

1
2
3 BEFORE THE LAND USE BOARD OF APPEALS
4 OF THE STATE OF OREGON
5
6

Zenith Energy Terminals Holdings
LLC,

Petitioner,

v.

CITY OF PORTLAND,

Respondent.

LUBA No. 2021-083

7
8 MOTION TO INTERVENE

9 I.

10 Pursuant to OAR 661-010-0050(2), Columbia Riverkeeper and Willamette
11 Riverkeeper (collectively, "Riverkeepers") move to intervene on the side of
12 Respondent City of Portland in the above-captioned appeal. Intervenors are
13 represented by Maura Fahey, Crag Law Center, 3141 E Burnside St., Portland,
14 Oregon 97214; Tel. No. (503) 525-2722; email: maura@crag.org.

15 II.

16 The facts establishing movants' right to intervene are as follows:
17 Intervenors appeared before the City of Portland regarding Petitioner's application
18 for a Land Use Compatibility Statement. Specifically, Riverkeepers submitted
19 written comments to Respondent on several occasions between June and August
20 2021. *See e.g.*, Email and Letter dated June 21, 2021 (attached to this motion as

1 Exhibit A (original attachment excluded)). Intervenors expect the record submitted
2 by Respondent will include additional written appearances of Intervenor Columbia
3 Riverkeeper. Thus, Riverkeepers have standing to intervene in this proceeding
4 pursuant to ORS 197.830(7)(b) and OAR 661-010-0050(1).

5 Alternatively, because Respondent did not provide formal notice of the
6 application or a public hearing, the requirement to “appear” is not necessary for
7 Riverkeepers to establish standing to intervene. *Weeks v. City of Tillamook*, 22 Or
8 LUBA 797, 798 (1991) (citing *Flowers v. Klamath County*, 98 Or App 384, 389
9 (1989)).

10
11 Dated: September 20, 2021

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13 
14 _____
15 Maura Fahey, OSB No. 133549
16 Of Attorneys for Intervenor-Respondents
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1 CERTIFICATE OF FILING

2 I hereby certify that on September 20, 2021, I filed the original and (1) copy
3 of this Motion to Intervene, with the Land Use Board of Appeals, DSL Building,
4 775 Summer Street NE, Suite 330, Salem, Oregon 97301-1283, by sending the
5 documents via first class U.S. mail.

6
7 Dated: September 20, 2021

8
9 
10 _____
11 Maura Fahey, OSB No. 133549
12
13
14

15 CERTIFICATE OF SERVICE

16 I hereby certify that on September 20, 2021, I served a true and correct copy
17 of this Motion to Intervene, by first class U.S. Mail to the following:

18
19 Eric L. Martin
20 Stoel Rives LLP
21 760 SW 9th Avenue, Suite 3000
22 Portland, OR 97205

23 Lauren King
24 City of Portland
25 Office of the City Attorney
26 1221 SW 4th Ave., Rm 430
27 Portland, OR 97204

28
29 Dated: September 20, 2021

30 
31 _____
Maura Fahey, OSB No. 133549

Coalition Letter in Opposition to Zenith's LUCS Application

Erin Saylor <erin@columbiariverkeeper.org>

Mon, Jun 21, 2021 at 12:16 PM

To: Director.Esau@portlandoregon.gov

Cc: "Tallant, Kimberly" <kimberly.tallant@portlandoregon.gov>, Robert <Robert.Taylor@portlandoregon.gov>, "King, Lauren" <Lauren.King@portlandoregon.gov>, Linly.rees@portlandoregon.gov

Ms. Esau,

Please accept the attached letter in opposition to Zenith Energy Terminal Holdings, LLC's recent application for a Land Use Compatibility Statement associated with its Title V Air Permit renewal.

We hope BDS will consider our thoughts and concerns as the Department reviews Zenith's application.

Thank you,

--

Erin Saylor (she/her) | Staff Attorney | Columbia Riverkeeper | 1125 SE Madison St., Suite 103A, Portland, OR 97214 | 541.399.4775

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[Rise Up Newsletter—Read it Now](#)

Kalama methanol victory - the musical; the formation of Comunidades; Snake River restoration opportunity; and Yakama voices against Rye Development.

