UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE NUCLEAR REGULATORY COMMISSION

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

JONES RIVER WATERSHED ASSOCIATION AND PILGRIM WATCH REPLY TO ANSWERS OF NRC STAFF AND ENTERGY TO JONES RIVER WATERSHED ASSOCIATION PETITIONS TO INTERVENE AND FOR HEARING UNDER 10 C.F.R. § 2.309

Filed March 26, 2012

This is the reply of Petitioners Jones River Watershed Association, Inc. (JRWA) and Pilgrim Watch (PW) to the March 19, 2012 answers of NRC Staff and Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (Entergy) to Petitioners March 8 and 15, 2012 motions under 10 C.F.R. § 2.309(a) to intervene and/or file new contentions.[1]

The legal construction of the Endangered Species Act, 16 U.S.C. § 1531 *et seq*. (ESA) and implementing regulations at 50 C.F.R. § 402.01 *et seq.,* advanced by Entergy and NRC Staff (Respondents) would require this decision-making body to ignore the ESA's unambiguous provisions and undo thirty-four years of precedent, starting with Tennessee Valley Authority v. Hill, 437 U.S. 154, 173 (1978) in 1978. Respondents cite no legal authority for their novel theory

[1] Jones River Watershed Association Petitions for Leave to Intervene and File New Contentions under 10 CFR § 2.309(a), (d) or in the alternative 10 CFR§ 2.309(e) and Jones River Watershed Association and Pilgrim Watch Motion to Reopen under 10 CFR § 2.326 and Request for a Hearing under 10 CFR §2.309(a) and (d).

that would eviscerate the provisions of § 7(a)(1)-(3) and § 7(c), and allow the NRC Staff to unilaterally make the "not likely to jeopardize" finding mandated by § 7(a)(2).

The superficial and unsupported affidavit of Michael D. Scherer (Scherer Affidavit) similarly gains the Respondents nothing. Petitioners submit a second affidavit from Alex Mansfield to show some of the defects in the Scherer Affidavit. The Respondents' answers to Petitioners' Magnuson-Stevens Fishery Conservation and Management Act of 1976, 16 U.S.C.S. §§1801 *et seq.* (MSA), since they cite no authority to support their positions. The NRC staff cannot excuse itself from its duties under National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.* as the NRC Staff argues.

The Petitioners further confirm in this filing that they have made the requisite showings under 10 C.F.R. §§ 2.326 and 2.309.

I. Written Concurrence from NMFS on the 2006 BA and the 2012 Supplemental BA is Prerequisite to PNPS Relicensing

Respondents' assertions that the NRC Staff can evade ESA § 7 consultation and unilaterally make the "jeopardy" finding by preparing a biological assessment that declares PNPS relicensing "would not have any adverse impact on threatened or endangered marine aquatic species"[2] flies in the face of settled laws. In Tennessee Valley Authority v. Hill, 437 U.S. 154, 173 (1978), the leading ESA case, the U.S. Supreme Court stated,

> One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies "to *insure* that actions *authorized, funded*, or *carried out* by them do not *jeopardize* the continued existence" of an endangered species or *"result* in the destruction or modification of habitat of such species . . . ." 16 U. S. C. § 1536 (1976 ed.). (Emphasis added.) This language admits of no exception.

[2] 2006 BA at § 6 (PNPS "would not have any adverse impact"); 2012 BA at p. 3 (no effect on Atlantic sturgeon) Entergy and the NRC claim that the 2006 BA reaches a conclusion on critical habitat. It does not. See, 2006 BA, § 6.

> …As it was finally passed, the Endangered Species Act of 1973 represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation. Its stated purposes were "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved," and "to provide a program for the conservation of such . . . species . . . ." .In furtherance of these goals, Congress expressly stated in § 2 (c) that "all Federal departments and agencies *shall* seek *to conserve endangered species* and threatened species . . . ." Lest there be any ambiguity as to the meaning of this statutory directive, the Act specifically defined "conserve" as meaning "to use and the use of *all methods and procedures which are necessary* to bring *any endangered species* or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." Aside from § 7, other provisions indicated the seriousness with which Congress viewed this issue: Virtually all dealings with endangered species, including taking, possession, transportation, and sale, were prohibited, except in extremely narrow circumstances…The Secretary was also given extensive power to develop regulations and programs for the preservation of endangered and threatened species." (Citations and brackets omitted)

Cited in, *e.g.* Pacific Coast Federation of Fishermen's Associations v. U.S. Bureau of Reclamation, 138 F. Supp 2d 1228, 1240 (N.D.Calif. 2001); Heartwood, Inc. v. Agpaoa, 611 F.Supp. 2d 675, 682 (E. Dist. Kent. 2009).

