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July 14, 2010

Dr. Benjamin Tuggle
Regional Director
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Southwest Region
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Re: Reply Refer to FWS/R2/ES-TE/BPO31309

Dear Sir,

Thank you for advising us that you are committed to complying with all the rules and regulations outlined in NEPA and the Endangered Species Act of 1973. You single out in that commitment “including **those related to public input and involvement**, and consideration of comments during the draft EIS and draft HCP processes.” [Our emphasis]

We know by your commitment to compliance that you did not intend to place public involvement in a position more important than coordination with local government through “cooperation to the fullest extent possible.” 40 CFR 1506.2(c).

We look forward to assisting you in your fulfilling your commitment by meeting with you or your representative on August 19, 2010 or August 24, 2010 at the Mason County Courthouse, Commissioners Courtroom, in Mason, Texas. Please contact my office so we can coordinate this meeting with as little delay as possible.

Here is the status of your agency and our Commission as we see it:

1. **Incidental Take Permit and Habitat Conservation Plan:**

Your agency: You are “currently in the scoping phase for development of a Habitat Conservation Plan and eventual application to the Service for an incidental take permit” anticipated to “cover impacts of transmission lines on routes ultimately selected by the PUC.” Your scoping is not directed toward any CREZ line, but must include any and all routes that are on the table as proposals. You must include all of them, and that includes the Mason line, or you will fail the commitment you say you have to the NEPA rules.

Our Commission: We too are studying the environmental impact on the human and natural environment within our jurisdiction, and our study involves the environmental consequences of constructing a transmission line through our jurisdiction, Mason County. Our scoping work plan shows our focus on all the elements that you must include in your study.

2. Relationship to the PUC and selection of routes:

Your agency: You say that you have no role in the “actual selection of final transmission line routes.”

Our Commission: Of course you don't. We know that. Neither do we have a role in the “selection” because neither you nor our Commission is an arm of the PUC. But, you do have the task of studying the environmental consequences of the proposed routes, including the Mason line.

3. The scoping process:

Your agency: You are in the scoping phase of your study that is necessary to protect the human and natural environment.

Our Commission: We are in the scoping phase of our study being conducted under our policy of protecting our human and natural environment.

Your agency: 40 CFR 1501.7 requires that during your scoping process you “invite” our participation.

Our Commission: We accept the invitation that you will no doubt formally present in order to comply with 40 CFR 1501.7, now that it is clear that our joint focus is on the environmental study, not the selection of the route.

We sent you a scoping work plan that makes it quite clear that we are focused on the action that you are studying, i.e., the incidental take permit and the Habitat Conservation Plan. We are well aware that you do not make the decision as to whether the line goes through Mason. Had we believed that, we would already have served the Department of Justice with a Notice of Intent to Sue.

But, we also know that any line that goes through Mason, whether by PUC decree or not, cannot lawfully be developed without an incidental take permit and Habitat Conservation Plan. We have specific expertise regarding the status of several varieties of species and their habitat throughout Mason County. Our advisors have ground-truthed knowledge that makes it clear that LCRA would be in civil and criminal violation of the Endangered Species Act if it developed the line without an incidental take permit.

We will look forward to our meeting at which we can discuss the contents of our scoping work plan, the nature of the species habitat and other ecological factors in Mason County and the

40 CFR 1502.16 Environmental Consequences.

“This section forms the scientific and analytic basis for the comparisons under 1502.14. . . It shall include discussions of:

...
(c) **Possible conflicts between the proposed action and the objectives of Federal, regional, State and local (and in the case of a reservation Indian tribe) land use plans, policies and controls** for the area concerned.”

40 CFR 1506.2 Elimination of duplication with State and local procedures. . . .

(b) Agencies shall **cooperate with State and local agencies to the fullest extent possible to reduce duplication** between NEPA and State and local requirements, unless the agencies are specifically barred from doing so by other law. . . .

(c) **Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and comparable state and local requirements,** unless the agencies are specifically barred from doing so by some other law. . . [no such bar exists in this case]

(d) **to better integrate environmental impact statements into State or local planning processes, statements shall discuss any inconsistency of a proposed action with any approved State or local plan and laws whether or not federally sanctioned. Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law.**”

As to the latter rule, 1506.2, the Council on Environmental Quality has explained that as to conflicts with local plans, policies or controls, “The agency [preparing the EIS] should first inquire of other agencies whether there are any potential conflicts.” Answer 23 to 40 Most Asked Questions, Appendix B to 40 CFR 1500.

Answer 23 also explains that the term “local policies” “includes formally adopted statements of land use policy as embodied in laws or regulations. **It also includes proposals for action such as the initiation of a planning process,** or a formally adopted policy statement **of the local, regional, or state executive branch,** even if it has not yet been formally adopted by the local, regional or state legislative body.”

We have made it clear to you that this Commission is the governing body of a unit of local government under Texas law, and the terms of our scoping work plan itself demonstrate without further explanation that we have initiated “a planning process”. Your commitment to comply with the NEPA rules then begins, under 1506.2 by inquiring of us whether there are potential conflicts between the proposal for you to issue an incidental take permit and our policy regarding a transmission line through Mason County. We already told you that there are conflicts, so your obligation (your commitment) now is to “discuss” [not “write to”, but “discuss”] with us those inconsistencies. 40 CFR 1506.2 supra.

Of course, the statutory terms of NEPA themselves require your agency to make the same all out effort to cooperate to “the fullest extent possible” with our Commission in order to better “coordinate” our efforts. We know that you are familiar with the language itself, but since we may be making a paper trail for involvement of the Department of Justice and the Council on Environmental Quality at this point, we set it forth as follows:

“The congress, recognizing the profound impact of man’s activities on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the **continuing policy of the Federal government, in cooperation with States and local governments** and other concerned public and private organizations **to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony and fulfill the social, economic and other requirements of present and future generations of Americans.**

(b) In order to carry out the policy set forth in this Act, **it is the continuing responsibility of the Federal government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans,** functions, programs and resources to the end that the Nation may - -

1. Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
2. Assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
3. Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
4. Preserve important historic, cultural and natural aspects of our national heritage, and maintain wherever possible an environment which supports diversity, and variety of individual choice;
5. Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life’s amenities; and
6. Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

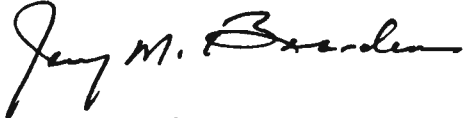
It is clear that what we expect of your agency is not some new or creative function. Since 1969 it has been the “continuing policy” of the Federal government to cooperate fully with local government in order to better coordinate federal plans. What we expect is only what the law requires.

What we expect is compliance with the law as the United States Fish and Wildlife Service has complied by coordinating with local governments in many other parts of the United States. It

may be the first time that the Service has been expected to comply with these regulations here in Texas, but we know of specific instances of compliance to these NEPA rules in California, Colorado, Kansas, Montana and Idaho.

We look forward to meeting with you to get down to work now that the formalities have been completed. We are confident that our meetings will be as fruitful for you as they will be for us.

Yours truly,



Jerry M. Bearden
Mason County Judge
Chairman, MSRPC

cc Barry Smitherman, Chairman, Public Utilities Commission of Texas
W. Lane Lanford, Executive Director, Public Utilities Commission of Texas
Thomas Mason, General Manager, Lower Colorado River Authority
Clayton Napier, Fish and Wildlife Biologist, U.S. F.&W.S.
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