

# Office of the Federal Inspector

## Alaska Natural Gas Transportation System

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### MEMORANDUM

TO: John T. Rhett  
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FROM: Ned Hengerer  
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SUBJECT: Legal Interpretation of the Reorganization Plan Provision for  
Federal Inspector Delegation of Enforcement Authority to the  
Agency Authorized Officers

### SUMMARY

Reorganization Plan No. 1 of 1979 centralizes enforcement of all federal requirements, related to the Alaska Natural Gas Transportation System (ANGTS), in the Federal Inspector. In Section 102, for example, the transfer of functions "shall vest in the Federal Inspector exclusive responsibility for enforcement of all Federal statutes relevant in any manner to pre-construction, construction, and initial operation" of ANGTS. Thus, in order to retain any enforcement role for the Agency Authorized Officers (AAO), Section 202(a) had to provide for Federal Inspector delegation of enforcement authority to the AAO's:

The Federal Inspector shall delegate to each Agency Authorized Officer the authority to enforce the terms, conditions, and stipulations of each grant, permit, or other authorization issued by the Federal agency which appointed the Agency Authorized Officer.

The "shall delegate" language has been misconstrued by some as mandatory and expansive. To the contrary, it does not diminish the Federal Inspector's broad management discretion in how he uses the AAO's. The delegation provision merely gives the Federal Inspector the authority to use the AAO's as enforcement agents, if he finds that arrangement appropriate.

When read in its entirety, the Reorganization Plan dictates this broad discretion. Specifically, the Federal Inspector has "exclusive responsibility for enforcement," while the Executive Policy Board (EPB) -- once contemplated as the final legal authority over ANGTS -- is only

advisory. Moreover, the AAO's, along with any staff, are to be employees of the Office of the Federal Inspector (OFI), "subject to the supervision and direction of the Federal Inspector."

The evolution of each of these elements of the Reorganization Plan -- from a minimal Federal Inspector role relative to the AAO's and the EPB to a dominant one -- reinforces the conclusion that it is for the Federal Inspector, not the AAO's, to manage enforcement. 1/ Any other interpretation would turn the Reorganization Plan on its head.

#### BACKGROUND

As first conceived by the President, federal reorganization to expedite ANGTS had a tripartite structure: The AAO's were to be the primary enforcement units, supervised at the field-level by the Federal Inspector. The EPB was to set policy for, and resolve disputes between, the two. The dramatic changes in the relative positions of these three entities help to explain why the delegation provision does not mandate any particular approach to delegation.

The reason behind Federal Inspector delegation to the AAO's arose when the EPB agencies first considered transferring enforcement authority to the Federal Inspector, instead of the federal agencies delegating that authority directly to their respective AAO's, as would have happened under the Decision. 2/ Absent an express delegation, Section 2(a)(5) of the Reorganization Act of 1977, 5 U.S.C. §903(a)(5), would probably have precluded the Federal Inspector from using the AAO's for official enforcement actions.

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1/ The evolution of the respective roles of the Federal Inspector, the AAO's, and the EPB starts with the President's Decision and Report to Congress on the Alaska Natural Gas Transportation System (Decision), September 1977. That was followed by the EPB agencies' 1st draft (May 10, 1978); OMB's 1st draft (October 10, 1978); the EPB agencies' 2d draft (November 13, 1978); OMB's 2d draft (January 9, 1979); and OMB's final draft (March 29, 1979).

2/ Decision - While the AAO's would be subject to Federal Inspector supervision, the actual enforcement authority flowed directly to the AAO's from their agencies: "The Agency Authorized Officers would directly represent the statutory authority of the respective Federal agencies in the field on all matters pertaining to construction of the pipeline." Decision at 42. Thus, there would be no need for any delegation from the Federal Inspector to the AAO's.

1st EPB Draft - In order to avoid the many delegations of enforcement authority from the respective federal agencies to their AAO's, the Federal Inspector would be transferred the agencies' authority.

While the EPB agencies first urged maximum delegation -- if not total transfer of the enforcement function -- to the AAO's, 3/ OMB ultimately provided for minimal delegation, declining to impose any requirement on the Federal Inspector as to the level or method for delegation. 4/ This discretion had been urged in Congressional comment leading to the final OMB draft. 5/

In practice the Federal Inspector has used the delegation provision to enhance management efficiency, tailoring the level of delegation to the particular circumstances. For example, because the Western Delivery System "is standard pipeline upgrading of limited complexity relative to ANGTS itself," the Federal Inspector delegated enforcement authority "to the greatest extent possible pursuant to Section 202(a) of the Reorganization Plan." 45 Fed. Reg. 53851 (August 13, 1980). By contrast, in Alaska there has been no delegation of enforcement authority to the AAO's. On the Eastern and Western Leg "prebuild" projects, the Federal Inspector has made limited use of delegations, focusing on enforcement on the small amount of federal land traversed.

