

1 BEFORE THE STATE OF WASHINGTON
2 ENERGY FACILITY SITE EVALUATION COUNCIL

3 In the Matter of Application No. 2013-01

CASE NO. 15-001

4 TESORO SAVAGE, LLC

5 VANCOUVER ENERGY
6 DISTRIBUTION TERMINAL

MOTION FOR DETERMINATION
REGARDING ISSUANCE OF
INDUSTRIAL WASTE DISCHARGE
PERMIT

7
8 **I. INTRODUCTION**

9 Tesoro Savage Petroleum Terminal LLC, (hereinafter “Vancouver Energy”), the
10 Applicant, seeks a determination confirming that the Washington State Energy Facility
11 Site Evaluation Council (“EFSEC” or “Council”) is the only agency authorized to issue an
12 industrial waste discharge permit for effluent discharges to the City of Vancouver’s
13 publicly owned treatment works (“POTW”) from the proposed Vancouver Energy
14 Terminal. The sole purpose of this motion is to establish that EFSEC is the agency
15 responsible for issuing the permit for the proposed facility. This motion does not
16 challenge applicable substantive permit standards.

17 EFSEC’s jurisdiction and responsibility to issue an industrial waste discharge
18 permit for the Vancouver Energy Terminal is clear. First, EFSEC has exclusive
19 jurisdiction to issue such permits because RCW 80.50.110 preempts any other state or
20 local entity’s authority to do so. Second, Washington’s state program for implementing
21 federal pretreatment standards for discharges to POTWs, as approved by the United States
22 Environmental Protection Agency (“EPA”), gives EFSEC explicit authority to issue
23 industrial waste discharge permits for energy facilities. Third, the Council’s past
24 interpretation of its jurisdiction to issue CWA § 401 water quality certifications supports
25 consolidated permitting of the proposed facility. Finally, issuance of this permit by the

1 City of Vancouver will frustrate EFSEC's primary purpose to streamline and expedite
2 permitting of energy facilities and its obligation to bring statewide energy considerations
3 to bear on siting related decisions.

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5 **A. EFSEC has exclusive jurisdiction to issue Industrial Waste Discharge
Permits at energy facilities.**

6 Pursuant to RCW 80.50.110, EFSEC has exclusive authority to implement *all* state
7 laws and regulations governing the location, construction, and operational conditions for
8 certification of energy facilities in the state of Washington. The EFSEC process
9 supersedes all state or local permitting and review processes necessary to establish such a
10 facility, including permits for the discharge of industrial wastes to POTWs.

11 **B. Washington's EPA-approved program for implementation of the National
12 Pretreatment Program designates EFSEC as the agency responsible for
issuing Industrial Waste Discharge Permits at energy facilities.**

13 Pretreatment of industrial waste discharged to POTWs is mandated by the Federal
14 Water Pollution Control Act, 33 U.S.C. §§ 1251 -1388 ("Clean Water Act" or "CWA").
15 EPA, or state and local agencies with EPA-approved pretreatment programs, must ensure
16 discharges comply with national pretreatment standards. 33 USC § 1317(b) ("CWA
17 § 307(b)"). Under the CWA implementing regulations, states have discretion to
18 determine the mechanism through which they will ensure compliance with all applicable
19 pretreatment standards (permit, order, or other mechanism). 40 C.F.R. 403.8(f)(1)(iii).
20 EPA must approve the state program. 40 C.F.R. 403.10(f), (g)(ii).

21 Washington State's implementation of the National Pretreatment Program, which
22 was approved by the EPA in 1986, relied on the state's then existing requirements for
23 industrial waste discharge permits, to ensure that discharges to local POTWs meet all
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1 federally adopted standards for pretreatment. EFSEC¹ was, and remains, the sole state
2 agency designated for issuance of industrial waste discharge permits for any EFSEC
3 regulated energy facility. RCW 90.48.165. The Washington State Department of
4 Ecology (“Ecology”) was responsible for issuance of permits to all *other* sources, and was
5 authorized to delegate its permitting authority for those *other* sources to qualifying POTW
6 operators, including cities throughout the state. RCW 90.48.160; RCW 90.48.165.
7 However, at the time of EPA approval, only EFSEC had authority to implement the
8 National Pretreatment Program for energy facilities in Washington by issuing industrial
9 waste discharge permits. Any other agency’s authority to issue such permits was
10 preempted by RCW 80.50.110. Ecology could not have delegated to any city the
11 authority to issue an industrial waste discharge permit for energy facilities because it had
12 no such authority to delegate. As a result, EFSEC is the only entity in Washington that
13 may implement the National Pretreatment Program through issuance of a state industrial
14 waste discharge permit. This is confirmed by the Council’s past interpretation of its
15 jurisdiction to issue § 401 water quality certifications and is supported by the purpose of
16 the EFSEC process.

