
- Issuing a declaratory ruling could impact all future DEQ 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.”

Title VI and alternative formats

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