LBP-12-16

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ann Marshall Young, Chair
Dr. Paul B. Abramson
Dr. Richard F. Cole

In the Matter of	Docket No. 50-293-LR
ENTERGY NUCLEAR GENERATION COMPANY and ENTERGY NUCLEAR OPERATIONS, INC. (Pilgrim Nuclear Power Station)	ASLBP No. 12-921-08-LR-BD01 July 20, 2012

MEMORANDUM AND ORDER
(Denying Petition for Intervention and Request to Reopen Proceeding and Admit New Contention)

For the third time since a majority of the licensing board terminated the license renewal proceeding for the Pilgrim Nuclear Power Station (Pilgrim),[1] Pilgrim Watch and the Jones River Watershed Association (JWRA, collectively Petitioners) have moved to reopen the proceeding.[2] Petitioners seek admittance of a new contention challenging the renewal of Pilgrim's operating license for an additional twenty-year period.[3] Petitioners contend that Pilgrim's owners, Entergy

[1] LBP-12-01, 75 NRC __, __ (slip op. at 27) (Jan. 11, 2012) (terminating proceeding); LBP-12-10, 75 NRC __ (May 24, 2012) (denying motion to reopen); LBP-12-11, 75 NRC __ (June 18, 2012) (same).

[2] [JRWA] and Pilgrim Watch Request to Reopen, for a Hearing, and to File New Contentions and JRWA Motion to Intervene on Issues of: (1) Violations of State and Federal Clean Water Laws; (2) Lack of Valid State § 401 Water Quality Certification; (3) Violation of State Coastal Zone Management Policy; and (4) Violation of NEPA (May 14, 2012) [hereinafter Motion]. The two organizations filed additional joint motions to reopen and admit contentions on March 8 and May 2, 2012. *See* LBP-12-10, 75 NRC __; LBP-12-11, 75 NRC __.

[3] *See* 71 Fed. Reg. 15,222, 15,222 (Mar. 27, 2006).

Nuclear Generation Company and Entergy Nuclear Operations, Inc. (collectively, Entergy), lack several necessary approvals for the plant from a number of federal and state government agencies under a variety of statutory and regulatory requirements, and that the Nuclear Regulatory Commission (NRC) Staff must supplement its Final Supplemental Environmental Impact Statement (FSEIS) to reflect the environmental impacts of these allegedly missing permits and approvals.

This licensing board denies Petitioners' motion because, as we explain herein, both the motion and the associated new contention are untimely and fail to satisfy the requirements of 10 C.F.R. §§ 2.326(a)(1) and 2.309 subsections (c) and (f)(2).

I. Background

Pilgrim Watch first petitioned to intervene in opposition to the Pilgrim license renewal application in 2006.[4] The licensing board granted the petition,[5] adjudicated two of Pilgrim Watch's contentions following evidentiary hearings[6] (one held after a Commission remand of a portion of a contention previously dismissed through summary disposition[7]), and otherwise ruled on numerous others.[8] In January of this year a majority of the licensing board ruled inadmissible Pilgrim Watch's final outstanding contention and terminated the proceeding, a ruling that was subsequently upheld by the Commission.[9]

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[4] Request for Hearing and Petition to Intervene by Pilgrim Watch (May 25, 2006).

[5] LBP-06-23, 64 NRC 257, 348-49 (2006).

[6] LBP-08-22, 68 NRC 590, 596 (2008), *aff'd*, CLI-10-14, 71 NRC 449 (2010); LBP-11-18, 74 NRC __, __ (slip op. at 1-2) (July 19, 2011), *aff'd*, CLI-12-01, 75 NRC __, __ (Feb. 9, 2012).

[7] CLI-10-11, 71 NRC 287 (2010).

[8] *See*, *e.g.*, LBP-11-20, 74 NRC __, __ (slip op. at 2-3) (Aug. 11, 2011), *aff'd*, CLI-12-10, 75 NRC __ (Mar. 30, 2012); LBP-11-23, 74 NRC __, __ (slip op. at 3) (Sept. 8, 2011), *aff'd*, CLI-12-03, 75 NRC __ (Feb. 22, 2012). The Commonwealth of Massachusetts also intervened and proffered contentions, but the board in LBP-06-23 found none of them admissible.

[9] LBP-12-01, 75 NRC __, __ (slip op. at 27) (Jan. 11, 2012), *aff'd*, CLI-12-15, 75 NRC __ (June (continued…)

Pilgrim Watch and JRWA jointly filed the instant motion and contention on May 14, 2012. The Commission referred Petitioners' submission to the Atomic Safety and Licensing Board Panel on May 16,[10] and on May 17 this licensing board was established.[11] We granted a Staff motion for an extension of time to file its answer,[12] and the NRC Staff[13] and Entergy[14] filed their answers to Petitioners' motion and contention on June 7 and 8, 2012, respectively.[15]

II. Applicable Legal Standards

As we have previously observed,[16] in order for Petitioners' current motion to be granted and new contention to be admitted, Petitioners must fulfill each of the following sets of requirements found in the Commission's regulations: (1) because the record in this proceeding is currently closed and Petitioners have filed a new contention, the motion must meet all of the requirements of 10 C.F.R. § 2.326 for reopening a closed record including, under § 2.326(d), those set forth at 10 C.F.R. § 2.309(c); (2) under 10 C.F.R. § 2.309(f)(2), the contention, having

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7, 2012).

