

# **EXHIBIT 7**

Wash. AGLO 1977 NO. 2, 1977 WL 25970 (Wash.A.G.)

\*1 Office of the Attorney General  
State of Washington

AGLO 1977 No. 2

January 11, 1977

OFFICES AND OFFICERS—STATE—ENERGY FACILITY SITE EVALUATION COUNCIL—APPLICABILITY OF SITING ACT TO CERTAIN FACILITY.

Because of the definitions of certain key terms in [RCW 80.50.020\(17\)](#) it is not possible to determine in advance of the commencement of operation whether a certain proposed project of the Mobil Oil Company in Whatcom county will be such as to be subject to a requirement of site certification under the provisions of chapter 80.50 RCW (the state siting law).

Honorable R. Ted Bottiger  
State Senator  
2nd District  
8849 Pacific Avenue  
Tacoma, Washington 98444

Dear Senator Bottiger:

In AGLO 1976 No. 71, as you know, we advised the chairman of the state energy facility site evaluation council that we could not now conclusively determine whether certain proposed “. . . modifications to the dock, and related facilities at [Mobil Oil Company's] Ferndale refinery” would constitute the reconstruction or enlargement of an energy facility so as to require site certification pursuant to chapter 80.50 RCW. Thereafter, by letter dated December 8, 1976, you provided us with a detailed recital of various specific facts regarding the project which you asked us to assume, primarily involving your understanding of the operational capacity of the proposed facility. Based thereon, you then asked whether our view of the situation would now be any different.

#### ANALYSIS

In responding to this inquiry we first reiterate a point which we made in AGLO 1976 No. 71; namely, that even if the applicability of the siting law (chapter 80.50 RCW) to this particular development could presently be determined - in

advance of construction - no legal action could now successfully be maintained by or on behalf of the energy facility site evaluation council to require Mobil to file an application with the council. While the siting law does provide for both criminal and substantial civil penalties for the construction or operation of any facilities in violation thereof (see, [RCW 80.50.150](#)), there is simply nothing within the act, or in any other law, which empowers the siting council to compel the filing of an application for site certification.

A second preliminary point to be made, of course, is that any legal opinion predicated upon an assumed state of facts is only as valid as are those facts themselves. In this case, we are informed by legal counsel for the Mobil Company that it is not now necessarily prepared to accept as verities any or all of the facts which you have asked us, for the purposes of this opinion, to assume to be true.

Bearing these two propositions in mind let us turn to the applicable statutes and to a further explanation of the problem posed in the administration of chapter 80.50 RCW as it is presently worded. To begin with, [RCW 80.50.020\(11\)](#) defines the term “energy facility” to mean

\*2 “. . . an energy plant, transmission facility or transmission corridor . . .”

Generally speaking, the siting law then provides that the construction and operation of such facilities may only be accomplished pursuant to a site certification agreement executed by the state and the owner-operator. Similarly, such certification is a prerequisite to reconstruction and enlargement of existing energy facilities if certain criteria (to be discussed herein) are met. [RCW 80.50.060](#), infra.

Definitions of the terms “transmission facility” and “transmission corridor” are set forth in [RCW 80.50.020\(7\) and \(8\)](#) respectively. [FN1] While these definitions are of some marginal analytical utility in resolving the question posed by your inquiry, it is, quite obviously, the further term “energy plant” (as used in the above definition) which is most germane to your question. [RCW 80.50.020\(17\)](#) defines this critical term to mean:

“. . . the following facilities together with their associated facilities:

“(a) Any stationary thermal power plant with generating capacity of two hundred fifty thousand kilowatts or more and floating thermal power plants of fifty thousand kilowatts or more, including associated facilities;

“(b) Facilities which will result in receipt of liquified natural gas in the equivalent of more than one hundred million standard cubic feet of natural gas per day, which has been transported over marine waters;

“(c) Facilities which will result in the receipt of more than an average of fifty thousand barrels per day of crude or refined petroleum which has been or will be transported over marine waters, except that the provisions of this chapter shall not apply to storage facilities unless occasioned by such new facility construction;

“(d) Any underground reservoir for receipt and storage of natural gas as defined in [RCW 80.40.010](#) capable of delivering an average of more than one hundred million standard cubic feet of natural gas per day; and

“(e) Facilities which will result in the processing of more than twenty-five thousand barrels per day of petroleum into refined products.”

Manifestly, we are here concerned with a facility which might be characterized according to either subpart (c) or (e) of [RCW 80.50.020\(17\)](#), supra, if the average barrel-perday criterion is established in either case. The problem which we adverted to in AGLO 1976 No. 71, supra - and which is every bit as nettlesome here - is that while subparts (a) and (d) of that statute speak of the capacity of particular facilities, subparts (b), (c) and (e) are couched, instead, in terms of the actual operational results of construction of the types of facilities described therein. Accordingly, irrespective of whether, in the instant case, the facility in question (together with associated facilities) is looked at from the standpoint of its output of refined petroleum products (as we did in AGLO 1976 No. 71) or from that of its receipt of crude or

refined petroleum (as you have alternatively suggested in your letter) there remains, in either event, a necessity to wait for the results before determining the applicability of the law to that facility. This is so because - unlike such things as a thermal power plant or an underground natural gas reservoir - it is in the case of the petroleum refining facility or a marine terminal facility not the project's capacity which is determinative of its legal status but, instead, it is its resulting operational use.

