

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Columbia Riverkeeper, Sierra Club,	Docket Nos. CP06-365-001
Landowners and Citizens for a Safe Community,	CP06-366-001
RiverVision, Wahkiakum Friends of the River,	CP06-376-001
Friends of Living Oregon Waters,	CP06-377-001
Willapa Hills Audubon Society,	
Fisherman's Protective Union,	
Peter Huhtala, and Christian Bock	

vs.

NorthernStar Energy LLC and
Bradwood Landing LLC

ORDER DENYING COMPLAINT

(Issued February 16, 2007)

1. On December 20, 2006, a complaint was filed under section 385.206 of the Commission's Rules of Practice and Procedure by Columbia Riverkeeper, the Sierra Club, Landowners and Citizens for a Safe Community, RiverVision, Wahkiakum Friends of the River, Friends of Living Oregon Waters, Willapa Hills Audubon Society, Fisherman's Protective Union, Peter Huhtala, and Christian Bock (Complainants) against Bradwood Landing LLC (Bradwood Landing) and NorthernStar Energy LLC (NorthernStar). Complainants allege that the *ex parte* contact prohibition of section 385.2201 of the Commission's Rules of Practice and Procedure¹ was violated by a meeting held on December 14, 2006, attended by, among others, Bradwood Landing, NorthernStar, and Commission staff.

2. Complainants request the Commission (1) issue an order prohibiting off-the-record communications between the applicants and Commission decisional employees and (2) place into the public record all documents presented at the December 14, 2006 meeting. The complaint is denied, for the reasons discussed below. The Commission finds the meeting in question was exempt from the prohibition against off-the-record

¹ 18 CFR § 385.2201 (2006).

communications, and thus finds no cause to issue the requested order. In accordance with Commission practice – *i.e.*, independent of the complaint – materials related to the meeting were placed into the public record on December 26, 2006.

Background

3. On June 5, 2006, in Docket No. CP06-365-000, Bradwood Landing submitted an application under section 3 of the Natural Gas Act (NGA) for authorization to site, construct, and operate a new LNG import terminal along the Columbia River near Bradwood, in Clatsop County, Oregon. On the same date, in Docket Nos. CP06-366-000, CP06-376-000, and CP06-377-000, NorthernStar submitted an application under NGA section 7(c) for authorization to construct, own, and operate a proposed 34-mile long pipeline and related facilities to transport up to 1.5 Bcf of gas per day from the new LNG terminal to an interconnection with Northwest Pipeline Corporation in Cowlitz County, Washington. The applications are pending.

4. Bradwood Landing’s and NorthernStar’s requested authorizations require federal action by the Commission and other agencies, which in turn necessitate compliance with the National Environmental Policy Act of 1969 (NEPA).² To meet this NEPA obligation, as part of its assessment of the applicants’ proposals, the Commission is preparing an environmental impact statement (EIS), which will consider, *inter alia*: (1) the environmental impact of the proposed actions; (2) any adverse environmental effects which cannot be avoided should the proposals be implemented; (3) alternatives to the proposed actions; (4) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and (5) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. In addition, prior to making any detailed statement, the Commission will consult with and obtain the comments of any federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.³

5. As part of the process of preparing an EIS, a meeting was held on December 14, 2006, in Portland, Oregon, attended by a Commission staff member and representatives from Bradwood Landing, NorthernStar, the U.S. Army Corps of Engineers, the U.S. Coast Guard, the U.S. Department of Commerce’s National Marine Fisheries Service (NOAA Fisheries), the U.S. Department of the Interior’s Fish and Wildlife Service,

² 42 U.S.C. §§ 4321–4370f (2005).

³ *See* 42 U.S.C. § 4332(2)(C) (2005). *See also* the Council on Environmental Quality (CEQ) regulation regarding NEPA, 40 CFR § 1502.6 (2006), which states that: “Environmental impact statements shall be prepared using an inter-disciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts.”