17 **C. The Council’s interpretation of its permitting jurisdiction supports**
18 **consolidated permitting of the proposed facility.**

19 EFSEC has previously determined that it has exclusive jurisdiction to issue water
20 quality certifications under CWA § 402, 33 U.S.C. 1341, for energy facilities subject to
21 EFSEC jurisdiction. This determination was based on a review by the Washington State
22 Attorney General’s Office, which concluded that the EFSEC statutes (Chapter 80.50
23 RCW) preempt Ecology’s authority to issue such certifications pursuant its general
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25 ¹ The Reviser’s note to this section states that: The “thermal power plan evaluation council” was redesignated the “energy facility site evaluation council” by 1975-’76 2nd ex.c. c 108.”

1 jurisdiction to administer the Clean Water Act under RCW 90.48.260. The preemption
2 analysis that led to this conclusion is equally applicable to issuance of industrial waste
3 discharge permits and is consistent with the purpose of EFSEC to consolidate the
4 permitting process, prevent duplication of effort, and avoid permitting delay.

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6 **D. Issuance of the Industrial Waste Discharge Permit by the City of Vancouver
will frustrate EFSEC's purpose.**

7 An industrial waste discharge permit issued by EFSEC will satisfy EPA, Ecology,
8 and the City's responsibility to ensure that Vancouver Energy complies with all
9 pretreatment standards and will ensure compliance with Washington's pretreatment
10 program (the "WPTP"). Conversely, the City's involvement in the permit process for this
11 energy facility will frustrate the EFSEC's primary purpose to consolidate the energy
12 facility permitting process. Most significantly, it would—in direct contradiction of
13 legislative intent—effectively transfer state energy policy analysis and related siting
14 decisions reserved to the state through EFSEC to local municipalities and other POTW
15 operators whose policies may not reflect state energy policy.

16 **II. FACTS AND REGULATORY BACKGROUND**

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18 **A. The Federal Clean Water Act requires that industrial discharges to POTWs
meet pretreatment standards.**

19 The Clean Water Act prohibits the discharge of pollutants from point sources into
20 waters of the United States without a permit. 33 § 311(a). EPA issues National Pollution
21 Discharge Elimination System ("NPDES") Permits either directly or through a state-
22 delegated program. 33 U.S.C. 1342(a); 40 C.F.R. 123.25(a)(24)-(a)(35). EPA also has
23 authority to regulate discharges to POTWs. CWA § 307(b); *U.S. v. Hartsell*, 127 F.3d
24 343, 348-49 (4th Cir. 1997).

1 EPA, or state and local agencies with EPA-approved pretreatment programs, must
2 ensure discharges comply with national pretreatment standards adopted under CWA
3 § 307(b), (c), or (d). National Pretreatment Program regulations set forth a self-
4 implementing program under which federal, state, local governments, and industry and the
5 public, implement National Pretreatment Standards to control pollutants passing through a
6 POTW. *See* 40 C.F.R. 403.1(a). States with federally approved NPDES programs must
7 submit a state pretreatment program for EPA approval, along with verification of the state
8 agency's legal authority to implement the program. 40 C.F.R. 403.10(f), (g)(ii). Unlike
9 NPDES, the National Pretreatment Program is not a federally delegated program; rather,
10 EPA approves the state pretreatment program. States have discretion to decide the
11 mechanism through which they will ensure compliance with all applicable pretreatment
12 standards (permit, order, or other mechanism). 40 C.F.R. 403.8(f)(1)(iii). If approved by
13 EPA, the state pretreatment program is used to enforce pretreatment requirements at the
14 state and local level.

