

155 FERC ¶ 61,139
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

Aguirre Offshore GasPort, LLC

Docket No. CP13-193-001

ORDER DENYING REHEARING

(Issued May 5, 2016)

1. On July 24, 2015, the Commission authorized Aguirre Offshore GasPort, LLC (Aguirre), pursuant to section 3 of the Natural Gas Act (NGA),¹ to site, construct, and operate liquefied natural gas (LNG) import terminal facilities along the southern shore of the Commonwealth of Puerto Rico near the municipality of Salinas (Aguirre LNG Project).² On August 21, 2015, Comité Diálogo Ambiental, Inc. (Diálogo) filed a timely request for rehearing and stay of the July 24 Order. As discussed below, we deny rehearing.

I. Background

2. Aguirre is developing the Aguirre LNG Project in cooperation with the Puerto Rico Electric Power Authority (PREPA)³ for the purpose of receiving, storing, and regasifying LNG for delivery to PREPA's existing Aguirre Power Complex in Salinas, Puerto Rico.⁴ The Aguirre LNG Project consists of: (i) an offshore berthing platform to

¹ 15 U.S.C. § 717b (2012).

² *Aguirre Offshore GasPort, LLC*, 152 FERC ¶ 61,071 (2015) (July 24 Order).

³ PREPA is a government-owned electric power company responsible for electricity generation, power transmission, and power distribution in Puerto Rico.

⁴ The Aguirre Power Complex, the largest capacity power generating facility in Puerto Rico, has an installed generation capacity of approximately 1,492 megawatts and currently uses fuel oil to produce energy.

receive LNG; and (ii) a 3.8-mile-long subsea pipeline connecting the platform to the Aguirre Power Complex.

3. The offshore berthing platform would be a fixed platform with two access berths. The platform would be configured to allow for the long-term mooring of a Floating Storage and Regasification Unit (FSRU) in the north (landward) access berth and for receipt of LNG carriers in the south (seaward) access berth.

4. Aguirre will use one of Excelerate Energy's existing Energy Bridge Regasification Vessels as the FSRU for the Aguirre LNG Project. The vessels are "purpose-built" LNG tankers that incorporate onboard equipment for the vaporization of LNG and delivery of high-pressure natural gas. The FSRU will receive LNG cargo from LNG carriers via conventional LNG loading arms and cryogenic piping located on the berthing platform and will store, regassify, and deliver regassified natural gas to the berthing platform via high-pressure gas loading arms located on the berthing platform.

5. The vessel used as the FSRU will remain capable of ocean travel, subject to regulation by the United States Coast Guard (Coast Guard). The FSRU will be moored long-term, but not permanently fixed, to the berthing platform and may be replaced by other vessels during periods of maintenance or for other purposes. For example, the FSRU is capable of ocean travel to avoid dangerous conditions caused by severe weather or other circumstances.

6. The subsea pipeline will extend from the offshore berthing platform, northward through the Boca del Infierno pass,⁵ and across the basin of Jabos Bay to connect with existing Aguirre Power Complex piping. Aguirre will employ Horizontal Directional Drilling (HDD), as described below, to install the portion of the subsea pipeline located in the pass. Aguirre will install the remaining portion of subsea pipeline in two stages. The first stage will consist of laying the pipe on the natural sea bottom. The second stage will employ lowering procedures designed to meet burial requirements established under the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration regulations.⁶

⁵ The Boca del Infierno pass is a natural 13-foot-deep channel located between Cayos de Barca and Cayos Caribe that provides an unobstructed exchange of water between Jobos Bay and the Caribbean Sea.

⁶ 49 C.F.R. pt. 192 (2015).

II. Discussion

A. Procedural Issues

1. Late Motion to Intervene

7. On September 10, 2015, PREPA filed a motion to intervene out of time and request to file an answer to Diálogo's request for rehearing and stay, asserting that it should be allowed to do so because Diálogo's rehearing request makes specific allegations for the first time regarding the content and purpose of a draft integrated resource plan prepared by Siemens Industry, Inc. for PREPA.

