

PECULIARITIES OF REGULATION OF THE LEGAL REGIME OF PROTECTIVE ZONES OF ELECTRICAL ENERGY PRODUCTION FACILITIES

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This article is dedicated to peculiarities and problems of the legal regulation of the regime of protective zones of electrical energy production facilities. The author analyzes the applicable laws establishing prohibitions and restrictions in respect of the use of land plots located within the boundaries of protective zones of electrical energy production facilities, pays attention to legal conflicts that significantly reduce the efficiency of enforcement of special provisions regulating the regime of a protective zone of electrical energy production facilities by authorized executive authorities for the purposes of elimination and prevention of possible violations of the indicated regime by land users of land plots adjacent to the generation facilities. Besides, the author points out the absence of any legal mechanisms facilitating prevention/suppression of identified violations of the regime of a protective zone of an electrical energy production facility. As a result of the identified conflicts in the current legal acts and the absence of any efficient mechanisms of influence on the persons having committed the violation of the regime of a protective zone of an electrical energy production facility, the author has developed proposals for the development of the legal regulation and creation of efficient measures to suppress and prevent any violations of the abovementioned regime.

Keywords: energy law; energy security; security of facilities of the fuel and energy complex, protective zones of electrical energy production facilities.

Problems of the legal support of energy security include various aspects including security of facilities of the fuel and energy complex. The carried out legal studies seem relevant as they involve strengthening of the energy law and order considering various internal and external challenges and threats. The efficiency of the energy law and order directly depends on the efficiency of the system of the legal regulation in the energy industry that consists of a multitude of elements, each of which represents an aggregate of provisions establishing rules, regimes, procedures for objects, subjects or private and public law relations in the energy industry [1]. The legal

regime of energy facilities refers to the key elements of the system of the legal regulation in the energy industry establishing the energy law and order [2]. The improvement of the regulatory framework in terms of ensuring of secure, reliable and stable functioning of the energy infrastructure and facilities refers to the primary tasks in ensuring energy security, so the carried out studies including the ones on challenging aspects of the legal support of security of facilities of the fuel and energy complex [3] are required for the further development of the legal regulation.

Until 2011, Russian laws contained no legal acts regulating the sphere of ensuring

security of facilities of the fuel and energy complex. Legal relations in the mentioned sector were regulated by legal acts common for all branches of the economy (the Civil Code of the Russian Federation, the Criminal Code of the Russian Federation) and special legal acts: Federal Law No. 116-FZ of July 21, 1997 On Industrial Security of Dangerous Production Facilities, Federal Law No. 7-FZ of January 10, 2002 On Environmental Protection, Federal Law No. 35-FZ of March 6, 2006 On Terrorism Combating, etc.

The mentioned legal acts failed to fully consider the specifics of ensuring secure functioning of facilities of the fuel and energy complex in general and electrical energy production facilities in particular.

Taking into account the special significance of facilities of the fuel and energy complex for the economy, subsistence and defense capacity of the country, the legislator adopted Federal Law No. 256-FZ of July 21, 2011 On the Security of Facilities of the Fuel and Energy Complex; the subject of the legal regulation of this law is as follows:

1. Establishment or organizational and legal bases for ensuring security of facilities of the fuel and energy complex in the Russian Federation for the purposes of prevention and avoidance of any illegal interference;

2. Appointment of authorized executive authorities in the sphere of ensuring security of facilities of the fuel and energy complex as well as rights, obligations and liability of subjects of the fuel and energy complex.

For the purposes of the implementation of Clause 1, Article 7 of Federal Law No. 256-FZ of July 21, 2011 On the Security of Facilities of the Fuel and Energy Complex stipulating the establishment by the Government of the Russian Federation of requirements for ensuring anti-terrorist protection and security of facilities of the fuel and energy complex obligatory by subjects of the fuel and energy complex, the Government of the Russian Federation approved the Rules for Ensuring Security and Anti-Terrorist Protection of Facilities of the Fuel and Energy Complex ("ATP Rules") by Resolution No. 458dsp of May 5, 2012.

ATP Rules set the number of specific requirements for ensuring security and anti-terrorist protection of facilities of the fuel and energy complex (including electrical energy production facilities) depending on the assigned facility danger category.