[10] Memorandum from Annette L. Vietti-Cook, NRC Secretary, to E. Roy Hawkens, Chief Administrative Judge, Atomic Safety and Licensing Board Panel, at 1 (May 10, 2012).

[11] Although composed of the same judges as the previous licensing board, this is a new board established specifically to address these new motions in a currently closed proceeding.

[12] Licensing Board Order (Granting NRC Staff's Unopposed Motion for Extension; Seeking Input from Parties) (May 17, 2012) (unpublished).

[13] NRC Staff's Answer to [JRWA] and Pilgrim Watch's Motion to Reopen the Record and Request for a Hearing with Regard to the Roseate Tern (May 16, 2012) [hereinafter NRC Staff Answer].

[14] Entergy's Answer Opposing [JRWA]'s and Pilgrim Watch's Motion to Reopen Hearing Request on Contention Related to the Roseate Tern (May 16, 2012) [hereinafter Entergy Answer].

[15] We note also that the Commission, upon the recommendation of the NRC Staff, on May 25, 2012, authorized the Staff to grant Entergy's application for renewal of the Pilgrim license, noting that, "if the renewed license is subsequently set aside on appeal, the previous operating license would be reinstated in accordance with 10 C.F.R. § 54.31(c)." SRM-SECY-12-0062, Renewal of Full-Power Operating License for Pilgrim Nuclear Power Station (May 25, 2012).

[16] *See* LBP-12-11, 75 NRC __ (slip op. at 3-4).

been filed after the deadline for initial intervention petitions, must have been submitted in a timely fashion, based on new information that is materially different from information previously available, or, alternatively, consideration of the contention under a balancing of the factors listed in § 2.309(c) must weigh in favor of admitting the contention; and (3) the contention must satisfy the general contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(i)-(vi).[17]

III. Petitioners' New Contention

Petitioners allege a number of deficiencies in their new contention, which they summarize as follows:

> Petitioners' evidence shows that Entergy does not have a valid consistency certification under the Coastal Zone Management Act, 16 U.S.C.S. §§ 1451 *et seq.* (CZMA), a valid state § 401 water quality certification under the federal Clean Water Act (CWA), 42 U.S.C.S. § 1341 (a)(1), or a current CWA 316(a) variance or 316(b) determination as required by the NRC regulation at 10 C.F.R. 51.53(c)(3)(ii)(B), and specifically that:
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> (1) Entergy is in violation of the state Clean Waters Act, [Mass. Gen. Laws ch. 21], §§ 26-53 (State Act), 314 [Mass. Code Regs.] 4.05(4)(a)(2)(d), because [it] does not have a state permit to operate its cooling water intake structure (CWIS), which uses almost .5 billion gallons per day of sea water from Cape Cod Bay;
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> (2) Entergy is violating the State Act and federal CWA because it does not have a state or federal permit to discharge tolytriazole [sic] to Cape Cod Bay, and [Pilgrim] has been discharging tolytriazole [sic] to Cape Cod Bay illegally since 1995, up to and including 2012;
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> (3) Entergy does not have a state permit to discharge radioactive effluent to Cape Cod Bay as required by 314 [Mass. Code Regs.] 4.05(5)(d);
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> (4) Entergy does not have authority to violate the state ban on killing river herring as set forth in 322 [Mass. Code Regs.] 6.17(3); and
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> (5) Federal Endangered Species Act, 16 U.S.C. §§ 1531 *et seq*., issues have not been resolved as required by 10 C.F.R. 51.53(c)(3)(ii)(E).
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> Due to the environmental impacts of the failure to comply with state and federal environmental permitting and approval requirements as set forth in above, the

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[17] Petitioners have previously been found to have standing. *See* LBP-12-10, 75 NRC at __ (slip op. at 4-5).

