

STATE CONTROL (SUPERVISION) OVER ENSURING SAFETY OF FUEL AND ENERGY COMPLEX FACILITIES

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This article analyzes the current regulatory legal acts regulating relations in the field of state control (supervision) over ensuring safety and anti-terrorism protection of the fuel and energy facilities. The article examines the rules governing the procedure for field and documentary, scheduled and unscheduled inspections by the body authorized to exercise state control (supervision) over ensuring safety of the fuel and energy facilities. The author analyzes the judicial practice in cases of administrative offences related to violation of the requirements of the laws on safety and anti-terrorism protection of the fuel and energy facilities. Based on the analysis of the current regulatory legal acts and judicial practice, it was proposed to amend certain regulatory legal acts in the field of safety and anti-terrorism protection of the fuel and energy complex facilities.

Keywords: energy law, energy security, legal regulation of anti-terrorism protection of the fuel and energy facilities, subjects of the fuel and energy complex, state control (supervision) in the energy sector.

By Order No. 157 of the President of the Russian Federation dated April 5, 2016, *Issues of the Federal National Guard Troops Service of the Russian Federation*, to ensure state and public security, protection of human and civil rights and freedoms, the internal troops of the Ministry of Internal Affairs of the Russian Federation were reorganized into the Federal National Guard Troops Service of the Russian Federation (hereinafter referred to as the Federal National Guard Troops Service, the Authorized Body).

It is the Federal National Guard Troops Service that exercises federal state control (supervision) over ensuring safety of the fuel and energy complex (hereinafter referred to as the FEC).

So far, there are not very many legal studies devoted to problematic aspects in implementation

of state control (supervision) over ensuring safety of the fuel and energy facilities. Herewith, many aspects deserve to be the subject of separate legal studies taking into account the results of law enforcement practice. Proper legal regulation in this area will contribute to strengthening the energy law order, as it is one of the main elements of its functioning [1].

These powers are granted to Federal National Guard Troops Service in accordance with clause 22, Part 1, Article 9 of Federal Law No. 226-Φ3 dated July 3, 2016, *On the National Guard Troops of the Russian Federation*.

The procedure for implementation by the Federal National Guard Troops Service and its territorial bodies of measures for federal state control (supervision) over ensuring safety of

the FEC facilities is regulated by a special act: the Rules for Implementation by the Federal National Guard Troops Service of the Russian Federation and Its Territorial Bodies of Federal State Control (Supervision) over Ensuring Safety of the Fuel and Energy Facilities approved by Decree No. 1067 of the Government of the Russian Federation dated October 20, 2016 (hereinafter referred to as Rules No. 1067).

Herewith, it should be borne in mind that the provisions of Federal Law No. 294-ФЗ dated December 26, 2008, *On Protection of the Rights of Legal Entities and Individual Entrepreneurs in the Implementation of State Control (Supervision) and Municipal Control* do not apply to these control (supervision) relations.

State control (supervision) over ensuring safety of the FEC facilities is implemented by the Authorized Body through inspections (documentary and field), which may be scheduled and unscheduled.

Documentary Inspection.

When conducting this type of inspection, the Authorized Body checks the conformity of documents issued according to the results of categorization of the FEC facility (safety data sheet, inspection report on the FEC facility, and other documents) with the requirements of the laws on safety of the FEC facilities (hereinafter referred to as the Laws).

In accordance with Clause 29 of Rules No. 1067, the Authorized Body first reviews the documents at its disposal. Such documents include documents drawn up according to the results of categorization of the FEC facility as well as materials of previous inspections and cases of administrative offences.

In case of doubt about reliability of information set forth in these documents or if such information is insufficient to assess compliance by the subject of the fuel and energy complex with the requirements of the Laws, in accordance with clause 30 of Rules No. 1067, Federal National Guard Troops Service is entitled to send a request to the subject of the fuel and energy complex to submit other documents. In this case, the request should be reasoned.

These documents may include: an act of inspection of a FEC facility; documents governing

access control and rules applied in the territory of the facility; contracts for protection of the FEC facility and its equipment using technical security equipment; title documents for the FEC facility; documents on appointment of officials responsible for ensuring anti-terrorism protection of the FEC facility, and other documents.

The FEC subject shall submit the relevant documents to the Authorized Body within 10 business days from the date of receipt of the relevant request (clause 31 of Rules No. 1067).

In practice, implementation of this clause raises the issue of calculating timelines. Shall the day of receipt of the request of the Authorized Body or the day following the receipt of the request of the Authorized Body be deemed the beginning of the ten-day period?

Rules No. 1067 do not settle this issue.

Herewith, according to the Authorized Body, the day of receipt of the request shall be deemed the beginning of the ten-day period.