The ESA consultation requirements relevant to this proceeding arise from ESA § 7(a)(2), (3), and (4) (federal agencies shall, in consultation with the Secretary of the Interior, insure that any action authorized by such agency is "not likely to jeopardize" species or habitat, § 7(a)(2); subject to "such guidelines as the Secretary may establish each agency shall consult" if a species "may be present" and the project "will likely affect such species,"§7(a)(3); and where the agency action "is likely to jeopardize the continued existence" of the species or habitat it "shall confer"§7(a)(4). To facilitate compliance with the ESA § 7(a)(2) provisions requiring a "not likely to jeopardize" finding, Congress established the "biological assessment" provisions of §7(c). If NOAA advises the action agency that proposed or listed species "may be present," the action agency "shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by the action." The

biological assessment is to "facilitate compliance with §7(a)(2)," which in turn requires the action agency, "in consultation with" the Secretary to make the "not likely to jeopardize" finding.

The ESA 50 C.F.R. 402.01 *et seq*., implement § 7(a)-(d) by setting out several forms of "consultation," whether or not a biological assessment is required: conference, informal consultation, and formal consultation. The Wilderness Society et al. v. Wisely. 524 F. Supp. 1285, 1298 (D.Colo. 2007)(the regulations contemplate several means of conferring; if both agencies agree that no adverse effects are likely, the consultation process is terminated). A long line of cases establishes that where a biological assessment concludes, as does the NRC Staff in the 2006 BA (species have a "reasonable potential to occur" and "may be affected) and the 2012 BA ("Atlantic sturgeon **in the vicinity** of Pilgrim are part of the Gulf of Maine distinct population segment, which is listed as threatened.")[3] The NMFS must issue a "written concurrence" -- whether as part of a conference, or informal, or formal consultation. The process is not complete until one form of consultation has been completed in writing. See also, Center for Native Ecosystems v. Cables, 509 F.3d 1310, 1321 (10th Cir. 2007) (agency may forgo formal consultation if it engages in informal consultation and determines, "with the written concurrence" of the Service, that even if the action agency concludes that although the proposed action **may affect** species or habitat, it is not likely to "adversely affect" the species or habitat."); Waterkeeper Alliance v. U.S. Dep't of Defense, 271 F. 3d 21, 25 (1st Cir. 2001) (Service must issue written concurrence after informal consultation under 402.14(b)); Heartwood, Inc. v.

[3] The 2006 BA states that endangered and threatened species "have a reasonable potential to occur in the vicinity of PNPS, and, therefore **may be affected** by continuing operations of PNPS" but "would not have any adverse impact on any threatened or endangered marine aquatic species," BA § 6.0, p. E-73. The February 29, 2012 supplemental BA concludes that Atlantic sturgeon "are expected to occur in Cape Cod occasionally during migration, but the available literature does not indicate that they are common to the Plymouth area near Pilgrim…the proposed license renewal of Pilgrim will have **no effect** on the Atlantic sturgeon." February 29, 2012 letter from NRC to NMFS.

Agpaoa, 611 F. Supp. 2d 675 (E. D.Ky. 2009); Fund for Animals v. Norton, 365 F. Supp. 2d 394, 427 (S.D. N.Y. 2005), aff'd Fund for Wild Animals v. Kempthorne, 2008 U.S. App. LEXIS 172 (2d Cir. 2008); City of Sausulito v. Brian O'Neill, 211 F. Supp. 2d 1175 (N.D. Calif. 2002).