> PNPS National Environmental Policy Act, (NEPA), 42 U.S.C. §§ 4321 *et seq*. environmental impact statement is incomplete and must be supplemented. Moreover, while the NRC may rely on its generic environmental impact statement regulations for operating relicensing renewal, these regulations truncate any meaningful NEPA analysis for purposes of assessing the environmental impacts for purposes of state permits, the Endangered Species Act, and CZM certification, and therefore the PNPS EIS is wholly inadequate. [18]

In support of their motion and contention, Petitioners attach four affidavits, each of which was also previously submitted in support of an earlier motion to reopen and contention.[19]

IV. Ruling on Motion to Reopen and New Contention

Petitioners' new motion and contention, like their prior two submissions, must be denied because they have not been timely presented, nor has it been shown that the motion and contention should nonetheless be further considered based on satisfaction of any other relevant criteria that would in effect excuse the untimeliness.[20] Because untimeliness under 10 C.F.R. §§ 2.326(a)(1) and 2.309(c), (f)(2), constitutes sufficient grounds on its own for denying the motion and contention, we need not consider the submission under other subsections of §§ 2.326 and 2.309. We address relevant timeliness questions with respect to each of the Petitioners' allegations, as follows:

A. Coastal Zone Management Act consistency certification

Petitioners acknowledge that "Entergy obtained a CZM certificate from Massachusetts in 2006," as required by the CZMA, but allege that the certificate was invalid at the time it was issued because it lacked necessary information and data and was based on inaccurate data.[21]

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[18] Motion at 2-3.

[19] Affidavit of Anne Bingham (Mar. 6, 2012); Affidavit of Alex Mansfield (Mar. 6, 2012) [hereinafter Mansfield Affid.]; Affidavit of E. Pine duBois (Mar. 6, 2012); Affidavit of Ian Christopher Thomas Nisbet, PhD. (Apr. 30, 2012).

[20] *See* 10 C.F.R. §§ 2.309(c), 2.326(a)(1).

[21] Motion at 10. *See also id.* at 12-16.

Petitioners' challenge to the sufficiency of the certificate six years after it was issued, based on information available months if not years prior to their May filing date, is plainly untimely. Petitioners nevertheless say their claim is supported by "new information" showing that Entergy will continue operations that adversely affect coastal resources during the relicensing period.[22] Petitioners provide as examples of such new information "2012 unpermitted discharges of toly[l]triazole, killings of river herring, unpermitted radioactive effluent releases, and new information about roseate terns and other endangered species,"[23] some of which have already been addressed in our previous rulings.[24]

Petitioners also state that "[i]t was not until recently that Petitioners[ ] discovered the wholesale failure of the regulatory system with regard to the issues raised in this contention," asserting further that "Entergy and the NRC kept silent about these issues, for which mandatory statutory disclosure and/or due diligence duties exist."[25] Petitioners refer to failures to supplement the CZM consistency report and a lawsuit in which Entergy tried "to prevent implementation of state water quality standards," but provide no citation to information supporting these statements.[26] They go on to argue the following:

> Petitioners should not be prejudiced for Entergy's failure to amend its CZM Report, to provide material new information to the NRC in this relicensing proceeding, or for NRC's wholesale failure to exercise due diligence with regard to Entergy's violations of state and federal law. Petitioners relied to their detriment on NRC doing its duty to ensure compliance with state and federal laws, and to act with reasonable diligence, and relied on Entergy to undertake

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[22] *Id.* at 19-20.

[23] *Id.* at 20.

[24] *See* LBP-12-10, 75 NRC __; LBP-12-11, 75 NRC __. With respect to tolyltriazole, Petitioners provide a January 2012 Discharge Monitoring Report that was not previously provided. Motion at 10 and Attach. 1.

[25] Motion at 21.

[26] *Id.* Staff notes that the case in question is *Entergy Nuclear Generation Co. v. Dep't of Env'l Protection*, 459 Mass. 319, 944 N.E.2d 1027 (Mass. 2011). Staff Answer at 16 n.84.

> mandatory efforts to provide all material relevant information in the licensing process. In NRC proceedings, estoppel has been applied to ensure fairness in the licensing process. Here, fundamental fairness requires that Entergy and the NRC be estopped from asserting that Petitioners' contention is untimely.[27]

Petitioners' cite one case in support of their argument. But as the NRC Staff points out, that case, *Armed Forces Radiobiology Research Institute*, involved a situation in which the NRC staff had actually provided advice regarding timing that misled that petitioner, and the staff had conceded timeliness in light of such advice.[28] Under those circumstances the licensing board in the case found that staff's representation warranted permitting estoppel to be asserted.[29] The situation with Petitioners herein is quite different.

Petitioners' protestations essentially amount to an argument that, by virtue of relying on *their own assumption* of action by NRC and Entergy, they have shown that the legal principle of equitable estoppel should be applied, such that we should find Petitioners' new contention to have been timely filed at this late date. But the law of estoppel does not extend so far as to accommodate these circumstances.

To be sure, as the Supreme Court has observed, in *Heckler v. Community Health Services of Crawford County, Inc.*, "[e]stoppel is an equitable doctrine invoked to avoid injustice in particular cases."[30] A party claiming estoppel, however, "must have relied on its adversary's conduct 'in such a manner as to change his position for the worse,' and that reliance must have been reasonable in that the party claiming the estoppel did not know nor should it have known

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[27] *Id.* (citing *Armed Forces Radiobiology Research Institute* (Cobalt-60 Storage Facility), LBP-82-24, 15 NRC 652, 658 (1982), rev'd on other grounds, ALAB-682, 16 NRC 150 (1982)).

