

## Routing the Alaska Pipeline Project through the Tetlin National Wildlife Refuge *What responsibilities do agencies have under ANILCA?*

The Alaska Pipeline Project (APP) is proposing a pipeline route that will cross the U.S.-Canada border from lands within the Tetlin National Wildlife Refuge. Congress created the Tetlin National Wildlife Refuge as a conservation system unit through the Alaska National Interest Lands Conservation Act (ANILCA). ANILCA establishes general processes that must be followed and findings that must be made in determining whether federal agencies will approve the construction of transportation or utility systems when they cross lands set aside under that act. In addition, Congress subsequently enacted the Alaska Natural Gas Pipeline Act (ANGPA), which establishes specific procedures for processing permit applications for pipelines that would deliver natural gas from the North Slope of Alaska to the Canadian border.

### **Requirements of ANILCA**

In 1980, Congress enacted ANILCA and established the Tetlin National Wildlife Refuge as well as other protected lands in Alaska of particular national interest. The statute also established a procedure, Title XI of the act, 16 U.S.C. 3161-3172, for reviewing proposed transportation or utility systems through these newly protected areas using a consolidated process for approval or disapproval. Hereafter, references made to ANILCA are specific to the requirements of Title XI of the act and the implementing regulations, 43 CFR Part 36.

ANILCA defines a term, “applicable law,” which is the law under which an agency would authorize a transportation or utility system if not for ANILCA. The statute then adds additional procedures and findings that apply when considering transportation and utility systems in conservation system units in addition to considerations under each agency’s applicable law.

ANILCA requires all federal agencies that must authorize all of or part of a transportation or utility system to participate in a unified process. It defines the term “Federal agency” to mean “any Federal department or agency that has any function or duty under applicable law.” This imposes the procedural requirements of ANILCA on all federal agencies that must approve a transportation or utility system. *ANILCA’s procedural steps must be followed with respect to authorization of the entire system when all or a part of the system would pass through a conservation system unit identified in ANILCA.*

Accordingly, ANILCA requires each agency that must issue any permit or license for the project to determine whether to approve the system, and leaves intact any other requirements of each agency to issue the permits, licenses or other approvals that would otherwise be required.

ANILCA requires that a lead agency prepare a single environmental impact statement (EIS) for the entire system in compliance with the National Environmental Policy Act. ANILCA provides specific timeframes for preparation of the EIS. The draft EIS must be prepared within nine months of the date the application is filed and the final EIS is to be completed three months later. ANILCA allows the lead agency to determine additional time is necessary for good cause. That single EIS is to be relied on by all of the agencies in making their decisions with respect to the system. While each agency must make the required findings, the data, information and analysis supporting the findings would normally be included in the EIS. So unless the applicable law provides different standards for decisions, the findings for each agency should be substantially the same.

Each agency must make its ANILCA determination and decision whether to approve the project within four months of the completion of the final EIS. If each agency approves the proposal in accordance with ANILCA considerations and its applicable laws, the system is deemed approved and each agency shall promptly issue its respective authorization. If any agency decides to disapprove, the project is deemed disapproved. The applicant has the right to appeal to the President. The President may override an agency's disapproval on the basis of two findings:

1. The project would be in the public interest, and
2. The project would be compatible with the purposes for which the conservation unit was established.

In making the decision, the President shall consider the EIS, public and agency comments, and the findings and recommendations of the federal agencies that rendered a decision with respect to the ANILCA application.

### Agencies in the ANILCA process

Determining which agencies would be required to participate in an ANILCA process is not straightforward. The drafters of ANILCA intended for all agencies with jurisdiction for issuing any permit, right-of-way, license, certificate or other authorization required for a system that passes through a conservation system unit to participate.

For some approvals, it is clear that an agency will be required to participate in the ANILCA process. For example:

- The Secretary of the Interior grants the right-of-way to cross all federal lands, after consulting with other agencies with interests in the land.
- The Federal Energy Regulatory Commission (FERC) issues a certificate of public convenience and necessity under Section 7 of the Natural Gas Act, authorization for the export of natural gas under Section 3 of the Natural Gas Act, and a Presidential Permit under Executive Order 10485 for border facilities at the international boundary between the United States and Canada.
- The U.S. Army Corps of Engineers (USACE) issues permits to place fill into wetlands under §404 of the Clean Water Act and for work in navigable waters under §10 of the Rivers and Harbors Act. USACE is also responsible for ocean disposal sites of dredged material as appropriate and the transport of dredged material to the site under §103 of the Marine Protection, Research and Sanctuaries Act, if the application includes such a proposal.
- The U.S. Coast Guard issues permits under the Rivers and Harbors Act and the General Bridge Act, if the pipeline crosses any navigable waterway.

