



Office of the Federal Inspector

Alaska Natural Gas Transportation System

Permitting

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Room 2413, Post Office Building
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MEMORANDUM

TO: John T. Rhett
Federal Inspector

FROM: Ned Hengerer *NH*
General Counsel

SUBJECT: Federal Inspector Authority to Modify or Waive Permit Conditions
and Other Legal Requirements Imposed on ANGTS Construction

SUMMARY

The Federal Inspector has the authority to modify, or even to waive, a term or condition in any permit, certificate, right-of-way, lease, regulation, or other authorization (hereinafter referred to as "permit condition") previously imposed by a federal agency on ANGTS construction. This authority flows from the Alaska Natural Gas Transportation Act (ANGTA), 15 U.S.C. §719, and from Reorganization Plan No. 1 of 1979, 44 Fed. Reg. 33663.

The Federal Inspector may exercise this authority in two separate contexts: (1) During the permit-issuance process, he coordinates with the jurisdictional federal agencies to assure against unreasonable conditions being imposed. (2) When subsequently enforcing these permits, the Federal Inspector may waive conditions which would cause unreasonable delay. This authority is closely tied to the legal obligation on those same federal agencies, in the first instance, to expedite construction of ANGTS.

BACKGROUND

The issue of Federal Inspector waiver authority has continued to be raised in a number of program areas. While this waiver authority has long been recognized (see, August 23, 1979, Legal Opinion of the OFI General Counsel), officials at several federal agencies have attempted to distinguish their agencies' permit conditions from its scope. In order to resolve this important issue once-and-for-all, I have prepared this legal opinion.

OFI policymakers may use this memorandum as the foundation for building efficient interagency relations. At the same time all OFI personnel involved in "one window" permit coordination and in enforcement (including design review) should read this memorandum carefully.

DISCUSSION

1. Modification Authority During the Permit-Issuance Process

a. Federal Agency Obligation to Expedite

Sections 9(a) and 9(b) of ANGTA direct the federal agencies to expedite and give precedence to ANGTS regulatory applications so as to issue the requisite approvals at the "earliest practicable date." This includes authority to take the most expeditious procedure among several permissible ones, since "Congress requires expedited consideration of all applications related to the ANGTS." Midwestern Gas Transmission Co. v. FERC, 589 F.2d 603, 619 (D.C. Cir. 1978).

Related but even more to the point, Section 9(c) of ANGTA circumscribes federal agency discretion so as to prevent unreasonable and oppressive legal obstacles to project completion. Specifically, federal agencies may not include in permits or other approvals permissive terms and conditions which (1) would 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. 1/

b. Federal Inspector Coordination Role

To assure that the federal agencies meet this legal obligation for expedition, Section 202(b) of the Reorganization Plan made the Federal Inspector "responsible for * * * coordinating the compliance by all the Federal agencies with Section 9 of the Act." The Federal Inspector is to assure that the federal agencies process and issue their ANGTS permits on time: Section 202(b) envisions the Federal Inspector "requiring submission of scheduling plans for * * * [, and managing] government requests for data" relating to, all permits and other necessary authorizations. He is also to prevent unreasonable permit conditions: Section 202(b) authorizes the Federal Inspector "serving as the 'one window' point for filing for and issuance of all necessary permits, certificates, grants or other authorizations * * * *"

c. Federal Inspector Authority to Modify Draft Permit Conditions

This coordination function is the first form of Federal Inspector

1/ Section 9(c) is directed to discretionary or permissive conditions, those which are "permitted but not required" by law. In other words if the agency -- as is usually the case -- has the choice of various conditions, all of which meet the statutory objective, Section 9(c) mandates the agency selecting the one least disruptive to project expedition. While discretionary, such a condition still has the force of law. For the relatively rare conditions "required by law," disruption to project expedition could only be waived by the President and Congress under Section 8(g) of ANGTA.

authority to modify permit conditions, albeit one administered indirectly through interagency communication. Specifically, acting as the "one window" coordinator, the Federal Inspector reviews draft permit conditions to assure compliance with Section 9(c) of ANGTA. This role was first recognized as necessary in the President's 1977 Decision and Report to Congress on the Alaska Natural Gas Transportation System (Decision), 2/ and was subsequently reaffirmed during Congressional approval of the Decision. 3/

Were the Federal Inspector to find a draft permit condition in conflict with Section 9(c) of ANGTA, the respective Agency Authorized Officer (AAO) would be contacted to make the necessary modification. Normally, this would be enough because each AAO is required by Section 101(c) of the Reorganization Plan "to represent [his agency's] authority on all matters [in this case compliance with Section 9(c)] pertaining to preconstruction, construction, and initial operation of the system." If not, the Federal Inspector would be compelled -- under Section 7(a)(5)(E) of ANGTA and Section 102(h)(2) of the Reorganization Plan -- to apprise the President and the Congress that the permit condition at issue constitutes a "factor[] which may delay the construction and initial operation of the system."

