

FEDERAL INSPECTOR
FOR THE
ALASKA NATURAL GAS TRANSPORTATION SYSTEM

Washington, D.C. 20503

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MEMORANDUM

TO: John T. Rhett
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FROM: Ned Hengerer
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SUBJECT: Authority of the Federal Inspector to Waive or Otherwise Modify the Terms and Conditions Issued By, and the Legal Requirements Governing, the Federal Agencies Relative to ANGTS

SUMMARY

The legal limits of the Federal Inspector's role in permitting and enforcement under the reorganization should be defined precisely at the earliest time possible. In particular, what are his powers to waive or otherwise modify legal requirements governing, or imposed by, the various Federal agencies with jurisdiction over the Alaska Natural Gas Transportation System?

The concept of the Federal Inspector has evolved over several years, being defined with increasing specificity by the Alaska Natural Gas Transportation Act (ANGTA), the President's Decision and Report to Congress on the Alaska Natural Gas Transportation System (Decision), and Reorganization Plan No. 1 of 1979, respectively. Before analyzing the controlling legal documents, it is advisable first to appraise Congress' and the President's underlying rationale or philosophy. If not ambivalent, this philosophy is at least complex.

On the one hand, the Federal Inspector is a response to certain perceived inefficiencies in the Federal oversight of the TAPS construction. Coordination of agency functions and expedition of construction are therefore sought.

On the other hand, the relevant Federal agencies, as well as the Federal Inspector, are not given a totally free rein to waive laws and other require-

ments which might affect project schedule or cost. In part at least, this too is a response to another aspect of the TAPS experience, inadequate enforcement of legal requirements.

In sum, Congress has sought to have ANGTS authorized and constructed quickly and at a reasonable cost, without Federal regulation causing delays and cost escalation. But Congress has also been jealous in wanting not to sacrifice environmental, safety, engineering, and consumer values--or at least desiring to minimize damage to those values.

Against this backdrop the seemingly complex legal framework for waivers and modifications of laws or terms and conditions can be better understood. In the first place the Federal Inspector cannot waive mandatory provisions of law, whether substantive or procedural. Only the President is empowered--under Section 8(g) of ANGTA--to seek such waivers. These waivers require approval by joint resolution of Congress.

Section 9 of ANGTA has, however, empowered the Federal agencies to speed up their permitting process, but, unlike TAPS, they do not have carte blanche authority to waive procedural requirements of law. For example, the minimum requirements of the Administrative Procedure Act still apply.

Moreover, the Federal agencies cannot, under Section 9, impose terms and conditions which are merely permitted by law and would seriously hurt the project. They must, however, continue to impose terms and conditions mandated by law. What this should mean is that, unless an underlying regulatory statute mandates a specific term and condition, each Federal agency must exercise its discretion in crafting terms and conditions so as to avoid major roadblocks to expedition, although staying within the general statutory objectives.

While Section 9 contemplated that each agency would ensure its own expedi-

tious permitting process, the Reorganization Plan has interjected the Federal Inspector. In this regard, there are two discrete powers entrusted by the Plan to the Federal Inspector.

In the non-enforcement phase--that is, the permit process--the Federal Inspector is charged with "coordinating the compliance by all the Federal agencies with Section 9" of ANGTA. This is a crucial provision for it defines the Federal Inspector's authority to keep the agencies from imposing discretionary--as contrasted to mandatory--terms and conditions which could slow down the project. A very narrow reading of this provision would be that his role is merely advisory. The broader interpretation, and one which is supported by the legislative history, is that the Federal Inspector is, in one form or another, the final arbiter, subject of course to judicial review.

The Federal Inspector's authority to alter agency enforcement practices is more clearly defined. These enforcement practices are to be followed, "except where the Federal Inspector determines that such policies and procedures would require action inconsistent with Section 9" of ANGTA. While this does not relieve the Federal Inspector of his duty to enforce the agencies' permits, etc., it does give him substantial latitude in determining how enforcement will be accomplished. If, however, the Federal Inspector is faced with enforcing terms and conditions of two agencies which would lead to irreconcilable conflict, he may then waive enforcement of one to eliminate that conflict.