However, the current judicial practice presupposes application of provisions of Article 4.8. of the Code of the Russian Federation on Administrative Offences to the specified relations. In accordance with this article, the term determined by the period shall be calculated from the day following the calendar date or occurrence of the event that determines the beginning of the term (Resolution of the Moscow City Court dated December 10, 2018, in case No. 4a-7588/2018) [2].

Field Inspection.

A field inspection is carried out to actually assess compliance by the FEC facilities with the requirements of the Laws.

In other words, during the field inspection, compliance of the physical protection system of a FEC facility (functioning of the complex of technical security equipment and actions of the security units) with the requirements of the Laws is checked.

In accordance with clause 38 and clause 41 of Rules No. 1067, a field inspection shall be performed by the Authorized Body if during a documentary inspection, it does not have the opportunity to verify completeness and reliability of the information contained in the documents at its disposal and to assess conformity of the activities

of the FEC subject and the security status of the FEC facility to the requirements of the Laws.

Despite the fact that Rules No. 1067 clearly distinguish documentary and field inspections and regulate the sequence of their implementation, in practice, the Authorized Body combines first a documentary and then a field inspection within the framework of one inspection.

It appears that such an approach of the Authorized Body is caused by time saving and the need for an integrated approach in the implementation of state control (supervision).

Scheduled Inspection.

When conducting a scheduled inspection, the Authorized Body verifies compliance by the FEC subjects with the requirements for ensuring safety and anti-terrorism protection of the fuel and energy facilities.

The frequency of scheduled inspections by the Authorized Body depends on the hazard category of the FEC facility.

For the FEC facilities of high and medium hazard categories, a scheduled inspection is carried out once a year. For the FEC facilities of low hazard category, a scheduled inspection is carried out once every 3 years (clause 9 of Rules No. 1067).

The basis for the scheduled inspection is the annual plan developed and approved by the head of the Authorized Body in the constituent entity of the Russian Federation (clause 16 of Rules No. 1067).

Unscheduled Inspection.

When conducting an unscheduled inspection, the Authorized Body verifies not only compliance by the FEC subject with the requirements of the Laws in the course of its activities, but also fulfillment of the instructions of the Authorized Body previously issued following the results of the scheduled inspection.

The bases for an unscheduled inspection (clause 19 of Rules No. 1067) are as follows:

- expiry of the terms for execution of the order issued by the Authorized Body;
- receipt by the Authorized Body of applications, statements and information on commitment of an unlawful act, which entailed harm to human life or health, state security, damage or destruction of property, or a threat thereof as well

as non-fulfillment or improper fulfillment by the FEC subject of the requirements of the Laws;

— order of the head of the Authorized Body.

Inspection Results.

The results of an inspection by the Authorized Body are reflected in an inspection report, the standard form of which was approved by Order No. 431 of Federal National Guard Troops Service dated December 10, 2016, *On Approval of Standard Forms of Documents Required in the Implementation by the Federal National Guard Troops Service of the Russian Federation and Its Territorial Bodies of Federal State Control (Supervision) over Ensuring Safety of the Fuel and Energy Facilities* [3].

An inspection report is executed in 2 counterparts. One counterpart is delivered to the representative of the FEC subject, and the other remains with the Authorized Body. In the absence of a representative of the FEC subject, the report shall be sent by registered mail with return receipt requested (clause 50 of Rules No. 1067).

Should it be revealed that the actions of the FEC subject violate the requirements of the laws on safety of the FEC facilities, the Authorized Body shall issue an order for the FEC subject to eliminate the identified violations, which shall be deemed an annex to the inspection report.

Herewith, in accordance with clause 54 of Rules No. 1067, officials of the Authorized Body shall take into account the findings set forth in the safety data sheet of the FEC facility when making decisions on the deadlines for elimination of the identified violations.

Therefore, in order to eliminate the risks of setting impossible deadlines, it seems appropriate to specify all violations registered by the Authorized Body in the order in the safety data sheet of the FEC facility.

When implementing measures aimed at elimination of the identified violations, in accordance with clause 65 of Rules No. 1067, the FEC subject shall be entitled to send a request for extension of term set for implementation of the order to the Authorized Body.

The FEC subject may send the specified request to the Authorized Body subject to the following conditions:

1) The request shall be reasonable.

2) The reasons why the FEC subject cannot implement the order should not depend on the FEC subject (for example, violation by the contractor of the deadlines for completion of work on equipping a FEC facility with the complex of technical security equipment).

3) The request shall be sent at least 10 business days prior to the date of expiry of the term set for implementation of such an order.

Within 30 calendar days, the Authorized Body shall consider the specified request and make a decision to extend (however, for one year maximum) or refuse to extend the term set for implementation of the order.