Entergy and the NRC make the unique argument that even though the NRC Staff concluded in the 2006 BA that endangered or threatened species "may be affected" and the Atlantic sturgeon "may be present", warranting biological assessments under §7(c), the agency can entirely sidestep ESA§ 7(a)-(d) by unilaterally determining that there are no "adverse" effects, or in the case of the Atlantic sturgeon, "no effects." 2006 BA § 6; 2012 Supplemental BA, p. 3.

Entergy sums up its' position: "no consultation is required, where as here, **the NRC has determined** that the proposed action will have no effect…[and] written concurrence is not required to meet the consultation requirement set forth in the statute. (Emphasis supplied) Entergy answer, p. 43. The plain language of the ESA, NOAA regulations, and NMFS and NRC policy guidelines cited in Petitioners' motions, pp. 6-11, as well as case law, establish the falsity of this position: a biological assessment was required, as the NRC admits, and requires written concurrence by NMFS under any "consultation" route that the NRC Staff might now, *post hoc*, have decided that it engaged in (conference, informal, or formal consultation).

The law is clear that once it is determined that species "may be present" and "may be affected" the NRC cannot **unilaterally** decide that PNPS operations will not affect them. Washington Toxics Coalition et al. v. U.S. Dept. of Interior et al**,** 457 F. Supp. 2d 1158, 1179-1180 (W.Dist Wa.) ("…the Court cannot conclude that the plain meaning of "consultation" contemplates the joint creation of a process by which action agencies may *unilaterally* make the

critical section 7(a)(2) determination" (emphasis supplied)… Nor can an agency define "consultation" under the ESA in a way that means no consultation at all.) Id. Without a shred of authority, this is what Entergy and the NRC Staff advocate: unilateral decision-making without written concurrence– or in the case of Entergy, no decision-making at all. The clear purpose of the ESA, forcefully and consistently affirmed in case law, is to bring the expertise of NOAA's Services (FWS and NMFS) to bear when an action agency identifies that ESA species or habitat "may be affected." This process is required to ascertain, using NMFS's specialized expertise, whether this "affect" is or is not likely to "jeopardize" the ESA species or habitat. § 7(a)(2).

NRC Staff argues illogically that even though the 2006 BA and Supplemental BA found that PNPS relicensing "may affect" listed species, BA § 6, and Supplemental at p. 3, it is "excused" from ESA consultation provisions under § 7(a)(1)-(3). An action agency, cannot "excuse" itself from the requirements of the ESA. Connor v. Burford, 848 F.2d 1441, 1455 (9th Cir. 1988).

The one case Entergy cites in support of its self-serving interpretation of the ESA is manifestly distinguishable, as clarified in a later decision from the same circuit. Ctr. For Biological Diversity v. Dep't of Interior, 563 F.3d 666 (D.C. Cir.2009). Entergy answer at p. 4, See Sierra Club v. Antwerp, 719 F. Supp. 2d 58, 74 (D.C.C. 2010); aff'd in part and rev'd in part by, Sierra Club v. Van Antwerp, 2011 U.S. App. LEXIS 23736 (D.C. Cir. 2011) ("If the agency determines that an action "may affect" ESA species, it must initiate formal consultation at least unless preparation of a biological assessment or participation in informal consultation indicates that a proposed action is "not likely" to have an adverse affect," citing 50 C.F.R. § 402.14(a)-(b), as always requiring written "concurrence". Moreover, none of the cases Entergy cites in footnote 37, p. 32 of its answer stands for the proposition that where, as here, the ESA-

species are both present in the vicinity and "may be affected," (2006 BA § 6) no written concurrence is needed. Entergy is simply wrong when it says, p. 32, that the NRC Staff has not determined that any species or habitat "may be affected." Entergy answer, p. 32. The 2006 BA, § 6, states that ten species "have a reasonable potential to occur in the vicinity of PNSA, and, therefore may be affected by continuing operations of PNPS." Entergy further argues for a "waiver" of written ESA concurrence should it be determined necessary. It cites, however, no legal basis for this claim. Based upon the record, it cannot be doubted that Entergy knew or should have known about the incomplete information relating to the ESA consultation process. Yet it remained silent. Entergy's silence almost won it a free pass on the ESA – a significant failing in light of the stated importance of ESA review under TVA and its progeny. See, 10 C.F.R. § 2.326(a).