By virtue of Subclause 3, Clause 9, Part 2 of the Provision on the Federal National Guard Troops Service of the Russian Federation approved by Order of the President of the Russian Federation No. 510 of September 30, 2016, Clause 22, Part 1, Article 9 of Federal Law No. 226-FZ of July 3, 2016 On the National Guard Troops of the Russian Federation, the Federal National Guard Troops Service of the Russian Federation exercises the federal state control (supervision) over ensuring security of facilities of the fuel and energy complex.

In addition to the adoption of the above listed legal acts aimed at the prevention of illegal interference with electrical energy production facilities, the legislator has also reviewed the issue of the establishment of the legal regime of protective zones of electrical energy production facilities aimed at ensuring secure functioning and exploitation of the latter.

Federal Law No. 257-FZ of July 21, 2011 On Amendments to Separate Legal Acts of the Russian Federation in Terms of Ensuring the Security of Facilities of the Fuel and Energy Complex introduced amendments to Paragraph 4, Clause 2, Article 89 of the Land Code of the Russian Federation aimed at the specification of the legal regime of protective zones of electrical energy production facilities, determination of the procedure for the establishment thereof and imposition of functions of supervision over the compliance with the regime of protective zones on the Federal Service for Environmental, Technological and Nuclear Supervision.

For the purposes of the development of provisions of Federal Law No. 256-FZ of July 21, 2011 On the Security of Facilities of the Fuel and Energy Complex, ATP Rules and within the framework of the implementation of Article 89 of the Land Code, on November 28, 2013, the Rules for the Establishment

of Protective Zones of Electrical Energy Production Facilities and Special Conditions for the Use of Land Plots Located within the Boundaries of Such Zones approved by Resolution of the Government of the Russian Federation No. 1033 of November 18, 2013 ("Rules No. 1033"), have entered into force.

The aim of the adoption of Rules No. 1033 is ensuring of secure and accident-free functioning, secure exploitation of electrical energy production facilities by means of the establishment of boundaries of protective zones and special conditions for the use of such land plots.

The boundaries of protective zones of electrical energy production facilities are introduced by the Federal Service for Environmental, Technological and Nuclear Supervision depending on the assigned danger category determined in accordance with the legal requirements in the anti-terrorist protection sphere.

Rules No. 1033 imply that electrical energy production facilities are energy installations that are used to produce electrical and thermal energy and consist of constructions, equipment for the transformation of various energy types into electrical and/or thermal energy and switching gear with the capacity of 500 kW and more.

ATP Rules, in their turn, regulate the requirements not only for electrical energy generation facilities established by Rules No. 1033 but also for other facilities of the fuel and energy complex.

Thus, thermal energy production facilities (boilerrooms) subject to division into categories in accordance with the legal requirements for ensuring security and auxiliary facilities directly used in the energy production process drop out of the zone of the legal regulation of Rules No. 1033.

The legal regime of a protective zone of an electrical energy production facility is understood as restricted use (through a set of prohibitions and limitations) of land plots located within the boundaries established by the Federal Service for Environmental, Technological and Nuclear Supervision.

Within the framework of Rules No. 1033, the legislator sets imperative prohibitions against performance of specific actions and the admissibility of performance of specific actions within the boundaries of a protective zone upon written approval of the owner of the electrical energy production facility.

The following actions are prohibited in protective zones of an electrical energy production facility in accordance with Clause 8 of Rules No. 1033:

a) removal, cover, dislocation of and damage to warning signs;

b) placement of cemeteries, burial of industrial and consumption wastes, cattle, radioactive, chemical, explosive, toxic, poisoning and poisonous substances;

c) discharge of caustic and corrosive substances including acid, alkali and salt solutions, fuel and lubrication materials;

d) lighting a fire and placement of open or closed fire sources;

e) performance of works, placement of facilities, constructions, buildings, items restricting access to facilities in case of absence of conditions for ensuring such access in form of passages and drive ways;

f) performance of works with the use of percussion mechanism, dropping of items of weight if their mass exceeds five tons;

g) warehousing of any materials (explosion-hazardous, fire-hazardous, fuel and lubrication materials).

The list of actions permitted in a protective zone upon written approval of the owner of the electrical energy production facility is established by Clause 9 of Rules No. 1033 and includes:

a) location of children's playgrounds, stadiums, athletic grounds, markets, retail outlets, field camps, cattle pens, garages, parking facilities, parking lots for any machine and mechanism types;

b) holding of events involving presence of people not engaged in the duly permitted performance of works/rendering of services;

c) performance of mining, land improvement, explosive works including works related to temporary land flooding.