If the federal agency were still to persist and issue the permit over the Federal Inspector's "one window" objection, the respective ANGTS sponsor company could have the permit overturned by the U.S. Court of Appeals. While Section 10 of ANGTA provides a narrow scope of judicial review (the agency action must either deny a constitutional right or lack statutory authority), the unreasonable permit condition would nonetheless come within that scope: Section 9(c) of ANGTA expressly divests the federal agencies of the "authority to include terms and conditions as would * * * prevent or impair in any significant respect the expeditious construction and initial operation" of ANGTS. With the Federal Inspector -- as the federal officer responsible for coordinating compliance with Section 9 -- already finding non-compliance, summary reversal of the agency's permit condition would be probable. 4/

2/ The President proposed to expand the role of the Federal Inspector beyond mere monitoring, 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).

3/ The House Interior and Insular Affairs Committee emphasized "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." H.R. Rep. No. 95-739, Part I, 95th Cong., 1st Sess. 10 (1977) (Emphasis added).

4/ Conversely, Federal Inspector concurrence with the permit condition would probably be dispositive against any sponsor court challenge.

2. Modification Authority During the Enforcement Process

a. Federal Inspector Waiver Authority

While the Federal Inspector's "one-window" review of draft permits should eliminate patently unreasonable conditions, unexpected problems and changed circumstances might necessitate more direct Federal Inspector action during actual enforcement. Section 102 of the Reorganization Plan transfers to the Federal Inspector enforcement authority for, among other things, all federal ANGTS permit conditions. Under Section 202(c) of the Reorganization Plan, the Federal Inspector is to follow the "enforcement policies and procedures" -- such as permit conditions -- of the federal agencies, "except where the Federal Inspector determines that such policies and procedures would require action inconsistent with Section 9 of" ANGTA. This Federal Inspector enforcement flexibility has been construed in Congress as "waiver" authority. 5/

The standard for Federal Inspector waiver during enforcement is the same as during "one window" coordination -- compliance with Section 9(c) of ANGTA. But since Section 9(c) compliance should have been substantially assured during the "one window" permit process, it has long been recognized that the Federal Inspector should not have to exercise this waiver authority often. 6/

Infrequent use does not, however, diminish the waiver authority itself, which was further codified by Section 1-106 of Executive Order 12142, 44 Fed. Reg. 36927: When he waives a permit condition, the Federal Inspector must publicize and transmit to the Executive Policy Board in writing "a complete factual and legal basis for the determination."

b. Relationship to Section 9(d) of ANGTA

For permits and other authorizations already issued and in force, Section 9(d) of ANGTA provides that "[a]ny Federal officer or agency * * *

5/ In deliberating on this provision of the Reorganization Plan proposal, the House Committee on Government Operations concluded that "[t]o 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 requirements which would affect the progress of the project." H.R. Rep. No. 96-222, 96th Cong., 1st Sess. 6 (1979).

6/ While recognizing that "the Federal Inspector could overturn judgement of the responsible agencies (EPA, Interior, etc.) regarding the actual substantive terms and conditions of leases and permits * * *", the Senate Committee on Governmental Affairs "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." S. Rep. No. 96-191, 96th Cong., 1st Sess. 9 (1979).

may * * * add to, amend or abrogate any term or condition included in such certificate, permit, right-of-way, lease, or other authorization * * * * "

There are two significant limitations to this authority. First, the Section 9(c) limitation on agency conditioning authority, discussed earlier, also applies here verbatim. Second, Section 9(d) adds no new legal authority, instead being couched "to the extent permitted under laws administered by such officer or agency * * * * "

Section 9(d) should be construed in light of the Reorganization Plan, the subsequent and more specific enactment. Thus, if this authority to "add to, amend or abrogate" conditions were part of "enforcement," Section 102 of the Reorganization Plan would already have transferred it to the Federal Inspector. In any event, however, it is clear that Section 9(d) -- whichever agency uses it -- does not supercede the Federal Inspector's waiver authority. By including Section 202(c) in the Reorganization Plan, the President and the Congress went beyond Section 9(d) of ANGTA to vest specific, enforcement-phase waiver authority in the Federal Inspector. And when he uses this waiver authority, the Federal Inspector need not look for the permit-issuing agency to act under Section 9(d), even though he might consult with the AAO before waiving the condition.

c. Relationship to Other Agencies' Preexisting Waiver Authority

As noted immediately above, Section 9(d) of ANGTA does not create a new source of waiver authority for federal agencies; it merely circumscribes any authority that they already have under their enabling statutes. And just as the existence of that preexisting agency authority does not supercede the Federal Inspector's waiver authority, the Federal Inspector may exercise his waiver authority without the procedural constraints frequently imposed on the federal agencies.