8. In ruling on a late motion to intervene, we apply the criteria set forth in Rule 214(d) of our Rules of Practice and Procedure and consider, among other factors, whether the movant had good cause for failing to file the motion within the time prescribed; whether any disruption to the proceeding might result from permitting intervention; whether the movant's interest is not adequately represented by other parties in the proceeding; and whether any prejudice to, or additional burdens upon, the existing parties might result from permitting the intervention.⁷ When late intervention is sought after the issuance of a Commission order, the prejudice to other parties and burden upon the Commission of granting late intervention may be substantial. Thus, petitioners bear a higher burden to show good cause for the granting of such late intervention.⁸

9. We find that PREPA has not shown good cause to intervene at this late stage of the proceeding. PREPA states that its interests were adequately represented by Aguirre during the initial consideration of the application for the Aguirre LNG Project, but states that Diálogo's rehearing request makes allegations for the first time regarding a resource plan prepared for PREPA, thus requiring PREPA's intervention for the benefit of the Commission and other parties in the proceeding. PREPA has been fully on notice of this proceeding from its inception and elected not to intervene timely. The fact that new issues are arguably now being raised is not sufficient grounds to justify intervention at

⁷ 18 C.F.R. § 385.214(d)(1)(i)-(iv) (2015).

⁸ See, e.g., *Cameron LNG, LLC*, 112 FERC ¶ 61,146, at P 6 (2005).

this late stage.⁹ In any event, we find that we are able to address Diálogo's request that we consider the resource plan below without the benefit of additional information submitted by PREPA. Consequently, we deny PREPA's late motion for intervention.

2. Answer to Requests for Rehearing

10. On September 8, 2015, Aguirre filed, in one pleading, a motion to respond to Diálogo's request for rehearing and reconsideration and an answer to Diálogo's motion for stay.

11. Answers to requests for rehearing are prohibited by Rule 713(d)(1) of the Commission's Rules of Practice and Procedure.¹⁰ Aguirre's request acknowledges that the Commission generally does not allow answers to requests for rehearing, but notes that Diálogo's pleading is also a request for reconsideration and, further, that the Commission permits answers to rehearing requests where the answers provided facilitate the Commission's decisional process, aid in the explication of issues, or help in the development of the record.

12. It is true that the Commission's rules do not prohibit responses to requests for reconsideration. However, Diálogo did not file a separate request for reconsideration, but rather elected to title its pleading both a request for rehearing and reconsideration. Regardless of how it was styled, the pleading is in effect a request for rehearing, as to which an answer is not permitted. Furthermore, we have previously indicated that the concerns that militate against answers to requests for rehearing similarly should apply to answers to requests for reconsideration.¹¹ We further find that the issues before us have been sufficiently addressed, such that Aguirre's response is not needed to assist in our

⁹ See, e.g., *California Department of Water Resources and the City of Los Angeles*, 120 FERC ¶ 61,057 (explaining that the Commission is "more liberal in granting late intervention at the early stages of a proceeding, but becomes progressively more restrictive as the proceeding nears its end" and noting that interested parties are "not entitled to hold back awaiting the outcome of the proceeding, or to intervene when events take a turn not to their liking....").

¹⁰ 18 C.F.R. § 385.713(d)(1) (2015). See, e.g., *Constitution Pipeline Co., LLC*, 154 FERC ¶ 61,046, at P 11 (2016).

¹¹ See *Appalachian Power Co.*, 148 FERC ¶ 61,026, at P 4 (citing *JD Wind I, LLC*, 130 FERC ¶ 61,127, at P 13 (2010); *CGE Fulton, L.L.C.*, 71 FERC ¶ 61,232, at 61,880-81 (1995); *Conn. Light & Power Co.*, 71 FERC ¶ 61,035, at 61,151 (1995)).

decision making here. Accordingly, we reject Aguirre's answer, with the exception of section III thereof, which is a permissible response to Diálogo's motion for stay.

3. Consideration of Additional Information Submittal

13. On February 24, 2016, Diálogo submitted a supplemental report on the impacts of HDD. Additionally, Diálogo's rehearing request references a recently-issued resource plan from PREPA that, according to Diálogo, indicates that the Aguirre LNG Project could be used in the future to provide natural gas to PREPA plants aside from the Aguirre Power Complex.