Herewith, the maximum period, for which implementation of the order may be rescheduled (one year maximum), as established by clause 55 of Rules No. 1067 does not always reflect the actual possibility to eliminate the violation since in most cases, the work is executed by contractors and it includes construction, installation, commissioning of equipment, etc.

Currently, based on the practice of relations with the Authorized Body, the latter does not extend the term for implementation of the order more than once although there is no direct prohibition in Rules No. 1067.

Moreover, according to inspection results, if it is revealed that the actions of the FEC subject have indicia of an administrative offence, the Authorized Body shall execute a report on the administrative offence committed by an official as provided by Article 20.30. of the Code of the Russian Federation on Administrative Offences.

In accordance with Part 3, Article 23.1 and Article 29.5 of the Code of the Russian Federation on Administrative Offences, cases of such administrative offences are considered by justices of the peace at the place of offence.

In practice, implementation of Article 20.30 of the Code of the Russian Federation on Administrative Offences raises a number of issues.

The first issue arises on the basis of the subject composition of an administrative offence under Article 20.30 of the Code of the Russian Federation on Administrative Offences. Only individuals and officials can act as subjects of this administrative offence.

Lack of liability of a legal entity for the specified offence entails unreasonable prosecution of officials of organizations acting as FEC subjects.

These situations arise in cases where an official appointed to act as the person responsible for ensuring safety and anti-terrorism protection of the FEC facility does not have the right to dispose of the administrative and financial resources of the organization acting as a FEC subject.

It seems that this problem may be solved through amendment of Article 20.30 of the Code of the Russian Federation on Administrative Offences by supplementing it with the liability of the legal entity as well as amendment of Part 3, Article 12 of Federal Law No. 256-Φ3 dated July 21, 2011, *On Safety of FEC Facilities* in terms of imposing the obligation to comply with the requirements for ensuring safety and anti-terrorism protection of the FEC facilities on the FEC subject rather than on its head.

The second issue concerns the possibility of consolidation of cases (that is, the possibility of application of Part 2, Article 4.4. of the Code of the Russian Federation on Administrative Offences) of administrative offences by courts under Article 20.30. of the Code of the Russian Federation on Administrative Offences committed by one official of a FEC subject at different FEC facilities belonging to one legal entity.

Analysis of the judicial practice shows that in the consideration of such issues, courts do not allow the possibility of consolidation of cases in accordance with Part 2, Article 4.4. of the Code of the Russian Federation on Administrative Offences.

Thus, in its Resolution No. 4a-3/2018 dated March 5, 2018, the Moscow City Court comes to the following conclusion: "Under such circumstances, the revealed facts of violations of the requirements of the Laws at each individual FEC facility form an independent (despite the similarity) offence under Article 20.30 of the Code of the Russian Federation on Administrative Offences. Therefore, in this case, the provisions of Part 2, Article 4.4 of the Code of the Russian Federation on Administrative Offences were not applicable, there were no grounds for consolidation of the cases of administrative offences, and consolidation of the cases by a justice of the peace resulted

in a violation of the rules for imposition of an administrative penalty”.

Methods of Protection of a FEC Subject's Rights in the Implementation by the Authorized Body of State Control (Supervision) over Ensuring Safety of FEC Facilities.

In the inspection by the Authorized Body of a FEC facility, the FEC Subject's rights can be protected both administratively (by sending objections to the report and the order as well as appealing against the actions of the officials of the Authorized Body in a superior body) and judicially (by appealing against the order).

Administrative Protection of a FEC Subject's Rights.

A FEC subject's right to send objections to the report and the order to the Authorized Body is regulated by clause 66 of Rules No. 1067. Objections must be reasoned and sent to the Authorized Body within 10 business days from the date of completion of the inspection (that is, from the date of the inspection report).

The specified method of protection of a FEC subject's rights seems ineffective since the objections should be sent to the same subdivision of the Authorized Body that issued the challenged report and order.

Nevertheless, sending of objections is an important element for formation of defense of the subject of the fuel and energy complex while appealing against the order in court.

The procedure for pre-trial appeal against actions (omission) and decisions of officials of the Authorized Body is regulated by Section 5 of the Administrative Regulation of the Federal National Guard Troops Service of the Russian Federation for Performance of the State Function of Exercising Federal State Control (Supervision) over Ensuring Safety of the Fuel and Energy Facilities approved by Order No. 418 of Federal National Guard Troops Service dated October 3, 2017 (hereinafter referred to as Administrative Regulation No. 418) [4].

A complaint about actions (omission) and decisions of officials of a territorial body of the Federal National Guard Troops Service shall be submitted in writing or electronically to the superior body of Federal National Guard Troops Service (central office).