Entergy goes so far as to assert that that no BA is required. Entergy answer, footnote 5, p. 4. The requirement for a biological assessment is clearly stated in §7(c) and the NRC Staff disagree with Entergy and completed two biological assessments. Entergy's position is absurdly removed from settled law and statutory language. See, Citizens for Better Forestry v. Jopple, 481 F.Supp. 2d 1059, 1091-1092 (N.D.Calif. 2007) ("any time FWS or NMFS concludes that endangered or threatened species 'may be present' in the area of the proposed agency action the ESA requires it to prepare a biological assessment to determine whether the proposed action 'is likely to affect' the species," and "[t]here is no dispute that the agency is required to engage in some type of consultation - even if no BA is required - if the proposed action, while not a "major construction activity," "may affect" endangered or threatened species and their habitat.") Entergy cherry-picks a portion of 51 CFR § 402.12(b) that relates to construction activities by federal agencies which is clearly inapposite to these circumstances.

In sum, the unique position advanced by Entergy and the NRC Staff would require the deciding body here to rewrite the ESA and implementing regulations. For that, it lacks authority.

II. Petitioners' showing that the 2006 BA is substantively defective creates a genuine dispute and is based on sufficient facts.

The NRC Staff argues that it "complied with the ESA" and therefore the Petitioners do not raise an admissible issue. NRC Staff answer, 6-15; Entergy makes similar arguments. Entergy answer 14-42. They base their arguments on a procedural point: (whether a BA, consultation, and/or written concurrence are needed) and a substantive argument that Petitioners failed to make an adequate showing that the 2006 BA is defective. Petitioners bear no such burden:"[I]t is not the responsibility of the plaintiffs to prove nor the function of the courts to judge, the effect of a proposed action on endangered species *when proper procedures have not been followed*") (emphasis added) Citizens for Better Forestry, supra at 1095.

Petitioners have shown that proper ESA consultation procedures were not followed here, and the inquiry should end there for purposes of determining violations of the ESA, MSA and NEPA. They submitted the DuBois and Mansfield Affidavits to show that they have met the standards for 10 C.F.R. 2.309 and 10 C.F.R. 2.326 for a hearing and reopening. Petitioners' Motions Parts II-IV, and table, below. Nonetheless, Petitioners respond here to some of the substantive issues.

The 2006 BA and the Supplemental BA, and the Scherer affidavit must be viewed in light of relevant ESA definitions. In order to ensure that the federal action is "not likely to jeopardize" the species or habitat, § 7(a)(2), the biological assessment, which is done to "facilitate compliance with § 7(a)(2)", must accurately portray the "action area", the "cumulative

effects" and the "destruction or adverse modification" as those terms are defined in 50 C.F.R. 402.101. § 7(c)(1). The definitions are:

> Action area" means all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.
>
> *Cumulative effects* are those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.
>
> *Destruction or adverse modification* means a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.
>
> *Effects of the action* refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration.

50 C.F.R. § 402.02

The NRC Staff's 2006 BA for 10 ESA species relies on a series of "Fact Sheets" and "Summary" documents from NOAA on endangered species, Entergy's 1975 Clean Water Act, §316 Demonstration Report and NRC relicensing application, two Entergy studies, and several generic "surveys" about the distribution of ESA species. The Fact Sheets and "Summary" are grade school science level thumbnail descriptions of the 10 species and the critical habitat at issue here. Neither Entergy's documents nor the other "studies" are the type of data necessary to assess the "cumulative effects," the extent of the "destruction or modification" or the "effects of

the action" on the integrated Cape Cod Bay ecosystem as required by NMFS regulations. Without this information, the 2006 BA does not begin to meet the action agency's obligation to ensure that PNPS relicensing is "not likely to jeopardize" the species and habitat. § 7(a)(2).

