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**BRIEFING BOOK FOR**
**FOOTHILLS -- INTERAGENCY TASK FORCE MEETING**

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# NEWS RELEASE

**FOR IMMEDIATE RELEASE**

## MAJOR PIPELINE COMPANIES REGROUP TO PREPARE ALASKAN GAS PROPOSAL

**Calgary, November 15, 2001** -- The Alaska Highway natural gas pipeline project took a giant step forward today with the signing of a memorandum of understanding (MOU) between six major American energy firms and three Canadian firms. The companies are proceeding immediately with development of a proposal for transporting Alaskan natural gas to markets and they expect to present a proposal to the Alaska North Slope producers by year-end. Once agreement is reached with the producers, the companies intend to move forward with the project, with the goal of delivering Alaskan gas to Canada and the Lower 48 states by 2008.

"All the MOU signatories were involved in developing the Alaska Highway project at one point," says Dennis McConaghy, co-Chief Executive Officer of Foothills Pipe Lines. "Through this agreement, the companies are demonstrating their intent to renew their commitment to the commercialization of vital natural gas infrastructure from the Alaska North Slope to Canada and the Lower 48 states."

The six U.S. companies include subsidiaries of Williams, Duke Energy, Sempra Energy International, Enron, PG&E Corporation and El Paso Corporation. The three Canadian companies, TransCanada PipeLines, Westcoast Energy and Foothills Pipe Lines, have remained active partners in the Alaska Natural Gas Transportation System (ANGTS) from its inception.

The parties have executed an MOU establishing key principles for re-enlisting in the Alaskan partnership to construct the Alaskan portion of the Alaska Highway natural gas pipeline project. A key element of the MOU is that the current and re-enlisting parties are committed to eliminating historic and other commercial barriers to construction of the Alaska Highway project.

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"Williams has been actively engaged in developing Alaska's natural resources for over twenty-five years," says Cuba Wadlington, Jr., President and CEO of Williams Gas Pipeline. "We now look forward to working with our pipeline industry peers, the North Slope producers and the State of Alaska to build this essential link connecting North Slope gas to North American markets."

The Alaska Highway project stretches over 1700 miles (2800 kilometres), from the North Slope of Alaska to northwest Alberta, Canada. The gas would then be transported from northwest Alberta to markets throughout Canada and the United States.

The companies signing the MOU are the original partners in the Alaskan Northwest Natural Gas Transportation Company. ANNGTC was designated by the President of the United States and the U.S. Congress to construct and operate the Alaska segment of the ANGTS in 1977. ANNGTC holds a certificate from the Federal Energy Regulatory Commission as well as numerous other federal permits for the construction and operation of the ANGTS. The statutory framework for the ANGTS provides for the expedited approval of the remaining permits necessary to proceed with the construction of the pipeline.

The ANGTS also has the regulatory and diplomatic framework in place to expedite construction of an Alaska gas pipeline. This framework includes U.S. and Canadian legislation and an international treaty between the two countries.

The Canadian and American sponsors of the ANGTS are now turning their collective attention to developing commercial proposals and negotiating with prospective shippers and investors, including the Alaska North Slope producers – Phillips, BP and ExxonMobil – and the State of Alaska.

"The economic benefits of this multi-billion dollar project would impact most regions of the U.S. and Canada," says Mike Stewart, co-Chief Executive Officer of Foothills. "Our expanded partnership is committed to enhancing these benefits by eliminating commercial barriers and offering a market-responsive proposal to producers and other gas shippers. We know the delivered price of Alaskan gas must compete in the market at the major pricing centers of North America."

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# TALKING POINTS: SCOPE OF ANGTA

- ANGTA, the President's Decision thereunder, and Congress's enactment of that decision into law discarded the usual procedures of the NGA for certifying a system for transporting natural gas from Alaska's North Slope to the Lower 48 States. In the mid-1970s, the FPC was struggling to choose, under § 7 of the NGA, the best among three mutually exclusive projects. The outcome of its complex comparative proceeding was further subject to judicial review under the NGA. While agreeing with the FPC that only one system could be certified, Congress concluded the NGA's procedures were too cumbersome to meet the nation's needs.

- In ANGTA, Congress superseded the NGA and the FPC's proceeding as applied to the transportation of Alaska North Slope gas to markets in the contiguous States. It empowered the President, subject to Congressional approval, to make the choice under ANGTA's unique procedures.

- Section 5 of ANGTA directed the FPC to suspend its pending comparative proceedings until the President's Decision took effect following Congressional approval, or no such decision took effect. Once Congress approved the President's Decision, the Commission was directed to vacate the suspended proceedings and in accordance with the President's Decision, issue a certificate of public convenience and necessity for the system and sponsors he designated.

- Under § 9, no condition in any certificate or permit related to the construction or initial operation of the approved system and no amendment or abrogation of any such term or condition could change the basic nature and general route of the approved system, or otherwise prevent or impair, in any significant respect its expeditious construction and initial operation.

- Under § 5, only if the President made no designation, or his designation never became effective for lack of Congressional approval, could the selection of an Alaska natural gas transportation system thereafter be made under the NGA's usual procedures.

- The ANGTS is controlled by international agreement. The President's Decision choosing the ANGTS was submitted to Congress on September 22, 1977. It reflected an agreement between the United States and Canada, signed two days earlier, specifying the ANGTS. The agreement cannot be terminated before 2012. Congress approved the President's Decision, including the Agreement with Canada incorporated therein, on November 8, 1977.

- ANGTA provided for its sunset and for a resumption of ordinary procedures under § 7 of the NGA with respect to the transportation of North Slope gas to the contiguous States, but only if no designation by the President became effective. Because the President's decision became effective, ANGTA and that Decision can be terminated only by another act of Congress.

- Thus, ANGTA's limitation of the NGA remains in effect until all components of the ANGTS are completed and in initial operation under final certificates. Other provisions of the NGA may apply to the ANGTS, but only to the extent that they are not inconsistent with ANGTA and the President's Decision.

- The President's choice cannot now be revoked by new FERC proceedings under the NGA comparing his chosen system, *i.e.*, the ANGTS, with subsequently filed proposals. Congress has never authorized other officers of the United States to overrule a substantive decision vested in the President as Chief Executive and the nation's organ of foreign policy. Because such an authorization would raise grave constitutional issues under Article II of the Constitution, it would require explicit statutory language. No such provisions are contained in ANGTA or the NGA.

- It would, moreover, be absurd to construe ANGTA as allowing FERC to use NGA procedures to reconsider and nullify the President's Decision. Having directed the vacation of the FPC's pending comparative "Ashbacker" proceedings, Congress could not have intended to allow the same parties or new applicants to begin the whole discarded comparative process again by thereafter filing new alternative proposals under § 7 of the NGA.

- Congress made its intent clear in § 9(b) of ANGTA, which requires that applications and requests with respect to authorizations required by the approved system "shall take precedence" over any similar applications and requests.

- Moreover, if notwithstanding § 9(b), such a proceeding could be launched today under the NGA, the Commission would be entangled in the same issues of mutual exclusivity that were pending before the FPC in the mid-1970s. The proceedings would be even more complex than the FPC's, given contemporary economic and environmental considerations. The specter of delay which Congress had sought to dispel in ANGTA, would be revived, including the full scale judicial review which Congress limited in § 10 of ANGTA.

- Since ANGTA bars inclusion in certificates and permits for the chosen system of **any** conditions obstructing that system's expeditious completion and startup, it follows *a fortiori* that alternatives to the chosen system cannot be considered or certified. The mere conduct of such proceedings by the FERC would necessarily delay or prevent completion and initial operation of the Presidentially designated system.

- Assuming that a literal construction of § 5(a)(1) of ANGTA permitted FERC to reconsider the President's Decision at any time after it became effective, such a construction would be both inconsistent with Congress's intention and unnecessarily raise constitutional problems concerning revision by FERC of a Presidential decision. In these

circumstances, the plain intent of Congress necessarily must overcome any literal reading at odds with that intent.

- ANGTA does not create a perpetual monopoly for the ANGTS. It establishes a priority designed to assure that the chosen system will be completed and begin initial operation in accordance with the decision of the President and Congress. Thereafter, but only thereafter, additional projects that compete with the completed system may be considered under § 7 of the NGA. This result is clearly indicated by the Department of Energy's Order Nos. 350 and 350-A relating to the export of North Slope gas, as contemplated by § 12 of ANGTA, to Pacific Rim countries.

- Nothing in ANGTA or in the certificates issued to the ANGTS thereunder provides for the expiration of the chosen system's priority because completion of the Alaska segment was postponed until the U.S. domestic market could support it. Rather, the **Alaska phase of the ANGTS has been held in reserve**, like the natural gas it will transport from North Slope, until the need arises in the Lower 48 States and that phase can be completed. All phases of ANGTS that could be economically supported were completed in 1982 after waiver by President Reagan of certain provisions of the original President's Decision and of the NGA. The sponsors have actively protected the reserved Alaskan segment by maintaining all necessary certificates and permits and actively overseeing all rights-of-way. Moreover, FERC has repeatedly confirmed its commitments to the ANGTS.

- Congress reconfirmed the status of the ANGTS in § 3012 of the Energy Policy Act of 1992. That section rejected recommendations for repeal of ANGTA by the Federal Inspector of the ANGTS, an officer appointed by the President and confirmed by the Senate to oversee compliance with the requirements of ANGTA and the President's Decision. The Federal Inspector's various characterizations of ANGTA included statements such as: the ANGTA regime conferred a "specific route for the transportation of Alaska gas . . ."; "the designation of the route and the sponsors for the various legs grants them a monopoly in perpetuity over the delivery system . . ."; and the ANGTA regime gave the "ANGTS project sponsors unique legal monopoly status." (Report to the President on the Construction of the Alaska Natural Gas Transportation System, January 14, 1992). The Federal Inspector then recommended that Congress abandon the whole scheme of ANGTA and withdraw the President's Decision on the ground that the ANGTS might never be needed or completed. Senator J. Bennett Johnson urged the President to reject this recommendation because American consumers would eventually need access to Alaska North Slope gas. He emphasized that the ANGTS as approved by the United States and Canadian governments would be the most economic and environmentally sound means of providing that access.

The Secretary of Energy subsequently urged the elimination of the Office of the Federal Inspector and the transfer of its functions, but did not endorse any other aspect of the Inspector's recommendations. Thus, neither the Executive Branch nor Congress rejected the Federal Inspector's characterization of the ANGTS Sponsors' unique legal monopoly

status, nor did they accept his recommendation that ANGTA be revoked. Section 3012 of EPAct 92 simply transferred the Federal Inspector's functions to the Secretary of Energy so that if new activity begins in the future on ANGTS, the inspection function can be carried out.

Because Congress revisited ANGTA in 1992 and reaffirmed it in the face of calls for its repeal, the original intent to limit the NGA must be given effect.

# ALASKA NATURAL GAS TRANSPORTATION SYSTEM

# ISSUE PAPER NO. 1

## *The Scope of the Alaska Natural Gas Transportation Act and its Continuing Authority Over the Development and Certification of Initial Transportation Facilities to Transport Natural Gas From the Alaska North Slope to Markets in the Lower 48 States*

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## FOREWORD

The Alaskan Northwest Natural Gas Transportation Company ("ANNGTC") is the partnership which holds the Federal Energy Regulatory Commission certificate of public convenience and necessity to construct, own and operate the Alaska component of the Alaska Natural Gas Transportation System (the "Alaska Highway Project"). Foothills Pipe Lines Ltd. ("Foothills") and TransCanada PipeLines Limited ("TransCanada") are the two current partners in the ANNGTC. In addition, Foothills is the sponsor of the Canadian segment of the Alaska Highway Project, and the majority owner and operator of the Canadian portions of the Eastern and Western Legs of the Project. Foothills is jointly owned by TransCanada and Westcoast Energy Ltd.

The corporate mission of Foothills is very specific: to build and operate the Alaska Highway Project. We were leaders in the Project that was conceived twenty-five years ago, and we are just as committed to it today.

Given concerns about high energy prices and the adequacy of natural gas supplies, interest in connecting Alaskan natural gas to markets in North America is being renewed. Of course, this is not a new issue. It is an issue that has dominated energy policy debates in the United States and Canada on and off for the last quarter century. There is much history in this story. Recognition of the importance of an Alaska gas project to both countries prompted action at the highest levels of government, including (1) Congressional action, embodied in the Alaska Natural Gas Transportation Act of 1976; (2) cooperation between the United States and Canada, as embodied in the 1977 Agreement Applicable to a Northern Natural Gas Pipeline; (3) Canada's enactment of the Northern Pipeline Act; and (4) the selection of the Alaska Highway Project in 1977 as the approved Alaska natural gas transportation system under these government acts.

During the current debate, questions understandably will arise regarding the history and context of the Alaska Highway Project. To facilitate the resolution of these issues, the ANNGTC and its partners will prepare from time to time Issue Papers that address emerging questions and provide a useful context within which to conduct the public policy and commercial debates.

Attached is one such Issue Paper. Please feel free to contact us for further information and/or to discuss the contents of this or other Issue Papers.

# THE SCOPE OF THE ALASKA NATURAL GAS TRANSPORTATION ACT AND ITS CONTINUING AUTHORITY OVER THE DEVELOPMENT AND CERTIFICATION OF INITIAL TRANSPORTATION FACILITIES TO TRANSPORT NATURAL GAS FROM THE ALASKA NORTH SLOPE TO MARKETS IN THE LOWER 48 STATES

## I. Introduction and Background

The abrupt rise in the price of oil and natural gas that began in the late 1990s and intensified in 2000 and 2001 echoes the energy situation that confronted the nation in the mid-1970s. Rising natural gas prices and increased demand for limited continental natural gas supplies have sparked renewed interest in the completion of the Alaska Natural Gas Transportation System ("ANGTS"). The ANGTS was designated by President Carter in his decision as the nation's chosen instrument for facilitating the transportation of gas from Alaska's North Slope to domestic markets in the lower 48 states pursuant to unique designation procedures established in the Alaska Natural Gas Transportation Act of 1976 ("ANGTA").[1] Pursuant to the ANGTA, the President's choice was thereafter approved by Congress.[2] Since then, it has never been revoked or rescinded.

Although parts of the ANGTS–the Eastern Leg, running from a point on the Canadian border near Moncy, Saskatchewan to Dwight, Illinois, and part of the Western Leg, running from the British Columbia border to California–were constructed and placed in operation, construction of the Alaska segment of the project was postponed when energy prices dropped in the late 1970s and early 1980s, rendering the Alaska portion of the project uneconomic with financing difficult to obtain. Due to the delay in construction of the Alaska segment of the ANGTS until domestic markets could support the project, it recently has been suggested that the Federal Energy Regulatory Commission ("FERC") might consider alternatives to the ANGTS under section 7 of the Natural Gas Act ("NGA"). Section 7 of the NGA generally authorizes the FERC to issue certificates of public convenience and necessity for the construction or extension of facilities for the transportation of natural gas in interstate commerce.[3] The primary legislative purpose of ANGTA, to assure construction and initial operation of the selected transportation system, requires the conclusion that the FERC is prohibited from considering, under section 7 of the NGA, alternative systems to the ANGTS to provide for the transportation of Alaska North Slope natural gas to the lower 48 states until such time as that purpose is fulfilled.

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[1] Pub. L. 94-586, approved October 22, 1976, 90 Stat. 2903, as amended, 15 U.S.C. §§ 719-719o (1994).
[2] Joint Resolution of Congress, H.R.J. 621, Pub. L. No. 95-158, 91 Stat. 1268, 95th Cong., 1st Sess. (1977).
[3] 15 U.S.C § 717f.

## II. ANGTA Modified § 7 of the NGA

In enacting the ANGTA, Congress discarded the usual procedures of the NGA and, in their place, established a unique framework for designating and certifying a system to transport natural gas from Alaska's North Slope to the lower 48 states. In the mid-1970s, the Federal Power Commission ("FPC"), the predecessor to the FERC, was struggling to choose, under section 7 of the NGA, the best among three mutually exclusive projects. While agreeing with the FPC that known gas reserves and anticipated market demand in the lower 48 states would support the financing and construction of only one transportation system, Congress recognized that the FPC's complex procedures for choosing the most suitable proposal, and the likelihood of judicial challenges to the FPC's final decision, threatened to increase the cost for, and delay the delivery of, much-needed North Slope natural gas to American consumers.

In light of the urgent need to meet demand in the lower 48 states and to blunt rising energy prices, Congress enacted the ANGTA. The ANGTA superseded the NGA process and the then-pending multiple FPC proceedings to certificate a project to transport Alaska North Slope gas to markets in the lower 48 states. Instead, it empowered the President, subject to Congressional approval, to choose a single project under the ANGTA's unique procedures. In addition, the ANGTA set forth various requirements intended to ensure that the system selected would be completed and in initial operation before any other proposals for moving Alaska natural gas to markets in the lower 48 states could be considered under the usual provisions of the NGA.

Section 5 of the ANGTA specifically directed the FPC to suspend its pending comparative proceedings until either the President's decision took effect following congressional approval or no such decision took effect (either because Congress withheld its approval or the President decided not to designate a system). Once Congress approved the President's Decision, the FPC was then directed to vacate the suspended proceedings and to issue, in accordance with the President's Decision, a certificate of public convenience and necessity for the designated system and its sponsors. Under section 5, only if the President made no designation, or if the President's designation never became effective because it was not approved by Congress, could the certification of an initial Alaska natural gas transportation system thereafter be made under the normal NGA procedures.

The ANGTA also required expedition and precedence for processing needed permits and authorizations such as rights-of-way in order to facilitate construction and initial operation. Specifically, section 9 of the ANGTA provided that no condition in any certificate or permit related to the construction or initial operation of the approved system and no amendment or abrogation of any such term or condition could change the basic nature and general route of the approved system, or otherwise prevent or impair, in any significant respect, its expeditious construction and initial operation.

In addition, the ANGTA limited judicial review concerning the ANGTS, replacing the usual judicial review provisions of the NGA with provisions allowing more restricted opportunities for judicial review. The purpose of this limitation was to prevent reviewing courts from assessing the reasonableness or the record basis for agency actions taken with respect to the ANGTS, and thus to expedite construction and initial operation of the chosen system.

The designation and construction of a pipeline system to transport gas from the North Slope to markets in the lower 48 states, however, is controlled not only by federal law, but also by international agreement. The President's Decision choosing the ANGTS was submitted to Congress on September 22, 1977. It reflected an agreement between the United States and Canada, signed two days earlier, which specified selection of the ANGTS.[4] Congress thereafter enacted a joint resolution approving the President's Decision, including the agreement with Canada incorporated therein, on November 8, 1977. The international agreement, which has the force and effect of law, cannot be terminated before 2012.

## III. ANGTA's Modifications of the NGA Are In Effect Today

The framework the ANGTA set up for the designation and certification of a system to transport North Slope natural gas to the lower 48 states, including the associated modifications made by the ANGTA to the NGA, still is viable and in effect today, and will remain so until the ANGTS is constructed and in initial operation. Congress provided that the ANGTA would sunset and that ordinary procedures under section 7 of the NGA would resume with respect to the transportation of North Slope natural gas to the lower 48 states only if the President decided not to designate a system or if his decision did not take effect for lack of congressional approval. Because the President's Decision became effective, however, the ANGTA and the President's Decision can be terminated only by another act of Congress. Thus, absent such an act, the ANGTA's limitations on NGA procedures, and its directions to all federal agencies and officers, remain in effect until the ANGTS is completed and in initial operation or ANGTA is modified by further legislation.

The ANGTA continues to restrict the FERC's authority with respect to the issue of certificating a system to transport North Slope natural gas to markets in the lower 48 states. The President's choice, ratified by Congress, cannot now be revoked by proceedings under the NGA comparing the chosen system, the ANGTS, with subsequently filed proposals. Congress never has authorized other officers of the United States to overrule a substantive decision vested in the President as Chief Executive and as "the nation's organ of the federal government in the field of international relations."[5] Because such an authorization would raise grave constitutional issues under Article II of

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[4] Agreement between the United States of America and Canada on Principles Applicable to a Northern Natural Gas Pipeline, 29 U.S.T. 3581 (1977) (T.I.A.S. 9030).

[5] United States v. Curtiss-Wright Corp., 299 U.S. 304, 320 (1936).

the Constitution, it would require explicit statutory language. No such language is contained in the ANGTA or the NGA.

The ANGTA cannot reasonably be read as allowing the FERC to use NGA procedures to reconsider and nullify the President's Decision. Having directed that the FPC's pending comparative "Ashbacker"[6] proceedings be vacated, Congress could not have intended to allow the same parties or new applicants to begin the discarded comparative process again by thereafter filing new alternative proposals under section 7 of the NGA.

Initiating new competitive proceedings today under the NGA would entangle the FERC in the same issues of mutual exclusivity that the FPC was facing in the mid-1970s. In fact, given contemporary economic and environmental considerations, proceedings today would be even more complex than those engaging the FPC in the 1970s. The specter of delay that Congress sought to dispel through the ANGTA would be revived, including the full scale judicial review that Congress limited in section 10 of the ANGTA. Interpreting the ANGTA to permit the FERC to reconsider the President's Decision at any time after that decision became effective would be patently inconsistent with Congress's intent and would unnecessarily raise constitutional issues concerning revision by FERC of a Presidential decision.

The ANGTA does not create a perpetual monopoly for the ANGTS or provide the ANGTS, once it is completed and in initial operation, any other protection from further competition. Rather, it provides the ANGTS a priority designed to assure that the chosen system will be completed and begin initial operation in accordance with the decision of the President and Congress. Once the project is completed, and has begun initial operation, and is delivering Alaskan gas to markets in the lower-48 states, additional projects that would compete with the completed system may be considered and certified under section 7 of the NGA.

This conclusion is supported by two Department of Energy ("DOE") orders issued in 1989 and 1990, Orders No. 350 and 350-A, which addressed the interaction of section 12 of the ANGTA and section 3 of the NGA.[7] These proceedings related to the proposed export of Alaska North Slope gas to Pacific Rim countries. Section 12 of ANGTA expressly permits exports of North Slope gas, provided the President finds that such exports "will not diminish the total quantity or quality nor increase the total price of energy available in the United States." Acting under Presidential delegation, the DOE found that domestic markets would not be adversely affected by the proposed export and that the "ANGTA neither grants ANGTS an exclusive license to North Slope gas nor dedicates any particular reserves to ANGTS."[8] At the same time, the DOE acknowledged the priority accorded by Congress to the ANGTS, including in one of its

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[6] See Ashbacker Radio Company v. FCC, 336 U.S. 327 (1945).

[7] Yukon Pacific Corporation, DOE Opinion and Order No. 350, Order Granting Authorization to Export Liquified Natural Gas from Alaska, ERA Docket No. 87-68-LNG (1989); Yukon Pacific Corporation, DOE Opinion and Order No. 350-A, Order Denying Request for Rehearing and Modifying Prior Order for Purposes of Clarification, ERA Docket No. 87-68-LNG (1990).

[8] DOE Order No. 350 at pp. 38-39.

orders a condition providing that: "No action shall be taken in connection with the export project that would compel a change in the basic nature and general route of the Alaska Natural Gas Transportation System (ANGTS) or otherwise prevent or impair in any significant respect the expeditious construction and initial operation of ANGTS." (emphasis added).

Nothing in the ANGTA or in the certificates issued to the ANGTS thereunder provides for the expiration of the chosen system's priority simply because completion of the Alaska segment has been postponed until domestic markets could support it. Rather, the Alaska phase of the ANGTS has been held in reserve, like the natural gas it will transport from North Slope, until the need arises in the lower 48 states and that phase can be completed. Indeed, all phases of ANGTS that could be economically supported were completed in 1982 after waiver by President Reagan of certain provisions of the original President's Decision and of the NGA. In the intervening years, the sponsors of the ANGTS have actively preserved the reserved Alaskan segment by maintaining all necessary certificates and permits and actively overseeing all rights-of-way. Moreover, the FERC repeatedly has confirmed its commitments to the ANGTS.

## IV. Congress Reconfirmed the Priority Status of the ANGTS in 1992

As recently as 1992, Congress elected to retain the unique framework established by the ANGTA and reflected in the President's Decision and the Congress's approval of that decision, despite recommendations that it do away with the ANGTA and revert to the general statutory scheme set forth in the NGA. In enacting section 3012 of the Energy Policy Act of 1992 Congress rejected recommendations for repeal of the ANGTA by the Federal Inspector of the ANGTS, an officer appointed by the President and confirmed by the Senate to oversee compliance with the requirements of the ANGTA and the President's Decision. The Federal Inspector's various characterizations of ANGTA included statements such as: the ANGTA regime conferred a "specific route for the transportation of Alaska gas . . ."; "the designation of the route and the sponsors for the various legs grants them a monopoly in perpetuity over the delivery system . . ."; and the ANGTA regime gave the "ANGTS project sponsors unique legal monopoly status." (Report to the President on the Construction of the Alaska Natural Gas Transportation System, January 14, 1992). The Federal Inspector recommended that Congress abandon the whole scheme of the ANGTA and withdraw the President's Decision on the ground that the ANGTS might never be needed or completed. Senator J. Bennett Johnston, then-Chairman of the Senate Committee on Energy and Natural Resources, urged the President to reject this recommendation because American consumers would eventually need access to Alaska North Slope gas. He emphasized that the ANGTS as approved by the United States and Canadian governments would be the most economic and environmentally sound means of providing that access. The Secretary of Energy subsequently urged the elimination of the Office of the Federal Inspector and the transfer of its functions, but did not endorse any other aspect of the Federal Inspector's recommendations.

Congress ultimately rejected the recommendation that the ANGTA be revoked. In section 3012 of the Energy Policy Act of 1992, Congress simply transferred the Federal Inspector's functions to the Secretary of Energy so that if new activity began in the future on ANGTS, the inspection function could be carried out. Thus, Congress and the President, in approving the transfer of the Federal Inspector's functions to the Secretary of Energy and rejecting recommendations to completely repeal the ANGTA, presciently preserved the unique framework for selecting and certifying a system for transporting North Slope natural gas to markets in the lower 48 states and the exclusive route and sponsor's rights conferred by the President's Decision, so that the ANGTS could be expeditiously completed when needed to meet American consumer demands. Thus, in light of Congress's review of the ANGTA in 1992 and its reaffirmation of the Act in the face of calls for repeal, there can be no question that the original statutory procedures prescribing expedited, limited federal administrative and judicial review remain in place and preclude ordinary procedures under the NGA until the ANGTS is constructed and in initial operation.

## V. Conclusion

Unless the Congress enacts legislation to modify or repeal the provisions of ANGTA, FERC has no authority to disregard the intent of the Congress to "provide the means for making a sound decision as to the selection of a transportation system for delivery of Alaska natural gas to the contiguous States for construction and initial operation by providing for the participation of the President and the Congress in the selection process, and, if such a system is approved under the Act, to expedite its construction and initial operation . . . ." As a consequence, FERC has no authority to consider or grant another application for a certificate pursuant to Section 7 of the NGA for an alternative system to the ANGTS prior to the ANGTS being constructed and in initial operation.

## FERC'S AUTHORITY TO AMEND ANNGTC'S CERTIFICATES UNDER THE NGA

An issue which has arisen recently is the extent of the authority for the Federal Energy Regulatory Commission ("FERC") or other federal agencies to amend or modify aspects of certificates, permits or other authorizations issued to Alaska Northwest Natural Gas Transportation Company ("ANNGTC") for the construction of the Alaska Highway Project. Based upon the provisions of the governing statute, the Alaska Natural Gas Transportation Act of 1976 and the Presidential Decision issued September 22, 1977 highlighted below, it is clear that the agencies may amend, modify or abrogate such authorizations so long as such actions would not "compel a change in the basic nature and general route of the approved transportation system or would otherwise prevent or impair in any significant respect the expeditious construction and initial operation of such transportation system."

- Congress envisioned that the federal agencies, including the FERC, would need the authority to amend from time to time previously issued certificates, permits and authorizations. The operative sections of ANGTA which specify the scope of the amending authority are sections 9(d) and (e).

- Section 9(d) provides that any federal officer or agency "may...add to, amend or abrogate any term or condition" included in an authorization, permit or certificate provided however that any term or condition to be added, or as amended, may not "compel a change in the **basic nature** and **general route** of the approved transportation system or would otherwise prevent or impair in any significant respect the expeditious **construction and initial operation** of such transportation system."

- Section 9(e) addresses the circumstances of amending or modifying specific terms and conditions recommended by the President in his Decision to be included in various federal permits, authorizations or certificates. Even with respect to those specific terms and conditions, section 9(e) states that the authority to amend or modify contained in section 9(d) shall also be available to the federal officers or agencies to amend or modify terms and conditions included in federal authorizations at the recommendation of the President in his Decision.

In order to understand the scope of the authority to amend or modify, it is necessary to understand the derivation and meaning of the terms **"basic nature"** and **"general route"**.

- Section 7(a)(4)(A) required that the President "describe the **nature and route** of the system designated for approval." In section 2 of his Decision, President Carter specified the nature and route for the system, as required by section 7(a)(4)(A). In describing the nature of the system, the Decision does no more than specify that it be and "overland pipeline system to transport natural gas from

the Prudhoe Bay area of Northern Alaska through Alaska and Canada into ... the contiguous United States." The decision then specifies the capacity, initially, at 2.0 to 2.5 Bcfd, capable of being expanded. There are no other details on the **nature** of the system. The **route** is then specified as the Alaska Highway Project route. No other details such as facilities, diameter, pressure, tariff are included in the President's Decision fulfilling the statutory requirement to "**describe the nature and route.**"

- In Section 3 of his Decision, President Carter separately identified the facilities which would be "encompassed" for purposes of section 9, as provided in section 7(a)(4)(C). The facilities identified by the President pursuant to section 7(a)(4)(C) are entitled to be "encompassed" in "construction and initial operation" for purposes of "defining the scope of the directions" contained in section 9.

- Under ANGTA section 7, the requirements that the President "describe" the "nature and route," as provided in section 7(a)(4)(**A**), and that he "identify" facilities for purposes of section 9 under section 7(a)(4)(**C**), have different consequences. The President's choice as to the "nature and route" can be changed only by waiver under section 8. Under section 9(d), however, FERC is expressly authorized to amend certificates covering the facilities "identified" by the President, so long as its amendment does not change "the basic nature and general route" of the system chosen by the President.

- Section 7(a)(6) allowed, but did not require, the President also to "identify" in his decision "such terms and conditions permissible under existing law as he determines appropriate for inclusion," with respect to any federal authorization issued under section 9, including certificates issued under the Natural Gas Act. Under section 9(e), the agency issuing such authorizations was required to include the terms and conditions identified by the President in their authorizations.

- Section 5 of the President's Decision specified, pursuant to section 7(a)(6), general terms and conditions which were to be incorporated into certificates, rights of way, leases , permits or authorizations to be made by Federal officers and agencies. These terms and conditions addressed "general standards of environmental and construction and performance, and the procedures for the submission and approval of construction plans and environmental safeguards . . . ." They did not include terms and conditions precluding amendments allowing modifications of facility design specifications or configuration.

- Section 2 of President Carter's decision can be changed only by waiver under section 8 of ANGTA , or by an Act of Congress. Facilities "identified" in Section 3 as qualified for being "encompassed" in the scope of the directions under section 9, and the conditions "identified" in Section 5, can be changed by amendment.

- The "scope of directions" under section 9 includes the FERC's powers, expressly conferred by section **9(c)**, to **condition** certificates, and by section **9(d)**, to **amend** certificates. These powers are subject to the limitation in both subsections prohibiting changes in the "basic nature and general route," and actions which will "otherwise" prevent or impair in any significant respect the expeditious construction and initial operation of "the system."

- The Commission's authority to amend is confirmed by comparing section 9(d) with section 9(e). The latter provision required the Commission to include in its certificates the terms and conditions identified by the President in Section 5 of his decision. However, Section 9(e) contains an express exception that plainly preserves the Commission's authority to amend even terms and conditions identified by the President in Section 5. Although § 9(e) commands that authorizing agencies "shall include" them, it further provides, "except that the requirement to include such terms and conditions shall not limit the Federal officer or agency's authority under subsection (d) of this section."

- If certificates and permits for facilities specifically "identified" by President Carter could not be amended to permit changes in those facilities, section 9(d) would be meaningless. Moreover, those changes may include anything except changes in the basic nature and general route. Otherwise, the terms "basic" modifying "nature" and "general" modifying "route" in the limitation expressed in sections 9(c) and 9(d) would likewise become meaningless. Congress intentionally included those terms, and they must be given effect under the familiar rule of construction that every word in a statute must be given meaning

- The distinction between changes in the "basic nature and general route"as specified pursuant to section 7(a)(4)(A), which cannot be effectuated by amendment, and changes in "identified facilities", which can, is reflected in President Reagan's Decision in 1981 waiving Congress's approval of § 2, ¶ 3, First Sentence, of President Carter's Decision. The waived sentence specified that the ANGTS began at the "discharge side of the gas plant facilities in the Prudhoe Bay field." That waiver was necessary because inclusion of the conditioning plant in the ANGTS changed the system's basic nature and general route as previously specified by President Carter and approved by Congress. President Reagan did not, however, separately add the conditioning plant to the facilities identified for section 9 treatment under section 7(a)(4)(C). He left that process for FERC to address by amendment under section 9(d). He also waived Condition IV-3 of the Carter Decision, which barred FERC from allowing the billing of pre-completion fees, payments or surcharges, so that the costs of the Canadian portion could be recovered. He also added a new condition limiting FERC's authority to change tariffs to impair recovery of expenses, taxes and debt service, and foreclosed any over-ride of this condition through the amendment process by also waiving provisions in the NGA under which such modifications might be made. In sum, "identified facilities" can be changed by amendment, but the basic nature and general route cannot.

# ALASKA NATURAL GAS TRANSPORTATION SYSTEM

# ISSUE PAPER NO. 2

## *Authority of the Federal Energy Regulatory Commission to Amend the ANNGTC's Certificate of Public Convenience and Necessity*

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## FOREWORD

The Alaskan Northwest Natural Gas Transportation Company ("ANNGTC") is the partnership which holds the Federal Energy Regulatory Commission certificate of public convenience and necessity to construct, own and operate the Alaska component of the Alaska Natural Gas Transportation System (the "Alaska Highway Project"). Foothills Pipe Lines Ltd. ("Foothills") and TransCanada PipeLines Limited ("TransCanada") are the two current partners in the ANNGTC. In addition, Foothills is the sponsor of the Canadian segment of the Alaska Highway Project, and the majority owner and operator of the Canadian portions of the Eastern and Western Legs of the Project. Foothills is jointly owned by TransCanada and Westcoast Energy Ltd.

The corporate mission of Foothills is very specific: to build and operate the Alaska Highway Project. We were leaders in the Project that was conceived twenty-five years ago, and we are just as committed to it today.

Given concerns about high energy prices and the adequacy of natural gas supplies, interest in connecting Alaskan natural gas to markets in North America is being renewed. Of course, this is not a new issue. It is an issue that has dominated energy policy debates in the United States and Canada on and off for the last quarter century. There is much history in this story. Recognition of the importance of an Alaska gas project to both countries prompted action at the highest levels of government, including (1) Congressional action, embodied in the Alaska Natural Gas Transportation Act of 1976; (2) cooperation between the United States and Canada, as embodied in the 1977 Agreement Applicable to a Northern Natural Gas Pipeline; (3) Canada's enactment of the Northern Pipeline Act; and (4) the selection of the Alaska Highway Project in 1977 as the approved Alaska natural gas transportation system under these government acts.

During the current debate, questions understandably will arise regarding the history and context of the Alaska Highway Project. To facilitate the resolution of these issues, the ANNGTC and its partners will prepare from time to time Issue Papers that address emerging questions and provide a useful context within which to conduct the public policy and commercial debates.

Attached is one such Issue Paper. Please feel free to contact us for further information and/or to discuss the contents of this or other Issue Papers.

# AUTHORITY OF THE FEDERAL ENERGY REGULATORY COMMISSION TO AMEND THE ANNGTC'S CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

## I. Introduction and Background

This paper addresses the extent to which the Federal Energy Regulatory Commission ("FERC" or "Commission") has the authority to amend the conditional certificate of public convenience and necessity authorizing the Alaskan Northwest Natural Gas Transportation Company ("ANNGTC") to construct and operate the Alaska segment of the natural gas transportation system approved by Congress under the Alaska Natural Gas Transportation Act ("ANGTA").[1] This paper concludes that the statute provides broad authority to add to, amend or abrogate prior decisions so long as there is not a change to the "basic nature and general route" of the system and the change does not compel a significant delay in the construction or initial operation of the system.

When Congress passed ANGTA in 1976, it recognized that the selection of a system to transport Alaska gas to the lower 48 states involves "questions of the utmost importance respecting national energy policy, international relations, national security, and economic and environmental impact . . . ."[2] Because of the importance of these issues, Congress decided that they "should appropriately be addressed by the Congress and the President in addition to those Federal officers and agencies assigned functions under law pertaining to the selection, construction, and initial operation of such a system."[3] The stated purpose of ANGTA "is to provide the means for making a sound decision as to the selection of a transportation system for delivery of Alaska natural gas to the contiguous United States . . . by providing for the participation of the President and the Congress in the selection process," and, if a system is approved under the Act, "to expedite its construction and initial operation . . . ."[4]

## II. Alcan Project Selected as the Approved Alaska Natural Gas Transportation System

### A. ANGTA Section 5 and the FPC's Recommendation to the President

ANGTA established specific procedures to govern the application of the Natural Gas Act and the implementing regulations of the Federal Power Commission ("FPC") and FERC. Section 5 of ANGTA gave the FPC approximately six months to consider the competing applications for authorization to construct an Alaska gas transportation system, and to submit a recommendation to the President as to which project, if any, should be selected. Although Section 5 of ANGTA listed factors that the FPC was to consider in making its recommendation to the President, it did not prohibit changes in the project as proposed by project sponsors. ANGTA simply required the Commission to describe "the nature and the route" of the recommended project. It did not require the Commission to determine each detail of the project.

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[1] Pub. L. 94-586, approved October 22, 1976, 90 Stat. 2903, as amended, 15 U.S.C. §§ 719-719o (1994).
[2] ANGTA § 2(1) & (4).
[3] *Id.*
[4] ANGTA § 3.

In accordance with Section 5 of ANGTA, the FPC submitted its Recommendation to the President by letter dated May 2, 1977.[5] The FPC also submitted an extensive report accompanying its Recommendation that compared three competing proposals: (i) a Canadian Arctic Gas overland project, (ii) an El Paso Alaska LNG project, and (iii) two alternative projects proposed by Alcan: the Alcan I 42-inch pipeline project and the Alcan II 48-inch pipeline project.[6]

The FPC concluded that the President should select an overland route. However, it split 2-2 on which of the two proposed overland routes was superior: the Arctic Gas project (which would traverse the Mackenzie Delta in Canada, thus allowing immediate access to Mackenzie gas), or the Alcan II 48-inch pipeline project (which would provide for future access to Mackenzie gas via a separate project that would connect with the Alcan II project).[7] The Commissioners concluded by stating: "In the absence of a Canadian determination that development and transportation of Mackenzie reserves should be permitted, the Alcan Project should be approved, subject to the Government of Canada's making the route available on acceptable terms and conditions."[8]

While the FPC based its conclusion on "the massive record" compiled in the proceeding, none of the FPC's conclusions referenced the specifics of the projects' proposed design or required the proposed projects to remain unaltered from those initially proposed by the project sponsors. The FPC focused on the relative effects of numerous factors on the environmental and economic impact of each proposal. Moreover, in its Recommendation, the FPC expressly recognized that "*final plans for design and construction are not yet developed.*"[9] Accordingly, the Commission's Recommendation to the President did not foreclose an amendment to the ANNGTC's Certificate that would change the design or configuration of the Alcan project as originally proposed as long as it does not change the basic nature and general route or significantly delay expeditious construction and initial operation.