15 EPA delegated authority for Washington to implement the NPDES program in
16 1973. *See* August 15, 1989 Ecology and EPA Region 10 Memorandum of Agreement, as
17 revised, available at [https://www.epa.gov/sites/production/files/2013-09/documents/wa-](https://www.epa.gov/sites/production/files/2013-09/documents/wa-moa-npdes.pdf)
18 [moa-npdes.pdf](https://www.epa.gov/sites/production/files/2013-09/documents/wa-moa-npdes.pdf). Washington's NPDES program operates in lieu of the federally managed
19 NPDES program. Ecology and EFSEC share NPDES permitting authority under the
20 Washington program, RCW 90.48.260(a), RCW 90.48.262(2).

21 **B. EFSEC has authority to issue permits under Washington's Pretreatment**
22 **Program.**

23 EPA approved Washington's Pretreatment Program ("WPTP") in 1986 based upon
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1 the state's preexisting pretreatment permit program set forth at RCW 90.48.160.² This
2 provision requires a permit for discharge of industrial waste to a POTW. As allowed
3 under 40 C.F.R. 123.1(g)(1), the WPTP assigns permitting responsibilities to more than
4 one agency, each with separate statewide jurisdiction over a class of activities or
5 discharges. RCW 90.48.160 and RCW 90.48.260. EFSEC has exclusive authority to
6 issue industrial waste discharge permits for energy facilities in the state. RCW 90.48.160,
7 RCW 90.50.110. Ecology has sole authority to issue permits to all other types of
8 facilities. RCW 90.48.260, RCW 90.48.262, 90.48.165. Ecology may also delegate its
9 authority to POTW operators such as municipalities. RCW 90.48.165. Ecology has
10 delegated this permitting authority to the City of Vancouver and other POTW operators
11 throughout the state. WAC 173-216-150.

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13 **C. EFSEC has notified Vancouver Energy that the City of Vancouver, not**
14 **EFSEC, must issue the Industrial Waste Discharge Permit for the Vancouver**
Energy Terminal.

15 On August 28, 2013, Vancouver confirmed that its POTW has capacity to receive
16 and treat the anticipated discharges from the proposed facility. Declaration of Brian
17 Carrico ("Carrico Decl."), Exhibit A. On January 27, 2014, Vancouver Energy submitted
18 an industrial waste discharge permit application to EFSEC for effluent discharges to the
19 City's POTW pursuant to RCW 90.48.160 and WAC 463-60-537 (requiring application
20 for site certification to include a state waste discharge permit for discharges from a
21 proposed energy facility to a POTW). *Id.* On February 19, 2016, EFSEC notified
22 Vancouver Energy that the City, not EFSEC, would need to issue the requested permit.
23 *Id.* Exhibit C.

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25 ² See <https://www.epa.gov/npdes/npdes-state-program-information>.

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III. ISSUE

Does EFSEC have exclusive jurisdiction to issue an industrial waste discharge permit for the proposed Vancouver Energy Terminal?

IV. ARGUMENT

A. EFSEC has exclusive authority to issue all state and local permits necessary to establish energy facilities in Washington State.

EFSEC’s purpose is to consolidate and expedite energy facility permitting and environmental review of energy facilities in Washington. RCW 80.50.010. EFSEC has broad authority to regulate and certify the location, construction, and operational conditions required for establishment of energy facilities in the state. RCW 80.50.110(2). State and local agencies are preempted from exercising this authority. Chapter 80.50 RCW, which establishes EFSEC and governs selection and utilization of sites for energy facilities, takes precedence over any other state or local law, rule, or regulation pertaining to establishment of energy facilities in the state. State and local rules governing industrial waste discharge permits are no exception. *Id.* at (1). RCW 80.50.120(3) provides that EFSEC’s issuance of site certification for an energy facility:

. . . shall be in lieu of any permit, certificate or similar document required by any department, agency, division, bureau, commission, board or political subdivision of this state whether a member of the council or not.

Regulations governing EFSEC confirm the Council’s exclusive authority over all state or local permitting processes related to, or regulation of, energy facilities in the state, including Ecology’s authority:

Chapter 80.50 RCW operates as a state preemption of all matters relating to energy facility sites. Chapter 80.50 RCW certification is given in lieu of any permit, certificate, or similar document which might otherwise be required by state agencies and local governments.

WAC 163-40-150.

1 RCW 80.50.120 and its implementing regulations could not be more clear. The
2 EFSEC process is intended to supersede all other local and state permitting requirements
3 which would otherwise be required for an energy facility's siting, construction, and
4 operation. There is no exception for industrial waste discharge review or permits.