Public notice and an opportunity to be heard are the most common procedures imposed on federal agencies when changing permit conditions. When attaching or modifying conditions to a certificate of public convenience and necessity, the FERC must provide notice and hearing (unless there are no material issues of fact). Section 7 of the Natural Gas Act, 15 U.S.C. §717f. And under the Natural Gas Pipeline Safety Act, 49 U.S.C. §1672(d), the Department of Transportation must also provide public notice and the opportunity for a hearing (frequently done through notice and comment procedures) before granting application to waive compliance with its pipeline safety standards.

While the Federal Inspector is still bound by any substantive statutory requirements (such as a welding waiver being "not inconsistent with gas pipeline safety"), his only procedural duties come from Section 1-106 of Executive Order 12142, as described above. But those public notice and EPB transmittal requirements are merely informational, occurring after the waiver has been made. Such procedural freedom is inherent in

the Reorganization Plan, since waiver by the Federal Inspector is intended for exigent circumstances with project expedition at stake.

3. Implementation of Federal Inspector Waiver Authority

The OFI has addressed the question of waiver authority on several occasions. Most recently, it was formalized in Chapter 7 of the OFI's Compliance Management Manual, Interim Guidance for Eastern and Western Leg construction. Specifically, the possible waiver or modification situations were arrayed from most likely to least likely to occur: (a) OFI interprets -- as contrasted to modify or waive -- flexible permit condition to avoid project delay; (b) OFI modifies condition in an OFI notice-to-proceed; (c) OFI waives schedule-disrupting permit condition issued by a federal agency; (d) OFI asks a federal agency to modify a condition, when delay is not imminent, as in the preconstruction planning phase; and (e) the President proposes that Congress waive a mandatory provision of law.

These five scenarios reflect how the OFI and other federal agencies have in fact met the ANGTA mandate to expedite ANGTS. The key instances, which are briefly described below, represent models of how the OFI has and should continue to implement its two-fold waiver authority in the future; the goal being avoidance of delay-causing legal requirements initially so as to minimize the need for waivers later.

The primary way to meet this goal has been for the federal agencies to establish flexible conditions. While assuring the statutory purpose underlying the permit, such flexible conditions leave the detailed administration to the Federal Inspector.

The best examples are probably the FERC's certificate conditions. After providing general standards for design and scope changes in the Incentive Rate of Return (IROR), the FERC left administration to the discretion of the Federal Inspector, thereby avoiding either waivers or time-consuming requests to FERC for modifications. In another instance, the stop-work order condition is triggered when the "Federal Inspector or his field representative determines that such issue presents problems or conflicts of a serious and immediate nature * * * * " The FERC gave the Federal Inspector the necessary room to interpret these conditions in the face of actual construction circumstances without being faced with the difficult choice of delay or waiver.

As a related matter to flexibility of individual conditions, certain authorizations have established a comprehensive, institutional, decisionmaking process to allow the Federal Inspector to apply general, agency-set standards to the overall design-to-construction activity of the sponsors. In this way the site-specific decisions will be made by the OFI, for example, in the context of attaching conditions to an NTP. Thus, if circumstances change, the Federal Inspector may merely modify the condition under Section 9(d) of ANGTA, with no need to waive the agency's permit condition.

The best examples of this approach are the grants of right-of-way across federal lands issued by the Department of the Interior (DOI). In the case of the grant for the Alaska segment (F-24538, issued December 1, 1980), the Federal Inspector is given the full responsibility for the design process: summary network analysis diagrams (Stipulation 1.5); design criteria, plans, and programs (Stipulation 1.6); notice to proceed (Stipulation 1.7); and stop orders (Stipulation 1.17).

This decisionmaking process to enforce the grant is both highly efficient (in terms of utilizing functions which the OFI would be performing anyway under the terms and conditions of Section 5 of the Decision) and also consistent with DOI's obligation under Section 9(c) of ANGTA. In other words, by avoiding the need for each design decision to return to DOI, project delay is prevented.

The Federal Inspector has employed the Section 202(c) waiver authority only once. The OFI promulgated cost reimbursement regulations different from those of the underlying agency, DOI. 10 CFR Part 1530; 45 Fed. Reg. 73081 and 46 Fed. Reg. 28395. This infrequency indicates that the "one-window" coordination process is working, with the agencies establishing permit conditions which satisfy Section 9(c) of ANGTA. But the OFI must continue to work with the permit-issuing agencies to assure that FERC and DOI model conditions, mentioned above, remain the norm for Section 9(c) compliance.

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