### B. ANGTA Section 7 and the President's Decision

After other jurisdictional agencies submitted to the President their comments on the FPC's recommendation,[10] Section 7(a)(1) of ANGTA gave the President three months to issue a decision as to whether a transportation system should be built and, if so, which one. If the President decided to designate a transportation system for approval by Congress, Section 7(a)(1) required the decision "to be based on his determination as to which system, if any, best serves

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[5] Federal Power Commission, *Recommendation to the President: Alaska Natural Gas Transportation Systems* (May 1, 1977) ("FPC Recommendation").

[6] In discussing each project, the FPC addressed matters such as gas reserves and availability, net national economic benefits, cost of service, expandability, environmental impacts, geotechnical problems and reliability, construction costs and scheduling, and financing and tariffs.

[7] Transmittal Letter at 2. The Commissioners' disagreement apparently was based on uncertainty regarding authorizations to be issued by the Canadian Government with respect to the Mackenzie gas.

[8] *Id.* References in the FPC's Recommendation to approval of the "Alcan project" refer to the Alcan II 48-inch pipeline project.

[9] FPC Recommendation at I-38 (emphasis added).

[10] *See* ANGTA § 6.

the national interest."[11] Section 7(a)(4)(A)-(D) required the President to make four specific determinations in his decision:

- To "describe the nature and route of the system designated for approval . . . .";
- To "designate the person to construct and operate such a system, which person shall be the applicant . . . which filed for a certificate of public convenience and necessity to construct and operate such system . . . ";
- To "identify those facilities, the construction of which, and the operations, the conduct of which, shall be encompassed within the term 'construction and initial operation' for purposes of defining the scope of the directions contained in section 9 of this Act," *i.e.*, directions to jurisdictional agencies with respect to expediting the construction and initial operation of the facilities; and
- To identify "those provisions of law . . . which provisions the President finds requires waiver pursuant to section 8(g) in order to permit expeditious construction and initial operation of the transportation system."[12]

By letter dated September 22, 1977, President Carter forwarded to Congress his Decision and report in which he selected the Alcan project as the Alaska Natural Gas Transportation System ("ANGTS"). In the Overview to his Decision, the President recounted events that led up to his Decision, most notably, the conditional approval by Canada's National Energy Board ("NEB") of the Canadian segments of the Alcan project and the signing of the Agreement on Principles.[13] In fact, the President incorporated the U.S.-Canada Agreement on Principles as Section 7 of his Decision.[14] The President's conclusion more than twenty-three years ago is equally applicable today:

> A superior project has now been selected as a result of a thorough decisionmaking process involving all the resources of the Federal Government and a spirited competition between private alternatives. The nation sorely needs new resources of economically competitive natural gas. Now is clearly the time to approve the decision to undertake the final planning and construction of this cost-effective system for bringing critical supplies of Alaska natural gas to U.S. markets.[15]

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[11] ANGTA § 7(a)(1).

[12] ANGTA §§ 7(a)(4)(A)-(D). Section 7(c) also required the President to include in his report a financial analysis of the transportation system designated for approval, for purposes of determining whether the system could be privately financed or would require Federal financing authority.

[13] President's Decision at pp. v-vii.

[14] The President observed that the Agreement on Principles "provides the framework for a clearly specified, economically efficient, and environmentally superior means of transporting both U.S. and Canadian gas to markets through a joint pipeline system." President's Decision at vii.

[15] President's Decision at xiv.

Structurally, the President's Decision mirrors the structure of ANGTA itself. The first four sections of the President's Decision correspond to the four conclusions required of the President by ANGTA Sections 7(a)(4)(A)-(D).

### 1. Section 2 of the President's Decision: The Nature and General Route of the Approved System

To comply with Section 7(a)(4)(A) of ANGTA, Section 2 of the President's Decision described the "Nature And Route Of The Approved System." The general, two-paragraph description of the approved system in Section 2 describes the "basic nature" of the approved transportation system and the remainder of Section 2 describes the "general route" of the ANGTS for purposes of implementing the various procedures specified in Section 9 of the Act.

Section 2 described the *nature* of the system in two short paragraphs:

> The Alcan system is an overland pipeline system to transport natural gas from the Prudhoe Bay area of Northern Alaska through Alaska and Canada into the Midwest and Western sections of the contiguous United States.
>
> The expected volume of gas to be available initially from the Prudhoe Bay field is 2.0 to 2.5 billion cubic feet per day (bcfd). The system described herein is designed to handle this throughput volume. The capacity of the system could be increased in the future to accommodate additional volume throughput by construction of additional facilities.[16]

The remainder of Section 2 described in some detail (in thirteen paragraphs and two maps) the *route* of the pipeline in Alaska, Canada, and the contiguous United States.[17]

### 2. Section 3 of the President's Decision: "Identification of Facilities Included Within 'Construction and Initial Operation'"

Section 3 of the President's Decision is titled "Identification of Facilities Included Within 'Construction and Initial Operation.'" It complied with Section 7(a)(4)(C) of ANGTA, which required the President to:

> . . . identify those facilities, the construction of which, and those operations, the conduct of which, shall be encompassed within the term "*construction and initial operation*" for purposes of defining the scope of the directions contained in section 9 of this Act, taking into consideration any recommendation of the Commission with respect thereto . . . .[18]

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[16] President's Decision at 6 (reference omitted).
[17] President's Decision at 6-11.
[18] ANGTA § 7(a)(4)(C) (emphasis added).

The President stated that Section 3 of his Decision "identifies the facilities for the Alcan project which will be entitled to the expedited authorization process prescribed in Section 9 of ANGTA"[19] – for example, pipeline diameter, the length of pipeline segments, and the location and horsepower of compressor stations.

In the General Project Description subsection, the President indicated that the facilities described in Alcan's March 8, 1977 filing, as well as any modifications in those facilities required by the Agreement on Principles, would be accorded Section 9's expedited procedures. *Both Alcan's March 8, 1977 filing and the Agreement on Principles recognized that significant changes would be made in the project after it was selected by the President and approved by Congress.*

Thus, Section 3 of the Decision is distinguishable from the description of the "basic nature and general route" of the approved pipeline system as set forth in Section 2. Section 3 responds to the requirements of ANGTA Section 7(a)(4)(C) and identifies facilities to be afforded expedited regulatory review in accordance with Section 9 of ANGTA. Section 3 of the Decision neither dictates the design or configuration of the facilities identified therein, nor prohibits the Commission from modifying or adding additional facilities under the expedited procedures of Section 9 of ANGTA.

### C. ANGTA Section 8: Congress Approves the Alcan Project

On November 2, 1977,[20] Congress issued a joint resolution adopting the President's Decision and the President signed the Joint Resolution into law on November 8, 1977. Today, the Alcan project remains the "approved transportation system" for purposes of Section 9 of ANGTA.

### D. ANGTA Section 9: FERC Issues Certificate

By order issued December 16, 1977, the Commission issued conditional certificates of public convenience and necessity to the project sponsors under Section 7 of the Natural Gas Act and ANGTA.[21] In its order, the Commission noted that its action issuing conditional certificates under ANGTA "are ministerial actions which the Commission must perform without any exercise of administrative judgment or discretion."[22] The Commission expressly noted the need for further data before it could take final action, stating, "the Alcan Pipeline Project is at too incipient a stage to warrant Commission acceptance of applications of permanent certificates of public convenience and necessity." The Commission further stated that it viewed its action "as a step which initiates the detailed process of final certification."[23]

The Commission expressly listed matters that would require "substantial inquiry," such as "gas reserves and deliverability, . . . wellhead price . . ., financial plan . . ., shippers' tariffs . .

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[19] President's Decision at 13.
[20] Joint Resolution of Congress, H.R.J. 621, Pub. L. No. 95-158, 91 Stat. 1268, 95th Cong., 1st Sess. (1977).
[21] 1 FERC ¶ 61,248 (1977).
[22] *Id.* at 61,641.
[23] *Id.*

., pipe selection (*choice of diameter and pressure*), and size and volume of the Eastern and Western Legs."[24] Accordingly, neither the Commission's order nor the conditional Certificate limited the project sponsors' ability to modify aspects of the design, facilities, financing plans and/or tariffs.

## III. ANGTA Section 9 and FERC Authorization to Amend the ANNGTC Certificate

Section 9 of ANGTA is addressed to all federal officers and agencies – including the FERC – that issue certificates, rights-of-way, permits, leases or other authorizations required for "the taking of any action which is necessary or related to the construction and initial operation of the approved project." Section 9(a) directs the covered federal officers and agencies to "issue or grant such certificates . . . and other authorizations" required for the construction and initial operation of the ANGTS "at the earliest practicable date" and to the "fullest extent" permitted by law. Moreover, Section 9(b) directs the covered federal officers and agencies to expedite "all actions . . . with respect to its consideration of applications or requests" for such authorizations, giving them "precedence over any similar applications or requests . . . ."

With respect to certificates or other authorizations already issued to the ANNGTC, *Section 9(d) expressly authorizes the issuing agencies or officers to "add to, amend or abrogate any term or condition included in such certificate . . . or other authorization . . . ."* However, such entities including the Commission, "shall have no authority to take such action if the terms and conditions to be added, or as amended, *would compel a change in the basic nature and general route* of the approved transportation system or would *otherwise prevent or impair in any significant respect the expeditious construction and initial operation of such transportation system*," unless such terms and conditions are required by law. (Emphasis added).

Under Section 9, therefore, the FERC must approve the ANNGTC's Certificate amendment to the fullest extent otherwise permitted by law, must expedite any action related to the certificate amendment, and must give that action precedence over any similar application – unless such action would "compel a change in the basic nature and general route of the [ANGTS] or would otherwise prevent or impair in any significant respect the expeditious construction and initial operation of such transportation system."

The "basic nature and general route" of the ANGTS, as that term is used in Section 9, is derived from Section 2 of the President's Decision. As discussed in part II.B.2 above, Section 3 of the President's Decision identified facilities included in the ANGTA term "*construction and initial operation*" for purposes of defining the scope of the directions contained in section 9 of ANGTA, which provisions include FERC's powers to condition certificates (Section 9(c)) and to amend certificates (Section 9(d)). Section 2 of the President's Decision described the "nature and route" of the approved system. It summarized the nature of the system as "an overland pipeline system to transport natural gas from the Prudhoe Bay area of Northern Alaska through Alaska and Canada into the Midwest and Western sections of the Contiguous United States." This language describes the "basic" nature of the transportation system approved by the President.

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[24] *Id.* at 61,642 (emphasis added).

As required by ANGTA Section 7(a)(4)(C), Section 3 of the President's Decision identified the "facilities" that "shall be encompassed within the term 'construction and initial operation' for purposes of defining the *scope* of the directions contained in Section 9" of ANGTA. (Emphasis added). Thus, Section 3 provided that the *scope* of Section 9's directions to federal authorities to expedite agency action would extend to pipelines, compressors, and metering facilities, as well as the location of operating centers, staging areas, material storage sites, and transportation and communication facilities, and the other facilities described in Section 3. Neither Section 7(a)(4)(C) of ANGTA nor Section 3 of the President's Decision restricted the Commission's authority to consider *changes* to those facilities. Rather, Congress specifically defined that authority in Section 9(d) of ANGTA.

Further, when Congress approved the President's proposed Waiver of Law in 1981 to add the gas conditioning plant to the system, it did so by approving an amendment to Section 2 of the President's Decision, not to Section 3. In this regard, the President's Findings and Proposed Waiver asked Congress to waive Public Law 95-158 (Congress' 1976 Joint Resolution incorporating and approving the President's Decision) "in the following particulars," including "Section 2, Paragraph 3, First Sentence, of the President's Decision, to include the gas conditioning plant in the *approved transportation system* and in the final certificate to be issued for the system . . . ."[25] Section 3 was not amended to include the gas conditioning plant. The President instead left that process for the FERC to address by amendment under Section 9(d) of ANGTA.

In approving this Waiver of Law, Congress recognized the importance of the conditioning plant to the overall system. As stated in the report of one jurisdictional committee:

> The Committee approves this segment of the waiver package because of the enormous size and capital cost of the facility. To withhold the gas conditioning plant from inclusion as part of the system could jeopardize the entire project. It should be noted that the granting of the waiver will make it eligible for consumer financing through the early billing commencement provisions of the waiver, for guarantees that costs will be passed through shippers to consumer[s], and for other "regulatory certainty" provisions in the waiver package.[26]

By amending Section 2 of the President's Decision to include the conditioning plant, Congress assured that the plant would be included in the "approved transportation system," that is, that the plant would be included in the "basic nature and general route" of the ANGTS. Because the description of "basic nature and general route" included in Section 2 of the President's Decision is what defines that same term as used in Section 9 of ANGTA, the inclusion of the plant in Section 2 allowed FERC to make an amendment to the certificate using Section 9(d). Moreover, the FERC's consideration of such amendment under the expedited procedures required under

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[25] Waivers to Permit Expedited Construction of the Alaska Natural Gas Transportation System, 97th Cong., 1st Sess., House Document No. 97-100, p. 2 (Oct. 15, 1981) (emphasis added).

[26] U.S. House of Representatives Report, 97-350, part 1, Committee on Interior and Insular Affairs, p. 22 (Nov. 20, 1981).

Sections 9(a) and (b) of ANGTA would facilitate, not prevent or impair, the expeditious construction and initial operation of the project. And that is exactly what FERC did regarding the conditioning plant.

## IV. Changes to the Design of ANGTS Are Authorized Under ANGTA

Section 9 of ANGTA expressly authorizes the FERC to amend the ANNGTC's Certificate if such amendment would not compel a change in the basic nature or general route of the system as approved in Section 2 of the President's Decision. As a general matter, the modification of facilities specifically described in Section 3 of the President's Decision would not necessarily change the basic nature or general route of the approved system. Under ANGTA Section 9, however, the ANNGTC will have to demonstrate that the kinds of modifications that it proposes would not compel a change in the basic nature or general route of the approved pipeline system under Section 2 of the President's Decision and would therefore be an appropriate amendment under Section 9(d).

The ANNGTC is currently evaluating technical changes to the ANGTS facilities to modernize the project to meet today's market conditions, such as with changes to pipeline diameter and pressure from that proposed in Alcan II. Any modifications proposed by the ANNGTC will improve the economic efficiency, safety and environmental impact of the ANGTS. Such changes in the technical design of the pipeline would not amend the "basic nature" of the ANGTS described in Section 2 of the President's Decision, *i.e.*, an overland pipeline system that transports natural gas from Prudhoe Bay through Alaska and Canada into the Western and Midwestern sections of the United States, with sufficient capacity to handle the volumes of gas expected to be available initially from the Prudhoe Bay field, and capable of expansion to handle additional volumes. Because approval of the pipeline design and specifications proposed by the ANNGTC would not compel a change in this "basic nature" of the approved project, Section 9(d) of ANGTA would expressly authorize the Commission to amend the ANNGTC's Certificate accordingly.[27]

ANNGTC is mindful of the prohibition in Section 9(d) of an amendment of the Certificate that would "otherwise prevent or impair in any significant respect the expeditious construction and operation" of the ANGTS. To the extent that advanced, more efficient, and safer pipeline construction technology and operation present new opportunities which must be field tested, such testing was an integral component of the FPC's Recommendation and the

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[27] As discussed in Section IV(C)(2)(b) of this memorandum, Section 10 of the Agreement on Principles provided for a bilateral technical study group to determine the appropriate diameter and pressure of the ANGTS to efficiently accommodate Mackenzie gas. The Agreement on Principles is still in effect, the Canadian and Alaskan segments addressed in Section 10 of the Agreement have not been constructed, and the development and transportation of Mackenzie reserves is still an issue of concern in Canada. It may be necessary, therefore, to convene a new study group under Section 10 of the Agreement to consider the appropriate system design necessary to "achieve safety, reliability and economic efficiency for operation of the Pipeline," under modern technologies and operating practices. Under this approach, Section 3 of the President's Decision expressly would include any resulting modifications in project design among the facilities covered by the expedited procedures of Section 9 of ANGTA.

President's Decision to ensure that ANGTS would consist of modern, efficient, and safe technologies. The Commission would be authorized to consider to apply the same public interest considerations to evaluate changes in reference to today's marketplace.

Additional changes that the ANNGTC is considering involve technical modifications of the pipeline configuration, the design of the Alaska Gas Conditioning Facility and improvements to the Net National Economic Benefit. Such changes will be proposed in a manner consistent with Section 9 of ANGTA to ensure they do not alter the basic nature and general route of the approved ANGTS project.

Changes to the technical nature of the ANGTS have been an integral part of the ANGTA process from the beginning. For example, Alcan's March 8, 1977 filing contemplated that the original system it proposed would be changed. In addition, the Agreement on Principles contemplated changes in pipeline size and pressure and directed a technical study group to address potential modifications to the approved project. The 1981 Waiver of Law also implemented changes to the ANGTS facilities, and provides an illustrative example of the type of changes that require amending the basic nature and general route of the ANGTS.

## V. Conclusion

Whether the Commission can amend the ANNGTC's Certificate to approve the modifications in pipeline design and specifications, pipeline configuration, and conditioning plant which may be proposed by the ANNGTC under the expedited procedures required by Section 9 of ANGTA depends on whether such changes modify Section 2 of the President's Decision and constitute changes in the "basic nature" or "general route" of the project within the meaning of Section 9.

The answer to this question is that where the project, as revised, will have the same *basic* nature and *general* route – i.e., it is still an overland pipeline system capable of transporting natural gas from Prudhoe Bay through Alaska and Canada into the Midwest and Western sections of the contiguous United States – such changes will be within the expedited review process of Section 9.

In addition, as reflected repeatedly in the FPC's Recommendation to the President, the Agreement on Principles, and the President's Decision, the design and configuration of the Alcan Project was far from being finalized at the time the project was approved by the President. As the example of the AGCF modifications illustrate, it is unreasonable to conclude that Congress intended to prohibit the Commission from modifying the project's design and configuration to achieve a superior system – provided that the basic nature and general route of the system remain unchanged.

Although neither ANGTA nor the President's Decision expressly defines the phrase "basic nature and general route" as used in Section 9, the most credible construction of Sections 2 and 3 of the President's Decision — when read together with Sections 7 and 9 of ANGTA — concludes that the broad description of the nature and route of the ANGTS in Section 2 defines the "basic nature and general route" for purposes of Section 9 of ANGTA.

It is apparent that modifications to the design and configuration of the Alaska segment currently being contemplated by the ANNGTC are not only related, but necessary, to the construction and initial operation of the Alaska segment under modern technology, operating practices, and market conditions.

Moreover, both the U.S. and Canadian governments remain bound by the Agreement on Principles, which has the force and effect of a treaty between the two nations. The Agreement obligates both nations to take "all necessary action" to "authorize the construction and operation of the Pipeline in accordance with the principles set out" in the Agreement.[28]

The Commission therefore is bound to consider any of ANNGTC's proposed modifications that are consistent with Section 2 of the President's Decision pursuant to the expedited procedures of ANGTA Section 9. In addition, to the extent necessary, the President is also bound to take "all necessary action" to enable the Commission to proceed expeditiously with the authorizations required for the completion of the ANGTS as required by the Agreement on Principles which could include a request from the President to the Congress to waive any provisions of law pursuant to Section 8(g) of ANGTA.

[28] Agreement on Principles, § 1.

# TALKING POINTS:
# MODERNIZING ANNGTC'S TARIFF

## INTRODUCTION

- In the Alaska Natural Gas Transportation Act of 1976 (ANGTA), Congress authorized the President to decide whether a system for the transportation of natural gas from Alaska's North Slope to the lower 48 states should be designated, to describe the nature and route of the system, and to designate a person to construct and operate it. ANGTA further provided for Congressional review and approval of the President's determination before it could become effective.

  > Section 7(a)(6) of ANGTA provides that "[i]f the President determines to designate for approval a transportation system for delivery of Alaska natural gas to the contiguous States, he may identify in such decision such terms and conditions permissible under existing law as he determines appropriate for inclusion with respect to any issuance or authorization directed to be made pursuant to section 9."

- ANGTA §5(a)(2) provides that if the President designates such a system and it is approved by Congress, the Commission shall "pursuant to section 9 and in accordance with the President's decision, issue a certificate of public convenience and necessity respecting such system."

- The Commission issued a conditional certificate to the ANNGTC in 1977, and, in Order Nos. 17 and 31, established a variable rate of return mechanism for the Alaska section of the ANGTS and a cost of service rate structure, noting that it had "sufficient discretion in implementing the incentive mechanism" to avoid a result which "is not in the public interest."

- The ANNGTC now is considering modernizing its tariff to:

  > reflect the Commission's open access policies adopted pursuant to Order Nos. 636 and 637, and
  >
  > provide shippers on the ANGTS with a negotiated/recourse rate tariff that is more suitable to the modern, pro-competitive market, while still retaining incentive rate/cost containment mechanisms.

## BACKGROUND

- Section 9 of ANGTA, addressed to all federal officers and agencies, establishes guidelines for the "taking of any action which is necessary or related to the construction and initial operation of the approved transportation system . . . ."

  Section 9(a) directs the Commission to "issue or grant such certificates . . . and other authorizations" required for construction and initial operation of the ANGTS "at the earliest practicable date."

  Section 9(c) permits any certificate to include terms and conditions required by law, except that no such term or condition may be included "as would compel a change in the basic nature and general route of the approved transportation system or the inclusion of which would otherwise prevent or impair in any significant respect the expeditious construction and initial operation of such transportation system."

  Section 9(d) authorizes agencies to "*add to, amend or abrogate any term or condition included in such certificate*," but no such amendments may "compel a change in the basic nature and general route of the approved transportation system or . . . otherwise prevent or impair in any significant respect [its] expeditious construction and initial operation . . . ."

  Section 9(e) requires the inclusion of terms and conditions identified in the President's Decision as appropriate for inclusion, but this requirement does "*not limit the federal officer or agency's authority under subsection [9](d),*" which authorizes agencies to add to, amend or abrogate any certificate term or condition.

- The 1977 President's Decision incorporated the "Agreement between United States of America and Canada on Principles Applicable to A Northern Natural Gas Pipeline."

  Section 4(b) of the Agreement provides that "the return on the equity investment in the Pipeline *will be based on a variable rate of return for each company owning a segment of the* Pipeline, designed to provide incentives to avoid cost overruns and to minimize costs consistent with sound pipeline management. The base for the incentive program used for establishing the appropriate rate of return will be the capital cost used in measuring costs overruns as set forth in Annex III."

- The President's Decision, Section 5, Condition IV-2 (Finance), implemented the Agreement on Principles by establishing that the Commission would fix "*a variable* rate *of return on equity* that will reward the applicant for project completion under budgeted cost and penalize the applicant for project completion above budgeted cost. The variable return shall be set to provide substantial incentives to construct the project without incurring overruns."

The Report accompanying the President's Decision states "the details of how the variable rate of return will be implemented are left to the FPC and NEB to balance the economic incentive with the administrative feasibility."

- Congress approved the 1977 President's decision in Pub. L. 95-158 (1977).

- Subsequently, in Orders Nos. 17 and 31, the Commission determined that it was "required by the Decision to assure that some type of incentive mechanism exists on all segments of the ANGTS," but that it had discretion and flexibility to implement the generic concept of a variable rate of return.

  In Order No. 31, FERC established the structure for the initial tariff to be applied to the transportation of Alaskan gas and the particular variable rate of return mechanism for the Alaskan portion of the project.

  FERC ruled that the President's Decision requires the use of a "variable" or Incentive Rate of Return (IROR) to deter cost growth during construction.

  FERC defines the variable rate of return mechanism as an IROR. It defines an IROR as "a one-time adjustment to rate base that would have the same effect as varying the allowed rate of return over the operating life of the pipeline. The adjustment would either increase or decrease the rate base attributable to equity financing depending on whether or not the project was completed within budget and on schedule."

  In Order No. 31, the Commission also prescribed a cost-of-service tariff for the ANGTS. It explained that: "the cost-of-service tariff allows the project to charge rates adequate to recover its full cost of service, even if cost or throughput change over time, *without the need for first filing a new rate schedule or obtaining this Commission's approval.* In contrast to the fixed-rate tariff, changes in costs or throughput volumes are reflected immediately in the pipeline's rates, rather than after some period required for processing a rate-change application."

- In 1981 President Reagan invoked the President's authority in ANGTA § 8(g)(1) to waive provisions of law applicable to certificates and permits issued for the ANGTS under § 9. Congress approved the waiver in Pub. L. 97-93 (1981). The 1981 Waiver altered or eliminated several terms and conditions in Section 5 of the 1977 President's Decision, as approved in Pub. L. 95-158, while limiting FERC's ability to adjust ANGTS' tariffs to changed circumstances.

  The waiver restricted FERC's authority under the Natural Gas Act's tariff and certificate provisions, *but only* to the extent that they would permit FERC to change rules or orders approving ANGTS tariffs ". . . (a) in any manner that would impair the recovery of the actual operation and maintenance expenses, actual current taxes, and amounts necessary to service debt . . .; or (b) the

recovery by purchasers of Alaska natural gas [i.e. shippers] of all costs related to transportation of such gas pursuant to an approved tariff; . . . ."

The House Report recommending approval of the waiver expressly recognized FERC's ability to reflect changed circumstances in the ANGTS rates, so long as FERC's response "does not involve a change to the provisions of any final rule or order approving any tariff in any manner that would impair the recovery of the costs specified in the waiver . . . ." H.R. Rep. No. 97-350, Part 2 at p. 20.

**THE ABILITY TO MODERNIZE**

- Although the President's Decision and the Agreement on Principles may be read to require the use of a variable rate of return mechanism for the ANGTS, the specifics of implementation were left to the FERC and the NEB. Sections 9(d) and (e) makes clear that the Commission has the authority to amend its prior orders (*i.e.*, Orders Nos. 17 and 31) to provide for a variable rate of return mechanism that reflects current natural gas markets.

- The 1981 waiver does not restrict FERC's authority to approve tariff amendments so long as cost recovery and debt service are not impaired.

- Conversion of the Alaska segment of the ANGTS to an open access pipeline under Order No. 636 is consistent with the goals of ANGTA and the President's Decision to assure non-discriminatory access by all shippers to the ANGTS.

  The goals of the Commission in implementing open access regulations under Order No. 636 are consistent with the goals of ANGTA. ANGTA § 13 imposes a statutory condition "that no person seeking to transport natural gas in the Alaska natural gas transportation system shall be prevented from doing so or be discriminated against in the terms and conditions of service on the basis of degree of ownership, or lack thereof, of the Alaska natural gas transportation system."

  The provisions against undue discrimination contained in §§ 4 and 5 of the Natural Gas Act continue to apply to the ANGTS.

  The 1981 waiver by President Reagan of provisions in President Carter's Decision, barring producer ownership interests in the ANGTS, specifically provided that participation in the ANGTS would be allowed only if no restrictions on access to the facilities were created.

- ANNGTC can include a variable rate of return mechanism in negotiated/recourse rates designed to accommodate competitive gas markets.

  A negotiated/recourse rate gives shippers the option of electing to take service under traditional stated rates or under alternative rates negotiated between the pipeline and the shipper. The recourse rate is either an existing Commission

approved rate or a new rate designed on traditional rate making principles. The recourse rate mitigates the pipeline's market power during negotiations.

In several recent cases, FERC has approved negotiated rate contracts containing a variable rate of return as one element in an overall pricing structure designed to limit shipper exposure to excessive project costs, *e.g.*, Vector Pipeline L.P., 85 FERC ¶ 61,083 (1998); Alliance Pipeline, L.P., 80 FERC ¶ 61,149 (1997), order issuing certificate and on rehearing, 84 FERC ¶ 61,239 (1998).

The use of such negotiated cost containment mechanisms, which put the pipeline at risk for cost overruns, provide incentives to contain project costs in a manner congruent with the goals of the President's Decision. They may indeed go further because they can cover operating costs as well as initial construction costs.

Approval of such mechanisms by FERC for the ANGTS is allowed under the Report accompanying the President's Decision, which calls on the Commission "to balance the economic incentive with the administrative feasibility."

- The FERC can accept a negotiated rate tariff with or without cost of service rates that automatically readjust as costs change. The ANGTS may instead use a fixed, stated rate structure.

  Nothing in the President's Decision or the Agreement on Principles required a cost of service tariff. Rather, the Decision and Report and the Agreement assumed such a tariff, which was one reason why the President required a variable rate of return.

- In fact the Commission has previously authorized conversion of cost-of-service tariffs to stated rate tariffs on both the eastern leg (Northern Border) and the western leg (Pacific Gas Transmission) of the ANGTS prebuild facilities.

## CONCLUSION

In sum, significant flexibility exists for the ANGTS sponsors to amend the existing tariff for the Alaska segment of the ANGTS to reflect today's natural gas markets so long as the provisions of section 9 of ANGTA and the antidiscrimination policy of section 13 are respected.

1. ANGTA expressly contemplates amendments to terms and conditions, provided such amendments do not compel a change in the basic nature and general route of the pipeline project or prevent or impair the expeditious construction and initial operation of the system.

2. Neither the President's Decision nor the Agreement on Principles mandates a cost-of-service tariff or a particular variable rate of return mechanism.

3. The Waiver of Law preserves FERC's ability to make changes to final orders relating to rates and tariff matters, subject to a narrow limitation to assure cost recovery.

4. In implementing the variable rate of return, the Commission determined that "after balancing economic incentives against administrative feasibility," it had "sufficient discretion in implementing the incentive mechanism" to avoid a result which "is not in the public interest."

5. Adoption of the Commission's open access policies and a negotiated/recourse rate structure, which incorporates a variable rate of return mechanism, comport with ANGTA, the President's Decision and the Agreement on Principles, and is otherwise in the public interest.

# ALASKA NATURAL GAS TRANSPORTATION SYSTEM

# ISSUE PAPER NO. 3

## *The Ability of the ANNGTC to Modernize Its Tariff*

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## FOREWORD

The Alaskan Northwest Natural Gas Transportation Company ("ANNGTC") is the partnership which holds the Federal Energy Regulatory Commission certificate of public convenience and necessity to construct, own and operate the Alaska component of the Alaska Natural Gas Transportation System (the "Alaska Highway Project"). Foothills Pipe Lines Ltd. ("Foothills") and TransCanada PipeLines Limited. ("TransCanada") are the two current partners in the ANNGTC. In addition, Foothills is the sponsor of the Canadian segment of the Alaska Highway Project, and the majority owner and operator of the Canadian portions of the Eastern and Western Legs of the Project. Foothills is jointly owned by TransCanada and Westcoast Energy Ltd.

The corporate mission of Foothills is very specific: to build and operate the Alaska Highway Project. We were leaders in the Project that was conceived twenty-five years ago, and we are just as committed to it today.

Given concerns about high energy prices and the adequacy of natural gas supplies, interest in connecting Alaskan natural gas to markets in North America is being renewed. Of course, this is not a new issue. It is an issue that has dominated energy policy debates in the United States and Canada on and off for the last quarter century. There is much history in this story. Recognition of the importance of an Alaska gas project to both countries prompted action at the highest levels of government, including (1) Congressional action, embodied in the Alaska Natural Gas Transportation Act of 1976; (2) cooperation between the United States and Canada, as embodied in the 1977 Agreement Applicable to a Northern Natural Gas Pipeline; (3) Canada's enactment of the Northern Pipeline Act; and (4) the selection of the Alaska Highway Project in 1977 as the approved Alaska natural gas transportation system under these government acts.

During the current debate, questions understandably will arise regarding the history and context of the Alaska Highway Project. To facilitate the resolution of these issues, the ANNGTC and its partners will prepare from time to time Issue Papers that address emerging questions and provide a useful context within which to conduct the public policy and commercial debates.

Attached is one such Issue Paper. Please feel free to contact us for further information and/or to discuss the contents of this or other Issue Papers.

# THE ABILITY OF THE ANNGTC TO MODERNIZE ITS TARIFF

## I. Introduction and Background

This paper addresses the issue of the extent to which the Alaskan Northwest Natural Gas Transportation Company ("ANNGTC" or "Project") can modernize its Federal Energy Regulatory Commission ("FERC" or "Commission") natural gas tariff applicable to the transportation of natural gas on the Alaska segment of the Alaska Natural Gas Transportation System ("ANGTS"). The ANNGTC anticipates that shippers on the ANGTS will prefer that its current FERC tariff be amended to reflect the Commission's open access policies adopted pursuant to Order No. 636. Further, the ANNGTC anticipates that shippers on the ANGTS will prefer adoption of a negotiated/recourse rate tariff which would include in the negotiated rate a variable rate of return in place of the specific Incentive Rate of Return ("IROR") mechanism developed in Order No. 31. Last, the ANNGTC may seek changes to its cost-of-service tariff. As discussed below, a negotiated/recourse rate mechanism could, if desired, be designed using a cost-of-service tariff.

The controlling documents on this issue are the Alaska Natural Gas Transportation Act of 1976 ("ANGTA"), the President's Decision and Report ("Decision"), the Agreement on Principles and the 1981 Waiver of Law. In addition, certain FERC orders are instructive on this issue, including those regarding (1) the variable rate of return mechanism developed in a FERC rulemaking proceeding for use by the U.S. portions of the ANGTS project, (2) other tariff orders related to the U.S. portion of the ANGTS, and (3) the movement of the U.S. Prebuild facilities to the Commission's open access regime. Last, other FERC-approved incentive methods are reviewed with regard to the possible application of those methods to the ANNGTC.

ANGTA itself does not specifically discuss the Project's tariff, but provides that the President in his decision may identify such terms and conditions permissible under existing law as he determines appropriate for inclusion in agency authorizations directed to be granted pursuant to section 9 of ANGTA. The President specified such terms and conditions in Section 5 of his Decision. In the Decision and the Agreement on Principles, which was incorporated into the Decision, the requirement that a variable rate of return mechanism be included as a term and condition in the FERC certificate is discussed in the context of private financing, cost estimation, containment of the construction costs of the Alaska Highway Project and protection of consumers against cost overruns. The President's discussion of a variable rate of return requirement was grounded in the experience of the huge construction cost overruns incurred by TAPS and the desire of the President to ensure that the ANGTS project sponsors shared in the risk of construction cost overruns. However, both the Decision and Agreement on Principles make clear that it was up to the Commission and National Energy Board ("NEB") to implement this concept. Furthermore, the Decision and Agreement on Principles do not include the use

of a cost-of-service tariff as a term and condition but appear to, at most, assume that one will be used.

The 1981 Waiver of Law added additional limitations to the Commission's latitude in adopting a variable rate of return concept. The Waiver of Law specified that the FERC could neither authorize a tariff for the ANNGTC that would impair the recovery of the actual operation and maintenance expenses, actual current taxes, and amounts necessary to service debt for the approved transportation system, nor prevent the recovery by purchasers of Alaska natural gas of all costs related to transportation of such gas pursuant to an approved tariff.

In lengthy proceedings, the FERC proposed and finally adopted in Order Nos. 17 and 31 a complicated variable rate of return concept, or IROR, and approved the use of a cost-of-service form of tariff, at least for the Alaska portion of the Project and the Eastern Leg of the Prebuild. The IROR for the Eastern Leg was implemented at the time the facilities went into service. Significantly, the FERC determined that it had enough flexibility under the President's Decision and the Agreement on Principles to decide not to require the use of a variable rate of return for the Western Leg of the Prebuild, even as it related to its initial construction and operation, since there already was adequate incentive to control cost. The Commission found that the consumer was better off under the existing Western Leg financing plan and the ability to privately finance was adequately assured. The Commission determined that "after balancing economic incentives against administrative feasibility," it had "sufficient discretion in implementing the incentive mechanism" to avoid a result which "is not in the public interest."

Under the statutory and administrative structure created under ANGTA, Congress and the President established the parameters for implementing and amending tariffs for the various segments of the ANGTS. In Section 9 of ANGTA, Congress expressly anticipated amendments and only constrained them in two respects: (1) the changes could not "compel a change in the basic nature and general route of the ANGTS," or (2) "otherwise prevent or impair in any significant respect the expeditious construction and initial operation of the project." It was left to FERC to implement the specific tariff provisions within the guidelines set by Congress and the President. The Commission has done so, acting to implement and amend specific tariff provisions on the various segments of the ANGTS according to the requirements of ANGTA, the President's Decision and the public interest standard of the Natural Gas Act.

Pursuant to this precedent and the purposes embodied in the ANGTA framework, the Commission would be able to amend the ANNGTC's tariff to reflect the Commission's open access policies and to implement negotiated/recourse rates, since such actions would neither "compel a change in the basic nature and general route of the ANGTS," nor "otherwise prevent or impair in any significant respect the expeditious construction and initial operation of the project." Further, the public interest goals set forth by the Commission in implementing open access transportation under Order No. 636 coincide with the goals of Congress and the President in creating the ANGTS legal

framework. Both programs sought to promote the transportation of gas without discrimination. In fact, the Commission has found that it is in the public interest and within the parameters set forth in the ANGTA regulatory scheme to permit other segments of the ANGTS, *i.e.*, the Eastern and Western Legs of the Prebuild, to change their tariffs to become open access pipelines. It would be consistent with these orders to permit the Alaska segment of the ANGTS to become an open access pipeline.

Additionally, the ANNGTC's adoption of the Commission's open access regime and implementation of negotiated/recourse rates addresses certain concerns identified by the President in his Decision. One such concern was that consumers would be saddled with spiraling construction costs, hence, the original requirement of a variable rate of return/IROR mechanism. The implementation of a negotiated/recourse rate, however, could directly address this concern by creating a cost containment mechanism in a market environment. The Commission has expressly found such market-driven cost containment mechanisms to be in the public interest. Further, Congress and the President were concerned in the Waiver of Law with protecting the debt service of the ANGTS pipeline sponsors. Again, this concern is addressed and alleviated by negotiated/recourse rates through a market mechanism. Specifically, the sponsors of the ANGTS can negotiate with shippers acceptable terms to cover their financing needs that would not run afoul of this concept.

Given the Commission's need to balance "economic incentive against administrative feasibility," and its discretionary authority to assure only that "some type of incentive mechanism exists," the ANNGTC's proposed tariff amendments are well within the scope of FERC's authority under the ANGTA regime. Further, as to the substance, it appears that approval of such a request would be consistent with prior Commission determinations of the public interest and it would not be contrary to the parameters set forth by ANGTA and the President's Decision.

## II. Summary of Pertinent Provisions of Controlling Documents On Tariff Issue

### A. ANGTA

ANGTA established the mechanism by which the President, upon the recommendation of the Federal Power Commission, was to select a natural gas transportation system to transport natural gas from the North Slope of Alaska to the lower 48 states. ANGTA did not mandate a particular type of, or discuss the scope of, any tariff that was to be used for the U.S. portions of the ANGTS. Section 7(a)(6) of ANGTA states that "[i]f the President determines to designate for approval a transportation system for delivery of Alaska natural gas to the contiguous States, he may identify in such decision such *terms and conditions permissible under existing law* as he determines appropriate for inclusion with respect to any issuance or authorization directed to be made pursuant to section 9."[1] President Carter did include such terms and conditions in

[1] ANGTA §7(a)(6), 90 Stat. 2903, 2909 (1976), 15 U.S.C. §719e(a)(6) (1994), (emphasis added).

