

1 ("Morton Memo"). A true and correct copy of the Morton Memo is attached hereto as
2 Exhibit A. The second was a memorandum, dated March 16, 1998, drafted by James
3 Harris, Chief Ecology Division, and directed to Rich Heath, Chief, General Legal
4 Division and Jay Manning, Chief, Ecology Division, entitled: Water Quality Certification
5 on Energy Projects ("Harris Memo"). A true and correct copy of the Harris Memo is
6 attached hereto as Exhibit B.

7 5. I declare under the penalty of perjury of the laws of Washington and the
8 United States that the foregoing statements are true and correct.

9 DATED this 29th day of March, 2016.

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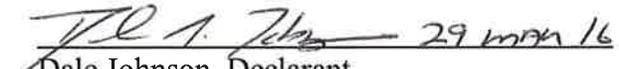

Dale Johnson, Declarant

EXHIBIT A

ATTORNEY GENERAL OF WASHINGTON

November 4, 1997

To: RICH HEATH, Sr. Assistant Attorney General
From: MEREDITH MORTON, ^{mum} Senior Counsel
Re: EFSEC/Ecology Dispute - Federal Clean Water Act Permit

You asked that I prepare a position paper on whether EFSEC or the Department of Ecology has the authority to issue a federal Clean Water permit for a project subject to EFSEC's jurisdiction. My analysis follows.

The Energy Facility Site Evaluation Council is the state agency responsible for processing applications for energy facilities, including crude or refined petroleum pipelines, and recommending site certification to the governor. The Council is composed of a Chairperson appointed by the governor and representatives from ten separate state agencies including the Department of Ecology. RCW 80.50.030. EFSEC is currently conducting an adjudication process and environmental review on the application of Olympic Pipeline Company to construct a gasoline pipeline from Snohomish County in western Washington to the Tri-Cities in eastern Washington.

The Legislature intended that EFSEC act as a "one-stop shopping" agency. Applicants for energy facilities and pipelines need only apply to EFSEC to obtain all of the state governmental approvals necessary to construct and operate an energy facility. The EFSEC member agencies have input into the siting process through their representative on the council. They may also generally appear as parties in the adjudication of applications. To ensure "one-stop shopping," the Legislature enacted the following:

RCW 80.50.110 states:

(1) If any provision of this chapter is in conflict with any other provision, limitation, or restriction which is now in effect under any other law of this state, or any rule or regulation promulgated thereunder, this chapter shall govern and control and such other law or rule or regulation promulgated thereunder shall be deemed superseded for the purpose of this chapter.

(2) The state hereby preempts the regulation and certification of the location, construction, and operational conditions of certification of the energy facilities included under RCW 80.50.060 as now or hereafter amended.

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In addition, RCW 80.50.120 states:

(1) Subject to the conditions set forth therein any certification shall bind the state and each of its departments, agencies, divisions, bureaus, commissions, boards, and political subdivisions, whether a member of the council or not, as to the approval of the site and the construction and operation of the proposed energy facility.

(2) The certification shall authorize the person named therein to construct and operate the proposed energy facility subject only to the conditions set forth in such certification.

(3) The issuance of a certification 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.

Emphasis added. Thus upon approval of an application and issuance of a site certification agreement executed by the governor, EFSEC has the duty and obligation to issue all permits necessary for the construction and operation of any energy facility. This includes issuance of Sec. 401 Clean Water Act Certification.

The Clean Water Act is a federal statute, however the state has the authority to issue necessary permits under the provisions of the Clean Water Act. RCW 90.48.260 designates the Department of Ecology as the State Water Pollution Control Agency for the purposes of the Federal Clean Water Act. RCW 90.48.260(1) grants the Department of Ecology the authority to establish and administer point source waste discharge and pollution discharge elimination permits. As seen by the EFSEC statutes cited above, the laws governing EFSEC's operation preempt all other state statutes.

The Legislature further clarified EFSEC's role in issuance of Federal Clean Water Act permits in RCW 90.48.262, which states in relevant part:

(1) The powers established under RCW 90.48.260 shall be implemented by the department through the adoption of rules in every appropriate situation . . .