 **2021.6.21_BDS Letter re_ Zenith LUCS.pdf**
1139K



June 21, 2021

Rebecca Esau, Director
 Bureau of Development Services
 1900 SW Fourth Avenue
 Portland, OR 97201

Dear Ms. Esau,

On behalf of the undersigned organizations, we are writing to express our strong opposition to Zenith Energy Terminal Holdings, LLC, and to voice a number of specific considerations we hope the City of Portland’s Bureau of Development Services (BDS) will consider during its review of Zenith’s recently submitted Land Use Compatibility Statement (LUCS) application associated with the renewal of the facility’s Title V Air Permit. Although the City does not currently provide an opportunity for public review or comment on LUCS applications,¹ we have a number of very important considerations we strongly urge BDS to consider during the course of its review. We also urge the City, through its Tribal Relations Program, to ensure any potentially affected tribes have an opportunity to voice their concerns.

¹ As a separate matter, we strongly encourage the City to correct this oversight in its land use code and to provide an opportunity for public review and comment on LUCS applications—such as Zenith’s—that are of particular interest to the public.

BDS Must Consider Whether Zenith’s Oil-by-Rail Facility is Compatible with the City of Portland’s 2035 Comprehensive Plan.

Under Oregon land use law, BDS must evaluate whether Zenith’s facility is compatible with the 2035 Comprehensive Plan. BDS should reject Zenith’s assertion that “findings of compatibility with the City of Portland’s 2035 Comprehensive Plan (“2035 CP”) are **not** required in connection with this LUCS” for two reasons.² First, Oregon law is clear that state agencies—including the Department of Environmental Quality (DEQ)—must ensure that their actions are undertaken “in a manner compatible with acknowledged *comprehensive plans* and land use regulations.”³ Second, DEQ’s regulations require that agency actions be “compatible with local government acknowledged *comprehensive plans* to the extent required by law.”⁴ DEQ’s LUCS form is consistent with the statute and DEQ’s implementing regulations, stating “[the form was] developed by DEQ to determine whether a DEQ permit or approval will be consistent with local government comprehensive plans and land use regulations.”⁵ Had the legislature intended for only local land use regulations to apply, and not the acknowledged comprehensive plan those regulations stem from, the legislature would have said as much in the statute. In the face of this legal directive, it defies logic for Zenith to argue that findings of compatibility with the 2035 CP are not required with respect to its LUCS application.

To the extent Zenith’s assertions are tied to the wording of DEQ’s LUCS application form, those arguments are misplaced. DEQ drafted the LUCS form to ensure the agency obtains the information it needs from local jurisdictions to determine whether its proposed action is compatible with the local jurisdiction’s acknowledged comprehensive plan and land use regulations. Tellingly, Zenith has cited no legal authority that prevents the City from requesting specific findings of compatibility with the 2035 CP or from issuing a LUCS in a format different from DEQ’s check-the-box form. We are also unaware of any legal requirement that binds the City to follow the exact same process for each and every LUCS application it receives, regardless of the specific facts before it.

As you are aware, the review of each LUCS application is a fact-specific undertaking. Here, the specific circumstances of Zenith’s facility are complex: the company is operating under a Title V air permit that has been expired for close to a decade—the property has changed hands and undergone multiple modifications during that time. Most notably, as we will address below, Zenith appears to be in the unique situation where its property’s “use” may be allowed under the City’s land use regulations but the specific “activity” taking place on the property is not compatible with the 2035 CP. Based on available information, this level of complexity was not

² Letter from Allison J. Reynolds, Counsel for Zenith Energy Terminal Holdings LLC, Stoel Rives LLP, to City of Portland Bureau of Development Services (May 16, 2021) (emphasis in original) (“LUCS Application”).

³ Or. Rev. Stat. § 197.180(1)(b) (2020) (emphasis added).

⁴ Or. Admin. R. 340-018-0050(1) (2020) (emphasis added).

⁵ See LUCS Application, supra n2, Attachment A.

present in the other LUCS reviews Zenith references in its letter to BDS. Oregon law affords the City broad discretion in both (1) how it reviews LUCS applications, and (2) the ultimate decision on those applications.⁶ Thus, BDS' request for specific findings of Zenith's compatibility with the 2035 CP is well within the City's authority and reasonable given Zenith's activities.

