**UNITED STATES OF AMERICA**

**NUCLEAR REGULATORY COMMISSION**

**BEFORE THE COMMISSION**

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| **In the Matter of** ) | **Docket # 50-293 LR** |
| **Entergy Nuclear Generation Company** ) | |
| **Entergy Nuclear Operations Inc.** ) | |
| **Pilgrim Nuclear Power Station** ) | |
| **License Renewal Application** ) | |
| ) | |

**JONES RIVER WATERSHED ASSOCIATION 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 JONES RIVER WATERSHED ASSOCIATION 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 ABOVE CAPTIONED LICENSE RENEWAL PROCEEDING**

Filed March 8, 2012

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## I. Introduction and Executive Summary

The Petitioners charge that the U.S. Nuclear Regulatory Commission has failed to complete four environmental assessments that are a prerequisite to relicensing the Pilgrim Nuclear Power Station. The absence of these assessments render the NRC's Supplement 29 to the "Generic Environmental Impact Statement for License Renewal of Nuclear Plants" *prima facie* invalid. Petitioners' contention establishes that no relicensing decision can be made until these assessments are completed and the results documented in a new supplemental environmental impact report that contains a meaningful analysis of the alternatives to the once-through cooling operations the applicant plans to use during the relicensing period. The contention is based on new and significant information, including admissions made by the NRC on February 29, 2012 and newly discovered information from other regulatory agencies. The contentions show:

- The NRC has failed to complete the § 7 consultation process under the Endangered Species Act (ESA), 16 U.S.C. §§ 1531 *et seq*., for ten listed endangered and threatened species (five whales, four turtles, and the Atlantic sturgeon).

- Contrary to the NMFS Consultation Handbook and recommendations in the ESA regulations, NRC Staff and Entergy have failed to conduct a specific assessment of the impact of relicensing on river herring, the third most commonly impinged species at PNPS, and have not considered ways to avoid or minimize adverse effects to river herring.

- The NRC staff has failed to comply with the Magnuson-Stevens Fishery Conservation and Management Act (MSA) of 1976, 15 U.S.C.S. §§ 1801 *et seq*. and implementing regulations at 50 C.F.R. 600.905 et seq. with regard to the PNPS relicensing.
- The environmental impact statement for PNPS is *prima facie* defective because a final EIS can only be issued following the completion of the ESA § 7 consultation process and an essential fish habitat consultation and assessment under the MSA. Further, NEPA requires that new and significant information must be considered before the PNPS may be re-licensed. 10 C.F.R. § 51.92. *See also* Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 385 (1989) (regardless of its eventual assessment of the significance of the information, the [agency] ha[s] a duty to take a hard look at the proffered evidence).

As shown here, Petitioners meet the standards for reopening a hearing under 10 C.F.R. § 2.326; general requirements for a hearing under 10 C.F.R.§2.309(a); nontimely filing standards under 10 C.F.R. § 2.309(c); standing requirements of §2.309(d); discretionary intervention standards of 10 C.F.R. §2.309(e); and contention standards of 10 C.F.R. § 2.309(f).

In an abundance of caution, this request to reopen and filed contentions is submitted simultaneously to both the Nuclear Regulatory Commission (NRC) and the ASLB because the rules are not clear, as confirmed by Emile Julian, Assistant for Rulemakings and Adjudications, Office of the Secretary of the Commission as to the correct forum for this filing.

## II. Factual Background and Statutory Framework

### A. Factors of 10 C.F.R. 2.309(f)(1)

Under **10 C.F.R. § 2.309(f)(1),** a request for hearing or petition for leave to intervene "must set forth with particularity the contentions sought to be raised." Petitioners' contention shows that the NRC has failed to comply with mandatory duties under three federal statutes relating to environmental issues and that these are prerequisites to a valid environmental impact statement under NEPA.

**First,** the Endangered Species Act (ESA) § 7 consultation process for listed and candidate species and critical habitat is incomplete, as admitted by the NRC in its February 29, 2012 letter to the National Marine Fisheries Service (NMFS). **Second,** ESA regulations and policy require assessment of the adverse impacts of PNPS operations on river herring, newly identified as "candidate species" and this has not occurred. **Third,** the Magnuson-Stevens Fisheries Act (MSA) requires consultation with NMFS and preparation of an essential fish habitat assessment (EFH) prior to relicensing. The NRC has unlawfully attempted to defer this assessment to the federal Clean Water Act National Pollutant Discharge Elimination System (NPDES) permit renewal process for PNPS. Evidence establishes that this process *has not yet begun*, has been stalled for 16 years, and will not be complete prior to the license renewal deadline of June 8, 2012. **Fourth,** the PNPS environmental impact statement is *prima facie* unlawful and must be revised and supplemented. The ESA, the MSA, and the NRC's own regulations require that the results of the ESA and MSA processes be included in the final supplemental environmental impact statement on an operating license renewal.

Since the ESA § 7 consultation and MSA assessment are not complete, the PNPS environmental impact statement fails to contain required information. The environmental impact statement must be revised and supplemented before relicensing. This multipart contention, addressing the most significant concurrent federal laws for environmental protection, is set forth with specificity below.

The following is a specific statement of the issues of law and fact to be raised or controverted. **10 C.F.R. § 2.0309(f)(1)(i).**

**Law**

*ESA § 7 Consultation Requirements*

The federal Endangered Species Act, 16 U.S.C. § 1531 *et. seq*., governs the protection of endangered and threatened species and critical habitat. In pertinent part it states,

> [e]ach Federal agency shall, in consultation with…the Secretary [of the Interior or Commerce as appropriate], insure that any such action authorized, funded, or carried out by such agency…is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of such species which is determined…to be critical.

ESA § 7, 16 U.S.C. § 1536(a)(2)(2010). National Marine Fisheries Service (NMFS) is an agency within the Department of Commerce; an agency with which Federal agencies, including the NRC, must consult. See, NOAA Fisheries Office of Protected Resources, Interagency Consultations, (ESA Section 7), http://ww.nmfs.noaa.gov/pr/consultation/

The ESA initially requires Federal agencies to request information from NMFS on "whether any species which is listed or proposed to be listed may be present in the area of [the] proposed action." ESA § 7, 16 U.S.C. § 1536(c)(1); see also 50 C.F.R. 402.12(c). Within 30

days of receiving notification of, or the request for, a species list, NMFS must "either concur with or revise the list…" or inform the Federal agency, "based on the best scientific and commercial data available," whether any listed or proposed species or designated or proposed critical habitat may be present in the action area. 50 C.F.R. § 402.12(d).

If NMFS advises, based on the "best scientific and commercial data available," that such species may be present, the Federal agency "shall conduct a biological assessment for the purpose of identifying any endangered or threatened species which is likely to be affected by such action." ESA § 7, 16 U.S.C. § 1536(c)(1). The biological assessment or BA "shall evaluate the potential effects of the action on listed and proposed species and designated and proposed critical habitat and determine whether any such species or habitat are ***likely to be adversely affected*** by the action and is used in determining whether formal consultation or a conference is necessary." 50 C.F.R. § 402.12 (a), (k). (emphasis supplied)

The ESA regulations set forth five factors to consider in the BA. 50 C.F.R. § 402.12(f)(1)-(5). Although the contents of the biological assessment are discretionary and depend on the nature of the Federal action, it must be based on species and habitat data sufficient to make an "informed" assessment of the impacts of the Federal agency action. Bob Marshall Alliance v. Watt, 685 F. Supp. 1514, (D. Mt. 1986), aff'd in part and rev'd in part and rev'd in part on other grounds, 852 F.2d 1223 (9th Cir.) cert. den. 489 U.S. 1066 (1989); See e. g. Sierra Club v. Flowers, 423 F. Supp. 2d 1273 (S.D. Fl. 2006) (it is the agency's responsibility to explain its decision under the ESA and…to do so with a reasoned analysis), vacated, remanded on other grounds, 526 F.3d 1353 (2008); aff'd Sierra Club v. Van Antwerp, 362 Fed. Appx. 100 (11th Cir. Fl. 2010).

Once completed by the Federal agency, a biological assessment must be submitted to NMFS for concurrence. 50 C.F.R. § 402.12(j). If the BA "indicates there are no listed species or critical habitat present that **are likely to be adversely affected**, **and the Director concurs** as specified in § 402.12(j), then formal consultation is not required." 50 C.F.R. § 402.12(j). (emphasis supplied) However, formal consultation is **required** unless, (1) "as a result of the preparation of a biological assessment under § 402.12 or as a result of informal consultation with the Service under § 402.13, the Federal agency determines, **with the written concurrence** of the Director, that the proposed action is not likely to adversely affect any listed species or critical habitat," or (2) if a NMFS itself does a preliminary biological opinion that is later confirmed as the final biological opinion. 50 C.F.R. § 402.14(b)(1) and (2) (emphasis supplied). [4] The regulations also provide for an informal consultation process between the Service and the Federal agency. 50 C.F.R. § 402.13. If, during informal consultation, the Federal agency determines, "with the **written concurrence** of the Service, that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is required." 50 C.F.R. § 402.13(a). (emphasis supplied) Thus, in both the formal and informal consultation processes, NMFS must provide **written concurrence** with the NRC staff BA determination of "**no adverse impact"**. 50 C.F.R. § 402.12(j) and 402.13(a).

The NRC's regulations expressly acknowledge that "consultation with appropriate agencies would be needed ***at the time of license renewal*** to determine whether threatened or endangered species are present and whether they would be adversely affected." 10 C.F.R. Part 51, Table B-1 of Appendix B to Subpart A. (emphasis supplied).

[4] The regulations set forth requirements for a formal consultation, which concludes with an NMFS biological opinion. 50 C.F.R. § 402.14(g)(1)-(8); § 402.14(h).

While consultation with NMFS is ongoing, ESA § 7(d) prohibits the Federal agency or project applicant from making an "**irreversible or irretrievable"** commitment of resources "which has the effect of **foreclosing** the formulation or implementation of any reasonable and prudent alternative" to the agency action. ESA Section 7(d); 1536 U.S.C. §1536(d); 50 C.F.R. 402.09.

The ESA implementing regulations and NMFS guidance address "candidate species" (a category distinct from "endangered" and "threatened" species) and are relevant here because Petitioners' contention addresses river herring, a candidate species under the ESA. On November 2, 2011, NMFS issued a 90-day finding on a petition to list alewife (*Alosa pseudoharengus*) and blueback herring (*Alosa aestivalis*), collectively referred to as "river herring," as threatened under the ESA, and to designate critical habitat concurrent with any listing. 76 Fed. Reg. 67652 (Nov. 2, 2011). The scientific basis for the designation as a candidate species is contained in the Federal Register. NMFS's final decision on whether to propose listing river herring as endangered or threatened is due August 2, 2011. *Id.* Since the PNPS operating license expires on June 8, 2012, NMFS could list river herring as endangered or threatened before the NRC makes its decision on PNPS relicensing. If the NMFS decision is made before June 8, 2012, a new ESA § 7 consultation must be initiated under 50 C.F.R. § 402.16.

In the consultation process, NMFS must inform a Federal agency who requests a species lists of the identity of candidate species. The NMFS regulations state,

> In addition to listed and proposed species, …[NMFS]…will provide a list of **candidate species** that may be present in the area. Candidate species refers to any species being considered by the Service for listing as endangered or threatened species but not yet the subject of a proposed rule. Although candidate species have no legal status and are accorded no protection under the Act, their inclusion will alert the Federal agency of potential proposals or listings**.**

50 C.F.R. 402.12(d) (emphasis supplied). See also, ESA, § 4 regulations at 69 Fed. Reg. 19975, April 14, 2004 (candidate species are those that "are the subject of a petition to list and for which NMFS has determined that listing may be warranted").