14. The Commission has a long-standing policy of not accepting additional evidence at the rehearing stage of a proceeding, absent a compelling showing of good cause.¹² Because other parties are precluded under Rule 713(d)(1)¹³ from filing answers to requests for rehearing, allowing parties to introduce new evidence at the rehearing stage would raise concerns of fairness and due process for other parties to the proceeding.¹⁴

15. Further, accepting such evidence at the rehearing stage disrupts the administrative process.¹⁵ The Commission has explained that "we cannot resolve issues with any efficiency or finality if parties are permitted to submit new evidence on rehearing and thus to have us chase a moving target."¹⁶ We find that the July 24 Order properly

¹² See, e.g., *Nevada Power Co.*, 111 FERC ¶ 61,111, at P 10 (2005), *Midwest Independent Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,178, at P 11 (2008).

¹³ 18 C.F.R. § 385.713(d) (2015).

¹⁴ *Tennessee Gas Pipeline Co., L.L.C.*, 142 FERC ¶ 61,025, at P 28 (2013). In Aguirre's Answer to Diálogo's rehearing request, Aguirre asserts that to the extent that new evidence is introduced at the rehearing stage, Aguirre should be entitled to respond.

¹⁵ *Id.*

¹⁶ *Southern California Edison Co.*, 102 FERC ¶ 61,256, at P 17 (2003); see also, *Avista Corp.*, 89 FERC ¶ 61,136, at 61,391 (1999) (noting that "[o]ur precedent does not permit parties to use a request for rehearing as a means of amending their original filings and providing new information."); and *Philadelphia Electric Co.*, 58 FERC ¶ 61,060, at 61,133 & n.4 (1992) (explaining that "we are reluctant to chase a moving target by considering new evidence presented for the first time at the rehearing stage of Commission proceedings.").

considered all evidence in the record at that time and do not believe that reopening the record now is justified.¹⁷

16. On March 4, 2016, Aguirre filed a motion asking the Commission to reject the late-filed information. On March 10, 2016, PREPA submitted a filing in support of Aguirre's motion. On March 24, 2015, Diálogo filed an answer to Aguirre's motion and PREPA's filing in support. Our decision to not accept the additional information renders the March 2016 filings from Aguirre, PREPA, and Diálogo moot.

4. Motion for Stay

17. In its rehearing request, Diálogo also asks that we stay the July 24 Order pending the Commission's decision on rehearing. This order addresses Diálogo's request for rehearing. Accordingly, we dismiss the request for stay pending rehearing as moot.

B. Jurisdictional Determination Regarding the FSRU

18. Diálogo states that the July 24 Order erred in determining that the FSRU does not fall under the Commission's jurisdiction.¹⁸

19. Section 3 of the NGA provides that the Commission has exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal. The July 24 Order noted that section 311(b) of the Energy Policy Act of 2005 added NGA section 2(11), which defines the term "LNG Terminal" as follows:

"LNG Terminal" includes all natural gas facilities located onshore or in State waters that are used to receive, unload, load, store, transport, gasify, liquefy, or process natural gas that is imported to the United States from a foreign country, exported to a foreign country from the United States, or transported in interstate commerce by waterborne vessel, *but does not include* — (A) *waterborne vessels used to deliver natural gas to or from any such facility*; or (B) any pipeline

¹⁷ This is particularly true when the PREPA resource plan appears to forecast the company's plans far into the future such that we cannot rely on any potential impacts to be reasonably foreseeable and where Aguirre is still finalizing its HDD methodology and mitigation plans.

¹⁸ Diálogo Rehearing Request at 4-5.

or storage facility subject to the jurisdiction of the Commission under section 7.¹⁹

20. Aguirre's proposed FSRU is not subject to Commission jurisdiction because, as described above, its FSRU is both a *waterborne vessel* capable of ocean travel and will be *used to deliver natural gas to or from an LNG Terminal*.

21. Diálogo challenges this conclusion, pointing to our decision in *Broadwater Energy LLC*,²⁰ where we determined that Broadwater's FSRU was subject to Commission jurisdiction. Broadwater's FSRU consisted of a floating platform with a single berth capable of receiving and unloading LNG tankers; a regasification plant; a mooring system that would moor the FSRU to a fixed tower that would allow the FSRU to pivot to withstand storm events; and additional space for facilities required for the terminal to function.²¹ Broadwater's FSRU was clearly not a waterborne vessel and thus, could be considered to be part of the proposed LNG terminal.

