UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of	)	
	)	
Entergy Nuclear Generation Company and	)	Docket No. 50-293-LR
Entergy Nuclear Operations, Inc.	)	ASLBP No. 06-848-02-LR
	)	
(Pilgrim Nuclear Power Station)	)	

ENTERGY'S ANSWER OPPOSING JONES RIVER WATERSHED ASSOCIATION'S AND PILGRIM WATCH'S MOTION TO REOPEN AND HEARING REQUEST

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I. Introduction

Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (collectively "Entergy") hereby oppose the petition to intervene, motion to reopen the record and late-filed hearing request that Jones River Watershed Association ("JRWA") and Pilgrim Watch (collectively, "Petitioners") filed on March 8, 2012 and supplemented on March 15, 2012 in the license renewal proceeding for the Pilgrim Nuclear Power Station ("Pilgrim" or "PNPS").[1] Petitioners contend that the NRC has failed to complete certain assessments and consultations under the Endangered Species Act ("ESA") and the Magnuson-Stevens Fishery Conservation and Management Act ("MSA"), allegedly rendering the final Supplemental Environmental Impact Statement ("FSEIS")[2] invalid. Petition at 3-4. The Petitioners are in error. The Petition

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[1] 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 (Mar. 8, 2012) ("Petition"). The Petition is accompanied by affidavits of Ms. Anne Bingham ("Bingham Affidavit"); Mr. Alex Mansfield ("Mansfield Affidavit"); and E. Pine duBois ("duBois Affidavit"). One week after the Petition was filed, Petitioners filed a Correction and Supplement to [the Petition] (Mar. 15, 2012) ("Supplement").

[2] NUREG-1437, Supplement 29, Generic Environmental Impact Statement for License Renewal of Nuclear Plants Regarding Pilgrim Nuclear Power Station (July 2007) ("FSEIS").

and Supplement are substantively without merit and fail to satisfy any of the Commission's standards for reopening a closed record.

First, their Petition, as supplemented, is untimely. The challenged assessments and consultations were included in the July 2007 FSEIS. There is simply no excuse for Petitioners having waited nearly five years to now challenge their completeness or sufficiency.

Second, none of Petitioners' substantive challenges raises a significant environmental issue as required under 10 C.F.R. § 2.326(a)(2). Petitioners have come forward with no credible evidence indicating that any species listed as threatened or endangered under the ESA ("ESA-listed species") will be affected by Pilgrim's continued operation. Nor have Petitioners provided any evidence demonstrating a genuine dispute with the NRC Staff's conclusion that continued operation of Pilgrim will have minimal adverse effect on essential fish habitat ("EFH") within the Cape Cod Bay ecosystem. Likewise, Petitioners fail to show that impacts to river herring will be any different than those impacts described in the FSEIS, or that continued operation of Pilgrim will have any substantial impact on river herring. As further explained in the Affidavit of Dr. Michael Scherer attached to this Answer, the NRC Staff's conclusions are well supported.[3]

Finally, Petitioners have failed to demonstrate that a materially different result will be likely, as required by 10 C.F.R. § 2.326(a)(3). Petitioners' claims are based on misinterpretation of the laws governing inter-agency consultations and, in any event, are entirely immaterial in the absence of any information demonstrating an impact on ESA-listed species, any error in the EFH Assessment, or any significant or unanalyzed impact on river herring.

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[3] Affidavit of Michael D. Scherer, Ph.D., in Support of Entergy's Answer Opposing Jones River Watershed Association's and Pilgrim Watch's Motion to Reopen and Hearing Request (March 19, 2012) ("Scherer Aff.").

For these reasons, and the additional reasons set forth in this Answer, the Commission should reject the Petition.

II. Background

Because the Petition focuses on consultation under the ESA and MSA, this answer will first provide a short overview of those obligations under each statute, before describing the careful analyses and consultations that were performed to meet these obligations.

A. Consultation Requirements under the Endangered Species Act

Section 7 of the ESA provides that each federal agency shall, in consultation with the National Marine Fisheries Service ("NMFS") or Fish and Wildlife Service ("FWS"),[4] insure that any agency action is not likely to jeopardize the continued existence of any threatened or endangered species or result in the destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(a)(2). Elaborating on this requirement, ESA Section 7 provides more specifically that each Federal agency shall confer with NMFS/FWS on any agency action which is likely to jeopardize the continued existence of such species or result in the destruction or adverse modification of their critical habitat. 16 U.S.C. § 1536(a)(2).

The ESA does not define "consultation" but provides that such consultation shall be completed within a 90 to 150 day period, unless the applicant consents to a longer period. 16 U.S.C. § 1536(b)(1)(B). To facilitate compliance with the consultation requirements, ESA Section 7(c) calls on Federal agencies to prepare a biological assessment ("BA") if ESA-listed species may be present in the area of proposed projects involving construction authorized by the

[4] The ESA refers to the Secretary of Commerce and the Secretary of the Interior, but these Departments have delegated their authority to NMFS and FWS.

agency (16 U.S.C. § 1536(c),[5] but does not specify how a federal agency should determine whether its actions are likely to affect ESA-listed species in other types of proceedings. In addition, the ESA does not require Federal agencies to obtain NMFS/FWS concurrence with a BA or acquiescence to a proposed action.

NMFS and FWS have promulgated joint regulations interpreting the ESA consultation provision. 50 C.F.R. Part 402. In promulgating these regulations, NMFS/FWS have made it very clear that:

> The Service performs strictly an advisory function under section 7 by consulting with other Federal agencies to identify and help resolve conflicts between listed species and their critical habitat and proposed actions . . . . However, the Federal agency makes the ultimate decision as to whether its proposed action will satisfy the requirements of section 7(a)(2). The Service recognizes that the Federal agency has the primary responsibility for implementing section 7's substantive command, and the final rule does not usurp that function.

Final Rule, Interagency Cooperation – Endangered Species Act of 1973, as Amended, 51 Fed. Reg. 19,926, 19,928 (June 3, 1986). These regulations describe two types of consultation — formal and informal — from which a federal agency must choose after concluding that its proposed activity "may affect" a listed species or critical habitat. 50 C.F.R. §§ 402.13-14. Neither formal nor informal consultation are required by the ESA if an agency determines that its proposed activity "will not affect" any listed species or critical habitat. Ctr. for Biological Diversity v. Dep't of Interior, 563 F.3d. 466, 475 (D.C. Cir. 2009).

Consistent with the ESA, the NMFS/FWS regulations call for preparation of a BA for Federal actions that are "major construction activities." 50 C.F.R. § 402.12(b). They further provide that upon submission of the BA to NMFS or FWS, the Director of the NMFS or FWS

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[5] "[T]he Service will not require biological assessments for actions that do not involve construction or activities having physical impacts similar to construction, such as dredging, blasting, etc. This limitation derives support

"will respond in writing within 30 days as to whether or not he concurs with the finding of the biological assessment." 50 C.F.R. § 402.12(j). Under the regulations, the Federal agency shall use the BA to determine whether formal consultation or a conference is required. 50 C.F.R. § 402.12(j). If the BA indicates the action is not likely to jeopardize the continued existence of ESA-listed species or result in destruction or adverse modification of their habitat, and the Director concurs, a conference is not required. 50 C.F.R. § 402.12(j). Similarly, if during informal consultation, the Federal agency, with the written concurrence of the NMFS/FWS, determines that the action is not likely to adversely affect ESA-listed species or critical habitat, the consultation process is terminated, and no further action is necessary. 50 C.F.R. § 402.13(a). The regulations do not explain what happens if the NMFS/FWS simply fail to respond to a BA. If a Federal agency determines that a proposed action may affect ESA-listed species or critical habitat, formal consultation is required. 50 C.F.R.§ 402.14(a).

B. Consultation Requirements under the Magnuson-Stevens Act

Section 305 of the MSA requires each federal agency that concludes that its proposed activity may adversely affect any EFH to consult with the NMFS. 16 U.S.C. § 1855(b). Although the MSA itself does not prescribe the content or form of consultation between an agency and the NMFS, NMFS implementing regulations require the agency to submit an EFH Assessment to the NMFS. 50 C.F.R. § 600.920(e)(1). These same regulations provide that the EFH Assessment contain a description of the proposed activity, an analysis of the potential adverse effects on the EFH and managed species therein, the agency's conclusions on the effects of the action on the EFH, and any mitigation proposals the agency may have in mind. 50 C.F.R.

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from the 1979 Conference Report reference to actions designed primarily to result in the building or erection of various projects." 51 Fed. Reg. 19,926, 19,936 (June 3, 1986).

§ 600.920(e). EFH Assessments may be incorporated into documents required by other statutes such as the National Environmental Policy Act ("NEPA"). 50 C.F.R. § 600.920(e).

Under the MSA, if NMFS receives information that a proposed action would adversely affect any essential fish habitat, NMFS "shall recommend to such agency measures that can be taken by such agency to conserve such habitat." 16 U.S.C. § 1855(b)(4). Because MSA only requires NMFS to provide recommendations that the agency can take, NMFS's implementing regulations provide that "NMFS will not recommend that state or Federal agencies take actions beyond their statutory authority." 50 C.F.R. § 600.930(a).

C. Statement of the Case

This proceeding, now in its seventh year, involves the application submitted by Entergy in January 2006 seeking renewal of the operating license for Pilgrim ("Application").[6] That Application included, in the January 2006 Environmental Report ("ER"), an assessment of ESA-listed species that may occur in the vicinity of the station. ER, §§ 2.5, 4.10. The assessment concluded:

> 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 critical habitat.

ER at 4-18. The ER also described the aquatic and riparian communities in the vicinity of the station and included assessments of the potential impacts of the station intake and discharge. ER, §§ 2.2, 4.2-4.4.