NMFS policy directs the agency to consider candidate species when making natural resource decisions and in informal consultations and conferences. *See* "Endangered Species Consultation Handbook, *Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act,* U.S. Fish & Wildlife Service, National Marine Fisheries Service (March 1998) available at httt://www.nmfs.nooa.gov/pr/pdfs/laws/esa_section7_handbook.pdf. (NMFS Consultation Handbook) pp. 31, 3-1, and 6-1. The Handbook states that NMFS biologists,

> …should **notify agencies of candidate species in the action area, and may recommend ways to reduce adverse effects and/or request studies as appropriate.** These may be added as conservation recommendations. Legally, the action agency does not have to implement such recommendations. However, candidate species may later be proposed for listing, making conference necessary in the future if proposed actions are likely to jeopardize the continued existence of such species. Service biologists should urge other Federal agencies to address candidate species in their Federal programs. The Services are eager to work with other Federal agencies to conserve candidate species. **Addressing candidate species at this stage of consultation provides a focus on the overall health of the local ecosystem and may avert potential future conflicts**. Id, p. 3-7 (emphasis supplied).[5]

[5] The NMFS Consultation Handbook also provides that informal consultations are used to "clarify whether and what …**candidate species** …may be in the action area; determine what effect the action may have on these species or critical habitats; explore ways to modify the action to reduce or remove adverse effects to the species or critical habitats… and explore the design or modification of an action to benefit the species." NMFS Consultation Handbook, p. 3-1 (emphasis supplied) In an informal conference, the Services may assist the action agency in determining effects and may advise the action agency on ways to avoid or minimize adverse effects to …candidate species if present, and voluntarily considered by the action agency and/or the applicant….Although not required by the Act, the Services encourage the formation of partnerships to conserve candidate species since these species by definition may warrant future protection under the [Endangered Species] Act." Handbook, P. 6-1

*NRC Practice Manual*

The NRC Practice Manual, 6.8.1 and 2, addresses required findings under the ESA. It prohibits the ALSB from approving a relevant action until the Department of Interior has been consulted as required by the ESA, § 7. One case has held that approval by the board, which is conditioned on later approval by the Department of Interior, does not fulfill the requirements of the ESA. "To give advance approval to whatever Interior might decide is to abdicate the Commission's duty under the Act to make its own fully informed decision." ALAB-463, 7 NRC at 363-364. Once informed that an endangered species lives in the vicinity of the proposed plant, the licensing board is obligated to examine all possible adverse effects upon the species which might result from construction or operation of the plant and to make findings with respect to them. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-463, 7 NRC 341, 361 (1978).

*Magnuson-Stevens Fisheries Act*

The Magnuson-Stevens Fishery Conservation and Management Act of 1976, 15 U.S.C.S. §§ 1801 *et seq.* (MSA) and implementing regulations at 50 C.F.R. 600.905 et seq., are relevant to Petitioners' contention. The purposes of the MSA include "to promote the protection of essential fish habitat in the review of projects conducted under Federal permits, licenses, or other authorities that affect or have the potential to affect such habitat." 15 U.S.C.S. §1801(b)(7). In adopting the MSA, Congress found and declared, *inter alia*, that "one of the greatest long-term threats to the viability of commercial and recreational fisheries is the continuing loss of marine, estuarine, and other aquatic habitats. Habitat considerations should receive increased attention

for the conservation and management of fishery resources of the United States." 15 U.S.C. S. § 1801(a)(9).

The MSA is implemented in part through a mandated interagency consultation process between NOAA, through NMFS, and the action agency, and requires an "Essential Fish Habitat Assessment" (EFH). 50 C.F.R. §600.900(i)(4). The consultation process applies to Federal actions that "may adversely affect" essential fish habitat. See also, 50 C.F. R. § 600.900(c)(2). The regulations state, "[u]nder Section 305(b)(4)(A) of the Magnuson-Stevens Act, NMFS is required to provide EFH Conservation Recommendations....For Federal actions, EFH Conservation Recommendations will be provided to Federal agencies as part of EFH consultations conducted pursuant to § 600.920." 50 C.F.R. § 600.925(a) and (b). When an EFH assessment is required, the Federal agency must submit it to NMFS at least 90 days prior to the its regulatory decision, such as licensing decision. 50 C.F.R. §600.900(i)(4).

Here, the NRC admits that an EFH Assessment is required, but has not submitted to NMFS as of the date of this filing. See *Facts*, below and duBois Affidavit Exhibit 2; 50 C.F.R. §600.900(i)(4). Section 600.920 sets out a process for coordinating EFH assessment with NEPA and other statutes, but nothing allows the EFH assessment to be performed after licensing, which NRC has attempted to do, as shown below.

*National Environmental Policy Act*

The fundamental purposes of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq*. are: (1) to guarantee that the government takes a "hard look" at all of the environmental consequences of proposed federal actions *before* the actions occur, Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989); and (2) to "guarantee[] that the

relevant information will be made available to the larger audience that may also play a role in both the decision making process and the implementation of that decision," *id.* at 349.

NEPA demands that federal agencies "insure the professional integrity, including the scientific integrity, of the discussions and analyses" included in an EIS, 40 C.F.R. § 1502.24, and disclose "all major points of view on the environmental impacts" including any "responsible opposing view." 40 C.F.R. §§ 1502.9(a), (b). Courts have found that an EIS that fails to disclose and respond to expert opinions concerning the hazards of a proposed action, particularly those opinions of the agency's own experts, are "fatally deficient" and run contrary to NEPA's "hard look" requirement.

NRC regulations state that the impacts of license renewal on threatened or endangered species is a "Category 2" issue requiring site-specific review under NEPA by NRC during individual license proceedings. See 10 C.F.R. Part 51, Table B-1 of Appendix B to Subpart A; NUREG-1437, GEIS § 3.9. NRC regulations state that ESA consultation is necessary for NRC staff to make informed recommendations on the propriety of relicensing nuclear generating facilities. ("Because compliance with the Endangered Species act cannot be assessed without site-specific consideration of potential effects on threatened and endangered species, it is not possible to determine generically the significance of potential impacts to threatened and endangered species. This is a Category 2 issue."). As noted above, the ESA § 7 regulations requires specific documentation of compliance with ESA processes and standards.

NEPA requires the Federal agencies to produce an environmental impact statement (EIS) that contains a "detailed statement . . . on . . . alternatives to the proposed action." 42 U.S.C. § 4332(C)(iii). The alternatives analysis should address "the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear

basis for the choice among options by the decision maker and the public." 40 C.F.R. § 1502.14. This analysis must "rigorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14(a). Agencies must consider three types of alternatives, which include a no action alternative, other reasonable courses of actions, and mitigation measures not in the proposed action. 40 C.F.R. § 1508.25. The purpose of this section is "to insist that no major federal project should be undertaken without intense consideration of other more ecologically sound courses of action, including shelving the entire project, or of accomplishing the same result by entirely different means." Environmental Defense Fund v. Corps of Engineers, 492 F.2d 1123, 1135 (5th Cir. 1974). "The existence of a viable but unexamined alternative renders an [EIS] inadequate." Natural Resources Defense Council v. U.S. Forest Service, 421 F.3d 797, 813 (9th Cir. 2005) (quoting Citizens for a Better Henderson v. Hodel, 768 F.2d 1051, 1057 (9th Cir. 1985)).

A Federal agency's continuing duty to take a "hard look" at the environmental effects of their actions requires that they consider and evaluate, make a reasoned determination about the significance of this new information, and prepare supplemental NEPA documentation accordingly. Warm Springs Task Force v. Gribble, 621 F.2d 1017, 1023-24 (9th Cir. 1980); Stop H-3 Association v. Dole, 740 F.2d 1442, 1463-64 (9th Cir. 1984). Federal agencies must supplement their NEPA documentation when "there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1509(c)(1)(ii). The need to supplement under NEPA when there is new and significant information is also found throughout the NRC regulations. See 10 C.F.R. §§ 51.92 (a)(2), 51.50(c)(iii), 51.53(b), 51.53(c )(3)(iv).

ESA § 7 consultation may be coordinated with preparation of an EIS under NEPA. A biological assessment for purposes of the ESA § 7 compliance "may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of …NEPA." 16 U.S. C. § 1536(c)(1); *See also,* Sierra Forest Legacy v. United States Forest Serv. 652 F.Supp. 2d 1065, 1071 (D. Cal. 2009) (acknowledging that a "BA may be conducted as part of the agency's NEPA compliant EIS"). Under NMFS regulations, when consultation or conference has been coordinated with NEPA, "the results should be included in the documents required by those statutes." 50 C.F.R. § 402.06(b), *See also,* pp. 4-11 of NMFS Consultation Handbook). ESA regulations and the NMFS Consultation Handbook are explicit that "[a]t the time the Final EIS is issued, section 7 consultation should be completed" and that the "[t] Record of Decision should address the results of section 7 consultation." *50 C.F. R. § 402.06(b).*

As noted, the section 7 consultation process can be formal or informal, and in either case, the NMFS must concur with the Federal agency findings in its BA. The law is clear that only after completion of this process can the Federal agency "determine whether and in what manner to proceed with the action in light of its section 7 obligations and the Service's biological opinion." 50 C.F.R. § 401.15; see also ESA § 7(d), 16 U.S. C. § 1536(d) (prohibiting agency action that forecloses formulation of reasonable measures/alternatives while consultation is on going). Thus, completion of the ESA §7 consultation is a prerequisite to an agency decision such as relicensing under the NRC's regulations.

This settled and proper approach is further demonstrated by numerous instances involving NRC licensing, where ESA § 7 consultation processes were concluded well prior to the completion of a concurrent NEPA review process, and where a BO was incorporated into the final EIS and formed part of the basis for the Federal agency's final decision making. Within

this regulatory framework, "[t]he Nuclear Regulatory Commission recognizes a continuing obligation to conduct its domestic licensing and related regulatory functions in a manner which is both receptive to environmental concerns and consistent with the Commission's responsibility as an independent regulatory agency for protecting the radiological health and safety of the public." Id. § 51.10 (b) .

NEPA coordination or compliance does not supplant ESA § 7 consultation. The ESA regulations, make this clear: "Consultation, conference, and biological assessment procedures under section 7 may be consolidated with interagency cooperation procedures required under other statutes, such as [NEPA] or the Fish and Wildlife Coordination act (FWCA)….**Satisfying the requirements of these other statutes, however, does not in itself relieve a Federal agency of its obligations to comply with the procedures set forth in this part or the substantive requirements of section 7…."** 50 C.F.R. § 402.06(a) (emphasis added).

*Facts*

Entergy seeks to relicense PNPS for an additional 20 years – from 2012 to 2032. The cooling and service water systems at PNPS operate as a once-through cooling system, drawing water from Cape Cod Bay. The Final Supplemental Environmental Impact Statement was published in July 2007. NUREG-1437, Supplement 29 (PNPS EIS) § 2.1.3. Among the environmental impacts of PNPS operation discussed in the EIS are water use and discharge issues, identified as "Category 1 Issues" and "Category 2 Issues," identified in Table 4-2. PNPS EIS § 4.1, Tables 4-1 and 4-2. Category 2 issues are: entrainment of fish and shellfish in early life stages, impingement of fish and shellfish, and heat shock. *Id.*, Table 4-2. The PNPS EIS includes a separate biological assessment (BA) prepared by NRC staff pursuant to ESA § 7 for

endangered and threatened species. The NRC prepared a supplemental BA in 2012, as discussed below.