22. In contrast, there is no question that an Excelerate Energy's Energy Bridge Regasification Vessel, even when serving as the FSRU for the Aguirre LNG Project, is a waterborne vessel capable of, and indeed intended to be used for, oceanic travel. As such, the Excelerate FSRU is outside of the Commission's jurisdiction, but rather is subject to applicable Coast Guard regulations that comprehensively address the design, safety and operations of such vessels (including their onboard LNG equipment), pollution control and LNG transfer operations.²² Accordingly, we deny rehearing on this issue.

¹⁹ July 24 Order at P 10 (citing 15 U.S.C. § 717a(11) (2012) (emphasis added)).

²⁰ 122 FERC ¶ 61,255, *reh'g denied*, 124 FERC ¶ 61,225 (2008).

²¹ 122 FERC ¶ 61,255 at P 4.

²² July 24 Order at n.18. The Coast Guard maintains regulatory authority over the FSRU as set forth in the Coast Guard's regulations, including 46 C.F.R. Part 154 (Safety Standards for Self-Propelled Vessels Carrying Bulk Liquefied Gases) and 33 C.F.R. Parts 127 (Waterfront Facilities Handling Liquefied Natural Gas and Liquefied Hazardous Gas), 155 (Oil or Hazardous Material Pollution Prevention Regulations for Vessels), and 156 (Oil and Hazardous Material Transfer Operations).

C. Adequacy of the Environmental Analysis

1. Environmental Review Process

23. On February 28, 2012, the Commission issued a *Notice of Intent to Prepare an Environmental Impact Statement* with respect to the Aguirre LNG Project. On March 20 and 21, 2012, Commission staff held public scoping meetings. On August 7, 2014, Commission staff issued a draft Environmental Impact Statement (EIS), which addressed the issues raised during the scoping period. On September 9 and 10, 2014, Commission staff held two public meetings to receive comments on the draft EIS.

24. On February 20, 2015, Commission staff issued the final EIS.

25. On March 30, 2015, the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NMFS) filed comments on the final EIS, stating that it had not received sufficient information to initiate consultations under the Endangered Species Act (ESA),²³ the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act),²⁴ or the Marine Mammal Protection Act²⁵ because of the changes made to the project following the issuance of the draft EIS, including changes to the subsea pipeline design and route and outstanding issues concerning the project's impacts to essential fish habitat, ESA, and Marine Mammal Protection Act resources.

26. The July 24 Order stated that the project's environmental impacts, as described in the final EIS, will be reduced to less-than-significant levels with the implementation of

²³ The ESA, 16 U.S.C. § 1531 *et seq.* (2012) requires each federal agency to ensure that any action authorized, funded, or carried out by the agency does not jeopardize the continued existence of a federally listed endangered or threatened species or result in the destruction or adverse modification of a listed species' designated critical habitat.

²⁴ The Magnuson-Stevens Act, 16 U.S.C. § 1855 *et seq.* (2012), requires federal agencies to consult with the Secretary of Commerce (as delegated to NMPS) regarding any action or proposed action, authorized by the agency, that may adversely affect Essential Fish Habitat identified under the act.

²⁵ The Marine Mammal Protection Act (MMPA), 16 U.S.C. § 1361 *et seq.* (2012), prohibits, with certain exceptions, the "take" of marine mammals in United States waters and the high seas. Unlike the ESA, the MMPA does not impose consultation requirements on federal agencies in respect to their authorization of activities. Aguirre must work with NMFS to satisfy the requirements of the MMPA.

Aguirre's proposed mitigation measures and Commission staff's additional recommended measures, which were adopted as conditions in the appendix to the order.²⁶

27. The July 24 Order also noted NMFS' statements that it needed further information to complete consultation and the agency's questioning the propriety of issuing an authorization conditioned on the completion of consultation and the finalization of some environmental measures. The Commission explained that the National Environmental Policy Act (NEPA) does not prohibit the Commission from issuing a certificate for the project before Aguirre received all necessary federal authorizations, including those required under the ESA, Magnuson-Stevens Act, and Marine Mammal Protection Act.²⁷ The July 24 Order further explained that the Commission typically authorizes natural gas projects, consistent with NGA section 7(e)²⁸ and NGA section 3(e)(3)(A),²⁹ subject to conditions that must be satisfied by an applicant or others before the authorization can be effectuated by constructing and operating the project. In this regard, Environmental Condition 9 of the July 24 Order states that prior to receiving authorization to commence construction of any Aguirre LNG Project facilities, Aguirre shall file documentation that they have received all applicable authorizations required under federal law.