The Scherer affidavit similarly consists of primarily a literature survey and factual reorganizations intended to refute the Mansfield Affidavit. All of the conclusions in the Scherer Affidavit are completely undermined by the fact that he fails to address the totality of "effects of the action" as defined by § 402.02. Instead, his analysis is primarily limited to whether or not species are impinged in the cooling water intake structure (CWIS). He fails to include an analysis of PNPS thermal *discharges* on the migratory patterns, feeding, foraging, or reproductive patterns of endangered species. Mansfield Affidavit ¶ 17. For example, Scherer bases his conclusions of "no effects" on endangered species on his statements such as: Atlantic sturgeon "would be able to overcome the CWIS" ¶¶s 27, 28, and PNPS will have "no effect" on endangered sea turtles because they have never been impinged in the CWIS, or found in intake channel, ¶¶s 36, 37, 41,42, 45-47. Another example of Scherer's limited analysis is shown by his failure to address historical and future *entrainment* of sand lance, a food stock for humpback and fin whales. Scherer makes conclusions about "relatively low numbers" of schooling fish, such as sand lance, *impinged* by PNPS concluding that PNPS "is not reasonably expected to have a discernible indirect effect" on endangered whales. See, ¶ 59, 63, 66, 70. This is a subjective statement, with no reference to the direct and indirect or past and present impacts of 40 years of impingement at PNPS. As to sand lance, the PNPS EIS states that, "Sand lance is an important prey species for many demersal fish species and the endangered fin whale [] and humpback whale[]….*Larvae* of the Atlantic sand lance are frequently observed in the PNPS *entrainment* sampling and are periodically observed in the impingement sampling…*Eggs and larvae* have

been collected in the PNPS *entrainment* sampling..." PNPS EIS p. 2-49. (Emphasis supplied) Scherer does not address the direct and indirect or past and present impacts of PNPS *entrainment* of eggs and larvae on the sand lance as a food supply for endangered whales, and the cumulative impact of Entergy's 40 year history of entraining these eggs and larvae or the future impact on sand lance populations from another 20 years of continuing to destroy sand lance eggs.

The Scherer conclusions on river herring also uses a subjective statement that the fish kills from impingement are "minimal." Scherer Affidavit ¶ 73. As shown in the second Mansfield Affidavit, ¶s 14, 15, submitted with this reply, it is equally conceivable that the PNPS impingement rates of river herring could be considered more than "minimal", and that Scherer's methodology is based on circular logic in any event, because he compares overall mortality and survival rates against only one mortality source (PNPS) that is included in the overall rate. Scherer also fails to include the fact that there is a moratorium on catching or killing river herring in Massachusetts. Mansfield Aff. ¶ 16

Further, Scherer in ¶ 51 relies on "SPUE" data to show that North Atlantic right whales "are not typically present in the vicinity of PNPS." The NOAA regulations define "action area" as "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." The Scherer affidavit only serves to prove Petitioners' original observation that the 2006 BA is defective on its face for limiting its assessment to the "vicinity" of PNPS. National Wildlife Federation v. National Marine Fisheries Service, 254 F. Supp. 2d 1196 (D. Ore. 2003) (the area defined as the "action area" was unlawful). Scherer's' affidavit is likewise defective. See also, second Mansfield Aff. ¶ 12-13.

In ¶50, Scherer twists the data, saying the Northern Right Whales "would not typically be expected to feed in the vicinity of PNPS." This sweeping and undocumented assertion is

contradicted by the fact that these whales are regularly spotted in the "critical area" defined by Entergy's own survey. Second Mansfield Aff. ¶ 12-13.

Entergy asserts that Petitioners do not "provide any evidence indicating that license renewal will result in the destruction or adverse modification" of Northern Right Whale critical habitat, and that the 2006 BA's conclusions "imply" that critical habitat will not be adversely modified or destroyed. Entergy answer, p. 22. ESA compliance cannot be established by mere "implications" allegedly contained in a biological assessment. See, cases cited *supra*. Entergy's entire answer is predicated on the inaccurate assumption that merely counting the numbers of species killed in impingement and entrainment concludes a full analysis of the "effects of the action" as defined by 50 C.F.R. § 402.02. For example, although the 2006 BA states that "habitat degradation, contamination, and climate and ecosystem change" are possible threats to the Northern Right Whale, p. E-70,no where does the BA address these "effects of the action" or the cumulative impacts of Entergy's operations. This is only one example of the defects in the 2006 BA that raise a genuine issue.