Section 5 of his Decision, and provided that they would be enforced by the Office of Federal Inspector.

Section 9 of ANGTA is addressed to all federal officers and agencies – including the FERC – that issue a certificate, right-of-way, permit, lease or other authorization required for the "taking of any action which is necessary or related to the construction and initial operation of the approved project." Section 9(a) directs the Commission to "issue or grant such certificates and other authorizations" required for the construction and initial operation of the ANGTS "at the earliest practicable date." Moreover, Section 9(b) directs the Commission to expedite "all actions . . . with respect to its consideration of applications or requests" for such authorizations, giving them "precedence over any similar applications or requests . . . ."

With respect to certificates or other authorizations already issued to the ANNGTC by the Commission, Section 9(d) of ANGTA expressly authorizes the Commission to "add to, amend or abrogate any term or condition included in such certificate . . . or other authorization . . . ." However, the Commission "shall have no authority to take such action if the terms and conditions to be added, or as amended, would compel a change in the basic nature and general route of the approved transportation system or would otherwise prevent or impair in any significant respect the expeditious construction and initial operation of such transportation system," unless such terms and conditions are required by law and it has not been waived pursuant to Section 8(g) of ANGTA.[2]

Finally, Section 9(e) of ANGTA provides that the FERC "shall include in any certificate . . . or authorization issued . . . those terms and conditions identified in the President's decision as appropriate for inclusion except that the requirement to include such terms and conditions shall not limit the Federal officer or agency's authority under subsection (d) of the section."

Congress, by its express words, therefore, plainly intended to allow the Commission flexibility to amend or abrogate certificate conditions identified in the President's Decision as appropriate, subject to the limitations in Section 9(d).

### B. FPC Recommendation and Report

ANGTA required the Federal Power Commission, the predecessor to the FERC, to issue a report and recommendation to the President regarding an Alaska gas transportation system.[3] The FPC made its recommendation to the President on May 2, 1977. In its recommendation, the FPC discussed the concepts of a cost-of-service tariff and a variable rate of return on equity. It did so in the context of recommending mechanisms to achieve successful private financing of the project. To that end, the FPC noted that in order to "allow gas producers and project investors to earn profits equal to the market value of the gas . . . a cost of service tariff during normal operation would be

[2] 15 U.S.C. §719g(d) (1994).
[3] ANGTA, §5(b)(1), 15 U.S.C. § 719c(b)(1) (1994).

provided."[4] Additionally, the Commission noted that, in order to provide investors an opportunity to earn a higher than usual rate of return, while not guaranteeing such a return, "a variable rate of return on equity is appropriate." [5] The Commission, however, recognized that given "the different guidelines that are certain to be in place when the successful applicant seeks to firm up final financial plans for Commission approval, the detailed record discussion of the feasibility of existing plans takes on less significance."[6] Thus, the Commission's Recommendation to the President contemplated that changes would likely be made as the project developed and did not foreclose a change to the ANNGTC's financing and tariff provisions as originally recommended.

### C. President's Decision and Report

On September 22, 1977, President Carter issued his Decision.[7] In Section 5 of the Decision, the President listed terms and conditions for the designated transportation system as permitted by Section 7(a)(6) of ANGTA. In the preface of this section he stated:

> To ensure the proper management and timely completion of the construction of the designated transportation system, the following general terms and conditions shall be *appropriately* incorporated into any certificate, right-of-way, lease, permit or authorization directed to be made by any Federal officer or agency . . . .[8]

The terms and conditions proposed for inclusion in the President's Decision are set forth by category and include the following that is relevant to the tariff issue at hand, Finance, Condition IV-2:

> [i]f these final capital cost estimates are not excessive under the above standard, the FPC may use these final estimates for the U.S. segments as the basis for fixing a *variable rate of return on equity that will reward the applicant for the project completion under budgeted cost and penalize the applicant for project completion above budgeted cost.* The variable return shall be set to provide substantial incentives to construct the project without incurring overruns.[9]

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[4] FPC, Recommendation to the President, Alaska Natural Gas Transportation System at I-52 (May 1, 1977)("Recommendation").

[5] Recommendation at I-53.

[6] Recommendation at I-58.

[7] Executive Office of the President, Energy Policy and Planning, Decision and Report to Congress on the Alaska Natural Gas Transportation System. (Sept. 1997) ("Decision") ("Report" appended to Decision).

[8] Decision at 26 (emphasis added).

[9] Decision at 36-37 (emphasis added). This condition subsequently was modified by the Waiver of Law to include the North Slope conditioning facility. It has been argued that the use of the underscored "may" means that the Commission has flexibility in choosing whether to impose an incentive mechanism. The Commission has ruled to the contrary: "Such an interpretation, however, is inconsistent with the entire theme and purpose of the President's Decision. The proper interpretation is that the Commission *must* fix an

The Report accompanying the Decision further explains this condition. The Report notes that, in order to secure private financing for the project, " [t]he burden of cost overruns be shared by equity holders and consumers upon completion through the application of *a variable rate of return on common equity. This would provide a strong incentive for the project to be constructed at the lowest possible cost.*"[10] The Report, however, does not propose the adoption of a specific variable rate design. To the contrary, the Report states: "*The details of how the variable rate of return will be implemented are left to the FPC and NEB to balance the economic incentive with administrative feasibility.*"[11]

Thus, while the President's Decision and Report clearly contemplate that a variable rate of return mechanism be used, the Decision and Report did not dictate how such mechanism would be implemented. Instead, the President left it to the Commission and NEB to develop the mechanism.[12] Regarding the use of a cost-of-service tariff, neither the President's Decision nor the Report forthrightly discuss it, and use of a cost-of-service tariff is not mentioned as a term and condition in the President's Decision.

### D. The Agreement on Principles

The President's Decision was issued concurrently with the Agreement on Principles, an agreement between the United States and Canada setting forth principles to which the two countries were to adhere for the construction of the ANGTS.[13] The Agreement is incorporated in the Decision as Section 7 (pp. 47-82). The Agreement required a variable rate of return mechanism in the ANGTS tariff. Specifically, Section 4(b) of the Agreement on Principles states that:

> The two Governments recognize the importance of constructing the Pipeline in a timely way and under effective cost controls. Therefore, the return on the equity investment in the Pipeline *will be based on a variable rate of return* for each company owning a segment of the Pipeline, designed to provide incentives to avoid cost overruns and to minimize

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incentive system for the project but *may* use the final cost estimates filed with the Commission prior to certification as the basis for that system. In other words, the Decision allows the Commission to select the basis for the mechanism, but requires that a mechanism be imposed." 4 FERC ¶ 61,315, 61,718 (1978)(emphasis in original).

[10] Report at p. 101 (emphasis added).

[11] Report at p. 123 (emphasis added).

[12] Pursuant to Section 8 of ANGTA, Congress passed a joint resolution approving the Presidential decision on Nov. 8, 1977. Pub. L. No. 95-158, 91 Stat. 1268 (1977). Congress recognized that details of the variable rate of return "remain to be worked out by the FERC and the Canadian National Energy Board." See, e.g., H. Rep. No. 95-739 Part II at p. 31 (Report of the House Committee on Interstate and Foreign Commerce).

[13] The "Agreement Between the United States of America and Canada on Principles Applicable to a Northern Natural Gas Pipeline." September 20, 1977, 29 U.S.T. 3581, T.I.A.S. No. 9030.

> costs consistent with sound pipeline management. The base for the incentive program used for establishing the appropriate rate of return will be the capital costs used in measuring cost overruns as set forth in Annex III.

Thus, while the Agreement on Principles assumes the use of a variable rate of return mechanism, the Agreement, like the President's Decision, did not dictate how such mechanism would be implemented.

### E. FERC's Comments on the President's Decision and Report

As required by Section 8(f) of ANGTA, the FERC submitted to Congress comments on the President's Decision.[14] Those comments focused on, among other things, Section 5 of the Decision, including the variable rate of return condition:

> The 'variable rate of return' concept proposed in the President's Decision has a great deal of merit. *While the details will have to be worked out respectively by the FERC and the NEB, it appears that an equitable method of providing the proper incentive to control construction costs would be to arrange accountability on the basis of project segments . . . .*[15]

In addition, the Commission provided several comments that apply to ANNGTC's tariff. These comments include the following statements:

- "The President's Report clearly contemplates that an acceptable tariff must include a variable rate of return, keyed to the magnitude of any cost overruns or underruns. (Rep. 37, 123). . . The Commission agrees with the President as to the value of this regulatory device and will incorporate such a provision in the final approved tariffs."[16]

- "Finally, the Commission recognizes that the President's Report, the Agreement on Principles, and the Applicants *anticipate that the gas transportation system tariffs may employ a cost of service formula as opposed to a stated rate.* The Commission notes that the accepted regulatory and industry understanding is that a cost of service rate form would be computed according to the same principles as a stated rate. These computations include consideration of operation and maintenance expenses, an allowance for depreciation and amortization, an allowance for return, income taxes, taxes other than income, and revenue credits."[17]

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[14] FERC, Comments on the "Decision and Report to Congress on the Alaska Natural Gas Transportation System" Issued by the President, September 22, 1977. (Oct. 1977) ("FERC Comments").

[15] FERC Comments at pp. 38-39.

[16] FERC Comments at p. 49.

[17] FERC Comments at pp. 50-51 (emphasis added).

- "[T]he Commission is not prepared at this time to specify in any more detail those provisions which would be acceptable in designing a tariff for the gas transmission system for the Alaskan gas. To do so now would be impractical and ill-advised without the benefit of having a filed tariff before us."[18]

- The Report [appended to the President's Decision] appears to assume that all costs associated with the purchase and transportation of Alaskan gas to markets will be flowed through to consumers on a current basis. However, the specific provisions for accomplishing complete tracking are not described or discussed. The Judge's decision adopted the applicant's proposals for "perfect tracking", i.e., all changes in costs automatically flow through to the end-use consumer. The FPC Recommendation did not uphold the Judge on this issue. Instead, the FPC found, in the context of approving a cost-of-service form of a tariff, that the purchased gas costs and transportation charges would be included in the cost of service of a jurisdictional pipeline shipper as operating and maintenance expenses. In lieu of tracking provisions, the FPC found that sufficient protection could be provided by simply agreeing to suspend the portion of general rate increases filed by the shipper attributable to operating and maintenance expenses for only one day . . . . The Report did not select the mechanism for flow-through of costs. Therefore, FERC would make this determination, based on its evaluation of such proposals as are subsequently filed with it.[19]

Thus, regarding the variable rate of return, the FERC recognized this as a "concept" set forth in the President's Decision.[20] FERC stated that it would provide the "details" of "an equitable method of providing the proper incentive to control construction costs."[21]

As to the use of a cost-of-service tariff, FERC only "anticipate[d] that the gas transportation system tariffs may employ a cost of service formula as opposed to a stated rate."[22] This language suggests that the FERC did not believe that it was required by the President's Decision to impose a cost-of-service tariff on the ANNGTC.

### F. The Waiver of Law

The Waiver of Law was necessitated by the need to enhance the ability of the ANNGTC to garner financing for the Project. To that end, the Waiver of Law, passed in 1981,[23] altered several of the terms and conditions included in Section 5 of the President's Decision and eliminated certain other requirements and authorities. In

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[18] FERC Comments at p. 51.
[19] FERC Comments at pp. 54-55.
[20] FERC Comments at p. 38.
[21] FERC Comments at pp. 38-39.
[22] FERC Comments at p. 50 (emphasis added).
[23] Pub. L. No. 97-93, 95 Stat. 1204 (1981), adopting a proposal of the President for Waiver to Permit Expedited Construction of the Alaska Natural Gas Transportation System, H. Doc. No. 97-100 (1981).

particular, the Waiver of Law (1) lifted the ban on producer ownership participation; (2) made the conditioning plant part of the "approved transportation system" as that term is defined in ANGTA; (3) altered the Decision's limitation on pre-completion billing; (4) allowed the Commission to use procedures other than formal evidentiary hearings in the course of reaching certification decisions regarding the ANGTS; (5) eliminated the Commission's authority to change its tariff orders to the detriment of debt service; and (6) made other technical changes.

The Waiver of Law eliminated the Commission's authority to change its tariff orders to the detriment of debt service. Specifically, the President waived Sections 4, 5, 7 and 16 of the NGA stating that his action was necessary:

> . . . to the extent that such sections would allow the Federal Energy Regulatory Commission to change the provisions of any final rule or order approving (a) any tariff in any manner that would impair the recovery of the actual operation and maintenance expenses, actual current taxes, and amounts necessary to service debt, including interest and scheduled retirement of debt, for the approved transportation system; or (b) the recovery by purchasers of Alaska natural gas of all costs related to transportation of such gas pursuant to an approved tariff . . . .[24]

In its report on the Waiver of Law, the Senate stated that:

> This provision [regarding FERC's authority to modify or rescind orders], *constitutes a limited restraint on the authority of FERC to make changes in final Orders* which would impair debt service for the ANGTS or preclude continued recovery by shippers of their costs associated with the purchase and transportation of Alaskan gas. The provision thereby affects an incremental increase in the predictability of the regulatory process as it may impact on debt service and cost recovery by shippers. [25]

The House Report accompanying the Waiver of Law stated that:

> The Waiver does not eliminate the Commission's ability to respond, on request or on its own initiative, to circumstances which change concerning the project. Generally, if the Commission's reaction to a changed circumstance does not involve a change to the provisions of any final rule or order approving any tariff in any manner that would impair the recovery of those costs specified in the waiver, then the

[24] H. Doc. No. 97-100 at pp. 3-4.
[25] S. Rep. No. 97-272 at p. 38 (1981) (emphasis added).

> Commission would be able to reflect the changed circumstances in the rates.[26]

The Report goes on to say that:

> The waiver prohibits the Commission from making changes in certain tariff provisions; it does not, on the other hand, require that tariff changes be adopted in response to changed circumstances. In the event that changed circumstances produce situations which would not be covered by the provisions of existing tariffs, the Commission would have the authority under Sections 4, 5, and 7 of the Natural Gas Act to change existing provisions or approve a new tariff, provided, however, that in so doing the Commission approves a tariff which is not inconsistent with the limitations in the waiver of Section 5, Condition IV-3 of the President's Decision, and does not make any changes to existing provisions in any manner which would impair the recovery of the actual operation and maintenance expenses, actual current taxes, and amounts necessary to service debt, including interest and scheduled retirement of debt, for the approved transportation system, or that would impair the recovery by purchasers of Alaska natural gas of all costs related to transportation of such gas pursuant to an approved tariff." [27]

By adopting the Waiver of Law, Congress permitted FERC to react to "changed circumstances" and make tariff changes. It only limited the permissible scope of those changes to protect the ability of the sponsors to recover the project's cost of service. Indeed, the House and Senate Reports endorsed the Commission's continuing ability to amend the ANNGTC's tariff to reflect changed circumstances.

## G. FERC Orders

### 1. Order Issuing Conditional Certificates

By order issued December 16, 1977, the Commission issued conditional certificates of public convenience and necessity to the project sponsors under Section 7 of the NGA and ANGTA.[28] In its order, the Commission noted that its action issuing conditional certificates under ANGTA "are ministerial actions which the Commission must perform without any exercise of administrative judgment or discretion."[29] The Commission expressly noted the need for further data before it could take final action, stating, "the Alcan Pipeline Project is at too incipient a stage to warrant Commission acceptance of applications for permanent certificates of public convenience

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[26] H. Rep. No. 97-350, Part 2 at p. 20.
[27] H. Rep. No. 350, Part 2 at p. 21.
[28] 1 FERC ¶ 61,248 (1977).
[29] Id. at p. 61,641.

and necessity." The Commission further stated that it viewed its action "as a step which initiates the detailed process of final certification."[30]

The Commission expressly listed matters that would require "substantial inquiry," such as "gas reserves and deliverability, . . . wellhead price . . ., financial plan (including consideration of a *variable rate of return provision* and possible debt guarantees by the State of Alaska and the Prudhoe Bay field producers), . . ., *shippers' tariffs* . . ., pipe selection (choice of diameter and pressure), and size and volume of Eastern and Western Legs."[31] Accordingly, the Commission's order expressly recognized that the form of tariffs and a variable rate of return provision were among the many issues yet to be decided.

### 2. Orders Implementing the Variable Rate of Return and Cost-of-Service Tariff

As stated above, the President's Decision and Report left to the Commission the authority to implement a variable rate of return for the U.S. portions of the ANGTS. The Commission exercised its authority for all U.S. segments of the ANGTS in rulemaking proceedings resulting in Order Nos. 17 and 31. In Order No. 17, the Commission adopted terms and conditions for an incentive rate of return on equity to be incorporated in the certificates of public convenience and necessity for the ANGTS.[32] In doing so, the Commission adopted the specific mechanism proposed in its revised notice of proposed rulemaking. That notice of proposed rulemaking concluded that:

> The President's Decision on the Alaska Natural Gas Transportation System mandates the use of an incentive rate of return (IROR) to deter cost overruns during the construction of this project.[33]

In explaining this statement, the Commission stated that "the reason that the *Decision* requires imposition of an incentive mechanism to control costs is to protect the consumer and also to facilitate private financing of the project."

The Commission specifically noted that the implementation of a variable rate of return mechanism was left up to it, with instructions "to balance the economic incentive with administrative feasibility."[34] Thus, the Commission stated that it "must" fix an

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[30] Id.

[31] Id. at p. 61,642 (emphasis added).

[32] It should be noted that the Commission used the terms "variable" and "incentive" interchangeably in referring to the generic concept of a variable rate of return as discussed in the President's Decision.

[33] Incentive Rate of Return for the Alaska Natural Gas Transportation System, Revised Notice of Proposed Rulemaking, 4 FERC ¶61,315 at p. 61,714 (emphasis added), Order Adopting IROR Conditions, Order No. 17, 5 FERC ¶61,199 (1978). Order on Clarification, Order No. 17-A, 6 FERC ¶61,042 (1979).

[34] 4 FERC ¶61, 315 at p. 61,718 (quoting page 123 of the President's Report).

incentive system for the project, but, it noted, it had "*sufficient discretion in implementing the incentive mechanism*" to avoid a result which "is not in the public interest."[35] The Commission deemed itself "to be required by the Decision to assure *that some type of incentive mechanism exists* on all segments of the ANGTS."[36]

As for the Western Leg, the revised notice of proposed rulemaking proposed, and Order No. 17 adopted, exemption of the Western Leg from the variable rate of return requirement. The revised notice of proposed rulemaking stated that:

> The President in the Report left the implementation of such a mechanism [i.e., the IROR mechanism] to the Commission . . . . *While the President spoke in general terms of a variable rate of return, therefore, the Commission was at the same time given sufficient discretion in implementing the incentive mechanism to avoid a result which is not in the public interest* . . . . The Commission, after balancing economic incentive against administrative feasibility, believes that application of the IROR to the Western Leg segment of ANGTS is neither appropriate nor mandated.[37]

Even though the Commission found that the President's Decision "mandated" the use of a variable rate of return, the Commission determined, "after balancing economic incentive against administrative feasibility," that application of a variable rate of return to the Western Leg segment of the ANGTS "is neither appropriate nor mandated." It concluded that, because the net effect of applying a variable rate of return mechanism to the Western Leg "would be to increase costs to consumers," existing incentives to reduce construction costs were adequate "for this segment of the system."[38] Thus, the Commission concluded that, despite the parameters of the ANGTA legal structure, including the Agreement on Principles, it had the authority to find that a variable rate of return structure was not appropriate, *i.e.*, not in the public interest, for the Western Leg.

The Commission further reasoned that "the looping of an existing pipeline along an existing right-of-way to transport an assured supply of gas is an undertaking of conventional risk, particularly considering the assurance of adequate revenues provided by a cost-of-service tariff."[39] In addition, the Commission distinguished between the 100% recourse debt financing issued by the sponsoring companies that would be used to finance the Western Leg and the much higher cost of a mixture of debt and equity financing to be used for the other components of the project. The Commission also noted that there is a built in cost control incentive in the use of debt financing in that the absence of equity capital eliminates the return of equity benefits of cost overruns and because the impact of that debt on the parent companies' financial conditions – debt

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[35] Id. (emphasis added).
[36] Id.(emphasis added).
[37] Id. (emphasis added).
[38] Id. at p.61,718.
[39] Id. at p. 61,731.

guarantee capacity and overall credit rating – will cause them to insist on stringent construction cost-control measures for the Western Leg. The Commission concluded that the application of IROR to the Western Leg lacks the salutary regulatory effect which it will have on the other segments of the project. There is already adequate incentive to control construction costs, and *the two bases underlying the President's variable rate of return condition have already been satisfied: the consumer is better off under the existing Western Leg financing plan, and the recourse nature of the debt acts to assure private financing.*[40]

In Order No. 31, the Commission established the structure for the initial tariff to be applied to the transportation of Alaskan gas and the particular variable rate of return mechanism for the Alaska portion of the project and the Eastern Leg of the Prebuild.[41] Again, the Commission reiterated that "[t]he President's Decision requires the use of a "variable" or incentive rate of return to deter cost growth during construction."[42] The Commission also stated that "in creating the incentive, the President sought to offer the project sponsors a positive reward for superior cost and schedule control, in a format that is not available under conventional public utility ratemaking practices."[43] The Commission stressed that the "consumer should be the chief beneficiary of the IROR," and that by using an IROR, "the burden of cost overruns will be distributed between consumers and equity investors."[44] "The ultimate effect of applying the IROR," continued the Commission, "will be to provide lower cost natural gas to consumers, with just and reasonable returns to investors."[45]

Regarding the particular variable rate of return mechanism developed, the Commission described the mechanism this way:

> [A]n Incentive Rate of Return (IROR) [is] a one-time adjustment to rate base that would have the same effect as varying the allowed rate of return over the operating life of the pipeline. The adjustment would either increase or decrease the rate base attributable to equity financing, depending on whether or not the project was completed within budget and on schedule. [46]

In Order No. 31, the Commission also adopted a cost-of-service form of tariff for the ANGTS. The Commission stated that:

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[40] Id. at p. 61,732 (emphasis added).
[41] Determination of Incentive Rate of Return, Tariff, and Related Issues, Order No. 31, 7 FERC ¶61,237 (1979).
[42] Id. at p.61,438.
[43] Id.
[44] Id. at p. 61,439.
[45] Id.
[46] Northern Border Pipeline Co., 52 FERC ¶ 61,102 at p. 61,492 (1990) (Commission description of IROR, as implemented on Northern Border); see also, Order No. 31, 7 FERC ¶ 61,237 at pp. 61,438, 61,454 (1979).

> the cost-of-service tariff allows the project to charge rates adequate to recover its full cost of service, even if costs or throughput change over time, without the need for first filing a new rate schedule or obtaining this Commission's approval. In contrast to the fixed-rate tariff, changes in costs or throughput volumes are reflected immediately in the pipeline's rates, rather than after some period required for processing a rate-change application. The commitment to allow a cost-of-service tariff is a major factor that offsets much of the risk exposure of investors in the ANGTS. The cost-of-service mechanism greatly reduces the risk of inability to earn an allowed return due to increases in cost or reduction in volumes .... Considering the risks associated with the relative proportions of debt to equity in the capital structure, we believe that the cost-of-service tariff provisions offset the high degree of leverage proposed by the sponsors and, consequently, we feel that ANGTS will face lower financial risks than would conventional pipelines with the same equity capitalization but without the cost of service tariff.[47]

In the conclusion of its order, the Commission noted that the mechanism chosen protected consumers from unreasonably high rates while maintaining the financial integrity of the project, and that "this classic balancing test must be applied to the IROR in a manner consistent with the mandate of the President's *Decision* to establish incentive to control costs."[48]

Thus, in Order Nos. 17 and 31, the Commission determined that it was required to "assure that some type of incentive mechanism exists on all segments." The Commission itself recognized the discretion and flexibility it had in implementing the generic concept of a variable rate of return. As previously noted, the Commission determined that it had enough flexibility even to determine that a portion of the ANGTS, that is, the Western Leg, did not require the use of a variable rate of return concept from the outset in order to contain costs, and that such a determination was required by the public interest.

### 3. Subsequent FERC Orders on the Prebuild

In orders issued by the Commission subsequent to Order No. 31, the Commission has made several changes to the tariffs of the prebuild facilities. These changes may serve as precedent for permitting changes to the existing tariff for the ANNGTC.

#### a. Northern Border Pipeline Company

As discussed above, FERC, noting that the President's Decision and the Agreement on Principles anticipated the use of a cost-of-service tariff in order to secure financing for the project, adopted a cost-of-service tariff for Northern Border.[49] Additionally, consistent with the President's Decision, the FERC established what it

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[47] Order No. 31, 7 FERC ¶ 61,237 at p. 61,446 (1979).
[48] Id. at p.61,463.
[49] See Northern Border Pipeline Co., 52 FERC ¶ 61,102 at pp. 61,492-493 (1990).

called a "variable or incentive rate of return mechanism" for Northern Border in order to relate the allowed rate of return of the project to the actual capital cost of the project.[50]

As for Northern Border's cost-of-service tariff, the Commission, consistent with its previous interpretation of flexibility under the ANGTA framework, recently has permitted Northern Border to change its rates to a stated rate tariff mechanism. The following occurred to lead up to this change:

1. In 1990, the Commission found that a cost-of-service rate was consistent with the Commission's Rate Design Policy Statement issued in 1989.[51] The Commission, however, did not expressly preclude changing Northern Border's cost-of-service rate, it only stated that "Northern Border's existing rate design accomplishes the goals of productive and allocative efficiency set forth in the Rate Design Policy Statement."[52]

2. In 1993, the Commission retained Northern Border's cost-of-service rates when it was challenged in the company's Order No. 636 restructuring proceedings, noting Northern Border's unique status as part of the ANGTS. Again, however, the Commission did not expressly state that it was prohibited from moving Northern Border off cost-of-service rates, only that Northern Border "should be permitted to retain" those rates.[53]

3. In 1995, the Commission set the issue for hearing without discussion,[54] and the case was resolved by settlement, retaining cost-of-service rates.[55]

4. In 1999, the Commission again set Northern Border's cost-of-service rates for hearing.[56] The Commission noted that, in the context of the proposed changes, the ANGTS project could still be "fully implemented."[57] The Commission subsequently accepted a settlement by the parties in the rate case, changing Northern Border's tariff from a cost-of-service rate tariff to a stated rate tariff.[58] The Commission accepted the settlement in a letter order, without comment regarding the change to a stated rate tariff.

As for Northern Border's Incentive Rate of Return mechanism, the Commission adopted a one-time adjustment to rate base, as discussed above. The one-time

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[50] 7 FERC ¶ 61,237 at p. 61,437.
[51] Interstate Natural Gas Pipeline Rate Design, 47 FERC ¶ 61,295, order on reh'g, 48 FERC ¶ 61,122 (1989).
[52] Northern Border Pipeline Co., 52 FERC ¶ 61,102 at p. 61,498 (1990).
[53] Northern Border Pipeline Co., 63 FERC ¶ 61,289 at p. 62,954 (1993).
[54] Northern Border Pipeline Co., 73 FERC ¶ 61,399 at p. 62,231 (1995), reh'g denied, 74 FERC ¶61,214 (1996).
[55] Northern Border Pipeline Co., 80 FERC ¶ 61,150 (1997).
[56] Northern Border Pipeline Co., 87 FERC ¶ 61,380 at p. 62,412 (1999).
[57] Northern Border Pipeline Co., 88 FERC ¶ 61,201 at p. 61,686 (1999).
[58] Northern Border Pipeline Co., 93 FERC ¶ 61,261 at p. 61,835 (2000).

adjustment, increasing the equity component of Northern Border's rate base in the project, was made shortly after Northern Border commenced operating to reflect the fact that the project was completed under budget and on schedule.[59] Because Northern Border's facilities have not been fully depreciated, the amortization of this one-time adjustment to rate base is ongoing.

In addition to the original IROR mechanism, the Commission has also permitted a similar mechanism to be implemented for the Harper, Iowa expansion facilities constructed by Northern Border. In approving a settlement reached by the parties regarding the inclusion of costs of the extension project in Northern Border's rates, the Commission approved a project cost containment mechanism (PCCM) which, among other things, established a "target cost" amount for the expansion project. The PCCM limited the amount of cost overruns Northern Border could recover above the target number.[60] The Commission noted that incentive rates can be a "valuable tool" in encouraging cost containment, and, the Commission added, "the Commission approved an incentive rate proposal for that very purpose when Northern Border was first built."[61]

Thus, the Commission is not constrained to a cost-of-service tariff on segments of the ANGTS if the sponsors propose a modification as part of a negotiated/recourse rate proposal to modernize its tariff. The Commission, in fact, has permitted stated rates to go in effect for Northern Border. As for an incentive rate mechanism, it has implemented the originally-proposed IROR mechanism for the Eastern Leg, and it has permitted an alternative incentive mechanism to go into effect for Northern Border expansion projects, recognizing, of course, that these latter expansion facilities were not constructed pursuant to ANGTA.

### b. Pacific Gas Transmission Company

As noted above, Order No. 31 found that the use of cost-of-service tariff for ANGTA, including the prebuild facilities, was appropriate, but specifically exempted the Western Leg prebuild facilities from the requirement for a variable rate of return.

Pursuant to Order No. 31, the builder of the Western Leg facilities, Pacific Gas Transmission Company ("PGT"), developed a cost-of-service tariff for service on the Western Leg prebuild facilities which was provided to Pacific Interstate Transmission Company ("PITCO") under Rate Schedule T-2. By settlement, cost-of-service rates were eventually eliminated by first designing T-2 rates on a stated rate basis and by converting PITCO's T-2 service to open-access Part 284 service.[62]

In 1980, the Commission issued orders approving the importation, transportation and sale of Canadian gas through the construction of the Western Leg prebuild facilities.

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[59] Northern Border Pipeline Co., 27 FERC ¶ 61,234 (1984).
[60] Northern Border Pipeline Co., 80 FERC ¶ 61,150 at pp. 61,611-612 (1997).
[61] Id. at p. 61,614 (emphasis added).
[62] Pacific Gas Transmission Co., 68 FERC ¶ 61,215 (1994).

The Commission approved incremental, cost-of-service rates to be charged under a separate rate schedule, designated Rate Schedule T-2.[63]

In Docket No. RP87-62, PGT entered into a settlement which provided for the elimination of the cost-of-service tariff in favor of stated rates for its pre-expansion services and retention of incremental, cost-of-service rates for T-2 service. The Commission order -- accepting the settlement -- remanded to the assigned ALJ the issue of whether continued use of incremental, cost-of-service rates was consistent with its 1989 Rate Design Policy Statement (policy favoring roll in where facilities are physically integrated). The Commission stated that ANGTS-related rates could be modified if the modifications would not impair ANGTS debt guarantees. The Commission stated further that it would not require a change here because of a lack of a complete record.[64]

The remanded proceeding was consolidated with a subsequent PGT rate filing wherein PGT proposed incremental, stated rates for T-2. With respect to T-2 service, the primary issue of concern in this proceeding was whether the prebuild facilities should be rolled in to PGT's rates.[65] In several further Commission and ALJ orders, a change to incremental, stated rates was rejected.[66] However, ultimate disposition of this matter remained pending before the Commission.

While the issue remained pending, PGT filed yet another rate case. A settlement in this case proposed that all prebuild facility costs be allocated to T-2, which would be designed on a stated rate basis, and that PITCO be allowed to convert from T-2 service to Part 284 service. The Commission accepted the settlement without discussing the elimination of the cost-of-service form of ratemaking. Moreover, the Commission permitted the prebuild shipper PITCO, to convert to open-access Part 284 service.[67]

## III. ANALYSIS

### A. FERC HAS THE AUTHORITY TO AMEND THE ANNGTC's TARIFF

The ANNGTC may amend its conditional certificate to implement the open access provisions of FERC Order No. 636 on the Alaskan segment of the ANGTS. In addition, the ANNGTC may replace the currently existing IROR rate mechanism with a negotiated/recourse rate to meet today's market conditions. The legal underpinnings of the ANGTA provide authority to make such amendments.

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[63] Northwest Alaskan Pipeline Co., 11 FERC ¶ 61,279 (1980).
[64] Pacific Gas Transmission Co., 50 FERC ¶ 61,067 (1990).
[65] See, e.g., Pacific Gas Transmission Co., 62 FERC ¶ 63,017 at p. 65,064 and n. 7 (1993).
[66] Pacific Gas Transmission Co., 62 FERC ¶ 61,109 (1993) and Pacific Gas Transmission Co., 62 FERC ¶ 63,017 (1993).
[67] Pacific Gas Transmission Co., 68 FERC ¶ 61,215 at p. 62,029 (1994).

Section 9 of ANGTA specifically contemplates, therein, amendments to the terms and conditions of the ANNGTC certificate. The only constraint on a "federal officer or agency" in Section 9 is that any change cannot compel a change in the basic nature and general route of the pipeline project chosen by the President, or prevent or impair the expeditious construction and initial operation of the system.

The President required that a variable rate of return concept be appropriately incorporated into any certificate issued by the FERC. The Agreement on Principles required the use of a variable rate of return mechanism for the ANGTS. The Waiver of Law affected FERC's authority by limiting its actions to the extent that they affected the recovery of debt service by the sponsors. However, in every one of these instances, neither Congress nor the President dictated how such a mechanism would be implemented. The specifics, within the confines of the ANGTA parameters, were left to FERC and the NEB. Thus, the Commission has the authority to amend its prior orders upon application by the sponsors to incorporate a negotiate/recourse rate tariff inclusive of a variable rate of return mechanism reflective of current natural gas markets.

Broad authority exists pursuant to which the Commission may implement specific tariff provisions, and make amendments to those provisions, on the Alaska segment of the ANGTS. In fact, FERC, in implementing ANGTA and the President's Decision, has authorized different tariffs for different segments of the ANGTS. On the Western Leg, the Commission went so far as to find that a variable rate tariff was unnecessary under the goals of ANGTA and the President's Decision. In doing so, the Commission expressly recognized that it could "balance economic incentive with administrative feasibility" in exercising its discretion to assure a result "which is in the public interest." Therefore, if the sponsors of the ANGTS request an amendment to the existing tariff of the ANNGTC which does not compel a change in the basic nature and general route of the project, or that prevent or impair the expeditious construction and initial operation of the system, the Commission has the requisite authority to approve such a request.

## B. IF DESIRED, THE ANNGTC CAN AMEND ITS TARIFF TO IMPLEMENT OPEN ACCESS TRANSPORTATION UNDER ORDER NO. 636

The ANGTS sponsors anticipate that producers and potential shippers of Alaskan North Slope gas will prefer an open access transportation tariff utilizing negotiated/recourse rates. Such a structure will permit efficient integration of North Slope gas into North American markets.

The goals of the Commission in implementing open access regulations under Order No. 636 are consistent with the goals of ANGTA and the President's Decision. In ANGTA, Congress sought to promote the construction of an Alaskan pipeline while, at the same time, prohibiting discrimination in the transportation of gas on the system. Among other things, in Section 13 of the Act, Congress expressly prohibited

discrimination on the basis of ownership, or lack thereof, in the ANGTS.[68] The Commission, in furtherance of these anti-discrimination provisions, required the prebuild transporters to include such anti-discrimination provisions in their tariffs.[69] Further, in the passage of the Waiver of Law, Congress noted specifically that producer participation in the ANGTS was permitted as long as no restrictions on access to the facilities were created.[70]

These anti-discrimination provisions are parallel to the anti-discrimination provisions contained in Order No. 636. Accordingly, converting the Alaska segment of the ANGTS to an open access pipeline under Order No. 636 is consistent with, and supportive of, the goals of ANGTA and the President's Decision. In fact, the Commission has already converted the Eastern and Western Legs of the Prebuild segments of the ANGTS to open access pipelines under Order No. 636, finding that open access transportation on the Eastern and Western Legs of the ANGTS was in the public interest.[71] The conversion of the Alaska segment to open access would be consistent with these decisions.

Ample precedent exists to find that open access transportation on the Alaska segment of the ANGTS is in the public interest. Moreover, no barrier exists to permitting such a conversion since the change would neither compel a change in the basic nature and general route of the pipeline project chosen by the President, nor prevent or impair the expeditious construction and initial operation of the system.

## C. COMPETITIVE MARKET RATES WHICH INCORPORATE A VARIABLE RATE OF RETURN MECHANISM CAN BE IMPLEMENTED UNDER THE COMMISSION'S NEGOTIATED/RECOURSE RATE POLICY

The sponsors of the ANGTS also anticipate the utilization of negotiated/recourse rates for transportation of gas in Alaska. Such a rate structure could easily incorporate a variable rate of return mechanism in lieu of the cumbersome IROR specifically adopted by the Commission in Order No. 31. Such an amendment would satisfy the requirements of Section 9, would be more "administratively feasible" than the previously adopted IROR and would be in the public interest since, properly designed, it could act to contain costs, protect consumers and support private financing.

In today's competitive natural gas markets, there is widespread use of "negotiated/recourse" rate designs.[72] For example, the negotiated rate structure approved

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[68] 15 U.S.C. § 719k (1994).

[69] Order No. 31, 7 FERC ¶ 61,237 at p. 61,471 (1979).

[70] S.Rep. No. 97-272 at 32 (1981).

[71] See discussion on Prebuild orders, supra, notes 49-67.

[72] Under a negotiated/recourse rate design, shippers are given the option of electing to take service under traditional stated rates or under alternative rates that are negotiated between the pipeline and the shipper. The recourse rate is either an existing Commission-approved rate or a new rate designed on traditional ratemaking principles.

in Vector Pipeline L.P. includes a variable rate of return cost containment mechanism.[73] The Commission approved negotiated rate contracts which included a variable rate of return as one element in an overall pricing structure which limited shipper exposure to excessive project costs. Specifically, the Vector negotiated rate contracts provided:

(1) an agreed-upon return on equity (11.5%), locked in for the primary term of the agreement, **to be adjusted based on whether actual construction costs were higher or lower than estimated costs;**

(2) an agreed-upon capital structure regardless of the Commission-approved capital structure;

(3) a fixed rate of return and capital structure used to calculate an allowance for funds used during construction (AFUDC); and

(4) a fixed cost of debt and O&M expenses (with an annual inflation adjustment) included in rates, with only a 50% adjustment for actual variance above or below the fixed number.

Comparing Vector's proposal with FERC's ANGTS orders, Vector's negotiated rate goes well beyond the cost containment protection of a variable rate of return, or IROR mechanism, as implemented by Order No. 31. Vector's negotiated rate employs a cost containment provision that applies to on-going operation of the pipeline and not just a one-time adjustment for initial construction cost.

In Alliance Pipeline L.P., the Commission approved negotiated rates which included a variable rate of return as well as other risk-sharing elements. Specifically, Alliance proposed, and the Commission accepted, the following provisions:

1. Base return on equity of 12%, which is adjusted upward or downward by up to 2%; for each 10% in variation of actual costs, a .5% adjustment is made;

2. Imputed 70/30 debt equity ratio, regardless of Commission determination;

3. Reservation rate based on higher of 1,250 MMcf/d or actual contracted quantity (i.e., Alliance bears the risk if it is unable to attract the minimum level of contract commitment).[74]

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It is the availability of the traditional "recourse" rate that mitigates the market power of the pipeline in the negotiation process. See, Alternatives to Traditional Cost-of-Service Rates for Natural Gas Pipelines, 74 FERC ¶ 61,076 (1996).