BDS' Scope of Review Should Consider All Changes at 5501 NW Front Ave Since at Least 2007

This LUCS application gives the City the unique opportunity to review all significant changes that have taken place at 5501 NW Front Ave. in the last fourteen years. Based on available information, to date the City has not had the opportunity to review the entirety of the facility operations as a whole. Rather, Zenith submitted a handful of building permit applications that prompted a siloed review of specific facility components. In reviewing Zenith's LUCS application, we strongly urge BDS to consider all changes that occurred on the property since DEQ issued the last Title V air permit in 2007.

In its application, Zenith attempts to limit the scope of the City's review by stating that "[n]o new development, facilities, or storage tanks are proposed in connection with this LUCS."⁷ That assertion is false. The entire reason DEQ required Zenith to seek a new LUCS from the City in association with its Title V permit renewal is because Zenith has made a significant number of changes to the facility since the air permit was last issued in 2007.⁸ In January 2021, DEQ sent Zenith a letter that describes these changes in detail and explains why Zenith must obtain a new LUCS—a copy of that letter is included below as "Attachment A."⁹

By arguing that "[n]o new development, facilities, or storage tanks are proposed in connection with this LUCS," Zenith omits three key facts. First, Zenith ignores the fact that it constructed three new rail unloading racks since its existing Title V permit was last issued. Second, Zenith fails to acknowledge that it plans to construct additional new rail infrastructure in the coming year. Third, Zenith attempts to obfuscate the fact that in the last three years it has increased its throughput of crude oil *fifteen fold*. This significant throughput increase occurred notwithstanding Zenith's assertion to DEQ that the new rail unloading racks would result in "no new throughput" at the facility.¹⁰ These are all significant changes that have taken place since the last air permit was issued in 2007—all of which the City should consider during its review of Zenith's LUCS application.

⁶ See *Bishop v. Deschutes County*, 72 Or LUBA 103, 17 (2015) ("[a] governing body's code interpretation made in the course of rendering a decision on a request for a land use compatibility statement is subject to the deferential standard of review at ORS 197.829(1)").

⁷ LUCS Application, *supra* n2, at 6.

⁸ See Letter from Nina DeConcini, NW Regional Administrator, Or. Dept. of Enviro. Quality, to Thomas R. Wood, Counsel for Zenith Energy Terminal Holdings LLC, Stoel Rives LLP (Jan. 11, 2021). Attachment A.

⁹ *Id.*

¹⁰ *Id.* at 2.

We urge BDS to consider all the changes that have occurred on the property since the 2007 Title V permit was issued; the City is under no obligation to limit its review based on Zenith’s patently false assertion that there is “no new development” associated with its LUCS application. The Oregon Land Use Board of Appeals (“LUBA”) has held that there is no statutory authority “that obligates [a local jurisdiction] to accept a LUCS applicants characterization of the proposed use or the scope of the proposed use, in determining whether the proposed state agency action is compatible with the [jurisdiction’s] land use legislation.”¹¹

BDS’ Review Requires Consideration of *Both* the Overarching “Use” of the Property and the “Activities” Taking Place There

BDS should reject Zenith’s unsupported argument that a “use” cannot simultaneously be allowed under the City’s land use regulations and incompatible with the comprehensive plan. In reviewing a LUCS application, the City must consider *both* the “use” of the property *and* the “activities” that are or will occur there as a result of the proposed agency action. There is nothing in ORS 197.180 or DEQ’s regulations that limit the scope of a local jurisdiction’s review to the designated use of the property. In fact, throughout DEQ’s LUCS application form, the agency requests information relating to the compatibility of “the *activity* or use.”¹² In Zenith’s case, while the existing “use” of the property—as a bulk fossil fuel terminal—may be an allowable use under the City’s land use regulations, the specific *activity* Zenith engages in—transloading fossil fuels purely for export outside the regional market—is incompatible with the 2035 CP.

As the City is aware, it takes a great deal of time and effort to pass new regulations. The 2035 CP was just formally acknowledged last year. That the City has not yet had the opportunity to pass land use regulations implementing each and every one of the goals and policies set forth in the 2035 CP does not automatically mean the uses and activities addressed in those comprehensive plan goals and policies are allowed outright. In fact, LUBA has acknowledged that comprehensive plan policies may apply directly to individual land use decisions, even where those policies have been implemented through land use regulations.¹³ Zenith’s arguments on this front are particularly self-serving given that the company itself is a party to the legal challenge that has stymied the City’s attempt to create land use regulations to better align the code with the policies in the 2035 CP addressing fossil fuel terminals.¹⁴

¹¹ *Bishop v. Deschutes County*, 72 Or LUBA 103, 16 (2015)

¹² See generally LUCS Application, supra n2, Attachment A (emphasis added).

