OPINION
76-130

April 29, 1976 (OPINION)

Mr. Vern Fahy

State Engineer

State Water Commission

900 East Boulevard

Bismarck ND 58505

RE: SWC Project No. 1595

Dear Mr. Fahy:

This is in reply to your letter of April 12, 1976, relative to the relationship between the Public Service Commission and the State Engineer in administering the provisions of Chapters 49-22 and 61-04 of the North Dakota Century Code. You state the following facts and questions:

I.

"Specific provisions of the 'North Dakota Energy Conversion and Transmission Facility Siting Act', hereinafter referred to as the Act, declare that the Public Service commission shall make siting determinations for energy-conversion facilities which will be binding on other state agencies. Examples of such provisions are:

> . . . no energy conversion facility or transmission facility shall be located, constructed, and operated within this state without a certificate of site compatibility. . . (Section 49-22-02)
>
> 49-22-16. EFFECT OF ISSUANCE OF CERTIFICATE OR PERMIT - FACILITY LICENSING - STATE AGENCY PARTICIPATION.
>
> 1. The issuance of a certificate of site compatibility or a transmission facility permit . . . shall, subject to subSections 2 and 3, be the sole site approval required to be obtained by the utility.
>
> * * *
>
> 3. Utilities subject to this chapter shall obtain state permits that may be required to construct and operate energy conversion facilities and transmission facilities. A state agency in processing a utility's facility permit application shall be bound to the decisions of the commission with respect to the energy conversion facility or

the corridor or route designation for the transmission facility and with respect to other matters for which authority has been granted to the commission by this chapter.

4. State agencies authorized to issue permits required for construction or operation of energy conversion facilities or transmission facilities shall participate in and present the position of the agency at public hearings and all other activities of the commission on specific site, corridor, or route designations of the commission, which position shall clearly state whether the site, corridor, or route being considered for designation or permit approval for a certain size and type of facility will be in compliance with state agency standards, regulations, or policies. No site or route shall be designated which violates state agency regulations. (emphasis added)

Of particular interest is the syntax of the emphasized provisions of Section 49-22-16: It clearly indicates that Public Service Commission decisions are a condition precedent to processing of applications by other state agencies.

The above provisions are clarified by the definitions provided in Section 49-22-03:

1. "Certificate" means the certificate of site compatibility issued under the provisions of this chapter.

2. "Commission" means the North Dakota public service commission.

* * *

6. "Facility" means an energy conversion facility, transmission facility, or both.

7. "Permit" means the permit for the construction of a transmission facility within a designated corridor issued under the provisions of this chapter.

* * *

9. "Route" means the specific location of a transmission facility within a designated corridor.

* * *

1. "Transmission facility" means:

* * *

c. A gas or liquid transmission line and associated facilities designed for or capable of transporting . .

. water . . . to an energy conversion facility . . .

It therefore appears that the Act requires that the State Engineer be bound by the Public Service Commission's determination concerning the specific route designation for the energy-conversion facility's water transmission facilities. The specific route designation would, of necessity, include the specific origin, specific terminus, and specific course of the water transmission facilities.

Further, it appears that such designation of the specific origin of the water transmission facilities is essential before the State Engineer may process an application for a water permit since the specific origin of the water transmission facilities must, of course, be the "proposed water appropriation site". Section 61-04-05 states, in part:

> Upon the filing of an application which complies with the provisions of this chapter and the rules and regulations established thereunder, the state engineer shall instruct the applicant to: (1) give notice thereof by certified mail in the form prescribed by him, to all record title owners of real estate within a radius of one mile from the location of the proposed water appropriation site, except where the one-mile radius extends within the geographical boundary of a city the notice shall be given to the governing body of such city and no further notice need be given to the record title owners of real estate within the geographical boundary of said city; and (2) publish notice thereof, in a form prescribed by him, in some newspaper of general circulation in the stream system, once a week for two consecutive weeks. Such notice shall give all essential facts as to the proposed appropriation, among them the places of appropriation and of use, amount of water, the purpose for which it is to be used, the name and address of the applicant and the time when the application will be taken up by the state engineer for consideration.

Therefore, my question is: Must the Public Service Commission designate the specific origination of the water transmission facilities before the State Engineer can process an application for a water permit?