[73] 85 FERC ¶61,083 (1998).

[74] Alliance Pipeline L.P., 80 FERC ¶ 61,149 at p. 61,592 (1997) (preliminary determination), order issuing certificate and on reh'g, 84 FERC ¶ 61,239 (1998).

Here, as in Vector, the negotiated contracts incorporated a variable rate of return based on actual construction costs. This variable rate of return is analogous to the variable rate of return/IROR mechanism established by the Commission for the ANGTS in Order No. 31. In fact, the cost containment in Alliance's negotiated rate more directly effect the pipeline than do the provisions set out in Order No. 31.

For other pipeline companies, the Commission has approved negotiated rates that contain fixed reservation and commodity rates for long term contracts.[75] For Guardian, the rate that was originally fixed had a component that permitted those rates to decline annually.[76] Such rate provisions provide an incentive to contain construction and operating costs since the pipeline is committed to providing service at the fixed or declining rate regardless of actually incurred costs.

Recently, another procedural approach has been presented. On January 31, 2001, Cove Point LNG, Limited Partnership, filed an application to reopen its inactive LNG terminal facility.[77] The filing included a rate settlement that Cove Point and the winning bidders negotiated after Cove Point held its open season but before Cove Point made its certificate filing. The settlement included provisions which capped the costs Cove Point could include in its rates for certain specified new facilities. The settlement also included a rate moratorium which prohibits Cove Point from filing for increased rates over a specified time period. Approval of Cove Point's application and the rate settlement is pending before the Commission.

The use of negotiated cost containment mechanisms which put the pipeline at risk for cost overruns provide incentives to contain project costs in a manner that is congruent with the goals of the Presidential Decision. In many respects, these negotiated mechanisms go further to protect the customer since they can cover operating costs as well as initial construction costs. By being tailored to the specific requirements of the shippers and the pipeline, the flexible, negotiated approach can be more "administratively feasible" than the complicated approach proposed by the Commission in Order No. 31.

## D. COMPETITIVE MARKET RATES CAN BE IMPLEMENTED WITH OR WITHOUT COST-OF-SERVICE RATES

Finally, a negotiated rate tariff can be implemented with or without cost-of-service rates. As noted above, neither the President's Decision nor the Agreement on Principles required that a cost-of-service tariff be included as a term and condition in the ANNGTC's FERC certificate. Instead, a cost-of-service tariff was assumed in the Decision and Report and in the Agreement, and was one of the reasons upon which the President found a variable rate of return necessary. FERC has already approved use of a cost-of-service tariff for the Alaska portion of the ANGTS in Order No. 31. The

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[75] See, e.g., Tennessee Gas Pipeline Co., 92 FERC ¶61,142 (2000) ( 20–year term); Central New York Oil and Gas Co., 94 FERC ¶61,194 (2001) (10-year term); Guardian Pipeline, L.L.C., 91 FERC ¶61,285 (2000)(10 or 15-year term).

[76] See, Guardian, supra, note 75.

[77] Docket No. CP01-76, et al. (filed Jan. 1, 2001).

ANNGTC could seek to keep the cost-of-service tariff or it could seek to amend its certificate to exclude the use of a cost-of-service tariff for the Alaska portion of the ANGTS and instead use a stated rate. The Commission has the authority to adopt such an amendment provided the sponsors demonstrate that such an amendment is consistent with the Waiver of Law and provides adequate revenues to meet its debt service obligations.

In fact, the Commission has already converted cost-of-service tariffs for both Northern Border and PGT for the ANGTS prebuild facilities. In the proceedings approving the conversions, the Commission took note of the requirements of ANGTA and did not find the conversion to be incompatible with ANGTA. Indeed, the Commission felt that, at most, use of a cost of service tariff was only "anticipated" by the President in his Decision. Thus, for the Alaska segment, if the pipeline is willing to forego such protection consistent with obtaining needed project financing, there is no policy reason for the Commission to raise objections. There is also no legal impediment in ANGTA or the Presidential Decision to the ANGTS converting from cost-of-service rates to stated rates if it proposes to do so.

## IV. CONCLUSION

In light of today's pro-competitive regulatory environment, the sponsors of the Alaska segment of the ANGTS anticipate seeking to amend the existing tariff of the Alaska segment of the ANGTS to reflect current market conditions. The desired amendments should be achievable within the parameters of ANGTA, the President's Decision, the Agreement and Principles and the FERC's authority. The central conclusions are as follows:

1. ANGTA expressly contemplates amendments to terms and conditions so long as the amendments do not compel a change in the basic nature and general route of the pipeline project or prevent or impair the expeditious construction and initial operation of the system;

2. Neither the President's Decision nor the Agreement on Principles mandates a cost-of-service tariff or a particular variable rate of return mechanism;

3. The Waiver of Law constitutes a narrow limitation of FERC's ability to make changes to final orders relating to rates and tariff matters;

4. In implementing the variable rate of return, the Commission determined that "after balancing economic incentives against administrative feasibility," it had "sufficient discretion in implementing the incentive mechanism" to avoid a result which "is not in the public interest;"

5. Adoption of the Commission's open access policies and a negotiated/recourse rate structure, which incorporates a variable rate of

return mechanism, comports with ANGTA, the President's Decision and the Agreement on Principles, and is otherwise in the public interest.

In conclusion, significant flexibility exists for the ANGTS sponsors to amend the existing tariff for the Alaska segment of the ANGTS to reflect today's natural gas markets so long as the provisions of Section 9 of ANGTA and the Waiver of Law are respected.

## TALKING POINTS: NEPA REQUIREMENTS FOR A REACTIVATED ANGTS

- In the Alaska Natural Gas Transportation Act of 1976 ("ANGTA"), Congress established a unique process for choosing among various proposals then pending before the Federal Power Commission ("FPC") for the transportation of natural gas from Alaska's North Slope to the lower 48 States. It authorized the President to decide whether such a system should be approved under ANGTA, to describe the nature and route of the system and to designate a person to construct and operate it. ANGTA further provided for a Presidential finding that NEPA had been satisfied. It also provided for Congressional review and approval of the President's determination (including, after public and agency review and comment, the NEPA finding) before his Decision could become effective.

- The National Environmental Policy Act of 1969 ("NEPA") requires that federal agencies proposing "major federal actions significantly affecting the quality of the human environment" prepare an environmental impact statement ("EIS") addressing the environmental impact of the proposed action.

  Current regulations of the Council on Environmental Quality ("CEQ") established under NEPA require a supplement to an EIS if: (1) an agency "makes substantial changes in the proposed action that are relevant to environmental concerns"; or (2) "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."

  It is well established that Congress may modify the NEPA process for particular actions by directing that satisfaction of substitute standards and procedures constitute satisfaction of NEPA's requirements.

- ANGTA § 8(e) directed the President to "find that any required environmental impact statement relative to the Alaska natural gas transportation system designated for approval by the President has been prepared and that such statement is in compliance with [NEPA]." Section 8(e) further provided that the President's finding "shall be set forth in the report [not the Decision] of the President submitted under Section 7." The President could supplement or modify the EISs prepared by the FPC or other officers or agencies. Any such EISs were to be submitted to Congress with the President's Decision.

- ANGTA also made specific provision for the approval by Congress of the EISs submitted with the President's Decision. Section 10(c)(3) provides that: "The enactment of a joint resolution under section 8 approving the decision of the President shall be conclusive as to the legal and factual sufficiency of the [EISs] submitted by the President relative to the approved transportation system and no court shall have jurisdiction to consider questions respecting the sufficiency of such statements under [NEPA]."

- Under ANGTA, two Final EISs and a Supplemental Final EIS were prepared for an Alaska natural gas transportation system. The President, after extensive comment by the FPC, the Council on Environmental Quality and an Interagency Task Force on Environment Issues, found the EISs to be legally and factually sufficient. The President

also established a comprehensive mechanism directing how federal agencies would conduct further environmental review, mitigation and compliance. Based on these determinations, the President recommended that the Alaska Natural Gas Transportation System ("ANGTS") be selected and authorized for construction.

The President's Decision determined:

> "pursuant to the direction of Section 8(e) of ANGTA, that the required environmental statements relative to an Alaska natural gas transportation system have been prepared, that they have been certified by the CEQ and that they are in compliance with [NEPA].
>
> Consequently the enactment of a joint resolution approving the Decision shall be conclusive as to the legal and factual sufficiency of the final environmental impact statements as provided by Section 10(c)(3) of ANGTA."

- When Congress approved the President's Decision, it also gave effect to the provision in § 10(c)(3) of ANGTA that its approval would "be conclusive as to the legal and factual sufficiency of the [EISs] submitted by the President."

  The Joint Resolution, Pub. L. No. 95-158, approved November 8, 1977, provides: "That the House of Representatives and Senate approve the Presidential decision on an Alaska natural gas transportation system submitted to the Congress on September 22, 1977, and find that any environmental impact statements prepared relative to such system and submitted with the President's decision are in compliance with [NEPA]."

- The President also recognized that significant, additional site-specific environmental analysis and documentation would need to be performed. *Section 5 — Terms and Conditions and Enforcement* of the President's Decision established the specific methodology that directed how federal officers and agencies would proceed to consider and issue the certificates, permits, rights-of-way and other authorizations necessary to construct and initially operate the project.

- The requirements of Section 5 also were relied upon by the President and Congress to determine that the EISs for the ANGTS were sufficient. So long as the details of the ANGTS remain within the general scope of the EISs and the President's Decision, and the federal officers and agencies comply with the Terms and Conditions of Section 5, the requirements of NEPA have been satisfied with respect to the ANGTS.

  Because §§ 9(c) and (d) of ANGTA bar agency actions that would change the basic nature and general route of the approved project, or otherwise prevent or impair its expeditious construction and initial operation, Congress' modification of NEPA in Pub. L. 95-158 applies to future actions within the general scope of the project as designated by the President and approved by Congress.

- The requirements in Section 5, Subsection III of the President's Decision were adopted by Congress to implement its NEPA sufficiency finding as the project is developed. By imposing these requirements for the development of, review of, and compliance with detailed plans to protect the environment during planning, design, construction and operation, Congress modified the application of NEPA. It substituted a specific, detailed set of standards and procedures directing how federal officers and agencies would conduct further environmental review, mitigation, and compliance. Since the concerned federal agencies were to be at the center of the development of these "additional 'site-specific' terms and conditions" as they proceeded to consider and issue the authorizations necessary to construct and operate the pipeline, there was no need for duplicative analysis and documentation under NEPA.

  The report of the House Interior and Insular Affairs Committee carefully described the substance of the President's Decision set forth in Section 5. It recognized that the Decision remitted environmental and other terms and conditions to the process of authorization by the appropriate federal officers. The House Report explained:

  > "As with all other terms and conditions established by the decision, these [terms and conditions in Section 5] are to be used as the basis for the development of more detailed specifications during the authorization and approval process."

  The House Report expressly noted the position of the CEQ "that environmental assessments, EIS supplements, or new impact statements may be required and that major design, engineering or other site-specific decisions that follow the selection of the corridor and technology must be considered in one of these types of NEPA analyses." The Committee, however, did not endorse this position, any more than had the President. Instead it relied on the mechanisms to be established under the President's Decision for addressing environmental issues through the certification and permitting process, without further NEPA proceedings.

- The court with exclusive jurisdiction under ANGTA § 10(c)(1) to review agency actions relating to the pipeline has recognized ANGTA's limitation of NEPA. In Earth Resources Company et al. v. FERC, 617 F. 2d 775 (D.C. Cir. 1980), the D.C. Circuit considered a challenge under NEPA to a FERC order setting design specifications and initial capacity for the Alaska segment of the ANGTS: specifically the proposed diameter and pressure of the Alaska segment of the ANGTS.

  The petitioners had asserted that: "The language [of § 10 (c)(3)] can perhaps be interpreted as approving the EISs only as regards those pipeline issues specifically evaluated in the EIS, not as regards all issues relative to the pipeline system." The court rejected this interpretation in light of ANGTA's statement of a purpose to limit judicial review. It held that it lacked "jurisdiction to review NEPA compliance for any issues 'relative to' the pipeline issue."

- **Conclusion**

The restrictions on NEPA's application to the ANGTS effectuated by ANGTA and Congress's approval of the President's Decision directed that further environmental review would be conducted through the implementation of the requirements of Section 5, Paragraph III of the President's Decision. Requirements for supplemental EISs that might have been applicable to the ANGTS in the absence of those determinations became irrelevant. Environmental safeguards for a reactivated ANGTS are to be effectuated through the mechanisms in Section 5, Subsection III of the President's Decision.

# ALASKA NATURAL GAS TRANSPORTATION SYSTEM

# ISSUE PAPER NO. 4

## *Completing the Environmental Analysis and Documentation for the Alaska Natural Gas Transportation System*

***April 2001***


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## FOREWORD

The Alaskan Northwest Natural Gas Transportation Company ("ANNGTC") is the partnership which holds the Federal Energy Regulatory Commission certificate of public convenience and necessity to construct, own and operate the Alaska component of the Alaska Natural Gas Transportation System (the "Alaska Highway Project"). Foothills Pipe Lines Ltd. ("Foothills") and TransCanada PipeLines Limited ("TransCanada") are the two current partners in the ANNGTC. In addition, Foothills is the sponsor of the Canadian segment of the Alaska Highway Project, and the majority owner and operator of the Canadian portions of the Eastern and Western Legs of the Project. Foothills is jointly owned by TransCanada and Westcoast Energy Ltd.

The corporate mission of Foothills is very specific: to build and operate the Alaska Highway Project. We were leaders in the Project that was conceived twenty-five years ago, and we are just as committed to it today.

Given concerns about high energy prices and the adequacy of natural gas supplies, interest in connecting Alaskan natural gas to markets in North America is being renewed. Of course, this is not a new issue. It is an issue that has dominated energy policy debates in the United States and Canada on and off for the last quarter century. There is much history in this story. Recognition of the importance of an Alaska gas project to both countries prompted action at the highest levels of government, including (1) Congressional action, embodied in the Alaska Natural Gas Transportation Act of 1976; (2) cooperation between the United States and Canada, as embodied in the 1977 Agreement Applicable to a Northern Natural Gas Pipeline; (3) Canada's enactment of the Northern Pipeline Act; and (4) the selection of the Alaska Highway Project in 1977 as the approved Alaska natural gas transportation system under these government acts.

During the current debate, questions understandably will arise regarding the history and context of the Alaska Highway Project. To facilitate the resolution of these issues, the ANNGTC and its partners will prepare from time to time Issue Papers that address emerging questions and provide a useful context within which to conduct the public policy and commercial debates.

Attached is one such Issue Paper. Please feel free to contact us for further information and/or to discuss the contents of this or other Issue Papers.

# COMPLETING THE ENVIRONMENTAL ANALYSIS AND DOCUMENTATION FOR THE ALASKA NATURAL GAS TRANSPORTATION SYSTEM

## I. Introduction

The National Environmental Policy Act of 1969 ("NEPA")[1] requires that federal agencies proposing "major federal actions significantly affecting the quality of the human environment" prepare an environmental impact statement ("EIS") addressing the environmental impact of the proposed action.[2] Regulations of the Council on Environmental Quality ("CEQ") established under NEPA[3] require a supplement to an EIS if: (1) an agency "makes substantial changes in the proposed action that are relevant to environmental concerns"; or (2) "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."[4]

In the Alaska Natural Gas Transportation Act of 1976 ("ANGTA"),[5] Congress established a unique process for choosing among various proposals then pending before the Federal Power Commission ("FPC") for the transportation of natural gas from Alaska's North Slope to the lower 48 States. It authorized the President to decide whether such a system should be approved under ANGTA, to describe the nature and route of the system and to designate a person to construct and operate it.[6] ANGTA further provided for Congressional review and approval of the President's determination before it could become effective.

This memorandum considers whether NEPA procedures continue to apply to the construction and initial operation of the system chosen by the President and approved by Congress. Extensive background material supporting the analysis presented here is contained in the following appendices to this memorandum:

Appendix A: Chronology of Events Relating to the Approval of the Alaska Natural Gas Transportation System;

Appendix B: Summary of Relevant Statutes and Regulations;

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[1] 42 U.S.C. §§ 4321-4370e (1994).
[2] 42 U.S.C. § 4332(2)(C) (1994).
[3] The CEQ was created by Section 202 of NEPA. 42 U.S.C. § 4342 (1994). The CEQ's NEPA regulations, 40 C.F.R. §§ 1500.1 et seq., are now applicable to all federal agencies. The regulations, issued on November 29, 1978, replaced CEQ's 1973 revised Guidelines concerning EISs, whose legal effect was uncertain. 43 Fed. Reg. 55978 (1978).
[4] 40 C.F.R. § 1502.9(c) (2000).
[5] Pub. L. No. 94-586, 90 Stat. 2903 (1976), as amended, 15 U.S.C. §§ 719-719o (1994).
[6] 15 U.S.C. § 719e(a) (1994). See Presidential Decision and Report to Congress on the Alaska Natural Gas Transportation System, September 22, 1977 (hereinafter "President's Decision"), as approved by Pub. L. No. 95-158, 91 Stat. 1268 (1977).

Appendix C: Legislative History of the Alaska Natural Gas Transportation Act and Public Law 95-158;

Appendix D: Environmental Analysis and Documentation Required During the Permitting and Construction Phase of the Project; and

Appendix E: Environmental Studies, Recommendations, Reports and Decisions Related to the Alaska Natural Gas Transportation System.

Two Final EISs and a Supplemental Final EIS were prepared for an Alaska natural gas transportation system. The President, after extensive comment by the FPC, the Council on Environmental Quality and an Interagency Task Force on Environment Issues, found the EISs to be legally and factually sufficient. The President also established a comprehensive mechanism directing how federal agencies would conduct further environmental review, mitigation and compliance. Based on these determinations, the President recommended that the Alaska Natural Gas Transportation System ("ANGTS") be selected and authorized for construction. Congress, in the Joint Resolution approving the President's Decision[7] hereunder, adopted the President's findings and recommendations and thereby completed the NEPA process as applied to the ANGTS. It is well established that Congress may modify the NEPA process for particular actions by directing that satisfaction of substitute standards and procedures constitute satisfaction of NEPA's requirements.[8]

## II. ANGTA's Environmental Provisions.

ANGTA provided in § 7(b) for the transmission to the Congress of the President's Decision and a report explaining in detail factors relating to the project, including environmental impacts. Specifically, § 7(b) required that the President's Decision be accompanied by a report "explaining in detail the basis for his decision with specific reference to the factors set forth in sections 5(c) and 6(a)."[9] ANGTA § 5(c) required that the FPC's recommendation concerning the selection of the transportation system be accompanied by a report that included a discussion of the environmental impacts of each alternative considered.[10] ANGTA § 6(a) authorized any federal officer or agency to submit comments to the President on the FPC's recommendation and

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[7] Pub. L. No. 95-158, 91 Stat. 1268 (1977) (hereinafter "Joint Resolution" or "Pub. L. 95-158").
[8] See, e.g., Robertson v. Seattle Audubon Society, 503 U.S. 429 (1992) (Northwest Timber Compromise included in Appropriation Act amended NEPA and other statutes relating to protection of spotted owls); Mount Graham Coalition v. Thomas, 53 F.3d 970 (9th Cir. 1995) (provisions in Arizona-Idaho Conservation Act relating to the construction of astronomical telescopes in red squirrel habitat effectively exempted described facilities from further compliance with NEPA and the Endangered Species Act).
[9] 15 U.S.C. § 719e(b) (1994).
[10] 15 U.S.C.§ 719c(c) (1994).

report. Such comments were to include information with respect to "environmental considerations, including air and water quality and noise impacts."[11]

ANGTA § 8(e) directed the President to "find that any required environmental impact statement relative to the Alaska natural gas transportation system designated for approval by the President has been prepared and that such statement is in compliance with [NEPA]." Section 8(e) further provided that the President's finding "shall be set forth in the report [not the Decision] of the President submitted under Section 7." Finally, the President could supplement or modify the EISs prepared by the FPC or other officers or agencies. Any such EISs were to be submitted to Congress with the President's Decision. [12]

ANGTA also made specific provision for the approval by Congress of the EISs submitted with the President's Decision. Section 10(c)(3) provides that: "The enactment of a joint resolution under section 8 approving the decision of the President shall be conclusive as to the legal and factual sufficiency of the [EISs] submitted by the President relative to the approved transportation system and no court shall have jurisdiction to consider questions respecting the sufficiency of such statements under [NEPA]."[13]

## III. The Final EISs Approved by Congress.

Pursuant to § 8(e) of ANGTA, the report accompanying the President's Decision contained a "*Presidential Finding – Environmental Impact Statements.*" In this *Finding*, the President noted that both the FPC's recommendation to the President and the July 1, 1977 report of the Interagency Task Force on Environmental Issues found the Alcan route to have the least environmental impacts. The *Finding* also referred to the report of the CEQ, dated July 1, 1977, which determined that the EISs submitted by the FPC were legally and factually sufficient. The *Presidential Finding* then concluded:

> The President hereby determines pursuant to the direction of Section 8(e) of ANGTA, that the required environmental statements relative to an Alaska natural gas transportation system have been prepared, that they have been certified by the CEQ and that they are in compliance with [NEPA].
>
> Consequently the enactment of a joint resolution approving the Decision shall be conclusive as to the legal and factual sufficiency of the final environmental impact statements as provided by Section 10(c)(3) of ANGTA.[14]

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[11] 15 U.S.C. § 719d(a) (1994).
[12] 15 U.S.C. § 719f(e) (1994).
[13] 15 U.S.C. § 719h(c)(3) (1994).
[14] Report Accompanying a Decision on an Alaska Natural Gas Transportation System, September 22, 1977 at 133.

When Congress approved the President's Decision, it also gave effect to the provision in § 10(c)(3) of ANGTA that its approval would "be conclusive as to the legal and factual sufficiency of the [EISs] submitted by the President." The Joint Resolution, Pub. L. No. 95-158, approved November 8, 1977, provides: "That the House of Representatives and Senate approve the Presidential decision on an Alaska natural gas transportation system submitted to the Congress on September 22, 1977, and find that any environmental impact statements prepared relative to such system and submitted with the President's decision are in compliance with [NEPA]."[15]

## IV. Section 5, Paragraph III of the President's Decision.

The President determined that the EISs were legally and factually sufficient under NEPA to select the Alcan alternative and to authorize its construction. However, the President also recognized that significant, additional site-specific environmental analysis and documentation would need to be performed. Therefore, *Section 5 — Terms and Conditions and Enforcement* of the President's Decision established the specific methodology that directed how federal officers and agencies would proceed to consider and issue the certificates, permits, rights-of-way and other authorizations necessary to construct and initially operate the project.[16] The requirements of Section 5 also were relied upon by the President and Congress to determine that the EISs for the ANGTS were sufficient. So long as the details of the ANGTS remain within the general scope of the EISs and the President's Decision and the federal officers and agencies comply with the Terms and Conditions of Section 5, the requirements of NEPA have been satisfied with respect to the ANGTS.

The environmental requirements of this specific methodology were set forth in *Section 5, Paragraph III, Environment.* Paragraph III-1 directed concerned government agencies to develop a set of stipulations containing "the general standards of environmental and construction performance, and the procedures for the submission and approval of construction plans and environmental safeguards." It also directed that "additional 'site-specific' terms and conditions will be incorporated in authorizations to proceed with construction issued by the appropriate federal agency, into particular certificates, rights-of-way, permits and other authorizations to protect and enhance environmental values during the design, construction and operation of the pipeline."[17]

Paragraph III- 2 further provided: "The successful applicant shall prepare a plan of operations which integrates environmental protection with the proposed schedule of construction and operations, the proposed supervisory and technical staffing, the proposed quality control programs, and the proposed quality assurance programs. In preparation and implementation of this plan, the successful applicant shall provide for timely integration of environmental

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[15] Pub. L. 95-158.
[16] President's Decision at 26 – 43.
[17] President's Decision, § 5, Par. III-1 at 33.

mitigation and restoration practices with the activity which creates the need for the restoration or mitigation."[18]

These provisions were intended to embrace such undecided matters as the precise final route, the final design specifications, details relating to compressor stations, stream crossings, fish and wildlife, vegetation, and variations from previous proposals.

## V. The Effect of Congress's Approval of the President's Decision.

The requirements in Section 5, Paragraph III of the President's Decision were adopted by Congress to implement its NEPA sufficiency finding as the project is developed. By imposing these requirements for the development of, review of, and compliance with detailed plans to protect the environment during planning, design, construction and operation, Congress modified the application of NEPA by providing a specific, detailed set of standards and procedures directing how federal officers and agencies would conduct further environmental review, mitigation, and compliance. Since the concerned federal agencies were to be at the center of the development of these "additional 'site-specific' terms and conditions" as they proceeded to consider and issue the authorizations necessary to construct and operate the pipeline, there was no need for duplicative analysis and documentation under NEPA.

The central role of this compliance program is demonstrated by several considerations. First, the requirements in Section 5, Paragraph III of the President's Decision implemented ANGTA § 8(e), which as noted above, directed the President to make a finding that required EISs relative to the ANGTS had been prepared and were sufficient to fulfill NEPA requirements. The requirements in Section 5, Paragraph III provided one ground for the finding that NEPA requirements were met, and also provided the standards and procedures for general and site-specific environmental terms and conditions to be developed and implemented as the necessary certificates, permits, rights-of-way and other authorizations were issued in the course of construction and initial operation.

By approving the President's Decision, including the mechanisms in Section 5, Paragraph III, in the Joint Resolution, Congress modified NEPA's application for purposes of the ANGTS, just as it has occasionally done for other purposes.[19] This purpose is confirmed by the text of Joint Resolution, when read in the light of ANGTA § 10(c)(3). The Joint Resolution was an express Congressional finding "that any environmental impact statements prepared relative to [the ANGTS] and submitted with the President's decision are in compliance with [NEPA]." Moreover, ANGTA § 10(c)(3) provided that the President's decision was conclusive as to the legal and factual sufficiency of the EISs submitted with it and further, that "no court shall have jurisdiction to consider questions respecting the sufficiency of such statements under [NEPA]."

The environmental aspects of the legislative history of Pub. L. 95-158 are based on the EISs prepared by the FPC, the Department of the Interior, and the Interagency Task Force led by

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[18] Id. at § 5, Par. III-2 at 35.
[19] See n. 8, supra.

the Department of the Interior, as well as the comments of the CEQ and other agencies. That legislative history confirms Congress's intent to find that NEPA's requirements had been fulfilled. The finding rested on the mechanisms in Section 5, Paragraph III, and adopted those mechanisms to govern future federal actions Congress directed be undertaken pursuant to Section 9 of ANGTA. Because §§ 9(c) and (d) of ANGTA bar agency actions that would change the basic nature and general route of the approved project, or otherwise prevent or impair its expeditious construction and initial operation[20], the modification of NEPA applies to future actions within the general scope of the project as designated by the President and approved by Congress.

The Congress adopted the House version of the Joint Resolution required by ANGTA § 8(g)(3)[21] after debates in the House and the Senate on November 2, 1977.[22] The report of the House Interior and Insular Affairs Committee[23] carefully described the substance of the President's Decision set forth in Section 5. It recognized that the decision remitted environmental and other terms and conditions to the process of authorization by the appropriate federal officers. The House Report explained:

> The decision prohibits the applicant from initiating any activity or any aspect of pipeline construction until authorized to proceed and until procedures for enforcement of terms and conditions have been established by the appropriate Federal officers. Further, the decision established preliminary terms and conditions governing safety and design, environmental, financial, and antitrust matters. **As with all other terms and conditions established by the decision, these are to be used as the basis for the development of more detailed specifications during the authorization and approval process.** As discussed later in this report, the committee will closely monitor this process to insure that preconstruction activities and construction procedures are developed and implemented through what the committee hopes will be unprecedented coordination and dialogue between Alcan, the Governments of the United States and Canada, the States and provinces, and environmental and native groups.[24]

The Congress was fully aware that the exact final pipeline route and exact terms and conditions for minimizing environmental impacts were yet to be determined. The House Report noted:

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[20] 15 U.S.C. § 719 (c) and (d) (1994).
[21] 15 U.S.C. § 719f(3) (1994).
[22] U.S. Code Cong. and Admin. News, 95th Cong. 1st Sess. 1977, Vol. III, at 3313.
[23] H.R. Rep. No. 95-739 (1977).
[24] Id. at 7 (emphasis added).

> Although construction monitoring and enforcement procedures will help insure sound pipeline construction practices, they cannot replace adequate data gathering and route planning. The committee is therefore relying on the administration's assertions that construction of the Alcan line will involve massive cooperation planning and coordination between the Governments of the United States and Canada, the States and Canadian Provinces, and Alcan before construction actually begins. This will enable early field surveys, studies and mapping to develop and select an exact final pipeline route and develop a quality control program which will minimize adverse environmental and social impacts.[25]

The Congress had before it all of the materials described by the President in Section 5, Paragraph III relating to his finding as to the sufficiency of the EISs, as well as the FPC hearings, the EISs prepared by the FPC and the Department of the Interior, the report of the Interagency Task Force on Environmental Issues, and the report of the CEQ. The House Report expressly noted the position of the CEQ "that environmental assessments, EIS supplements, or new impact statements may be required and that major design, engineering or other site-specific decisions that follow the selection of the corridor and technology must be considered in one of these types of NEPA analyses."[26] The Committee, however, did not endorse this position, any more than had the President.[27] Instead it relied on the mechanisms to be established under the President's Decision for addressing environmental issues through the certification and permitting process, without further NEPA proceedings.[28]

## VI. The Limitation of Judicial Review of NEPA Issues.

The court with exclusive jurisdiction under ANGTA § 10(c)(1)[29] to review agency actions relating to the pipeline has recognized ANGTA's limitation of NEPA. In Earth Resources Company et al. v. FERC,[30] the D.C. Circuit considered a challenge under NEPA to a FERC order setting design specifications and initial capacity for the Alaska segment of the ANGTS: specifically the proposed diameter and pressure of the Alaska segment of the ANGTS. The Court considered the petitioners' argument that the language of Section 10(c)(3) concerning the conclusiveness of the EISs submitted by the President, and the accompanying preclusion of

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[25] Id., Part I at 10-11.

[26] Id., Part II at 4; see also Decision and Report to Congress on the Alaska Natural Gas Transportation System, Selected Materials, printed for the use of the Senate Committee on Energy and Natural Resources, Publication No. 95-56, 95th Cong., 1st. Sess., Committee Print, October 1977.

[27] The CEQ's position was based on its then extent 1973 revised Guidelines, whose legal effect was uncertain. See n. 3, supra.

[28] See Cong. Rec., November 1, 1977 at H 11974 (remarks of Rep. Roncalio).

[29] 15 U.S.C. § 719h(c)(1) (1994).

[30] 617 F.2d 775 (D.C. Cir. 1980).

judicial review, was possibly ambiguous. The petitioners had asserted that: "The language [of § 10(c)(3)] can perhaps be interpreted as approving the EISs only as regards those pipeline issues specifically evaluated in the EIS, not as regards all issues relative to the pipeline system."[31] The court rejected this interpretation in light of ANGTA's statement of a purpose to limit judicial review. It held that it lacked "jurisdiction to review NEPA compliance for any issues 'relative to' the pipeline issue. Pipeline pressure and capacity are of course integrally related to the system."[32]

Although the Earth Resources court expressly stated that it was not deciding whether FERC's actions satisfied NEPA's requirements, its decision illuminates how § 10(c)(3) impacts NEPA's application to the subsequent permitting of the construction of the ANGTS. The petitioners had argued that only issues specifically evaluated in the submitted EISs were precluded because the CEQ had asserted that additional NEPA studies would be required on particular issues concerning the pipeline. The Court found this unpersuasive in light of the actual language of the statute. Thus, under Earth Resources, the issues precluded from judicial review under NEPA by § 10(c)(3) include all "issues relative to the pipeline" within the general scope of the EISs conclusively deemed to be sufficient for purposes of NEPA. Those issues include the numerous details of the permits, rights-of-way and certificates to be issued pursuant to ANGTA § 9(a), and that could be conditioned or amended under § 9(c), and amended under § 9(d), so long as such conditions or amendments do not change the basic nature and general route of the ANGTS or prevent or hinder its expeditious construction and operation.[33]

To the extent that "issues related to the pipeline," such as agency orders concerning diameter and pressure, are exempted from judicial review for compliance with NEPA, they also are exempted from further NEPA procedures. Instead, such environmental "issues related to the pipeline" system are to be addressed by the appropriate authorizing agencies under the requirements for general procedures and standards, and site-specific terms and conditions to be developed as directed in Section 5, Paragraph III of the President's Decision. Sections 9(a), (c) and (d) of ANGTA provide for such authorizations under existing statutes administered by such agencies, subject to the limitation that they may not change the Project's approved basic route and general nature, or prevent or delay its expeditious construction and initial operation.

## VII. Conclusion

In sum, the restrictions on NEPA's application to the ANGTS effectuated by ANGTA and Congress's approval of the President's Decision directed that further environmental review would be conducted through the implementation of the requirements of Section 5, Paragraph III of the President's Decision. Requirements for supplemental EISs that might have been applicable to the ANGTS in the absence of those determinations became irrelevant. The CEQ's views were overtaken by the President's Decision as approved by Congress. Congress

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[31] Id. at 780.
[32] Id.
[33] 15 U.S.C. §§ 719g(a), (c) and (d) (1994).

determined and directed that the requirements of NEPA would be satisfied by the new requirements of Section 5, Paragraph III of the President's Decision.

Undoubtedly, when ANGTS is reactivated and applications for necessary authorizations are filed with the appropriate federal agencies, environmental information and data will have to be updated or developed. But that process will take place within the framework outlined above, not NEPA. Congress's modification of the applicability of NEPA procedures to the ANGTS, coupled with the Earth Resources court's holding that ANGTA § 10(c)(3) forecloses judicial review of NEPA claims, establishes an environmental compliance process that will expedite the final, detailed, certification, permitting and construction of the ANGTS, while maintaining strict standards to address environmental impacts. The ANGTS has, as described above, progressed from the NEPA "assessment phase" to a compliance, planning phase focusing upon construction, operation and mitigation planning.

# COMPLETING THE ENVIRONMENTAL ANALYSIS AND DOCUMENTATION FOR THE ALASKA NATURAL GAS TRANSPORTATION SYSTEM

## APPENDIX A

## CHRONOLOGY OF EVENTS RELATING TO THE APPROVAL OF THE ALASKA NATURAL GAS TRANSPORTATION SYSTEM

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| **March 1974:** | Alaskan Arctic Gas Pipeline Company submitted an application to build an Alaskan gas transportation system. |
| **September 1974:** | El Paso Alaska Company submitted an application to build a different transportation system. |
| **January 1975:** | The Federal Power Commission (FPC) ordered a comparative hearing to determine which of the competing applications best satisfied the requirements of the Natural Gas Act (NGA). |
| **September 1975:** | Bills were introduced in the U.S. Congress to create an alternative process for the selection and approval of an Alaskan gas transportation system. |
| **March 1976:** | The Department of Interior issued a Final Environmental Impact Statement (FEIS) relating to applications for right-of-way permits for an Alaskan gas transportation system. |
| **April 1976:** | The FPC submitted a FEIS on an Alaskan gas transportation system. |
| **July 1976:** | Alcan Pipeline Company and Northwest Pipeline Company filed a third application proposing a route across Alaska to Fairbanks. |
| **September 1976:** | The FPC completed a Supplement to its FEIS in order to consider Alcan's application. |
| **October 1976:** | Congress enacted Alaska Natural Gas Transportation Act (ANGTA), entrusting in Congress and the President the authority to make determinations on authorization and selection of a transportation system for delivery of Alaskan natural gas. |
| **February 1977:** | The FPC suspended all proceedings relating to a system for the transportation of Alaska natural gas. |
| **February 1977:** | The Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs held hearings to monitor the special procedures set up under ANGTA. |
| **March 1977:** | The Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs held hearings to monitor the special procedures set up under ANGTA. |
| **April 1977:** | The Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs held hearings to monitor the special procedures set up under ANGTA. |

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| **May 1977:** | The FPC issued its Recommendation to the President, suggesting the selection of an overland transportation system through Canada. |
| **July 1977:** | The Interagency Task Force on Environmental Issues issued its Report. |
| **July 1977:** | Report on Socioeconomic Impacts, containing comments on the socioeconomic impact analyses submitted to the FPC during its proceedings and on FPC's Recommendation. |
| **July 1977:** | The Council on Environmental Quality submitted a Report to the President entitled "Environmental Impacts of the Proposed Alaska Gas Transportation Corridors." |
| **September 1977:** | The President submitted to Congress his Decision adopting the Alcan proposal. |
| **September 1977:** | The Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs jointly with the Interstate and Foreign Commerce Subcommittee on Energy and Power of the House Committee on Interior and Insular Affairs held hearings on the President's recommendation. |
| **October 1977:** | The Federal Energy Regulatory Commission (FERC) submitted comments on the President's decision, defining the Alcan proposal as the superior Alaskan natural gas transportation system from an environmental standpoint. |
| **October 1977:** | The Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs jointly with the House Interstate and Foreign Commerce Subcommittee on Energy and Power of the House Committee on Interior and Insular Affairs held hearings on the President's recommendation. |
| **October 1977:** | The House Committee on Interior and Insular Affairs approved a Report entitled "Approving the Presidential Decision on an Alaska Natural Gas transportation System, and for Other Purposes." |
| **November 1977:** | The Senate Committee on Energy and Natural Resources approved a Report entitled "To Approve the Presidential Decision on an Alaska Natural Gas Transportation System." |
| **November 1977:** | Congress enacted a Joint Resolution approving the President's decision on an Alaskan Natural Gas Transportation System. |

**December 1980:** The United States Court of Appeals for the D.C. Circuit held that it lacked jurisdiction to review National Environmental Policy Act (NEPA) compliance for any issues relative to the proposed system.

# COMPLETING THE ENVIRONMENTAL ANALYSIS AND DOCUMENTATION FOR THE ALASKA NATURAL GAS TRANSPORTATION SYSTEM

## APPENDIX B

## SUMMARY OF RELEVANT STATUTES AND REGULATIONS

## 1. Alaskan Natural Gas Transportation Act ("ANGTA")

Section 3 of ANGTA sets out the purposes of the Act and states that "to accomplish this purpose it is the intent of Congress to exercise its constitutional powers to the fullest extent in the authorizations and directions herein made, and particularly with respect to the limitation of judicial review of actions of Federal officers or agencies taken pursuant thereto."[1]

Section 5(c) of ANGTA required the Federal Power Commission ("FPC") (predecessor to the Federal Energy Regulatory Commission ("FERC")) to submit a report containing the Commission's recommendation concerning the selection of the transportation system. The provision required that the report explain the basis for the FPC's recommendation and discuss, for each transportation system reviewed or considered, certain factors, including environmental impacts.[2]

Section 5(e) of ANGTA required the FPC to submit to the President, along with its recommendation for approval of a particular transportation system, an EIS with respect to the recommended system, if any, and each EIS which may have been prepared respecting any other system reported on in its Recommendation.[3]

Section 6(a) of ANGTA provided that any Federal officer or agency could, but was not required to, submit written comments to the President on the FPC's Recommendation and that such written comments should include information within the competence of such officer or agency with respect to several issues, including "environmental considerations, including air and water quality and noise impacts." Furthermore, Section 6(d) of ANGTA required the Council on Environmental Quality ("CEQ") to "afford interested persons an opportunity to present oral and written data, views, and arguments respecting the environmental impact statements submitted by the Commission under section 5(e)." The CEQ was further tasked with the requirement of submitting a report to the President summarizing any data, views, and arguments received and setting forth the CEQ's views concerning the legal and factual sufficiency of each such EIS and "other matters related to environmental impact as the Council considers to be relevant."[4]

Section 7(a) of ANGTA directed the President to issue a decision as to whether or not a transportation system for Alaskan natural gas should be approved. The President was also to decide the nature and route of the system, designate a person to construct and operate the system, identify which facilities shall be encompassed in the scope of the project, and identify provisions of law which would require a waiver in order to permit the expeditious construction of the system.[5]

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[1] 15 U.S.C. § 719a (1994).
[2] 15 U.S.C. § 719c(c) (1994).
[3] 15 U.S.C. § 719c(e) (1994).
[4] 15 U.S.C. § 719d (1994).
[5] 15 U.S.C. § 719e(a) (1994).