28. On February 26, 2016, Commission staff issued its Biological Assessment identifying 32 federally listed threatened or endangered species as occurring or potentially occurring in the project area and noting that the project is within critical habitat for two federally listed coral species. The Biological Assessment determined that the project would have no effect on 13 of the listed species and discussed in detail the remaining 19 species. The Commission submitted the Biological Assessment to NMFS and the U.S. Fish and Wildlife Service (FWS), requesting that the two agencies concur with certain of staff's findings and begin formal consultation under the ESA as to other species.

²⁶ July 24 Order at P 20.

²⁷ *Id.* P 75.

²⁸ NGA section 7(e) grants the Commission the "power to attach to the issuance of the certificate and to the exercise of rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C. § 717f(e) (2012).

²⁹ Under NGA section 3(e)(3)(A), the Commission may by its orders approve such application, "in whole or part, with such modifications and upon such terms and conditions as the Commission may find necessary or appropriate." 15 U.S.C. § 717b(e)(3)(A) (2012).

29. Diálogo raises several issues regarding the Commission's environmental review, as discussed below.

2. Horizontal Directional Drilling Impacts and Turbidity

30. Diálogo contends that the July 24 Order inadequately considered HDD impacts and asserts that the Aguirre LNG Project would result in significant adverse environmental impacts, even with implementation of the conditions in the order. Diálogo asserts that HDD impacts to the surrounding habitat of Jobos Bay and impacts to coral reef habitat have been inadequately addressed.³⁰

31. Diálogo further contends that the July 24 Order failed to adequately consider the turbidity and sediment deposition impacts from constructing the subsea pipeline, asserting that the Commission should “be more precise and limit the permissible amount of sedimentation and turbidity per square foot onto the benthic habitat...”³¹

32. The HDD process is described in detail in the document titled “Horizontal Directional Drilling Feasibility Report – Jobos Bay HDD” prepared by Laney Directional Drilling Company and submitted to the COE and filed with FERC on July 7, 2015 just prior to the July 24 Order. This report was preceded by a preliminary report prepared by the same company. (Collectively, the Laney Studies)

33. Diálogo notes that the Laney Studies find that no HDD installation is without some risk of inadvertent drilling fluid returns and that this would result in an unreasonably high risk of impacts to the surrounding habitat of Jobos Bay and to coral reef habitat. The July 24 Order explained that inadvertent releases of drilling fluid may occur as a result of rock fractures, low density soils, and unconsolidated geology, which were unforeseen during the HDD design phase.³² The July 24 Order notes that the final EIS recognized the potential for inadvertent drilling fluid returns, and as such, Environmental Condition 13 requires Aguirre to conduct additional necessary subsurface investigations of potential mitigation measures. Such measures could include, but are not limited to, the use of casings to minimize the likelihood of an inadvertent release, turbidity curtains to minimize sediment transport, and barges to collect drilling mud. Environmental Condition 13 also requires Aguirre to develop a site-specific HDD

³⁰ Diálogo Rehearing Request at 5-9.

³¹ *Id.* at 11.

³² July 24 Order at P 64, n.45.

Construction Plan and Contingency Plan that addresses containment and cleanup of any inadvertent releases.

34. Commission staff addressed the issues of sediment deposition and turbidity in sections 4.2.3.2 and 4.5.2.4 of the final EIS. The final EIS specifically considered the sensitivity and tolerance limits of coral reef systems.³³ The July 24 Order notes that Commission staff reviewed a study predicting the suspended sediment concentrations and subsequent transport and deposition at the entry and exit points for an HDD of the Boca del Infierno pass.³⁴ The results showed a maximum deposition of 16 inches, but that deposition rates were reduced to less than 0.4 inch within 300 feet and less than 0.04 inch within 2,300 feet. Turbidity was predicted to decrease to 50 milligrams per liter or less within approximately 3,000 feet and to 10 milligrams per liter or less within 7,300 feet. The July 24 Order explained that while Environmental Condition 13 required Aguirre to provide project-specific information about the exact location of the proposed HDD entry and exit points along with a technical study and/or models to predict impacts, the impacts of an HDD will likely be environmentally preferable to directly laying the pipe on, or trenching through, sensitive habitat.