On May 25, 2006, Pilgrim Watch filed a petition seeking to intervene in the proceeding and requesting a hearing on five proposed contentions, none of which sought to raise any issue

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

concerning impact on ESA-listed species, critical habitats, or EFH.[7] JRWA did not seek to intervene in the proceeding. The Atomic Safety and Licensing Board ("Board") granted Pilgrim Watch's petition for leave to intervene and admitted two contentions.[8]

In December 2006, the NRC published its draft supplemental environmental impact statement ("DSEIS").[9] The DSEIS included a BA ("2006 BA") evaluating the potential effects on threatened and endangered species (DSEIS at E-22), which determined that continued operation of Pilgrim over the 20-year renewal period would have "no effect" on any of the ESA-listed marine species that could be present in the vicinity of Pilgrim. Id. at E-37 to E-43.[10] It also included an EFH Assessment (id. at E-50), which concluded that "within the overall Cape Cod Bay ecosystem, the staff has determined that continued operation of the PNPS cooling water system would have a minimal adverse effect on EFH." Id. at E-105. Neither Pilgrim Watch nor JRWA attempted to raise any new contentions challenging these assessments. And while JRWA submitted comments on the DSEIS relating to the conclusions in the EFH Assessment, neither of the Petitioners submitted any comments questioning the BA or findings on ESA-listed species and critical habitats.[11]

The NRC transmitted the DSEIS, 2006 BA, and EFH Assessment to the NMFS on December 8, 2006. Letter from P.T. Kuo, NRC, to P. Colosi, NMFS, Biological Assessment and Essential Fish Habitat Assessment for License Renewal of Pilgrim Nuclear Power Station (Dec.

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[7] Request for Hearing and Petition to Intervene by Pilgrim Watch (May 26, 2006).

[8] Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), LBP-06-23, 64 N.R.C. 257, 349 (2006).

[9] NUREG-1437, Supplement 29, Generic Environmental Impact Statement for License Renewal of Nuclear Plants Regarding Pilgrim Nuclear Power Station – Draft Report for Comment (Dec. 2006) (ADAMS Accession No. ML063260173) ("DSEIS")..

[10] This assessment and conclusion is also summarized in Section 4.6 of the DSEIS.

[11] Letter from P. DuBois to NRC, Public Comment NUREG-1427, Supplement 29 (Feb. 28, 2007 (ADAMS Accession No. ML070660273); Pilgrim Watch, Draft Supplemental Impact Statement (DSEIS) – Draft NUREG-1437, Supplement 29 – Summary Comments (Feb. 5, 2007) (ADAMS Accession No. ML070430263).

8, 2006) (ADAMS Accession No. ML063390166). In that letter, the NRC requested NMFS concurrence with its determination in the 2006 BA and conclusion of the ESA Section 7 consultation. NRC also requested initiation of an EFH consultation. Id. at 2. On January 23, 2007, NMFS responded and concluded the EFH consultation without recommendations, but indicated that comments on ESA consultation would be provided separately.[12] Neither JRWA nor Pilgrim Watch raised any concern with NMFS's decisions to conclude EFH consultation and to provide no conservation recommendations.

The 2006 BA, EFH Assessment, and the NMFS response were included in the FSEIS published in July 2007 (FSEIS at E-44, E-51, E-80). Neither Pilgrim Watch nor JRWA made any attempt to challenge the disposition of these assessments in the FSEIS. Specifically, Petitioners made no attempt to claim either that the EFH consultation or ESA consultation was improper.

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[12] Letter from P. Colosi, NMFS, to P.T. Kuo, NRC (Jan. 23, 2007) (ADAMS Accession No. ML070360071). This letter states in pertinent part:

> We note 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 the US Environmental Protection Agency (EPA) through their National Pollution Discharge Elimination System (NPDES) permitting process, pursuant to Section 316(a)(b) of the Federal Clean Water Act. As such, NRC does not intend to incorporate any mitigation conditions to offset impacts on NMFS trust resources. As noted within the GEIS, the EPA is in the process of developing a demonstration document for the 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. Rather, NMFS will perform a detailed review of the proposed project within the NPDES permit renewal process and potentially provide EFH conservation recommendations at that time.
>
> Although NMFS is concluding the EFH consultation without providing conservation recommendations, we strongly encourage the NRC to continue to characterize and evaluate impacts on EFH and other living marine resources as part of its National Environmental Policy Act review process. Please note that these comments refer to the NRC's consultation with NMFS relative to the MSA and the FWCA. Comments relative to the Section 7 Endangered Species Act consultation will be provided by NMFS Protected Resources Division under separate cover.

Id. at 1-2.

Pilgrim Watch's two admitted contentions were initially resolved in Entergy's favor, one by summary disposition in 2007[13] and one after hearing in 2008.[14] In 2010, the Commission remanded for hearing a limited portion of the contention that had been resolved through summary disposition.[15] While this remanded contention was being addressed, Pilgrim Watch filed six successive requests for hearing on new contentions. On July 19, 2011, after further hearing, the Board resolved the remanded contention in Entergy's favor.[16] In three subsequent decisions, the Board denied each of Pilgrim Watch's requests for hearings on new contentions.[17] Following its most recent decision on January 11, 2012, the Board terminated the proceeding.[18]

Undeterred, Pilgrim Watch, now joined by JRWA, once more seeks to reopen the proceeding to litigate a new contention, this time after the Board has terminated the proceeding and less than three months before the expiration of the Pilgrim license on June 8, 2012. In essence, this contention consists of four claims: (1) the NRC has failed to complete the consultation process for ESA-listed species; (2) the NRC has not completed a BA of river herring, which is not an ESA-listed species, but in November of last year was designated as a "candidate species"; (3) the NRC has failed to complete the EFH consultation process under the MSA; and (4) the FSEIS may not be issued before these consultations and assessments are completed. Petition at 3-4; Supplement at 2.

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[13] LBP-07-13, 66 N.R.C. 131 (2007).

[14] LBP-08-22, 68 N.R.C. 590, 610 (2008).

[15] CLI-10-11, 71 N.R.C. 287, 310 (2010). In a separate decision, the Commission denied Pilgrim Watch's request for review of all other Licensing Board decisions that Pilgrim Watch had initially challenged on appeal. CLI-10-14, 71 N.R.C. 459 (2010).

[16] LBP-11-18, 74 N.R.C. __, slip op. (July 19, 2011), petition for review denied, CLI-12-1, 75 N.R.C. __, slip op. (Feb. 9, 2012).

[17] LBP-11-20, 74 N.R.C. __, slip op. (Sept. 8, 2011); LBP-11-23, 74 N.R.C. __, slip op. (Sept. 8, 2011), petition for review denied, CLI-12-03, 75 N.R.C. __, slip op. (Feb. 22, 2012); LBP-12-01, 75 N.R.C. __, slip op. (Jan. 11, 2012).

[18] LBP-12-01 at 27.

Because the proceeding before the Board has been terminated, Petitioners have filed the Petition with both the Board and the Commission. Petition at 4. By letter dated March 9, 2012, Entergy noted that jurisdiction properly lies with the Commission,[19] and requested that the Commission retain jurisdiction because the Petition seeks to raise matters concerning NRC interaction with other agencies and is raised so late in this proceeding.[20] Entergy renews this request and asks the Commission to reject Petitioners' untimely and meritless motion and render a final decision authorizing issuance of the renewed license.

III. Applicable Legal Standards for Reopening the Record, Late Contentions, and Admissible Contentions

The NRC does not look with favor on amended or new contentions filed after the initial filing. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 N.R.C. 631, 638 (2004). As the Commission has repeatedly stressed,

> our contention admissibility and timeliness rules require a high level of discipline and preparation by petitioners "who must examine the publicly available material and set forth their claims and the support for their claims at the outset." There simply would be "no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements" and add new contentions at their convenience during the course of a proceeding based on information that could have formed the basis for a timely contention at the outset of the proceeding. Our expanding adjudicatory docket makes it critically important that parties comply with our pleading requirements and that the Board enforce those requirements.

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 N.R.C. 235, 271-72 (2009) (emphasis added) (citations omitted).

Where, as here, the adjudicatory record has been closed, the Commission's rules specify that a motion to reopen that record to consider additional evidence – including evidence on a new

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[19] See, e.g., Southern Nuclear Operating Company (Vogtle Electric Generating Plant, Units 3 and 4), Order of the Secretary (Aug. 25, 2010) at 1.

[20] Letter from D. Lewis to A. Vietti-Cook (Mar. 9, 2012).

contention (see 10 C.F.R. § 2.326(d)) – will not be granted unless the following criteria are satisfied:

> (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.

10 C.F.R. § 2.326(a). Further, under the NRC rules,

> The motion must be accompanied by affidavits that set forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) of this section have been satisfied. Affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. Evidence contained in affidavits must meet the admissibility standards of this subpart. Each of the criteria must be separately addressed, with a specific explanation of why it has been met. When multiple allegations are involved, the movant must identify with particularity each issue it seeks to litigate and specify the factual and/or technical bases which it believes support the claim that this issue meets the criteria in paragraph (a) of this section.

10 C.F.R. § 2.326(b) (emphasis added). "All of the factors in section 2.326 must be met in order for a motion to reopen to be granted." Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-12-03, 75 N.R.C. __, slip op. at 15 (Feb. 22, 2012) ("CLI-12-03").

Further, the Commission repeatedly has emphasized that "[t]he burden of satisfying the reopening requirements is a heavy one." Oyster Creek, CLI-09-7, 69 N.R.C. at 287 (citing Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 N.R.C. 1, 5 (1986)). "[P]roponents of a reopening motion bear the burden of meeting all of [these] requirements." Id. (citing Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-10, 32 N.R.C. 218, 221 (1990)). "Bare assertions and speculation . . . do not supply the requisite support." Id. (citing AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 N.R.C. 658, 674 (2008)). Evidence contained in the Section 2.326(b)

affidavits must meet the admissibility standards in 10 C.F.R. § 2.337. Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-12-06, 75 N.R.C. __, slip op. at 18 (Mar. 8, 2012) ("CLI-12-06"). In other words, the evidence must be relevant, material, and reliable. Id.