Section 7(b) of ANGTA required the President to transmit this decision to both Houses of Congress. It further required that the President's decision be accompanied by a report explaining in detail the basis for his decision, with specific reference to the factors set forth in sections 5(c) and 6(a) of ANGTA.[6]

Section 8(d) of ANGTA provided that the President's Decision designating a transportation system would become effective upon enactment of a joint resolution. The statute set forth the specific language to be included as the resolving clause of such a resolution, including language concerning the sufficiency of the EISs on the ANGTS:

> That the House of Representatives and Senate approve the Presidential decision on an Alaska natural gas transportation system submitted to the Congress on _____, 19 , and find that any environmental impact statements prepared relative to such system and submitted with the President's decision are in compliance with the Natural [sic] Environmental Policy Act of 1969.[7]

Section 8(e) of ANGTA directed the President to set forth in the report accompanying his Decision a finding that "any required environmental impact statement relative to the Alaska natural gas transportation system designated for approval by the President has been prepared and that such statement is in compliance with the National Environmental Policy Act of 1969."[8] It further authorized the President to " supplement or modify the environmental impact statements prepared by the Commission or other Federal officers or agencies."[9] Moreover, it directed that: "Any such environmental impact statement shall be submitted contemporaneously with the transmittal to the Senate and House of Representatives of the President's decision pursuant to section 719e(b) of this title or subsection (b) of this section."[10]

Section 9 of ANGTA limits the agencies' discretion in taking certain actions with respect to the ANGTS. Section 9(a) of ANGTA directs Federal agencies to issue or grant, "to the fullest extent permitted by the provisions of law administered by such . . . agency," authorizations "necessary or related to the construction or initial operation of the approved transportation system."[11] Sections 9(c) and 9(d) of ANGTA prohibit agencies from including in authorizations for the chosen system any terms and conditions that would "compel a change in the basic nature

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[6] 15 U.S.C. § 719e(b) (1994).

[7] 15 U.S.C. § 719f(d)(2) (1994). The blank space was to be filled in with the date on which the President's Decision was submitted to the House of Representatives and the Senate. Id.

[8] 15 U.S.C. § 719f(e) (1994); Joint Report of the Senate Committees on Commerce and Interior and Insular Affairs, S. Rep. No. 94-1020, at 20 (June 30, 1976) ("Section 8(e) specifies that, as part of the President's decision, he must find that any final environmental statement required pursuant to section 102(c)(2) of the National Environmental Policy Act of 1969 . . . has been prepared. He may supplement existing environmental impact statements and if he selects a system for which no required statement has been prepared he may delay his decision for up to 90 days to supplement or prepare a final environmental impact statement.").

[9] 15 U.S.C. § 719f(e) (1994).

[10] Id.

[11] 15 U.S.C. § 719g(a) (1994).

and general route of the approved transportation system or would otherwise prevent or impair in any significant respect the expeditious construction and initial operation" of that system.[12] Because any effort by the agencies to reconsider the original authorization for the ANGTS would delay or prevent completion and initial operation of the Presidentially designated ANGTS, such an effort would exceed the authority allowed to agencies under Section 9 of ANGTA.

Section 10(c)(3) of ANGTA provides that the joint resolution of Congress approving the President's Decision "shall be conclusive as to the legal and factual sufficiency of the environmental impact statements submitted by the President relative to the approved transportation system" and explicitly removed jurisdiction to consider challenges with respect to the sufficiency of those EISs from the judiciary. Section 10(c)(3) states:

> The enactment of a joint resolution under section 719f of this title approving the decision of the President shall be conclusive as to the legal and factual sufficiency of the environmental impact statements submitted by the President relative to the approved transportation system and no court shall have jurisdiction to consider questions respecting the sufficiency of such statements under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).[13]

### 2. Congressional Joint Resolution

Pub. L. 95-158, approved November 8, 1977,[14] provides "That the House of Representatives and Senate approve the Presidential decision on an Alaska natural gas transportation system submitted to the Congress on September 22, 1977, and find that any environmental impact statements prepared relative to such system and submitted with the President's decision are in compliance with [NEPA]."

### 3. National Environmental Policy Act (NEPA)

Section 102(2)(C) of NEPA states that "all agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement prepared by the responsible official . . . ."[15] The statement shall address: (1) the environmental impact of the proposed action, (2) any adverse environmental effects which cannot be avoided should the proposal be implemented, (3) alternatives to the proposed action, (4) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (5) any irreversible and irretrievable commitments of resources

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[12] 15 U.S.C. §§ 719g(c) and (d) (1994).
[13] 15 U.S.C. § 719h(c)(3) (1994).
[14] 91 Stat. 1268 (1977).
[15] 42 U.S.C. § 4332 (C) (1994).

which would be involved in the proposed action should it be implemented.[16] Such a statement is commonly referred to as an Environmental Impact Statement ("EIS").

The Council on Environmental Quality ("CEQ"), created by Section 202 of NEPA[17], has promulgated regulations applicable to all federal agencies to assist those agencies in complying with NEPA.[18] In regards to supplementation of an EIS, the CEQ regulations state that an EIS must be supplemented if an agency "(1) makes substantial changes in the proposed action that are relevant to environmental concerns;" or "(2) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."[19]

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[16] Id.
[17] 42 U.S.C. §4342 (1994).
[18] 40 C.F.R. §§1500.1 et seq.; Andrus v. Sierra Club, 442 U.S. 347, 358 (1979) (stating that "CEQ's interpretation of NEPA is entitled to substantial deference.").
[19] 40 C.F.R. § 1502.9(c) (2000).

# COMPLETING THE ENVIRONMENTAL ANALYSIS AND DOCUMENTATION FOR THE ALASKA NATURAL GAS TRANSPORTATION SYSTEM

## APPENDIX C

## LEGISLATIVE HISTORY OF THE ALASKA NATURAL GAS TRANSPROTATION ACT AND PUBLIC LAW 95-158

The following Appendix sets forth select pieces of the Legislative Histories of ANGTA and the Joint Resolution which are referenced in the main text.

## 1. ANGTA Legislative History

The issue of the Act's curtailment of normal NEPA procedures and the cut off of court review of the sufficiency determination was specifically debated as evidenced in the legislative history of ANGTA. For example, in a letter submitted by the administrator of the Federal Energy Administration to the Chairman of the House of Representative's Committee on Interstate and Foreign Commerce, the administrator suggests that proposed Section 8(e) of ANGTA (the proposed language he was commenting on is the same language finally adopted) be changed since its requirements "would differ significantly from the procedures established by the Council on Environmental Quality" under NEPA.[1]

In addition, after having been reported out of the Senate Committees on Commerce and Interior and Insular Affairs, the Senate took up a debate of the proposed Act. In that debate, a dialogue occurred between Senator Durkin and Senator Stevenson regarding assurances that the FPC recommendation is based on adequate environmental consideration. To that end, Senator Durkin queried whether it was true that the FPC must continue to research and investigate the potential environmental effects of different proposals even after the date of enactment. Senator Stevenson replied that

> Under the bill, the FPC and any other agency which issues permits or authorizations under the act has the responsibility of insuring *compliance with the terms and conditions of such permits and authorizations.* They are thus responsible for continuing vigilance to see that provisions designed to maintain the environment and minimize environmental damage are followed.[2]

Later on in the same debate, Senator Stevenson stated that a full review, consistent with NEPA, of the environmental impacts of any project chosen will occur under the Act, but that "Congress would itself make, rather than delegate to the courts, the decision concerning the sufficiency of the impact statement prepared for the system." He went on to state that "the bill does not alter the substantive requirements of existing law *with respect to the terms and conditions included in necessary permits and authorizations*, except in the event that any term or condition would overturn the judgment of the President and Congress regarding the basic nature and route of the system or otherwise contradict the intent of the provisions" of the Act.[3]

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[1] H.R. Rep. No. 94-1658, pt.1 at 36 (1976).
[2] 122 Cong. Rec. 22025 (1976) (emphasis added).
[3] Id. (emphasis added).

95TH Congress } HOUSE OF REPRESENTATIVES { REPT. 95-739
*1st Session* } { **Part I**

# APPROVING THE PRESIDENTIAL DECISION ON AN ALASKA NATURAL GAS TRANSPORTATION SYSTEM, AND FOR OTHER PURPOSES

## PURPOSE

The purpose of House Joint Resolution 621[1] is to approve the Presidential decision on an Alaska natural gas transportation system.

[1] Introduced by Representatives Staggers, Udall, and Roncalio.

In order to insure proper management and timely completion of the system, the decision proposes general terms and conditions for inclusion in any certificate, right-of-way, lease, permit or other authorization issued by any Federal office or agency. As a starting point for development of a comprehensive plan for system construction and operation, the decision sets forth these proposed terms and conditions as guidelines, which will be further refined and particularized during the authorization and approval process.

These terms and conditions include a requirements for a detailed management plan for the important preconstruction and construction phases, the prohibition of cost-plus type contracts (unless specifically authorized by the Federal inspector); and the preliminary specification for the insurance, bonding and other prequalification requirements for consultants and execution contractors. Prior to initiation of construction, the successful applicant will be required to provide a detailed analysis and description of its proposed cost and schedule control techniques; to provide the Federal inspector with a final design, cost estimate, and construction schedule; and to supply detailed information on its labor relations procedures. The successful applicant will be required to submit cost effective and feasible methods for supplying general and specialized equipment; to detail the quality assurance and control procedures that will be implemented; and to develop and submit an affirmative action program.

The decision prohibits the applicant from initiating any activity or any aspect of pipeline construction until authorized to proceed and until procedures for enforcement of terms and conditions have been established by the appropriate Federal officers. Further, the decision established preliminary terms and conditions governing safety and design, environmental, financial, and antitrust matters. As with all other terms and conditions established by the decision, these are to be used as the basis for the development of more detailed specifications during the authorization and approval process. As discussed later in this report, the committee will closely monitor this process to insure that preconstruction activities and construction procedures are developed and implemented through what the committee hopes will be unprecedented coordination and dialogue between Alcan, the Governments of the United States and Canada, the States and provinces, and environmental and native groups.

*Planning and environmental protection*

Although construction monitoring and enforcement procedures will help insure sound pipeline construction practices, they cannot replace adequate data gathering and route planning. The committee is therefore relying on the administration's assertions that construction of the Alcan line will involve massive cooperation planning and coordination between the Governments of the United States and Canada, the States and Canadian provinces, and Alcan before construction actually begins. This will enable early field surveys, studies and mapping to develop and select an exact final pipeline route and develop a quality control program which will minimize adverse environmental and social impacts. The committee intends to conduct oversight hearings to insure test this occurs and looks forward to prompt receipt of the quarterly progress reports specified by section 7(a)(5)(E) of the ANGTA.

During construction of the Alyeska line, a Joint Fish and Wildlife Advisory Team was created to advise on wildlife and other environmental matters. The committee agrees with Assistant Secretary Martin's testimony that such a body serves a valuable function, and strongly urges the creation of a similar panel for the Alcan line. However, the committee feels that it is important for fish and wildlife officials to have enforcement, as distinguished from mere advisory powers. Interpreting the general tenor of Assistant Secretary Martin's remarks, it is the hope of the committee that fish and wildlife officials will be given enforcement powers so that environmental protection will not be sacrificed for the sake of construction efficiency. Along the same lines, the committee strongly urges that the Federal inspector have a background in environmental matters as well as management and engineering skills.

95TH Congress } HOUSE OF REPRESENTATIVES { REPT. 95-739
*1st Session* } **Part II**

# ALASKA NATURAL GAS TRANSPORTATION SYSTEM

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October 26, 1977.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. Staggers, from the Committee on Interstate and Foreign Commerce, submitted the following

REPORT

together with

MINORITY AND SUPPLEMENTAL VIEWS

[To accompany H.J. Res. 621 which on October 12, 1977 was referred jointly to the Committees on Interior and Insular Affairs and Interstate and Foreign Commerce]

The Committee on Interstate and Foreign Commerce, to whom was referred the joint resolution (H.J. Res. 621) approving the Presidential decision on an Alaska natural gas transportation system, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the joint resolution do pass.

*** Excerpted from Page 6 of H.R. Rep No. 95-739, pt. II ***

July 1, 1977 Summary of Agency Reports

1. FEA concluded in its report on supply, demand and energy policy that any of the proposed Alaskan natural gas transportation systems would help to insure that natural gas shortages are alleviated or eliminated. At the same time, the FEA found that the availability of Alaskan gas would reduce our dependence on foreign energy resources.

2. In its report regarding financing, the Department of the Treasury stated that the principal conclusion of the report was that there was good reason to anticipate that an economically viable system to transport natural gas from Alaska to the lower 48 States could be privately financed. The report noted, however, that a private financing would be difficult, if not impossible, to arrange without the prior resolution of a number of issues and that the actual likelihood that a private financing could be accomplished could be determined only after these issues had been resolved.

3. In its report on economic benefits, FEA concluded that net national economic benefits would be positive unless there was: (1) a construction delay longer than 4 years, (2) an increase of more than 100 percent in construction costs or (3) a reduction from 2.4 Bcf/d to less than 1.2 Bcf/d in gas transported through the system. Net national economic benefits according to the report are between $3.3 billion to $4.8 billion. The report said the Alcan route would provide the greatest net economic benefit.

4. In its report on socioeconomic impacts, the Office of Coastal Zone Management of the Department of Commerce found that: "The significance of socioeconomic impacts for the overall route decision depends on the weight given to impacts disruptive of social and cultural structure as opposed to economic development considerations. If factors such as adverse effects on native communities and local lifestyles are given primary importance, the Arctic and El Paso routes would tend to suffer in comparison with Alcan. If more importance is placed on a route which will stimulate the Alaskan economy, the El Paso route clearly has the advantage, followed by Alcan."

5. In its report to the President, the CEQ concluded that:

A. Although they have shortcomings, the environmental impact statements are legally and factually sufficient under the National Environmental Policy Act for purposes of selecting the corridor and basic technology for a gas transportation system.

B. Although the impact statements provide the information necessary to select a corridor and the basic technology for a gas transportation system, they lack the data required for specific decisions concerning route alignments, project designs, mitigation measures, and facility siting.

CEQ said that environmental assessments, EIS supplements, or new impact statements may be required and that major design, engineering or other site-specific decision that follow the selection of a corridor and technology must be considered in one of these types of NEPA analyses.

CEQ found the Alcan proposal to be "the most environmentally acceptable" of the three proposals. However, CEQ said that some of Alcan's environmental risks are still unknown and specifically mentioned frost heave and thaw settlement as problems whose solutions remain uncertain.

6. The report by the Department of the Interior on environmental issues found that Alcan appeared to promise the least environmental impact if proper mitigative actions were taken. However, the DOI noted that " the data base associated with Alcan's route is generally considered to be inadequate. Additional research and data collection are needed to define site-specific problems and appropriate mitigating measures."

7. The report by the Department of State discussed the United States-Canada international relations aspects of selection of a pipeline route through Canada to carry Alaskan natural gas to the lower 48 States. The State Department concluded that a viable option existed for the transportation of Alaskan natural gas across Canada.

8. The Justice Department report found that antitrust considerations did not militate against selection of any of the proposed transportation systems and that competitive considerations did not indicate the selection of one transportation system proposal in preference to the others. The Justice Department recommended, however, that "an ownership interest, or participation in any form in the transportation system, by one or more gas producers of significant amounts of gas be prohibited."

9. The report by the DOT concluded that "with regard to pipelines, their continuity of service is by far the best of any mode of transportation in the United States and we believe the Canadian experience is comparable".

The report by DOT also found that there was a significant difference in the efficiency of each transportation system on the basis of the quantity of gas needed to operate that system. DOT concluded that there was a "significant efficiency advantage to an all-pipeline system."

10. The report by the Department of the Interior and the Department of Transportation on cost overruns and schedule delays found that overruns on total costs including financing may range from 40 percent to 55 percent and that construction delays would range from 15 to 17 months. Taking expected cost overruns and construction delays into account, the report found that the Alcan proposal had the earliest expected delivery date and the least total cost.

11. The Department of Defense determined that none of the proposed natural gas transportation systems was preferable in terms of military considerations. They found, however, that a system to transport gas from Alaska to the continental United States was necessary to national security since it would enable the United States to reduce oil imports.

*** Excerpted from Page H 11974 of Cong. Rec., November 1, 1977 ***

CONGRESSIONAL RECORD – HOUSE *November 1, 1977*

Remarks by Rep. Roncalio

The Federal Energy Regulatory Commission and the Federal Inspector in particular, must strike a fair and acceptable balance between investor, consumer, and environmental interests. The President's decision lays down certain specific guidelines and principles in the form of conditions which can achieve that balance if they are properly implemented and administered. Both FERC and the Federal Inspector have been given great latitude and discretion in determining how they will implement and administer those principles to assure a successful project.

# COMPLETING THE ENVIRONMENTAL ANALYSIS AND DOCUMENTATION FOR THE ALASKA NATURAL GAS TRANSPORTATION SYSTEM

## APPENDIX D

## ENVIRONMENTAL ANALYSIS AND DOCUMENTATION REQUIRED DURING THE PERMITTING AND CONSTRUCTION PHASE OF THE PROJECT

The following is a list of terms and conditions representative of the range and type of preventive and remedial measures that Federal agencies have required and will require in the future for the construction of the ANGST. The list includes both general and site specific measures that are either routinely required or have been established by the responsible Federal agencies. Such measures may be modified and new measures may be required as necessary when needed pursuant to section 5 of the President's Decision.

## 1. FERC – Environmental Reports Accompanying Application to Amend Certificate

The ANGTS will apply to the FERC to amend the existing certificate of public convenience and necessity. Under the FERC's regulations, that application must be accompanied by thirteen environmental reports that cover such things as water use and quality, vegetation and wildlife, cultural resources, socioeconomic impact, geological resources, soils, land use, recreation and aesthetics, air noise and quality, and PCB contamination. The following is a detailed description of the contents of each environmental report.

*Resource Report 1 – General Project Description*

- Provide a detailed description and location map of the project facilities
- Describe any nonjurisdictional facilities that would be built in association with the project
- Provide current original U.S. Geological Survey (USGS) 7.5-minute-series topographic maps with mileposts showing the project facilities
- Provide serial images or photographs or alignment sheets based on these sources with mileposts showing the project facilities
- Provide plot/site plans of compressor stations showing the location of the nearest noise-sensitive areas (NSAs) within 1 mile
- Describe construction and restoration methods
- Identify the permits required for construction across surface waters
- Provide the names and address of all affects landowners and certify that all affected landowners will be notified as required in §157.6(d)

*Resource Report 2 – Water Use and Quality*

- Identify all perennial surface water bodies crossed by the proposed project and their water quality classification
- Identify all water body crossings that may have contaminated waters or sediments
- Identify watershed areas, designated surface water protection areas, and sensitive water bodies crossed by the proposed project
- Provide a table (based on National Wetlands Inventory (NWI) maps if delineations have not been done) identifying all wetlands, by milepost and length, crossed by the project (including abandoned pipeline), and the total acreage and acreage of each wetland type that would be affected by construction
- Discuss construction and restoration methods proposed for crossing wetlands, and compare them to staff's Wetland and Water body Construction and Mitigation Procedures

- Provide original NWI maps or the appropriate state wetland maps, if NWI maps are not available, that show all proposed facilities and include milepost locations for proposed pipeline routes
- Identify all U.S. Environmental Protection Agency (EPA) – or state – designated aquifers crossed

*Resource Report 3 - Vegetation and Wildlife*

- Classify the fishery type of each surface water body that would be crossed, including fisheries of special concern
- Describe terrestrial and wetland wildlife and habitats that would be affected by the project
- Describe the major vegetative cover types that would be crossed and provide the acreage of each vegetative cover type that would be affected by construction
- Describe the effects of construction and operation procedures on the fishery resources and proposed mitigation measures
- Evaluate the potential for short-term, long-term, and permanent impact on the wildlife resources and state-listed endangered or threatened species caused by construction and operation of the project and proposed mitigation measures
- Identify all federally listed or proposed endangered or threatened species that potentially occur in the vicinity of the project and discuss the results of the consultations with other agencies. Include survey reports as specified in §380.12(e)(5)
- Identify all federally listed essential fish habitat (EFH) that potentially occurs in the vicinity of the project and discuss the results of the abbreviated consultations with NMFS, and any resulting EFH assessments
- Describe any significant biological resources that would be affected. Describe impact and any mitigation proposed to avoid or minimize impact

*Resource Report 4 - Cultural Resources*

- Initial cultural resources consultation and documentation, and documentation of consultation with Native Americans
- Overview/Survey Report(s)

*Resource Report 5 - Socioeconomics*

- For major aboveground facilities and major pipeline projects that require an EIS, describe existing socioeconomic conditions within the project area
- For major aboveground facilities, quantify impact on employment, housing, local government services, local tax revenues, transportation, and other relevant factors within the project area

*Resource Report 6 – Geological Resources*

- Identify the location (by milepost) of mineral resources and any planned or active surface mines crossed by the proposed facilities
- Identify any geological hazards to the proposed facilities
- Discuss the need for and locations where blasting may be necessary in order to construct the proposed facilities

- For LNG projects in seismic areas, prepare the materials required by "Data Requirements for the Seismic Review of LNG Facilities"
- For underground storage facilities, describe how drilling activities by others within or adjacent to the facilities would be monitored, and how old wells would be located and monitored within the facility boundaries

*Resource Report 7 – Soils*

- Identify, describe, and group by milepost the soils affected by the proposed pipeline and aboveground facilities
- For aboveground facilities that would occupy sites over 5 acres, determine the acreage of prime farmland soils that would be affected by construction and operation
- Describe, by milepost, potential impacts on soils
- Identify proposed mitigation to minimize impact on soils, and compare with the staff's Upland Erosion Control, Revegetation, and Maintenance Plan

*Resource Report 8 – Land Use, Recreation and Aesthetics*

- Classify and quantify land use affected by:
  - Pipeline construction and permanent right-of-way
  - Extra work/staging areas
  - Access roads
  - Pipe and contractor yards
  - Aboveground facilities
- Identify by milepost all locations where the pipeline right-of-way would at least partially coincide with existing right-of-way, where it would be adjacent to existing rights-of-way, and where it would be outside of existing right-of-way
- Provide detailed typical construction right-of-way cross-section diagrams showing information such as widths and relative locations of existing rights-of-way, new permanent right-of-way, and temporary construction right-of-way
- Summarize the total acreage of land affected by construction and operation of the project
- Identify by milepost all planned residential or commercial/business development and the time frame for construction
- Identify by milepost special land uses (e.g. sugar maple stands, specialty crops, natural areas, national and state forests, conservation land, etc.)
- Identify by beginning milepost and length of crossing all land administered by Federal, state, or local agencies, or private conservation organizations
- Identify by milepost all natural, recreational, or scenic areas, and all registered natural landmarks crossed by the project
- Identify all facilities that would be within designated coastal zone management areas. Provide a consistency determination or evidence that a request for a consistency determination has been filed with the appropriate state agency
- Identify by milepost all residences that would be within 50 feet of the construction right-of-way or extra work area
- Identify all designated or proposed candidate National or State Wild and Scenic Rivers crossed by the project

- Describe any measures to visually screen aboveground facilities, such as compressor stations
- Demonstrate that applications for rights-of-way or other proposed land use have been or soon will be filed with Federal land-managing agencies with jurisdiction over land that would be affected by the project

*Resource Report 9 -- Air and Noise Quality*

- Describe existing air quality in the vicinity of the project
- Quantify the existing noise levels (day-night sound level ($L_{dn}$) and other applicable noise parameters) at noise-sensitive areas and at other areas covered by relevant state and local noise ordinances
- Quantify existing and proposed emissions of compressor equipment, plus construction emissions, including nitrogen oxides ($NO_x$) and carbon monoxide (CO), and the basis for these calculations. Summarize anticipated air quality impacts for the project
- Describe the existing compressor units at each station where new, additional, or modified compressor units are proposed, including the manufacturer, model number, and horsepower of the compressor units. For proposed new, additional, or modified compressor units include horsepower, type, and energy source
- Identify any nearby noise-sensitive area by distance and direction from the proposed compressor unit building/enclosure
- Identify any applicable state or local noise regulations
- Calculate the noise impact at noise-sensitive areas of the proposed compressor unit modifications or additions, specifying how the impact was calculated, including manufacturer's data and proposed noise control equipment

*Resource Report 10 -- Alternatives*

- Address the no action alternative
- For large projects, address the effect of energy conservation or energy alternatives to the project
- Identify system alternatives considered during the identification of the project and provide the rationale for rejecting each alternative
- Identify major and minor route alternatives considered to avoid impact on sensitive environmental areas (e.g. wetlands, parks, or residences) and provide sufficient comparative data to justify the selection of the proposed route
- Identify alternative sites considered for the location of major new aboveground facilities and provide sufficient comparative data to justify the selection of the proposed site

*Resource Report 11 -- Reliability and Safety*

- Describe how the project facilities would be designed, constructed, operated, and maintained to minimize potential hazard to the public from the failure of project components as a result of accidents or natural catastrophes

*Resource Report 12 – PCB Contamination*

- For projects involving the replacement or abandonment of facilities determined to have PCBs, provide a statement that activities would comply with an approved EPA disposal permit or with the requirements of the TSCA
- For compressor station modifications on sites that have been determined to have soils contaminated with PCBs, describe the status of remediation efforts completed to date

*Resource Report 13 – Additional Information Related to LNG Plants*

- Provide all the listed detailed engineering materials

## 2. BLM – Terms And Conditions Necessary to Use Federal Right of Way Grant

The Grant of Right-of-Way for the Alaska Natural Gas Transportation System's Alaska Segment (Serial Number F-24538), granted to the Northwest Alaskan Pipeline Company on December 1, 1980, contains detailed general, environmental and technical stipulations governing the use of the federal right-of-way for the ANGTS Project. These stipulations, imposed by the Bureau of Land Management (BLM), at the time the Right-of-Way was initially issued, cover a broad range of environmental issues, including pollution control, buffer strips, erosion and sedimentation control, fish and wildlife protection, water issues, visual resources, restoration, and cultural resources. The stipulations also address technical issues such as pipeline system standards, slope stability, and stream and floodplain crossings.

In order to construct and operate the ANGTS, these stipulations require that the project sponsors must obtain a variety of approvals from the BLM with respect to use of the Right-of-Way. At the time that such approvals are made and in furtherance of complying with these stipulations, BLM will have the opportunity to take new information.

The following is a list of the terms and conditions included in the stipulations:

- Comply with the requests of the Federal Inspector or of officers of Federal Agencies invested of its functions on release of data, modification of the pipeline system, inspection and monitoring
- Submit, for approval by the Federal Inspector, a summary network analysis diagram for the project that includes all environmental, engineering and construction-related activities and contingencies which may reasonably be anticipated in connection with the project
- Submit design criteria for approval by the Federal Inspector
- Submit, for approval by the Federal Inspector, comprehensive plans and/or programs relating to:

  - Air quality
  - Blasting
  - Camps

- Clearing
- Corrosion control
- Cultural resource preservation
- Environmental briefings
- Erosion and sedimentation control
- Fire control
- Liquid waste management
- Material exploration and extraction
- Oil and hazardous substances control, cleanup and disposal
- Overburden and excess material disposal
- Pesticides, herbicides, chemicals
- Pipeline contingency
- Quality assurance/control
- Restoration
- River training structures
- Solid waste management
- Stream, river and floodplain crossing
- Surveillance and maintenance
- Visual resources
- Wetland construction
- Seismic
- Human-carnivore interaction

- Comply with requirements necessary for issuance of a Notice to Proceed and with any site-specific terms and conditions which the Notice to Proceed may contain
- Develop comprehensive quality assurance and quality control programs
- Continuously inspect pipeline construction
- Comply with quality assurance and control programs as approved and submit quarterly reports to demonstrate such compliance
- Perform operations in a safe and workmanlike manner so as to ensure protection of the environment and safety and integrity of the pipeline
- Conduct a surveillance and maintenance program applicable to the subarctic and arctic environment during construction, operation, maintenance and termination of the pipeline system
- Adopt measures necessary to protect the health and safety of all persons directly affected by the activities performed by the company in the general vicinity of the right-of-way or permit area in connection with construction, operation, maintenance or termination of the pipeline system and immediately abate any health or safety hazards
- Protect existing public or private improvements that may be adversely affected by the company's activities
- Mark and protect all survey monuments encountered during construction, operation, maintenance, and termination of the pipeline system
- Adopt all measures necessary or appropriate for the prevention and suppression of fires and promptly notify the Federal Inspector of any fires on the pipeline system

- Screen, filter or otherwise suppress any electronically operated devices installed as part of the pipeline system so that they do not adversely affect the functioning of existing communications systems
- Remove all improvements and equipment from Federal lands upon termination or revocation of the authorization, unless otherwise approved in writing by the Federal Inspector
- Comply with stop orders issued by field representatives designated by the Federal Inspector with respect to activities conducted under a Notice to Proceed
- Provide and maintain roads and airstrips as necessary to provide for continuing maintenance and surveillance of the pipeline system
- Provide alternative routes for existing roads and trails, at locations and to standards as determined by the Federal Inspector during construction of the pipeline
- Develop and provide environmental briefings in accordance with the approved environmental briefings plan
- Comply with applicable air and water quality standards and Federal laws and regulations relating to pollution control and prevention
- Comply with applicable State of Alaska "Water Quality Standards" as approved by the Environmental Protection Agency
- Use nonpersistent and immobile types of pesticides, herbicides and other chemicals where possible
- Remove or dispose of all hazardous substances and waste generated in construction, operation, maintenance and termination of the pipeline system in a manner acceptable to the Federal Inspector
- Use and operate facilities and devices so as to avoid or minimize ice fog
- Maintain buffer strips of undisturbed land at least 500 feet wide between the pipeline system and streams, lakes, wetlands and between material sites and state highways, unless otherwise approved by the Federal Inspector
- Implement erosion control measures on Federal lands
- Use fill ramps for temporary access over streambanks prior to and following trenching, unless otherwise approved by the Federal Inspector
- Dispose of excavated material in excess in accordance with the approved overburden and excess material disposal plan
- Design, construct, operate, maintain and terminate the pipeline system so to assure free passage and movement of fish in streams designated by the Federal Inspector
- Avoid disturbances to designated fish spawning beds, fish rearing areas and overwintering areas, adopt appropriate mitigation measures where disturbances cannot be avoided, and comply with site-specific terms and conditions imposed by the Federal Inspector
- Comply with restrictions imposed by the Federal Inspector on activities in key fish and wildlife areas and in specific areas were threatened or endangered species of animals are found
- Design, construct, and maintain the pipeline so to assure free passage and movement of big game animals
- Comply with Federal regulations for purchasing of mineral materials and timber
- Prevent soil erosion, damage to vegetation, and destruction of fish and wildlife habitat in layout of material sites

- Identify clearing boundaries, which shall be approved by the Federal Inspector, and comply with clearing procedures established by the Stipulation
- Perform any activities causing a disturbance of natural waters or use natural waters on Federal lands only upon approval by the Federal Inspector
- Operate mobile ground equipment off the right-of–way or authorized areas only upon approval by the Federal Inspector
- Develop a visual resources plan for the pipeline system
- Submit a plan for storage and use of explosive and obtain approval by the Federal Inspector of timing and location of blasting
- Restore all areas of Federal lands disturbed by the Company and obtain approval by the Federal Inspector of the restoration performed
- Notify in accordance with applicable law of any spill, leakage, or discharge of oil or other hazardous substance in connection with the construction, operation, maintenance or termination of the pipeline system
- Submit an oil and hazardous substance control, cleanup and disposal plan for approval by the Federal Inspector
- Submit a pipeline contingency plan for approval by the Federal Inspector
- Undertake the affirmative responsibility to identify, protect and preserve cultural, historic, prehistoric and archeological resources that may be impacted by the Company's activities
- Do not create any permanent obstruction to the passage of small craft in streams
- Comply, for all design and practices employed with respect to the pipeline system, with sound engineering practice, Department of Transportation Regulations, and requirements imposed by the Federal Inspector as necessary to reflect the impact of arctic and subarctic environments
- Submit a layout of each proposed road for approval by the Federal Inspector
- Construct and maintain roads according to standards suitable for safe operation of equipment and in accordance with safe and proven engineering practice
- Adopt modern, state-of-the-art seismic design procedures
- Obtain approval by the Federal Inspector of a seismic monitoring system and adopt procedures for safe shutdown for the pipeline under seismic conditions
- Obtain certification by the Federal Inspector that all recognizable or reasonably inferred faults within any construction segment have been identified and that any risk of major pipeline damage resulting from fault movement has been assessed and provided for in the design of the construction segment
- Adopt measures to prevent the occurrence of or to protect the pipeline system from the effects of mass movement, where avoidance of areas subject to mudflows, landslides, avalanches, rock falls and other mass movements is not practicable
- Design the pipeline system so as to minimize stream and wetland crossing and to withstand the effects of those meteorologic and hydrologic conditions considered characteristic for each hydrologic region
- Stabilize culvert inlet and outlet areas by appropriate methods to prevent erosion
- Adopt erosion control procedures to accommodate the rainfall rate and snow melt combination in the region and the effects that result from thawing
- Design culvert and bridges necessary for operation and maintenance of the pipeline to accommodate at a minimum a fifty year flood in accordance with established criteria

- Adopt corrosion resistant design and methods for early detection of corrosion in accordance with federal regulations
- Base the final design for the construction mode on the results of adequate geotechnical field exploration and testing programs and obtain approval by the Federal Inspector of the final design prior to pipe installation

### 3. Terms and Conditions Necessary to Use CWA Section 404 Permits

ANNGTC currently holds two permits granted by the U.S. Army Corps of Engineers under Section 404 of the Clean Water Act authorizing work in wetlands, streams and other waters involved with the proposed construction and operation of the Alaska segment of the ANGTS. The Sagavanirktok River permit, 120, No. N-830282, known as the "Sag" River permit, authorizes the placement of clean gravel fill for workpads, access roads, and other structures associated with the ANGTS. A second permit, known as Beaufort Sea 176, No. N-820121, authorizes the placement of gravel fill for gas conditioning facilities which are to be located at Prudhoe Bay, Alaska. Both permits expire on September 10, 2007.

The Sag River permit contains 29 environmentally protective "Special Conditions" relating to the proposed structures and work authorized by the permit. (In addition, the environmental stipulations accompanying the attached federal right of way grant for the pipeline route discussed above are incorporated by reference into the permit.) For example:

- "site-specific" plans addressing the stabilization and restoration of the disturbed wetland areas and streams will be provided to DOE for approval at the time of remobilization;
- construction activities must also be accomplished pursuant to conditions outlined by the then-Federal Inspector for sensitive wildlife areas and fish streams;
- protective restrictions for the endangered Peregrine Falcon are also prescribed;
- a minimum distance of 500 feet must be maintained between work pads and access roads and lakes or streambanks;
- a number of specific best management construction practices are set forth to curb siltation and erosion, maintain natural drainage, and otherwise minimize disturbance of wetlands, streams and other waters.

Finally, prior to construction, updated plans and information that take advantage of new technology and existing facilities to minimize harm to aquatic resources must be submitted to the Corps and other federal and state resource agencies.

# COMPLETING THE ENVIRONMENTAL ANALYSIS AND DOCUMENTATION FOR THE ALASKA NATURAL GAS TRANSPORTATION SYSTEM

## APPENDIX E

## ENVIRONMENTAL STUDIES, RECOMMENDATIONS, REPORTS AND DECISIONS RELATED TO THE ANGTS

A significant amount of environmental analysis was conducted by various federal agencies with respect to the ANGTS. This appendix provides an outline of the major Environmental Impact Statements (Final and Supplemental), Environmental Analyses, Environmental Assessments, and the resulting reports and recommendations that were prepared in regards to the ANGTS.

## A. Environmental Impact Statements, Supplemental Environmental Impact Statements, Environmental Analyses, and Environmental Assessments Prepared on the ANGTS

### 1. Final Environmental Impact Statement, Alaska Natural Gas Transportation System, U.S. Department of Interior (March 1976)

In March 1976, the Department of the Interior issued its Final Environmental Impact Statement for the Alaska Natural Gas Transportation System (hereinafter "1976 DOI FEIS") relating to applications for right-of-way permits for the ANGTS to cross federal lands. The 1976 DOI FEIS, which was presented in nine volumes, addresses a route and right-of-way alignment, but is based on a "corridor" concept to allow "adjustments in alignment of up to several miles on either side of the route" without necessitating the treatment of all route adjustments as alternatives to the proposal. Further, because the 1976 DOI FEIS was finalized before detailed construction designs and plans for site restoration and system operations were completed, some of the impacts and mitigation measures discussed in the document are expressed in terms of ranges or are otherwise qualified.

The 1976 DOI FEIS sets forth a proposed action, the Alaska Arctic Pipeline, that entails construction of the pipeline along a route different from the project as contemplated today. The proposed project, as described in the 1976 DOI FEIS, would be constructed on a northerly route, originating on the southwest shore of Prudhoe Bay, running southeasterly along the Arctic Coastal Plain from three to thirty miles from the south shore of the Beaufort Sea, entering the Arctic National Wildlife Refuge, and passing within five miles of Demarcation Bay, before crossing into Canadian territory. The proposed terminus of the pipeline in Alaska is 195 miles east of Prudhoe Bay, Alaska, at the United States-Canada border, about 4.5 miles inland from the Beaufort Sea coast.

The 1976 DOI FEIS considered several alternatives to the proposed action, including an Interior Route, within the Federal utility corridor established by the Secretary of the Interior in 1972 for construction of oil and gas pipelines from Prudhoe Bay, and the Fairbanks Alternative, which is similar to the current pipeline right-of-way. Other alternatives considered included Offshore, Coastal, and Fort Yukon Alternatives, as well as several liquified natural gas ("LNG") alternative system routes.

### 2. Final Environmental Impact Statement, Alaska Natural Gas Transportation System, Federal Power Commission (April 1976)

In April 1976, the Federal Power Commission issued its Final Environmental Impact Statement for the Alaskan Natural Gas Transportation System (hereinafter "April 1976 FPC FEIS"). The April 1976 FPC FEIS reviewed the El Paso, Arctic and Western LNG Terminal proposed projects. The April 1976 FPC FEIS adopted, with certain stipulations, the 1976 DOI FEIS (insomuch as it had evaluated the environmental impact of the Arctic Gas System). The Fairbanks Alternative analyzed in the 1976 DOI FEIS, which is basically the Alcan project, was considered Staff's preferred alternative to the proposals that it had under consideration.