35. Based on the information described above, we find that the July 24 Order, as conditioned, adequately addressed potential HDD installation impacts, including potential turbidity and sediment deposition impacts of the Aguirre LNG Project.

3. Terminal Siting Impacts

36. Diálogo contends that the July 24 Order inadequately considered the proposed terminal's impact on coral reef and submerged aquatic vegetation and that the final EIS failed to properly consider the amount of coral reef located at the offshore terminal site proposed by Aguirre as compared to other alternative terminal location sites.³⁵ Specifically, Diálogo states that the July 24 Order failed to provide an explanation for not selecting an alternative terminal site south of the barge channel, which would involve routing the undersea pipeline through the barge channel, rather than through the coral reef.³⁶

³³ Final EIS at section 4.5.2.4.

³⁴ July 24 Order at P 48 (citing final EIS at Appendix C, Sediment Dispersion Modeling For Pipeline Installation, Aguirre Offshore GasPort, Puerto Rico).

³⁵ Diálogo Rehearing Request at 5-9.

³⁶ *Id.* at 10.

37. The July 24 Order explained that the final EIS evaluated four alternate berthing platform sites, with varying water depths and seafloor/benthic habitat conditions, lengths of pipeline required to connect the offshore terminal to the Aguirre Power Complex, and proximity to the closest population centers.³⁷ Specifically, the final EIS does evaluate two alternatives utilizing the barge channel: Terminal Site 4 and Alternative Pipeline Route 3 and Terminal Site 4 and Alternative Pipeline Route 4. Both alternatives were evaluated for their impact on coral reef habitat, as well as recreation and commercial activities. Based on the impacts identified, the Commission concluded that both alternatives “[do] not present any significant environmental advantages compared to the proposed Project.”³⁸ The final EIS explained that the “advantages of the proposed site and pipeline route are the shorter pipeline length required to connect to the Aguirre Plant, the reduced visual impact, and increased distance from major population centers.”³⁹ Accordingly, the Commission has already addressed and rejected alternatives using the barge channel.

38. Further, the July 24 Order noted that NEPA does not require the Commission to find the “best” site for the berthing platform⁴⁰ and explained that such an undertaking in this case would be especially onerous, given the large marine area surrounding the project.⁴¹

39. Based on the foregoing, we affirm the July 24 Order’s finding that the selected berthing platform site is environmentally acceptable and that the alternate sites studied would not provide a significant environmental advantage over the proposed site.

³⁷ July 24 Order at P 62.

³⁸ Final EIS at section 3.6.

³⁹ *Id.*

⁴⁰ In describing the duty of federal agencies to consider alternatives to the proposed project, NEPA requires that the Commission “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” 42 U.S.C. § 4332(2)(E) (2012).

⁴¹ July 24 Order at P 61.

4. Impacts on ESA Listed Species and Fisheries

40. Diálogo's rehearing request challenges the July 24 Order's findings regarding the Aguirre LNG Project's impacts on fisheries. Diálogo contends that our authorization should not have been issued prior to completing the ESA consultation process and receiving conditions from NMFS, particularly where earlier NMFS letters indicated the potential for significant adverse impacts on fisheries in the project area.⁴²

41. NEPA does not prohibit the Commission from issuing a conditional authorization for the project before Aguirre receives all other necessary federal authorizations, including those required under the ESA, Magnuson-Stevens Act, and Marine Mammal Protection Act. Under NEPA, the purpose of an EIS is to ensure that an agency, in reaching its decisions, will have available, and will carefully consider, detailed information concerning significant environmental impacts. The EIS also guarantees that the relevant information will be made available to the larger audiences that may also play a role in both the decision-making process and the implementation of that decision.⁴³ The EIS adopted by the Commission for the Aguirre LNG Project provides the information necessary to achieve those purposes.