DISCUSSION

A. ANGTA

1. Presidential Waivers

The authority to waive provisions of law, relative to the Alaska Natural

Gas Transportation System (ANGTS), is derived from the Alaska Natural Gas Transportation Act (ANGTA), Pub. L. 94 - 586, 15 U.S.C. Section 719. Subsequent references to waiver--in the President's Decision and the Reorganization Plan for the Federal Inspector--also have their genesis in ANGTA.

The most straightforward--and yet the least feasible--waiver provisions are assigned, in the first instance, to the President. There are two such provisions.

First of all, under Section 7(a) (4) (D) of ANGTA, 15 U.S.C. Section 719e (a) (4) (D), the President could identify in his Decision provisions of law, related to agency approvals, which must be waived so as to expedite construction and initial operation of ANGTS. The joint resolution of Congress, to approve the President's Decision, would likewise approve the requested waivers. In practice the President made very limited use of this waiver provision, only identifying two minor provisions related to gas imports. Decision, pp. 23 - 25.

The second Presidential waiver provision appears in Section 8(g) of ANGTA, 15 U.S.C. Section 719(g). It is the same as the former, except that the President can request waiver at any time after his Decision has been approved. Approval by joint resolution of Congress is likewise required. To date, no waiver of law has been sought under Section 8(g) of ANGTA.

2. Agency Actions

With the necessity of securing an affirmative joint resolution of Congress, the Section 8(g) Presidential waiver is of limited practical value. The provisions of Section 9 of ANGTA, 15 U.S.C. Section 719g, are much more germane to the field-level role of the Federal Inspector.^{1/}

^{1/}While Section 9 was originally addressed to the various agencies having regulatory jurisdiction over ANGTS, the President's Decision and the Reorganization Plan have brought the Federal Inspector within the ambit of Section 9, as will be discussed starting at page 7 of this memorandum.

The central thrust of Section 9 is to assure an expeditious agency approval process for the myriad certificates, rights-of-way, permits, leases, etc., associated with ANGTS (referred to throughout as the "permit process.") In addition, however, the relevant federal officers and agencies were given latitude in how they administer their respective laws in this permit process. While this latitude has sometimes been characterized as "waiver authority," that perhaps overstates the matter.

a. Expediting the Permit Process

In terms of actually processing the permit applications, Sections 9(a) and 9(b) direct the Federal agencies to expedite and give precedence to such applications so as to issue the requisite approvals—"to the fullest extent permitted by the provisions of law"—at the "earliest practicable date." Waiver of procedural laws is not contemplated.^{2/} There is, however, authority to take the most expeditious procedure among several permissible ones. The FERC, for example, has on several occasions diverged from its traditional, time-consuming procedures (such as on-the-record trials), relying on these ANGTA provisions to initiate,

^{2/}Section 9(b), as it appeared in earlier Senate and House versions of ANGTA--S.3521 and House amendments thereto--authorized Federal agencies to waive procedural requirements of law. Section 203(c) of the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. Section 1652(c), had this same provision to waive procedural requirements. This waiver authority was, however, deleted from the final version of ANGTA. During the floor debates leading to this final version, certain Congressmen expressed concern about the grant of waiver authority. Representative Seiberling, for example, argued that "to give that kind of authority [to waive procedural rules] to a whole array of officials, high and low, without any awareness of the possible implications is just an abdication of responsibility. Since it is not necessary, we ought not to put ourselves in that position." 122 CONG. REC. 34128 (1976). His view prevailed. This lack of general waiver authority over procedures is accentuated by Section 5(a)(1) of ANGTA, which directed the FPC to suspend its normal adjudicatory procedures in order to facilitate timely issuance of its Recommendation, and concomitantly the President's Decision.