For other agencies, it is less obvious whether the law under which they may authorize the project meets the definition of "applicable law" under ANILCA. For instance, incidental take statements are normally issued under the Endangered Species Act by the Fish and Wildlife Service and the National Marine Fisheries Service for major projects involving a biological opinion and letters of authorization or incidental harassment authorizations for incidental take of marine mammals under the Marine Mammal Protection Act. The Fish and Wildlife Service is also responsible for permits for take of bald and golden eagles and their nests under the Bald and Golden Eagle Protection Act. These statements or authorizations address the taking or harassing of these species, which presumptively could be mitigated through reasonable and prudent measures and avoidance. Thus, it is unclear whether the

transportation or utility system could be constructed without such statements or authorizations, since the taking or harassing of threatened or endangered species is otherwise outlawed.

EPA may have to participate in the process under its authority to issue a National Pollution Discharge Elimination System (NPDES) permit under §402 of the Clean Water Act to allow discharges into waters of the United States. The authority to issue NPDES permits for oil and gas activities has not yet been delegated to the state of Alaska as part of the state program under the Clean Water Act. The state is working to obtain this authority to issue such permits in the near future. If it does so before APP files its applications, then the EPA may not need to participate in the ANILCA process.

### **Requirements of ANGPA**

While ANILCA provides a general approach to processing permit applications for transportation or utility systems through conservation system units, ANGPA provides a specific process for approving and constructing one specific system — a natural gas pipeline from the North Slope of Alaska to the Canadian border.

ANGPA establishes a specific expedited procedure for the preparation of an EIS for an Alaska natural gas transportation project. Congress designated the FERC as the lead agency to prepare a single EIS that consolidates the environmental reviews of all federal agencies considering any aspect of the Alaska natural gas transportation project.

ANGPA also requires that:

1. The EIS "shall be adopted by each Federal agency" . . . in satisfaction of the responsibilities of the Federal agency under section 102(2)(C) of the National Environmental Policy Act."
2. All agencies considering an aspect of the construction and operation of a project shall cooperate with FERC and comply with the commission's deadlines in preparation of the environmental impact statement.

ANGPA established clear deadlines for the completion of the EIS. A draft EIS must be completed within 12 months of the filing of a complete application with the FERC. The final EIS must be completed six months later. FERC is then required to determine whether to issue a certificate of public convenience and necessity within 60 days after completion of the final EIS. ANGPA is silent with respect to the timing of other agencies' decisions.

### **Requirements of the Energy Policy Act of 2005**

Section 313 of the Energy Policy Act (EPA) of 2005 applies permitting provisions comparable to those in ANGPA to other projects under the Natural Gas Act. EPA designates FERC as the lead agency for preparation of environmental impact statements for natural gas projects. In addition, it authorizes FERC to establish schedules for all federal authorizations that all other agencies must meet. The statute authorizes the applicant to seek judicial enforcement of the schedules.

Pursuant to this authority, FERC has issued regulations that require other agencies to make a decision on their authorizations for natural gas projects subject to Section 3 or 7 of the Natural Gas Act no later than 90 days after FERC issues its final environmental document, unless another schedule is established by federal law.