In addition, where a motion to reopen relates to a contention not previously in controversy, as is the case here, a motion to reopen must also satisfy the standards for non-timely contentions in 10 C.F.R. § 2.309(c). 10 C.F.R. § 2.326(d); Pilgrim, CLI-12-03 at 9.[21] Section 2.309(c) provides that non-timely contentions will not be entertained, absent a determination by the Board that the contentions should be admitted based upon a balancing of the following factors:

> (i) Good cause, if any, for the failure to file on time;
>
> (ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
>
> (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;
>
> (iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;
>
> (v) The availability of other means whereby the requestor's/petitioner's interest will be protected;
>
> (vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;
>
> (vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and
>
> (viii) The 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).

In keeping with the Commission's disfavor of contentions after the initial filing, these factors are "stringent." Oyster Creek, CLI-09-7, 69 N.R.C. at 260, citing Florida Power & Light Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2, et al.), CLI-06-21, 64 N.R.C. 30, 33 (2006). "Late petitioners properly have a substantial burden in justifying their tardiness." Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 N.R.C. 273, 275 (1975).

Commission case law places most importance on whether the petitioner has demonstrated sufficient good cause for the untimely filing. Tennessee Valley Authority (Watts Bar Nuclear Plant, Unit 2), CLI-10-12, 71 N.R.C. 319, 323 (2010) ("CLI-10-12"); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-02, 51 N.R.C. 77, 79 (2000); Millstone, CLI-09-5, 69 N.R.C. at 125. Indeed, failure to demonstrate good cause requires the petitioner to make a "compelling" showing with respect to the other factors. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 N.R.C. 156, 165 (1993). In other words,

> A petitioner's showing must be highly persuasive; it would be a rare case where [the Commission] would excuse a non-timely petition absent good cause.

Watts Bar, CLI-10-12, 71 N.R.C. at 323 (footnote omitted).

Finally, any new contention must also satisfy the strict standards for admissibility in 10 C.F.R. § 2.309(f)(1). These standards also are enforced rigorously. "If any one . . . is not met, a contention must be rejected." Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Unit Nos. 1, 2, and 3), CLI-91-12, 34 N.R.C. 149, 155 (1991) (citation omitted); USEC, Inc. (American Centrifuge Plant), CLI-06-9, 63 N.R.C. 433, 437 (2006) ("These requirements

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[21] See also Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 N.R.C. 115, 125 (2009); Oyster Creek, CLI-08-28, 68 N.R.C. at 668.

are deliberately strict, and we will reject any contention that does not satisfy the requirements." (footnotes omitted)). A licensing board is not to overlook a deficiency in a contention or assume the existence of missing information. Palo Verde, CLI-91-12, 34 N.R.C. at 155; Oyster Creek, CLI-09-7, 69 N.R.C. at 260 (the contention admissibility rules "require the petitioner (not the board) to supply all of the required elements for a valid intervention petition" (emphasis added) (footnote omitted)).

IV. The Petition Fails to Meet the Reopening Standards

The Petition fails to satisfy all of the standards for reopening a closed record in 10 C.F.R. § 2.326. As a threshold matter, the Petition should be rejected out of hand because its supporting affidavits fail to meet the Section 2.326(b) requirement that such affidavits specifically address why each one of the Section 2.326(a) reopening standards has been met. Despite Petitioners' assertion that their affiants have addressed the relevant criteria, Petition at 38, the Commission will search the affidavits in vain for any such discussion. Not one of Petitioners' affidavits mentions the relevant Section 2.326(a)(i)-(iii) criteria for reopening the record, let alone provides a "specific explanation of why [each] has been met," or "specif[ies] the factual and/or technical bases" why each of the Section 2.326 criteria has been met for each of the multiple allegations raised in the Petition. 10 C.F.R. § 2.326(b). The Commission has long held that this defect alone is sufficient grounds to reject the Petition. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 N.R.C. 62, 76 (1992), citing Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-89-1, 29 N.R.C. 89, 93-94 (1989).[22]

[22] See also Pilgrim, CLI-12-03 at 16 (ruling that Pilgrim Watch failed to meet the Section 2.326 reopening standards because it did "not demonstrate, with the level of support required under section 2.326(b), that a materially different result would have been likely") (emphasis added).

A. Petitioners' Claims Are Untimely

Neither Petitioners nor their affiants demonstrate that the issues raised in the Petition are timely, nor could they. The bases for Petitioners' challenges are not new information and could have been raised long ago.

Except in certain circumstances inapplicable here, the NRC rules allow new contentions to be filed only with the leave of the presiding officer upon a showing that:

> (i) The information upon which the amended or new contention is based was not previously available;
>
> (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
>
> (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

10 C.F.R. § 2.309(f)(2)(i)-(iii). In essence, a proponent of a new contention must show that it could not have raised its contention earlier. "[T]he unavailability of [a] document does not constitute a showing of good cause for admitting a late-filed contention when the factual predicate for that contention is available from other sources in a timely manner." Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 N.R.C.1041, 1043 (1983). Consequently, an intervenor cannot establish good cause for filing a late contention when the information on which the contention is based was publicly available "for some time" prior to the filing of the contention. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 N.R.C. 13, 21 (1986). The NRC typically applies a "30-day clock" to the filing of a new contention based on new information,[23] and this has been the standard established in this proceeding.[24]

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[23] Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-08, 74 N.R.C. __, slip op. at 3 n.8 (Sept. 27, 2011).

[24] See Order (Establishing Schedule for Proceeding and Addressing Related Matters) (Dec. 20, 2006) at 6-7.

Petitioners' claims that the NRC has failed to complete the consultation processes under the ESA and/or MSA could have been brought in 2007. With respect to the ESA, Petitioners are clearly aware of (because of their copious citation to) the NMFS/FWS regulations, and thus know that those regulations call for NMFS to respond in writing within 30 days whether or not it concurs with a BA. See 50 C.F.R. § 402.12(j). Because the NRC transmitted its BA to NMFS on December 8, 2006, any concern with the lack of response from NMFS would have been ripe in January 2007 and clearly apparent in July 2007 when the FSEIS was published. With respect to the MSA, Petitioners concede (Supplement at 2) that the NRC provided both its 2006 EFH Assessment and the NMFS letter concluding consultation in the July 2007 FSEIS. FSEIS at E-80; FSEIS at E-45. Any challenge to the NMFS decision to conclude consultation without conservation recommendations should have been brought at that time.

Petitioners' claims that NRC's assessments were inadequate could have been brought even earlier, in December 2006 when those assessments were included in the DSEIS. Indeed, the untimeliness of these claims is laid bare in the Petition itself. Petitioners purport to challenge the 2006 BA with information that existed "at the time the 2006 BA was prepared." Petition at 20-21 (emphasis added). Further, Petitioners' challenges rely on (1) a 1993 fish spotting study, Mansfield Affidavit at ¶¶ 10-11; (2) "scientific and commercially available data which could have been obtained prior to 2007" documenting right whale sitings in Cape Cod Bay, id. at ¶¶ 12-16 (emphasis added); (3) 2001 and 2011 studies concerning whales, id. at ¶ 17; (4) a recovery plan for the right whale published in 2005 by NMFS, id. at ¶ 18; (5) data concerning endangered sea turtles from the July 2007 Pilgrim SEIS, id. at ¶¶ 19-21; and (6) data concerning impingement and entrainment of river herring and other fish species obtained from the July 2007 Pilgrim SEIS and a 2011 study, id. at ¶¶ 22-29. With respect to their MSA EFH Assessment

claims, Petitioners rely on a June 27, 2000 letter from the Commonwealth of Massachusetts Office of Coastal Zone Management to the U.S. EPA concerning Pilgrim's Clean Water Act Section 316 Demonstration Report and "adult-equivalent" data on the entrainment of winter flounder from 1997 and 1998. See duBois Affidavit at Exhibit 2; Supplement at 5-6. Obviously, none of this information is new.

Nor is Petitioner's ESA claim made timely by the NRC's February 29, 2012 letter to NMFS, as Petitioners appear to suggest. See Petition at 33. The NRC's February 29, 2012 letter transmits a Biological Assessment Supplement addressing a distinct population segment of Atlantic Sturgeon that had just been listed on February 6, 2012. While that letter also took the opportunity to summarize the prior consultation to confirm NMFS's concurrence with the 2006 BA, it does not renew any claim that the prior consultation process was insufficient. "Putting old wine into new wineskins does not make it new wine."[25] Rather, the NRC's February 29, 2012 letter merely summarized information concerning the ESA Section 7 consultation process that has been widely apparent since the publication of the Pilgrim FSEIS. Documents that merely collect, summarize, or place into context previously available information do not support the timeliness of a new contention. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 N.R.C. 481, 496 (2010).

Further, Petitioners were clearly aware of the status of consultation prior to the February 29, 2012 letter. Indeed, on February 6, 2012, Petitioner JRWA sent a letter to NMFS (with a copy to the NRC) claiming that "NMFS has yet to concur with the NRC's July 2007 [sic] 'biological assessment' under the ESA" and that the "last relevant communication in the relicensing proceeding record is a January 23, 2007 letter from NMFS." duBois Affidavit,

Exhibit 1 at 1 (available at ADAMS Accession No. ML12053A020). While Petitioners could have raised this issue at any time since issuance of the July 2007 FSEIS more than four and half years ago, they were in any event aware, by their own admission, of this issue for more than a month before they filed the current motion. Particularly at this late stage of the proceeding, such delay should not be permitted.[26]

Petitioners' claim that the NRC has not completed a BA of river herring could also have been brought earlier. River herring became a candidate species on November 2, 2011. 76 Fed. Reg. 67,652 (Nov. 2, 2011). Putting aside the fact that designation of candidate species does not implicate ESA responsibilities (as discussed later in this Answer), any claim to the contrary should have been raised within 30 days of that designation, or no later than December 2, 2011, more than three months ago. This claim is therefore untimely. See Prairie Island, CLI-10-27, 72 N.R.C. at 494 (ruling untimely a proposed contention based on information that was "already available to [petitioner] at least 2 months prior to [petitioner's] submission of its new contention").