instead, expedited procedures.^{3/}

b. Establishing Terms and Conditions

As for the substance of the permits and other authorizations issued, (the so-called "terms and conditions"), Section 9(c) circumscribes agency discretion so as to prevent unreasonable and oppressive legal obstacles to project completion. Terms and conditions are divided between those "permitted by law" and those "required by law;" that is, permissive versus mandatory terms and conditions. Mandatory terms and conditions must be attached to the agency permits. If they would severely impair project expedition, the only remedy is a Presidential request for waiver under Section 8(g) of ANGTA, as discussed earlier. But permissive terms and conditions cannot be included if they would (1) change the basic nature and general route of ANGTS or (2) "would otherwise prevent or impair in any significant respect the expeditious construction and initial operation" of ANGTS.

c. Modifying Existing Terms and Conditions

Finally, there is provision to change terms and conditions in permits and other authorizations already issued and in force, although it is somewhat limited. In this regard Section 9(d) first states that the Federal agencies may "add to, amend or abrogate" any term or condition "to the extent permitted under laws ad-

^{3/}E.g., Midwestern Gas Transmission Company v. FERC, 589 F.2d 603 (D.C. Cir. 1978). The Court affirmed FERC's conditional import authorization of gas from Alberta as part of the ANGTS pre-build, recognizing that "Congress requires expedited consideration of all applications related to the ANGTS, however, so that the Commission considered the import proposals immediately."

ministered by" those agencies.^{4/} Nevertheless, agencies cannot so amend or abrogate terms and conditions (even when permitted by law to do so), if the effect is to change the route or nature of the project, or to impair expedition, just as proscribed by Section 9(c) above.^{5/}

B. AUTHORITY OF THE FEDERAL INSPECTOR

As ANGTA was enacted, the Federal Inspector could monitor project progress but otherwise had a very limited role. See, Section 7(a)(5) of ANGTA, 15 U.S.C. 719e(a)(5). Consequently, administration of the several Section 9 provisions discussed above was left to the respective agencies--not to mention court appeals initiated by dissatisfied parties. This was changed by Reorganization Plan No. 1 of 1979, establishing the Office of the Federal Inspector.

The Federal Inspector has been invested by the Reorganization Plan with two basic roles--apart from actual field-level enforcement--related to the agencies' permits issued under Section 9 of ANGTA. One concerns the imposition of unreasonable or conflicting terms and conditions. The other deals with enforcement policies and procedures in the field. The Plan does not, however, fully detail how these two roles are to be exercised. Nonetheless, relevant legislative his-

^{4/}This really does not provide new and independent authority for the agencies: Since the authority to amend or abrogate is limited "to the extent permitted by law," the agencies already have that authority. By contrast, under Section 203(a) of the TAPS Act, 43 U.S.C. Section 1652(e), the Federal agencies could amend any authorization at any time. As such, Section 9(d) of ANGTA reflects a diminution of agency waiver authority. The floor debates on ANGTA reveal this Congressional reticence: "The difficulty I have with this provision is that if we grant blanket authority to any bureaucrat who is involved at any point in the licensing process to waive any condition that he considers desirable under the terms of this, we are opening up the door to such things as, taking the oil pipeline, for example, waiving the requirements of inspection by X-rays, waiving safety requirements. . ." 122 CONG. REC. 34127 (1976). (remarks of Representative Seiberling).

^{5/}Under Section 9(e) the agencies are likewise required to include in their permits or other authorizations the terms and conditions established in the President's Decision. And their authority to change such terms and conditions is the same as set forth in Section 9(d).

tory—surrounding ANGIA, the President's Decision, as well as the Reorganization Plan—bring these roles of the Federal Inspector into focus.

1. Federal Inspector Interceding in the Agency Permit Process

During the permit, nonenforcement phase, the Federal Inspector has a role in the agencies' process of prescribing terms and conditions. Specifically, Section 202(b) provides that the

Federal Inspector shall be responsible for coordinating the expeditious discharge of nonenforcement activities by Federal agencies and coordinating the compliance by all the Federal agencies with Section 9 of the Act. (Emphasis added).