## Comparison of ANILCA, ANGPA, and EAct

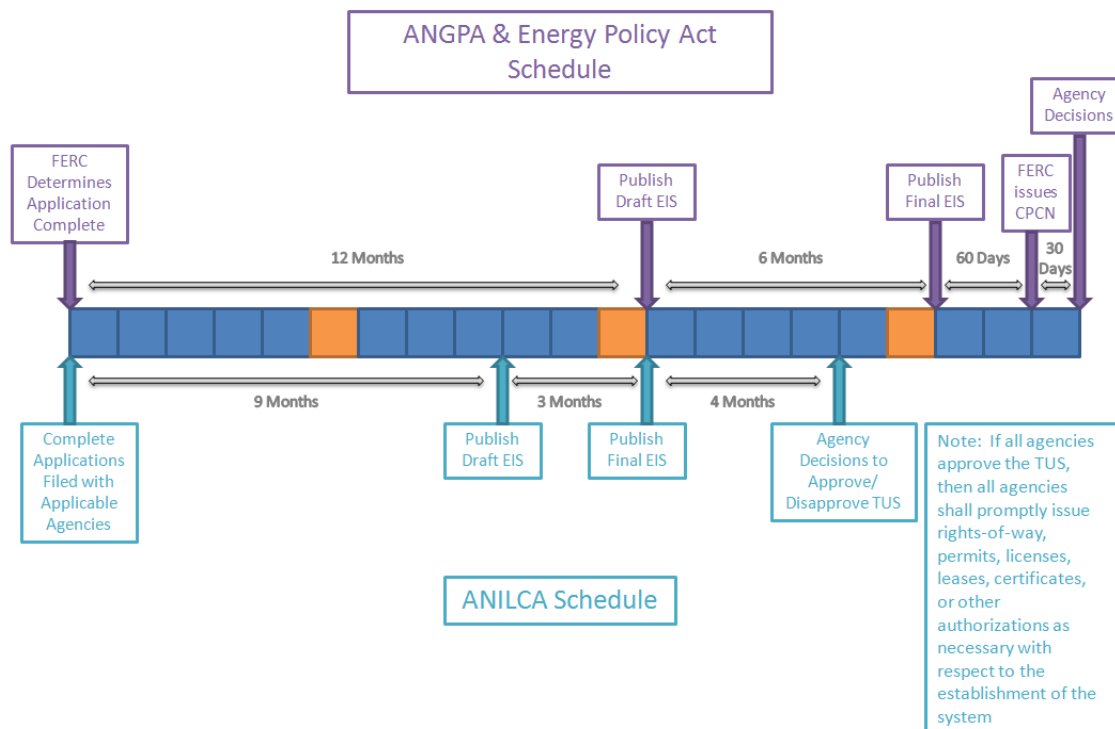
Aside from the obvious difference that ANILCA is a general statute that applies to any transportation or utility system that crosses any conservation system unit in Alaska, and that ANGPA addresses a particular gas line from one specific place to another, there are many similarities and a few differences between ANILCA and ANGPA. Both statutes require most or all of the federal agencies that make decisions with regard to the project to participate in the preparation of a single EIS prepared by a chosen lead agency. ANGPA's language is a bit broader in this regard, extending the obligation to rely on the EIS to all federal agencies with decisions to make about the pipeline that may not meet ANILCA's test of issuing an authorization essential for the construction of the pipeline.

The time frames for NEPA compliance are different with ANILCA requiring an EIS to be complete within 12 months as opposed to the 18-month timeframe under ANGPA. This difference reflects a congressional recognition that the Alaska gas line is more complex to construct than a road or telephone line and that more agencies are likely to be included in the decision process. The time difference can be resolved if the lead agency follows the procedure outlined in ANILCA for extending the time for preparation of an EIS – publish a notice in the Federal Register, signed by the head of the lead agency, indicating that it has determined that good cause exists to extend the ANILCA deadlines for NEPA to correspond with ANGPA's deadlines.

ANILCA, ANGPA, and EAct all require schedules for a NEPA environmental review and timely issuance of authorizations. The key difference is the timing of the authorizations:

1. Agencies that must approve a transportation or utility system under ANILCA have four months after the final EIS to complete their decisions, followed by the issuance of the authorization, if appropriate.
2. Agencies that do **not** have to approve a transportation or utility system under ANILCA have 90 days after the final EIS (under EAct) to make their decisions.

The figure below highlights the different timelines under ANILCA, ANGPA, and EAct.



## Looking Forward

If the pipeline routing as proposed by APP continues through Tetlin Wildlife Refuge, ANILCA will define the approval or disapproval process for certain federal agencies. It will be necessary for each agency to make its own determination if it is considered an applicable agency with an applicable law. Additionally, it will be necessary for APP to have obtained sufficient data at the time of their application to FERC to meet not only the data needs for the EIS but also for each authorization.