Entergy admits that "continued operation of PNPS for the period of extended operation [i.e. during the license renewal period] will result in irreversible and irretrievable resource commitments…." Entergy Environmental Report, § 6.4.2. The PNPS EIS addresses irreversible irretrievable resource commitments associated with continued operation of PNPS for an additional 20 years: "These resources include materials and equipment required for plant maintenance and operation, the nuclear fuel used by the reactors, and ultimately, permanent off-site storage space for the spent fuel assemblies." PNPS EIS § 9.1.2, p. 9-6.

The NEPA and ESA § 7 consultation processes followed by the NRC on PNPS are as follows: On December 8, 2006, the NRC issued a draft supplemental environmental impact statement. PNPS EIS, p.1-7. There was a 75 day comment period, ending Feb. 28, 2007. *Id.* During comment period, public meetings were held on January 24, 2007. Id at 1-7. Petitioners appeared at the public meeting, and submitted written comments and verbal testimony on the draft supplemental EIS. Affidavit of E. Pine duBois (duBois Affidavit ¶19 and 20).

By letter of April 25, 2006, NRC staff requested from NMFS a list of species that "may be in the vicinity of PNPS." PNPS EIS, p. E-53; 50 C.F.R. 402.12(c). NMFS responded on June 8, 2006 in a letter providing the NRC with "…a list of Federal protected species in the project area. A total of ten aquatic species under NMFS jurisdiction that are afforded protection under the ESA, were identified as having the potential to inhabit the project area." This consisted of five species of whales, four sea turtles, and one fish, the shortnose sturgeon. The NMFS 2006 letter identified part of Cape Cod Bay as designated critical habitat for the Northern right whale.

See, PNPS EIS, p. E-15 and p. 53. (NMFS 2006 letter). The letter is in the PNPS EIS at p. E-17-18; see Mansfield Affidavit ¶ 12 – 18)

The NMFS June 8, 2006 letter informed the NRC of its obligation to obtain NMFS' concurrence with any NRC staff determination as to impacts on listed species and designated habitat from PNPS continued operations during the relicensing period. The NRC staff prepared a BA, dated December 2006, which was put in the final PNPS EIS. The BA states, "[t]he NRC is using the ER [Entergy's Environmental Report] and other information as the basis for a Supplemental Environmental Impact Statement, a plant-specific supplement to the *Generic Environmental Impact Statement for License Renewal of Nuclear Power Plants, NUREG-1437.* This biological assessment examines the potential effects of the continued operation of PNPS on ten Federally listed species that could occur within the PNPS site or near the site. This consultation is pursuant to Section 7(e)(2) of the…ESA." PNPS EIS, p. E-52-53.

The NRC staff BA of December 2006 "determined that continued operation of PNPS for an additional 20 years would not have any adverse impact on any threatened or endangered marine aquatic species." *Id.* at p. E-73. The BA does not make a determination on the potential effects of relicensing on critical habitat for the Northern right whale, which it was required to do under 50 C.F.R.§ 402.12(a). It did, however, identify the whale's critical habitat as beginning "approximately 3 mi east of PNPS and extends south and east to the coastline and north beyond the tip of Cape Cod." *Id.*, at p. E-69.

On January 23, 2007, NMFS wrote NRC staff stating, in pertinent part, it had "reviewed the GEIS Supplement 29…" and "[c]omments relative to the Section 7 Endangered Species Act consultation will be provided by NMFS Protected Resources Division under separate cover." (NMFS 2007 letter). *Id.* at p. E 44-45.

On November 2, 2011 river herring was designated a candidate species under ESA § 7, and a listing decision will be made by August 2, 2012, about two months after PNPS's license expires. Neither the NRC staff nor Entergy have addressed the new scientific data contained in the November 2, 2011 Federal Register evidencing the threat to the existence of river herring, even though, as shown below, it is the third most impinged species in the PNPS once-through cooling water system. See Mansfield Affidavit ¶ 22-28; duBois Affidavit ¶ 9-11

In December 2011, staff of JRWA, having relied upon the statements in the NRC and NMFS correspondence that the ESA § 7 consultation was pending, began research to try to ascertain the results of the consultation. See Bingham Affidavit. JRWA learned that there was no record that the ESA consultation was complete. Accordingly, it sent at letter to NMFS asking for documentation of the results of the consultation and raising issues about the contents of the 2006 NRC staff BA. The letter, dated February 6, 2012, is attached to the Affidavit of Pine DuBois as Exhibit 1. duBois Aff. ¶ 24.

On February 6, 2012, NFWS designated a distinct population segment of the Atlantic sturgeon (*Acipenser oxyrhynchus oxyrhynchus)* in the Gulf of Maine as threatened under the ESA. 77 Fed. Reg. 5880 (Feb. 6, 2012).[6] Cape Cod Bay is part of the Gulf of Maine. Mansfield Affidavit ¶ 8. The final rule is effective April 6, 2012.

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[6] Atlantic sturgeon (*acipenser oxyrinchus*) is identified by in the PNPS EIS as a marine aquatic species with "the potential to occur in the vicinity of the PNPS site…." and one that "could occur in Cape Cod Bay in the vicinity of PNPS…." PNPS EIS, p. 2-83. When the PNPS EIS was issued in July 2007, the Atlantic sturgeon was listed by Massachusetts as endangered, and was a candidate species under the ESA. Atlantic sturgeon was identified by NMFS as a "candidate species" beginning in 1991. 77 Fed. Reg. 5880 (Feb. 6, 2012). (*Cf.* PNPS EIS, Table 2-4, p. 2-84, where it is listed but not identified as a candidate species.) The NFWS rulemaking states in relevant part, "[w]e, NMFS, are issuing a final determination to list the Gulf of Maine (GOM) Distinct Population Segment (DPS) of Atlantic sturgeon (*Acipenser oxyrinchus oxyrinchus*) as a threatened species under the Endangered Species Act (ESA)…. We have proposed protective regulations for the GOM DPS in accordance with ESA section 4(d) in a separate rulemaking published in the Federal Register on June 10, 2011." The February 6, 2012 announcement did not designate a critical habitat for GOM DPS Atlantic sturgeon, but NMFS stated,

> in the coming months we will continue to evaluate the physical and biological features of specific areas (*e.g.*, spawning or feeding site quality or quantity, water quality or quantity…that are essential to the

On February 29, 2012, NRC sent NMFS a letter asking for concurrence on "the NRC's 2006 biological assessment per 50 CFR 40.12(j)" and on a recent supplemental Biological Assessment on Atlantic sturgeon. This letter and the supplemental BA is attached as Exhibit 2 to the duBois Affidavit. The NRC thus expressly acknowledged that the ESA § 7 consultation is incomplete for the 2006 BA and the supplemental BA. On March 2, 2012, Petitioners received a copy of the supplemental BA through informal channels. duBois Aff. ¶ 25.

Since the PNPS EIS was prepared and issued in final form in 2007, it does not address the 2012 supplemental BA on Atlantic sturgeon. In the 2012 supplemental BA, the "NRC concludes that the proposed license renewal of Pilgrim will have no effect on the Atlantic sturgeon." Atlantic sturgeon is addressed only briefly in the PNPS EIS, at p. 2-86, and not addressed in the December 2006 BA, even though it was a candidate species under the ESA at the time.

With this contention, Petitioners proffer evidence to show that the BA prepared by the NRC in 2006, which is currently the subject of the NMFS ESA § 7 consultation is entirely lacking in scientific credibility in several respects. This showing is material and relevant to the instant proceeding because it demonstrates the superficial and deficient manner in which the NRC has handled is mandatory obligations under the ESA and MSA. Petitioners proffer this evidence to show that their contention meets the standards of 10 C.F.R. § 2.309(f). This

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conservation of the three DPS in the Northeast… We are currently considering the available information in order to designate critical habitat. With this rule, we are also soliciting information that may be relevant to the designation of critical habitat for all three DPSs in the Northeast Region. Details of our analyses, their outcome, and a request for public comment on our proposed critical habitat designations will be published in subsequent Federal Register documents. 77 Fed. Reg. 5880

demonstration of lack of scientific credibility in the BA is not a comprehensive compilation of all such evidence, but merely provides examples.

As an example, as set forth in the Affidavit of Alex Mansfield (Mansfield Affidavit), there exists now, and did at the time the 2006 BA was prepared, a wide and varied body of information concerning endangered species in Cape Cod Bay which was not used in preparing the 2006 BA. Mansfield ¶ 10 to 20. Had such sources been consulted, Entergy would have had to acknowledge the presence of large numbers of endangered right whales within the "critical area" designated by the permittee itself as potentially effected by PNPS operations. Moreover, a simple analysis of the entrainment and impingement data prepared by Entergy would demonstrate the extensive destruction of multiple species which are food sources to endangered whales and endangered turtles. Mansfield Affidavit ¶ 28 to 30.

As to the "candidate species" river herring, one of the two river herring species, alewife (*Alosa pseudoharengus*),

> is ***one of the most commonly impinged species at PNPS*** (ENSR 2006). Alewife larvae and juveniles have been collected in the PNPS entrainment sampling. Juveniles and/or adults have been consistently collected in the PNPS impingement sampling program. Over the last 25 years (1980 to 2005), alewives have had the ***third highest number of individuals impinged at PNPS***, based on annual extrapolated totals (Normandeau 2006b).

PNPS EIS, p. 2-34. (emphasis supplied) The PNPS EIS also states, "spawning occurs in freshwater rivers and streams," p. 2-34, but then says larvae are found in the entrainment sampling at PNPS. It is contrary to normal river herring breeding patterns to find larvae in a saltwater environment like PNPS's salt-water intake, several miles from suitable freshwater habitat in the area, such as Eel River and Jones River. Mansfied Aff. ¶ 22 to 27.

Further, Entergy's records show that during a ten-year period, 1994 to 2004, 46,286 alewife and 16,188 blueback herring were impinged at PNPS, for a total of 62,474 river herring. Mansfield Aff. ¶ 23 to 25. In relation to the entire Jones River herring stock, PNPS's impingement and entrainment numbers are significant. In 2004 alone, PNPS impinged 2,192 river herring (alewife and blueback herring). In the following year, 2005, the total estimated Jones River river herring stock was 804 – therefore in 2004, PNPS impinged 2.75 times as many fish as the entire Jones River river herring run the next year (2005). Mansfield Aff. ¶ 22 to 27.

The record contains no evidence that Entergy or NRC staff has ever consulted with NMFS on river herring under the ESA § 7. The PNPS EIS merely contains tallied references to "local populations" of fish. The PNPS EIS states, "[d]ue to lack of recent information describing the status of several local populations, it is difficult to quantify impingement impacts." PNPS EIS, p. 4-33; § 4.1.2.3, "Summary of Impingement Impacts." The PNPS EIS does discuss alewife, but does not address any threats to its continued existence as a species. *Id.* p. 2-34 to 2-35, The blueback herring is not identified at all in the PNPS EIS list of marine aquatic resources. *Id.*, § 2.2.5.3.1. *Thus, even though Entergy's data consistently shows that alewife are the third most commonly impinged species at PNPS, the environmental impact statement minimizes this well documented impact on alewife and blueback stocks.* *Id.*, § 4.1.2.2**;** p. 4-29 to 4-33.