Petitioners' argument that their MSA claims are made timely by their discovery of the status of Pilgrim's NPDES permit (Petition at 33) is also unpersuasive. That argument rests entirely on the inaccurate claim that the NRC unlawfully attempted to defer the EFH Assessment to the EPA NPDES permit renewal process. Petition at 5. The NPDES permit is irrelevant to whether NRC completed its assessment and consultation obligations. Moreover, Petitioners have been aware, or should have been aware, of the status of the NPDES permit for some time. Ms. Bingham's Affidavit asserts that "[t]he last piece of correspondence in the EPA files between

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[25] Progress Energy Florida, Inc. (Levy County Nuclear Plants, Units 1 and 2), LBP-09-10, 70 N.R.C. 51, 142 (2009).

[26] Vogtle, CLI-11-08, at 3 n.8.

Entergy and EPA relating to the PNPS's NPDES permit was dated April 27, 2005."[27] Bingham Affidavit at ¶ 6 (emphasis added). Ms. duBois asserts that she "tried to find out more about the [NPDES] permit in 2007, and found that there had been no action on the application for NPDES permit renewal filed by Boston Edison in 1995." duBois Affidavit at ¶ 13 (emphasis added). In addition, "[i]n the spring of 2011, [Ms. duBois] contacted EPA to determine whether the NPDES process was in review, and obtained the permit that was issued in 1991," and "[i]n December [2011] [she] asked for an update on [EPA's] process to issue the permit and to review their file." duBois Affidavit at ¶ 23 (emphasis added). See also Supplement at 4-6 (reiterating NPDES permit renewal claims). Consequently, any claim concerning the timing of NPDES permit renewal process could have been raised months or years ago.[28]

Finally, Petitioners' claim that the FSEIS is defective because its issuance could not precede completion of the ESA and MSA consultations is obviously untimely. That claim could have been brought in July 2007 when the FSEIS was issued. Petitioners do not even attempt to provide any excuse for this late claim.

Because Petitioners' claims are untimely, in order to reopen the record Petitioners must demonstrate that their issues are "exceptionally grave." 10 C.F.R. § 2.326(a)(1).[29] When promulgating the "exceptionally grave" standard to consider untimely claims, the Commission

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[27] Ms. Bingham's assertion is surprising, as Pilgrim submitted a voluminous response to an EPA request in 2008.

[28] Petitioners' Supplement appears to inject a new claim that Entergy could not rely on its existing NPDES permit to satisfy 10 C.F.R. § 51.53(c)(3)(ii)(B), because that permit is allegedly not "current." Supplement at 4. Any challenge to Entergy's reliance on the Section 316(b) determinations for Pilgrim Station to meet the requirements of 10 C.F.R. § 51.53(c)(3)(ii)(B) could have been brought at the outset of this proceeding, as that information is set out in Sections 4.2 and 4.3 of the Environmental Report. Further, the assertion that Entergy submitted only four pages of documentation to the NRC (Supplement at 5) is baseless. Entergy provided numerous documents to the NRC Staff, including Summary of Environmental Site Audit Related to the Review of the License Renewal Application for Pilgrim Station. (July 25, 2006) (ADAMS Accession No. ML062070305), Encl. 2 (References Collected at the Pilgrim Nuclear Power Station Site Audit May 1-5, 2006). Further, the suggestion that Entergy has stalled the EPA's NPDES permitting proceeding (Supplement at 6) is both unsupported and false.

made clear that "exceptionally grave" means that an in issue presents "a sufficiently grave threat to public safety."[30] None of the allegations in the Petition or the affidavits raises any issue that could be characterized as a sufficiently grave threat to public safety. Moreover, there is no evidence that continued operation of Pilgrim during the license renewal term will endanger any ESA-listed species. Consequently, Petitioners have failed to raise any exceptionally grave issue.

B. Petitioners' Claims Do Not Address any Significant Environmental or Safety Issue

In addition to being untimely, Petitioners' claims fail to demonstrate the existence of a significant environmental or safety issue. The Commission has directly held that "bare assertions and speculation . . . do not supply the requisite support" to satisfy the Section 2.326 standards.[31] Merely asserting that something "might turn up" to support an intervenor's concerns does not raise a significant issue sufficient to restart the hearing process.[32] In order to demonstrate the existence of a significant environmental issue, the information Petitioners present must paint a "seriously different picture of the environmental landscape."[33]

None of Petitioners' claims (or their affiants' assertions) raises any significant environmental issue. Petitioners have come forward with no credible evidence that any ESA-listed species will be affected by Pilgrim's continued operation. Nor have Petitioners provided

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[29] Vogtle, CLI-11-08 at 14 n.44 ("when a motion to reopen is untimely, the § 2.326(a)(1) 'exceptionally grave' test supplants the § 2.326(a)(2) 'significant safety or environmental issue' test") (citation omitted).

[30] Final Rule, Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,536 (May 30, 1986), quoting Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-124, 6 A.E.C. 358, 365 n.10 (1973).

[31] Oyster Creek, CLI-09-7, 69 N.R.C. at 287 (citing Oyster Creek, CLI-08-28, 68 N.R.C. 658, 674 (2008)).

[32] Oyster Creek, CLI-08-23, 68 N.R.C. 461, 486 (2008) (rejecting a motion to reopen where movants provided only mere speculation that the contention might materially alter conclusions in the final safety evaluation report) (emphasis in original).

[33] See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-06-03, 63 N.R.C. 19, 28-29 (2006) ("PFS") (holding that claimed additional environmental impacts were "not so significant or central to the FEIS's discussion of environmental impacts that an FEIS supplement (and the consequent reopening of our adjudicatory record) is reasonable or necessary").

any evidence disputing the NRC Staff's conclusion that continued operation of Pilgrim will have minimal adverse effect on EFH within the Cape Cod Bay ecosystem. Likewise, Petitioners fail to show that effects to river herring will be any different than the impacts described in the FSEIS, or that continued operation of Pilgrim will have any substantial impact on the river herring population.

1. Endangered Species Act

The NRC Staff's 2006 BA "conclude[d] that the proposed action would have no effect on any of the 10 Federally listed species" under the ESA. FSEIS at E-38; see also FSEIS at E-67 to E-73. Likewise, the NRC Staff's 2012 BA concluded that continued operation of Pilgrim "will have **no effect** on the Atlantic sturgeon." 2012 BA at 3 (bold text in original). Neither Petitioners nor their affiants demonstrate that these determinations are wrong. In particular, none of Petitioners' affiants even claims that any ESA-listed species will be adversely affected by continued operation of Pilgrim.

Instead, Petitioners offer at most some vague and speculative criticism of the 2006 BA without ever showing that an ESA-listed species is likely to be affected. In particular,

- Mr. Mansfield claims that sighting data shows that right whales may be present in much broader special scales that the "narrow areas defined by the GEIS and the 2006 BA" (Mansfield Affidavit, ¶ 16) but does not provide one whit of information explaining how or indicating that PNPS operation may affect these whales. Further, contrary to Mr. Mansfield's characterization (unsupported by any citation), the FSEIS and 2006 BA did not define "narrow areas." Instead, the 2006 BA focused on Cape Cod Bay covering an area of 365,000 acres (FSEIS at E-64), and also discussed the presence of right whales in Massachusetts Bay and the western North Atlantic ocean (id. at E-69). Further, the BA

clearly indicated the presence of right whales in Cape Cod Bay, noting that 72% of the catalogued population has visited Cape Cod Bay and Massachusetts Bay (id.), so Mr. Mansfield's suggestion that their presence has been somehow understated is without foundation.[34]

- Petitioners assert that the NRC Staff did not "make a determination on the potential effects of relicensing on critical habitat for the Northern right whale." Petition at 18. But Petitioners do not provide any evidence indicating that license renewal will result in the destruction or adverse modification of the whale's critical habitat. None of Petitioners' affiants discusses or identifies any impact on critical habitat for the right whale. Further, the BAs' conclusions that there will be no effect on listed species obviously imply that critical habitat will not be adversely modified or destroyed.

- Mr. Mansfield claims generally that the FSEIS does not address "how thermal loading, impingement, and entrainment impact the food web, food supply for the listed species and critical habitat" (Mansfield Affidavit at ¶ 30), but he does not provide any information suggesting that any ESA-listed species present in the vicinity of Pilgrim is being affected by any shortage in food supply. He does not even discuss the right whale's habitat or food. Such bare assertions are insufficient to raise a significant issue under Section 2.326(a)(2).

- Mr. Mansfield asserts that the FSEIS does not address how mid-term changes (i.e., 20 years) to water temperatures could result in the northward expansion of sea turtles (id. at

[34] In point of fact, as Dr. Scherer explains, the data presented by Mr. Mansfield is skewed and does not present an accurate picture of right whales' presence in the Bay. The data relied on by Mr. Mansfield do not account for sighting effort, and therefore does not represent the true distribution of whales in a given area. To avoid this potential source of error, scientists generally correct for sighting effort by reporting the number of whale sightings per unit effort ("SPUE"), represented in units of time or distance surveyed by boat or plane. Scherer Aff. at ¶ 55.

¶ 21), but does not provide any information indicating (1) that changes in migratory patterns are expected or likely to occur, or (2) that Pilgrim operation is likely to have any effect on sea turtles. Merely asserting that something ought to be studied does not meet the Commission's stringent standards for reopening the record.