Oregon's Department of Fish and Wildlife, the Nez Perce Tribe, the Columbia River Inter-Tribal Fish Commission, Northwest Natural Gas Company, and employees from engineering firms. The meeting was held to assist in preparing the Commission's biological assessment (BA) and Mitigation Plan.

Complaint

6. Complainants emphasize that the Bradwood Landing and NorthernStar proposals are contested on-the-record proceedings, and therefore claim that the December 14, 2006 meeting was a prohibited off-the-record communication, *i.e.*, "an oral communication made without reasonable notice to the parties to the proceeding and without the opportunity for such parties to be present when the communication is made."⁴ Complainants state that there was no public notice of the December 14, 2006 meeting and that they sought to, but were precluded from, attending the meeting. Complainants therefore contend the December 14, 2006 meeting constituted a violation of the Commission's *ex parte* rules governing off-the-record communications.

7. As relief, Complainants request the Commission (1) issue an order prohibiting off-the-record communications between the applicants and Commission decisional employees⁵ and (2) place into the public record all documents presented at the December 14, 2006 meeting.

8. Complainants state that they were refused access to the December 14, 2006 meeting on the grounds that the meeting was covered by the section 385.2201(e)(vi)(A) exception for "an off-the-record communication . . . that relates to the preparation of an environmental impact statement if communications occur prior to the issuance of the final environmental impact statement," provided that, pursuant to section 385.2201(g), "any document, or a summary of the substance of any oral communication . . . promptly will be submitted to the Secretary and placed in the decisional record of the relevant Commission proceeding."

9. Complainants maintain this exemption should not apply the December 14, 2006 meeting, because the purpose of that meeting was to consider the Commission's plans for the preparation of its BA, an activity, Complainants assert, that is separate from the preparation of an EIS, and thus is not covered by the exception in section 385.2201(e)(vi)(A). Complainants note that consultation on the BA is not required under

⁴ Quoting 18 CFR § 385.2201(c)(4) (2006).

⁵ As defined in section 385.2201(c)(3) of the Commission's Rules of Practice and Procedure, "decisional employee" includes any employee of the Commission "who is or may be expected to be involved in the decisional process of a proceeding."

NEPA; rather, it is an obligation under section 7 of the Endangered Species Act (ESA)⁶ and its implementing regulations.⁷ Further, Complainants maintain the section 385.2201(e)(vi)(A) exception “is intended for communications between federal consulting and/or cooperating agencies and FERC staff” and contend, therefore, that the meeting was not excepted from the Commission’s *ex parte* rules by that section of the regulations since “numerous non-consulting and non-cooperating organizations and intervenors attended the meeting.”⁸ Finally, Complainants contend that the December 14, 2006 meeting contravenes the goals of NEPA as it deprived Complainants of access to environmental information in advance of decisions being made and actions taken.⁹

Answer of Bradwood Landing and NorthernStar

10. Bradwood Landing and NorthernStar acknowledge the December 14, 2006 meeting took place, but deny there was any prohibited off-the-record communication. Bradwood Landing and NorthernStar state the meeting was held to discuss the preparation of the Commission’s BA, and highlight the direction provided by CEQ to federal agencies to integrate their review of relevant environmental laws into each EIS. Respondents maintain the biological review called for under the ESA constitutes a relevant environmental law.¹⁰ They thus conclude communications regarding the preparation of the BA were part of the preparation of the EIS and, as such, constitute communications exempt from the general rule prohibiting off-the-record communications under section 385.2201(e)(vi)(A) of the Commission’s Rules of Practice and Procedure.

⁶ 16 U.S.C. § 1536 (2005).

⁷ 50 CFR § 402.12 (2006).

⁸ Complaint at 4 (December 20, 2006).

⁹ Complainants cite the CEQ regulation, 40 CFR § 1500.1(b), which states that “NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.”

¹⁰ Bradwood Landing and NorthernStar quote the Commission’s statement in implementing the *ex parte* rule that “the CEQ regulations require that Federal agencies integrate related surveys, required by other relevant environmental laws, into an EIS.” *Regulations Governing Off-the-Record Communications*, Order No. 607, 64 FR 51,222, 51,229 (September 22, 1999); FERC Stats. & Regs. ¶ 31,079 (1999) (Final Rule).