Such a complaint shall be considered by the Authorized Body within 30 days from the date of its registration. The specified period may be extended by the Authorized Body for 30 days maximum (clause 82 and clause 83 of Administrative Regulation No. 418).

Following the results of consideration of the complaint, the head of the Authorized Body, to which the complaint was sent, takes one of the following decisions:

— Recognizes actions (omission) of officials as well as decisions taken by them as valid and justified.

— Recognizes actions (omission) of officials as well as the decisions taken by them as unlawful in whole or in part, and also determines measures required to eliminate the committed violations.

Judicial Protection of a FEC Subject's Rights.

In case of disagreement with the conclusions of the Authorized Body set forth in the order, a FEC subject has the right to appeal against it in the commercial court. The right to file a claim for invalidation of the order issued by the Authorized Body as a non-regulatory legal act is regulated by Article 198 of the Arbitration Procedure Code of the Russian Federation.

According to clause 4, Article 200 of the Arbitration Procedure Code of the Russian Federation, in the consideration of cases relating to challenging non-regulatory legal acts, decisions and actions (omission) of bodies exercising public powers, officials, the arbitration court shall review the challenged act or its individual provisions and determine its compliance with the law or other regulatory legal act, and also establishes whether or not the challenged act infringes the rights and legitimate interests of the applicant in the field of entrepreneurial and other business activities.

Herewith, according to clause 5, Article 200 of the Arbitration Procedure Code of the Russian Federation with due account of clause 1, Article 65 of the Arbitration Procedure Code of the Russian Federation, the obligation to prove in this category of cases shall be imposed on the body or person that adopted the relevant act.

By virtue of Article 13 of the Civil Code of the Russian Federation a non-normative act that does not comply with the law or other legal acts,

and violates civil rights and interests of a citizen protected by law may be invalidated by the court.

Thus, it follows from the essence of the above rules that in order to invalidate the order challenged by the applicant, simultaneous presence of two mandatory conditions is required:

- the order does not comply with the law or other regulatory legal act;
- the order violates the rights and legitimate interests of the FEC subject in the field of entrepreneurial and other business activities.

At the same time, in accordance with the procedure provided for in Chapter 24 of the Arbitration Procedure Code of the Russian Federation, the inspection report may not be challenged since as a document that records the

results of the inspection it does not oblige the FEC subject to take any actions and, accordingly, it cannot be considered a non-regulatory legal act. The specified legal position was confirmed in judicial practice. [5]

Summing up, it should be noted that the current legal regulation in the field of state control (supervision) over safety and anti-terrorism protection of the FEC facilities generally provides the basis for stable and safe functioning of the fuel and energy facilities.

Nevertheless, certain regulatory legal acts need to be amended since the problematic aspects discussed in this article create conditions for abuse both by the regulatory (supervisory) authorities and by FEC subjects. ■

References

1. Romanova V.V. Energy Law Order: Current State and Tasks / V.V. Romanova. Moscow : Yurist. 2016. 255 p.
2. Resolution of the Moscow City Court dated December 10, 2018, in Case No. 4a-7588/2018. URL: <https://www.mosgorsud.ru/mgs/services/cases/review-supervision/details/f99c5f96-a8db-4045-b3b1-ad13100a5db3?caseNumber=4%D0%B0-7588/2018>
3. Order No. 431 of Federal National Guard Troops Service dated December 10, 2016, *On Approval of Standard Forms of Documents Required in the Implementation by the Federal National Guard Troops Service of the Russian Federation and Its Territorial Bodies of Federal State Control (Supervision) over Ensuring Safety of the Fuel and Energy Facilities* // Official Internet Portal of Legal Information. URL: <http://www.pravo.gov.ru> (date of access: January 11, 2017)
4. Order No. 418 of Federal National Guard Troops Service dated October 3, 2017, *On Approval of the Administrative Regulation of the Federal National Guard Troops Service of the Russian Federation for Performance of the State Function of Exercising Federal State Control (Supervision) over Ensuring Safety of the Fuel and Energy Facilities* // Official Internet portal of Legal Information. URL: <http://www.pravo.gov.ru> (date of visit: October 31, 2017)
5. Ruling No. 309-KT16-8968 of the Supreme Court of the Russian Federation dated September 19, 2016, in Case No. A50-21311/2015; Resolution No. 09АП-38288/2018 of the Ninth Commercial Court of Appeal dated October 26, 2018, in Case No. A40-165916/17; Resolution No. 09АП-8558/2017 of the Ninth Commercial Court of Appeal dated March 29, 2017, in Case No. A40-189391/16. URL: <http://ras.arbitr.ru/>