In contrast, NMFS Federal Register announcement cites to data stating,

> As described previously, the petition asserts that various life stages of river herring may be impinged or entrained through water intake structures from commercial, agricultural, or municipal operations. **These intake structures alter flow, and may cause direct mortality to various life stages of river herring if they are impinged or entrained by the intake. In addition, aside from direct mortality, the petition asserts that intakes alter flow, which can affect water quality, temperature, substrate, velocity, and stream width and depth.** NRDC suggests that these alterations can affect spawning

> migrations as well as spawning and nursery habitat, which could pose a significant threat to river herring. 76 Fed. Reg. at 67656. (emphasis supplied)

Essential fish habitat (EFH) protected under the MSA was also the subject of correspondence between NMFS and NRC. The January 2007 letter from NMFS to the NRC, *supra*, addresses essential fish habitat. PNPS EIS p. E-15. The January 2007 letter states NMFS,

> concurs with the NRC's determination that adverse impacts on living marine resources and habitats will occur as a result of the operation of the facility ....[NMFS] notes the NRC's position that operational activities including the intake of cooling water, the discharge of heated effluent and/or mitigation conditions are under the sole authority… of USEPA under its NPDES process pursuant to Section 316(a)(b) of the Federal Clean Water Act….[NMFS notes] NRC does not intend to incorporate any mitigation conditions to offset impacts on NMFS trust resources…**EPA is currently in the process of developing a demonstration document for reissuance of the NPDES permit.** Based on this information, NMFS has determined that our issues of concern relative to living marine resources and EFH would be most appropriately addressed through the EPA's NPDES permit renewal process. **As such, NMFS will not be providing the NRC with EFH conservation recommendations regarding the License Renewal for the Pilgrim Nuclear Power Plant.**

*Id.* p. E-44.

Thus, the NRC has attempted to defer its mandatory MSA duties to the EPA NPDES permit process. The NPDES permit renewal process at U.S. EPA, however, will not be completed prior to June 8, 2012. Affidavit of Anne Bingham (Bingham Aff.). There is nothing in the EPA files or the NRC record to show that an EFH assessment will be done before that time.

In Massachusetts, the U.S. EPA retains primary authority for the NPDES permitting process under the Clean Water Act. Bingham Affidavit. The state retains authority under its state clean water laws to set water quality standards and regulate point source discharges such as those at PNPS. In litigation culminating in Massachusetts' highest court in April 2011, Entergy

challenged the state's authority to regulate PNPS cooling water intakes and discharges. As described by the Massachusetts Supreme Judicial Court in upholding the state's authority "the environmental impact of these systems is staggering." Entergy Nuclear Generation Company vs. Department of Environmental Protection, SJC-10732, 2011 Mass. Lexis 163, April 11, 2011. The state's highest court further stated:

> "As the sources referenced by the department indicate, the ecological harms associated with CWISs [cooling water intake structures] are well understood. The intake of water by a CWIS at "a single power plant can kill or injure billions of aquatic organisms in a single year." Riverkeeper, Inc. v. United States Envtl. Protection Agency, 475 F.3d 83, 90 (2d Cir. 2007), rev'd in part on other grounds, Entergy Corp. v. Riverkeeper, Inc., 129 S. Ct. 1498, 173 L. Ed. 2d 369 (2009). See Riverkeeper, Inc. v. United States Envtl. Protection Agency, 358 F.3d 174, 181 (2d Cir. 2004).

The Petitioners know of no plans by the state to exercise its authority to implement measures to mitigate the adverse impacts of the PNPS cooling-water intake structure prior to the relicensing deadline of June 8, 2012. Bingham Affidavit.

***Brief Explanation of Basis for Contention: § 2.309(f)(1)(ii)***

Petitioner hereby offers the following "brief explanation of the basis" for its Contention. The law and facts supporting their contention are set forth at pages 5 -21 *supra*.

PNPS cannot be relicensed until the NRC complies with the ESA, the MSA and supplements the PNPS EIS. The ESA § 7 consultation process is incomplete for the ten endangered and threatened species and the critical habitat identified in the 2006 BA, and for Atlantic sturgeon, identified in the supplemental BA. Petitioners contend that impacts to river herring, a "candidate species" under the ESA, and the third most frequently impinged species at PNPS, should be addressed pursuant to § 7, prior to relicensing as required by NMFS regulations

and policy in order to ensure that continued operation of PNPS over the next 20 years does not "jeopardize" the continued existence of river herring.

The NRC has a mandatory duty to conduct ESA § 7 consultations, and has incorporated this duty into its own NEPA procedures. Until the § 7 process is completed, the NRC cannot meet its obligation to "insure" that the relicensing will not "jeopardize" the species and/or habitat.

While consultation with NMFS is ongoing, ESA § 7(d) prohibits the Federal agency or project applicant from making an "irreversible or irretrievable" commitment of resources "which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative" to the agency action. ESA Section 7(d); 1536 U.S.C. §1536(d); 50 C.F.R. 402.09. Entergy admits that "continued operation of PNPS for the period of extended operation [i.e. during the license renewal period] will result in irreversible and irretrievable resource commitments…." Entergy ER § 6.4.2. Therefore, until the § 7 consultation is completed and the PNPS EIS properly supplemented, PNPS cannot be relicensed. Otherwise, there would be an "irreversible or irretrievable" commitment of resources which will have the effect of foreclosing formulation of implementation of any reasonable and prudent alternative to authorization of relicensing.

Further, prior to relicensing, the MSA and implementing regulations require an EFH Assessment containing specific items, including an analysis of the potential adverse impacts of Entergy operations on EFH, proposed conclusions, and proposed mitigation. Congress has assigned NMFS a specific duty under the MSA to protect EFH. 50 C.F.R. §600.900(i)(4). NRC has unlawfully attempted to defer the EFH Assessment to the EPA NPDES permit renewal process, which will not be done by June 8, 2012 when the PNPS license expires and renewal

would be required. Bingham Affidavit. NEPA requires that the PNPS EIS be supplemented with information from a completed ESA § 7 process and compliance with the MSA prior to relicensing.

***Contention is Within the Scope: § 2.309(f)(1)(iii)***

Issues related to the NRC's failure to comply the ESA and MSA and the need for supplementing the PNPS EIS are squarely within the scope of the PNPS license renewal proceeding. The NRC regulations and policy state that ESA § 7 consultation for the BA and Atlantic sturgeon is a mandatory part of the PNPS relicensing process, and the NRC acknowledges this.

Petitioners contend that river herring should also be addressed under the ESA § 7 process to insure that continued operation of PNPS as proposed, using once-through cooling, "is not likely to jeopardize the continued existence" of this species. Although not a mandatory § 7 consultation, Entergy and the NRC should seek the expert advice of NMFS because Entergy's own data shows river herring are the third most impinged species at PNPS, and "addressing candidate species at this stage of consultation provides a focus on the overall health of the local ecosystem and may avert potential future conflicts" during the 20 year relicensing period. NMFS Consultation Handbook, p. 3-7. The failure to identify river herring as a candidate species, which may be proposed for listing prior to the PNPS June 8, 2012 relicensing date, and Entergy's failure to voluntarily cooperate with NMFS about adverse impacts on river herring, a known victim of Entergy's once through cooling water system, is squarely within the scope of this proceeding.

There is no dispute that the EFH consultation and assessment is required for PNPS relicensing. (*See, e.g*., PNPS EIS, p. xix. "However, the staff has identified the need for an essential fish habitat (EFH) consultation.") The problem is that the NRC has unlawfully attempted to defer the EFH assessment to the U.S. EPA NPDES process. Whether this deferral is proper is squarely within the scope of the relicensing proceeding.

NEPA requires supplementation of an environmental impact report when there is new information. Petitioners contend that the information developed during completion of the ESA §7 consultation and in the mandatory EFH consultation and assessment must be put in a supplement to the PNPS EIS under NEPA. Therefore, these issues are squarely with the scope of the PNPS license renewal proceeding.

***Contention is Material to the NRC's Findings: § 2.309(f)(1)(iv)***

Petitioners make the following showing that the "issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding." **10 C.F.R. 20.309(f)(1)(iv).** Petitioners' contention is material because it demonstrates that the ESA § 7 and MSA processes are incomplete and that the PNPS EIS must be supplemented following their completion. Without NMFS' concurrence with the 2006 BA and supplemental BA, which will provide NMFS' expert position on the impacts of the activity, potential alternatives, mitigation measures, the necessity of a take permit, etc., the decision maker does not possess all information necessary to make the relevant findings regarding the PNPS license renewal. Conclusion of the consultation is necessary to insure that relicensing does not "jeopardize the continued existence" of endangered and threatened species. 50 C.F.R. § 402.14(g)(4).

The river herring issue is also material. NMFS directs its biologists to "urge other Federal agencies to address candidate species and to focus "on the overall health of the local ecosystems." NMFS Consultation Handbook, p. 307. By addressing candidate river herring now, NRC staff can make informed decisions about relicensing PNPS as Entergy currently proposes it – that is, using through cooling water for the next 20 years. This operating method has a documented adverse impact on river herring, a fish that is a candidate for ESA listing as endangered or threatened by August, 2012.

If the NRC relicenses PNPS without voluntarily consulting with NMFS on river herring, and PNPS continues to operate without attempting to mitigate or avoid significant adverse impacts on river herring, Entergy could jeopardize the continued existence of the species over the next 20 years. Thus, the issue of whether NRC should seek the advice of NMFS on river herring and weigh its advice in its relicensing decision is material to the findings the NRC must make to support relicensing.

The issue of whether an EFH assessment can properly be deferred to another agency proceeding (i.e. the EPA NPDES process) that will not be complete by June 8, 2012, is material to findings the NRC must make. The law is clear that the MSA requires an EFH assessment prior to relicensing. Further, without the benefit of NMFS' response to an EFH Assessment for PNPS, the NRC does not have all of the information necessary to make relevant findings on the license renewal. For example, the MSA regulations at § 600.900(2)(i) require expanded consultation procedures where there are substantial adverse effects to EFH, resulting in "EFH Conservation Recommendations" pursuant to 305(b)(4)(A) of the MSA. Here, there has been no determination as to whether there are any – let alone "substantial adverse effects" - to EFH from PNPS operations. Without such a determination, and the benefit of any NMFS conservation

recommendations, the NRC will lack data it is required to have as part of the NEPA process that will form the basis of its relicensing decision. Therefore, issue of MSA compliance is material to the findings the NRC must make on PNPS license renewal.

Under NEPA, the NRC must "insure the professional integrity, including the scientific integrity, of the discussions and analyses" included in an EIS and disclose "all major points of view on the environmental impacts." The failure to disclose and respond to expert NMFS opinions concerning the adverse impacts of PNPS's relicensing on species protected under the ESA and on essential fish habitat renders the PNPS EIS "fatally deficient" and runs contrary to NEPA's "hard look" requirement.