If so, are pending applications for water permits for energy-conversion facilities affected? It would appear that the State Engineer should suspend further processing action on the pending applications for water to be used in energy-conversion facilities until after the Public Service Commission has issued both a certificate of site compatibility and a permit for the construction of a transmission facility.

II.

A letter dated January 29, 1976, from James L. Grahl, Manager of Basin Electric Power Cooperative, to Governor Link indicates: (1) that the Public Service Commission is unable to

process the application for a certificate of site compatibility until the Mercer County Planning and Zoning Commission grants a conditional use permit; and (2) that the Mercer County Zoning Ordinance does not authorize the granting of a conditional use permit until they have received "written evidence of approval for a water permit from the State Water Commission".

It is correct that the Mercer County Planning and Zoning Commission must issue a conditional use permit before the Public Service Commission may issue a certificate of site compatibility:

> A certificate of site compatibility for an energy conversion facility shall not supersede or preempt any county or city land use, zoning, or building rules, regulations, or ordinances and no site shall be designated which violates local land use, zoning, or building rules, regulations, or ordinances. (49-22-16(2) (emphasis added)

However, is the Mercer County Planning and Zoning Commission authorized to require "written evidence of approval for a water permit from the State Water Commission" to accompany an application for a conditional use permit?

It is the State Engineer that grants water permits pursuant to Chapter 61-04. The State Water Commission's approval is not required unless the water involved is subject to a declaration of intent (Section 61-02-30); in other situations the State Water Commission's approval is not legally binding on the State Engineer.

Also, depending upon your answer to the first question of this letter, the State Engineer may be precluded from granting a water permit until after the Public Service Commission has issued a certificate of site compatibility and a permit for the construction of a transmission facility. It would appear that the Mercer County ordinance is in conflict with Chapter 49-22 and, consequently, is invalid.

III.

Attached are draft conditions which may be attached to any water permit to be granted to Natural Gas Pipeline Company of America - provided the State Water Commission recommends approval of the application. Also attached, as a part of the document, is a draft contract which would precede any final approval of a water permit. Would you comment on the legality of the conditions and contract.

IV.

The above-mentioned contract and conditions contemplate final action by the State Engineer at the time the application for a water permit is approved. However, if the water permit must be approved before the Public Service Commission considers the siting application, there may not be adequate information available to make a "public interest" judgment as is required

by Section 61-04-07:

> (The state engineer) may refuse to consider or approve an application . . . if, in his opinion, the approval thereof would be contrary to the public interest. In determining the public interest, the state engineer shall be limited to those considerations within his jurisdiction.

Although "public interest" and the State Engineer's jurisdiction is not specifically defined, Section 61-01-26 (among others) would probably apply:

In view of legislative findings and determination of the ever-increasing demand and anticipated future need for water in North Dakota for every beneficial purpose and use, it is hereby declared to be the water resources policy of the state that:

1. The public health, safety and general welfare, including without limitation, enhancement of opportunities for social and economic growth and expansion, of all of the people of the state, depend in large measure upon the optimum protection, management and wise utilization of all of the water and related land resources of the state;

2. Well-being of all of the people of the state shall be the overriding determinant in considering the best use, or combination of uses, of water and related land resources;

In order to give an applicant additional time to present "public interest" information without suspending indefinitely action on a permit application, could the following condition be attached to a conditional water permit?

> It has been tentatively determined from the information available that the applicant has met the required burden of proof in establishing that the granting of this permit is in the public interest. However, the State Engineer reserves the authority to modify or void this conditional water permit within 45 days after the issuance of a certificate of site compatibility by the Public Service Commission (pursuant to Chapter 49-22 of the North Dakota Century Code) if the State Engineer determines that information (or the lack thereof) presented to other agencies in the interim (the period between the granting of this permit and the date 45 days after the granting of a certificate of site compatibility) indicates that the applicant has failed to meet the continuing burden of proof that the use of water contemplated in this conditional water permit would be in the public interest.

Your response prior to the forthcoming State Water Commission meeting on April 21-22 would be appreciated."

Your questions will be considered in the order presented and, because of the length of the letter, will be repeated prior to our answer.

1. "Must the Public Service Commission designate the specific origination of the water transmission facilities before the State Engineer can process an application for a water permit?"