### 3. Final Environmental Impact Statement Supplement, Alcan Pipeline Project, Federal Power Commission (September 1976)

The FPC completed its Final Environmental Impact Statement Supplement for the Alcan Pipeline Project in September of 1976 (hereinafter "1976 FPC SEIS"). The April 1976 FPC FEIS was supplemented to evaluate the applications by Alcan and Northwest Pipeline Corporation seeking authorization to construct a natural gas transportation system in Alaska along the existing Alyeska pipeline right-of-way to Delta Junction and from there along the Alaska Highway to the Alaska-Yukon border.

On July 9, 1976, Alcan and Northwest filed applications for certificates of public convenience and necessity to construct and operate in the United States approximately 1089 miles of 42-inch and 30-inch diameter natural gas pipeline, 16 new compressor stations, additions at eight existing compressor stations, and other appurtenant facilities. The 1976 FPC SEIS analyzes impacts of the entire project, including the portion in Canada.

The 1976 FPC SEIS considered, or incorporated by reference consideration of, nine alternatives to the proposed action: (1) Alternate Proposals (Alaskan Arctic Gas Pipeline Company and El Paso Alaska Company); (2) FPC Environmental Staff's Alternative Systems, (3) Minor pipeline route modifications; (4) Alternate system concepts – operation pressure, pipeline wall thickness, and diameter; (5) Alternate construction seasons (6) Alternate transportation mode – methanol; (7) The Alternate of no action; (8) Alternate sources of energy; and (9) Energy conservation.

The 1976 FPC SEIS considered environmental impacts related to: climate; topography; geology; soils; hydrology; vegetation; wildlife; land use, aesthetics, and recreation; socioeconomics; archaeological and historical resources; and air and noise quality.

In the 1976 FPC SEIS, the FPC environmental staff concluded that the proposals by El Paso Alaska and Arctic Gas were unacceptable because they traverse areas that are "highly worthy of preservation." The staff also found that, while the route of the Alcan

proposal was acceptable, the Alcan proposal lacks the "necessary expansion flexibility required to accommodate additional volumes of gas." The 1976 FPC SEIS concludes:

> "The environmental staff further concludes that the Fairbanks Corridor alternative route . . . along with a 48-inch high-pressure system . . . provide the flexibility for expansion not available with the Alcan proposal, and environmental benefits not available with either Arctic Gas or El Paso Alaska. This route would constitute the environmental staff's preferred Fairbanks alternative . . . ."[1]

### 4. Environmental Analysis, 48" Alcan Alternative, Federal Power Commission (April 1977)

On April 8, 1977, the FPC issued an environmental analysis on the 48" Alcan Alternative (hereinafter "1977 FPC EA"). Specifically, the 1977 FPC EA covered Alcan's amended proposal filed with the Commission on March 22, 1977. Regarding the amended filing, the FPC concluded that "there is absolutely nothing new or novel about the 48-inch diameter pipelines proposed to follow the Fairbanks-Alcan Highway corridor. In fact, initial filings made by the Arctic Gas group to the FPC and the National Energy Board (NEB) on March 21, 1974, and which were the genesis of these regulatory proceedings, contained material which discussed a 48-inch Fairbanks alternative."[2]

### 5. Environmental Assessment, Taylor Highway-Klondike Highway Realignment – Alcan Pipeline Project, Federal Power Commission Staff (August 1977)

In August 1977, one month before the release the President's Decision and Report, the FPC released an environmental assessment of the Taylor Highway-Klondike Highway Realignment for the Alcan Pipeline Project "pursuant to a directive by the Council on Environmental Quality and the White House Alaska Task Force" (hereinafter "August 1977 FPC EA"). The Commission stated that:

> The directive results from the recent announcement of the National Energy Board of Canada that transport of Alaskan natural gas through Canada to the lower 48 states should be along the route proposed by the Alcan Pipeline Company (Alcan) with a Taylor Highway-Klondike Highway realignment. This realignment would diverge from the proposed Alcan route at Tetlin Junction, Alaska, and then follow the Taylor Highway to the Alaska-Yukon border . . . . Based on their analysis of the Assessment, CEQ has informed the FPC staff that it is their conclusion that no final supplement is required prior to the President's decision on the basic system and technology.[3]

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[1] 1976 FPC SEIS at 389.
[2] 1977 FPC EA at 3.
[3] Transmittal Letter accompanying August 1977 FPC EA at 1.

The Commission concluded that the "environmental impacts of the Taylor Highway realignment are acceptable in Alaska."[4] However, the Commission pointed out that:

> the detailed investigation by the DOI and FPC staffs concludes that the original Alcan prime route is environmentally preferable . . . . Therefore, when all aspects of the environment are evaluated, it is evident that the prime Alcan route is superior to the Taylor Highway-Klondike Highway realignment suggested by the National Energy Board of Canada. If the alternative Taylor Highway-Klondike Highway realignment is the choice of the President and the Congress, it is the FPC staff's further opinion that the discussion of this route and its anticipated environmental impacts has been sufficient to allow a proper decision to be made, provided adequate terms and conditions are adopted to mitigate the various impacts identified.[5]

### B. Recommendations and Reports Prepared on the Environmental Impact Statements, Supplemental Environmental Impact Statements, Environmental Analyses, and Environmental Assessments

#### 1. Federal Power Commission Recommendation to the President (May 2, 1977)

The FPC in its 1977 Recommendation to the President (hereinafter "1977 FPC Recommendation") reviewed three projects: two overland (the Arctic Gas and Alcan projects) and one, the El Paso Alaska project, which was a pipeline and LNG tanker project. The FPC recommended that an overland route be selected, but split 2-2 on the Arctic Gas and Alcan route. In reviewing the environmental impacts of the three proposed systems, the FPC stated that:

> Each system will have some adverse environmental impacts. We believe all of these impacts to be acceptable, given proper precautionary measures. Arctic would involve crossing the Arctic National Wildlife Range, and other lands now little used by man. The other projects would generally follow existing utility corridors – a distinct environmental advantage.[6]

The FPC further stated that "we are confident that the measures proposed, together with proper conditions placed upon the successful applicant, and subsequent monitoring by the Federal inspector which the Act requires, will all provide adequate

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[4] August 1977 FPC EA at 68.
[5] Id. at 68-69.
[6] Letter Transmitting 1977 FPC Recommendation to the President, at 3.

protection of the environment."[7] As compared to the Arctic proposal, both Alcan II and El Paso proposed the use of an existing utility corridor, to which the FPC found not to be compelling reason to choose one overland transportation system over another, concluding that "each system must be judged on its own total impact and that impact cannot be assumed negligible simply because the system is constructed in an existing utility corridor."[8]

Chapter V of the 1977 FPC Recommendation provides a detailed discussion of the "more significant" environmental impacts associated with each of the three proposals.[9] The Commission noted that "the approach throughout these proceedings has been to assess the maximum environmental risks presented by the applications, and by selected alternatives. We are convinced that all requirements of NEPA have been satisfied and that there is sufficient information for an effective environmental assessment."[10]

The FPC concluded that:

> We believe we have complied with the National Environmental Protection Act (NEPA) in exploring alternatives. Each system has changed substantially from its original routing and design in response to criticisms raised and alternatives explored during the two years of these proceedings The Alcan proposal, itself, started as an alternative without a sponsor. The perfecting techniques required by NEPA, which have caused in this proceeding substantial changes and improvements, prove the desirability and effectiveness of the NEPA requirements.
>
> As a result of these modifications and others which will continue to be made, we find that each of the three systems is environmentally acceptable. No doubt, the Alcan route promises the least environmental impact, if proper mitigative actions are taken during final design, construction, and operation . . . .[11]

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[7] 1977 FPC Recommendation, at I-22.

[8] Id. at I-29.

[9] For purposes of its discussion on environmental review, the FPC looked at the environmental impacts of the Alcan II 48-inch pipeline proposal. As is made clear in the CEQ comments discussed infra, none of the EISs done on the Alaska projects specifically covered the Alcan II proposal. However, the Commission found that "in most respects, the Alcan II route is similar to the Fairbanks corridor route [considered in BLM's EIS] which environmental staff found to be environmentally preferable to the Arctic or El Paso under certain circumstances." Id. at V-22.

[10] Id. at V-2, citing to Kleppe v. Sierra Club, 44 U.S.L.W. 5104, 5110 fn. 21, June 26, 1976.

[11] Id. at I-31 (emphasis added); see also 1977 FPC Recommendation at I-61 ("On balance, however, we find Alcan's route preferable from an environmental standpoint. The use of existing utility corridors and all-weather roads over much of its route means

## 2. Council on Environmental Quality, Report to the President on Environmental Impacts of Proposed Alaska Transportation Corridors (July 1, 1977)

As required by Section 6(d) of ANGTA, on July 1, 1977, the CEQ submitted a report to the President entitled "Environmental Impacts of Proposed Alaska Gas Transportation Corridors" (hereinafter "CEQ Report"). CEQ stated that it had two tasks. First, it determined that there was adequate environmental information for a sufficiency determination. The CEQ found that the impact statements, including the impacts of alternative corridors, and other public documents provide a wealth of information on the environmental impacts associated with the three proposed projects. The CEQ stated: "Altogether, they permit a fair comparison of the significant environmental impacts that we believe are most relevant to the decision before the President and Congress."[12] In addition, this information "formed the focus for the CEQ's public hearings and our more detailed review of the EISs."[13]

Second, CEQ stated that it had to determine the legal significance, if any, of the analytical flaws in the EISs identified during its review. The CEQ stated that "based on the extensive new material submitted at our public hearings and on further staff analysis, we conducted this aspect of our analysis much as a court would, by applying statutory standards to the facts before us and drawing legal conclusions regarding the impact statements' sufficiency."

Regarding sufficiency, the CEQ concluded that:

> [T]he environmental impact statements are legally and factually sufficient under NEPA and . . . provide an adequate basis for selecting the corridor and the basic technology for an Alaska gas transportation system. The documents serve their essential purpose of providing responsible officials with the information that they need to make a reasoned choice among the competing proposals. In particular, the impact statements analyzed each of the significant impacts that we deemed crucial to adequate evaluation of the proposed transportation systems and discussed feasible mitigation measures for reducing environmental effects. The environmental impact statements were circulated to government agencies and subjected to public scrutiny as required by Council Guidelines, and we find that the Department of the Interior and the Federal Power

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that Alcan's construction and operating impact is less than if these corridors and roads were not already in place."); 1977 FPC Recommendation at V-30 ("we agree with Staff's conclusion that a project similar to the Alcan II 48-inch pipeline alternative . . . would constitute the most environmentally acceptable system to transport Prudhoe Bay gas to the contiguous United States.").

[12] CEQ Report as reprinted in S. Rep. No. 95-56 at 173 (1977).

[13] Id.

Commissior: satisfactorily responded to comments received on their draft statements.[14]

In so concluding, the CEQ emphasized that:

> these statements must be viewed as essentially akin to broad 'program' documents which do not purport to analyze the specific route alignments, project designs, or facility sitings, for example . . . . As a result, the EISs do not contain the site-specific and engineering design information that will be necessary to evaluate detailed plans for the actual on-the-ground construction of the approved transportation system.[15]

As to the specific issues not discussed in the EISs, CEQ stated that "these 'downstream' decisions must be based upon more specific environmental data." CEQ noted that following issuance of the EISs, Alcan modified its pipeline proposals and that while such modifications had not been analyzed in an EIS, Alcan had fully explained these modifications in submissions to the FPC and CEQ. The CEQ concluded that "they must be considered only as modifications and not important changes in the basic nature and general route already proposed" by Alcan.[16] Significantly, CEQ went on to state that:

> Given the fact that the proposals now pending are essentially elaborate conceptual studies, changes of this kind could appropriately have been anticipated when the EISs were prepared. Similar modifications are in fact to be expected as engineering design proceeds and responds to site-specific information.[17]

The CEQ did caution, however, that if there were significant environmental impacts in the future, new NEPA documents might have to be prepared:

> Following a Presidential and Congressional decision on a pipeline corridor, federal agencies may not bypass further environmental analysis of the authorized system simply because broad program statements have been prepared and found sufficient under NEPA. Rather, they must weigh important environmental concerns at all subsequent stages of decision making to ensure that the Nation's environmental policy receives as much attention on the ground in Alaska as it does while federal planning is underway in Washington. Environmental assessments, EIS supplements, or new impact statement may be required, depending upon the significance of impacts and the degree to which they have already been treated. Any major design, engineering, or other site-specific decision that

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[14] Id. at 175.
[15] Id. at 176.
[16] Id. at 177.
[17] Id.

follows the selection of a corridor and technology must be considered in these types of NEPA analysis.[18]

Thus, the CEQ Report clearly recognized that additional detailed work would need to be done as the applicants sought approval of the detailed construction and operation of the proposed transportation system.

### 3. Executive Office of the President, Decision and Report to Congress on the Alaska Natural Gas Transportation System (September 22, 1977)

The Executive Office of the President, Decision and Report to Congress on the Alaska Natural Gas Transportation System (hereinafter "President's Decision") states:

> The President hereby determines pursuant to the direction of Section 8(e) of ANGTA, that the required environmental impact statements relative to an Alaska natural gas transportation system have been prepared, that they have been certified by CEQ and that they are in compliance with the Natural [sic] Environmental Policy Act of 1969. Consequently the enactment of a joint resolution approving the Decision shall be conclusive as to the legal and factual sufficiency of the final environmental impact statements as provided by Section 10(c)(3) of ANGTA.[19]

Section 5 of the President's Decision outlines, among other terms and conditions, those applicable to the environment. The President's Decision goes on to state the following in regards to the aforementioned terms and conditions:

> To ensure the proper management and timely completion of the construction of the designated transportation system, the following general terms and conditions shall be appropriately incorporated into any certificate, right-of-way, lease, permit or authorization directed to be made by any Federal officer or agency . . . these terms and conditions will be followed by a set of stipulations establishing general standards of environmental and construction performance, and the procedures for the submission and approval of construction plans and environmental safeguards, and then by site specific terms and conditions issued prior to actual construction of any pipeline segment.[20]

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[18] Id. at 178.

[19] Executive Office of the President, Decision and Report to Congress on the Alaska Natural Gas Transportation System, at 306 (1977), approved by Congress, Pub. L. No. 95-158, 91 Stat. 1263 (1977).

[20] President's Decision, § 5, p. 234 of Compilation.

The environmental terms and conditions in the President's Decision were set forth in the following detail:

III. Environment

1. The successful applicant shall construct, operate, maintain and terminate the pipeline with maximum concern for the protection of environmental values. A set of stipulations containing the general standards of environmental and construction performance, and the procedures for the submission and approval of construction plans and environmental safeguards will be developed by the concerned government agencies and must be accepted by the applicant as a condition of his right to proceed over public lands. Additional "site-specific" terms and conditions will be incorporated in authorizations to proceed with construction issued by the appropriate Federal agency, into particular certificates, rights-of-way, permits and other authorizations to protect and enhance environmental values during the design, construction and operation of the pipeline. The additional "site-specific" terms and conditions will be issued as appropriate to minimize disturbance from construction and operation of the pipeline to rivers and other water bodies and adjacent land and vegetation; to protect wildlife and endangered species and maintain forest, agricultural and other resource productivity; to control the risks of pipeline ruptures, leaks and hazards; to maintain air and water quality values; to make provision for control and disposal of sewage, garbage, wastes and toxic substances; and take other measures necessary for protection of the environment during the design, construction and operation of the pipeline.

2. The successful applicant shall prepare a plan of operations which integrates environmental protection with the proposed schedule of construction and operations, the proposed supervisory and technical staffing, the proposed quality control programs, and the proposed quality assurance programs. In preparation and implementation of this plan, the successful applicant shall provide for timely integration of environmental mitigation and restoration practices with the activity which creates the need for the restoration or mitigation.

3. The successful applicant shall develop and submit to the Federal Inspector an effective plan for implementation of specific environmental safeguards through an educational program for field personnel prior to and during construction, operation, maintenance and termination of the pipeline.

4. The successful applicant shall establish an effective pipeline-performance monitoring system of inspection and instrumentation to insure performance in keeping with environmental concerns.[21]

A review of these terms and conditions clearly establishes that the President did not accept the CEQ's viewpoint that any further NEPA review would need to be done. The terms and conditions instead focus on the development of: "stipulations containing general standards of environmental and construction performance," "procedures for the submission and approval of construction and environmental safeguards," "site specific terms and conditions . . . incorporated into authorizations to proceed,"[22] "a plan of operations which integrates environmental protection," "an effective plan for implementation of specific environmental safeguards through an educational program for field personnel," and "an effective pipeline-performance monitoring system of inspection and instrumentation."[23]

The President's Decision states as to the CEQ's comments only that it "found that the environmental impact statements submitted by the FPC with respect to Alcan, pursuant to Section 5(e) of ANGTA, are legally and factually sufficient."[24] The President's Decision concludes that "pursuant to Section 8(e) of ANGTA . . . the required environmental statements relative to an Alaska natural gas transportation system have been prepared, and that they have been certified by the CEQ and that they are in compliance with [NEPA]." "Consequently," the President states, "the enactment of a joint resolution approving the Decision shall be conclusive as to the legal and factual sufficiency of the final environmental impact statements as provided by Section 10(c)(3) of ANGTA."[25]

The President's Decision points out that "the success of the Alcan proposal is in large measure a result of its attention to environmental impact."[26] It further states that:

> To sum up, environmental values have been extensively considered and evaluated throughout the certification and decision

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[21] President's Decision at 237.

[22] The President's Decision states that "these additional 'site specific' terms and conditions will be issued as appropriate to minimize disturbance from construction and operation of the pipeline to rivers and other water bodies and adjacent land and vegetation; to protect wildlife and endangered species and maintain forest, agricultural and other resource productivity; to control the risks of pipeline ruptures, leaks and hazards; to maintain air and water quality values; to make provision for control and disposal of sewage, garbage, wastes, and toxic substances; and take other measures necessary for protection of the environment during the design, construction and operation of the pipeline." President's Decision at 237.

[23] President's Decision at 237.

[24] Id.

[25] Id. at 276.

[26] President's Decision at 275.

process. In the future, Federal oversight of design and construction of the Alcan system should strengthen and implement the environmental priorities established in this decision process . . . . As required by ANGTA, environmental concerns have been paramount in the study and decision process, and will be translated into a responsive permitting and enforcement mechanism for the implementation of the Decision. Federal oversight will seek to avoid "trade-offs" between protection of environmental priorities and construction economics by seeking through advance planning by the Government and the applicant for the coordinated enhancement of both.[27]

#### 4. Comments on the "Decision and Report to Congress on the Alaska Natural Gas Transportation System" Issued by the President on September 22, 1977, Federal Energy Regulatory Commission (October 1997)

The Federal Energy Regulatory Commission's Comments on the "Decision and Report to Congress on the Alaska Natural Gas Transportation System" Issued by the President on September 22, 1977, submitted to Congress pursuant to Section 8(f) of ANGTA,[28] (hereinafter "1977 FERC Comments") concurred with the President's Decision with respect to the sufficiency of the EISs.[29] The 1977 FERC Comments accepted the Alcan proposal as "the superior Alaskan Natural Gas Transportation System from an environmental standpoint" and stated: "The Commission strongly supports, on environmental grounds, the President's Decision to approve Alcan's route, and concurs with the conclusion of the Council on Environmental Quality that the environmental impact statements are legally and factually sufficient to support the President's choice of an applicant and a route."[30] FERC further emphasized that steps could be taken to further minimize environmental impact, consisting primarily of: "(1) elimination of unnecessary construction; (2) minor route modifications to avoid environmentally sensitive areas; (3) additional special studies to provide guidance on environmental planning, safety and route selection; and (4) use of existing Trans-Alaska Pipeline System (TAPS) right-of-way and construction areas where prudent and feasible."[31] All of these steps, FERC noted, "can be incorporated in the terms and conditions of a final certificate."[32]

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[27] Id. at 276-277.
[28] 15 U.S.C. § 719f(f) (1994).
[29] 1977 FERC Comments at 46.
[30] Id.
[31] Id. at 46-47.
[32] Id. at 47.

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**DISCUSSION-DRAFT**

**October 5, 2001**

**Current Status of the Functions and Authorities of the Federal Inspector for the Construction of the Alaska Natural Gas Transportation System**

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## Introduction

The purpose of this memorandum is to discuss the current status of the functions and authorities of the Federal Inspector for the construction of the Alaska Natural Gas Transportation System ("ANGTS"). The memo examines the enactment of Section 3012 of the Energy Policy Act of 1992 ("EPAct")[1] and its transfer of all the functions and authorities vested in the Federal Inspector to the Secretary of Energy. Tracing the changes in the structure of regulatory oversight over the ANGTS, the memo discusses the relationship between the Federal Inspector, the Executive Policy Board and the Agency Authorized Officers, who exercised the authority of federal agencies to expedite permitting and construction of the ANGTS. The memo then addresses several questions about the functions and authorities now vested in the Secretary of Energy as a starting point for discussions of possible actions to remobilize a coordinated federal regulatory approach to streamline permitting and construction of the ANGTS.

## I. Overview of the Functions and Authorities of the Federal Inspector

The 1976 Alaska Natural Gas Transportation Act ("ANGTA")[2] establishes a unique regulatory framework for the selection and construction of the ANGTS. The ANGTS, selected by the President[3] and approved by the Congress,[4] will allow the transportation of natural gas from Alaska's North Slope to the lower 48 States.

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[1] Pub. L. No. 102-486, 106 Stat. 3128 (1992).
[2] Pub. L. No. 94-586, 90 Stat. 2903 (1976), as amended, 15 U.S.C. §§ 719-719o (1994).
[3] Executive Office of the President, Decision and Report to Congress on the Alaska Natural Gas Transportation System, September 22, 1977 (hereinafter "President's Decision" or "Decision").
[4] Joint Resolution approving the Presidential decision on an Alaska natural gas transportation system, and for other purposes, Pub. L. No. 95-158, 91 Stat. 1268 (1977) (hereinafter "Joint Resolution").

In order to expedite construction and avoid delays and cost overruns due to interagency conflict,[5] Federal involvement with the construction of the ANGTS was streamlined and centralized through a specific organization, which was comprised of a Federal Inspector ("Inspector") for the construction of the ANGTS, an Executive Policy Board ("Board") and Agency Authorized Officers.

This organization was the result of independent provisions found in the following statutory and executive sources:

- ANGTA;
- the President's Decision;
- Reorganization Plan No. 1 of 1979;[6] and
- Executive Order 12,142.[7]

Over time, these statutes and executive orders modified the original role of the Federal Inspector envisioned under ANGTA by expanding the type and number of functions and authorities vested in the Inspector and altering its relation with the Executive Policy Board and the Agency Authorized Officers.

Section 3012 of EPAct abolished the Office of the Federal Inspector and repealed the section of ANGTA that described some of the Inspector's duties. At the same time, it transferred all the functions and authority vested in the Inspector to the Secretary of Energy, but made no specific provision regarding the Executive Policy Board or the Agency Authorized Officers. EPAct raises several questions about the current status of the functions and authorities possessed by the Secretary of Energy which are addressed below.

## A) The Alaska Natural Gas Transportation Act

Section 7(a)(5) of ANGTA provided for the appointment of a Federal inspector of construction of an Alaska natural gas transportation system, following Congressional approval of the President's designation of such a system.

Section 7(a)(5) did not mandate a specific structure for the office of the Inspector. Either an individual or a board could have served as Inspector: the former as an "officer of the United States," appointed by the President with the advice and consent of the Senate, and the latter consisting of such an officer, as chairman of the board, and other individuals "as the President determines appropriate to serve . . . by reason of background, experience, or position."

The functions of the Inspector described in ANGTA were exclusively limited to monitoring compliance with applicable laws, terms and conditions and progress towards the

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[5] Report accompanying the President's Decision at 197.
[6] Reorganization Plan No. 1 of 1979, 44 Fed. Reg. 33,663, 93 Stat. 1373 (hereinafter "Reorganization Plan" or "Plan").
[7] Executive Order No. 12,142 of June 21, 1979, 44 Fed. Reg. 36,927.

achievement of some general objectives of the project. Under Section 7(a)(5) of ANGTA, the Inspector was to

> (A) establish a joint surveillance and monitoring agreement, approved by the President, with the State of Alaska similar to that in effect during construction of the trans-Alaska oil pipeline to monitor the construction of the approved transportation system within the State of Alaska;
>
> (B) monitor compliance with applicable laws and the terms and conditions of any applicable certificate, rights-of-way, permit, lease, or other authorization issued or granted under section 9;
>
> (C) monitor actions taken to assure timely completion of construction schedules and the achievement of quality of construction, cost control, safety, and environmental protection objectives and the results obtained therefrom;
>
> (D) have the power to compel, by subpena [sic] if necessary, submission of such information as he deems necessary to carry out his responsibilities; and
>
> (E) keep the President and the Congress currently informed on any significant departures from compliance and issue quarterly reports to the President and the Congress concerning existing or potential failures to meet construction schedules or other factors which may delay the construction and initial operation of the system and the extent to which quality of construction, cost control, safety and environmental protection objectives have been achieved (emphasis added).

Section 9 of ANGTA left the authority to issue certificates, right-of-ways, permits, leases, or other authorizations required for any action necessary or related to the construction and initial operation of the ANGTS with the respective Federal agencies. However, Section 7(a)(6) authorized the President to identify, in his Decision, "such terms and conditions permissible under existing law as he determines appropriate for inclusion with respect to any issuance or authorization directed to be made pursuant to section 9 [of ANGTA]."[8] These terms and conditions were identified in Section 5 of the Decision, which included a role for the Federal Inspector. Thus, it appears that Section 7(a)(6) provided a statutory basis independent from Section 7(a)(5) that empowered the President to vest with the Federal Inspector certain additional functions and authorities related to such authorizations.

[8] Section 9(b) requires that consideration of the issuance of such certificates, rights-of-way, permits, leases, or other authorizations be expedited and take precedence over similar applications or requests. Under Section 9(c) and (d), Federal officers or agencies are prohibited from including, amending or abrogating terms and conditions permitted but not required by law that "would compel a change in the basic nature and general route of the approved transportation system or would otherwise prevent or impair in any significant respect the expeditious construction and initial operation of such transportation system."

## B) The President's Decision

One of the purposes of ANGTA was "to provide the means for making a sound decision as to the selection of a transportation system for delivery of Alaska natural gas to the contiguous States . . ."[9] As part of the selection process, the Federal Power Commission was to issue a recommendation to the President on an Alaska natural gas transportation system, based on a review of all applications, then pending under Section 7 of the Natural Gas Act,[10] for issuance of a certificate of public convenience and necessity relating to such a system. After a comment period, the President was to issue a Decision "as to whether a transportation system for delivery of Alaska natural gas should be approved under this Act" and, if so, he was to designate the system.[11] The President's Decision was then subject to approval by a Joint Resolution of Congress.[12]

Pursuant to the selection process established by ANGTA, the President submitted to Congress a Decision and a Report designating the Alcan project as the designated Alaska Natural Gas Transportation System. Because of its subsequent approval by Congress on November 1977,[13] the Decision has the full force and effect of law.

In his Decision, the President expanded the role of the Federal Inspector in three ways:

- by creating additional monitoring functions for the Inspector;
- by attributing to the Inspector new approval authorities;
- by providing for the transfer of specific enforcement authority to the Inspector.

The Inspector's increased functions and authorities reflected the President's view that the mission of the Office of the Inspector was "to achieve greater coordination of the government monitoring and enforcement process."[14] The Report accompanying the Decision expressed the Presidential intent to make the Inspector an "officer independent of other existing Federal agencies."[15]

The Decision also created an Executive Policy Board and provided for the designation of Agency Authorized Officers. The Board was to supervise the Inspector and exercise ultimate policy-making functions. It was to be comprised of senior representatives of the Departments of Interior, Energy, Transportation, the Environmental Protection Agency, and the U.S. Army Corps of Engineers and provide policy guidance to the Inspector, who was to act as the "agent or conduit of the Board"[16] in all matters pertaining to construction of the ANGTS. The Board also

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[9] ANGTA, Section 3.
[10] The Act of June 21, 1938, Ch. 556, 52 Stat. 821, as amended, 15 U.S.C. 717 et seq.
[11] ANGTA, Section 7.
[12] ANGTA, Section 8.
[13] Supra Note 4.
[14] Report accompanying the President's Decision at 145.
[15] Report accompanying the President's Decision at 202.
[16] President's Decision at 43.

was to have the function of an appellate body to resolve differences between Federal Agencies and the Inspector.

Agency Authorized Officers represented "the respective Federal agencies in the field on all matters pertaining to construction of the pipeline"[17] and exercised the authority of the Agency they represented. According to the Report accompanying the Decision, the Agency Authorized Officers were to "directly enforce"[18] stipulations, terms and conditions, subject to the Inspector's supervisory enforcement authority.

With respect to the Inspector's functions and authorities, the Decision first confirmed the monitoring functions set forth in Section 7(a)(5) of ANGTA.[19] Besides incorporating them by reference to Section 7(a)(5), it is important to note that the Decision created an independent statutory basis for such duties, by listing them as functions that the Inspector was to perform "[u]pon approval of the Presidential designation of an Alaska natural gas transportation system."[20] Since the President's Decision had the full force and effect of law after approval by Congress, the monitoring functions listed therein became entrusted in the Federal Inspector by virtue of a statutory source independent of Section 7(a)(5) of ANGTA.

Section 5 of the Decision set forth "Terms and Conditions" that the President identified pursuant to Section 7(a)(6) of ANGTA.[21] These Terms and Conditions expanded the role of the Federal Inspector and vested in the Inspector monitoring functions in addition to those derived from Section 7(a)(5) of ANGTA and new approval authorities. The language of the Decision is explicit that the functions and authorities included in the Terms and Conditions are independent and additive to the duties set forth in Section 7(5)(a), which were also incorporated by the President pursuant to Section 7(a)(6) of ANGTA.[22]

As far as additional monitoring functions, the Federal Inspector was to:

- receive a final design, design-cost estimate, and construction schedule from the successful applicant (Terms and Conditions I.5);

- receive from the successful applicant cost-effective and feasible methods for supplying general and specialized equipment, repair facilities and spare-part inventories to execution contractors (Terms and Conditions I.6);

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[17] President's Decision at 42.
[18] Report accompanying the President's Decision at 200.
[19] President's Decision at 40.
[20] President's Decision at 41. The description of the functions repeats almost verbatim the duties listed in Section 7(a)(5) of ANGTA.
[21] President's Decision at 27.
[22] The Decision describes the purpose of the appointment of a Federal Inspector as "to enforce the terms and conditions proposed [under Section 5 of the Decision] and to carry out the duties of the office assigned and set forth by section 7(a)(5)(A)-(E) of ANGTA" (President's Decision at 40, emphasis added).

- receive detailed information on the successful applicant's labor relations procedures (Terms and Conditions I.7);

- receive from the successful applicant detailed description of quality assurance and control procedures (Terms and Conditions I.9); and

- receive from the successful applicant an effective plan for implementation of specific environmental safeguards (Terms and Conditions III.3) (emphasis added).

The Terms and Conditions also vested new approval authorities in the Federal Inspector. In particular, the Inspector was given the authority to

- approve a detailed overall management plan for the preconstruction and construction phases provided by the successful applicant prior to the issuance of the certificate (Terms and Conditions I.1);

- determine whether special conditions warrant use of cost-plus type contracts with execution contractors as opposed to otherwise required fixed-price contracts (Terms and Conditions I.2);

- approve of insurance, bonding, and any other prequalification requirements for all consultants and execution contractors (Terms and Conditions I.3);

- determine whether extenuating circumstances warrant relaxation of requirement that design cost estimate and schedule represent at least 70 percent of the total system(Terms and Conditions I.5);

- approve the successful applicant's plan for taking affirmative actions to ensure no person be excluded from receiving or participating in certain contracts on grounds of race, creed, color, national origin or sex (Terms and Conditions I.11);

- approve of the design of any pipeline segment (Terms and Conditions II.2);

- approve of the successful applicant's plan or procedure for conducting its own inspections of project facilities during construction (Terms and Conditions II.5);

- approve of the successful applicant's seismic monitoring system (Terms and Conditions II.6) (emphasis added).

The Decision further extended the role of the Federal Inspector to give the Inspector enforcement authority over permits, certificates and other authorizations. Under Section 9 of ANGTA, Federal Agencies have the authority to issue certificates, permits, rights-of-way, and other authorizations. To achieve greater coordination, the Decision stated that the President was to propose a reorganization plan that would transfer to the Federal Inspector "field-level supervisory authority over enforcement of terms and conditions from those Federal agencies

having statutory responsibility over various aspects of an Alaska natural gas transportation system."[23] By virtue of such supervisory authority, the Inspector could overrule the enforcement action of an Agency Authorized Officer. The Report accompanying the Decision stated that the Inspector's enforcement authority was "essential to avoid project delays and minimize cost overruns" and suggested that, in absence of such authority, a "coordinated regulatory approach will be elusive."[24]

### C) Reorganization Plan No. 1 of 1979

Reorganization Plan No. 1 of 1979, submitted by President to Congress in accordance with the President's Decision, strengthened the Inspector's coordinating role, clarified, and arguably expanded, its enforcement authority, but departed from the Decision by changing the relationship between the Inspector and the Board.

The Plan formally established the Office of the Federal Inspector and required each Federal agency with statutory responsibilities over any aspect of the ANGTS to appoint an Agency Authorized Officer "to represent that authority on all matters pertaining to the pre-construction, construction, and initial operation of the system."[25] Section 101 of the Plan characterized the Office of the Federal Inspector as "an independent establishment in the executive branch" that "shall serve at the pleasure of the President."

Pursuant to the President's Decision, the Plan transferred to the Inspector supervisory authority over agency enforcement actions. Although the Decision proposed that the Inspector have the authority to overrule decisions of the Agency Authorized Officers, the Plan clarified the relationship between the Inspector and Agency Authorized Officers by providing that the Inspector "shall delegate to each Agency Authorized Officer" enforcement authority.[26] Significantly, the transfer of supervisory authority to the Inspector "vest[ed] in the Federal Inspector exclusive responsibility for the enforcement of all Federal statutes relevant in any manner to pre-construction, construction and initial operation."[27] This suggests that the Agency Authorized Officers possessed enforcement authority only by virtue of delegation from the Inspector and not by virtue of their appointment by and representation of the respective Federal agency. Such characterization may seem in conflict with the Report's sections stating that the Agency Authorized Officers "will directly enforce"[28] stipulations, terms and conditions and that agency delegated authorities "can be exercised only by the respective Agency Authorized Officers . . . ."[29] The source of the enforcement authority, however, does not alter the enforcement process which, under both the Decision and the Reorganization Plan, gave the Agency Authorized Officers the responsibility to enforce permits, certificates and other

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[23] President's Decision at 41-42.
[24] Report accompanying the President's Decision at 198-199.
[25] Reorganization Plan § 101(c) at 33,663.
[26] Reorganization Plan § 202(a) (emphasis added).
[27] Reorganization Plan § 102 at 33,663 (emphasis added). Section 102(a)-(h) lists a detailed series of permitting provisions found in various statutes. Such a list, which includes enforcement of functions created pursuant to ANGTA, is most reasonably viewed as being illustrative.
[28] Report accompanying the President's Decision at 200.
[29] Report accompanying the President's Decision at 203-204.

authorizations, subject to the supervision of the Inspector, who possessed the authority to overrule them.[30]

For nonenforcement activities, Section 202 of the Plan added to the Inspector's duties a specific responsibility 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 [ANGTA]."

The Plan also modified the relationship between the Inspector and the Board. While the Report accompanying the Decision stated that the Board "will be paramount in all policy matters,"[31] under the Plan, the Board's role became simply to advise the Inspector on the performance of its functions. Importantly, Section 201 of the Plan provided that "[a]ll other functions assigned, or which could be assigned pursuant to the Decision, to the Executive Policy Board are hereby transferred to the Federal Inspector."[32] Thus, the Inspector assumed a larger policy role in the ANGTS' regulatory framework and the Board could advise, but not direct him. The Reorganization Plan did not reference the appellate role of the Board set forth in the Decision.

### D) Executive Order 12,142

Executive Order 12,142 implemented the Reorganization Plan and formally established the Executive Policy Board. While the functions of the Board corresponded to its advisory role under the Reorganization Plan, the structure of the Board was different from the structure outlined in the President's Decision. The Inspector, who was to be the non-voting Chairman, was no longer a member of the Board.[33] Also, the Chairman of the Federal Energy Regulatory Commission was included as a member of the Board.

The functions of the Board reflected its more limited role. Under Section 1-104 of the Executive Order, the Board was to:

> (a) advise the Federal Inspector for the Alaska Natural Gas Transportation System (the "Federal Inspector") established by Reorganization Plan No. 1 of 1979,

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[30] The Reorganization Plan explicitly listed the enforcement functions of the Federal Energy Regulatory Commission ("FERC") among the enforcement functions transferred to the Federal Inspector (Reorganization Plan, § 102(d)). Pursuant to 5 U.S.C. § 905(a)(1), a reorganization plan may not provide for or have the effect of "abolishing or transferring an executive department or an independent regulatory agency, or all the functions thereof, or consolidating two or more executive departments or two or more independent regulatory agencies, or all the functions thereof." Thus, the President acted within the law when he transferred the enforcement functions of FERC to the Federal Inspector through the Reorganization Plan, because the Plan neither transferred all the functions of the FERC nor eliminated an independent agency.

[31] Report accompanying the President's Decision at 203.

[32] Reorganization Plan § 201 at 33,665. The difference between Section 201 and the Decision could raise the question of how a reorganization plan can be inconsistent with an act, like the Decision, which, pursuant to its Congressional approval, has full force of law. Under 5 U.S.C. § 907(a), however, a reorganization plan supercedes a preceding statute with respect to the transfer of functions from one agency to another.

[33] Pursuant to § 1-103 of the Executive Order, the Inspector could always be elected as an additional member of the Board by a majority vote of its members.

on policy issues in accord with applicable law and existing Departmental or Agency policies;

(b) provide advice, through the Federal Inspector, to officers representing and exercising the functions of the Federal Departments and Agencies that concern the System ("Agency Authorized Officers");

(c) advise the Federal Inspector and the Agency Authorized Officers on matters concerning enforcement actions; and

(d) at least every six months, assess the progress made and problems encountered in constructing the System and make necessary recommendations to the Federal Inspector (emphasis added).

The Executive Order also established a process for the Inspector to overrule the Agency Authorized Officers' enforcement action. Upon receipt of written notice of a proposed enforcement action, the Inspector could make a determination that "implementation of Departmental or Agency enforcement policies and procedures would require action inconsistent with Section 9" of ANGTA. When such a determination was made, a written copy was to be forwarded promptly to the Board.

## II. The Impact of Section 3012 of the Energy Policy Act of 1992 on the Functions and Authorities of the Federal Inspector, the Energy Policy Board and the Agency Authorized Officers

Section 3012 of EPAct changed Federal oversight of ANGTS. Subsection (a) of Section 3012 repealed Section 7(a)(5) of ANGTA; subsection (b) of Section 3012 abolished the Office of the Federal Inspector and transferred "all functions and authority vested in the Inspector" to the Secretary of Energy; and subsection (c) of Section 3012 revoked regulations applicable to the Office of the Federal Inspector set forth in Chapter 15 of Title 10 of the Code of Federal Regulations.