- Petitioners are correct that, on February 6, 2012, NMFS designated a distinct population segment of the Atlantic sturgeon as threatened under the ESA. See, e.g., Petition at 19. However, the FSEIS states that no Atlantic Sturgeon have been observed in the area near the Pilgrim Station. FSEIS at 2-86. The 2012 BA performed by the NRC Staff in response to the designation of the Atlantic Sturgeon as a threatened species provides that "the available literature does not indicate that they are common to the Plymouth area near Pilgrim" and that no "take of Atlantic sturgeon has occurred at Pilgrim since it began operating in 1972." 2012 BA at 3. Thus, the NRC concluded that "the proposed license renewal of Pilgrim will have **no effect** on the Atlantic Sturgeon." Id. (bold text in original). Petitioners nowhere dispute this information, or otherwise provide any evidence that Pilgrim license renewal will have any effect on Atlantic sturgeon.

Moreover, the attached Affidavit from Dr. Michael D. Scherer demonstrates that Petitioners' ESA claims raise no significant issue. As Dr. Scherer's Affidavit demonstrates, PNPS and NRC considered information on, and in the case of NRC conducted an independent review of, every species identified by Petitioners, including the recently listed Atlantic Sturgeon, and the NRC's "no effect" conclusions are well-founded. The information established that, despite ESA-listed species' occasional presence in Cape Cod Bay, either the ESA-listed species' size, swimming ability, habitat preference, or feeding behavior, or the ambient currents in Cape

Cod Bay, mean that no ESA-listed species is expected to come into contact with PNPS's cooling water intake system ("CWIS"), or otherwise be affected by PNPS's continued operations.

More specifically:

- The CWIS includes design features, including breakwaters, a skimmer wall, trash racks, and travelling screens, that make it highly unlikely that the CWIS would affect ESA-listed species, and considerable monitoring data confirms the absence of any discernible effect on these species. Scherer Aff. at ¶¶ 10-16.
- The NRC's 2006 BA conclusion that the five ESA-listed species of whales that are known to be present at times in Cape Cod Bay would not be affected by the continued operation of the Station is well-founded. Whales are too powerful swimmers at all life stages to ever become impinged by the Pilgrim CWIS. Scherer Aff. at ¶ 48.
- North Atlantic right whales feed on dense patches of three specific copepods, which are located away from Pilgrim's northwest location in the Bay. In order to impact North Atlantic right whales, entrainment at Pilgrim would have to cause the mortality of this specific type and density of zooplankton during the months when right whales are known to be present in Cape Cod Bay, typically February through May. It has been shown that the zooplankton entrainment survival rate is very high except when the cooling water system is being chlorinated. Chlorination of the Pilgrim cooling water system can be expected to cause mortality to approximately 8.3% of zooplankton entrained. This low level of impact to zooplankton is not reasonably expected to affect right whales' foraging capability in Cape Cod Bay, particularly in light of Pilgrim's location away from the dense patches of zooplankton. Scherer Aff. at ¶¶ 52, 54.

- For the remaining four ESA-listed whale species (Humpback, Fin, Sei, and Sperm), the NRC's 2006 BA conclusion that continued operation of Pilgrim will have no discernible effect on those species is well-founded for similar reasons:
    - SPUE data for the whales demonstrates that Humpback, Fin, and Sei whales are present in Cape Cod Bay in relatively low numbers. Scherer Aff. at ¶¶ 57, 61, 65.
    - It is rare to find a sperm whale in less than 300m-deep water, and thus neither sperm whales nor their food sources will be impacted by continued operation of Pilgrim. Scherer Aff. at ¶¶ 68-69.
    - Sei whale primarily feeds on zooplankton. For the same reasons discussed with respect to North Atlantic right whales, zooplankton are not significantly affected by operation of Pilgrim. Scherer Aff. at ¶ 66.
    - For the humpback and fin whale species, which feed on fish species that are impinged at Pilgrim (such as herring, sand lance, and mackerel), the number of fish impinged at Pilgrim on a mean annual basis is far less than the amount of fish these whale species consume in a single day, and thus continued operation of Pilgrim will have little if any effect on these species. Scherer Aff. at ¶¶ 58, 62.
- The 2006 BA concluded that continued operation of Pilgrim would have no effect on any of the four species of endangered or threatened sea turtles that are known to forage in Cape Cod Bay. This is because of their relevant biology and the oceanographic features of the Bay, which demonstrate that sea turtles are highly unlikely to be impinged at Pilgrim. No sea turtle has been found impinged at Pilgrim or detected within the vicinity of the CWIS. Scherer Aff. at ¶¶ 29-47.

- With respect to Atlantic sturgeon, the NRC's 2012 BA conclusion that relicensing of Pilgrim would have no effect on the species is well-founded. Eggs and larvae of Atlantic sturgeon cannot reasonably be expected to be entrained at Pilgrim. Mature Atlantic sturgeon are large powerful fish and would thus be able to overcome the CWIS intake flow and avoid impingement. No Atlantic sturgeon has been observed impinged at Pilgrim, and only two have been observed in the vicinity of Pilgrim over the past 30 years. Thus, there is no credible evidence of any potential impact on this species. Scherer Aff. at ¶¶ 21-28.

In short, the clear picture that emerges of the record is one of complete, comprehensive and searching analysis, which fully supports the conclusion that there will be no effect on ESA-listed species.

2. Magnuson-Stevens Act

Similarly, none of Petitioners' claims with respect to the MSA raises any significant environmental issue. Petitioners' affiants have raised no issue calling into question the NRC Staff's MSA-related determinations. Petitioners' affiants provide no indication that any significant environmental issue has been overlooked in the NRC Staff's 2006 EFH Assessment, or in the NRC's consultation with NMFS on the NRC Staff's 2006 EFH Assessment. Indeed, Petitioners' affiants nowhere address or challenge the substance of the NRC's EFH Assessment, or its conclusion that "within the overall Cape Cod Bay ecosystem, the staff has determined that continued operation of the PNPS cooling water system would have a minimal adverse effect on EFH" (FSEIS at E-135), or the NMFS's determination to provide no conservation recommendations on the NRC's 2006 EFH Assessment (FSEIS at E-45). See generally Bingham Affidavit, Mansfield Affidavit, and duBois Affidavit. Consequently, Petitioners do not

demonstrate, "with the level of support required under section 2.326(b)," Pilgrim, CLI-12-03 at 16, the existence of any significant environmental issue related to the MSA or the NRC's EFH Assessment.

Further, none of Petitioners' claims with respect to river herring and the Atlantic sturgeon challenges or is relevant to the EFH Assessment consultation required under the MSA. The NRC Staff's December 2006 EFH Assessment identifies the "EFH Species Potentially Occurring in the Vicinity of PNPS." FSEIS at E-102. The species managed within an EFH do not include river herring (alewife or blueback) and the Atlantic sturgeon. See also FSEIS at A-79 ("Neither species [of river herring] was determined to have EFH in the vicinity of PNPS"). Because NMFS regulations governing the EFH consultation process require EFH Assessments to address only the adverse effects on those fish species (and their habitats) managed within an EFH,[35] there is no legal basis for any suggestion that the EFH Assessment should have explored the adverse effect of license renewal on river herring and Atlantic sturgeon and their habitats.

The sole challenge to the adequacy of the EFH Assessment consists of statements in Petitioners' Supplement concerning winter flounder, but Petitioners nowhere address how that information is any different than the information already addressed in the EFH Assessment. Petitioners note the fact that the Pilgrim cooling water system will have an impact on Cape Cod Bay, and point to data from 1997 and 1998 concerning the entrainment of winter flounder larvae and eggs (expressed in terms of adult equivalents). Supplement at 3, 5-6. The NRC's 2006 EFH Assessment states that "winter flounder eggs and larvae dominated entrainment samples at PNPS," and that continued operations of the PNPS intake system may have a substantial, adverse

[35] See 50 C.F.R. § 600.920 (e)(3)(i) (describing the mandatory contents of an EFH Assessment); see also 50 C.F.R. § 600.805(b)(1) (noting that the MSA EFH provisions do not protect the habitats of fish species that are not

impact on EFH for winter flounder. FSEIS at E-128. Petitioners' fail to show that that the information purportedly calling into question the NRC's 2006 EFH Assessment is any different, let alone significantly different, than the information on which the NRC based its conclusions.

Contrary to Petitioners' claims, the EFH Assessment is very conservative, with available data indicating if anything a smaller rather than larger impact than presented in the EFH Assessment. As discussed in Dr. Scherer's Affidavit, (1) only a small fraction of the winter flounder larvae drifting past the intake are actually entrained; (2) equivalent adult losses from entrainment and impingement at PNPS are very small compared to the size of the winter flounder population both in the Gulf of Maine and in the Bay; and (3) fisheries management models indicate that the impacts of entrainment and impingement at PNPS are very small compared to impacts of fishing and have no discernible effect on winter flounder populations. Scherer Aff., ¶¶ 77-81.

3. River Herring

None of the allegations raised in the Petition or affidavits relating to river herring raises a significant environmental issue. Mr. Mansfield asserts that the "high levels of impingement of river herring have not been addressed in the NRC Staff BA or in the GEIS." Mansfield Affidavit at ¶ 25. Because river herring are not currently proposed or listed as a threatened or endangered species, the absence of discussion of this species in the 2006 and 2012 BAs raises no issue.

The assertion that impingement of river herring is not discussed in the FSEIS is simply incorrect. See FSEIS at 2-34 – 2-35. The FSEIS specifically identified alewife as an "important fish species for evaluation as representative of the potentially affected fish community in Cape

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managed within a Fishery Management Unit ("FMU") designated by Regional Fishery Management Councils as part of their Fishery Management Plans ("FMPs")).

Cod Bay." FSEIS at A-80.[36] The FSEIS notes that "[a]lewife larvae and juveniles have been collected in the PNPS entrainment sampling," alewife "juveniles and/or adults have been consistently collected in the PNPS impingement sampling program," and "alewives have had the third highest number of individuals impinged at PNPS." FSEIS at 2-34 – 2-35. The FSEIS provides the results of a 2000 316(b) Demonstration Report that evaluated entrainment and impingement impacts on alewife. See FSEIS at 4-21, 4-29 to 4-30. As reported in this study, the estimated losses of most species, including alewife, were less than 1 percent of the population. Id. at 4-22, 4-31. Petitioners do not dispute any of this information.