The PNPS EIS must contain a "detailed statement . . . on . . . alternatives" to once-through cooling that incorporates the new ESA and MSA information. This supplementation must ensure that the new information about the endangered and threatened species and essential fish habitat impacts of once-through cooling at PNPS, and that the alternatives are analyzed in comparative form, sharply defining the issues and providing a clear basis for the choice among options by the decision maker and the public. The alternatives analysis must "rigorously explore and objectively evaluate all reasonable alternatives." Without the legally required information from the ESA and MSA process, the PNPS NEPA alternatives analysis is fatally flawed on its face. Only after completion of the ESA § 7 process can a federal agency determine whether and in what manner to proceed with in action, and a record of the process must be included in the agency's NEPA EIS. *Supra* at Part II. The relicensing decision cannot be made absent a legally adequate EIS containing a "hard look" at alternatives. Therefore, the contention is material.

***Concise Statement with Citations/References: § 2.209(f)(1)(v)***

The Petitioners provide a concise statement of the facts supporting the contention, along with appropriate citations in accordance with **10 C.F.R. 20.309(f)(1)(v).** The facts supporting Petitioners' contention are these: the NRC admits, by its February 29, 2012 letter to NMFS seeking concurrence on the 2006 BA and the supplemental BA, that the ESA § 7 process is incomplete. The letter is attached as Exhibit 2 to the Affidavit of Pine duBois. Until the ESA § 7 process is complete, NRC staff's findings and conclusions regarding threatened and endangered species and critical habitat, and in turn, the record and the PNPS EIS as to alternatives and the appropriateness of relicensing PNPS, will remain factually and legally deficient. See, references to ESA law and regulations and citations to NEPA law, *supra*.

Petitioners contention on river herring is supported by facts demonstrating that river herring are impinged at PNPS, law showing that they have been designated a candidate species under the ESA, and that NMFS regulations and guidance direct it to urge the NRC to address impacts to river herring in order to insure that relicensing will not jeopardize the species continued existence. *See,* NMFS regulations and NMFS Consultation Handbook, *supra.*

Further, as shown above in *Facts*, there is no record of compliance with the MSA. Facts cited by Petitioners show that the NRC has not done an EFH assessment but deferred its responsibility to EPA. NMFS 2007 Letter.

As a threshold matter, the PNPS EIS is incomplete and unlawful without the legally required information from the ESA and MSA processes. This is not a question of whether the NRC properly weighed alternatives under NEPA. Rather, the record demonstrates that as a matter of law, the PNPS EIS is incomplete because it does not contain legally required information. The failure to complete the ESA § 7 process and the MSA EFH assessment, and

disclose and respond to expert NMFS opinions concerning the adverse impacts on marine aquatic species and habitat of PNPS's relicensing renders the PNPS EIS "fatally deficient" and contrary to NEPA's "hard look" requirement.

Further, because the ESA § 7(d) prohibits Entergy and the NRC from making an "irreversible or irretrievable commitment of resources" while consultation with NMFS is ongoing, and Entergy admits that its decision to operate for another 20 years under relicensing would be such a commitment of resources, the relicensing decision cannot be made until the ESA consultation is complete. ESA Section 7(d); 1536 U.S.C. §1536(d); 50 C.F.R. 402.09; Entergy Environmental Report, § 6.4.2.

***Contention Raises Genuine Dispute: § 2.309(f)(1)(vi)***

Sufficient information indicates a "genuine disputes exists" between Petitioners and the applicant, Entergy, on a material issue of law or fact, pursuant to **10 C.F.R. 20.309(f)(1)(vi).** Entergy's Environmental Report (ER) states in relevant part:

> Renewal of the operating license for PNPS is not expected to result in the taking of any threatened or endangered species. Renewal of the license is not likely to jeopardize the continued existence of any threatened or endangered species or result in the destruction or adverse modifications of any habitat.

ER, § 4.10.6, p. 4-18 (The ER is contained in Entergy's License Application). Petitioners challenge Entergy's unilateral conclusion, made absent NMFS concurrence under ESA § 7 and mirrored in the NRC staff 2006 and 2012 supplemental BA. They also show this is unsupported by scientific evidence. Similarly, Petitioners contend the ESA § 7 policies should be followed for river herring, a candidate species, but neither Entergy nor the NRC have addressed this issue.

Entergy has also flouted the legal mandates of the MSA. Apparently, it is Entergy's position *either* that it is entitled to a license without complying with the MSA, or the EFH obligations can be deferred to the NPDES permitting process. Petitioners have the opposite view. While NRC staff acknowledge the need for an EFH, they improperly attempt to pass the job on to another agency- the EPA in the NPDES permit renewal process, which will not occur prior to the relicensing deadline. Bingham Affidavit. In the PNPS EIS, NRC staff write, "NRC conducted an EFH consultation with the National Marine Fisheries Service (NMFS). NMFS concluded the EFH consultation; such documentation is in included in Appendix E of this SEIS." *Id.* The NRC "concluded" the EFH consultation" by simply passing the buck to EPA. The "documentation" to which NRC staff refer is simply the NMFS 2007 letter reiterating that the job has been postponed until the EPA undertakes the NPDES permit renewal process. Petitioners contend that such a postponement is unlawful, and therefore there they have a genuine dispute on material issues of fact and law with Entergy.

Without completing the ESA and MSA processes and supplementing NEPA, the NRC staff evidenced a blatant disregard for explicit statutory and regulatory procedures set forth by Congress for the protection of listed and proposed species and habitat, essential fish habitat and the mandates of NEPA. NEPA plainly requires the NRC to address the environmental information from NMFS consultations under ESA § 7, and MSA consultations for Essential Fish Habitat ***before*** making a re-licensing decision for PNPS. This is necessary in order to ensure that "important effects [of the licensing decision] will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." Robertson, 490 U.S. at 349; 40 C.F.R. §§ 1500.1(c), 1502.1, 1502.14. The NRC's obligation to comply with NEPA in this respect is independent of, and in addition to the NRC's responsibilities under the Atomic

Energy Act, and must be enforced to the "fullest extent possible." Calvert Cliffs Coordinating Committee, 449 F.2d at 1115. See also Limerick Ecology Action v. NRC, 869 F.2d 719, 729 (3rd Cir. 1989) (citing Public Service Co. of New Hampshire v. NRC, 582 F.2d 77, 86 (1st Cir. 1978)). Under NEPA, the NRC is required to address the ESA § 7 and MSA assessment findings and recommendations as they pertain to PNPS before making a licensing decision, regardless of whether it does or does not choose to do so in the context of its AEA-based regulations. *See* citations in Part II.A.

As shown above, material genuine issues of fact and law exist.

**B. Factors of 10 C.F.R. 2.309(f)(2)**

Petitioners' contention meets the standards of **10 C.F.R. § 2.309(f)(2)(i) through (iii).** The contention is based on information that was not previously available. **10 C.F.R. § 2.309(f)(2)(i).** As shown above, on February 29, 2012, the NRC admitted that the ESA § 7 process for the 2006 BA and the 2012 BA is incomplete. As to river herring, the NMFS did not announce that the river herring is a candidate species until November 2, 2011. 76 Fed. Reg. 67652. The NMFS has not responded to Petitioners' February 6, 2012 letter asking for information to show that river herring are being considered under the ESA § 7 process. duBois Aff. As to MSA compliance, Petitioners have only recently discovered that, in fact, EPA's NPDES renewal process as not "ongoing" as represented by the NMFS 2007 letter deferring the EFH Assessment to that process. Bingham Aff. Therefore, the EFH Assessment, tied by NRC to the EPA NPDES permit, will not be done prior to relicensing. All of this information was not previously available.

The new information proffered by Petitioners' contention is materially different than information previously available, as required by **10 C.F.R. § 2.309(f)(2)(ii)**. As shown in *Facts*, above, the PNPS EIS and agency correspondence represented that the ESA § 7 process on the 2006 BA as soon to be completed in 2007. The NRC's February 2012 admission that the ESA § 7 process is incomplete differs materially from those prior agency representations. The PNPS EIS that failed to identify Atlantic sturgeon as a "candidate species" for which the NMFS had a duty to provide information and recommendations. Now, the Atlantic sturgeon is identified as an endangered species.

As described above in Part II. A., federal regulators made repeated written statements in the record that the ESA § 7 and EFH processes were "ongoing." The Petitioners reasonably assumed that NRC had, in the intervening years between July 2007 and January 2012, completed the § 7 consultation process, and that the US EPA was, in fact, renewing the NPDES permit. NMFS 2007 letter clearly creates a reasonable assumption that the NPDES permit would be renewed prior to the June 8, 2012 relicensing deadline, and that the MSA would be complied with in that process. New material information shows quite the opposite: the NPDES permit renewal process is stalled, is not ongoing, and will not be done prior to the June 8, 2012 deadline for PNPS NRC relicensing. Bingham Affidavit. Further, the statement in the SEIS that NRC staff have "concluded the EFH consultation," PNPS EIS, p. xix, is materially different from the proffered contention which shows that instead of properly "concluding" the EFH consultation and assessment prior to June 8, 2012, NRC staff passed on the job to EPA.

Petitioners' proffered evidence constitutes "new and significant information" under NEPA whose environmental implications must be considered before the NRC may make a decision that approves license renewal for PNPS. Therefore, the NRC must supplement the

PNPS EIS to include information from the ESA and MSA processes There are significant new circumstances and information relevant to environmental concerns and bearing on the proposed action or its impacts. 40 C.F.R. § 1509(c)(1)(ii); 10 C.F.R. §§ 51.92 (a)(2), 51.50(c)(iii), 51.53(b), 51.53(c )(3)(iv).

The contention has been submitted in a timely fashion based on the availability of the subsequent information. **10 C.F.R. § 2.309(f)(2)(iii)**. The contention is being filed within days of the February 29, 2012 letter and supplemental BA, and within thirty days of the February 6, 2012 of JRWA's letter to NMFS seeking information about ESA matters. Shortly after the November 2, 2011 announcement of river herring as a candidate species under the ESA, Petitioners began research culminating in that letter. Thus, Petitioners have acted in a timely fashion based upon on the recent availability of the subsequent information, to bring this contention before the NRC.

The contention is also timely because it is being filed promptly after Petitioners concluded their comprehensive review of EPA's records. Bingham Affidavit. As noted above, Petitioners undertook this review for various reasons, including to ascertain whether the NPDES permit would be reissued prior to June 8, 2012. Petitioners also reasonably relied on U.S. EPA to timely renew Entergy's NPDES permit, but this has not occurred.

## III. Motion to Reopen, 10 C.F.R. § 2.326

Pursuant to **10 C.F.R. § 2.326**, Petitioners move to reopen the closed record to consider additional evidence. This motion relates to a contention not previously in controversy among the parties, and as shown here, Petitioners meet the standards of 10 C.F.R. § 2.326(a), (b) and (d).

Under **10 C.F.R. § 2.326(a),** Petitioners' motion to reopen must satisfy these criteria: "(1) The motion must be timely. However, an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented; (2) The motion must address a significant safety or environmental issue; and (3) the motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially." As shown below, Petitioners satisfy these criteria. First, this motion to reopen is timely presented, or alternatively, presents an exceptionally grave issue that allows the presiding officer discretion to consider. Petitioners' have described in detail in above that the contention is based on information that is new, and that was not previously available.