The list of actions prohibited by the regime of a protective zone or requiring approval of the owner of the energy production facility established by the Rules contains uncertain wordings resulting in ambiguous interpretation.

Prohibitions and limitations imposed by Rules No. 1033 often contradict ATP Rules, e.g., by not prohibiting the possibility of junction of buildings, constructions, extensions, etc. to the fence of an electrical energy production facility.

At the same time, the list of prohibited actions established by ATP Rules is significantly broader if compared to the requirements of Rules No. 1033.

One of the shortcomings of Rules No. 1033 is also the fact that in accordance with Clause 2 of Resolution of the Government of the Russian Federation No. 1033 of November 18, 2013, prohibitions and limitations imposed by the said Rules do not cover any buildings, constructions and other facilities placed within the boundaries of protective zones of electrical energy production facilities before November 28, 2013.

In the event of location of a disputable building, construction or other facility in direct proximity from the perimeter fence of an electrical energy production facility, this circumstance prevents the owner of such a facility from compliance with the requirements of ATP Rules.

In this regard, the only available option for compliance with ATP Rules by an owner of an electrical energy production facility is full compensation for losses including lost profit to land users of adjacent land plots, whose rights have been restricted by the established protective zone. It should be noted that this mechanism is not transparent and poorly developed, imposes excess burden on owners of electrical energy production facilities performing a socially important function and can serve as a factor of growth of electrical energy tariffs.

It seems that violation of the regime of a protective zone of an electrical energy production facility usually entails simultaneous violation of requirements for the anti-terrorist protection of a facility of the fuel and energy complex.

The above shows that provisions of Rules No. 1033 and ATP Rules are closely interrelated.

It is worth noting that the Federal Service for Environmental, Technological and Nuclear Supervision is not authorized to exercise control over the compliance with the regime of a protective zone of an electrical energy production facility and thus performs no scheduled/unscheduled audits, issues no mandatory instructions, etc.

Whilst the Federal National Guard Troops Service of the Russian Federation is not entitled to apply Rules No. 1033 in carrying out of audits of compliance with the requirements for the anti-terrorist protection of electrical energy production facilities.

Pursuant to Clause 11 of Rules No. 1033, if an owner of an electrical energy production facility identifies any cases of violation of the protective zone regime, such an owner shall submit an application to the energy supervision authority and/or executive authorities authorized to review cases on the respective offenses.

However, the Federal Service for Environmental, Technological and Nuclear Supervision not only performs no inter-departmental cooperation with the Federal National Guard Troops Service of the Russian Federation in the identification of any violations of Rules No. 1033, but is also not authorized to exercise control or supervision over the compliance with the regime of a protective zone of an electrical energy production facility.

The laws establish no administrative liability in respect of a person violating the regime of a protective zone of an electrical energy production facility.

Thus, unclear wordings of Rules No. 1033, absence of any legally established administrative pressure measures in respect to an offender hinder any preventive measures and make it impossible to correct any identified violations of the regime of a protective zone of an electrical energy production facility.

Considering the active development of industrial zones adjacent to electrical energy

production facilities, transformation of such zones in industrial clusters, technology parks, construction of residential complexes, the tendency towards toughening of requirements for anti-terrorist protection and environmental laws, Rules No. 1033 are no longer meeting the objectives and criteria they have been adopted for.

It should be noted that no significant amendments in terms of the legal regime of a protective zone have been introduced in Rules No. 1033 since their adoption. However, there have been multiple attempts to amend the same, in particular:

- in 2017, it was proposed to introduce amendments specifying the cases when the approval of actions in a protective zone should be withheld including the cases of placement of a major construction object resulting in the absence of access to an electrical energy production facility and in the event of violation of construction features of electrical energy production facilities.

- in 2019, it was planned to adopt a Resolution of the Government of the Russian Federation substantially changing the legal regulation in the electrical energy industry. It was intended to revoke two resolutions of the Government of the Russian Federation: Resolution of the Government of the Russian Federation No. 160 of February 24, 2009, and Rules No. 1033. The abovementioned documents were supposed to be replaced by the adopted Provision on Protective Zones of Electrical Energy Production Facilities establishing the legal regime of protective zones for electrical grid facilities and for generation facilities as well. A prohibition against placement of buildings, constructions, garages and parking lots for transport vehicles in protective zones was assumed to be one of significant novelties of that document.

