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November 29, 2022

Oregon Department of Environmental Quality
Northwest Region
700 NE Multnomah St., Suite 600
Portland, OR 97232
Attn: David Graiver, Air Quality Permit Writer and Inspector

Oregon Department of Energy
550 Capitol Street NE
Salem, OR 97301
Attn: Wally Adams, Operations and Policy Analyst

Sent via email to: Walter.Adams@energy.oregon.gov and Graiver.David@deq.state.or.us

Re: Land Use Board of Appeals Decision Invalidates NEXT ACDP and Site Certificate Exemption

Dear David Graiver & Wally Adams,

Columbia Riverkeeper writes to formally notify the Oregon Department of Environmental Quality (DEQ) and the Oregon Department Energy (ODOE) that NEXT is currently violating its air permit and site certificate exemption. These permits are invalid after a recent Oregon Land Use Board of Appeals (LUBA) decision reversed the land use approval required for both permits. DEQ and ODOE should immediately revoke NEXT's air permit and site certificate exemption. Additionally, we request meetings to discuss the implications of the LUBA decision on the permit process going forward. Columbia Riverkeeper is committed to preventing harm to the Columbia River Estuary, including the surrounding community and farmland, where this project is situated.

On October 27, 2022, LUBA reversed a county land use approval for NEXT.¹ LUBA overturned Columbia County's approval of a rail yard that would have served NEXT's proposed non-conventional diesel refinery along the lower Columbia. The decision established that NEXT's rail yard is not allowed on agricultural land, as proposed by NEXT.² The rail yard is an integral part of NEXT's whole refinery proposal; NEXT indicated that the rail yard is necessary to receive feedstocks and other supplies and materials necessary for the refinery. NEXT's Land Use Compatibility Statement (LUCS) explicitly requires the county approval that LUBA reversed—without it, the LUCS is invalid. NEXT did not appeal LUBA's decision by the November 17, 2022, deadline. Accordingly, NEXT does not currently have, and is not likely to

¹ See 1000 Friends of Oregon v. Columbia County (Order, LUBA No. 2022-039, Oct. 27, 2022) (attached).

² The court noted that pursuing an alternate design or seeking an exception to Goal 3 would each "require more than insignificant changes to the application, if not a new application." LUBA Decision at 24.

obtain in the near future, a local land use approval for its refinery as proposed in application documents submitted to DEQ and ODOE.

LUBA's decision directly affects NEXT's air permit and site certificate exemption, which both require valid land use approval.

A. Without Land Use Approval, NEXT is Violating its Air Contaminant Discharge Permit (ACDP).

NEXT is currently violating its air permit because LUBA reversed its land use approval. Valid land use approval is one of the basic requirements of an ACDP.³ Without this basis, a permit cannot stand. When a LUCS⁴ is successfully appealed, DEQ “may *either* proceed to revoke or suspend the permit.”⁵ Revocation or suspension are the only two options here because the window for NEXT to appeal has passed. Additionally, DEQ may revoke an air permit based on violation of any applicable rule or statute.⁶ NEXT's refinery and rail yard are interdependent—NEXT's applications describe the rail yard as necessary for both feedstocks and bringing in materials to operate the refinery. NEXT's air permit application itself lists its proposed rail activities as a source of emissions,⁷ and shows that the rail yard is essential.⁸ After LUBA's decision, NEXT no longer has valid land use approval for the facility, which constitutes a violation of the air permit. DEQ should immediately begin the process of revoking NEXT's ACDP for violating the requirement to have a valid land use approval.

B. LUBA's Decision Invalidates NEXT's Site Certificate Exemption.

LUBA's decision reversing NEXT's land use approval disqualifies NEXT from a site certificate exemption under ORS 469.320(2)(f). To qualify for an exemption, ORS 469.320(2)(f)(B) requires NEXT to have “received local land use approval under the applicable acknowledged comprehensive plan and land use regulations of the affected local government” Because LUBA reversed the local land use approval underpinning NEXT's exemption, NEXT must apply for and receive a site certificate under ORS 469.350 before constructing and operating the facility.

Conclusion

Because NEXT is violating its air permit and site certificate exemption, DEQ and ODOE should immediately begin revoking those authorizations. Columbia Riverkeeper additionally requests meetings with DEQ and ODOE to discuss further implications of this matter.

³ OAR 340-216-0040(1)(a)(K).

⁴ NEXT's LUCS requires the approval that LUBA reversed. *See* NEXT Revised LUCS, Apr. 2, 2021 at 3 (Section 2F satisfied by Columbia County land use approval). The entire LUCS is now invalid because the county land use decision was appealed.

⁵ OAR 340-018-0050(2)(a)(H) (emphasis added).

⁶ OAR 340-216-0082(4)(a).

⁷ ACDP Application, Appx A, Tables 1, 17-18.

⁸ ACDP Application, Figure 3-2 Process Flow Diagram Dry Material Handling (showing that the rail yard is essential even if feedstocks are delivered by ship).

Sincerely,

A handwritten signature in black ink, appearing to read 'Audrey Leonard'. The signature is fluid and cursive, with a long horizontal stroke at the end.

Audrey Leonard
Staff Attorney
Columbia Riverkeeper