Section 202(b) goes on to discuss the Federal Inspector coordinating, for the agencies, scheduling plans, "one window" filing, and data requests. These relate primarily to Section 9(a) and (b), in terms of expedited process. Nevertheless, Section 202(b), as quoted above, should also be read to give the Federal Inspector a role in administering Section 9(c), that is, to preclude permissive terms and conditions which, for example, would significantly impair expeditious construction.^{6/}

Based on Section 202(b) of the Plan, the Federal Inspector can take an active

^{6/}The mechanics of administering this role have yet to be defined. It could entail the Federal Inspector intervening in the various permit proceedings and pointing out terms and conditions which he feels do not comply with Section 9(c). Alternatively, the Federal Inspector could remain apart, only interceding as an arbiter if Northwest complained that an agency was imposing terms and conditions contrary to Section 9(c). Or else, the Federal Inspector could merely monitor these agency proceedings and intercede unofficially and off-the-record with the agency at issue. This latter approach would, however, raise certain legal problems relative to the Administrative Procedure Act, which has not been waived. A follow-up memorandum will expand on this question of how the Federal Inspector should exercise his role under Section 202(b) of the Plan.

stance to resist unreasonable terms and conditions. But his role has definite legal limits. Again, "waiver" authority probably overstates his power.

The Federal Inspector must first limit his focus to permissive terms and conditions: For example, an agency's underlying regulatory statute authorizes it to promulgate regulations and to issue permits which should protect some environmental value, but the agency is also invested with the authority to determine how best to attain that statutory objective. The terms and conditions which result are "permissive." If the agency has the choice of various terms and conditions, all of which meet the overall statutory objective, the Federal Inspector could intercede if the agency selected the one which changes the basic nature of ANGTS or significantly impairs expedition.^{7/} A less disruptive term and condition must then be fashioned. As such, the Federal Inspector or the specific agency is not waiving a legal requirement. The overall statutory requirement must still be met; it is only the specific approach of the permitting agency which must be changed.

The legislative history surrounding the whole ANGTA process supports this active role for the Federal Inspector under Section 202(b) of the Plan. Congressional concern over unreasonable or conflicting terms and conditions first appeared in Section 7(a)(3) of the Senate's version of ANGTA, S. 3521. It would have allowed the President to include in his Decision "a special administrative process (to substitute for judicial review) to further assure that actions by

^{7/}It is important to distinguish between terms and conditions "permitted by law" and "required by law." Both types are legally binding on the applicants. The former, however, can be altered by the issuing agency and yet still satisfy the underlying statute. The mere fact that the agency has promulgated implementing regulations does not render permissive terms and conditions mandatory.

federal officers are reasonable and in the public interest."^{8/} As finally enacted, however, ANGTA did not mention this special administrative process, relying instead upon Section 9(c)--and agency self-enforcement thereof--to avoid unreasonable terms and conditions.

The need for greater coordination among the Federal agencies was again recognized by the President in his Decision. He proposed to expand the role of the Federal Inspector beyond mere monitoring--as set forth in Section 7(a)(5) of ANGTA--in part at least to "avoid rules and bureaucratic procedures that are merely cumulative and would be sources of delay." Id. at 197. Therefore, the President proposed that the Federal Inspector would "coordinate Federal involvement with the pipeline operator during the design and construction phases of the project." Id., at 202 (Emphasis added).

The strong role of the Federal Inspector in the permit phase is even more apparent in Congress' perception and approval of the Federal Inspector, as portrayed in the Decision. In the context of the joint resolution approving the Decision,^{9/} for example, the House Interior and Insular Affairs Committee, as one of the jurisdictional committees, expressed strong support for centralized Federal Inspector authority in the permit process, even though the agencies are actually to issue the permits:

. . . [the Committee] wishes to emphasize the importance of insuring that one authority be responsible for the overall coordination of activities, beginning at the preliminary field work and right-of-way permitting stages. Only if this is done can unnecessary administrative delays and cost overruns be minimized.^{10/}
(Emphasis added).