42. The July 24 Order noted that the final EIS determined that eight federally listed or proposed for ESA listing species were likely to be adversely impacted by construction and/or operation of the project.⁴⁴ Specifically, the final EIS concluded that the project would impact the endangered Antillean manatee and seven species of listed or proposed-to-be-listed corals. The final EIS stated that Aguirre should avoid the impacts on federally listed corals which would result from direct lay installation of the subsea pipeline within the Boca del Infierno pass. In order to mitigate these potential impacts, Aguirre changed its proposed construction method through the Boca del Infierno to an HDD. The July 24 Order agreed with the final EIS conclusion that avoidance of a direct lay and/or trenching through the Boca del Infierno pass (which the final EIS finds would result in unacceptable impacts on sensitive corals and other benthic resources) in favor of an HDD will greatly reduce impacts on listed corals and other benthic species. As noted above, Environmental Condition 13 requires Aguirre to conduct necessary subsurface investigations and to develop a site-specific HDD Contingency Plan to address containment and cleanup of any inadvertent releases. In addition, Environmental

⁴² Diálogo Rehearing Request at 12-13.

⁴³ See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

⁴⁴ July 24 Order at P 39.

Conditions 19, 21, 29, 30, and 31 will further minimize impacts on these and other species in the project area from construction and operation of the project.

43. The July 24 Order explained that while Commission authorization may precede approvals from other federal agencies, such authorization does not nullify the obligation to obtain all required authorizations. The order explained that conditional authorization of the project would not prevent the Commission and NMFS from completing formal consultation in compliance with the ESA.⁴⁵ Further, the order noted that it is Commission practice to issue an order prior to completion of formal consultation under the ESA in situations where there are complex issues related to federally listed threatened and endangered species.⁴⁶ Environmental Condition Nos. 9 and 30 state that all applicable authorizations are required prior to commencement of construction activities. The Commission's process here is similar to that in *State of Idaho v. Interstate Commerce Commission*,⁴⁷ where the court affirmed an authorization by the Interstate Commerce Commission, the implementation of which was conditioned on the subsequent completion of a number of environmental matters, including ESA consultation.

44. Diálogo contends that issuing a conditional authorization in this case bars the opportunity for rehearing and, consequently, judicial review of the adequacy of future project conditions and modifications. This is not the case.

45. Deferral to other agencies of the consideration of impacts that may require mitigation does not cost parties their right to seek judicial review of our decisions.⁴⁸ This order constitutes final action by the Commission and parties who are aggrieved may seek judicial review of the order upon its issuance. In addition, no construction or operation of the authorized facilities can commence until numerous conditions of our authorizations are met. Information required by those conditions will be filed with the Commission and available for review and comment by the public. Once NMFS has completed its consultation under the ESA, it will issue a Biological Opinion. Where Biological Opinions contain reasonable and prudent alternatives or incidental take conditions, it is our practice that holders of NGA authorizations and certificates must implement those conditions. The Director of the Office of Energy Projects will issue orders as necessary

⁴⁵ *Id.* at 77.

⁴⁶ *Id.* at 78 (citing *Bradwood Landing LLC*, 126 FERC ¶ 61,035, at PP 43-44 (2009)).

⁴⁷ 35 F.3d 585 (D.C. Cir. 1994).

⁴⁸ *See, e.g., Bradwood Landing LLC*, 126 FERC ¶ 61,035 at P 36.

ruling on Aguirre's compliance with conditions. To the extent those orders constitute substantive decisions, as opposed to ministerial actions, they will be subject to rehearing by the Commission.⁴⁹ The Commission's orders, in turn, will be subject to judicial review.

46. We find that the July 24 Order was consistent with both NEPA and the ESA.

5. Air Quality Impacts

47. Diálogo contends that the air quality analysis for the Aguirre LNG Project is inadequate, stating that "[n]either the AES plant nor any of the other industrial operations nearby in Guayama were explicitly included in the computer monitoring conducted for the EIS."⁵⁰

48. The air quality modeling described in the final EIS analyzes the construction and operational air quality impacts of the Aguirre LNG Project.⁵¹ In addition, the July 24 Order specifically addressed Diálogo's concern about the cumulative air quality impacts of major pollutants from nearby sources such as the AES coal-fired power plant.⁵² The order concluded that the analysis of cumulative air quality impacts in the final EIS was appropriate and proportionate to the scope of the project, given that the conversion of the Aguirre Power Complex from primarily fuel oil to primarily natural gas would lead to beneficial changes to the complex's contribution of emissions. Given that the project's impact on air quality would be positive, there was no need to engage in more detailed cumulative impact analysis.