(2) Permits for energy facilities subject to chapter 80.50 RCW shall be issued by the energy facility site evaluation council: PROVIDED, That such permits shall become effective only if the governor approves an

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application for certification and executes a certification agreement pursuant to said chapter. The council shall have all powers necessary to establish and administer a point source discharge permit program pertaining to such plants, consistent with applicable water quality standards established by the department, and to qualify for full participation in any national waste discharge or pollution discharge elimination permit system. The council and the department shall each adopt, by rules, procedures which will provide maximum coordination and avoid duplication between the two agencies with respect to permits in carrying out the requirements of this act including but not limited to, monitoring and enforcement of certification agreements, and in qualifying for full participation in any such national system.

As a practical matter, in order to carry out its duties under the provisions of the foregoing statute, EFSEC has contracted with the Department of Ecology to prepare the necessary permit and to provide on-going monitoring once the facility is constructed. In fact, EFSEC has agreed that it will continue to enter into such agreements with Ecology. Following the permit preparation, the Council then makes the determination of whether or not to issue the permit, along with all of the other necessary permits.

The Department of Ecology has now taken the position that it has the sole statutory authority to issue Federal Clean Water Act permits - not EFSEC. Their argument seems to be that the EFSEC statutes only preempt state laws and that the Federal Clean Water Act is not a state law. However, RCW 90.48.260 anointing Ecology the State Water Pollution Control Agency is a state law, not a federal law. Ecology's position is not supported by the clear, unambiguous language of the pertinent statutes. RCW 90.48.262 clearly states that Clean Water Act permits shall be issued by EFSEC in coordination with Ecology. Further, Ecology's position flies in the face of chapter 80.50 RCW which preempts other conflicting statutes and vests the authority for issuance of all permits essential to construct and operate energy facilities with EFSEC.

Ecology's position is inconsistent with the purpose of creating an agency like EFSEC. Their position could also potentially wreak havoc with the statutory scheme. When EFSEC completes its hearings on an application, it makes a recommendation to the governor on whether to approve or reject the application. RCW 80.50.100(1). The governor has 60 days to accept or reject the recommendation, or to require reconsideration by EFSEC. RCW 80.50.100(2). Approval or rejection by the governor is final with

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respect to the application subject only to judicial review under the APA. RCW 34.05.140.

Having Ecology make its own independent determination on whether to issue the Clean Water permit removes that one permit from the process and puts it into an entirely separate channel of review. There is no provision under Ecology's permit process for a final decision to be made by the governor. Also, any permit decision is appealable to the Pollution Control Hearings Board, not to court. The PCHB would have to go through its own appeal process before the matter could be submitted to superior court for APA review. Thus, the permit process would be bifurcated, the final decision would not be made by the governor as intended and there could be two independent court reviews with respect to the project: one based on the EFSEC record and the other based on the PCHB record. The chances of any such reviews coinciding at any step of the process would be remote.

For all of the foregoing reasons, it is submitted that the correct resolution of this issue is that EFSEC has the authority to issue Federal Clean Water Act permits with respect to EFSEC projects.

MWM:lla

ATTORNEY GENERAL OF WASHINGTON

July 1, 1997

To: Rich Heath, Sr. Assistant Attorney General
From: Meredith Morton, Senior Counsel
Subject: EFSEC/Ecology Dispute

EFSEC and Ecology are having a dispute. It concerns the Olympic Pipeline application. Alan Reichman, AAG for Ecology and representing them in the Olympic application, approached me about two months ago and asked if EFSEC or Ecology would be doing the \$401 Clean Water Act Certification. After checking with EFSEC, I informed him that EFSEC would. I had assumed that he was asking a simple question not preparing for a major war.

I could not determine what Ecology wanted. Allen Fiksdal has met with Ecology staff several times. Alan Reichman said his client wanted to be involved in the permit process. With that in mind, EFSEC agreed to issue the permit but to use Ecology staff to review/process the certification. Reichman now tells me that Ecology wants jurisdiction over the process and believe that have a strong legal argument. I do not believe they have any legal argument (see analysis below). Someone has convinced Tom Fitzsimmons to request a formal AGO on this subject. I told Reichman in a voice message that probably Ecology did not want to request a formal AGO to deal with an interagency dispute. In his reply he indicated that Ecology wanted to go forward.