[28] *See Armed Forces*, LBP-82-24, 15 NRC at 655-56; *see also* Staff Answer at 14-16.

[29] *See Armed Forces*, LBP-82-24, 15 NRC at 658.

[30] *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 59 (1984).

that its adversary's conduct was misleading."[31] Moreover, "it is well-settled that the Government may not be estopped on the same terms as any other litigant."[32]

The United States District Court for the District of Columbia, citing *Heckler* and other case law, has recently described the elements of a showing of estoppel against the government, noting that there is a "clear presumption in [the D.C.] Circuit against invoking the doctrine . . . against government actors in any but the most extreme circumstances," . . . and that parties asserting estoppel must show that:

> (1) there was a "definite" representation to the party claiming estoppel,
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> (2) the party "relied on its adversary's conduct in such a manner as to change his position for the worse,"
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> (3) the party's "reliance was reasonable" and
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> (4) the government "engaged in affirmative misconduct."[33]

It is clear that Petitioners have not shown estoppel even in its simplest form, much less proven the elements of estoppel against the government. They have shown no "definite" representation made to them upon which they reasonably relied to their detriment, nor *any* actual action on the part of Entergy or the NRC upon which they relied, nor any "affirmative misconduct" on the part of the NRC in making any representation at all to Petitioners.

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[31] *Id.*

[32] *Id.* at 60.

[33] *United States v. Honeywell Int'l, Inc*., 2012 WL 210955, at 2 (D.D.C. 2012) (citing *Heckler*, 467 U.S. at 60; *Int'l Union v. Clark*, 2006 WL 2598046, at 12 (D.D.C. Sep. 11, 2006); *Morris Commc'ns, Inc. v. FCC*, 566 F.3d 184, 191 (D.C.Cir.2009); *Graham v. SEC*, 222 F.3d 994, 1007 (D.C.Cir.2000)). *See also Dickow v. United States*, 740 F. Supp. 2d 231, 239 (D. Mass. 2010) ("Affirmative misconduct means 'an affirmative misrepresentation or affirmative concealment of a material fact by the Government, although it does not require that the government intend to mislead a party.'"); *Ctr. for Special Needs Trust Admin., Inc., v. Olson*, 676 F.3d 688, 698 (8th Cir. 2012) ("claimant must prove: 1) a false representation by the government; 2) that the government had the intent to induce the plaintiff to act on the misrepresentation; 3) the plaintiff's lack of knowledge or inability to obtain the true facts; and 4) the plaintiff's reliance on the misrepresentation to his detriment.").

Petitioners simply made assumptions, without underlying foundation, and they failed to act when they should have if they wished to challenge the matters they now raise.

This is not to say that Petitioners do not have any concerns that, had they been presented at an appropriate time, might have warranted further inquiry and possible consideration in the EIS. But no facts have been shown to warrant any finding of estoppel that could reasonably be applied with respect to the admission of their contention or granting of their motion. Further, while Petitioners have provided some information purporting to show that Entergy's past activities have continued into early 2012, this information was several months old when the instant motion was filed. Moreover, they have provided nothing to overcome the simple reality that, if they wished to challenge Entergy's 2006 application[34] or the NRC's 2007 FSEIS,[35] they could have done so at the time these documents were made available, assuming all other relevant admissibility criteria were met. Because Petitioners have not, however, done this, and because they have not shown any facts, circumstances, or law to support a finding of timeliness notwithstanding their own failures to act sooner, we must find that Petitioners have not timely raised any issues related to the Pilgrim CZM certification.

B. Clean Water Act § 401 water quality certification

Section 401 of the federal Clean Water Act (CWA) requires that an applicant for a federal discharge permit provide a certification from the State that the proposed activity will not violate state water pollution control standards.[36] The parties do not dispute that in its 2006

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[34] Entergy Nuclear Operations, Inc., License Renewal Application – Pilgrim Nuclear Power Station (January 25, 2006) (Agencywide Documents and Access Management System (ADAMS) Accession No. ML060300028).

[35] Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 29 Regarding Pilgrim Nuclear Power Station Final Report – Appendices, NUREG-1437, at E-3 - E-19 (July 2007) (ADAMS Accession Number ML071990027) [hereinafter FSEIS].

[36] 33 U.S.C. § 1341(a).

license renewal application, Entergy sought to satisfy this requirement (1) by submitting letters the Massachusetts Water Resources Commission sent to Pilgrim's previous owner in 1970 and 1971, indicating that the agencies were therein providing certain certifications relating to "applicable water quality standards"; and (2) by relying on its 1994 National Pollutant Discharge Elimination System (NPDES) permit.[37] Petitioners argue that Entergy has failed to meet the requirements of § 401 in its reliance on the Massachusetts letters.[38] Whether or not Entergy's submission was adequate, however, Petitioners' contention on this point could, and therefore should, have been filed promptly following publication of Entergy's application and environmental report in 2006. In addition, none of Petitioners' assertedly "new information" appears to dispute either the existence of the letters themselves that contain the certifications in question, or the submission of those letters as part of Entergy's license renewal application, and no good reason is provided for failing to challenge them earlier. Under the circumstances, we must find that Petitioners' challenge is untimely.