¹³ See *Friends of the Hood River Waterfront vs. City of Hood River*, 68 Or. LUBA 459, 10-14 (2013) (acknowledging that even where land use regulations were adopted to implement the comprehensive plan, those comprehensive plan requirements may still apply directly to individual land use decisions).

¹⁴ Zenith is a member of the Portland Business Alliance, one of the plaintiffs in the legal challenge against the Fossil Fuel Terminal Zoning Amendments that would place restrictions on the development and expansion of bulk fossil fuel terminals.

Zenith's Transloading Activities are Incompatible with Numerous Policies in the 2035 CP

Below, we highlight a handful of specific policies that Zenith's activities are incompatible with, including:

1. **Policy 4.33 Off-site impacts.** *Limit and mitigate public health impacts, such as odor, noise, glare, light pollution, air pollutants, and vibration that public facilities, land uses, or development may have on adjacent residential or institutional uses, and on significant fish and wildlife habitat areas. Pay particular attention to limiting and mitigating impacts to under-served and underrepresented communities.*

We strongly encourage BDS to look into the specific routes the unit trains servicing Zenith take through the city. In 2020 alone, Zenith moved over 234 million gallons of crude oil through its facility.¹⁵ That's roughly equivalent to 70–80 unit trains—each one up to a mile long—moving through north Portland.¹⁶ Based on demographic data the City compiled in 2009, the areas the trains are most likely moving through overlaps with many lower income neighborhoods and communities of Black, Indigenous, and people of color (BIPOC).¹⁷ The significant risks associated with an oil train derailment are well documented.¹⁸ Pursuant to Policy 4.33, BDS should assess the route by which the trains servicing Zenith are traveling through the city to ensure low-income and BIPOC communities are not being put at increased risk from the rapidly increasing number of crude oil trains moving through their neighborhoods as result of Zenith's activities.

2. Multiple Policies Relating to Seismic Safety and Risk Reduction:

- a. **Policy 4.62 Seismic and energy retrofits.** *Promote seismic and energy-efficiency retrofits of historic buildings and other existing structures to reduce carbon emissions, save money, and improve public safety.*
- b. **Policy 4.79 Natural hazards and climate change risks and impacts.** *Limit development in or near areas prone to natural hazards, using the most current hazard and climate change-related information and maps.*

¹⁵ See Zenith Energy Terminal Holdings LLC's 2020 Title V Permit Annual Report, Permit No. 26-2025 (Feb. 8, 2021).

¹⁶ See Gordon R. Friedman, *Crude oil trains increasingly travel through Portland, alarming regulators*, The Oregonian (April 6, 2019), <https://bit.ly/3cuTwWa> (provides a map of the most likely routes trains travel to reach Zenith).

¹⁷ See Portland Plan, <https://www.portlandonline.com/portlandplan/?c=52257&>

¹⁸ See e.g., KATU News, *14 oil train cars derail in Columbia River Gorge, railcars erupt in flames; I-84 reopens* (June 3, 2016), <https://bit.ly/3cvGGGR>; see also Dameon Pesanti, *Worst-case scenario: Vancouver oil disaster could cost \$6 billion* (June 5, 2016), <https://bit.ly/3iwXyRx> (discussing the risks of moving crude-by-rail through a city).

- c. **Policy 4.81 Disaster-resilient development.** *Encourage development and site-management approaches that reduce the risks and impacts of natural disasters or other major disturbances and that improve the ability of people, wildlife, natural systems, and property to withstand and recover from such events.*
- d. **Policy 4.82 Portland Harbor facilities.** *Reduce natural hazard risks to critical public and private energy and transportation facilities in the Portland Harbor.*
- e. **Policy 7.14 Natural hazards.** *Prevent development-related degradation of natural systems and associated increases in landslide, wildfire, flooding, and earthquake risks.*

Portland is situated atop the Cascadia Subduction Zone—a fault line widely considered to be “overdue” for a seismic shift that could generate a catastrophic earthquake. Portland’s Critical Energy Infrastructure (CEI) hub is also located on a known liquefaction zone—meaning, there is a very high risk that many of the tanks and infrastructure located in that area are at serious risk of collapse in the event of a large earthquake.¹⁹ The majority of the storage tanks on Zenith’s property are over half a century old; the oldest operating tank is nearly 80 years old.²⁰ Storing large amounts of volatile crude oil in decades old tanks in a known liquefaction zone is directly incompatible with numerous 2035 CP policies that seek to reduce the exact risk Zenith’s facility poses. If BDS chooses not to outright deny Zenith’s LUCS application on the basis of the significant risks the facility poses, we strongly urge BDS to condition the LUCS on Zenith completing extensive seismic upgrades on its tanks to minimize the risks posed by its activities.