Here's the legal argument: Ecology claims they have jurisdiction - which they do under normal circumstances - but as you know, RCW 80.50.110 states that chapter 80.50 RCW preempts all other state laws and regulations. Ecology claims that RCW 90.48.260 designates Ecology as the state agency responsible for administration of the "federal" clean water act. Reichman then says that the EFSEC preemption statute only applies to state law so it does not apply to the federal clean water act. I pointed out that it is a state law (RCW 90.48.260) that vests Ecology with state administration of the federal law. He nevertheless believes that Ecology has a "strong legal argument" and has evidently convinced his client that they do.

I suggested that Reichman and I sit down with our respective clients but he indicated that his client is adamant about wanting full jurisdiction. I do not know where Jay Manning is in all of this but I didn't think that I should call Jay.

Suggestions??

EXHIBIT B



Neredith Morston

Christine O. Gregoire

ATTORNEY GENERAL OF WASHINGTON

1125 Washington Street SE • PO Box 40100 • Olympia WA 98504-0100

MEMORANDUM

March 16, 1998

TO: Rich Heath
Chief, General Legal Division

Jay Manning
Chief, Ecology Division

FROM: ~~James Pharris~~
SF Assistant Attorney General

SUBJECT: **Water Quality Certification on Energy Projects**

Your divisions have supplied issue papers to the Solicitor General's Team on the question whether the Department of Ecology (Ecology) or the Energy Facilities Site Evaluation Council (EFSEC) has jurisdiction to issue, on behalf of this state, a water quality certification pursuant to Section 401 of the federal Clean Water Act, 33 U.S.C. Sections 1251 et seq. In my opinion, the weight of the argument is with EFSEC.

This discussion arises out of an application now pending before EFSEC for a Cross Cascade Pipeline. Federal law will require the applicant to obtain a permit from the Army Corps of Engineers pursuant to Section 404 of the Clean Water Act (33 U.S.C. Section 1344). The Army Corps cannot issue this permit unless the State (or in some circumstances an interstate water pollution control agency) provides a certification that any discharge into navigable waters resulting from the project "will comply with the applicable provisions of sections 301, 302, 303, 306, 307 of this Act." Clean Water Act, Section 401 [33 U.S.C. Section 1341(a)]. The question is which state agency will provide the necessary certification.

As a general matter, of course, Ecology administers the federal Clean Water Act in this state pursuant to a delegation agreement with the EPA and alongside its parallel administration of the state water pollution laws. See, e.g., RCW 90.48. RCW 90.48.260 designates Ecology as the "State Water Pollution Control Agency for all purposes of the federal clean water act." Certainly on projects not within EFSEC's jurisdiction, Ecology is the appropriate agency to perform the functions called for by Section 401.

EFSEC is a special council whose chairman is appointed by the governor and whose membership consists of certain state or local agency heads or their designees. RCW 80.50.030.

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EFSEC has jurisdiction to consider, and to recommend to the Governor, the approval or rejection of certain energy facility construction projects defined in RCW 80.50. The EFSEC process supersedes the individual permitting or review processes state or local agencies might otherwise engage in pursuant to various state laws. RCW 80.50.110. For projects within its jurisdiction, EFSEC has authority to make rules, apply environmental guidelines, conduct public hearings, present state concerns to other states and to federal agencies, and serve as an interagency coordinating body. RCW 80.50.040.

The language superseding other statutes is both broad and explicit. RCW 80.50.110 provides:

(1) If any provision of this chapter is in conflict with any other provision, limitation, or restriction which is now in effect under any other law of this state, or any rule or regulation promulgated thereunder, this chapter shall govern and control and such other law or rule or regulation promulgated thereunder shall be deemed superseded for the purposes of this chapter.

(2) The state hereby preempts the regulation and certification of the location, construction, and operational conditions of certification of the energy facilities included under RCW 80.50.060 as now or hereafter amended.