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6 **B. EFSEC has explicit authority to issue permits for the discharge of industrial
wastes to a Publicly Owned Treatment Works (POTW).**

7 **1. Washington's Water Pollution Control Act expressly delegates to EFSEC
8 the authority to issue all permits to implement Clean Water Act
requirements for energy facilities.**

9 Washington's Water Pollution Control Act, Chapter 90.48 RCW, designates
10 Ecology as the state water pollution control agency for all purposes of the Clean Water
11 Act (CWA), except for CWA permits at energy facilities subject to Chapter 80.50 RCW.
12 For these facilities, EFSEC has exclusive state jurisdiction to issue CWA permits,
13 including permits under the National Pretreatment Program.

14 RCW 90.48.260 establishes Ecology's authority to implement CWA programs
15 under state law. There is an exception, however, for CWA permits related to energy
16 facilities under EFSEC jurisdiction:

17 [Ecology has c]omplete authority to establish and administer a
18 comprehensive state point source waste discharge or pollution discharge
19 elimination permit program which will enable the department to qualify for
20 full participation in any national waste discharge or pollution discharge
21 elimination permit system and will allow the department to be the sole
22 agency issuing permits required by such national system operating in the
23 state of Washington **subject to the provisions of RCW 90.48.262(2)**.
24 Program elements authorized herein may include, but are not limited to: (i)
Effluent treatment and limitation requirements together with timing
25 requirements related thereto; (ii) applicable receiving water quality
standards requirements; (iii) requirements of standards of performance for
new sources; (iv) pretreatment requirements;

RCW 90.48.260(1)(a) (emphasis added).

1 RCW 90.48.262 governs state implementation of the CWA at energy facilities,
2 which would otherwise be subject to Ecology’s jurisdiction under RCW 90.48.260. The
3 exception for energy facilities set forth at RCW 90.48.260(1)(a), demonstrates the
4 Legislature’s intent to divide responsibilities for CWA programs between Ecology and
5 EFSEC. RCW 90.48.262 provides the significant clarification that the permit program
6 authorized under RCW 90.48.260(1), “shall constitute a continuation of the established
7 permit program of RCW 90.48.160” RCW 90.48.262(1). This is a specific reference
8 to the requirement under RCW 90.48.160 that energy facilities discharging to a POTW
9 obtain a permit from EFSEC:

10 Any person who conducts a commercial or industrial operation of any type
11 which results in the disposal of solid or liquid waste material into the
12 waters of the state, **including commercial or industrial operators**
13 **discharging solid or liquid waste material into sewerage systems**
14 **operated by municipalities or public entities** which discharge into public
15 waters of the state, shall procure a permit from either the department **or the**
16 **thermal power plant site evaluation council**³ as provided in RCW
17 90.48.262(2) before disposing of such waste material

18 RCW 90.48.160 (emphasis added).

19 Moreover, RCW 90.48.262 expressly provides that EFSEC is solely responsible
20 for issuing CWA programs permits for energy facilities:

21 Permits for energy facilities subject to chapter 80.50 RCW shall be issued
22 by the energy facility site evaluation council: PROVIDED, That such
23 permits shall become effective only if the governor approves an application
24 for certification and executes a certification agreement pursuant to said
25 chapter.

RCW 90.48.262(2).

These provisions of state law clearly demonstrate the Legislature’s intent that
EFSEC issue all CWA-related state permits for energy facilities under the Council’s

³ The Reviser’s note to this section states that: The “thermal power plan evaluation council” was redesignated the “energy facility site evaluation council” by 1975-’76 2nd ex.c. c 108.”

1 jurisdiction pursuant to Chapter 80.50 RCW. Ecology is responsible for permits unrelated
2 to such energy facilities. This bifurcated approach to permitting existed before the
3 National Pretreatment Program was adopted and was confirmed by the Legislature after
4 adoption of that program. The requirement set forth in RCW 90.48.160 that energy
5 facilities discharging to a POTW procure a permit from EFSEC and non-energy facilities
6 obtain Ecology approval, predated adoption of the National Pretreatment Program.⁴
7 Likewise, RCW 90.48.260 and RCW 90.48.262, which reflect the same bifurcated
8 permitting process, were adopted before the National Pretreatment Program.⁵ Those
9 provisions confirm that energy facilities must look to EFSEC for such permits, whereas
10 non-energy facilities must seek Ecology authorization.⁶

11 EFSEC's broad powers under Chapter 80.50 RCW, the unequivocal command that
12 EFSEC's authority over establishment of energy facilities preempts other entity's
13 permitting authority over such facilities, and the explicit authority provided to EFSEC by
14 RCW 90.48.160 and RCW 90.48.262 to issue CWA-related permits for energy facilities
15 reflect the Legislature's intent that the Council exercise exclusive jurisdiction over
16 industrial waste discharge review and permitting at energy facilities under its jurisdiction.
17 EFSEC is the sole agency that may issue Vancouver Energy a permit to discharge effluent
18 to the City of Vancouver's POTW.