C. Clean Water Act §316(a) variance and 316(b) determination

NRC regulations require license renewal applicants to submit documentation of their compliance with §§ 316(a) and (b) of the CWA concerning thermal discharges.[39] Petitioners allege that Entergy failed to fulfill this requirement when it submitted, as part of its license renewal application, its purported § 401 certificates and NPDES permit as evidence that its "cooling water intake structures represent the best technology available for minimizing adverse

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[37] *See* Motion at 7-8; Entergy Answer at 8-9 (citing Applicant's Environmental Report, Operating License Renewal Stage, Pilgrim Nuclear Power Station, App. E (Jan. 25, 2006) (ADAMS Accession No. ML060830611) at 9-2 & Attach. A [hereinafter ER]); *see also* FSEIS at E-12, E-19.

[38] Motion at 7-8.

[39] *See* 10 C.F.R. § 51.53(c)(3)(ii)(B); 33 U.S.C. § 1326(a), (b).

environmental impact"[40] and that it had received a variance for its thermal discharge.[41] As Staff points out,[42] however, the Commission has indicated that an NPDES permit need not specifically grant a § 316(a) variance; it can itself constitute such a variance if this is clearly intended.[43] In any event, as with the portion of the contention concerning the § 401 certification, Petitioners have put forward no plausible explanation for why they did not raise this issue when Entergy submitted its application in 2006, nor have they supplied any significant support for the proposition that the issue is now raised based on information that is really new. The claim is clearly untimely.

D. State permit to operate cooling water intake structure

Petitioners contend that Entergy lacks another required permit from Massachusetts to operate its cooling water intake structure, or CWIS,[44] arguing that under *Entergy Nuclear Generation Co. v. Department of Environmental Protection*, "[t]here is no doubt that the Commonwealth has the authority to regulate Entergy's CWIS."[45] Interestingly, Entergy argues that Petitioners' claim relating to the CWIS was resolved by the court in the same case, pointing out that the court noted in its opinion that Pilgrim holds a permit authorizing discharges from the plant that was jointly issued by the U.S. Environmental Protection Agency (EPA) and the Massachusetts Department of Environmental Protection, and which was last renewed in 1991

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[40] 33 U.S.C. § 1326(b).

[41] Motion at 7-8; s*ee* 33 U.S.C. § 1326(a).

[42] *See* NRC Staff Answer at 27.

[43] *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-07-16, 65 NRC 371, 385-86 (2007) ("Congress has severely limited our scope of inquiry into section 316(a) determinations. All we may do is examine whether the EPA or the state agency considered its permit to be a section 316(a) determination. If the answer is 'yes,' our inquiry ends.").

[44] *See* Motion at 3, 7-9 (citing 314 Mass. Code Regs. 4.05(4)(a)(2)(d)).

[45] *Id.* at 5.

and modified in 1994.[46] The permit Entergy describes appears to be the NPDES permit for Pilgrim, which Entergy argues authorizes its CWIS.[47]

We note that, in the case submitted as authority by both parties, the Massachusetts Supreme Judicial Court actually held (in a decision issued April 11, 2011) that certain Massachusetts regulations relating to CWISs, which Entergy had challenged, were valid under the State Clean Waters Act, observing in the course of reaching its decision that another "permitting regime for discharges does not foreclose the department from developing compatible methods of regulating water intakes at CWISs."[48] In addition, Petitioners have highlighted the court's statement that, "[i]n areas with a designated use as aquatic habitat (such as Cape Cod Bay where Pilgrim's CWIS operates) . . . CWISs hinder the attainment of water quality standards."[49] Petitioners also make various assertions of harm to wildlife, including that the Pilgrim CWIS kills "vast amounts" of marine life and has the potential to adversely affect the roseate tern.[50] As NRC Staff suggests, however, Petitioners have provided little if any support to show any specific violations of any Massachusetts regulations,[51] nor have they shown that the NRC would have jurisdiction over any such violations *per se.*

In the end, Petitioners provide no clear argument or factual support for a conclusion that the Commonwealth has taken any action with respect to the Pilgrim CWIS that would have a direct impact on the renewal of the Pilgrim license. Nor have they shown that either any such

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[46] Entergy Answer at 18 (citing *Entergy Nuclear Generation Co.*, 459 Mass. at 321).

[47] *Id.* at 18-20.

[48] *Entergy Nuclear Generation Co.*, 459 Mass. at 330.

[49] Motion at 6. Petitioners in providing a quotation containing this language did not provide a citation, but we find the language in question at *Entergy Nuclear Generation Co.*, 459 Mass. at 332.

[50] Motion at 9.