Discussion

11. The Commission concurs with the Complainants that the docketed applications are contested on-the-record proceedings subject to the Commission's rules prohibiting off-the-record communications. However, the Commission concludes the December 14, 2006 meeting was exempt from the prohibition against off-the-record communications because the intent of, and all discussion at, the meeting was for the purpose of preparing an EIS. Documents presented at the meeting, as well as a summary of the meeting's oral communications, were placed in the public record on December 26, 2006, in accordance with the disclosure requirements of section 385.2201(g)(1) of the Commission's Rules of Practice and Procedure.

12. Complainants are correct that the Commission's preparation of a BA and an EIS are compelled under separate statutory mandates; however, the Commission considers its NEPA review as the umbrella under which all environmental issues are identified and addressed, including issues involved in the Commission's preparation of its BA. A BA considers a proposed project's potential impacts on endangered species which have potential habitats or known individual occurrences within the planned project area. Although it is not reflected in the regulations, the Commission's well-established practice is to prepare the BA as part of its overall environmental review and incorporate the findings of the BA as part of the EIS or, if an EIS is not prepared, the environmental assessment (EA).¹¹

13. The ESA requires the Commission to consult with the Fish and Wildlife Service and the NOAA Fisheries to ensure that a proposed project "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species."¹² The ESA directs that if "any species which is listed or proposed to be listed may be present in the area of such proposed action," the Commission "shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected

¹¹ See, e.g., *Southern LNG Inc.*, 103 FERC ¶ 61,029 at PP 65-68 (2003) and *Greenbrier Pipeline Company, LLC*, 103 FERC ¶ 61,024 at P 90 (2003). Note that the Commission's preparation of an EA, like its preparation of an EIS, qualifies as an exempt off-the-record communication, provided the Commission solicits public comments prior to issuance of the final environmental document. See 18 CFR § 385.2001(e)(vi)(B) (2006).

¹² 16 U.S.C. § 1536(a)(2) (2005).

by such action,” and adds that that this “assessment may be undertaken as part of a Federal agency’s compliance with the requirements of section 102 of the National Environmental Policy Act of 1969.”¹³ The meeting in question was a part of this process.

14. In instituting its *ex parte* rules, the Commission discussed the scope of the section 385.2201(e)(vi)(A) exemption. The Commission observed that the CEQ regulation directing a federal agency to integrate related surveys required by other relevant environmental review laws into its EIS specifies that such laws “include, but are not limited to, the Coastal Zone Management Act of 1972, 16 U.S.C. 1451 et seq.; National Historic Preservation Act of 1966, 16 U.S.C. 470 et seq.; *Endangered Species Act*, 16 U.S.C. 1532 et seq.; and section 401, the Clean Water Act, 33 U.S.C. 1341”¹⁴ (emphasis added). The Commission has followed this approach by integrating the surveys and studies needed for its BA, as required under the ESA, into the process of preparing its EIS, as required under NEPA. Thus, as stated above, the Commission’s final EIS typically includes the Commission’s BA, if one is prepared. Therefore, any off-the-record communications related to the preparation of the Commission’s BA (or, for that matter, any communications that takes place in order to further compliance with other relevant environmental review laws) constitute part of the process of preparing the EIS, and as such, come within the section 385.2201(e)(vi)(A) exemption for off-the-record communications related to the preparation of an EIS.¹⁵

15. In its consideration of its *ex parte* rules, the Commission addressed the Complainants’ concern that off-the-record communications could result in decisions and actions absent the input of all relevant participants. On the one hand, the Commission found “that there will be times when off-the-record contacts may assist in the

¹³ 16 U.S.C. § 1536(c)(1) (2005).

¹⁴ 64 FR 51,222, 51,229, n. 79 (September 22, 1999); FERC Stats. & Regs. ¶ 31,079 (1999).