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20 ⁴ The statute was amended in 1973 to reflect EFSEC's authority to issue permits for energy facilities. *See*
21 *Laws 1973, ch. 155, § 3.*

22 ⁵ Likewise, portions of the statutes reflecting the permitting authority of EFSEC for energy facilities were
23 adopted in the 1973 versions of the statutes. *See Laws 1973, ch. 155, § 3.*

24 ⁶ The Legislature authorized Ecology to delegate its permitting authority for effluent releases to POTWs to
25 any city, town or municipal corporation operating a POTW. RCW 90.48.165. Ecology delegated that
power to the City of Vancouver for effluent releases to the City's POTW. However, under the WPTP's
statutory structure approved by EPA, Ecology's authority to issue industrial waste discharge permits to
energy facilities regulated by 80.50 RCW, or to delegate that power, was preempted. Ecology could not
delegate authority to the City of Vancouver to issue such permits to energy facilities. As such, that authority
remains with EFSEC.

1 **C. EFSEC’s authority to issue the Industrial Waste Discharge Permits is**
2 **consistent with the National Pretreatment Program.**

3 **1. The National Pretreatment Program governs pretreatment of industrial**
4 **discharges to POTWs.**

5 The CWA prohibits the discharge of pollutants from point sources into waters of
6 the United States without a permit. CWA § 311(a). The Act expressly authorizes the
7 EPA to issue a NPDES permit either directly or through a state-delegated program. CWA
8 § 342(a). Concomitant with its grant of authority to EPA to regulate discharges into the
9 waters of the United States, Congress granted EPA authority to regulate discharges to
10 POTWs. 33 USC 1317(b) (“CWA § 307(b)”); *U.S. v. Hartsell*, 127 F.3d 343, 348-49 (4th
11 Cir. 1997). A discharge means the introduction of pollutants into a POTW from a non-
12 domestic source regulated under CWA § 307(b), (c), or (d); 40 C.F.R. 403.3(i). A POTW
13 is a treatment works as defined by § 212 of the Act, owned by a state or municipality.
14 40 C.F.R. 403.3(q). Whether discharges to a POTW are directly permitted by the EPA, or
15 by a state or local agency through a state-approved pretreatment program, the agency
16 regulating such discharges must ensure that the discharges comply with pretreatment
standards adopted under CWA. § 307(b), (c), or (d).

17 National Pretreatment Program regulations establish the responsibilities of the
18 federal, state, local governments, and industry and the public, to implement National
19 Pretreatment Standards to control pollutants passing through a POTW, *see* 40 C.F.R.
20 403.1(a). The regulations apply to states, including Washington, which have federally
21 approved NPDES programs, and to POTWs receiving wastewater from sources subject to
22 the National Pretreatment Standards. *Id.* at (b). The National Pretreatment Program
23 identifies requirements that apply to discharges by industrial users or nondomestic sources
24 of waste to a POTW. 40 C.F.R. 403.1.

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1 **2. The NPDES Permitting Program and the National Pretreatment Program**
2 **are separate programs.**

3 The NPDES program is a federal permit program pertaining to point source
4 effluent discharges to waters of the United States. EPA issues NPDES Permits. EPA may
5 delegate its authority to administer the NPDES program to states. States administering the
6 NPDES permit program must adopt procedures equivalent to those set forth in 40 C.F.R.
7 124, (establishing required elements of state NPDES programs) in order to operate in lieu
8 of the federal program. 40 C.F.R. 123.25(a)(24)-(a)(35). Two or more state agencies may
9 share NPDES authority but each agency must have statewide jurisdiction over a specific
10 class of activities or discharges. 40 C.F.R. 123.1(g)(1). In Washington, Ecology and
11 EFSEC share NPDES permitting authority. EFSEC has authority to issue NPDES permits
12 to energy facilities under its control. RCW 90.48.260(a).