[51] Staff Answer at 29-31.

action or any alleged underlying harm to fish and wildlife would constitute sufficiently new information to reopen the Pilgrim license renewal proceeding . Again, while Petitioners' claim may warrant further inquiry, they have not shown it to be timely, whatever its merits.

E. State or federal permit to discharge tolyltriazole

Petitioners allege that "[s]ince about 1995, [Pilgrim] has been regularly discharging a corrosion inhibitor called toly[l]triazole into Cape Cod Bay without a state or federal water pollution permit."[52] Petitioners provide as support for this part of their contention the January 2012 discharge monitoring report referenced above.[53] Because Petitioners acknowledge, however, that these discharges began in 1995, as recorded in publicly available discharge monitoring reports, and because they do not reasonably explain why this matter could not have been alleged in a contention filed at the outset of the proceeding, the claim must fail. Under the circumstances, it is obviously untimely.

F. State permit to discharge radioactive effluent

According to Petitioners, Entergy is discharging radioactive effluent into Cape Cod Bay in violation of Massachusetts law.[54] They cite a Massachusetts state regulatory provision prohibiting harmful quantities of radioactive substances in surface waters, and allege that Entergy lacks a state permit for its radioactive effluent and has not shown that its discharges meet the standard in the state regulation.[55] Entergy states that this is actually governed by NRC regulations,[56] and Petitioners concede that "Entergy's radioactive effluent discharges to Cape Cod Bay are described in monitoring reports going back to at least 1996 and continuing to the

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[52] Motion at 8.

[53] *See supra* n.23.

[54] Motion at 8.

[55] *Id.*

[56] Entergy Answer at 21-22.

present."[57] Thus, as with the other matters raised in this new filing, Petitioners could, and should, have filed any contention with respect to this issue much earlier than 2012. Because the information on which this portion of the contention is based was publicly available at the outset of the proceeding, this claim is manifestly untimely at this time.

G. State ban on killing river herring

A regulation of the Massachusetts Division of Marine Fisheries states that "[i]t shall be unlawful for any person to harvest, possess or sell river herring in the Commonwealth or in the waters under the jurisdiction of the Commonwealth."[58] Petitioners allege that Entergy routinely violates this regulation by entraining and impinging river herring in the Pilgrim CWIS;[59] Entergy counters that the regulation applies to recreational and commercial fishermen, not Pilgrim.[60] We need not resolve the question (even if we had jurisdiction to do so) because, like Petitioners' other claims, it is untimely. Petitioners note that the state ban on killing river herring has been in place since 2006, and claim that Pilgrim has been killing herring throughout its operation.[61] Assuming this to be true, Petitioners' claim is not based on new information, could have been raised earlier, and is untimely now.

H. Annual biological report

Petitioners allege that Entergy is violating a requirement in the Pilgrim NPDES permit that it prepare an annual marine biological report in accordance with an environmental monitoring plan. The report is subject to approval by Massachusetts and EPA, but not NRC.

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[57] Motion at 8.

[58] 322 Mass. Code Regs. 6.17(3).

[59] Motion at 9.

[60] Entergy Answer at 23.

[61] Mansfield Affid. at 8-9.

Petitioners claim that Entergy has not had an approved monitoring plan "for about 10 years";[62] Entergy disputes this.[63] Again, whatever the case may be, Petitioners are inexcusably late in bringing this claim.

I. Endangered species issues

Petitioners renew arguments they made in their earlier motions to reopen concerning compliance with the Endangered Species Act and the Magnuson-Stevens Fishery Conservation and Management Act.[64] At the time Petitioners filed the current Motion those claims had not been decided, but they have since been rejected,[65] and Petitioners have not put forward any new information that would cause us to revisit those conclusions.

J. Alleged NEPA violation

Petitioners essentially claim that the NRC violates NEPA by not considering the environmental impacts of Entergy's failure to possess the allegedly missing permits and approvals, and of related failures and discharges.[66] We note that compliance with the Clean Water Act "does not negate the requirement for NRC to weigh all environmental effects of [a] proposed action."[67] However, for the same reasons that their underlying claims are untimely, their NEPA claim is similarly untimely in this adjudicatory proceeding. In any event, nothing

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[62] Motion at 10.

[63] Entergy Answer at 21.

[64] *See* [JRWA] and Pilgrim Watch Motion to Reopen, Request for Hearing and Permission to File New Contention in the Above-Captioned License Renewal Proceeding on Violations of the Endangered Species Act with Regard to the Roseate Tern (May 2, 2012); [JRWA] Petitions for Leave to Intervene and File New Contentions Under 10 C.F.R. § 2.309(a), (d) or in the Alternative 10 C.F.R. § 2.309 (e) and [JRWA] and Pilgrim Watch Motion to Reopen Under 10 C.F.R. 2.326 and Request for a Hearing Under 10 C.F.R. § 2.309(a) and (d) in the Above Captioned License Renewal Proceeding (Mar. 8, 2012).