As you note the plant siting act, Chapter 49-22 of the N.D.C.C., was enacted in 1975. It carried an emergency clause and became effective April 9, 1975, the date it was approved by the Governor. The Act did not amend the provisions of the statutes governing the appropriation of waters. Prior to April 9, 1975, the only state permit required for this purpose was the permit of the State Engineer. While the new act imposes an additional permit requirement upon energy conversion sites which also use water, and while the location of the site of the plant is ultimately to be determined pursuant to that act, there is nothing in the statute which indicates that the State Engineer can exercise his authority only after the Public Service Commission has acted pursuant to Chapter 49-22. This may mean that in certain instances if the State Engineer has granted a water permit and the site of the plant is altered by the Public Service Commission action from that originally contemplated by the applicant, another application or an amended application to the State Engineer will be necessary. We thus note that the plant site and transmission facility site approval by the Public Service Commission and the approval of the point of diversion by the State Engineer for water permit purposes are inexorably related from a practical standpoint, but they are not so necessarily related from the legal standpoint, i.e., while the location of the plant site and transmission facility may influence the point of diversion or vice versa, that is a practical matter and not a legal matter. There is nothing in the statutes which requires the plant and transmission facility sites and the diversion point to be identical. While subSections 3 and 4 of Section 49-22-16 do specify that the state agencies authorized to issue permits required for construction or operation of energy conversion facilities or transmission facilities are to be bound to the decisions of the Commission with respect to the site, that provision, in our mind, only implies that the other state agencies cannot order a site change of their own volition. If the plant site has not been approved by the time the State Engineer is ready to act on a water permit application, he may proceed to grant or deny the application based on the point of diversion therein specified. If the Public Service Commission approves a plant site other than that contemplated in the water permit application, and this requires a new or amended application because the point of diversion must be changed as a result, the applicant would have to file an amended application with the State Engineer and the procedure necessary for a water permit would have to be repeated.

The State Engineer is, of course, required to participate in and present the position of the Water Commission at the hearing before the Public Service Commission pursuant to Section 49-22-16(4) of the N.D.C.C. If, on the other hand, the Public Service Commission has already acted, there is no particular problem insofar as the State Engineer is concerned. However we cannot state, as a matter of law, that the Public Service Commission must act before the State Engineer can act.

While this procedure may seem repetitious and while a more facile

procedure should perhaps be adopted, that is a matter for the Legislature to determine. We can only conclude that under the present statutes the legislative intent is that the Public Service Commission and the State Engineer act in accordance with the statutes governing their particular area of jurisdiction.

2. "Is the Mercer County Planning and Zoning Commission authorized to require 'written evidence of approval for a water permit from the State Water Commission' to accompany an application for a conditional use permit?"

The state's attorney is, by statute, the legal advisor of county officials. While the state's attorney of the county may request the opinion of this office, we have not received a request as to the authority of the Mercer County Zoning Commission insofar as this particular matter is concerned. In addition the State Engineer is authorized to act pursuant to statutes which do not make his determination subject to local zoning rules, regulations or ordinances although he may certainly consider them in making his decision. Neither have we been requested for an opinion from the Public Service Commission concerning this matter and that agency is, by virtue of Section 49-22-16(2) of the N.D.C.C., affected directly by local zoning regulations. We do not therefore believe it would be proper for this office to attempt to delineate the authority of the Mercer County Zoning Commission in this opinion.

It may be that the actions of the Mercer County Zoning Commission indirectly affect the State Engineer because of the provisions in the siting act in Chapter 49-22 of the N.D.C.C. However, as noted in our reply to question one, the decision of the State Engineer is not immediately subject to decisions of other agencies, including the local zoning agencies.

3. "Attached are draft conditions which may be attached to any water permit to be granted to Natural Gas Pipeline Company of America provided the State Water Commission recommends approval of the application. Also attached, as a part of the document, is a draft contract which would precede any final approval of a water permit. Would you comment on the legality of the conditions and contract."