The motion meets the standard for an "exceptionally grave" issue that may be considered in the discretion of the presiding officer even if untimely presented. As shown in Part II above, Petitioners show by affidavit from competent individuals with knowledge of the facts alleged and by documentary evidence that consultations and preparation of relevant information required by the ESA and MSA have not been completed, rendering the PNPS EIS *prima facie* invalid. Congress, in enacting the ESA, MSA, and MEPA statutes expressed substantial and significant public policy concerns. (Fundamental purposes of NEPA are to guarantee "hard look" at the environmental consequences of proposed federal actions and to insist that no action be undertaken without intense consideration of other more ecologically sound course of action, see cases cited *supra*; Congress finds that species of fish threatened with extinction are of "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people" and out to be preserved, 16 U.S.C.S. § 1531(a)(3); continuing loss of marine habitat is one of longest long term threats to viability of commercial and recreational fisheries, 15 U.S.C.S. § 1809(a)(9)). Failure to comply with these statutes in the PNPS relicensing proceeding is an

"exceptionally grave" issue that must be addressed prior to relicensing. It is only through the evidence proffered in connection with Petitioner's contentions that this information will be made available to public via a supplemental PNPS EIS and to the NRC licensing authorities prior the relicensing decision.

Under **10 C.F.R. 2.326(2),** this motion must address a significant safety or environmental issue. As shown in Part II, above, the failure to comply with the ESA, MSA and NEPA, constitutes a "significant environmental issue."

This motion demonstrates that a "materially different result would be or would have been likely had the newly proffered evidence been considered initially." **10 C.F.R. § 2.326**. Here, the NRC has not yet rendered its decision on whether to relicense, so it is not possible to say whether Petitioners' evidence would have changed that decision. However, it is clear that had Petitioners' newly proffered evidence been considered initially, or prior to closing the hearing, the NRC would have before it the information and recommendations of NMFS under the ESA and the MSA, and the PNPS EIS would have been more likely to be incompliance with NEPA.

Specifically, a materially different result would have been likely because: (1) there would be a completed ESA § 7 process for the ten endangered and threatened species in the 2006 BA and for Atlantic sturgeon, and there is not; (2) there would be information in the record about river herring documentation of compliance with NMFS guidelines and regulations, and there is not; (3) there would be a record of an essential fish habitat assessment, and there is not, and (4) the NEPA SEIS would contain the information in (1) to (3). Each of these four categories of newly proffered evidence is explained more fully in Part II above, to establish that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

As required by 10 C.F.R. § 2.326(b), motion is accompanied by affidavits that set forth the factual and/or technical bases for the Petitioner's claim that the criteria of 10 C.F.R. § 2.326(a) have been satisfied. Petitioners' three affidavits are given by competent individuals and based on admissible evidence, address the criteria of § 2.326(a)(1)-(3), and explain why each has been met. These affidavits, accompanying documents, and documentation from the NRC record, establish that the motion is timely as required by § 2.336(a)(1). The affidavits and accompanying documents show that the motion is based on new ESA listings and announcements, that Petitioners reasonably relied upon representations from regulators about the NPDES renewal process, that Petitioners recently completed research, have received no response to their Feb. 6, 2012 letter to NMFS, and that the NRC staff filed a supplemental BA on Feb. 29, 2012 and admitted the ESA § 7 process is incomplete for the 2006 BA.

The motion to reopen relates to a contention not previously in controversy and meets the requirements for nontimely contentions. **10 C.F.R. 2.309(c**). The motion covers all issues that must be addressed in order to raise a contention at a late stage of license renewal adjudication. Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station, LBP-10-19, __ NRC __ (October 28, 2010).

## IV. Request for Hearing and Petition for Leave to Intervene 10 C.F.R. 2.309(a) and (d)

Pursuant to 10 C.F.R. § 2.309(a), Petitioners desire to participate and hereby file a request for a hearing, accompanied by a contention it seeks to have litigated in the hearing. Pursuant to 10 C.F.R. § 2.309(a): "any person whose interest may be affected by a proceeding and who desires to participate as a party must file a written request for hearing and specification

of the contentions which the person seeks to have litigated in the hearing." Petitioners have set forth a contention above in Part II that meets § 2.309(f).

**A. Standing** Pursuant to 10 C.F.R. § 2.309(a) and (d), Petitioners addresses the four general requirements for standing applicable to a request for hearing or a petition to intervene under 10 C.F.R. § 2.309(d)(i) to (iv). They further address the standards for discretionary intervention and § 2.309(e).

*Pilgrim Watch Standing*

Petitioner Pilgrim Watch (PW) is already a party to this matter, and thus clearly has the right under the Atomic Energy Act to be a party to this proceeding - a proceeding in which many contentions are not closed, in which Entergy's operating license renewal application has not been granted. Pilgrim Watch is a non-profit citizens' organization located at 148 Washington Street, Duxbury, Massachusetts, 02332. It is represented by Mary Lampert *pro se*, who makes her residence and place of occupation and recreation within ten (10) miles of Pilgrim Nuclear Power Station.

*JRWA Standing*

The name, address and telephone number of the Petitioner is Jones River Watershed Association, Inc., 55 Landing Road, Kingston, Massachusetts, tel. 781-585-2322. **10 C.F.R. 2.309(d)(i)**, Pursuant to **10 C.F.R. 2.309(d)(ii)**, a petitioner must set out the nature of the petitioner's right under the Atomic Energy Act to be made a party to the proceeding. When assessing whether a petitioner has set forth a sufficient interest to intervene, NRC licensing boards generally rely on judicial concepts of standing. See Entergy Nuclear Vermont Yankee. L.L.C.. & Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station) LBP-04-28, 60 NRC 548, 552 (2004); Allen v. Wright, 468 U.S. 737, 751 (1984).

Additionally, the petitioner must meet the "prudential" standing requirement by showing that the asserted interest arguably falls within the zone of interests protected by the governing law. "For construction permit and operating license proceedings, the Commission generally has recognized a presumption in favor of standing for those persons who have frequent contacts with the area near a nuclear power plant." See, e.g., Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 95 (1993). In particular, "Commission case law has established a 'proximity presumption,' whereby an individual may satisfy . . . standing requirements by demonstrating that his or her residence or activities are within the geographical area that might be affected by an accidental release of fission products, and in proceedings involving nuclear power plants this area has been defined as being within a 50-mile radius of such a plant." Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Unit 1), LBP-07-11, 65 NRC 41, 52 (2007). Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 162-63 (1993).

Under 10 CFR § 2.309(d), Petitioner JRWA has standing to intervene in the license renewal proceedings of Pilgrim because its members live and work within 50 miles of the facility. duBois Affidavit ¶ 5. For reactor construction and licensing proceedings, the NRC has recognized a presumption that people who live within close proximity of the facility (50 miles) have standing to intervene in the proceedings.

When an organization, such as JRWA, seeks to intervene in a proceeding, it must demonstrate either organizational or representational standing. Petitioner JRWA seeks to intervene and/or participate as a party based on representational standing, by demonstrating that one or more of its members would have standing to intervene on their own, and that the identified members have authorized the organization to request a hearing on their behalf. See,

Shaw AREVA MOX Servs. (Mixed Oxide Fuel Fabrication Facility), LBP-07-14, 66 NRC 169, 183 (2007). In addition, the interests that the representative organization seeks to protect must be germane to its own purpose, and neither the asserted claim nor the requested relief must require an individual member to participate in the organization's legal action. Id.

Petitioner JRWA asserts both representational standing and organizational standing based on the attached declaration of E. Pine DuBois, Executive Director of JRWA (DuBois). DuBois is a Kingston resident who lives approximately 8 miles from the PNPS. duBois Aff. ¶ 1 to 5. The duBois Affidavit demonstrates that this member is concerned about the effects on marine aquatic resources associated with extending the reactor operation of the PNPS for 20 years beyond the year 2012. The duBois Affidavit establishes that she would suffer a distinct and palpable harm to constitute injury-in-fact within the zone of interest that are to be protected by the AEA, 42 U.S.C. 2011, *et seq.*, and the injury can be fairly traced to the challenged action and the injury is likely to be redressed by a favorable decision.

An alleged injury to the environment, shared equally by many, can form the basis for standing. *See* Philadelphia Elec. Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1434 (1982). The duBois Affidavit states that she has authorized JRWA to represent her interests in this licensing proceeding. *Id.* ¶ 3. Therefore, JRWA has established representational standing.

JRWA also meets the standard for organizational standing. Petitioner JRWA's objectives in this matter are to protect the environment and the attributes of it which its' members enjoy by ensuring that newly proffered evidence about marine aquatic species and their habitat is properly considered in this proceeding. The protection of these values is directly linked to JRWA's organizational mission and the interests of its members. duBois Aff. ¶ 6 to 12.

Neither the Petitioners' asserted contentions nor the requested relief requires an individual member to participate. JRWA was established in 1985, to protect the "natural resources and wildlife areas for the use and enjoyment of present and future generations, to preserve and protect historic sites, to educate the public about the wise use of natural resources, and to work with other organization having the same purposes." duBois Aff. ¶ 2. JRWA has engaged in extensive participation in the relicensing proceedings for PNPS and evidenced its concern with the impact of PNPS on the environment in actions to monitor and improve the habitats and populations of diadromous fishes in Cape Cod Bay and the Jones River, including, river herring. *Id.* ¶ 7 to 18.

Petitioner JRWA has shown that it has members who live, work, and recreate within the 50-mile radius of the PNPS, members who have frequent and regular contacts with the marine aquatic resources in the Jones River and Cape Cod Bay, as well as with other features of the natural environment. duBois Aff. ¶5, 7, 10, 17, 26. The Commission has long used the 50-mile presumption to establish standing. The Commission has noted that "[t]he rule of thumb generally applied in reactor licensing proceedings" includes "a presumption of standing for persons who reside or frequent the area within a 50-mile radius of the facility." Sequoyah Fuels, CLI-94-12, 40 NRC at 77. *See also* North Anna, ALAB-522, 9 NRC at 56; Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-183, 7 AEC 222 (1974). The 50-mile presumption "is a recognition of the potential effects at significant distances from the facility of the accidental release of fissionable materials." Babcock & Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 83 (1993).

The regulation at **10 C.F.R. § 2.309(d)(iii**) requires the Petitioner to state the nature and extent of the petitioner's property, financial, or other interest in the proceeding. Petitioner

JRWA has both a property interest, a financial interest, and other interests in the proceeding by virtue of its property ownership and the interest of its members in preserving environmental quality standards in the environs of PNPS. duBois Aff. ¶ 1 to 27. These interests relate to both the JRWA's organizational mission and the interests of its members. *Id.* JRWA and its members have an interest in the health and viability of Cape Cod Bay, habitat for anadromous and diadromous fisheries that have been the focus of JRWA's decades long efforts to restore and protect the Jones River and Cape Cod Bay. JRWA has raised public and private funds totaling over $750,000 dollars to restore fish passage on the Jones River, including passage for the ESA candidate species river herring. *Id.* at ¶ 18.

Pursuant to **10 C.F.R. § 2.309(d)(iv)** the petitioner must state the possible effect on petitioner's interest of any decision or order that may be issued in the proceeding. Any decision or order that may be issued to address the both Petitioners' contentions about compliance with the ESA, MSA and NEPA would have a positive effect on petitioner JRWA's interests in protecting and restoring marine and freshwater aquatic species and habitat in Cape Cod Bay and the Jones River. Such a decision or order would require proper compliance with ESA §7, MSA and NEPA. An order or decision mandating compliance with the ESA, MSA and NEPA would help ensure consideration of essential fish habitat for the species that JRWA has worked for decades to restore and protect. Thus, an order or decision will directly impact JRWA's interests in protecting the interests of its members, and help ensure that it can successfully carry out its mission during the 20 year relicensing period of PNPS operations.