The attached Affidavit from Dr. Michael D. Scherer demonstrates that no significant environmental issue exists with respect to river herring.

- For 1980-2010, the annual average number of alewife and blueback herring impinged at Pilgrim were 2,150 and 735, respectively. Most if not all of these were "young-of-the-year" fish, or less than one-year old. Assuming maturity occurs at age 3, the number of these young-of-the-year fish that would be expected to survive into adulthood is 38 and 2, respectively. Thus, PNPS' impact on river herring through impingement is negligible at best. Scherer Aff. at ¶ 73.

- On rare occasions, stray larvae from freshwater rivers in which river herring spawn could find itself in the vicinity of Pilgrim, but such an extremely rare event does not indicate that Pilgrim has any discernible effect on river herring. Over the past 30 years, larvae were entrained in only five years. In each of these years, the number of larvae entrained

[36] During the FSEIS comment process, the NRC Staff addressed a comment that the environmental analysis failed to assess the species of river herring (blueback herring) that spawns in the Jones River. FSEIS at A-80. The NRC responded that its analysis for the alewife "provided a conservative representation of the potential impacts on the blueback herring" because "the habitat in the immediate vicinity of PNPS, which is marine, is the same as for the alewife." Id.

was small. For example, a total of two larvae were found in 1996, and just a single larvae in 2005. Scherer Aff. at ¶ 72.

For all of the reasons set forth above, Petitioners' claims fail to address a significant environmental or safety issue as required under Section 2.326(a)(2).

C. Petitioners Have Failed to Demonstrate That a Materially Different Result Would Be Likely

Petitioners and their affiants fail to "demonstrate" that a materially different result would have been likely had their newly proffered evidence been considered initially, as required by 10 C.F.R. § 2.326(a)(3) (emphasis added). The sole claim that Petitioners make with respect to this criterion is that, had their information been considered initially, "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 in[]compliance with NEPA." Petition at 37. More specifically, Petitioners contend that a materially different result would have been likely because the Pilgrim FSEIS would contain (1) information on the completed ESA Section 7 consultation processes for the 2006 BA and Atlantic Sturgeon; (2) information about river herring; and (3) an EFH Assessment. Id. at 37-38. However, as previously discussed, Petitioners have not identified any significant environmental issue concerning the content of the BA, EFH Assessment, or SEIS, and as discussed below, Petitioners' claims concerning consultation are simply wrong. Consequently, they have failed to demonstrate that any one of their allegations would result in a materially different outcome.

Petitioners have a "deliberately heavy" burden to demonstrate that a materially different result would be likely. Oyster Creek, CLI-08-28, 68 N.R.C. at 674; see also Pilgrim, CLI-12-03 at 8; Oyster Creek, CLI-09-7, 69 N.R.C. at 287. At this late stage of the proceeding, is it not

sufficient simply to raise an issue. "The level of support required for a motion to reopen is greater than that required for a contention under the general admissibility requirements of 10 C.F.R. § 2.309(f)(1)." Pilgrim, CLI-12-06 at 18. "'[N]o reopening of the evidentiary hearing will be required if the [documents] submitted in response to the motion demonstrate that there is no genuine unresolved issue of fact.'" PFS, CLI-05-12, 61 N.R.C. 345, 350 (2005), citing Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 A.E.C. 520, 523-24 (1973). A petitioner will fail to demonstrate that a materially different result will be likely where the petitioner seeks to litigate issues outside the scope of a proceeding, or fails to challenge pertinent information contained in the existing licensing documents. See Pilgrim, CLI-12-06 at 26-27.

1. Endangered Species Act

Petitioners have not demonstrated that their complaint concerning the ESA consultation is likely to affect the result of this proceeding. Petitioners' complaint that the ESA consultation is incomplete boils down to a claim that the process was deficient because NMFS did not provide a written concurrence with the NRC's determination that "the proposed action would have no effect on any of the 10 Federally listed species" identified in the vicinity of Pilgrim. See Petition at 8; see also id. at 3, 5, 18, 24, 30. However, no consultation is required where, as here, the Federal agency determines that a proposed action will have no effect on threatened or endangered species. See 50 C.F.R. § 402.14(a) (requiring consultation only if the agency determines that threatened or endangered species "may be affected."). As NMFS/FWS have explained:

> Although the current regulations do not explicitly state that consultation is not required when a Federal action agency determines that its action will have no effect on listed species or critical habitat, an evaluation of the current regulations makes it clear that no consultation was contemplated for these situations; the

> current regulations only require Federal action agency consultation when there is a determination that an action ''may affect'' a listed species or designated critical habitat. 50 CFR 402.14(a). By policy and practice the Services have consistently determined that consultation is not required when an action has no effect on listed species or critical habitat.

73 Fed. Reg. 47,868, 47,870 (Aug. 15, 2008). The courts have routinely upheld action agency ''no effect'' determinations made without formal consultation with the Services.[37] Because NRC determined that there would be "no effect," it was not even obligated to consult, let alone obtain NMFS concurrence.

For this reason, Petitioners are wrong in interpreting 50 C.F.R. § 402.14(b) as requiring formal consultation unless the Federal agency obtains the NMFS/FWS written concurrence that the proposed action is not likely to affect ESA-listed species or habitat. See Petition at 8. Unless the Federal agency has determined that the proposed action "may affect" ESA-listed species or habitat, 50 C.F.R. 402.14(b) is not invoked. Here, the NRC did not determine that any species or habitat may be affected. Rather, it determined that there will be "no effect."

Even if one construes NMFS/FWS regulations as requiring a concurrence as a procedural formality where the NRC, as here, voluntarily prepares a BA,[38] such concurrence should be

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[37] See, e.g., Sw. Ctr. for Biological Diversity v. U.S. Forest Service, 100 F.3d 1443, 1447 (9th Cir. 1996) (agency's initial "no effect" determination obviates the need for formal consultation under the ESA); Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of Navy, 383 F.3d 1082, 1092 (9th Cir. 2004) (it was not arbitrary and capricious for an agency to conclude that it was not required to consult with NMFS where the risk of an effect to an EPA-listed species was remote); Pac. Rivers Council v. Thomas, 30 F.3d 1050, 1054 n.8 (9th Cir. 1994) (formal consultation requirements are not triggered if an agency determines that a particular action will have no effect on ESA-listed species); and, Defenders of Wildlife v. Kempthorne, No. 04-1230, 2006 WL 2844232, at *19 (D.D.C. Sept. 29, 2006) ("Congress intended to allow Action Agencies to initially evaluate the potential environmental consequences of federal actions and to move forward on many of them without first consulting the Services if they concluded that they had 'no effect' on listed species and their critical habitat").

[38] Pursuant to 50 C.F.R. § 402.12(b), NRC is required to produce a BA only for federal actions that are "major construction activities," defined as "a construction project (or other undertaking having similar physical impacts) which is a major Federal action significantly affecting the quality of the human environment…." 50 C.F.R. § 402.02. See note 5 supra. Because Pilgrim license renewal does not involve a "major construction activity" as defined in the regulations, preparation of a BA was not required.

deemed waived by NMFS's five year inaction.[39] The ESA does not define what constitutes consultation and nowhere requires NMFS concurrence when a federal agency concludes that the proposed action will have no effect on any endangered or threatened species. See 16 U.S.C. § 1536(a)(2). While the interpretive regulations provide for NMFS's concurrence with BAs, those regulations cannot be read as allowing NMFS to veto agency action through non-response, or to convert the consultation process into a required approval. As the Eighth Circuit has succinctly stated, "[c]onsultation under [ESA] Section 7 does not require acquiescence." Sierra Club v. Froehlke, 534 F.2d 1289, 1303 (8th Cir. 1976). See also Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-785, 20 N.R.C. 848, 881 n.145 (1984) (citing Sierra Club v. Froehlke). Indeed, as previously explained, when promulgating regulations implementing the statute, NMFS/FWS explicitly stated that:

> The Service performs strictly an advisory function under section 7 by consulting with other Federal agencies to identify and help resolve conflicts between listed species and their critical habitat and proposed actions . . . . However, the Federal agency makes the ultimate decision as to whether its proposed action will satisfy the requirements of section 7(a)(2). The Service recognizes that the Federal agency has the primary responsibility for implementing section 7's substantive command, and the final rule does not usurp that function.

51 Fed. Reg. at 19,928 (emphasis added).[40] At bottom, the responsibility to ensure that the federal action does not jeopardize the existence of any endangered species rests not with NMFS

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[39] Notably, and underscoring the problems with Petitioners' late claims, NMFS may never have intended to issue a written concurrence. After the FSEIS was published, NMFS was involved in a rulemaking to streamline its informal consultation process, including by setting explicit deadlines and providing for waivers. In December 2008, NMFS amended their regulations to explicitly provide that, if the Service does not provide a response within 60-days following a Federal agency's request for concurrence on an informal consultation, the federal agency may terminate consultation and its consultation obligations would be deemed satisfied. 73 Fed. Reg. 76,272, 76, 287 (Dec. 16, 2008). While these amendments were later revoked by the incoming administration pending broader review (74 Fed. Reg. 20,421 (May 9, 2009)), that revocation did not affect any actions taken prior to the effective date of the revocation. Consequently, the evolving NMFS regulatory framework may explain why NMFS never provided a written response during the period of PNPS's review.