The legislative history of EPAct's changes is limited. The only mention of these changes is in a Committee Report from the House of Representatives Committee on Energy and Commerce that explains that the Office of the Federal Inspector was abolished because "virtually nothing has happened in the construction of the ANGTS." The Report adds that the purpose of transferring the functions of the Inspector was "so that if new activity begins in the future on ANGTS, the Inspector's oversight can be carried out by [the Secretary]."[34]

[34] House of Representatives Committee on Energy and Commerce, Comprehensive National Policy Act, H.R. Rep. No. 102-474 Part I at 226 (1992). The bill then recommended by the Committee provided for the transfer of the Inspector's functions to the Chairman of the Federal Energy Regulatory Commission. The legislative history does not provide an explanation of why it was later decided to transfer those functions to the Secretary of Energy. See discussion infra at n.39.

The enactment of Section 3012 of EPAct necessitates analysis of the current status of the organization designed to coordinate and monitor construction of the ANGTS expeditiously and with minimal cost overruns due to regulatory confusion, while ensuring vigorous compliance and enforcement of all applicable statutes, rules, regulations and conditions. In analyzing the issues raised by Section 3012, it is essential to remember that the repeal found in EPAct is limited to a specific section of ANGTA, while the authorities vested in the Inspector were developed, expanded and codified through other provisions of law applicable to the ANGTS.

In particular, it is important to note that in January of 1992 the Federal Inspector released a report to the President (the "Bayer Report"), which called for a complete repeal of ANGTA and its accompanying regime.[35] Arguing that the assumptions underlying the creation of the ANGTS had proven, in hindsight, to be incorrect, the Bayer Report recommended, among other things, that Congress and the President

- Repeal the Alaska Natural Gas Transportation Act;
- Eliminate the exclusive ANGTS route to transport Alaska North Slope gas to the Lower 48;
- Eliminate the ANGTS project sponsors' unique legal monopoly status;
- Withdraw the President's Decision and Report, rescind Executive Order 12,142 and withdraw Reorganization Plan No. 1 of 1979;
- Restore to original agencies the special regulatory authorities transferred to OFI;
- Terminate the 1979 Agreement of Principles with Canada;
- Withdraw the Office of Federal Inspection Regulations; and
- Institute normal Federal agency shutdown procedures with regard to the Office of Federal Inspector.[36]

Significantly, the Bayer Report, inspired by philosophical and budgetary concerns, expressly recommended against a reorganization that would have simply eliminated the underutilized Office of the Federal Inspector but maintained the unique regulatory framework otherwise applicable to the ANGTS. In his conclusions, the Federal Inspector stated that "[p]erhaps as important as what is recommended is what is not. . . . The government should remove itself from dictating how and by whom Alaska gas is delivered to the Lower 48 states. Therefore, I do not recommend an option simply to move this Office (or to abolish the Office and move its authorities) to another department or agency, whether it be the Department of Energy, FERC or the Department of Interior."[37] Months after the release of the Bayer Report, Congress rejected these recommendations by enacting EPAct and specifically transferring "all functions and authority vested in the Inspector" to the Secretary of Energy.

In Section 3012 of EPAct, Congress chose to limit its intervention in the regulatory regime created by ANGTA to the transfer of functions from the Inspector to the Secretary of Energy, adopting the one policy option that the Bayer Report expressly opposed. Thus, Congress

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[35] Report to the President on the Construction of the Alaska Natural Gas Transportation System, January 14, 1992 (hereinafter "Bayer Report").
[36] Bayer Report at 13.
[37] Bayer Report at 16.

rejected the Bayer Report's premise that the special status of the ANGTS was no longer valid or necessary.

### A) Impact of EPAct on Statutory and Executive Functions and Authorities Vested in the Inspector

#### *1) Whether the EPAct invalidated all functions and authorities vested in the Federal Inspector*

Since Section 7(a)(5) was the only provision of ANGTA to mention the Federal Inspector, there may be a question as to whether its repeal invalidated all the functions and authorities vested in the Inspector. Although other actions taken pursuant to ANGTA created functions and authorities for the Inspector, it might be argued that such actions were premised on the existence of a Federal Inspector and that its removal rendered all such functions and authorities invalid or inapplicable.

As discussed above, the President's Decision, the Plan and the Executive Order vested functions and authorities in the Inspector. Given that section 3012 of EPAct did not refer to these provisions, the argument that they are invalid or inapplicable assumes that the repeal of Section 7(a)(5) was intended to also repeal other statutory authority by implication — a statutory construction that is generally disfavored. Moreover, section 3012 explicitly transferred all functions and authorities vested in the Inspector to the Secretary of Energy. Had these functions or authorities been repealed or eliminated, this provision would be without meaning. The brief legislative history noted above appears to confirm that the intent of Congress was to preserve the functions and authorities vested in the Inspector and have the Secretary of Energy exercise them.

#### *2) Whether EPAct affected functions and authorities found under the Terms and Conditions of the President's Decision*

The repeal found in EPAct is limited to Section 7(a)(5) of ANGTA. The monitoring functions and approval authority attributed to the Inspector under the Terms and Conditions of the President's Decision were implemented by the President pursuant to Section 7(a)(6) of ANGTA. These provisions are included in the Decision, which has, independent of Section 7(a)(5), the full force and effect of law. EPAct did not repeal other provisions of ANGTA or the Decision and there is no indication that Section 3012 would affect the monitoring functions and approval authority established under the Terms and Conditions. Consequently, the repeal of Section 7(a)(5) does not appear to alter the Terms and Conditions of the President's Decision and, therefore, the functions and authorities thereunder have been transferred to, and remain vested in, the Secretary of Energy.

### *3) Whether EPAct affected the supervisory authority over enforcement actions of Federal agencies*

An additional question is whether Section 3012 affected the Inspector's supervisory authority over enforcement actions of federal agencies. The Inspector's supervisory authority was specified by the President in his Decision and was implemented in the Reorganization Plan and in the Executive Order. Under the Decision, the Reorganization Plan and the Executive Order, the authority was vested in an independent office in the executive branch authorized to direct and oversee officers representing other federal agencies. One possible issue is whether such authority, designed to be independent of any other federal agency, could now be exercised by a Department or agency that would have otherwise been subject to the authority of an independent Inspector. It could be argued that the transfer of supervisory authority was contingent on the independent nature of the Inspector and that the abolition of the Federal Inspector rendered invalid or inapplicable the exercise of supervisory authority.

The Inspector's supervisory authority, however, was not related to the duties listed under Section 7(a)(5), the only section repealed by EPAct. There is an independent basis in law in the President's Decision for such authority. While EPAct revoked certain regulations applicable to the Office of the Federal Inspector, it did not mention the Reorganization Plan, which expressly vested the supervisory enforcement authority in the Inspector. Indeed, Section 3012 transferred all functions and authorities to the Secretary of Energy and nothing in the provision indicates that the supervisory enforcement authority conferred by the Reorganization Plan was to be excluded.

The language of Section 3012 is clear and unambiguous that all "functions and authority vested in the Inspector" have been transferred to the Secretary of Energy.[38] Moreover, while ANGTA and the President's Decision provided for an "independent" Federal Inspector, independence was not the Inspector's paramount reason for being. The primary purpose of the Inspector was to assure a coordinated and focused federal effort to ensure expeditious but compliant construction of the ANGTS. Congress determined in EPAct to repose the Inspector's functions and authorities in the Secretary of Energy, as opposed to any other federal official, which is consistent with a focus on clear policy coordination. Indeed, the ANGTS is a major energy supply project that represents a clear national energy policy to assure development of the vast but remote Prudhoe Bay reserves. The Secretary of Energy is the most senior federal official charged with energy policy development and coordination within the federal government.

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[38] In a letter to the U.S. Army Corps of Engineers, the Department of Energy confirmed that the Secretary of Energy currently exercises enforcement functions attributed to the Federal Inspector. With reference to a permit issued by the Corps of Engineers which contained conditions to be enforced by the Inspector, the Department stated that "[r]egarding permit reference to [the Office of Federal Inspector], it is not necessary to change those references to the Secretary of Energy in order to maintain the validity of the permit. The functions and authorities vested in the [Office of Federal Inspector], including the responsibilities reflected in the special conditions of the . . . permit, have been transferred to the Secretary by operation of law pursuant to section 3012(b) of EPAct. Thus, a reference to [Office of Federal Inspector] involving a transferred functions is deemed a reference to the Secretary, and no work can proceed under the permit without [Department of Energy]'s authorization." Letter from James K. White, Department of Energy to Colonel Sheldon I. Jahn, U.S. Army Corps of Engineers (August 21, 1997).

Thus, residing the Federal Inspector functions and authorities in the Secretary of Energy is remarkably consistent with long-standing Congressional intent.[39]

### *4) Whether the monitoring duties listed under Section 7(a)(5) have been eliminated*

The monitoring functions listed under Section 7(a)(5) of ANGTA were explicitly repealed by EPAct. Those monitoring functions, however, are listed in the President's Decision. The Decision has independent force and effect of law, because it was independently confirmed by Congress in the 1977 Joint Resolution. The Decision indicated that those functions were actions that the Inspector was to take upon Congressional approval of the Presidential designation.[40] This supports the argument that the President's Decision, to the extent it is implementing Section 7(a)(6) as distinct from Section 7(a)(5) of ANGTA, created an independent statutory basis for those functions, which have been transferred to the Secretary of Energy like all other functions and authorities set forth in the Decision.

This interpretation leads to the conclusion that no functions or authorities of the Inspector have actually been eliminated. The abolition of the Office of the Federal Inspector, therefore, is more appropriately viewed as a purely budgetary, government streamlining action to eliminate an office that was perceived as unnecessary at the time.[41] The legislative history of EPAct does not conflict with this interpretation, since the purpose of transferring all the functions and authorities of the Inspector to the Secretary of Energy was to allow the exercise of regulatory oversight of the ANGTS in the future.

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[39] In fact, the Department of Energy was established for the express purpose of coordinating the energy policy of the Federal government. In creating DOE, Congress stated that "formulation and implementation of a national energy program require the integration of major Federal energy functions into a single department in the executive branch." Department of Energy Organization Act ("DOE Act"), Pub. L. 95-91, 91 Stat. 565, 567 (1977), § 101(5), as amended, 42 U.S.C. § 7111(5). The DOE Act declared that "the establishment of a Department of Energy is in the public interest and will promote the general welfare by assuring coordinated and effective administration of Federal energy policy and programs." DOE Act, Section 102, as amended, 42 U.S.C. § 7112 (emphasis added). Thus, the Secretary of Energy is well suited to exercise the functions of the former Federal Inspector. The DOE Act vests in the Secretary broad functions and authorities to coordinate federal energy policy with other executive branch agencies. For example, the Secretary has the power to "propose rules, regulations, and statements of policy of general application with respect to any function within the jurisdiction of the [Federal Energy Regulatory Commission] under section 402 of [the DOE Act]." DOE Act, Section 403(a), as amended, 42 U.S.C. § 7173 (a).

[40] President's Decision at 41.

[41] The specific repeal of Section 7(a)(5) of ANGTA can be explained in light of the fact that this section required the President to appoint a Federal Inspector and mandated reporting to Congress. The reporting requirement had become pointless at the time, because no construction activity was foreseen in the near future. The intent to eliminate the office, but not the functions, explains why Congress did not repeal the provisions creating functions for the Inspector, but only the provision requiring its appointment. This conclusion is consistent with the legislative history, the failure of Congress to accept the recommendations of the Bayer Report and the silence of EPAct with respect to other statutory provisions vesting functions in the Inspector.

### *5) Whether EPAct deprived executive actions of a statutory basis*

It could be argued that the abolition of the Federal Inspector and the repeal of Section 7(a)(5) (which directed the President to appoint a Federal Inspector) have rendered the Reorganization Plan and the Executive Order invalid. Both the Plan and the Executive Order are executive actions designed to implement the Office of the Federal Inspector.[42] This might suggest that they cannot survive the abolition of the office.

The Reorganization Plan, however, was not promulgated pursuant to Section 7(a)(5), which is never mentioned in the text of the Plan, but pursuant to the President's Decision.[43] The Plan, therefore, would appear to implement the independent, Congressionally approved provisions found in the Decision, which added functions and authorities for the Inspector separate from those listed in Section 7(a)(5). In this context, the repeal of Section 7(a)(5) does not appear to deprive the Plan of its continuing legal effect.

On balance, the better argument is that, because EPAct provided for the transfer of all functions of the Inspector to the Secretary of Energy, it transferred those functions that were implemented by executive decisions and orders.

### *6) Whether the transfer of functions from an independent office to a Cabinet position alters the degree of control and supervision that the President would have over their exercise*

The Report accompanying the Decision characterized the Inspector as "an officer independent of other existing Federal agencies."[44] Similarly, Section 101 of the Reorganization Plan constituted the Office of the Federal Inspector as "an independent establishment in the executive branch." The transfer of its functions to a Cabinet position raises the issue of whether the President has a different degree of control and supervision over the exercise of such functions.

Although qualified as independent, the Office of the Federal Inspector was a part of the executive branch and was not vested with quasi-judicial functions. Section 101 of the Reorganization Plan clarified that the Inspector would "serve at the pleasure of the President." It appears that the President would have had the same degree of policy supervision and power of removal that he has over other appointees of the Executive Branch. This same relationship exists between the President and the Secretary of Energy under Article II of the Constitution.

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[42] The Reorganization Plan is titled "Office of the Federal Inspector for Construction of the Alaska Natural Gas Transportation System." Executive Order 12,142 implements selected sections of the Reorganization Plan and was expressly ordered by the President pursuant to Sections 202 and 205 of the Plan (the Executive Order recites: "By the authority vested in me as President by the Constitution and laws of the United States of America, including Section 301 of Title 3 of the United States Code and Sections 201 and 205 of Reorganization Plan No. 1 of 1979, it is hereby ordered as follows . . .").

[43] President's Decision at 41-42.

[44] Report Accompanying the President's Decision at 197.

## B) Impact of EPAct on the Executive Policy Board and the Agency Authorized Officers

### *1) Whether EPAct altered the structure or the functions of the Board*

Another issue raised by the enactment of Section 3012 relates to the status of the Executive Policy Board. It might be argued that, since the Board had the role of advising the Inspector on the performance of its functions, it ceased to exist when the office of the Inspector was abolished.

Section 3012 of EPAct does not reference the Board. Under the statutory and executive directives relating to the ANGTS, the Board and the Inspector were distinct and independent entities. Pursuant to Executive Order 12,142, the Inspector was not among the members of the Board. On balance, the Board's advisory role seems to depend on the existence of an office vested with certain functions with respect to the ANGTS, rather than on the existence of the Federal Inspector *per se*. The transfer of all functions and authorities of the Federal Inspector to the Secretary of Energy would seem to allow the Board to continue to perform its advisory role for the benefit of the Secretary in performing the duties of the former Federal Inspector. The transfer does not seem to have altered the structure of the Board, since the Federal Inspector was not a member under Executive Order 12,142.

It appears, therefore, that the Executive Policy Board could perform any of its functions, advise the Secretary of Energy on policy issues and make recommendations regarding the construction of the ANGTS, pursuant to Executive Order 12,142.

### *2) Whether EPAct affected the existence or the functions of the Agency Authorized Officers*

As previously discussed, it appears that supervisory authority over the enforcement actions of Federal agencies has been transferred to the Secretary of Energy pursuant to Section 3012 of EPAct. Such supervisory authority could not be exercised effectively without the existence of Agency Authorized Officers. Moreover, coordination among Federal agencies, an express goal of the President's Decision, could not be accomplished without Agency Authorized Officers. The Reorganization Plan directs each Federal agency with statutory responsibilities over any aspect of the ANGTS to appoint an Agency Authorized Officer.

Considering that EPAct does not refer to such provision and that the existence of the Agency Authorized Officers was not enacted pursuant to Section 7(a)(5) of ANGTA, it appears that Federal agencies would still be empowered to appoint Agency Authorized Officers to represent their authority on all matters pertaining to pre-construction, construction, and initial operation of the system.

## III. Possible Actions to Remobilize the Functions and Authorities Transferred to the Secretary of Energy

The Secretary of Energy could act of his own initiative and delegate to an *ad hoc* officer within the Department of Energy the functions and authorities transferred pursuant to EPAct. Volume 42 of the United States Code, section 7252 provides that the Secretary "may delegate any of his functions to such officers and employees of the Department as he may designate, and may authorize such successive redelegations of such functions within the Department as he may deem to be necessary or appropriate," except as otherwise expressly prohibited by law. Pursuant to 42 U.S.C. § 7253, the Secretary of Energy is also authorized "to establish, alter, consolidate or discontinue such organizational units or components within the Department as he may deem to be necessary or appropriate." It appears, therefore, that the Secretary of Energy could use its delegation and reorganization authority to create an office within the Department of Energy vested with the same functions and authorities as the Federal Inspector.[45] Pursuant to the rulemaking authority found in 42 U.S.C. § 7191(a)[46] and the Administrative Procedure Act,[47] the Secretary of Energy could promulgate the regulations necessary for such an office to exercise the functions and authorities of the former Federal Inspector.

Also, previously mentioned, it appears that the Energy Policy Board is legally still in existence and retains the same advisory functions assigned under Executive Order 12,142. The Congress or the President could call on the Board to make recommendations to the Secretary of Energy on the remobilization and exercise of functions and authorities transferred to the Secretary pursuant to Section 3012 of EPAct.

### Conclusion

A plain reading of Section 3012 of EPAct suggests that the Secretary of Energy currently possesses all the functions and authorities that were vested in the Federal Inspector. The same analysis indicates that the Energy Policy Board and the Agency Authorized Officers appear still to be part of the regulatory oversight with respect to the ANGTS. These conclusions can be a starting point for understanding the extent of the functions and authorities transferred to the Secretary of Energy and for discussion of possible actions to remobilize some of the entities involved in the Federal oversight of the ANGTS.

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[45] An executive reorganization could no longer be accomplished by means of a reorganization plan prepared by the President and transmitted to Congress. 5 U.S.C. § 905(b) sets a limitation on the use of reorganization plans and provides that "[a] provision contained in a reorganization plan may take effect only if the plan is transmitted to Congress (in accordance with section 903(b)) on or before December 31, 1984."

[46] "Subject to the other requirements of this title, the provisions of subchapter II of chapter 5 of title 5, United States Code, shall apply in accordance with its terms to any rule or regulation, or any order having the applicability and effect of a rule . . . issue pursuant to authority vested by law in, or transferred or delegated to, the Secretary . . . ." 42 U.S.C. 7191(a).

[47] 5 U.S.C. § 551.

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# Memorandum

**Privileged and confidential**
**Attorney work product**

DATE: October 5, 2001

RE: Role of the Office of the Federal Inspector and the Secretary of Energy with Regard to the Processing of the Alaska State Right-of-Way Application

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## Introduction

The Alaskan Northwest Natural Gas Transportation Company ("ANNGTC") recently reactivated its application with the State of Alaska for a right-of-way lease across State lands ("State Application"). As part of the process for the construction of the Alaska Natural Gas Transportation System ("ANGTS"), the ANNGTC entered into a Memorandum of Understanding ("MOU") with the State of Alaska concerning the continued processing of the application.[1] The purpose of this memorandum is to discuss the role that the Secretary of Energy ("Secretary"), in his capacity as the officer vested with the functions and authorities of the Office of the Federal Inspector ("OFI"), may be required to perform with respect to the State Application. This memorandum should be read in conjunction with the memorandum of the same date entitled "Current Status of the Functions and Authorities of the Federal Inspector for the Construction of the Alaska Natural Gas Transportation System" (hereinafter "OFI Status Memo").

The OFI was the central element of the organization created to streamline and centralize the Federal involvement with the construction of the ANGTS. Statutory and regulatory sources vested different types of functions and authorities in the Federal Inspector, including monitoring functions, approval authorities and enforcement authorities, and ultimately attributed to the OFI the exclusive responsibility for the enforcement of all Federal statutes relevant in any manner to the pre-construction, construction and initial operation of the ANGTS. The primary sources of the OFI functions and authorities are:

- Section 7(a)(5) of the 1976 Alaska Natural Gas Transportation Act ("ANGTA");[2]

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[1] A copy of the MOU is attached.

[2] Pub. L. No. 94-586, 90 Stat. 2903 (1976), as amended, 15 U.S.C. §§ 719-719o (1994).

- Section 5 of the President's Decision,[3] which selected the ANGTS pursuant to the process provided by ANGTA and fully incorporated the functions and authorities provided in Section 7 (a)(5) of ANGTA. The Decision was approved by Congress[4] and has the full force and effect of law;

- the Reorganization Plan No. 1 of 1979;[5] and

- Executive Order 12,142.[6]

Unfavorable market conditions placed the Alaska portion of the ANGTS into a holding phase and led to the repeal of Section 7(a)(5) of ANGTA and the abolition of the OFI by Section 3012 of the Energy Policy Act of 1992 ("EPAct").[7] The provision was essentially a budgetary, government streamlining measure, aimed at the elimination of an office that by then had become largely inactive. Section 3012 of EPAct, however, did not repeal the regulatory framework related to the ANGTS and transferred all functions and authorities of the OFI to the Secretary. As fully discussed in the OFI Status Memo, although Section 7(a)(5) was repealed by EPAct, all of these functions and authorities have a basis in law independent of that section. Any responsibility that the OFI would have had in relation to the Application is now vested in the Secretary.[8]

## I. The Role of the OFI and the Secretary in the Coordination between the Federal Government and the State of Alaska

### A) Coordination between Federal Government and State of Alaska

The regulatory framework developed in relation to the ANGTS identified the Federal Inspector as the officer generally responsible for providing the necessary coordination between the Federal government and the State of Alaska.

Section 7(a)(5) of ANGTA required the Federal Inspector to "establish a joint surveillance and monitoring agreement, approved by the President, with the State of Alaska similar to that in effect during construction of the trans-Alaska oil pipeline to monitor the construction of the approved transportation system within the State of Alaska." Significantly, this was the first function assigned to the Federal Inspector. The agreement, however, has never been finalized. Although Section 7(a)(5) of ANGTA was later repealed by EPAct, its provisions are reiterated, almost verbatim, in Section 5 of the President's Decision, which has independent force and effect as law because it was approved by Act of Congress. Therefore, the obligation to

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[3] Executive Office of the President, Decision and Report to Congress on the Alaska Natural Gas Transportation System, September 22, 1977 (hereinafter "President's Decision" or "Decision").

[4] Joint Resolution approving the Presidential decision on an Alaska natural gas transportation system, and for other purposes, Pub. L. No. 95-158, 91 Stat. 1268 (1977) (hereinafter "Joint Resolution").

[5] Reorganization Plan No. 1 of 1979, 44 Fed. Reg. 33,663, 93 Stat. 1373 (hereinafter "Reorganization Plan" or "Plan").

[6] Executive Order No. 12,142 of June 21, 1979, 44 Fed. Reg. 36,927.

[7] Pub. L. No. 102-486, 106 Stat. 3128 (1992).

[8] A list of all OFI functions and authorities now transferred to the Secretary and their statutory basis is attached.

establish a joint surveillance and monitoring agreement with the State of Alaska has an independent statutory basis and was not affected by the repeal of Section 7(a)(5) of ANGTA. When EPAct transferred to the Secretary all functions and authorities of the OFI, it necessarily also transferred the still outstanding responsibility for the establishment of a joint surveillance and monitoring agreement with the State of Alaska.

Coordination between the Federal government and the State of Alaska was essential to the regulatory process necessary for the construction and initial operation of the ANGTS. The President's Decision stated that "[t]here is contemplated cooperative action by the Federal and Alaska State Governments in the development and enforcement of stipulations and site specific terms and conditions. . . .[T]he Federal Inspector for construction of the [ANGTS] shall have supervision authority over the enforcement of these terms and conditions."[9] The Report accompanying the President's Decision explained that the establishment of a joint surveillance and monitoring agreement with the State of Alaska was to be a "substantial responsibility" for the OFI.[10] The Report also illustrated the scope of the coordination between the Federal government and the State of Alaska and stated that "[t]he Federal Inspector . . . will therefore work with the State of Alaska and with other States in a cooperative fashion both for the protection of the environment and for the expeditious construction of the pipeline. The terms and conditions and stipulations which pertain to State and Federal lands should be as similar as possible."[11]

**B) The Alaska State Right-of-Way Application**

The ANNGTC's State Application is the kind of activity to which such coordination was intended to apply. The OFI worked closely with the project sponsors on early processing of the State Application. When the sponsors suspended the project because of unfavorable market conditions, the Federal Inspector determined that the office would still be involved in monitoring the State Application. At the time of the project's suspension, OFI anticipated that it would be affiliated with a cabinet level Agency and reduced to three or four part time positions for the remainder of the suspension period, which OFI described as the "Holding Phase." The OFI issued a Remobilization Encyclopedia in 1984, revised in 1985, which listed tasks that the OFI was to perform during the Holding Phase and outlined a process leading to full remobilization once the sponsors had received a "market signal." During the Holding Phase, the OFI was to be responsible for core oversight jointly with the sponsors. Among the activities the Remobilization Encyclopedia listed to be undertaken during the Holding Phase was:"[c]oncentrate on securing the State of Alaska Right-Of-Way grant".[12] The Remobilization Encyclopedia also required the OFI to "continue to be responsible for whatever review and monitoring requirements exist for the ANGTS."[13]

Because of EPAct's transfer of OFI's functions and authorities to the Secretary, the Secretary should logically be expected to become involved at the current stage of the

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9 President's Decision, Section 5.

10 Report accompanying the President's Decision, Chapter VI.

11 Id. (emphasis added).

12 Remobilization Encyclopedia, I-4 (emphasis added).

13 Id.

ANNGTC's State Application in order to provide the necessary coordination between the Federal government and the State of Alaska. EPAct's transfer of all OFI's functions and authorities to the Secretary occurred by operation of law. The transferred duties include the responsibilities of the OFI during the so-called Holding Phase. Those responsibilities continue without the need for any trigger, "market signal" or full remobilization of the ANGTS project.

## II. The Role of the OFI and the Secretary in the Enforcement of Federal Statutes

One of the primary functions of the OFI was coordination among Federal agencies. In order to make such coordination effective, the President's Decision provided that the OFI would have supervisory enforcement authority over permits, certificates and other authorizations from other Federal Agencies. The Report accompanying the Decision characterized such authority as "essential to avoid project delays and minimize cost overruns" and suggested that, in absence of the OFI's enforcement authority, a "coordinate regulatory approach will be elusive."[14] The Reorganization Plan implemented the President's decision and vested in the Federal Inspector "exclusive responsibility for enforcement of all Federal statutes relevant in any manner to pre-construction, construction, and initial operation [of the ANGTS]."[15]

The continued processing of the ANNGTC's State Application may raise issues related to the enforcement of Federal statutes. In fact, over the next 15 months, the State of Alaska's work plan for the Joint Pipeline Office calls for several activities that could have a direct impact on Federal statutes and the Secretary's role in review and monitoring.[16] During that time, the State of Alaska plans to undertake review of several matters that reasonably should be coordinated with the Secretary. These matters include Federal statutes and standards, among others, that control stream crossings, mitigate impacts on fish and wildlife and determine the number and size of compressor facilities. Unless the Secretary exercises its authority, the process of establishing State conditions and standards may begin without a Federal coordinating presence. If this gap in coordination were to occur, ANNGTC believes it would be inconsistent with existing Federal law.

## III. Conclusion

For all of the reasons discussed above, the Secretary is, in ANNGTC's view, legally required to be involved at this stage in the processing of the ANNGTC's Application. The ANNGTC urges the Secretary to establish the joint surveillance and monitoring agreement with the State of Alaska in order to provide the level of coordination that the processing of the Application requires. The Secretary should also exercise, at this stage, its enforcement authority with respect to those issues related to the enforcement of Federal statutes as they are identified during the State review process.

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14 Report accompanying the President's Decision at 198-199.

15 Reorganization Plan, § 102.

16 See attached Work Plan.

# MEMORANDUM OF UNDERSTANDING AND REIMBURSEMENT AGREEMENT BETWEEN THE STATE OF ALASKA AND THE ALASKAN NORTHWEST NATURAL GAS TRANSPORTATION COMPANY CONCERNING THECONTINUED PROCESSING OF THE STATE RIGHT-OF-WAY LEASE APPLICATION FOR THE ALASKA NATURAL GAS TRANSPORTATION SYSTEM

## I. INTRODUCTION:

Whereas, on April 15, 1981, the Alaskan Northwest Natural Gas Transportation Company ("ANNGTC") filed an application with the State of Alaska ("State") under the Alaska Right-of-Way Leasing Act for a right-of-way lease across State lands;

Whereas, ANNGTC represents that ANNGTC's application was publicly noticed by the State;

Whereas, ANNGTC has a pending application for a State right-of-way lease and is prepared to respond to requests from the State for additional information necessary for the State to complete its review of ANNGTC's right-of-way application;

Whereas, ANNGTC wishes the State to complete its review of ANNGTC's application for a State right-of-way lease;

Whereas, ANNGTC represents that it is the successor to the Alcan Pipeline Company and is the company designated under United States and Canadian law as the company to construct and operate the Alaska portion of the Alaska Natural Gas Transportation System ("ANGTS");

Whereas ANNGTC represents that in 1982, prior to obtaining its requested State right-of-way lease ANNGTC placed the Alaska Highway Project on hold, including the acquisition of the State right-of-way lease, due to a decrease in demand for Alaska gas;

Whereas, ANNGTC represents that in 1982, at the time the Project was placed on hold, the ANNGTC application had reached the point where the Commissioner of Natural Resources was preparing his analysis of the ANNGTC application as contemplated by Section 38.35.080 of the Alaska Right-of-Way Leasing Act;

Whereas ANNGTC represents that given the substantial work undertaken with respect to obtaining a State right-of-way lease, ANNGTC continued to work on the lease application post-1982 with the belief that the application could be completed more expeditiously when the Alaska Highway Project was re-mobilized;

Whereas between April 1981 and 2000, ANNGTC filed a substantial quantity of reports, studies and analyses in support of, and reached certain agreements with, and approvals from the State related to its application;

Whereas the State and ANNGTC have agreed to evaluate all filings previously made by ANNGTC and previous approvals or agreements received from or reached with the State between 1981 and today, relating to the pending application;

Whereas, the State of Alaska, Department of Natural Resources, State Pipeline Coordinator's Office (hereinafter "SPCO") is the State agency assigned the responsibility to coordinate the processing of State approvals for such a pipeline in Administrative Order 187;

Whereas, the State of Alaska, Department of Natural Resources has established the Gas Pipeline Coordinator's Office (hereinafter "GPO") to assume and carry out the responsibilities assigned to the State Pipeline Coordinator's Office by Administrative Order 187;

Whereas, the parties agree that it is to the mutual benefit of the State and ANNGTC that the State have sufficient resources to work closely with ANNGTC as ANNGTC continues the process of procuring the State right-of-way lease and related ANNGTC permits for the Alaska Highway Project;

Whereas, the parties agree that it is to the mutual benefit of the State and ANNGTC that the State have a functional multi-agency office prepared to process ANNGTC's State right-of-way lease application and related ANNGTC permit applications;

Whereas, the parties agree that it is to the mutual benefit of the State and ANNGTC that the State pursue streamlined permit approval processes among State agencies and between the State and local, federal, and Canadian agencies;

Whereas, the parties agree that it is to the mutual benefit of the State and ANNGTC that State technical experts work with ANNGTC to identify impact prevention and mitigation measures, project design features, and best management practices that can be incorporated into a project design to reduce the need for permits and the need for conditions on permits; and

Whereas, the parties agree that it is to the mutual benefit of the State and ANNGTC that ANNGTC reimburse reasonable costs associated with the State's efforts related to processing of the ANNGTC State right-of-way lease application and related ANNGTC permit applications.

Therefore, in consideration of the premises and the mutual covenants contained herein, ANNGTC and the State, (through its agent GPO) have voluntarily entered into this Memorandum of Understanding and Reimbursement Agreement (hereinafter "MOU"), and agree and covenant as follows:

## II. AGREEMENTS:

The following are understood and agreed to by both parties:

A. ANNGTC and the State, through its representative, GPO agree to the following:

1) The purpose of this MOU is to provide for ANNGTC to defray the GPO's costs incurred in processing ANNGTC's right-of-way application. While the State will bill ANNGTC only for charges incurred in and relating to processing ANNGTC's application pursuant to this MOU and Exhibit A hereto, the State shall retain the sole discretion in allocating resources among various pipeline right-of-way applicants including ANNGTC. The

State will use its best efforts to do so in a manner which allows for the processing of ANNGTC's application in a timely and equitable manner and the State agrees to use its best efforts to add resources proportionate to the task at hand and as needed to enable the State to process ANNGTC's application in a timely and equitable manner.

2) This MOU covers ANNGTC's share of certain anticipated State expenses (as described herein) from the time the MOU is signed through the earlier of either the issuance of the State right-of-way lease to ANNGTC or until the MOU is terminated by either the State or ANNGTC pursuant to subparagraph II.A.9. Descriptions of the expenses covered by this MOU during State Fiscal Year 2002 to be shared by pipeline project proponents are described in this Section II.A and in Exhibit A hereto (collectively the "GPO Expenses"). ANNGTC's portion of GPO Expenses shall be as determined by this MOU and Exhibit A hereto. Exhibit A hereto (as modified from time to time) is agreed to be a part of this MOU. A description of the budget and scope of work for fiscal year 2002 are contained in Exhibit A hereto. ANNGTC and the State agree to develop a work plan describing specific tasks and target completion dates for those tasks as soon as possible after execution of this MOU.

3) Costs to establish a GPO consisting of State agencies with permitting and authorization authority and responsibility will be paid for solely by the State. Such costs will include: 1) costs relating to recruitment, moving, office furniture, computers, phone system purchase, and the purchase of major office equipment such as copiers, and 2) indirect costs for co-located State agencies working on various proponents pipeline right-of-way applications (or pre-application issues) including ANNGTC's State right-of-way application through the end of September 2001 ("State Funded Costs"). State Funded Costs shall be funded by State general funds. This MOU does not cover State expenses associated with activities unrelated to permits and authorizations or expenses for public participation processes unrelated to project permitting, such as the Governor's Policy Council, (collectively the "Non-MOU Expenses") which costs will also be funded by State general funds. Neither State Funded Costs nor Non-MOU Expenses shall be a part of GPO Expenses hereunder. Pipeline project proponents including ANNGTC agree to pay for all other costs to operate the GPO including ongoing costs related to rent, supplies and staff provided that ANNGTC's portion of GPO Expenses shall be determined by this MOU and Exhibit A hereto.

4) The State prefers and supports the Alaska Highway route for a natural gas pipeline from the North Slope to North American markets. The State opposes the "over the top" route as inconsistent with State policies regarding development of the State's natural resources. The State may devote resources to the "over the top" route if adequate staff is available. ANNGTC will not be invoiced for these resources.

5) ANNGTC will reimburse the State for ANNGTC's portion of the GPO Expenses actually incurred, as described in and determined by this MOU and Exhibit A hereto. ANNGTC agrees to continue to reimburse the State in this manner until the earlier of the date this MOU is terminated pursuant to Section II.A.9 hereunder or the ANNGTC right-of-way application is granted by the State.

6) ANNGTC shall have the right to conduct, at its own expense, reasonable audits by auditors or accountants, of the books, records, and documents of the GPO and of other State Agencies working on the ANNGTC State Right-of-Way Application and/or other ANNGTC State permit applications for which invoices are issued hereunder. The audits must be related to items on an invoice submitted under Section C.4 of this MOU and must be conducted at a place where such books, records, and documents are usually maintained and during normal GPO business hours. Written notice of the desire to conduct such an audit must be given by ANNGTC to the Gas Pipeline Coordinator at least 45 days prior to the desired commencement of such audit and not later than 1 year after the close of the fiscal year for which the books, records, and documents are sought to be audited. The State agrees to cooperate in the audit with ANNGTC representatives. Audits conducted under this section shall not commence more frequently than once a fiscal year, unless the parties agree in writing to a different time frame due to special circumstances. Audits conducted under this section shall be completed within 120 days after commencement. Within 60 days of the completion of such audit, if there are discrepancies ANNGTC wishes to pursue with the State, ANNGTC will provide notice to the State of any discrepancies identified by it during the course of the audit, and the State shall cooperate with ANNGTC to resolve the discrepancies in accordance with Section II.A.8 of this MOU.

7) On or before November 30, 2001, the State and ANNGTC agree to re-examine the scope of work, and budget for the second half of State fiscal year 2002. At that time, the State and ANNGTC will determine whether adjustments to the scope of work and/or budget are warranted based on progress made during the first half of State fiscal year 2002. The parties agree to use reasonable best efforts to annually re-examine the scope of work, budget and maximum amount of ANNGTC's share of GPO Expenses for subsequent State fiscal years in a timely manner prior to the commencement of each such subsequent State fiscal year until the earlier of the date the State right-of-way lease is granted to ANNGTC or this MOU is terminated pursuant to Section II.A.9.

8) The designated single points of contact for the State and ANNGTC will attempt to resolve any disagreements regarding matters covered by this MOU. Any disagreement that they cannot resolve will be resolved through discussions between the Project Manager of the ANNGTC and the Commissioner of Natural Resources.

9) Either party may terminate this MOU upon ninety (90) days written notice to the other party.

B. ANNGTC agrees to the following:

1) To establish a single point of contact with the State's representative hereunder, the GPO. That person will be Terry Klatt, or his appointed designee.

2) To reimburse its share of GPO Expenses incurred in accordance with this MOU and Exhibit A hereto within 45 days of receipt of invoices.

C. State agrees to the following:

1) To establish a single point of contact with ANNGTC. That person is William G. Britt, Jr., Gas Pipeline Coordinator, or his appointed designee.

2) To track the portion of GPO Expenses relating to work performed by the State for ANNGTC, and to request reimbursement from ANNGTC for only reasonably incurred State costs related to their work on ANNGTC's application, in accordance with this MOU and Exhibit A hereto.

3) For the period during which this MOU remains in effect, to provide ANNGTC with annual estimates of the anticipated GPO Expenses covered by this MOU. The initial estimate covering the period through the end of State Fiscal Year 2002 is attached. Subsequent annual estimates, upon agreement by the parties, shall be attached to and incorporated by reference into this MOU.

4) To invoice ANNGTC on a monthly basis its share of GPO Expenses incurred in accordance with this MOU and Exhibit A hereto.

The signatories to this MOU warrant that they have the authority to enter into this agreement on behalf of their respective organizations.

## III. SIGNATORY

This agreement is entered into and on the date last signed below.

STATE OF ALASKA

William G. Britt, Jr.
Gas Pipeline Coordinator

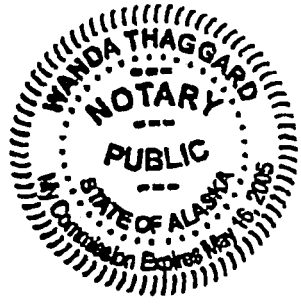

STATE OF ALASKA}
}ss
Third Judicial District }

This is to certify that on July 18, 2001, before me appeared William G. Britt, Jr. known by me to be the State Pipeline Coordinator of the Department of Natural Resources, who executed this document voluntarily signing it on behalf of the State of Alaska.

Wanda Thaggard
Notary Public in and for the State of Alaska
My commission expires: May 16, 2005

STATE OF ALASKA

Chris Rutz
Contracts Officer




STATE OF ALASKA}
}ss
Third Judicial District }

This is to certify that on July 18, 2001, before me appeared Chris Rutz, known by me to be the Contracts Officer for the Department of Natural Resources, and who executed this document on behalf of State Resources voluntarily signing it on behalf of the State of Alaska.