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3/ 1st EPB Draft - To emphasize their strong role, the AAO's "would be delegated the authority and responsibility for enforcement." The EPB agencies recognized that maximum delegation "may be more cumbersome and thus less efficient than one without some degree of agency identity." Nevertheless, they recommended to OMB maximum delegation on the supposition that "the agencies' missions and statutory authorities will retain their identity in the Federal Inspector organization."

1st OMB Draft - AAO's were not mentioned at all.

2d EPB Draft - "Delegation" was not used. Instead, the "Federal Inspector shall exercise the enforcement authority herein transferred through the appropriate Agency Authorized Officers."

4/ 2d OMB Draft - The delegation provision as it now exists in Section 202(a) first appeared in this draft.

Final OMB Draft - This sentence in Section 202(a) was unchanged.

5/ Senators Jackson and Hatfield of the Senate Committee on Energy and Natural Resources (the jurisdictional ANGTS committee), in their bipartisan letter of March 13, 1979, urged a strong Federal Inspector role. On the question of delegation of enforcement authority to the AAO's, they stated that the Federal Inspector must have authority to delegate but need not do so: "The Federal Inspector himself must have authority to stop work in progress \* \* \* . The reorganization plan should be designed so as to resolve that dispute [over stop work authority] in advance and must specify who has stop work authority and who may delegate stop work authority to other Federal officials." (Emphasis added).

## DISCUSSION

While the delegation provision remained unchanged in the last two OMB drafts, the Federal Inspector's role increased dramatically from (1) mere AAO oversight to (2) direct enforcement of certain enumerated legal requirements to (3) exclusive responsibility and final authority for enforcing all federal requirements, whether or not enumerated. 6/ Thus, the delegation provision -- while not eliminated -- must be read as having been subordinated to the now-exclusive Federal Inspector enforcement role: The only qualification to that role is Section 202(c), which directs the Federal Inspector to "carry out the enforcement policies and procedures" of the federal agencies, unless inconsistent with ANGTA.

Moreover, there are three specific changes in the AAO mechanism which reinforce the declining significance of the delegation provision. First, the

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6/ Decision - The President contemplated "a limited, single-purpose transfer of field-level supervisory authority over enforcement of terms and conditions \* \* \* " Decision at 204. This would have allowed him "to overrule the enforcement actions of an Agency Authorized Officer," Id. at 42. who would actually be the primary enforcement official in the field.

1st EPB Draft - The Federal Inspector was transferred enforcement authority. But since the AAO's were still to be the prime enforcers, the Federal Inspector would have to delegate his authority to the AAO's. The Federal Inspector would still only have "field supervisory authority over AAO's."

1st OMB Draft - "The following functions insofar as they relate to enforcement \* \* \* are hereby transferred to the Federal Inspector." This was followed by a list of agencies and their statutes.

2d EPB Draft - This was the same, except that it accentuated the limited scope of the transfer: "Agency enforcement actions affecting the system taken pursuant to authorities, not transferred by this plan, shall not be taken without prior consultation with the Federal Inspector."

2d OMB Draft - The prior version was eliminated and replaced by expansive transfer language similar to Section 102 of the Plan itself: "This transfer shall lodge in the Federal Inspector exclusive responsibility for enforcement of all Federal statutes relevant in any manner to preconstruction, construction, and initial operation."

Final OMB Draft - Section 102 was slightly edited from the earlier draft, now appearing as in the Plan. More importantly, for the first time, Section 202(a) made Federal Inspector enforcement decisions the final government action: Any Federal Inspector "decision on enforcement matters shall constitute 'action' for purposes of Section 10 of" ANGTA.

role and employment status of the AAO staff changed dramatically. The AAO staffs started as the primary OFI units, remaining employees of the respective agencies; then, they became OFI employees; and finally, they were eliminated as an explicit part of the Reorganization Plan. 7/ Second, the AAO's themselves went from employees of their respective agencies to OFI employees. 8/ With the AAO's being OFI employees, the delegation provision necessarily is circumscribed: Delegation to one's own employee is by definition more discretionary and flexible than delegation to an employee of another agency. Third, as a further qualification to the delegation provision, the Federal Inspector's control over the AAO's -- in addition to that

7/ 1st EPB Draft - "Each Agency Authorized Officer and specialized staff of agency enforcement personnel would be the basic component of the Federal Inspector's field teams." And the Federal Inspector's independent "staff should not duplicate Agency Authorized Officer staff or responsibility."