Furthermore, the Legislature has specifically provided that "[p]ermits for energy facilities subject to chapter 80.50 RCW shall be issued by the energy facility site evaluation council." RCW 90.48.262(2) The question then becomes: is the preemptive language of the EFSEC statutes sufficiently broad to include the issuance of Section 401 certifications? In the absence of explicit language dealing with this particular permit, I think the preemptive intent behind the EFSEC laws is broad enough to include Section 401 certifications. When the Legislature enacts several statutes on the same subject, the courts try to harmonize them to give maximum effect to all. In this case, we have only a general statute giving Ecology "default" jurisdiction over the administration of state clean water programs, measured against a very specific statute superseding contrary rules as to energy projects covered by RCW 80.50. If Section 401 certifications are not covered by this language, EFSEC no longer is a "one-stop shopping" agency with full authority to deal with all environmental issues which might arise in connection with a particular project. The potential for inconsistent positions or timelines arises. This undercuts the policies behind the creation of EFSEC, and I could not discern any competing policy consideration pushing for a contrary answer.

Ecology makes three arguments in favor of its separate jurisdiction over 401 certifications: (1) federal law prescribes it; (2) RCW 90.48.262 explicitly grants EFSEC certain permitting power but does not mention Section 401; and (3) Executive Order 81-18 assigns this authority to Ecology. None of the arguments is convincing.

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Although the responsibility to provide a Section 401 certification arises under federal rather than state law, the federal law nowhere prescribes that any particular state agency perform the functions associated with the federal act. Section 401, and every other part of the Clean Water Act I reviewed, simply refers to "States" or "a State," and leaves it to each state to decide what agency to create and how to assign their powers and duties. I also looked for any federal provision purporting to restrain states from consolidating their permitting in a single agency, as the EFSEC statutes do; I found nothing meeting this description. Federal law is simply silent as to which state agency performs the Section 401 duties.

Ecology does not directly argue that federal law designates Ecology here, but makes a somewhat related argument: that RCW 80.5.0110(1) preempts only regulatory authority assigned to other agencies "under any other law of this state." Ecology suggests that this language is not broad enough to cover 401 certifications because these are done pursuant to federal rather than state law. I disagree. While federal law conditions the granting of certain federal permits on receipt of a 401 certification, Section 401 is not a "regulatory authority" assigned to Ecology by federal law. The assignment of a particular agency 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.

Ecology also points out that RCW 90.48.262, assigning to EFSEC the authority to issue permits for energy facilities subject to RCW 80.50, only explicitly mentions "all powers necessary to establish and administer a point source discharge permit program." I do not see how this specific grant of authority to EFSEC could be read as a limitation on the opening sentence of RCW 90.48.262(2). In light of the clear language there and in RCW 80.50, I don't think it's significant that RCW 90.48.262 contains no explicit reference to Section 401 certifications.

Finally, Ecology refers to Executive Order 81-18, originally adopted in 1981 by Governor Spellman and reaffirmed in 1997 by Governor Locke. The Order designates Ecology to "coordinate state agency review of all federal environmental documents prepared pursuant to NEPA." In a cover letter addressed to Brigadier General Ernest J. Harrell of the Army Corps and dated February 20, 1997, Governor Locke directs Ecology "to continue to coordinate the state agency review of [Army Corps] environmental documents and public notices for permits under Section 10 of the River and Harbor Act and Section 404/401 of the Clean Water Act."

We have noted in previous opinions that Executive Orders are essentially statements of policy and do not generally have the force of law. AGO 1991 No. 21. In any case, however, I do not read either Executive Order 81-18 or Governor Locke's letter to General Harrell as inconsistent with the statutes discussed above. The Order and the letter designate Ecology as the

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coordinating agency, in effect the liaison between federal agencies and the state. Since most 401 certifications are not related to energy projects (nor are most NEPA or River and Harbor matters), Ecology is the logical agency to coordinate with the Corps in these areas. The coordination role, however, is not inconsistent with the assignment, by state law, of specific regulatory functions to some agency other than Ecology. Thus, even if the Order could supersede statute, which is a highly doubtful proposition, I do not read either the Order or the letter as attempting to do so.

For the reasons stated above, I agree with the General Legal Division that EFSEC, and not Ecology, has authority to issue a Section 401 certification on behalf of the State for any project falling within EFSEC's statutory jurisdiction.

JKP/bw

cc: Narda Pierce
David Walsh
Shirley Battan