13 In contrast to the NPDES program, the National Pretreatment Program does not
14 establish a permit program. The National Pretreatment Program is self-implementing.
15 The regulations governing the program require industrial facilities to comply with all
16 applicable National Pretreatment Standards and require state and local municipalities with
17 authority to implement pretreatment programs to ensure compliance with those standards.
18 Federal regulations give states the discretion to ensure compliance with pretreatment
19 standards by whatever means they deem appropriate, including by permit, order, or similar
20 means. 40 C.F.R. 403.8(f)(1)(iii). Unlike the NPDES permit program, which requires
21 delegation from EPA, states submit their pretreatment program to EPA for approval, not
22 delegation. Once approved, industrial users must obtain permits or other control
23 mechanisms established by the state to discharge wastewater to a POTW. The control
24 mechanism chosen by the state may specify the effluent quality necessitating pretreatment

1 or impose other controls on pollutants in wastewater prior to discharging it to the POTW,
2 and ensure that all discharges meet National Pretreatment Standards.

3
4 **3. EPA approved Washington's Pretreatment Program based on an existing**
5 **permit program that authorized only EFSEC to grant Industrial Waste**
6 **Discharge Permits to Energy Facilities.**

7 Federal regulations governing the National Pretreatment Program establish
8 requirements for states to administer the program. As noted above, states have flexibility
9 to implement their pretreatment programs, by permit, order or other means. Key to
10 federal approval of a state administered pretreatment program is verification of the state's
11 legal authority to implement its pretreatment program. 40 C.F.R. 403.10(f). This
12 verification requires submission to EPA of the laws and regulations demonstrating that
13 state agency or agencies responsible for implementing the program have the authority to
14 do so. 40 C.F.R. 403.10(g)(ii).

15 Rather than establish a new mechanism to implement the National Pretreatment
16 Program, Washington decided to use its existing state industrial waste discharge permit
17 program to ensure that discharges to POTWs meet all federally mandated pretreatment
18 standards. RCW 90.48.160. Washington applied for EPA approval of the WPTP and
19 obtained that approval on September 30, 1986. Its application relied on the state statutes
20 pertaining to industrial discharge permits in effect at the time.⁷

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22 ⁷ Vancouver Energy, though its legal counsel, has filed a Public Disclosure Request to EFSEC under
23 Chapter 42.56 RCW seeking all documents regarding EFSEC's authority or lack of authority to administer a
24 pretreatment program for waste discharges from energy facilities, and/or to issue permits for discharges to a
25 Publicly Owned Treatment Works from energy facilities, including but not limited to all communications
between EFSEC and the U.S. Environmental Protection Agency regarding EPA's position on this issue.

These documents would, presumably include the specific documents submitted to EPA regarding state
authority to implement the pretreatment program. To date, no documents have been released in response to
this request.

1 One of the statutes Washington relied upon in its application to EPA is RCW
2 90.48.160. As noted above, this statute requires that any person who operates an
3 industrial or commercial operation resulting in discharges to sewage systems operated by
4 municipalities or public entities which discharge into public waters of the state, must
5 obtain a permit from Ecology or the Thermal Power Plant Site Evaluation Council (now
6 EFSEC). *Id.* The other statutes Washington relied upon to obtain EPA approval of its
7 WPTP were RCW 90.48.260 and 90.48.262, which authorize Ecology to administer a
8 permit program to implement Clean Water Act requirements, but which authorizes only
9 EFSEC to issue such permits for all energy facilities under its jurisdiction.

10 Similarly, any person proposing to discharge industrial waste to a municipal
11 sewage system must file an application with Ecology at least sixty days prior to
12 discharging. WAC 173-216-070. For energy facilities, an application seeking a permit to
13 discharge an industrial effluent to a POTW must instead be filed with EFSEC. WAC 463-
14 60-537.

15 As permitted by 40 C.F.R. 123.1(g)(1), RCW 90.48.160 and RCW 90.48.260 place
16 industrial discharge permit requirements in the hands of separate state agencies, each with
17 statewide jurisdiction over a class of activities or discharges. For energy facilities, only
18 EFSEC is authorized to grant permits implementing the National Pretreatment Program.
19 For all other facilities, Ecology is empowered to grant those permits or to delegate its
20 authority to the local POTW operator pursuant to RCW 90.48.165. There is no similar
21 provision authorizing EFSEC to delegate its WPTP authority to a municipality such as
22 Vancouver.