It seems that unsuccessful attempts at revision of Rules No. 1033 are caused by the absence of optimal solutions of protective zone problems considering the laws on security of facilities of the fuel and energy complex and provisions of the Land Code of the Russian Federation.

In view of the above, the author has proposed options for the development of the

legal regulation of Rules No. 1033 and laws on ensuring security of facilities of the fuel and energy complex.

Option No. 1

1. Introduction of amendments aimed at the expansion of Rules No. 1033 to cover thermal energy production facilities and auxiliary facilities directly used in the thermal and electrical energy production process.

Today, the said facilities are to be divided into categories within the framework of requirements of Federal Law No. 256-FZ of July 21, 2011 On the Security of Facilities of the Fuel and Energy Complex and are placed at land plots with the following permitted use type: placement of energy industry facilities.

However, irrespective of the strategic importance of thermal energy production facilities and auxiliary facilities directly used in the thermal and electrical energy production process for the subsistence, the legislator just sets the requirements for anti-terrorist protection in respect of such facilities and establishes no protective zone regime.

2. Transfer of authorities to control the compliance with the protective zone regime to a constituent entity of the Russian Federation. This opportunity is stipulated by Part 2, Article 4 of Federal Law No. 248-FZ of July 31, 2020 On State Control (Supervision) and Municipal Control in the Russian Federation.

3. Supplementing the list of actions prohibited by the protective zone regime with the requirements established by ATP Rules, e.g., prohibition of junction of buildings, constructions, extensions, equipment and material warehousing sites to the fence of a facility of the fuel and energy complex.

4. Establishment of liability for the violation of the protective zone regime and introduction of the respective amendments to the Administrative Offense Code of the Russian Federation as today, there is no administrative liability for violation of the regime of a protective zone of an electrical energy production facility.

It is assumed that the following objectives will be achieved by the implementation of events listed in option No. 1:

— Origination of legal mechanisms of disassembly of buildings, constructions, extensions restricting access to generation facilities as the constituent entity of the Russian Federation has the corresponding agencies and a defined action plan.

E.g., in Moscow, these agencies are the State Inspectorate for Control over the Use of Real Estate of Moscow, district commissions for prevention of unauthorized construction. The action plan is in this case governed by Resolution of the Government of Moscow No. 614-ПП of November 2, 2012 [4] and Resolution of the Government of Moscow No. 829-ПП of December 8, 2015 [5].

— Solution of inter-departmental cooperation problems at issue of construction permits considering the location of protective zones;

— Systematization of data on the presence of established protective zones;

— Reduction of cases of off-target and unauthorized use of land plots;

— Extension of liability stipulated by the Administrative Offense Code of Moscow [6] for land offenses to cover offenders of the protective zone regime (Art. 6.7, 6.9, 6.11 of the Administrative Offense Code of Moscow).

Option No. 2

1. Revocation of Rules No. 1033 and introduction of amendments to ATP Rules stipulating the following:

— establishment of an exclusion zone in respect of classified facilities of the fuel and energy complex by analogy with protective zones, introduction of the corresponding data in security passports of facilities of the fuel and energy complex;

— development of an exclusive list of actions prohibited in an exclusion zone or requiring consent of a subject of the fuel and energy complex.

2. Provision of territorial authorities of the Federal National Guard Troops Service of the Russian Federation with powers to establish an exclusion zone and control the compliance with its regime, qualify any illegal actions performed in an exclusion zone as obstruction of compliance with the requirements for ensuring security and anti-terrorist protection of facilities of the fuel and energy complex (Article 20.30 of the Administrative Offense Code of the Russian Federation).

It is assumed that the following objectives will be achieved by the implementation of events listed in option No. 2:

— Achievement of objectives of ATP Rules, i.e., ensuring comprehensive security of facilities of the fuel and energy complex, efficient liability mechanisms;

— Mitigation of risks related to security of facilities of the fuel and energy complex;

— Development of efficient preventive measures aimed at non-admission of any violations of the exclusion zone regime;

— Rapid prevention of offenses within the boundaries of an exclusion zone.

Conclusions

Summing up, it is worth noting that applicable Rules No. 1033 do not meet the objectives they have been adopted for and fail to ensure secure functioning and exploitation of electrical energy production facilities.

In this regard, Rules No. 1033 and the laws regulating the anti-terrorist protection of facilities of the fuel and energy complex require substantial redevelopment as their current version can with a high degree of probability create prerequisites for illegal interference and abuse by land users of sites located within the boundaries of a protective zone. ■

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