[40] Similarly, the Commission has long held that, as an independent agency, it is not bound by other Federal executive agencies' regulations that "'have a substantive impact on the way in which the Commission performs its regulatory functions.'" See Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 N.R.C. __, slip op. at 44 (Oct. 12, 2011).

but with the agency involved – here, the NRC. 16 U.S.C. § 1536(a)(2); Nat'l Wildlife Fed'n v. Coleman, 529 F.2d 359, 371 (5th Cir.1976).[41]

Moreover, as Petitioners recognize (Petition at 9), while consultation is ongoing, the ESA only 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 measures." 16 U.S.C. § 1536(d); 50 C.F.R. § 402.09. "Reasonable and prudent measures" refers to actions necessary or appropriate "to minimize the impacts, i.e., the amount or extent of, incidental take." 50 C.F.R. § 402.92. The only irreversible or irretrievable commitment of resources identified by Petitioners (Petition at 17) are those described in the SEIS, consisting of "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." FSEIS § 9.1.2. Obviously, the commitment of these resources will have no effect on the formulation or implementation of any alternative measures to minimize impacts on any threatened or endangered marine species. Consequently, even if consultation were deemed incomplete, it would not prevent the NRC from renewing Pilgrim's license.

Nor does the recent listing of Atlantic sturgeon raise any issue likely to affect the outcome of this proceeding. The NRC concluded that "the proposed license renewal of Pilgrim will have **no effect** on the Atlantic sturgeon." February 29, 2012 letter at 3 (bold text in

[41] Even in cases where ESA Section 7 "formal" consultation requirements are triggered because a determination has been made that an action may affect listed species or critical habitat, (circumstances not applicable here), ESA Section 7 does not provide a "veto over the actions of other federal agencies, provided that the required consultation has occurred." Coleman, 529 F.2d at 371. If NMFS cannot "veto" the actions of other agencies even where potential adverse effects to endangered species or critical habitat are identified, certainly NMFS's non-response after five years cannot veto NRC action, particularly where (as here) the NRC Staff found "no effect" on threatened and endangered species as a result of Pilgrim license renewal, and Petitioners have come forward with no evidence suggesting any adverse impacts to threatened or endangered species.

original). Neither Petitioners nor their affiants have provided any evidence even suggesting that the 2012 BA's "no effect" determination is incorrect. Indeed, as described in the attached Affidavit, eggs and larvae of Atlantic sturgeon cannot reasonably be expected to be entrained at Pilgrim, no Atlantic sturgeon has even been impinged, or is likely to ever be impinged, at Pilgrim, and the species has been documented in the vicinity of Pilgrim only twice during its operating period. Scherer Aff. at ¶¶ 26-28. Further, the NRC Staff has requested NMFS's concurrence with this determination, (2012 BA at 2), so there is simply no question regarding compliance with consultation requirements. Petitioners and their affiants therefore "do[] not demonstrate, with the level of support required under section 2.326(b), that a materially different result would have been likely." Pilgrim, CLI-12-03 at 16.

In sum, there is no doubt in this case that the NRC Staff has discharged its responsibilities under the ESA. It has assessed the potential impact on all ESA-listed species and has determined that there will be no effect. This alone fully discharges its responsibilities. Nevertheless, it has also voluntarily sought NMFS concurrence, and with respect to the 2006 BA, has been waiting five years. Under these circumstances, there is no credible claim that NRC has failed to consult. In short, Petitioners have failed to demonstrate that consideration of their ESA Section 7 related claims would likely result in a materially different outcome.

2. Magnuson-Stevens Act

Petitioners have not demonstrated that their complaints concerning the EFH Assessment are likely to affect the result of this proceeding. Petitioners' claim that the NRC has unlawfully deferred its MSA obligations to the NPDES permit renewal process (e.g., Petition at 5, Supplement at 4-7) is simply inaccurate. The NMFS January 23, 2007 letter makes explicit that NMFS "will not be providing NRC with EFH conservation recommendations regarding the

License Renewal for the Pilgrim Nuclear Power Plant." FSEIS at E-44 – E-45 (NMFS January 23, 2007 letter at 1). NMFS also stated that it would "potentially provide EFH conservation recommendations" during the NPDES permit renewal process. Id. at E-45 (NMFS January 23, 2007 at 2) (emphasis added). Thus, NMFS's decision not to provide any conservation recommendations was not conditioned on providing them during the NPDES permit renewal process. Petitioners' claim that the NRC Staff has deferred its EFH Assessment responsibility to the NPDES permit renewal process simply cannot be squared with the plain statements made in the NMFS January 23, 2007 letter.

Petitioners' Supplement shifts claims and appears to now argue that NMFS was required to provide recommendations. Pet. Supp. at 6 ("Under the MSA, where adverse impacts are found the NMFS must provide conservation recommendations."). What the MSA in fact provides is that, if the Secretary receives information that a proposed action would adversely affect any EFH, "the Secretary shall recommend to such agency measures that can be taken by such agency to conserve such habitat." 16 U.S.C. § 1855(b)(4)(A) (emphasis added). Consistent with this statutory provision, the regulation cited by Petitioners explicitly provide that "NMFS will not recommend that state or Federal agencies take actions beyond their statutory authority." 50 C.F.R. § 600.925(a). Here, the NRC disclosed in its EFH Assessment that "EPA has sole jurisdiction over the regulation of water quality with respect to the withdrawal and discharge of waters for nuclear power stations, and that the NRC is prohibited from placing any restrictions or requirements upon the licensees of these facilities with regards to water quality." FSEIS at E-132, citing Tennessee Valley Authority (Yellow Creek Nuclear Plant, Units 1 and 2), ALAB-515, 8 N.R.C. 702, 712-13 (1978). NMFS noted this limitation on NRC's authority in its letter determining not to provide EFH recommendations to the NRC. Id. at E-44. Thus, NMFS's

conclusion of consultation without recommendations was completely consistent with the MSA and NMFS regulations.

Further, whether NMFS acted inappropriately by not making EFH conservation recommendations, or suggesting that it "potentially" would make such recommendations during the NPDES permit renewal process, is a question outside the Commission's jurisdiction. The Commission has long held that that the scope of a licensing proceeding does not include litigating issues that are the primary responsibility of other agencies. Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-16, 48 N.R.C. 119, 121-22 (1998). Just as Congress gave the Commission "no roving mandate to determine other agencies' permit authority," id. at 121, the Commission has no jurisdiction to question the NMFS determination that it would provide no conservation recommendations. Moreover, NMFS's decision not to provide recommendations to the NRC is immaterial (i.e., has no potential affect on the outcome of this proceeding) because under Section 511(c)(2) of the Clean Water Act, the NRC has no authority to review any requirement or limitation imposed under the Clean Water Act. 33 U.S.C. § 1371(c)(2). See Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), CLI-07-16, 65 N.R.C. 371, 386-87 (2007). Demanding that NMFS provide conservation recommendations would therefore be pointless because the NRC has no authority to direct any changes in the manner in which the intake system approved under Section 316(b) of the Clean Water Act is designed and operated, or to impose any additional limitations on effluent.

For all of these reasons, Petitioners therefore cannot show that their MSA claims would likely result in a materially different outcome in this proceeding.

3. River Herring

Petitioners' claims with respect to river herring also have no likelihood of affecting the result of this proceeding. The NRC simply is not obligated to take any action under ESA Section 7 with respect to river herring. As Petitioners acknowledge, river herring is listed as a "candidate" species under the ESA. E.g., Petition at 9. The ESA does not require that the NRC conduct BAs on, or consult with NMFS with respect to, candidate species. These requirements apply only to "endangered" or "threatened" species. 16 U.S.C. §§ 1536(a), (c). Indeed, when promulgating its regulations implementing the ESA, NMFS/FWS explicitly stated that "[c]andidate species have no legal status and are accorded no legal protection under the Act, and thus the Federal agency need not include them in a biological assessment." 51 Fed. Reg. at 19,946. Petitioners have pointed to no authority requiring the NRC to conduct a BA on, or otherwise consult with NMFS with respect to, river herring under ESA Section 7.

Petitioners also note that river herring could be listed as threatened or endangered by August. Petition at 9. But, such listing might not occur. Thus, this concern is not ripe. NEPA does not obligate the Commission to consider unripe issues. The Commission recently held in this proceeding that "NEPA requires that [it] conduct [its] environmental review with the best information available now" and "does not . . . require that [it] wait until inchoate information matures into something that later might affect [its] review. Pilgrim, CLI-12-06 at 32 (emphasis added) (citing Supreme Court and other federal precedent). Accordingly, the possibility that river herring may be listed as endangered or threatened in the future does not result in any present NRC NEPA obligation.

Moreover, as previously discussed, Petitioners nowhere challenge the substantial discussion of impacts to river herring addressed in the Pilgrim FSEIS. FSEIS at 2-34 – 2-35, A-

80. Such failure to challenge existing analyses precludes any demonstration of the likelihood of success on the merits. Pilgrim, CLI-12-06 at 27.

For all of these reasons, Petitioners have failed to show that their claims with respect to river herring would likely result in any materially different outcome.

4. Claims Regarding the FSEIS

Finally, Petitioners' claim that FSEIS was defective because it was issued before the ESA and EHF consultations and assessments were complete is simply wrong as a matter of law. As Petitioners' acknowledge (Petition at 15), the governing statute does not require that the BA prepared by the NRC to support its ESA Section 7 obligations be reflected in the Pilgrim FSEIS. Rather, the statute prescribes that "[s]uch assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969." 16 U.S.C. § 1536(c)(1) (emphasis added). NMFS/FWS regulations provide the same leeway. 50 C.F.R. § 402.06(a) ("[c]onsultation, conference, and biological assessment procedures under section 7 may be consolidated with interagency cooperation procedures required by other statutes, such as the National Environmental Policy Act (NEPA) . . . .) (emphasis added). Thus, even if Petitioners' concerns with respect to the ESA Section 7 consultation process were valid, Petitioners have failed to demonstrate the existence of any requirement that such concerns be addressed in the Pilgrim FSEIS.

Likewise, with respect to EFH Assessments conducted under the MSA, "Federal agencies may incorporate an EFH Assessment into documents prepared for other purposes such as Endangered Species Act (ESA) Biological Assessments pursuant to 50 CFR part 402 or National Environmental Policy Act (NEPA) documents and public notices pursuant to 40 CFR part 1500."

50 C.F.R. § 600.920(e) (emphasis added). That the NMFS makes such incorporation permissive means that it is not mandatory.