[65] *See* LBP-12-10, 75 NRC __ (May 24, 2012); LBP-12-11, 75 NRC __ (June 18, 2012).

[66] Motion at 3, 18.

[67] 10 C.F.R. § 51.71(d) n.3.

Petitioners have provided "reveal[s] a seriously different picture of the environmental impact of the proposed project," as required by relevant case law.[68]

K. Exceptionally grave issue claim

Petitioners argue that, even if their motion is untimely, it nevertheless meets the reopening criteria of 10 C.F.R. 2.326(a)(1) because it presents an "exceptionally grave issue" such that it may be admitted at the board's discretion. The issues Petitioners contend are exceptionally grave:

> include but are not limited to: lack of valid state CZM certificate, lack of valid state § 401 water quality certification, lack of a state permit to operate a CWIS, unpermitted discharges of pollutants, prima facie violations of state water quality standards designed to protect Cape Cod Bay as a "Class SA" use due to the lack of a CWIS permit and unpermitted pollutant discharges and violation of the ban on killing river herring; and failure to comply with the ESA Section 7 including failure to assess the significant potential for impact on the endangered roseate tern and potential effects on other endangered species for which federal review by NOAA is incomplete.[69]

In addition, Petitioners allege that support for these allegations is found in the affidavits they have provided, which they contend also show "violations of state and federal water pollution control laws."[70] Petitioners provide a chart purporting to illustrate which affidavits, and in some instances which parts of which affidavits, relate to particular issues, but cite the "[e]ntirety" of three affidavits as supporting a finding of an exceptionally grave issue.[71] They do not further describe or even summarize more precisely which parts of the affidavits support their

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[68] *See Hydro Res., Inc*. (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-04, 53 NRC 31, 52 (2001); *see also Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 370-71 (1989); NRC Staff Answer at 40-41.

[69] Motion at 4. Petitioners note that "[u]nder state water quality standards, a Class SA water body is 'an excellent habitat for fish, other aquatic life and wildlife, including for their reproduction, migration, growth and other critical functions, and for primary and seconardy [sic] contact recreation.' … and has excellent aesthetic value." *Id.* at 4 n.1.

[70] *Id.* at 22.

[71] *Id.* at 23.

argument in this regard. Indeed, as with the other matters discussed *supra*, Petitioners largely discuss their allegations in generalities, fail to state specific issues concisely and precisely, and fail to support any such issues with focused, clearly-described and well-organized allegations of fact and law that are tied to specific allegations. Although we have in our previous rulings noted that some of what is in these affidavits is not to be discounted, we have also, either explicitly or implicitly, found that none of the affidavits have provided sufficient support to show an "exceptionally grave issue," nor do we find any discussion of specific facts that are specifically asserted to constitute or support a finding of any "exceptionally grave" matters at this time.

Finally, whatever merit Petitioners' claims in this regard might have, the Commission has defined an exceptionally grave issue as one which raises "a sufficiently grave threat to public safety."[72] Petitioners have not claimed or shown that any alleged failure of Entergy to obtain required permits and approvals, or that the discharges and other harm they allege, pose any grave threat to the safety of the public. We must therefore conclude that Petitioners' motion to reopen fails to meet either the timeliness or "exceptionally grave issue" requirement of section 2.326(a)(1).

V. Conclusion

For the reasons expressed above, we conclude that Petitioners' motion and contention fail to meet the timeliness requirements of 10 C.F.R. § 2.326(a)(1) and § 2.309(f)(2). In addition, they fail to meet the requirements of 10 C.F.R. § 2.309(c), which permits untimely filings in certain circumstances. Petitioners do not establish good cause for their new submission's untimeliness, and under the circumstances discussed herein, we find no other

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[72] Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,536 (May 30, 1986); *see also Hydro Res., Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-00-12, 52 NRC 1, 5 (2000) ("we will reopen the record only when the new evidence raises an 'exceptionally grave issue' calling into question the safety of the licensed activity").

considerations weigh sufficiently in Petitioners' favor to further consider their motion and contention.[73]

Because Petitioners fail to meet the requirements of 10 C.F.R. §§ 2.326(a)(1) and 2.309, subsections (c) and (f)(2), their current motion and contention must be denied, and it is unnecessary to further consider their other, non-timeliness-related arguments. We observe, however, that the permits and approvals that Petitioners allege Entergy lacks are within the domain of other state or federal agencies. This board does not have jurisdiction to determine whether other government entities have properly followed their regulations or procedures,[74] nor

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[73] We note Petitioners' citation of a 1994 Commission decision for the proposition that "[t]he fact that no one will represent a petitioner's position if its[ ] hearing request is denied is itself sufficient for the Commission to excuse the untimeliness of the request." Motion at 34 (citing *Westinghouse Elec. Corp* (Nuclear Fuel Export License for Czech Republic – Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 329 (1994)). However, what the Commission actually stated in that case is the following:

> While we recognize that no one will represent the Petitioners' perspective if the hearing requests are denied, this in itself is insufficient for us to excuse their untimeliness. . . . Indeed, excusing untimeliness for every petitioner who meets only this factor would effectively negate any standards for untimely intervention in cases such as this where no one else has requested a hearing, since a late-filing petitioner could always maintain that there will be no hearing to protect its interest if intervention is denied.