23 There is no legal basis to conclude that EPA approved a pretreatment program that
24 authorized Ecology to issue (or delegate to a POTW the authority to issue) industrial
25 waste discharge permits for energy facilities. At the time EPA approved the WPTP, only

1 EFSEC—not Ecology—had the power to issue such permits for energy facilities under
2 Chapter 80.40 RCW. Moreover, RCW 90.48.160 was the only state pretreatment program
3 authority in existence at the time of EPA’s approval. As discussed above, this statute
4 divides responsibility for issuance of industrial waste discharge permits between EFSEC
5 (for energy facilities) and Ecology (for all other facilities). EPA approved Washington’s
6 pretreatment program in 1986 on the basis of state law that reflected EFSEC’s exclusive
7 authority to issue WPTP permits for energy facilities and Ecology’s authority to issue
8 such permits (or to delegate its authority to POTW operators) to all other facilities. RCW
9 80.50.110, RCW 80.50.120, RCW 80.50.040(9), RCW 90.48.160, RCW 90.48.260, RCW
10 90.48.262(2).

11 EPA did not, and could not have, approved a scheme whereby Ecology or a
12 municipality would issue an industrial waste discharge permit for an energy facility
13 because no state law authority to do so existed at the time. EPA approved the bifurcation
14 of permitting authority between EFSEC and Ecology that existed at the time of its
15 approval of the state pretreatment program, and which remains in effect today.

16
17 **4. EFSEC can assure compliance with state and national pretreatment**
18 **program requirements through its review, approval, and conditioning of**
19 **Industrial Waste Discharge Permits.**

20 EFSEC has the responsibility and capability to ensure that the Vancouver Energy
21 Terminal will comply with pretreatment program requirements. EFSEC is empowered to
22 communicate with EPA, Ecology and the City of Vancouver to confirm that all
23 pretreatment requirements will be met. WAC 436-60-537. EFSEC may also, as
24 necessary, contract with independent consultants to conduct studies to confirm such
25 compliance. EFSEC is empowered to develop and apply conditions of site certification

1 for the design, construction, and operation of energy facilities. RCW 80.50.040(2). This
2 includes the authority to set conditions required by the National Pretreatment Program and
3 the WPTP. EFSEC may also prescribe specific monitoring to ensure on-going
4 compliance. RCW 80.50.040(9).

5 Fundamentally, EFSEC must confirm, under federal requirements, that Vancouver
6 Energy's effluent to the City's POTW will meet all applicable National Pretreatment
7 Standards. 40 C.F.R. 403.10(f)(1)(i); RCW 80.50.040(9). Moreover, upon approval of
8 site certification, the Council must include conditions in the draft certification agreement
9 which consider state or local governmental or community interests affected by the
10 construction or operation of the facilities. WAC 463-28-070. While the City's
11 pretreatment authority is preempted, the Council must ensure that any facility discharge to
12 the City's POTW will comply with the program requirements.

13
14 **D. The Council's interpretation of its permitting jurisdiction supports EFSEC
issuance of the Industrial Waste Discharge Permit.**

15 In 1998, EFSEC concluded that it has exclusive authority to issue water quality
16 certifications under CWA § 401, 33 U.S.C. 1341, for energy facilities subject to its
17 jurisdiction. The preemption analysis that led to this conclusion is equally applicable to
18 issuance of industrial waste discharge permits.

19 The CWA prohibits federal agencies from issuing permits that may result in any
20 discharge into navigable waters without obtaining certification from the state in which the
21 discharge originates that any such discharge will comply with all applicable state water
22 quality standards. *Id.* In 1997, a careful review by the Office of the Attorney General,
23 determined that EFSEC is the only agency authorized to issue CWA § 401 certification
24 for energy facilities seeking CWA permits in Washington. This determination was based,
25 in large part, on the express preemption of other agency authority to issue energy facility

1 permits set forth in Chapter 80.50 RCW. Declaration of Dale Johnson (“Johnson Decl.”),
2 Exhibit A (November 4, 1997 Morton Memorandum (“Morton Memo.”)); Exhibit B
3 (March 16, 1998 Pharris Memorandum (“Pharris Memo.”)).