1st OMB Draft - Neither AAO's nor their staffs were mentioned.

2d EPB Draft - For the first time AAO staffs would be OFI employees (but with express reemployment rights). This appeared as Section 202(e).

2d OMB Draft - This basically followed the 2d EPB Draft.

Final OMB Draft - Section 202(e) was eliminated, and with it any reference to AAO staff.

8/ 1st EPB Draft - The AAO's would remain employees of their respective agencies.

1st OMB Draft - The AAO's were not mentioned at all.

2d EPB Draft - As part of Section 202(d), the AAO "shall remain an employee of his respective agency."

2d OMB Draft - This remained the same, except renumbered as Section 202(e).

Final OMB Draft - The AAO's for the first time are no longer agency employees, instead becoming part of the OFI. This was accomplished by two revisions. First, Section 202(e) of the January draft -- stating that the AAO "shall remain an employee of his respective agency" -- was eliminated. Second, the final Section 202(a) was revised so that the AAO's "shall be detailed to and located within" the OFI.

inherent in AAO and staff being OFI employees -- was expressly increased. 9/

Finally and of greatest significance, the role of the EPB was almost completely eliminated. This change was the direct corollary to the enhancement of Federal Inspector authority and the reduction in the AAO role. As originally conceived and as later established through all but the final draft, the EPB would exercise both policy and appellate control over the Federal Inspector. 10/ But these strong EPB policy and appellate roles were viewed as detrimental to the

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9/ 2d EPB Draft - "In the exercise of these enforcement functions, the Agency Authorized Officers shall be subject to the supervision of the Federal Inspector."

2d OMB Draft - This same language was added as the second sentence of Section 202(a), the first sentence of which is the delegation provision.

Final OMB Draft - This language in Section 202(a) was amended to include both "supervision and direction of the Federal Inspector \* \* \* ."

10/ Decision - "The Board will provide policy guidance to the Federal Inspector, and act as an appellate body to resolve differences among the agencies and the Federal Inspector, including differences that may arise when the Federal Inspector overrules an enforcement action of any Agency Authorized Officer." Decision at 43.

1st EPB Draft - The Decision was merely reiterated.

1st OMB Draft - EPB policy and appellate authority over the Federal Inspector remained essentially the same, now appearing in Sections 201(a) and 201(b) respectively: "Federal Inspector shall be subject to the policy guidance of the Executive Policy Board \* \* \* " and "any agency \* \* \* may appeal to the Executive Policy Board those portions of a decision of the Federal Inspector which enforce a function transferred from the appealing agency \* \* \* ."

2d EPB Draft - Section 201 remained the same as above.

2d OMB Draft - While following Section 201 above, there were two additions: EPB's appellate authority was expanded also to hear appeals from "any person designated by the President in the Decision \* \* \* ," that is ANGTS sponsor companies. Also, the EPB, not the Federal Inspector, would render the final enforcement decision; "the Board's decision means such appeal shall constitute agency action within the meaning of Section 10 of ANGTA."

basic purpose of the Federal Inspector. 11/ As a result, OMB eliminated both roles, leaving the EPB in Section 201 to "advise the Federal Inspector on the performance of the Inspector's functions," which would now include those previously given to the EPB in the Decision. 12/ Therefore, the Federal Inspector became the final arbiter of how the delegation provision is to be administered.

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11/ The Jackson-Hatfield letter raised this same concern: "The Executive Policy Board must not be allowed to repeat the dickering \* \* \* between an Authorized Officer and the Federal Inspector. The presumption must be built in that the Federal Inspector's decision will prevail." And in OMB Director McIntyre's decision memorandum to the President, it was stated that "[g]ood management suggests that one individual have the authority and be responsible for efficient, effective oversight of the pipeline. Commissions and boards are not always effective means for organizing to ensure that a regulatory enforcement process is properly administered."

12/ In transmitting the final OMB draft to Congress, the President reiterated the need for single control, thereby eliminating the EPB for other than advisory purposes: "I am convinced that the Federal Inspector must have authority commensurate with this responsibility." 15 Weekly Compilation of Presidential Documents 592 (April 9, 1979).