On November 7, 1974, this office issued an opinion to Byron Dorgan, State Tax Commissioner, concerning conditions attached to the Michigan-Wisconsin Pipeline Company and the United Power Association and Cooperative Power Association conditional water permits. In that opinion we concluded that the conditions thereto attached were basically valid but noted that, as in all such cases, the courts would make the final dispositive determination as to validity. We further stated:

> "Any condition that affects and controls actions of the applicants which do not reasonably relate to the use of the waters of the state to be appropriated is considered to demand of the applicants no more than required by applicable federal and state statutes, rules and regulations administered by federal and state agencies with direct statutory authority, specifically in the area of air pollution control, water pollution control and reclamation."

We further stated: "A reasonable understanding of the above-discussed provisions of Sections 61-02-14, 61-02-27, 61-02-28, 61-02-29, 61-02-30, and 61-02-73 leads to the conclusion that the commission has broad general powers over the regulation of appropriation of the waters of the state and that the commission is the sole state agency responsible for the overall development, utilization and conservation of the state's water resources. . ."

Subsequent to the issuance of the opinion, the 1975 Legislature considered this matter pursuant to an interim study conducted by the Legislative Council. This study resulted in the submission of House Bill 1061 to the 1975 Legislative Assembly. That bill created Section 64-04-07.1 of the N.D.C.C. which provides as follows:

> "APPROVAL OF APPLICATIONS WITH CONDITIONS. - The state engineer may, upon his own initiative, or upon the direction of the commission, attach limitations and conditions to any conditional permit issued pursuant to Section 61-04-06. Conditions and limitations so attached shall be related to matters within the jurisdiction of the state engineer of the commission; provided, however, that all conditions attached to any permit issued prior to the effective date of this Act shall be binding upon the permittee."

The bill also amended Section 61-04-09 of the N.D.C.C. to include the following language:

> "Nothing in this Section shall be construed to allow the state engineer or the commission to attach any conditions or limitations or issue any order extending any right described in the conditional water permit or to allow the state engineer or the commission to attach any condition or limitation, or issue any order, not related to matters within the jurisdiction of the state engineer or the commission; provided, however, that all conditions attached to any permit issued prior to the effective date of this Act shall be binding upon the permittee."

The bill as originally introduced would have limited the authority of the State Engineer or the Commission in attaching conditions or limitations to a water permit to those considerations "directly affecting the use and appropriation of water."

Thus the report of the Legislative Council, as found on page 183 of the 1975 Report, states:

> "The legality of the conditions attached to the permits was addressed by a written opinion of the State Attorney General, which the Committee considered shortly after it was released. In that opinion, the Attorney General was generally supportive of the Water Commission's action, but also urged the Legislature to study the area to determine if legislative action was necessary. Thus, the Committee also considered the propriety of the Water Commission's Action.
>
> * * *

> The first bill considered by the Committee would have allowed the Water Commission to attach to its permits only those conditions directly affecting the use and appropriation of water; the intention of the bill being to preclude the attachment of conditions which were only peripherally concerned with the use of water, such as conditions concerning air pollution control and the reclamation of strip mined lands.
>
> The second bill considered by the Committee would have the effect of ratifying those conditions already attached to existing permits and to allow the Water Commission, in the future, to attach those conditions dealing with the 'appropriation and use of waters and factors affecting the natural environment'.
>
> The Committee concluded that the effect of the second bill would be to allow the Water Commission to exercise general regulatory power in all areas of environmental control when water appropriation permits were involved. Such broad authority was unacceptable to a majority of the Committee. The Committee therefor recommends a bill allowing the commission to attach only those conditions directly affecting the use and appropriation of water. The recommended bill would also ratify conditions applicable to permits that will already have been granted by the Commission by the effective date of the bill."

As noted above, the bill as introduced was amended. See pages 270 and 281 of the House Journal. The effect of the amendment was to specify the authority of the State Engineer and Commission to attach only those conditions or limitations which were within the jurisdiction of the Commission rather than conditions "directing the use and appropriation of water". Since the 1974 opinion to Mr. Dorgan had already concluded certain matters were within the jurisdiction of the Commission it would appear, insofar as this office is concerned, that the situation remains the same as it did at the time the 1974 opinion was issued with respect to such matters. As we noted above, the ultimate decision as to whether these matters were within the jurisdiction of the Commission would, as in all cases, be subject to final dispositive determination as to validity by the courts.