49. Diálogo also repeats its argument made in the underlying proceeding that we failed to adequately address and provide mitigation for hazardous air pollutant emissions from the project. As the July 24 Order notes, although the final EIS does not contain

⁴⁹ *Id.*

⁵⁰ Diálogo's Rehearing Request at 14.

⁵¹ Final EIS section 4.10.1.4 addresses construction emissions impact and mitigation. Final EIS section 4.10.1.5 considers operational emissions impact and mitigation. Operational air emission sources associated with the Aguirre LNG Project include equipment on the FSRU, the terminal platform, and the LNG carriers. The Offshore and Coastal Dispersion model was used to assess the air quality concentrations for all criteria pollutants from the Aguirre LNG Project.

⁵² July 24 Order at P 69.

estimates for the hazardous air pollutant emissions from the project, such information is in the public record and is included in Aguirre's air permit application to the EPA and Puerto Rico Environmental Quality Board.⁵³ Further, the July 24 Order explained that conditioning the operation of the Aguirre Power Complex to mitigate future emissions is beyond the scope of the Commission's authority under NEPA.⁵⁴ The operation of the Aguirre Power Complex is subject to the permitting processes before the EPA and Puerto Rico pursuant to the Clean Air Act. Because there was sufficient information in the public record to support our decision, and because we lack authority to impose mitigation measures on the Aguirre Power Complex, our analysis of air quality impacts was sufficient.

6. Socioeconomic and Environmental Justice Analysis

50. Diálogo contends that the Commission should require further socioeconomic study and environmental justice assessment and disputes statements from Aguirre about the number of potential jobs the project would create or save. These same arguments were previously made by Diálogo and were adequately responded to in the July 24 Order.⁵⁵

51. The July 24 Order stated that we do not dispute that the project would constitute a major industrial facility in an area already containing existing industrial facilities, sensitive marine resources, and a local economy reliant upon tourism, recreation, and subsistence activities. However, we found that the final EIS accurately disclosed the potential impacts, analyzed proposed mitigation measures for adequacy in order to avoid or minimize impacts, and included recommendations for further mitigation. We affirm the conclusion that while the project will impact various resources, those impacts would not be significant, and therefore the level of impacts does not necessitate further socioeconomic and environmental justice assessment. With respect to the alleged inconsistency regarding how many jobs will be created, we again find that although it is not the function of the Commission to ensure that local jobs are created or saved as a consequence of the project, it was reasonable for the final EIS to note that Aguirre had signed an affidavit attesting that the employment information it provided to the Commission is true and provides the best available information.

⁵³ *Id.* P 68.

⁵⁴ *Id.* P 69, n.47.

⁵⁵ *Id.* PP 70-73.

D. Aguirre's Request for Correction

52. On July 31, 2015, Aguirre filed a request for correction noting that the July 24 Order contains an incorrect description of ownership structure. The order stated that "Excelerate Energy ... is jointly owned by an individual and RWE Supply and Trading Participations Limited, a member of the RWE AG Group."⁵⁶ Aguirre explains that a revision to its application filed on October 4, 2013, explained that while Mr. George B. Kaiser previously owned 50 percent of Excelerate Energy, he now owns 100 percent of that entity. We note this correction, although it has no impact on our decision.

The Commission orders:

(A) Diálogo's request for rehearing of the July 24 Order is denied as discussed in the body of this order.

(B) PREPA's motion for late intervention is denied.

(C) Aguirre's motion to reject Diálogo's late-filed supplemental information, PREPA's motion in support, and Diálogo's motion in opposition are dismissed.

(D) Diálogo's motion for stay is dismissed.

By the Commission.

Kimberly D. Bose,
Secretary.

⁵⁶ *Id.* P 2.