- 3. **Policy 6.48 Fossil fuel distribution.** *Limit fossil fuels distribution and storage facilities to those necessary to serve the regional market.*

Zenith’s activities—which involve transloading crude oil from rail cars to tanker ships (ships destined for refineries outside Oregon)—is completely incompatible with Policy 6.48 in the 2035 CP. Zenith’s attempt to argue otherwise—by defining various words from the single sentence policy—is entirely nonsensical.²¹ The policy is clear that only those fossil fuel distribution and storage facilities necessary to meet regional demand are considered compatible with the 2035 CP. To our knowledge, all of the crude oil moving through Zenith’s terminal is destined for out-of-state refineries. Thus, Zenith’s

¹⁹ See Or. Dept. of Geology and Mineral Industries, Earthquake Risk Study for Oregon’s Critical Energy Infrastructure Hub (Aug. 2012), <https://www.oregongeology.org/earthquakes/CEI-Hub-report.pdf>; see also Blair Stenvick, Portland Mercury, *On Shaky Ground* (Nov. 21, 2019), <https://bit.ly/3ga341a>

²⁰ See Zenith’s current Oregon Title V Operating Permit, Permit No. 26-2025-TV-01, at 4, available at https://www.deq.state.or.us/AQPermitsonline/26-2025-TV-01_P_2007.PDF

²¹ See LUCS Application, supra n2, Attachment C at 2.

activities—if not the use—are incompatible with the 2035 CP. Notably, in its application, Zenith makes no effort to argue that any of the crude oil it is handling is necessary to serve the regional market. Whether the storage capacity at Zenith’s terminal is or is not needed to serve the region is irrelevant—the fact of the matter is that Zenith’s storage capacity *is not being used to serve the region*. Thus, Zenith’s facility is incompatible with the 2035 CP. If the City intends to issue the LUCS to Zenith, we strongly urge BDS to condition the LUCS on Zenith’s complete phase out of its crude oil transloading operations by a near-term date.

Conclusion

For these reasons, we strongly encourage BDS to deny Zenith’s LUCS application. Absent an outright denial, we urge BDS to condition the LUCS in such a way as to reduce the risk the oil trains moving through the city pose to low-income and BIPOC communities, reduce the significant seismic hazard posed by Zenith’s aging tanks, and require the complete phase-out of all fossil fuel transloading operations beyond those necessary to serve the regional market.

Sincerely,

Erin Saylor
Staff Attorney
Columbia Riverkeeper

Elisabeth Holmes
Staff Attorney
Willamette Riverkeeper

Dineen O’Rourke
Campaign Manager
350PDX

Nick Caleb
Climate and Energy Attorney
Breach Collective

Cassie Cohen
Executive Director
Portland Harbor Community Coalition

Jonah Sandford
Staff Attorney
Northwest Environmental Defense Center

Samantha Hernandez
Climate Justice Organizer
Oregon Physicians for Social Responsibility

Debra Higbee-Sudyka
Vice-Chair Conservation Committee
Oregon Chapter Sierra Club

Bonnie McKinlay
Core Team Member
CedarAction

Michelle Fawcett
Coordinator
Portland-Metro People’s Coalition (PMPC)

Elizabeth Willbach
Justice Advocates

Leigha LaFleur
BerniePDX

Mike Horner
Climate Action Coalition

Joan Horton
Alliance for Democracy

Karen Deora
Right 2 Survive

Noelle Studer-Spevak, Board Member
Families for Climate

John Talberth, PhD
President and Senior Economist
Center for Sustainable Economy

Leeor Schweitzer
Portland Tenants United

Bethany Cotton
Conservation Director
Cascadia Wildlands

Cc:
Kim Tallant, Division Manager - Land Use
Robert Taylor, City Attorney
Lauren King, Deputy City Attorney