Petitioners' claims with respect to supplementing the FSEIS are not likely to succeed for an additional reason. Supplementation of environmental documents is required only upon a demonstration of both new and significant information. Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 373-74 (1989). See also Pilgrim, CLI-12-03 at 9 n.42 (finding that even if purported new information was "truly new," petitioner failed to demonstrate the significance of the information). For information to be significant information, it must "paint a 'seriously different picture of the environmental landscape.'" PFS, CLI-06-03, 63 N.R.C. at 28-29 (emphasis in original). For the reasons previously set forth in this Answer, Petitioners have raised no new and significant information that would require supplementing the Pilgrim FSEIS. None of the claims concerning the ESA Section 7 consultation, the EFH Assessment, river herring, or Atlantic sturgeon is either new or significant. Petitioners have identified no issue that is not already appropriately addressed in the Pilgrim FSEIS.

Petitioners have thus failed to show that supplementation of the FSEIS would be, or would have been, likely had their claims been considered initially.

V. The Petition Fails to Meet the Late-filed Contention Standards

The Petitioners' belated contention should not be admitted because Petitioners have shown no good cause for their extreme tardiness, and a balancing of the remaining factors in 10 C.F.R. § 2.309(c) does not outweigh this failure.

To demonstrate good cause, the first and most important late-filed factor, Petitioners must establish that the information on which their Contention is based is new information not already in the public domain that could not have been presented earlier. Comanche Peak, CLI-92-12, 36

N.R.C. at 69-73; Millstone, CLI-09-5, 69 N.R.C. at 126. Petitioners have failed to demonstrate good cause under Section 2.309(c)(1) for the same reasons that their Contention is untimely under Section 2.326(a) and 2.309(f)(2), discussed supra. All of Petitioners' claims could have been raised months, if not years, ago.

Having failed to show good cause, the demonstration regarding the other factors must be "compelling" in order to justify admitting the Contentions. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 N.R.C. 551, 565 (2005); Comanche Peak, CLI-92-12, 36 N.R.C. at 73. In balancing the remaining late-filed contention factors, the Commission grants considerable weight to factors seven and eight.

> We regard as highly important the intervenor's ability to contribute to the development of a sound record on a particular contention. We also are giving significant weight to the potential delay, if any, which might ensue from admitting a particular contention.

Consumers Power Co. (Midland Plant, Units 1 and 2) LBP-82-63, 16 N.R.C. 571, 577 (1982) (citations omitted), citing South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 N.R.C. 881, 895 (1981); see also Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 N.R.C. 241, 246-47 (1986). Petitioners cannot make a compelling showing on the remaining factors because factors seven and eight heavily weigh against admitting the Contention.

Factor seven, the extent to which admission of the Contention will broaden the issues or delay the proceeding, weighs heavily against admitting the Contention. All admitted contentions have been resolved, and the proceeding before the licensing board has been terminated. The Commission has made clear that "the introduction of a new contention, well after the contested proceeding closed, would broaden the issues and delay the proceeding." Vogtle, CLI-11-08 at 18. Where, as here, the proceeding has been ongoing for over six years, the NRC's Staff's view

has long since been complete, all issues before the Board have been resolved, and there is less than three months before the expiration of the Pilgrim license, there can be no question that admission of the Contention would broaden the issues and delay the proceeding.

Factor eight, the ability to contribute to a sound record, also weighs heavily against admitting the Contention. As explained throughout this Answer, neither Petitioners nor their affiants provide any information, let alone significant information, demonstrating the existence of any significant environmental issue warranting supplementation of the Pilgrim FSEIS. Further, Entergy has demonstrated that no materially different result would be likely were the Petitioners' claims considered. Petitioners have thus failed to demonstrate any ability to contribute to a sound record.

Thus, factors one (good cause), seven (broaden and delay proceeding), and eight (contribution to a sound record) – the three most significant factors – count heavily against Petitioners. The other factors in 10 C.F.R. § 2.309(c)(1) are less important (see, e.g., Pacific Gas & Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-1, 67 N.R.C. 1, 6 (2008); Comanche Peak, CLI-93-4, 37 N.R.C. at 165), and therefore cannot outweigh Petitioners' failure to demonstrate good cause or meet factors seven and eight.

VI. The Petition Fails to Meet the Standards for an Admissible Contention

Even if Petitioners had met the standards for reopening a closed record and the standards for a late contention (which they have not), their contention would still be inadmissible because it does not satisfy the pleading requirements in 10 C.F.R. § 2.309(f)(1). Petitioners are still required to demonstrate that its contention satisfies the admissibility standards in 10 C.F.R. § 2.309(f)(1)(i)-(vi). Sacramento Municipal Utility District (Rancho Seco Nuclear Generating

Station), CLI-93-12, 37 N.R.C. 355, 362-63 (1993). Petitioners' Contention does not meet these standards.

Many of the issues that Petitioners seek to raise are not material to the finding the NRC must make. 10 C.F.R. §§ 2.309(f)(1)(iv). As previously discussed in this Answer, these issues include:

- Petitioners' complaint that the ESA Section 7 consultation process is not complete because NMFS has not yet concurred in writing with the NRC's 2006 BA. E.g., Petition at 27, 30. This complaint is not material to this proceeding because (1) no consultation is required where, as here, the NRC has determined that the proposed action will have no effect on threatened or endangered species; (2) written concurrence from NMFS is not required to meet the consultation requirement set forth in the statute; and (3) there is no statutory requirement that the Pilgrim FSEIS reflect any BA prepared by the NRC to support its ESA Section 7 obligations.

- Petitioners' complaint that NMFS's determination that it would not provide EFH conservation recommendations on the 2006 NRC EFH Assessment. E.g., Petition at 28-29, Supplement at 5-6. This complaint is not material because NMFS has no obligation under the MSA or its regulations to provide recommendations that are beyond NRC's statutory authority to implement. Further, this complaint is outside the scope of this proceeding because the NRC has no jurisdiction to look behind NMFS's determination.

- Petitioners' complaint that the NRC has not addressed the fact that river herring has been listed as a "candidate species" under ESA Section 7. E.g., Petition at 28. This complaint is not material to the findings that the NRC must make because the "[c]andidate species

have no legal status and are accorded no legal protection under" ESA Section 7. 51 Fed. Reg. at 19,946.

Petitioners' Contention is also inadmissible because it is not supported by sufficient information to show that a genuine dispute exists on a material issue of law or fact, as required by 10 C.F.R. § 2.309(f)(1)(vi). Under the NRC's Rules of Practice, "a protestant does not become entitled to an evidentiary hearing merely on request, or on a bald or conclusory allegation that such a dispute exists. The protestant must make a minimal showing that material facts are in dispute, thereby demonstrating that an 'inquiry in depth' is appropriate." Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989) (quoting Conn. Bankers Ass'n v. Bd. of Governors, 627 F.2d 245, 251 (D.C. Cir. 1980)). Petitioners make numerous assertions that fall far short of this strict standard:

- Petitioners assert that the NRC's 2006 BA and the 2012 BA lack "scientific credibility" and were unsupported by "scientific evidence," Petition at 20, 21, 31, and otherwise assert that the 2006 BA and 2012 BA are flawed without written concurrence from NMFS. E.g., Petition at 24, 30, 31. But Petitioners fail to provide adequate support for these assertions. With respect to the 2006 BA, Petitioners nowhere show that the NRC failed to sufficiently analyze potential impacts to any threatened or endangered species within the vicinity of Pilgrim, or that any threatened or endangered species would be adversely affected by continued operation of Pilgrim. Petitioners therefore fail to raise any genuine dispute with the 2006 BA. With respect to the 2012 BA, Petitioners nowhere show that the NRC failed to sufficiently analyze potential impacts on Atlantic

sturgeon, or that any Atlantic sturgeon would be adversely affected by continued operation of Pilgrim.

- Petitioners assert that the NRC failed to appropriately assess impacts to river herring, which NMFS has identified as a candidate species. E.g., Petition at 5, 31. To the contrary, the NRC Staff is not required to perform a BA on river herring. Petitioners also assert that the impingement of river herring has not been addressed in the Pilgrim FSEIS. Mansfield Affidavit at ¶ 25. This is not true, as even a cursory review of the relevant sections of the FSEIS reveals. FSEIS at 2-34, A-79 – A-80 (the alewife and blueback herring commonly referred to as "river herring" are "commonly impinged species at PNPS"). Petitioners thus fail to raise a genuine dispute with information in the FSEIS here.

- Petitioners assert that the MSA consultation was unlawful because the NRC purportedly deferred the EFH consultation to the NPDES permit renewal process. Petition at 32. This assertion is demonstrably false. The NRC Staff determined that, "within the overall Cape Cod Bay ecosystem, the staff has determined that continued operation of the PNPS cooling water system would have a minimal adverse effect on EFH." FSEIS at E-135. NMFS determined that it would not provide EFH conservation recommendations on Pilgrim's license renewal. FSEIS at E-44. NMFS also stated that would "potentially" provide EFH conservation recommendations during the NPDES permit renewal process. Petitioners' mischaracterization of the EFH Assessment consultation does not raise any genuine dispute on a material issue.

VII. Conclusion

For the reasons set forth above, the Commission should reject Petitioners' intervention request, motion to reopen, and hearing request on this profoundly late and meritless contention.

Respectfully Submitted,

/signed electronically by David R. Lewis/

_____

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Dated: March 19, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of	)	
	)	
Entergy Nuclear Generation Company and	)	Docket No. 50-293-LR
Entergy Nuclear Operations, Inc.	)	ASLBP No. 06-848-02-LR
	)	
(Pilgrim Nuclear Power Station)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of Entergy's Answer Opposing Jones River Watershed Association's and Pilgrim Watch's Motion to Reopen and Hearing Request, dated March 19, 2012, was provided to the Electronic Information Exchange for service on the individuals below, this 19th day of March, 2012.

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