4 The Attorney General’s Office correctly concluded that the EFSEC statutes
5 preempt the general grant of authority to Ecology, under RCW 90.48.260, to administer
6 the Clean Water Act. The Attorney General’s Office concluded:

7 While federal law conditions the granting of certain federal permits on
8 receipt of a 401 certification, Section 401 is not a “regulatory authority”
9 assigned to Ecology by federal law. The assignment of a particular agency
10 to carry out these functions **is purely a matter of state law**. Specifically, it
is a state law, RCW 90.48.260, which would be Ecology’s authority to
issue the certifications, **absent the EFSEC statutes**.

11 Pharris Memo, at 3 (emphasis added).

12 Therefore, “[t]he preemptive intent behind the EFSEC laws is broad enough to
13 include Section 401 certification.” *Id.* at 2. The Attorney General’s Office further
14 concluded that, in light of the Chapter 80.50 RCW’s clear intent to preempt other
15 authorities pertaining to permitting of energy facilities, it is irrelevant that the statute lacks
16 a specific reference to CWA § 401 certification. *Id.* at 3. The Attorney General’s Office
17 noted that an interpretation that would result in Ecology CWA § 401 certification for
18 energy facilities would be inconsistent with the purpose of EFSEC, and could “wreak
19 havoc” on the EFSEC process by removing one permit/approval from the process, placing
20 it into an entirely bifurcated channel of review. Morton Memo. at 3-4.

21 Like the state’s obligation to provide CWA § 401 certification for a project
22 seeking federal permits, the requirements for the state to ensure compliance with the
23 National Pretreatment Program derives from the CWA. For an energy facility subject to
24 EFSEC jurisdiction, the CWA § 401 certification process requires a “certification” by
25 EFSEC, just as the pretreatment program requires issuance of an industrial waste

1 discharge permit issued by EFSEC. In both cases, the unambiguous provisions of RCW
2 90.48.260 and RCW 90.48.262 provide EFSEC exclusive jurisdiction to issue the required
3 certification or permit. There is no rational legal or policy basis for a jurisdictional
4 distinction between the CWA § 401 certification process and the pretreatment program.

5 EFSEC has jurisdiction over all permits and certifications for energy facilities in
6 Washington. Ecology is explicitly preempted from issuing CWA-related permits at such
7 facilities. This is consistent with EFSEC's purpose to consolidate and expedite the
8 permitting process and to ensure that statewide energy policy is considered during all
9 phases of the decision-making process related to siting of energy facilities. EFSEC's
10 authority encompasses all certifications and permits under the CWA, including authority
11 to issue industrial waste discharge permits. To hold otherwise would "fl[y] in the face of
12 chapter 80.50 RCW which preempts other conflicting statutes and vests the authority for
13 issuance of all permits essential to construct and operate energy facilities with EFSEC."
14 Morton Memo at 3.

15 V. CONCLUSION AND REQUEST FOR RELIEF

16 EFSEC has exclusive authority to implement all state laws and regulations
17 governing the location, construction, and operational conditions for certification of energy
18 facilities in the state of Washington. The EFSEC process supersedes all state or local
19 permitting and review processes necessary to establish such a facility, including permits
20 for the discharge of industrial wastes to POTWs. EPA approved the bifurcated permitting
21 regime of the WPTP, which designates EFSEC as the sole agency responsible for issuing
22 industrial waste discharge permits at energy facilities. The Council itself has previously
23 interpreted its permitting authority as encompassing all permitting and certification
24 authority under Chapter 90.48 RCW for energy facilities. To hold otherwise would
25 remove one permit from the otherwise consolidated permitting process for energy

1 facilities, thereby frustrating the Legislature's intent to vest energy facility permitting
2 decisions and the associated state energy policy in the Council, rather than in local
3 municipalities.

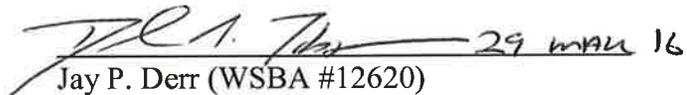
4 Based on the foregoing, Vancouver Energy requests a determination that EFSEC
5 has exclusive jurisdiction to issue the required permit to allow the proposed Vancouver
6 Energy Terminal to discharge effluent to the City of Vancouver's POTW.

7 DATED this 29th day of March, 2016.

8 VAN NESS FELDMAN LLP

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