## V. Nontimely Filing under 2.309(c)

NRC regulation **10 C.F.R. § 2.309(c)** on nontimely filing requires balancing eight factors under §2.309(c)(1), and 2.309(c)(2).

The NRC has held that late intervention is possible until issuance of a full-power license. Texas Utilities Electric Co. (Comanche Pak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC, 156, 160 (1993). A petitioner whose late-filed petition to intervene has met the [eight]-part test of **10 C.F.R. § 2.309 (c)(1)** need not meet any further late-filing qualifications to have its contentions admitted. It is not to be treated differently than a petitioner whose petition to intervene was timely filed. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), LBP-84-17A, 19 NRC 1011, 1015(1984). As shown below, Petitioners meet the eight part test of §2.309(c)(1) and do not need to meet the late-filing qualifications of §2.309(e), although they have make the showing under (e) nonetheless.

*Good Cause*

First, late-filed petitions must address "[g]ood cause, if any, for the failure to file on time." **10 C.F.R. § 2.309(c)(1)(i).** This "good cause" factor should be given substantial weight in the balancing of factors required under § 2.309(c)(1). Crow Butte Resources, Inc. (North Trend Expansion Project), LBP-08-6, 67 NRC 241 (2008) (good cause is the most important factor in balancing the eight factors). Where a late filing of an intervention petition has been satisfactorily explained, a much smaller demonstration with regard to the other factors of 10 C.F.R. § 2.309 (c) is necessary than would otherwise be the case. Wisconsin Public Service Corporation (Kewaunee Nuclear Power Plant), LBP-78-24, 8 NRC 78, 83 (1978).

The NRC has previously found good cause where (1) a contention is based on new

information and, therefore, could not have been presented earlier, and (2) the intervener acted promptly after learning of the new information. Texas Utils. Elec. Co. (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 69-73 (1992). New regulatory developments and the availability of new information may constitute good cause for delay in seeking intervention. Duke Power Co. (Amendment to Materials License SNM-1773 -- Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC 146, 148-149 (1979). See also Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), LBP-80-14, 11 NRC 570, 572-573 (1980).

In considering the good cause factor, The Licensing Board has applied the principle of estoppel where a petitioner relied to its detriment on NRC Staff's representations. In 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), where the Staff represented that no action would be immediately taken on licensee's application for renewal, elementary fairness required that the action of the Staff could be asserted as an estoppel on the issue of timeliness of petition to intervene, and the petition must be considered even *after* the license has been issued.

As shown in this filing, there has been new information, both in the form of new facts and new regulatory developments. On the NRC admitted on February 29, 2012 that there was is no ESA § 7 concurrence on the 2006 BA and the 2012 supplemental BA on Atlantic sturgeon, it was revealed that there would be no EFH assessment before June, 2012, and river herring was designated a candidate species. Further, this filing shows Petitioners reasonably relied on statements of federal regulators, including the NRC, and reasonably expected that they would

carry out their mandatory statutory duties under statutes that provide protection for water resources and species that depend on these resources. This has not happened. Therefore, the principle of estoppel applies to any opposition to Petitioners' nontimely filing.

Petitioners relied on written NRC Staff statements in 2007 that the ESA § 7 consultation was being conducted and the EFH process was "concluded" and that the NPDES permit renewal process was underway. In a similar case before the NRC, confusing and misleading letters from the Staff to a prospective *pro se* petitioner for intervention, and failure of the Staff to respond in a timely fashion to certain communications from such a petitioner, constitute a strong showing of good cause for an untimely petition. Wisconsin Public Service Corporation (Kewaunee Nuclear Power Plant), LBP-78-24, 8 NRC 78, 81-82 (1978).

As noted, new developments and the availability of new information support late-filed motions to intervene. See Duke Power Co. (Amendment to Materials License SNM-1773-Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528 9 NRC 146, 148-49 (1979); Consumer Power Co. (Midland Plant, Units 1 & 2), LBP-82-62, 16 NRC 571, 577 (1982); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station Units, 1 &2), CLI-92, 36 NRC 62, 69-73 (1992). The availability of material information "is a significant factor in a Board's determination of whether a motion based on such information is timely filed." Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-85-19, 21 NRC 1707, 1723 (1985) (internal citations omitted). Here, Petitioners have shown the existence of new developments and the availability of new information that supports its late-filed motion to intervene.

Although a petitioner may not rely on the pendency of another proceeding to protect its interests, and then justify a late petition on that reliance when the other petition fails to represent

those interests, where petitioners were provided with erroneous information they have been allowed to intervene nonetheless. Consolidated Edison Co. (Indian Point Station, Unit No. 2), LBP-82-1, 15 NRC 37, 39-40 (1982); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-117B, 16 NRC 2024, 2027 (1982). (A claim that petitioner believed that its concerns would be addressed in another proceeding will not be considered good cause.) To justify a late petition based on claims that petitioners relied on the pendency of another proceeding, it must be established that petitioners were furnished erroneous information on matters of basic fact, and that it was reliance upon that information that prompted their own inaction. Palo Verde, supra, 16 NRC at 2027-2028. Here, Petitioners were furnished erroneous information by the NRC staff, NMFS, and Entergy, all of whom represented that the regulatory proceedings under the ESA, MSA and the NPDES permit renewal process were "current" or "ongoing." Petitioners have shown this is erroneous information.

The Petitioners seek intervention in a timely and prompt fashion – i.e. within days of the NRC supplemental BA and admission that there has been no concurrence on the 2006 BA, and within weeks of obtaining information that the NPDES permit renewal process is stalled and the permit review will not be complete by June 8, 2012.

*2. Right to be Made a Party*

The second factor requires late-filed petitions to address the nature of the petitioner's right under the Atomic Energy Act to be made a party to the proceeding. **10 C.F.R. § 2.309(c)(1)(ii).** The Petitioners' right under the Act to be made a party arise from its interest in the proceeding and the harm to that interest, as described in *Standing* in Part IV of this document. To establish standing, under 10 C.F.R. § 2.309(d)(ii) is required to make the identical showing as under § 2.309(c)(ii). The Petitioners incorporate by reference herein the law and

testimony in Part IV, to establish under § 2.309(c)(1)(ii) that they have a right to be made a party. This information shows that this factor weighs in Petitioners' favor.

*3. Petitioner's Property, Financial and Other Interests*

Third, late-filed petitions must address the nature and extent of the petitioner's property, financial or other interest in the proceeding. 10 C.F.R. § 2.309(c)(1)(iii). Petitioners' showing in *Standing* in Part IV above, establishes standing. This information shows that this factor weighs in Petitioners' favor.

*4. Possible Effect of Any Order on the Petitioner's Interest(s)*

Fourth, late-filed petitions must address the "possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest. 10 C.F.R. § 2.309(c)(1)(iv). This factor is addressed in *Standing* in Part IV above. This information shows that this factor weighs in Petitioners' favor.

*5. Other Means for Protecting Petitioners' Interests*

Fifth, late filed petitions mush address the "availability of other means whereby the requestor's/petitioner's interest will be protected." **10 C.F.R. § 2.309(c)(1)(v).** With regard to this factor, the question is not whether other parties may protect a petitioner's interests, but rather whether there are other means by which the petitioner may protect its own interests. Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), ALAB- 292, 2 NRC 631 (1975). Participation of the NRC Staff in a licensing proceeding is not equivalent to participation by a private intervenor. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1175-1176 (1983). See Florida Power and Light Co. (Turkey Point

Nuclear Generating Plant, Units 3 and 4), LBP-90-5, 31 NRC 73, 81 (1990), aff'd, ALAB-950, 33 NRC 492, 495-96 (1991). Thus, it is not sufficient to say that the NRC staff will represent the Petitioners' interests in the licensing proceeding.

Other than litigating their contentions in the licensing proceeding, there are no other means available to Petitioners to protect their interests in ensuring that marine and freshwater species and their habitats obtain the protections of the ESA, MSA and the review provided by NEPA. The NRC staff admits Entergy operations may case adverse harm to the species listed under the ESA and to habitat. See, e.g. 2007 NMS Letter, *supra.* Under the processes of the ESA and MSA, the extent of this harm and mitigation must be evaluated by NMFS biologists who are experts in this topic. This information must be included in the record. There is no other forum that is developing a record that will be the basis for the decision to relicense PNPS. It is this body that must be provided with the information required to be developed under the ESA, MSA, and NEPA. This information shows that this factor weighs in favor of Petitioners' intervention.

*6. Extent to Which Petitioners' Interests Will be Represented by Existing Parties*

Sixth, a late-filed petition must address the "extent to which the requestor's/petitioner's interests will be represented by existing parties." 10 C.F.R. § 2.309(c)(1)(vi). The Licensing Board has ruled that in the circumstances where denial of a late petition would result in no hearing and no parties to protect the petitioner's interest, the question, "To what extent will Petitioners' interest be represented by existing parties?" must be answered, "None." This factor therefore, was held to weigh in favor of the late petitioners. Florida Power and Light Co. (Turkey Point Nuclear Generating Units 3 and 4), LBP-79-21, 10 NRC 183, 195 (1979).

The other parties to this proceeding are Entergy and the NRC Staff, and the Massachusetts Attorney General has not yet been granted a hearing. Throughout this proceeding both NRC Staff and Entergy (in concert with each other) have consistently opposed Pilgrim Watch's interests. There is no reasonable basis to expect that leopard will change its spots. The NRC has accurately recognized that, in weighing the [sixth] factor, a board will not assume that the interests of a late petitioner will be adequately represented by the NRC Staff. The general public interest, as interpreted by the Staff, may often conflict with a late petitioner's private interests or perceptions of the public interest. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1174-1175 n.22 (1983). NRC Digest, Prehearing Matters, 35; see also NRC Practice Digest, Prehearing Matters 33: "Participation of the NRC Staff in a licensing proceeding is not equivalent to participation by a private intervener. As in Turkey Point (NRC Practice Digest, Prehearing Matters, 34-35), the question of "to what extent will Petitioners' interest be represented by existing parties?" must be answered, "None." Moreover, here, there is no proceeding since the hearing has been closed.

Unless the hearing is reopened and Petitioners allowed to intervene and litigate their contentions, their interests will not be represented in the relicensing proceeding. No other party will represent Petitioners' interests in a supplemental NEPA filing. See also, Part IV, *Standing*. This factor thus weighs in favor of Petitioners' intervention. Florida Power and Light Co. (Turkey Point Nuclear Generating Units 3 and 4), LBP-79-21, 10 NRC 183, 195 (1979).

*7. Extent to Which Petitioner's Participation Will Broaden the Issues or Delay the Proceedings*

Seventh, late-filed petition must address "[t]he extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding." 10 C.F.R.

§ 2.309(c)(1)(vii). Petitioners' contention will not broaden the issues beyond the narrow scope of what the NRC was required to do anyway, and only requires it to complete processes it had already begun under the ESA, MSA and/or NEPA. Essentially, this means complete the ESA § 7 process for Atlantic sturgeon and river herring, obtain concurrence on the NRC staff BA, conduct a EFH assessment, and add this information to the NEPA record. These are narrow issues, and steps that should have been taken by regulatory agencies and Entergy in the past six years upon filing the renewal application.

Petitioners should not be prejudiced because regulators and Entergy have not complied with specific statutory mandates. The petition is late-filed in part because they have not done their jobs, and in part because of the recent listing of Atlantic sturgeon and recognition that river herring is a candidate species under the ESA.