Westinghouse, CLI-94-7, 39 NRC at 329 (citation omitted). Petitioners' characterization of the preceding evidences an unfortunate level of carelessness, which regrettably appears to be representative of much of their preparation and presentation with respect to this and their previous two submissions.

[74] *See, e.g.*, *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-07-16, 65 NRC 371, 377 (2007) (The Clean Water Act "precludes [the NRC] from . . . second-guessing the conclusions in NPDES permits"). *See* 33 U.S.C. § 1371(c)(2), which provides that nothing in NEPA shall be deemed to:

> (A) authorize any Federal agency authorized to license or permit the conduct of any activity which may result in the discharge of a pollutant into the navigable waters to review any effluent limitation or other requirement established pursuant to this chapter or the adequacy of any certification under section 1341 of this title.
>
> (B) authorize any such agency to impose, as a condition precedent to the issuance of any license or permit, any effluent limitation other than any such limitation established pursuant to this chapter.

(continued…)

the authority to compel other such agencies to provide the Petitioners with relief. "Whether non-NRC permits are required is the responsibility of bodies that issue such permits."[75] If, for example, Petitioners are correct that Entergy's CWIS or discharges violate Massachusetts regulations, or that the CZM certification issued by Massachusetts is flawed, their remedy lies with the Commonwealth, not NRC. Likewise, issues relating to the status of the Pilgrim NPDES permit appear to lie with the EPA, with input from the Commonwealth.[76]

VI. Order

For the foregoing reasons:

a. Petitioners' May 14, 2012, motion to reopen fails to satisfy the requirement for reopening a closed record under 10 C.F.R. § 2.326(a)(1); and

b. Petitioners' accompanying contention fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(2) and § 2.309(c).

These failures require denial of the motion to reopen and contention filed by Pilgrim Watch and JRWA. The motion to reopen and contention are therefore both DENIED.

Pursuant to 10 C.F.R. § 2.341(a), this decision will constitute a final decision of the Commission forty (40) days from the date of issuance, *i.e.*, on August 29, 2012, unless a

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Cf. supra n.67 and accompanying text.

[75] *Hydro Res., Inc.* (292 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-16, 48 NRC 119, 120 (1998).

[76] With respect to the long period of time – over sixteen years – that the 1994 NPDES permit for Pilgrim has administratively remained in effect after it was scheduled to expire in 1996, *see* ER, Attach. A; Entergy Answer, Exhs. 1, 2, this would seem obviously to be a matter of concern, and it is clearly to be hoped that EPA and Massachusetts (insofar as its action is required) will act as expeditiously as possible to resolve this state of affairs. To the extent that the NRC Staff may appropriately choose to attempt to bring about some action in this regard, through interagency communication on matters of common or related concern, this would also seem to be beneficial and consistent with the purposes and goals of NEPA, other environmental statutes at issue, and NRC environmental regulations.

petition for review is filed in accordance with 10 C.F.R. § 2.341(b), or the Commission directs otherwise. Any party wishing to file a petition for review on the grounds specified in section 2.341(b)(4) must do so within fifteen (15) days after service of this decision. A party must file a petition for review in order to exhaust its administrative remedies before seeking judicial review. Within ten (10) days after service of a petition for review, any other party to the proceeding may file an answer supporting or opposing Commission review. Any petition for review and any answer shall conform to the requirements of 10 C.F.R. § 2.341(b)(2)-(3).

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

_____
Ann Marshall Young, Chair
ADMINISTRATIVE JUDGE

/RA/

_____
Dr. Paul B. Abramson
ADMINISTRATIVE JUDGE

/RA/

_____
Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

Rockville, Maryland
July 20, 2012[77]

[77] Copies of this Memorandum and Order were filed with the agency's EIE system for service to the parties on this date.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
ENTERGY NUCLEAR GENERATION CO.	)	Docket No. 50-293-LR-CWA
AND	)	
ENTERGY NUCLEAR OPERATIONS, INC.	)	ASLBP No. 12-921-08-LR-BD01
	)	
(Pilgrim Nuclear Power Station)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Denying Petition for Intervention and Request to Reopen Proceeding and Admit New Contention) (LBP-12-16)** have been served upon the following persons by Electronic Information Exchange (EIE) and by electronic mail as indicated by an asterisk*.

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Docket No. 50-293-LR-CWA
ASLBP No. 12-921-08-LR-BD01
MEMORANDUM AND ORDER (Denying Petition for Intervention and Request to Reopen Proceeding and Admit New Contention) (LBP-12-16)

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[Original signed by Nancy Greathead]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 20th day of July 2012