¹⁵ “[C]ommunications necessary to assure compliance with all relevant statutes protecting environmental, cultural and historic preservation concerns also would be considered as excluded from the rule [prohibiting off-the-record communications], if they occur prior to the issuance of a completed EA or EIS” (footnote omitted). 63 FR 51,312, 51,318 (September 25, 1998); FERC Stats. & Regs. ¶ 32,534 (1998) (Notice of Proposed Rulemaking).

development of sound environmental analysis.”¹⁶ On the other hand, the Commission sought to uphold the “due process principles underlying *ex parte* [that] relate to preserving the actual and apparent integrity of administrative processes and [the] creation of any agency decision-making record capable of judicial review.”¹⁷ To achieve these two ends, the Commission adopted a notice and disclosure requirement that would apply to certain exceptions to the *ex parte* rules, including the exception for *ex parte* communications relating to the preparation of an EIS or EA:

The disclosure requirement provides that any written communication, and a summary of any oral communication obtained through an exempted off-the-record communication to or from Commission staff, will be promptly placed in the decisional record of the proceeding, and noticed by the Secretary. Thus, interested persons will have notice of comments received on a NEPA document and be given the opportunity to respond. Such a practice will enhance the openness of the NEPA process and allow the Commission to make the most informed decisions practicable.¹⁸

16. Such was the procedure followed in this case, where written and oral off-the-record communications relating to the preparation of an EIS were promptly placed in the decisional record of the proceeding, and noticed by the Secretary. Complainants will have the opportunity to review and comment on the information presented and discussed at the December 14, 2006 meeting, and their comments will be taken into account by the Commission as part of its preparation of its EIS.

17. Section 385.2201(g)(1) of the Commission’s Rules of Practice and Procedure states that certain exempt off-the-record communications, including those relating to preparing an EIS, are subject to notice and disclosure “unless the communication was with a cooperating agency.” Complaints maintain this exception to the notice and

¹⁶ *Id.* at 51319. See also *Louisiana Ass'n of Independent Producers and Royalty Owners v. FERC*, 958 F.2d 1101, 1113 (D.C. Cir. 1992), quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 57 (1977) stating “that informal contacts between agencies and the public are the ‘bread and butter’ of the process of administration and are completely appropriate so long as they do not frustrate judicial review or raise serious questions of fairness.”

¹⁷ 63 FR 51,312, 51,319 (September 25, 1998); FERC Stats. & Regs. ¶ 32,534 (1998).

¹⁸ 64 FR 51,222, 51,229 (September 22, 1999) (footnote omitted); FERC Stats. & Regs. ¶ 31,079 (1999).

disclosure requirement does not apply to the December 14, 2006 meeting. The Commission concurs, and has never maintained otherwise, and has thus placed a summary of discussions and a copy of the materials presented at the meeting in the public record.

The Commission orders:

The complaint filed in Docket Nos. CP06-365-001, CP06-366-001, CP06-376-001, and CP06-377-001 is denied, for the reasons discussed in the body of this order.

By the Commission. Commissioner Wellinghoff dissenting in part with a separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

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WELLINGHOFF, Commissioner, dissenting in part:

Complainants state that they sought to, but were precluded from, attending a December 14, 2006 meeting on the Commission's plans for the preparation of a biological assessment in this case. Complainants further state that they were refused access to that meeting, for which no public notice was issued, on the grounds that the meeting was covered by an exemption from the Commission's *ex parte* regulations that govern off-the-record communications.

In my opinion, the use of that exemption as a basis for excluding Complainants from the December 14, 2006 meeting is inappropriate. I recognize the importance to efficient administrative proceedings of participants respecting the purpose of particular meetings. I also recognize that the documents presented at the meeting in question, as well as a summary of the meeting's oral communications, have been placed in the public record in accordance with the Commission's disclosure requirements. Nonetheless, I believe that Complainants should have been given the opportunity to attend the meeting.

For this reason, I respectfully dissent in part.

Jon Wellinghoff
Commissioner