\*3 Moreover, in again so concluding we should add that our analysis remains unchanged even when we turn to [RCW 80.50.060\(1\)](#), which you have quoted at page 4 of your letter. In fact, as you will note, that further statute was also cited, and quoted, on page 2 of our own prior opinion. As amended by § 34, chapter 108, Laws of 1975-76, 2nd Ex. Sess., [RCW 80.50.060\(1\)](#) says that:

“(1) Provisions of this chapter shall apply to those energy facilities to be newly constructed or installed anywhere within the state of Washington, or to reconstruction or enlargement of such existing energy facilities where the new physical capacity being added meets or exceeds those capacities defined in [RCW 80.50.020](#). No construction of such energy facilities or energy transmission corridors may be undertaken, except as otherwise provided in this chapter, after March 15, 1976, without first obtaining certification in the manner provided in this chapter.”  
(Emphasis supplied.)

Since, however, the only references to capacity in [RCW 80.50.020\(17\)](#), supra, involve thermal power plants and underground natural gas reservoirs, and since, instead the statutory criteria in the case of all of the other types of energy plants therein described are expressed in terms of result rather than capacity there is, as of now, something of a problem presented in attempting to apply the portion of [RCW 80.50.060\(1\)](#) which we have above underscored to reconstruction or enlargement of the types of energy plants described in [RCW 80.50.020\(17\) \(b\), \(c\) and \(e\)](#), supra. [FN2] While we are not necessarily prepared to say that the statute cannot be applied at all to such reconstruction or enlargement projects it seems to us that if it is to be so applied it will, once again, have to be on the basis of resulting use rather than mere capacity. In other words, assuming that the legislature truly intended also to encompass the reconstruction or enlargement of those types of energy plants with respect to which operational result rather than capacity is definitionally relevant, one is still faced with a necessity to await the result before determining the applicability of the law to a given enlarged or reconstructed facility.

Conversely, had the legislature truly intended to make “capacity” rather than “result” the test - both in terms of new developments and of the reconstruction or enlargement of existing energy plants - it could easily have used the same terminology in subparts (b), (c) and (e) of [RCW 80.50.020](#), supra, as it did in the case of thermal power plants and natural gas reservoirs in subparts (a) and (d) of the same statute. Perhaps, upon reflection, the legislature might now desire to do just that. If so, we would propose an amendatory bill [FN3] reading as follows:

“Energy plant’ means the following facilities together with their associated facilities:

“(a) Any stationary thermal power plant with generating capacity of two hundred fifty thousand kilowatts or more and floating thermal power plants of fifty thousand kilowatts or more, including associated facilities;

\*4 “(b) Facilities which will (( )) have the capacity to receive liquified natural gas in the equivalent of more than one hundred million standard cubic feet of natural gas per day, which has been transported over marine waters;

“(c) Facilities which will (( )) have the capacity to receive more than an average of fifty thousand barrels per day of crude or refined petroleum which has been or will be transported over marine waters, except that the provisions of this chapter shall not apply to storage facilities unless occasioned by such new facility construction;

(d) Any underground reservoir for receipt and storage of natural gas as defined in [RCW 80.40.010](#) capable of delivering an average of more than one hundred million standard cubic feet of natural gas per day; and

“(e) Facilities (i) capable of processing of more than twenty-five thousand barrels per day of petroleum into refined products.” [FN4]

In closing, however, we should further add that it does not seem to us correct to say, as you have inferred in your letter, that our view of the present meaning of the law prevents it from effectively applying to petroleum refineries or marine terminal facilities until construction actually commences. Anyone who proposes to build and operate such a facility will presumably also be aware of the actual uses which will then be made of it. If those uses will be such as to cause the development to constitute an energy plant as defined in RCW 80.50.20(17) (c) or (e), supra, then that person will, as a practical matter, have to file an application for site certification under chapter 80.50 RCW in order to obtain a state certification agreement permitting the development to be used in the manner intended. Likewise, even the developer who does not now plan to utilize such a facility to its full designed capacity will also have to obtain such certification from the state prior to its construction if, at some later date, the developer is to be free to decide, in effect, to change its mind and use the facility to full capacity - assuming, of course, that such use would then result in the existence of an “energy plant” as above defined. In short, if such a developer now proceeds to construct the facility without obtaining state certification the developer may be forever barred from using the facility to its full capacity.

We trust that the foregoing will be of assistance to you.

Very truly yours,  
Slade Gorton  
Attorney General

Philip H. Austin  
Deputy Attorney General

Thomas F. Carr  
Assistant Attorney General

[FN1]“(7) 'Transmission facility' means any of the following together with their associated facilities:

“(a) Crude or refined petroleum or liquid petroleum product transmission pipeline: A pipeline larger than six inches minimum inside diameter between valves for the transmission of these products with a total length of at least fifteen miles;

“(b) Natural gas, synthetic fuel gas, or liquified petroleum gas transmission pipeline:

A pipeline for the purpose of delivering gas to a distribution facility or more specifically, a 'gas transmission line' as defined by the office of pipeline safety, United States department of transportation, except an interstate natural gas pipeline regulated by the United States federal power commission;

“(8) 'Energy transmission corridor' means land jointly used for more than one new transmission facility;”

[FN2] In addition it will be similarly noted that the definitions of “transmission facility” and “transmission corridor,” which are also energy facilities under RCW 80.50.020(11), supra, are largely expressed in terms not including the concept of capacity. Thus RCW 80.50.060(1) would also appear to have little (if any) bearing on these energy facilities.

[FN3] As requested by you in the event of our reaffirmation, here, of AGLO 1976 No. 71.

[FN4] To be consistent, [RCW 80.50.060\(1\)](#), supra, would then also need to be amended as follows:

“(1) Provisions of this chapter shall apply to those energy facilities to be newly constructed or installed anywhere within the state of Washington, or to reconstruction or enlargement of ((facilitiesRCW 80.50.020

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