^{8/}S. Rep. No. 94 - 1020, 94th Cong., 2d Sess. 18 (1976).

^{9/}H. J. Res. 621, Pub. L. 95 - 158, 95th Cong., 1st Sess.

^{10/}H. R. Rep. No. 95 - 739 - Part I, 95th Cong., 1st Sess. 10 (1977).

The President concurred in the necessity of centralized authority in the permitting stage, as evidenced by Section 202(b) of the Reorganization Plan. Under that provision, as discussed above, the Federal Inspector is charged with "coordinating the compliance by all the Federal agencies with Section 9 of the Act."

Again, the perceptions of the relevant committees, in terms of approving the Plan, reiterate the active role of the Federal Inspector relative to terms and conditions. For example, the House Committee on Government Operations read the Plan to give the Federal Inspector certain waiver authority:

To the extent, however, that terms and conditions are evolved from agency policy, the inspector will have the discretion to waive their application when it is necessary to resolve conflicting [sic] requirements which would affect the progress of the project.^{11/}

Earlier in the same report, the Government Operations Committee had listed "[t]ypes of agency conflicts that may require Federal inspector to intercede." Id. at 4. The conflict between the listed terms and conditions in each case is patent. This in turn speaks for the Federal Inspector interceding during the permit phase, to cure conflicting, or otherwise unreasonable, legal requirements at their inception, in lieu of waiting for the conflict to surface and cause construction delay.

While a strong case can, and should, be made for the Federal Inspector interceding during the permit phase, a word of caution must be raised. There is Congressional sentiment that such intercession should be rare. The Senate Committee on Governmental Affairs, for example, accepted that the Federal Inspector can overturn substantive terms and conditions. As a caveat, however, it stated that

^{11/}H.R. Rep. No. 96 - 222, 96th Cong., 1st Sess. 6 (1979).

the Committee expects these to be rare and that this grant of authority for conflict resolution not be used to overturn the judgement of the responsible agencies in a large number of instances.^{12/}

2. The Federal Inspector Managing Enforcement

In addition, the Federal Inspector has authority to alter agency enforcement activities. Specifically, under Section 202(c) of the Plan, the AAO's and the Federal Inspector are to employ in general the "enforcement policies and practices" of the underlying agencies. The only exception is "where the Federal Inspector determines that such policies and procedures would require action inconsistent with Section 9" of ANGTA. In other words, the Federal Inspector may alter an agency's method of enforcement of its terms and conditions, if necessary to ensure expedition.^{13/}

Unlike the Federal Inspector's status in the permit stage, it is perfectly clear that during enforcement he is the final arbiter.^{14/} For example, under Section 202(a) of the Plan, the AAO's "shall be subject to the supervision and direction of the Federal Inspector, whose decision on enforcement matters shall constitute 'action' for purposes of Section 10 of the Act [that is, for judicial review]." While the Federal Inspector has the final say on all enforce-

^{12/}S. Rep. No. 96-191, 96th Cong. 1st Sess. 9 (1979).

^{13/}While the Federal Inspector could wait until enforcement is in process and then merely react to individual AAO enforcement actions, he might instead work out--with the active support or mere acquiescence of the various agencies--uniform enforcement practices for all permits and authorizations.

^{14/}Under the President's Decision the Executive Policy Board (EPB) would have heard appeals from AAO's overruled by the Federal Inspector, but Section 201 of the Plan reduced the EPB to a merely advisory role.

ment matters, Congress believes that he will be judicious in exercising that power.^{15/}

^{15/}For example, during the full House's consideration of the Reorganization Plan, Representative Dingell asked for standards by which to judge the Federal Inspector's performance. Representative Brooks, as chairman of the Government Operations Committee, responded that "[i]t is my understanding that the administration, as recently as yesterday, has worked out an understanding with the gentleman from Michigan, and I want to assure the gentleman of my cooperation in seeing that they adhere to it as they have said they would." 125 CONG. REC. H 3951 (daily ed. May 31, 1979).