Similarly, the Petitioners' participation will not delay the proceeding. Entergy's operating license for the PNPS does not expire until June 2012. There is ample time for NRC staff and NMFS to undertake the assessments and make the determinations required prior to that date and supplement and revise the PNPS EIS. As noted, the steps required are scientific evaluations and recommendations that should have been done, anyway.

In balancing the factor of the extent to which petitioners' participation will broaden the issues or delay a currently the proceeding, the ruling body should focus on the "extent" to which the issues will be broaden or delay will occur, and whether it is appropriate to weigh this factor in evaluating the late-filing of the petition and Petitioners' narrow contention. The question of "extent" should be viewed in relation to the benefits that may accrue the public and etitioners from the proceeding being reopened to consider petitioners' new discovered and proffered evidence, and the value of petitioners participation in the proceeding. Here, Petitioners'

contentions raise exceptionally grave and significant concerns relative to compliance with the ESA, MSA and NEPA, and the impact of Entergy's continued operations on aquatic species and habitat over the next 20 years. It is not disputed that Entergy's once-through cooling water system has an adverse impact on Cape Cod Bay. The extent to which the continued operation under the license is likely to jeopardize endangered, threatened and candidate species and their habitat, and essential fish habitat is a determination that Congress has ruled must be made only with the concurrence of NMFS.

Further, any broadening of the issues or delay in the proceedings must be viewed in light of the importance Congress has placed on the need for NMFS involvement in ensuring that endangered, threatened, and candidate species and their habitat, and essential fish habitat, by affording maximum protection under the law. See, *Law*, Part II.A. above. The relative benefits of the Petitioner's participation on these contentions weighs in favor of granting the petition and the decision maker should give this factor substantial weight in balancing the factors in favor of determining that Petitioners' request, petitions, and contention should be allowed.

In considering factor seven, the Licensing Board has ruled that this includes only that delay which can be attributed directly to the tardiness of the petition. Jamesport, supra, ALAB-292, 2 NRC at 631; South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-8-11, 13 NRC 420, 425. While the potential for delay is of immense importance in the overall balancing process, Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 402 (1983), it is not dispositive. USERDA (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383 (1976). In considering the factor of delay, the magnitude of threatened delay must be weighed, since not every delay is intolerable. Public Service Electric & Gas Co. (Hope Creek Generating Station, Units 1 & 2), LBP-77-9, 5 NRC474 (1977). In

balancing this factor, the benefits of allowing Petitioners' contention to be litigated outweighs any potential disadvantage with regard to broadening the issues or delaying the proceeding.

*8. The Extent to which Petitioner's Participation May Reasonably Be Expected to Assist in Developing a Sound Record*

Finally, late-filed petitions must address "[t]he extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record." **10 C.F.R. § 2.309(c)(1)(viii).** In the absence of Petitioners participation in the instant proceeding, there will be an incomplete record on compliance with the ESA, MSA, and NEPA, because as shown below, the NRC staff and Entergy have by their actions and statements shown that their position is that they do not need to comply further with these statutory mandates. Yet, the ESA, MSA and NEPA require that the record contain documentation of compliance.

Petitioners' contention and supporting affidavits and documentation will assist in developing a sound record since they provide information that is required to be produced by NMFS, and required to be in the record. The NMFS determinations and assessments are the expert opinions of highly qualified experts in marine aquatic species and their habitats. Pacific Gas & Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-01, 67 NRC 1, 6 (2008) (finding that, when assisted by experienced counsel and experts, participation of a petitioner may be reasonably expected to contribute to the development of a sound record). Furthermore, as a matter of law, ESA, MSA and NEPA require consideration of the new and significant information set forth in the Petitioners' contentions, as shown in Part I. This factor weighs in favor of Petitioners' intervention.

In sum, a balancing of the eight factors of 10 C.F.R. § 2.309(d) shows that Petitioners' petition, if determined to be nontimely, should nevertheless be allowed.

## VI. Discretionary Intervention under 10 C.F.R. § 2.309(e)

Petitioners alternatively move for discretionary intervention under **10 C.F.R. § 2.309(e).** The presiding officer may consider a request for discretionary intervention when a petitioner has established standing and at least one admissible contention has been admitted so that a hearing will be held. In determining whether discretionary intervention should be permitted, the Commission has indicated that the Licensing Board should be guided by the following factors: (1) the extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record, (2) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding, and (3) the possible effect of any order which may be entered in the proceeding on the requestor's/petitioner's interest. 10 C.F.R. § 2.309(e)(1)-(2). See Andrew Siemaszko, CLI-06-16, 63 NRC 708, 715-16 (2006).

As shown in Part IV, Petitioners have standing, and at least one admissible contention has been submitted and is the basis for Petitioners' hearing request, as shown in Part II, above. Should the decision maker find either Petitioner has not established standing to intervene as of right, that Petitioner moves for intervention as a matter of discretion.

The discretionary intervention doctrine comes into play only in circumstances where standing to intervene as a matter of right has not been established. Duke Power Co. (Oconee Nuclear Station and McGuire Nuclear Station), ALAB-528, 9 NRC 146, 148 n.3 (1979). In Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-363, 4 NRC 631 (1976), despite petitioner's lack of judicial standing, intervention was permitted based upon petitioner's demonstration of the potential significant contribution it could make on substantial issues of law and fact not otherwise raised or presented and a showing of the importance and

immediacy of those issues. Babcock and Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility, LBP-93-4, 37 NRC 72, 94 n.66 (1993).

The Commission has broad discretion to allow intervention where it is not a matter of right. The ***primary*** factor to be considered is the significance of the contribution that a petitioner might make; whether permissive intervention is likely to produce a valuable contribution to the NRC's decision-making process on a significant safety or environmental issue appropriately addressed in the proceeding in question. Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 & 2), ALAB-413, 5 NRC 1418 (1977). *See also* Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-470, 7 NRC 473, 475 n.2 (1978); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-92-23, 36 NRC 120, 131-32 (1992); Tennessee Valley Authority (Sequoyah Nuclear Plant, Units 1 & 2; Watts Bar Nuclear Plant, Unit 1), LBP-02-02-14, 56 NRC 15, 28 (2002). Where there are no intervenors as of right, a Licensing Board will determine whether a discernible public interest would be served by ordering a hearing based on a grant of discretionary intervention. Envirocare of Utah, Inc., LBP-92-8, 35 NRC 167, 183- 84 (1992). *See* Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 617 (1976); see also Andrew Siemaszko, CLI-06-16, 63 NRC at 716; General Public Utilities Nuclear Corp. (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 160 (1996)(A primary consideration is the first factor of assistance in developing a sound record.) Here, Petitioners' detailed contentions and supporting affidavits are essential to ensuring a sound adjudicatory record.

Under 10 C.F.R. § 2.309(e), in addition to addressing the factors in 10 C.F. R. § 2.309(d)(1), a petitioner who is determined not to have standing as of right, who wishes to seek intervention as a matter of discretion, is required to address 6 factors that are to be weighed.

Even though they assert that they have established standing, Petitioners address the 6 factors. The factors weighing in favor of allowing intervention are set forth in § 2.309(e)(1)(i) through (iii), and mirror the factors in § 2.309(c)(1)(viii), (iii), and (iv) respectively. Therefore, in support of its showing under for discretionary intervention under § 2.309(e)(1)(i) through (iii), Petitioners incorporate by reference its statements in Parts II-V, addressing the requirements for nontimely requests, petitions, and contentions under §2.309(c)(1).

The factors weighing against intervention are set forth in § 2.309(e)(2)(i) through (iii) and mirror the factors in § 2.309(c)(1)(v), (vi), and (vii), respectively. Therefore, in support of its Motion to Reopen under § 2.309(e)(2)(i) through (iii), Petitioners incorporate by reference its statements in Part V supra, addressing §2.309(c)(1) )(v), (vi), and (vii). As shown therein, Petitioners' have no other means whereby their interests will be protected and it is necessary to allow them to intervene to protect their interests. § 2.309(e)(2)(i). If there were other means to protect their interests, this would weigh against allowing intervention but that is not the case.

Petitioners have shown that their participation may reasonably be expected to assist in developing a sound record, the nature and extent of their property, financial and other interests in the proceeding is significant, and any decision or order that may be issued in the proceeding will have a substantial effect on petitioners' interests. Petitioners have demonstrated the capability and willingness to contribute to the development of the evidentiary record, even if the decision-maker determines they cannot show the traditional interest in the proceeding. Petitioners have submitted the substantive affidavits of Mansfield and duBois which show their capability and willingness to contribute the development of the evidentiary record.

Petitioners' interests would be served by the issuance of any order requiring the NRC to fulfill its non-discretionary duty under NEPA to consider the new and significant information

and newly proffered evidence in Petitioner's contentions before making a licensing decision. *See* Silva v. Romney, 473 F.2d 287, 292 (1st Cir. 1973). Compliance with NEPA ensures that environmental issues are given full consideration in "the ongoing programs and actions of the Federal Government." Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 371, n.14 (1989). Petitioners' interests will not be represented by existing parties because the hearing is closed and the other parties, Entergy and the NRC, hold positions opposing Petitioners. §2.309(e)(2)(ii). Therefore, there is little weight to be placed on this factor, because there is no other way for Petitioners interests to be represented. Finally, Petitioners' participation will not inappropriately broaden the issues or delay the proceeding as shown in Part (c). §2.309(e)(2)(iii). Therefore, when the factors weighing in favor of intervention far outweigh those against allowing intervention and the ruling body should allow discretionary intervention.

For discretionary intervention, the burden of convincing the Licensing Board that a petitioner could make a valuable contribution lies with the petitioner. Nuclear Engineering Co., Inc. (Sheffield, Ill. Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 745 (1978). Considerations in determining the petitioner's ability to contribute to development of a sound record include: showing of significant ability to contribute on substantial issues of law or fact which will not be otherwise properly raised or presented; the specificity of such ability to contribute on those substantial issues of law or fact; justification of time spent on considering the substantial issues of law or fact; provision of additional testimony, particular expertise, or expert assistance; and specialized education or pertinent experience. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-81-1, 13 NRC 27, 33 (1981) (and cases cited therein). In order for the Commission to grant a discretionary hearing, a petitioner must offer something that would generate significant new information or insight about the challenged action. The offer of

"new evidence" that consists of documents that have already been in the public domain for some time does not meet the criteria for the grant of a discretionary hearing. Westinghouse Electric Corporation (Nuclear Fuel Export License for Czech Republic - Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 334 (1994). JRWA has offered significant new information on the status of compliance with ESA and EFH, the most recent, a letter dated February 29, 2012 from NRC, newly acknowledging that compliance with ESA § 7 has not occurred. duBois Aff, Exhibit 2. This is precisely the type of new evidence that should be entered into the record as discretionary matter, regardless of standing in order to create a complete and representative record.

## V. Conclusion

Petitioners have made the requisite showings for a motion to reopen, to intervene and file contentions, and have met the standards for non-timely filings. Their request for a hearing should be granted. The Commission and/or Board should consider the new and significant information brought forward by Pilgrim Watch and Jones River Watershed Association before deciding whether to approve Entergy's Application to continue operations until 2032.

Respectfully submitted,

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On March 7, 2012, the Petitioners notified all parties of record of their intent to make this filing. Entergy advised that it objects. The NRC Staff has advised it objects. Massachusetts Attorney General's Office did not respond.

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