The 1974 opinion also recognized that although we considered the attachment of conditions on the permits as an appropriate exercise of the Commission powers as an agency of the state, enforceable under the Commission's grant of police power in 61-02-44 of the N.D.C.C., "it is also considered, in the case of UPA/CPA, that the conditions on its water permit are valid as a contract as agreed to by the applicant and the commission by 'Resolution'." We adhere to that position and note that H.B. 1061 did not refer to conditions or limitations reached through contract but rather was concerned with those imposed as a condition of the permit.

In this instance the conditions and limitations are part of the proposed contract for the water permit. In addition, we have examined the individual provisions in the proposal and find them to be considerably less extensive than those attached to the prior

permits. As such we adhere to our previous opinion as to the legality of the conditions and contract except insofar as Condition No. 2 is concerned. (See our reply to question 4 with respect to such conditions).

4. "In order to give an applicant additional time to present 'public interest' information without suspending indefinitely action on a permit application, could the following condition be attached to a conditional water permit?"

> "It has been tentatively determined from the information available that the applicant has met the required burden of proof in establishing that the granting of this permit is in the public interest. However, the State Engineer reserves the authority to modify or void this conditional water permit within 45 days after the issuance of a certificate of site compatibility by the Public Service Commission (pursuant to Chapter 49-22 of the North Dakota Century Code) if the State Engineer determines that information (or the lack thereof) presented to other agencies in the interim (the period between the granting of this permit and the date 45 days after the granting of a certificate of site compatibility) indicates that the applicant has failed to meet the continuing burden of proof that the use of water contemplated in this conditional water permit would be in the public interest."

As noted in our response to the first question herein, there is no limitation on the Water Commission or the State Engineer, to proceed within their authority to grant the water permit. As such we question whether the above condition is contemplated by statute. It appears to us that the condition is such that a valid conditional water permit has not been issued until forty-five days after the issuance of a certificate of site compatibility by the Public Service Commission. It further appears that the State Engineer would not, under such a condition, have made a final finding that the conditional water permit is in the public interest and, since same is required by statute, such a statement would be nothing more than an indication that the State Engineer is considering acting favorably upon the application for the permit if he discovers nothing new in the intervening time.

Inherent in this question are the provisions of Section 61-04-07 of the N.D.C.C., as amended by the 1975 Legislative Assembly. This Section provides in part:

> "He may refuse to consider or approve an application or to order the publication of notice thereof if, in his opinion, the approval thereof would be contrary to the public interest. In determining the public interest, the state engineer shall be limited to those considerations within his jurisdiction. Any applicant, within sixty days from the date of refusal to approve an application, may appeal to the district court of the county in which the proposed place of diversion or storage is situated, from any decision of the state engineer which denies a substantial right. In the absence of such appeal, the decision of the state engineer shall be final."

While the proposed statement does not appear to be a denial of the application, neither does it appear to be an approval. As such there remains a serious question as to whether an appeal could be taken from the decision if based upon the proposed condition. Presumably it could be argued that the State Engineer has not denied the permit. He had not approved it either, however. Therefore, while we have no observations now concerning the length of time which the State Engineer may take to make his decision as to whether the permit is in the public interest, we do not believe the approval of such a permit can be said to be the approval specified by statute and therefore the approval of the permit with such a condition attached would be the same as no approval at all until forty-five days following the issuance of a certificate of site compatibility by the Public Service Commission.

By such a conclusion we do not mean to imply that the State Engineer cannot follow such procedure. Our position on the matter is that if he follows such a procedure he cannot also claim he has approved the permit. Also with respect to your first question, we do not indicate that the State Engineer must as a matter of law issue his certificate of approval before the Public Service Commission acts. In some instances he may determine not to do so for whatever reasons he deems proper. Our position is that each agency is to pursue its own duties and obligations under the statutes without waiting for another agency to act upon an application which is a part of the whole project. Interagency cooperation is, of course, desirable insofar as it can be accomplished within the framework of the agency's prescribed duties and insofar as it does not compromise the decision which that agency is required to make, independent of the decisions made by other agencies which may also be involved in the entire project. This office cannot, however, impose such cooperative requirements as a matter of law. If the Legislature determines that interagency dependence and cooperation is required as a matter of law, they must so provide.

Sincerely,

ALLEN I. OLSON

Attorney General