

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Comité Diálogo Ambiental, Inc.,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 16-1229
	)	
Federal Energy Regulatory Commission	)	
And United States of America	)	
	)	
Respondents	)	
	)	

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**PETITIONER’S STATEMENT OF ISSUES TO BE RAISED**

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The Petitioner, Comité Diálogo Ambiental, Inc., hereby submits this Statement of Issues to be Raised:

Petitioner challenges the decision of the Federal Energy Regulatory Commission (FERC) to approve the location, construction and operation of the Aguirre Offshore Gasport (“Gasport”) before completing the consultation process mandated by section 7 of the Endangered Species Act (“ESA”). 16 U.S.C. §1536. FERC admits that the Gasport will adversely affect a number of protected species including highly endangered corals and sea turtles; and it acknowledges that formal section 7 consultation is required.

Petitioners maintain that the ESA and NEPA require that consultation must be completed before a federal agency authorizes an action that may adversely affect protected species, and before any “irreversible or irretrievable commitment of resources that might foreclose reasonable and prudent alternatives” has been made by FERC or by the applicant. FERC takes the position that section 3 of the Natural Gas Act (NGA), 15 U.S. Code § 717b, allows it to postpone consultation until after it has approved construction and operation of the Gasport, despite ongoing financial commitments and infrastructure changes being made to effectuate the project. This “cart before the horse” approach raises the following five legal issues.

1. Section 7(a)(2), 16 U.S.C. §1536(a)(2), and the implementing regulations at 50 C.F.R. § 402 impose a duty on federal agencies to consult with wildlife agencies such as the National Marine Fisheries Service before authorizing any action that “may affect” protected species. 16 U.S.C. § 1536 (a)(2). The purpose of the consultation process is to prevent later substantive violations of the ESA. *Sierra Club v. Marsh*, 816 F.2d 1376, 1389 (9th Cir. 1987). FERC takes the position, based on a single case cited in its May 5, 2016 Order Denying Rehearing and Stay, that section 3 of the NGA allows it to grant final approval the Gasport before completing consultation. The issue is whether FERC may grant final approval of a project that will affect

endangered and threatened species prior to completion of the consultation required under 16 U.S.C. §1536(a)(2).

2. Section 7(c), 16 U.S.C. §1536(c), requires that federal agencies prepare a Biological Assessment (BA) to evaluate the potential effects of a proposed action on protected species and any designated or proposed critical habitat; and to determine whether any such species or habitat are likely to be adversely affected by the action. 50 C.F.R. §402.12. Here, the BA was prepared by the applicant and approved by FERC despite the BA's failure to meet the requirements set by National Marine Fisheries Service. The issue is whether FERC violated 15 U.S.C. §1536(c) by approving a BA that did not contain all of the information required by the National Marine Fisheries Service.
3. Section 7(d), 16 U.S.C. §1536(d), prohibits agencies and the permit applicant from making any "irreversible or irretrievable commitment of resources" that has the effect of foreclosing the formulation or implementation of any "reasonable and prudent alternatives" that would avoid harm to protected species. The purpose of § 7(d) is to "ensur[e] that the status quo will be maintained during the consultation process." *Conner v. Burford*, 848 F.2d 1441, 1455 n. 34 (9th Cir.1988), *cert. denied*, 489 U.S. 1012 (1989). The issue is whether, as a result of FERC's final approval of

this project prior to the completion of consultation, commitments have been made, including extensive modifications that have been made to the existing Aguirre Power Complex to enable it to burn gas from the proposed project, that have the effect of foreclosing the formulation or implementation of reasonable and prudent alternatives, thereby “steamrolling” the consultation process. *Cf. Pacific Rivers Council v Thomas*, 936 F. Supp. 738 (D. Idaho 1996).

4. Section 7(a)(2), 16 U.S.C. § 1536 (a)(2), imposes a substantive duty on federal agencies to “insure” that actions they authorize are not likely to jeopardize the continued existence of protected species or adversely modify designated critical habitat. In *TVA v Hill*, 437 U.S. 153, 173-74 (1978) the United States Supreme Court held that this command “admits of no exception;” and that protection of endangered species was to be afforded “the highest of priorities.” In the absence of a biological opinion from the National Marine Fisheries Service, FERC is unable to comply with this duty to insure no jeopardy to, or adverse modification of the critical habitat of, the protected species that will be affected by the Gasport. The issue is whether FERC has complied with its duty to insure no jeopardy to, or adverse modification of the critical habitat of, the protected species that will be affected by the Gasport.

5. NEPA, 42 U.S.C. §4332, and its implementing regulations, require that FERC prepare an Environmental Impact Statement that adequately discloses the likely environmental impacts of this project, considers a reasonable range of alternatives, and encourages public participation in the agency's decisionmaking process. The issue is whether FERC's final approval of this project, prior to the initiation or completion of the required consultation of the ESA, violated NEPA and its implementing regulations.

Respectfully submitted this 11th day of August, 2016.

/s/ Douglas A. Ruley

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**CERTIFICATE OF SERVICE**

I hereby certify that I have on this 11th day of August, 2016, electronically filed the foregoing documents with the United States Court of Appeals for the District of Columbia Circuit via the appellate CM/ECF system. Per Circuit Rule 25(f), the Notice of Docket Activity sent by the Court's CM/ECF system constitutes service for those parties who have consented to electronic service.

I further certify that I have mailed the foregoing documents by First Class U.S. Mail, postage pre-paid, to the following parties:

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