Wanda Thaggard
Notary Public in and for the State of Alaska
My commission expires: May 16, 2005

ALASKAN NORTHWEST NATURAL GAS TRANSPORTATION COMPANY

John R. Ellwood
Project Manager

STATE OF ALASKA}
}ss
Third Judicial District }

WANDA THAGGARD NOTARY PUBLIC STATE OF ALASKA My Commission Expires May 16, 2005

This is to certify that on July 18, 2001, before me appeared John R. Ellwood, known by me to be the Project Manager for the Alaskan Northwest Natural Gas Transportation Company, and who executed this document voluntarily signing it on behalf of the Alaskan Northwest Natural Gas Transportation Company.

Notary Public in and for the State of Alaska
My commission expires: May 16, 2005

Exhibit A

**Fiscal Year 2002**

Schedule:

State Fiscal Year 2002, and this MOU, begin on July 1, 2001 and end on June 30, 2002.

Scope of Work:

During Fiscal Year 2002, State activities covered by this MOU include:

- Establishing and maintaining a multi-agency Gas Pipeline Office based on guidance within Administrative Order 187
- Creating and implementing an integrated, streamlined State permitting process and plan applicable to ANNGTC's continued permitting needs
- Reviewing previously filed and new documents filed by ANNGTC in support of their application to determine their adequacy and the completeness of the application package
- Continuing to process the ANNGTC right-of-way application and processing related permit application materials submitted by ANNGTC
- Providing consultation to ANNGTC and their contractors
- Processing permits for ANNGTC and their contractors to perform field work
- Development of an updated land title report for the ANGTS route
- Gathering and developing selected information on historical and archeological resources, and other environmental, health and safety, and other topics as necessary and appropriate to respond to ANNGTC efforts and otherwise process applications for a gas pipeline
- Working with local governments to provide information and streamline permitting Working with the University of Alaska, the Alaska Mental Health Trust, and the Alaska Railroad Corporation to provide information and streamline permitting
- Working with the federal agencies to provide information and streamline permitting
- Working with the Canadian agencies to provide information and streamline permitting
- Working with Native corporations, tribal councils and other aboriginal or First Nations organizations to provide information and streamline permitting
- Working with the legislature and other State departments on legislative and regulatory initiatives related to permitting a gas pipeline
- Keeping the public and interested and affected parties informed of State and other actions related to permitting a gas pipeline
- Performing legal work in support of ongoing and anticipated application processing efforts

Budget:

The State anticipates total GPO costs for the period from July 1, 2001 through December 31, 2001 of $3,497,000. A portion of those costs will be paid for by the State using State general funds, as described in this MOU and Exhibit A and such State Funded Costs shall not be included as part of GPO Expenses for such period. The pipeline project proponents will pay for the GPO Expenses for this period, however, notwithstanding any other provision in this MOU or Exhibit A, ANNGTC's portion of the GPO Expenses for this period will not exceed $1,000,000 without prior consultation and written agreement between ANNGTC and the State.

The State anticipates total GPO costs for the period January 1, 2002 through June 30, 2002 to be approximately $4,379,000. A portion of these costs will be covered by State general funds as described in this MOU and Exhibit A hereto and such State Funded Costs shall not be included as part of GPO Expenses for such period. The parties agree that, notwithstanding any other provision of this MOU or Exhibit A, ANNGTC's portion of the GPO Expenses for this period will not exceed $1,094,750 unless another maximum limit is agreed to in writing by the State and ANNGTC. The parties agree that the estimate of $4,379,000, the scope of work, the budget and the maximum amount ANNGTC will pay as its portion of GPO Expenses, all for the period January 1, 2002 to June 30, 2002, may only be amended by the parties if agreed to in writing and will be considered when the parties meet as contemplated by the first sentence in Section II.A.7 of this MOU.

## Functions and Authorities of the Office of the Federal Inspector

### Monitoring Functions

- Establish a joint surveillance and monitoring agreement, approved by the President, with the State of Alaska similar to that in effect during construction of the trans-Alaska oil pipeline to monitor the construction of the approved transportation system within the State of Alaska **(Source: ANGTA, Section 7(a)(5); President's Decision, Section 5)**

- Monitor compliance with applicable laws and the terms and conditions of any applicable certificate, rights-of-way, permit, lease, or other authorization issued or granted under section 9 **(Source: ANGTA, Section 7(a)(5); President's Decision, Section 5)**

- Monitor actions taken to assure timely completion of construction schedules and the achievement of quality of construction, cost control, safety, and environmental protection objectives and the results obtained therefrom **(Source: ANGTA, Section 7(a)(5); President's Decision, Section 5)**

- Have the power to compel, by subpena [sic] if necessary, submission of such information as he deems necessary to carry out his responsibilities **(Source: ANGTA, Section 7(a)(5); President's Decision, Section 5)**

- Keep the President and the Congress currently informed on any significant departures from compliance and issue quarterly reports to the President and the Congress concerning existing or potential failures to meet construction schedules or other factors which may delay the construction and initial operation of the system and the extent to which quality of construction, cost control, safety and environmental protection objectives have been achieved **(Source: ANGTA, Section 7(a)(5); President's Decision, Section 5)**

- Receive a final design, design-cost estimate, and construction schedule from the successful applicant **(Source: President's Decision, Section 5, Terms and Conditions I.5)**

- Receive from the successful applicant cost-effective and feasible methods for supplying general and specialized equipment, repair facilities and spare-part inventories to execution contractors **(Source: President's Decision, Section 5, Terms and Conditions I.6)**

- Receive detailed information on the successful applicant's labor relations procedures **(Source: President's Decision, Section 5, Terms and Conditions I.7)**

- Receive from the successful applicant detailed description of quality assurance and control procedures **(Source: President's Decision, Section 5, Terms and Conditions I.9)**

- Receive from the successful applicant an effective plan for implementation of specific environmental safeguards **(Source: President's Decision, Section 5, Terms and Conditions III.3)**

- Coordinate the expeditious discharge of non-enforcement activities by Federal agencies and the compliance by all federal agencies with Section 9 of ANGTA **(Source: Reorganization Plan, Section 202(b))**

**Approval Authorities**

- Approve a detailed overall management plan for the preconstruction and construction phases provided by the successful applicant prior to the issuance of the certificate **(Source: President's Decision, Section 5, Terms and Conditions I.1)**

- Determine whether special conditions warrant use of cost-plus type contracts with execution contractors as opposed to otherwise required fixed-price contracts **(Source: President's Decision, Section 5, Terms and Conditions I.2)**

- Approve of insurance, bonding, and any other prequalification requirements for all consultants and execution contractors **(Source: President's Decision, Section 5, Terms and Conditions I.3)**

- Determine whether extenuating circumstances warrant relaxation of requirement that design cost estimate and schedule represent at least 70 percent of the total system**(Source: President's Decision, Section 5, Terms and Conditions I.5)**

- Approve the successful applicant's plan for taking affirmative actions to ensure no person be excluded from receiving or participating in certain contracts on grounds of race, creed, color, national origin or sex **(Source: President's Decision, Terms and Conditions I.11)**

- Approve of the design of any pipeline segment **(Source: President's Decision, Section 5, Terms and Conditions II.2)**

- Approve of the successful applicant's plan or procedure for conducting its own inspections of project facilities during construction **(Source: President's Decision, Section 5, Terms and Conditions II.5)**

- Approve of the successful applicant's seismic monitoring system **(Source: President's Decision, Section 5, Terms and Conditions II.6)**

**Enforcement Authority**

- Exercise exclusive responsibility for the enforcement of all Federal statutes relevant in any manner to pre-construction, construction and initial operation **(Source: Reorganization Plan, Section 102)**
- 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 **(Source: Reorganization Plan, Section 202(a))**

# ATTACHMENT 1

## ANNGTC STATE RIGHT-OF-WAY APPLICATION REVIEW
## TIMING FOR STATE APPROVALS

| TAB | JULY 1 TO DECEMBER 31, 2001 | TAB | JANUARY 1 TO JUNE 30, 2002 | TAB | JULY 1 TO DECEMBER 31, 2002 |
|---|---|---|---|---|---|
| 1 | Date of Application: | 20 | Temperature each Substance will be Transported and whether Heated or Refrigerated | 16 | Design Characteristics and Amount of each Type of Pipe Used |
| 2 | Name and Address of Applicant | 24 | Proposed Method for Stream Crossings and Crossings of other Bodies of Water | 22 | Methods to be Employed for Partially or Completely Burying any Portion |
| 3 | Point of Origin | 27 | Proposed Construction, Operation and Maintenance Support Facilities | | |
| 4 | Point of Termination | | | 23 | Bridges, Trestles, other structures or Beams for the Support of the Proposed Pipeline |
| 5 | Total Proposed Length | 29 | Size, Number and Approximate Location of Housing for Personnel Operating or Maintaining the Pipeline | | |
| | | | | 25 | Proposed Methods for Grades, Cuts or Fills |
| 6 | Total Length Proposed to Cross State Lands | 45 | Plans to Prevent, Detect and Abate Hazards to the Safety of the Workers | 26 | Planned Facilities for Spill or Leak Prevention and Containment |
| 7 | State Upland Ownership Along Proposed Right-of-Way | 46 | Plans to Prevent, Detect and Abate any Hazards to the Public Health and Safety | 30 | Size, Number and Approximate Location of Health Care Facilities |
| | | 47 | Plans to Prevent, Detect and Abate Harm or Damages to Public/Private Property | 31 | Approximate Number of Persons to be Employed during Construction |
| 8 | Proposed Crossings of Streams and Other Bodies of Water | 48 | Plans to Detect and Abate any Condition Arising from Construction, Operation, Maintenance or Termination That May Cause Harm or Damages to Vegetation or Timber | 32 | Approximate Number of Persons to be Employed to Operate and Maintain the Pipeline |
| 9 | Proposed Centerline Right-of-Way Crossing Stream Beds and other Bodies of Water | 50 | Plans for Restoring Areas of Vegetation or Timber Damaged by the Pipeline | 33 | Planned Commencement Date for Construction |

# ATTACHMENT 1

| TAB | JULY 1 TO DECEMBER 31, 2001 | TAB | JANUARY 1 TO JUNE 30, 2002 | TAB | JULY 1 TO DECEMBER 31, 2002 |
|---|---|---|---|---|---|
| | | 51 | Plans for Abating Erosion and Restoring Eroded Areas | 34 | Estimated Construction Time |
| 10 | Width of Proposed Temporary Right-of-Way required for Construction on State Land | 52 | Plans for Quality Control and Procedures for Inspection and Testing the Pipeline | 35 | Planned Commencement Date for Operations |
| | | 53 | Plans to Ensure Compliance by Contractors With Safeguards and Stipulations of the Right-of-Way Lease | 36 | Estimated Cost of Materials |
| 11 | Size and Location of any Temporary Sites | | | 37 | Estimated Cost of Construction and Installation |
| 12 | Width of Proposed Right-of-Way required for Operating the Completed Pipeline | | | 38 | Estimated Annual Cost for Operations and Maintenance |
| | | | | 39 | Connections Between Proposed Pipeline and Planned Field Gathering Systems |
| 13 | Size and Location of any Sites requested for the Operation of the Pipeline | | | 40 | Technical and Economic Feasibility of Providing Connections with Field Gathering Systems |
| 14 | Legal Description of State Lands within the Proposed Pipeline Right-of-Way | | | 41 | Technical and Economic Feasibility of Providing Connections or Interchanges with other Pipelines at Intermediate Points Along the Proposed Pipeline |
| 15 | Substances to be Transported | | | 42 | Locations, Area and Capacity of Proposed Tank Farms or other Storage Facilities |
| 17 | Size, Number and Location of Pumping, Compressing, Heating or Refrigeration | | | 43 | Description of any Terminal Delivery Facility of the Proposed Pipeline |
| | | | | 44 | Technical and Economic Feasibility of Providing Delivery Facilities at Intermediate Points |

# ATTACHMENT 1

| TAB | JULY 1 TO DECEMBER 31, 2001 | TAB | JANUARY 1 TO JUNE 30, 2002 | TAB | JULY 1 TO DECEMBER 31, 2002 |
|---|---|---|---|---|---|
| 18 | Transportation Capacity of the Proposed Pipeline | | | 55 | Probable Financing Requirements for the Proposed Pipeline |
| 19 | Estimated Life of the Pipeline | | | 56 | Annual Financial Statement and balance Sheet for each Applicant |
| 21 | Buried or Above Ground Pipeline | | | 57 | Name and Address of the Proposed General Contractor(s) for Construction (Much Later) |
| 28 | Size, Number, Approximate Location and Planned Duration of Field Camps | | | 58 | Name and Address of the Proposed Operator of the Pipeline |
| 49 | Plans to Prevent, Detect and Abate Harm or Damages to Fish or Wildlife | | | 59 | Other Information |
| 54 | Plans and Procedures to Protect the Interests of Individuals Living in the General | | | | |

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VanNess Feldman
ATTORNEYS AT LAW

# Memorandum

DATE: October 29, 2001

RE: How ANGTA Coordinates the Federal and State Agency Issuance of Permits and Other Authorizations for the ANGTS and Expedites Federal Action Related to the Construction and Initial Operation of the ANGTS

## I. Introduction

The Alaska Natural Gas Transportation Act of 1976 ("ANGTA") includes unique provisions for the coordination of Federal and state agencies' issuance of permits, certificates and authorizations for the Alaska Natural Gas Transportation System ("ANGTS") and for the expedition of Federal action related to the construction and initial operation of the ANGTS. ANGTA does this through Section 9 thereof which directs Federal officers and agencies to issue or grant all certificates, rights of way, permits, lease, or other authorizations "necessary or related to the construction or initial operation of the approved transportation system" and to do so "at the earliest practicable date." In addition, ANGTA established the Office of Federal Inspector ("OFI"). The OFI was the central element of the organization created to streamline and centralize the Federal involvement with the construction of the ANGTS, and the OFI was generally responsible for providing the necessary coordination between the Federal government and the State of Alaska. Furthermore, ANGTA includes unique provisions regarding environmental review and limitations on judicial review, all of which assist in the expeditious issuance of authorizations for the ANGTS.

## II. The ANGTA Framework Results in Increased Coordination Between Federal and State Agencies and in the Expeditious Issuance of the Federal Authorizations Needed for the ANGTS

In the mid-1970s, the Federal Power Commission ("FPC"), the predecessor to the Federal Energy Regulatory Commission ("FERC"), was struggling to choose, under section 7 of the Natural Gas Act ("NGA"),[1] the best among three mutually exclusive projects to deliver gas from the North Slope of Alaska to markets in the

[1] 15 U.S.C. § 717f.

lower 48 states. While agreeing with the FPC that known gas reserves and anticipated market demand in the lower 48 states would support the financing and construction of only one transportation system, Congress recognized that the FPC's complex procedures for choosing the most suitable proposal, and the likelihood of judicial challenges to the FPC's final decision, threatened to increase the cost for, and delay the delivery of, much-needed North Slope natural gas to American consumers. In light of the urgent need to meet demand in the lower 48 states and to blunt rising energy prices, Congress enacted ANGTA. ANGTA superseded the NGA process and the then-pending multiple FPC proceedings to certify a project to transport Alaska North Slope gas to markets in the lower 48 states. Instead, it empowered the President, subject to congressional approval, to choose a single project under ANGTA's unique procedures. In addition, ANGTA set forth various requirements intended to ensure that the system selected would be completed and in initial operation before any other proposals for moving Alaska natural gas to markets in the lower 48 states could be considered under the usual provisions of the NGA.

Section 5 of ANGTA specifically directed the FPC to suspend its pending comparative proceedings until either the President's decision took effect following congressional approval or no such decision took effect (either because Congress withheld its approval or the President decided not to designate a system). Once Congress approved the President's Decision, the FPC was then directed to vacate the suspended proceedings and to issue, in accordance with the President's Decision, a certificate of public convenience and necessity for the designated system and its sponsors. Under section 5, only if the President made no designation, or if the President's designation never became effective because it was not approved by Congress, could the certification of an initial Alaska natural gas transportation system thereafter be made under the normal NGA procedures.

In his Decision and Report under ANGTA,[2] President Carter selected, for the Alaska portion of the ANGTS, -the system and route proposed by the predecessor of the ANNGTC and incorporated in his Decision the U.S./Canada Agreement. The President's Decision, including the Agreement with Canada, was approved by Congress by Joint Resolution, Pub. L. No. 95-158, 91 Stat. 1268 (1977). ANGTA's procedures and limitations, and the President's decision as approved by Congress, remain in full force and effect today. The actions by the Chief Executive and the Congress confer a priority on the selected system that cannot constitutionally be revoked or undermined by administrative action of the FERC or any other Federal agency. Indeed, when Congress decided in 1992 to abolish the existing OFI and to transfer all the OFI's functions and authorities to the Secretary

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[2] Executive Office of the President, Decision and Report to Congress on the Alaska Natural Gas Transportation System, September 22, 1977 (hereinafter "President's Decision" or "Decision").

of Energy,[3] it determined to retain the unique legal framework that confers priority on the selected ANGTS, despite recommendations that it repeal ANGTA and revert to the NGA certification process superseded by ANGTA.

In addition to a priority status against alternative applications for the transportation of Alaska natural gas to the Lower 48, ANGTA grants the ANGTS expedition and precedence for the processing of those permits and authorizations needed for the construction and initial operation of the ANGTS. Section 9 of ANGTA expressly establishes the ANGTS as a priority for Federal agencies and requires agencies to expedite all actions with respect to the consideration of certificates or other authorizations related to the construction and initial operation of the approved system. Section 9(a) directs all Federal officers and agencies that issue a certificate, right-of-way, permit, lease, or other authorization required for "the taking of any action which is necessary or related to the construction and initial operation of the approved transportation system" to "issue or grant such certificates . . . and other authorizations at the earliest practicable date," to the "fullest extent" permitted by law.[4] Section 9(b) further directs each such Federal officer and agency to expedite "[a]ll actions . . . with respect to consideration of applications or requests" for such authorizations and to give those authorizations "precedence over any similar applications or requests."[5] In addition, Sections 9(c) and 9(d) authorize agencies to include terms and conditions in such authorizations, and to amend or abrogate any such terms and conditions, but with two important limitations: (1) the agencies may not take any action that would compel a change in the "basic nature" or "general route" of the approved system, as set forth in Section 2 of the President's Decision; and (2) they may not take any action that would otherwise prevent or impair in any significant respect the expeditious construction and initial operation of the system.[6]

To further help expedite the construction and initial operation of the project, Congress, in Section 10 of ANGTA, significantly limited judicial review of agency actions relating to the ANGTS, replacing the usual judicial review provisions of the NGA with more restrictive provisions.[7] Under Section 10, review is limited to claims that agency actions taken under ANGTA either denied constitutional rights or were in excess of statutory rights. The purpose of this limitation is to prevent reviewing courts from assessing the reasonableness or the record basis for agency actions taken with respect to the ANGTS, and thus to expedite construction and initial operation of the chosen system. This was affirmed in Earth Resources

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[3] See Section 3012 of Energy Policy Act of 1992 ("EPAct"), Pub. L. No. 102-486, 106 Stat. 3128 (1992).

[4] 15 U.S.C. § 719g(a).

[5] 15 U.S.C. § 719g(b).

[6] 15 U.S.C. §§ 719g(c), (d).

[7] 15 U.S.C. § 719h.

Company of Alaska v. FERC,[8] when the U.S. Court of Appeals for the D.C. Circuit dismissed a petition for review of a FERC order setting design specifications and initial capacity of the Alaska segment of the ANGTS, arguing that it had no jurisdiction under ANGTA to review the reasonableness of FERC's exercise of discretion.

In order to expedite even further construction of the ANGTS and avoid delays and cost overruns due to agency conflict, the ANGTA framework streamlined and centralized Federal involvement with the construction of the ANGTS through the creation of the OFI. Section 7(a)(5) of ANGTA, the President's Decision, and other executive sources vested a variety of functions and authorities in the Federal Inspector, including, among others, monitoring functions, approval authorities, and enforcement authorities, and ultimately attributed to the OFI exclusive responsibility for the enforcement of all Federal statutes relevant in any manner to the pre-construction, construction, and initial operation of the ANGTS, as well as the authority to delegate to an authorized officer of each agency the authority to enforce the terms, conditions, and stipulations of each grant, permit, or other authorization issued by that agency.[9] Furthermore, the regulatory framework developed in relation to the ANGTS identified the Federal Inspector as the officer generally responsible for providing the necessary coordination between the Federal government and the State of Alaska.[10]

Unfavorable market conditions placed the Alaska portion of the ANGTS into a holding phase and led to the repeal of Section 7(a)(5) of ANGTA and the abolition of the OFI by Section 3012 of EPAct. Section 3012 of EPAct was essentially a budgetary, government streamlining measure, aimed at the elimination of an office that by then had become largely inactive. It did not, however, repeal the regulatory framework related to the ANGTS, and transferred all functions and authorities of the OFI to the Secretary of Energy. Therefore, any responsibility that OFI would have had in relation to the ANGTS is now vested in the Secretary.

ANGTA also included several provisions intended to ensure that the completion of the ANGTS was consistent with maintaining safety, public health, and environmental protections and that the determination of the project's environmental impacts pursuant to ANGTA was conclusive as to the ANGTS' compliance with the National Environmental Policy Act of 1969 ("NEPA"). ANGTA provided in Section 7(b) for the transmission to the Congress of the President's Decision and a report explaining in detail factors relating to the project, including environmental impacts. Specifically, Section 7(b) required that the President's Decision be accompanied by a report "explaining in detail the basis for his decision

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8 Earth Resources Company of Alaska v. FERC, 617 F. 2d 775 (D.C. Cir. 1980).

9 Reorganization Plan No. 1 of 1979, §§ 102, 202(a), 44 Fed. Reg. 33,663, 93 Stat. 1373.

10 See e.g., President's Decision, Section 5.

with specific reference to the factors set forth in sections 5(c) and 6(a)."[11] ANGTA Section 5(c) required that the FPC's recommendation concerning the selection of the transportation system be accompanied by a report which included a discussion of the environmental impacts of each alternative considered.[12] ANGTA Section 6(a) authorized any federal officer or agency to submit comments to the President on the FPC's recommendation and report. Such comments were to include information with respect to "environmental considerations, including air and water quality and noise impacts."[13]

In addition, ANGTA Section 8(e) directed the President to "find that any required environmental impact statement relative to the Alaska natural gas transportation system designated for approval by the President has been prepared and that such statement is in compliance with [NEPA]." Section 8(e) further provided that the President's findings "shall be set forth in the report" of the President submitted under Section 7. Finally, the President could supplement or modify the environmental impact statements ("EISs") prepared by the FPC or other officers or agencies. Any such EISs were to be submitted to Congress with the President's Decision.[14]

ANGTA also made specific provision for the approval by Congress of the EISs submitted with the President's Decision. Section 10(c)(3) provided that: "The enactment of a joint resolution under section 8 approving the decision of the President shall be conclusive as to the legal and factual sufficiency of the [EISs] submitted by the President relative to the approved transportation system and no court shall have jurisdiction to consider questions respecting the sufficiency of such statements under [NEPA]."[15] The U.S. Court of Appeals for the D.C. Circuit found that "[t]he effect of this section is to place review in the Congress instead of the courts" and declined jurisdiction over the complaints brought under NEPA.[16]

Two final EISs and a supplemental EIS already have been prepared for the ANGTS project.[17] Pursuant to Sections 8(e) and 10(c)(3) of ANGTA, the President, in his Decision,[18] and Congress, in its ratification of the Decision,[19] found that the

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11 15 U.S.C. § 719e(b).

12 15 U.S.C. § 719c(c).

13 15 U.S.C. § 719d(a).

14 15 U.S.C. § 719f(e).

15 15 U.S.C. § 719h(c)(3).

16 Earth Resources Company of Alaska at 779.

17 The ANGTS currently has an EIS prepared on the pipeline in support of the federal right-of-way grant. In addition, the project has an EIS and a supplemental EIS prepared by the FPC on the pipeline. Subsequently, the FERC prepared an EIS on the conditioning facilities.

18 Report Accompanying a Decision on an Alaska Natural Gas Transportation System, at 133 ("The President hereby determines pursuant to the direction of Section 8(e) of ANGTA, that the required environmental statements relative to an Alaska natural gas transportation system

EISs were legally and factually sufficient under NEPA. In addition, the President, in Section 5 of his Decision, established a comprehensive mechanism under which Federal officers and agencies are to conduct further site-specific environmental review, mitigation, and compliance, and to include appropriate environmental terms and conditions in certificates, permits, rights-of-way, and other authorizations necessary to construct and initially operate the project. By enacting Section 10(c)(3) of ANGTA and by approving the President's Decision, including the mechanism in Section 5, in the Joint Resolution, Congress modified NEPA's application for purposes of the ANGTS. The Joint Resolution was an express Congressional finding "that any environmental impact statements prepared relative to [the ANGTS] and submitted with the President's decision are in compliance with [NEPA]." Thus, any further environmental review would be conducted through the implementation of the requirements of Section 5 of the President's Decision.

ANGTA, the President's Decision thereunder, and Congress's Joint Resolution approving the President's Decision provide clear guidance to federal agencies that, in carrying out their decisionmaking process, the ANGTS must be a priority. In order to expedite federal activities required for the construction and initial operation of the ANGTS, as required by ANGTA, agencies must schedule activities in accordance with this priority.

## III. The Office of the Federal Inspector, and Now the Secretary of Energy, Provides a Mechanism for Coordinating Governmental Activities With Respect to the ANGTS

### (A) Coordination Among Federal Agencies

The creation of the OFI, whose duties and authorities have since been transferred to the Secretary of Energy, provides an existing mechanism for coordinating governmental activities with respect to the ANGTS. As discussed above, the OFI was created as a way to streamline Federal activities related to the construction of the ANGTS. By centralizing many related functions in a single office, delays and cost overruns due to agency conflict would be avoided and construction of the project would be expedited. The OFI also was designed to provide a means of facilitating coordination between the Federal government and

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have been prepared, that they have been certified by the CEQ and that they are in compliance with [NEPA].").

[19] The Joint Resolution provides: "That the House of Representatives and Senate approve the Presidential decision on an Alaska natural gas transportation system submitted to the Congress on September 22, 1977, and find that any environmental impact statements prepared relative to such system and submitted with the President's decision are in compliance with [NEPA]." Pub. L. No. 95-158, 91 Stat. 1268 (1977).

the State of Alaska.

One of the primary functions of the OFI was coordination among Federal agencies. In order to make such coordination effective, the President's Decision provided that the OFI would have supervisory enforcement authority over permits, certificates and other authorizations from other Federal Agencies. The Report accompanying the Decision characterized such authority as "essential to avoid project delays and minimize cost overruns" and suggested that, in absence of the OFI's enforcement authority, a "coordinate regulatory approach will be elusive."[20] The Reorganization Plan implemented the President's decision and vested in the Federal Inspector "exclusive responsibility for enforcement of all Federal statutes relevant in any manner to pre-construction, construction, and initial operation [of the ANGTS]."[21]

**(B) Coordination between Federal Government and State of Alaska**

The regulatory framework developed in relation to the ANGTS also identified the OFI as the office generally responsible for providing the necessary coordination between the Federal government and the State of Alaska. Section 7(a)(5) of ANGTA required the Federal Inspector to "establish a joint surveillance and monitoring agreement, approved by the President, with the State of Alaska similar to that in effect during construction of the trans-Alaska oil pipeline to monitor the construction of the approved transportation system within the State of Alaska." The agreement has not yet been finalized. Although Section 7(a)(5) of ANGTA was later repealed by the EPAct, its provisions are reiterated, almost verbatim, in Section 5 of the President's Decision, which has independent force and effect of law because it was approved by an Act of Congress. Therefore, the obligation to establish a joint surveillance and monitoring agreement with the State of Alaska has an independent statutory basis and was not affected by the repeal of Section 7(a)(5) of ANGTA. When EPAct transferred to the Secretary of Energy all functions and authorities of the OFI, it necessarily also transferred the still outstanding responsibility for the establishment of a joint surveillance and monitoring agreement with the State of Alaska.

Coordination between the Federal government and the State of Alaska was essential to the regulatory process necessary for the construction and initial operation of the ANGTS. The President's Decision stated that "[t]here is contemplated cooperative action by the Federal and Alaska State Governments in the development and enforcement of stipulations and site specific terms and conditions. . . .[T]he Federal Inspector for construction of the [ANGTS] shall have supervision authority over the enforcement of these terms and conditions."[22] The

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20 Report accompanying the President's Decision, at 198-199.

21 Reorganization Plan, § 102.

22 President's Decision, Section 5.

Report accompanying the President's Decision explained that the establishment of a joint surveillance and monitoring agreement with the State of Alaska was to be a "substantial responsibility" for the OFI.[23] The Report also illustrated the scope of the coordination between the Federal government and the State of Alaska and stated that "[t]he Federal Inspector . . . will therefore work with the State of Alaska and with other States in a cooperative fashion both for the protection of the environment and for the expeditious construction of the pipeline. The terms and conditions and stipulations which pertain to State and Federal lands should be as similar as possible."[24]

### (C) The Alaska State Right-of-Way Application

The ANNGTC's State Application is the kind of activity to which such coordination was intended to apply and in which the Secretary of Energy, as successor of the OFI, could become involved at the current stage. The OFI worked closely with the project sponsors on early processing of the State Application. When the sponsors suspended the project because of unfavorable market conditions, the Federal Inspector determined that the office would still be involved in monitoring the State Application. At the time of the project's suspension, OFI anticipated that it would be affiliated with a cabinet level Agency and reduced to three or four part time positions for the remainder of the suspension period, which OFI described as the "Holding Phase." The OFI issued a Remobilization Encyclopedia in 1984, revised in 1985, which listed tasks that the OFI was to perform during the Holding Phase and outlined a process leading to full remobilization once the sponsors had received a "market signal." During the Holding Phase, the OFI was to be responsible for core oversight jointly with the sponsors. Among the activities the Remobilization Encyclopedia listed to be undertaken during the Holding Phase was:"[c]oncentrate on securing the State of Alaska Right-Of-Way grant".[25] The Remobilization Encyclopedia also required the OFI to "continue to be responsible for whatever review and monitoring requirements exist for the ANGTS."[26]

Because of EPAct's transfer of OFI's functions and authorities to the Secretary of Energy, the Secretary should logically be expected to become involved at the current stage of the ANNGTC's State Application in order to provide the necessary coordination between the Federal government and the State of Alaska. EPAct's transfer of all OFI's functions and authorities to the Secretary of Energy occurred by operation of law. The transferred duties include the responsibilities of the OFI during the so-called Holding Phase. Those responsibilities continue without

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23 Report accompanying the President's Decision, Chapter VI.

24 Id. (emphasis added).

25 Remobilization Encyclopedia, I-4 (emphasis added).

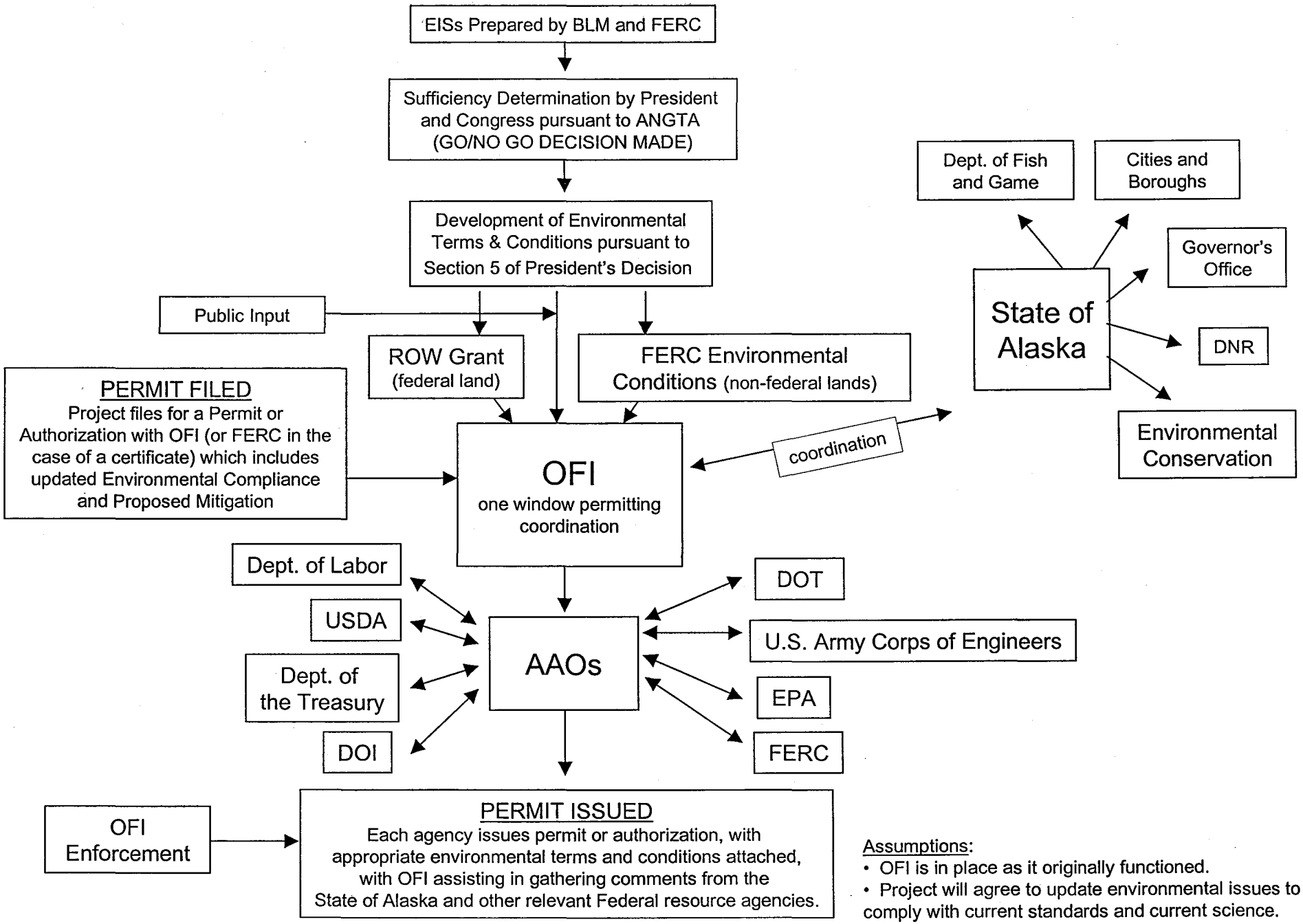
26 Id.

the need for any trigger, "market signal" or full remobilization of the ANGTS project.

## IV. Conclusion

Through its expedited permitting provisions, limits on agency discretion, and limited judicial review, ANGTA provides substantial regulatory certainty and expedition. The creation of the OFI, whose authorities are now vested in the Secretary of Energy, provides an existing mechanism for the coordination of Federal activities related to the project, as well as for coordination between the Federal government and the State of Alaska.

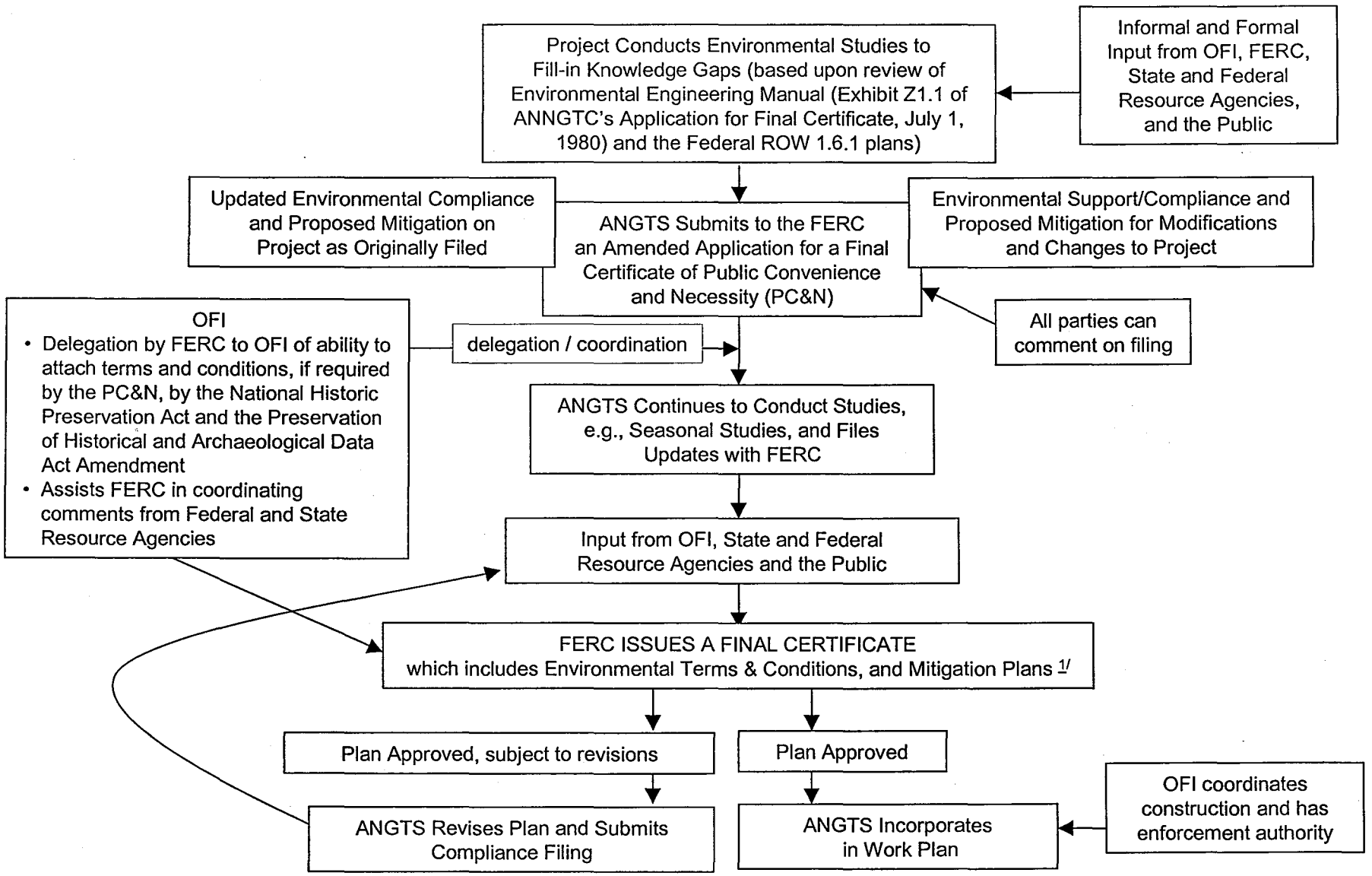
# ANGTS FEDERAL ENVIRONMENTAL DOCUMENTATION PROCESS -- U.S.




Assumptions:

- OFI is in place as it originally functioned.
- Project will agree to update environmental issues to comply with current standards and current science.

# ANGTS FERC CERTIFICATE AND ENVIRONMENTAL DOCUMENTATION PROCESS -- U.S.




1/ The ANGTS' sponsors would endeavor to have such terms and conditions mirror those included in the Federal ROW grant.

# ANGTS FEDERAL LAND RIGHTS AND ENVIRONMENTAL DOCUMENTATION PROCESS - U.S.