As the court stated in Gifford Pinochet Task Force v. U.S. Fish and Wildlife Service, 378 F.3d 1059, 1066 remanded on other grounds, 387 F. 3d 968 (9th Cir. 2004), the type of analysis needed to ensure that the agency action is "not likely to jeopardize" is more than just a "simplistic x number acres = y number of [species] type of equation." But this is exactly the type of oversimplified analysis upon which Entergy and the NRC Staff rely. For examples of the types of information courts have found necessary to meet ESA § 7 obligations, see: Hammond v. Norton, 370 F.Supp. 2d 226 (2006 D.C.); Citizens for Better Forestry v. Hanns, 481 F. Supp. 2d 1059 (N.D. Calif. 2007); National Wildlife Federation v. NMFS, 481 F.3d.

1224, (2007), Pacific Coast Federation of Fishermen's Association v. U.S Bureau of Reclamation, 606 F. Supp. 2d 1122 (N.D. Calif. 2001).

The NRC Staff claims that its February 29, 2012 request to NMFS for concurrence on the 2006 BA "at most" constituted "informal consultation." NRC Staff reply at 12. Entergy claims it is just a "summary" of the prior consultation. Entergy reply at p. 17. Neither attempt at distorting the plain language of the February 29, 2012 letter can be successful. The letter states, '[t]he NRC requests your concurrence on the NRC's determination concerning the Atlantic sturgeon as well as the NRC's 2006 biological assessment per 50 CFR 502.12(j).".

Under NOAA regulations, the "informal consultation" to which the NRC staff refers "includes all discussions, correspondence, etc." between the Service and the action agency. Center for Native Ecosystems, *supra* at 1321. Here, there is no such data-merely the 2006 and 2012 biological assessments themselves and the April and June 2006 letters referred to in Petitioners' motion, Part II.A. The NRC Staff has provided no declaration or affidavit to confirm or describe the "informal consultation" it claims to have undertaken with regard to the 2006 BA. Pacific Coast at p. 18. Instead, it contorts explicit requirements in ESA § 7(a) and (c) in a way which directly contradicts the agency's own actions in originally preparing two biological assessments and asking NMFS for its "concurrence" on them.

The flaws in the 2006 BA that Petitioners identify by testimony from qualified persons shows why the written concurrence of NMFS, bringing to bear its expertise, is necessary. NRC Staff, lacking the scientific expertise, working in tandem with industry representatives, should not be able to "unilaterally" make findings under the ESA. The endangered status of the North Atlantic right whale highlights this issue: the right whale population in the western North Atlantic is estimated to number less than 300 individuals. 2206 BA, p. E-69. As the U. S.

Supreme Court has stated, "Lest there be any ambiguity as to the meaning of this statutory directive, the Act specifically defined "conserve" as meaning "to use and the use of *all methods and procedures which are necessary* to bring *any endangered species* or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." Tennessee Valley Authority, supra. The "methods and procedures" to be used in evaluating the effects and any protective measures should be confirmed in writing by NMFS, not left to industry and the NRC Staff who have ignored this issue for 6 years.

III. Respondents' arguments about the requirement for an MSA consultation bear no credibility.

The NRC Staff attempts to side step the MSA EFH consultation provisions by claiming that the NRC "does not have the authority to implement the measures in question." NRC Staff answer at 24; Entergy answer pp. 36-37, relying on the provisions of 50 C.F.R. § 600.925 saying NMFS "will not recommend" that the NRC take actions beyond its authority. Entergy also relies on the word "can" in 16 U.S.C. § 1855(b)(4)(A) (the Secretary "shall" recommend such conservation actions that "can" be undertaken by the action agency). Neither Entergy nor the NRC Staff have shown how the NMFS has or would recommend actions that are beyond the NRC's authority. Moreover, what is within the scope of the NRC's authority is not for NMFS to decide: given the broadly worded language of § 600.925, this interpretation is a matter of convenience intended to evade MSA compliance. In citing to § 600.925, Entergy attempts to diminish and contain an EFH assessment, and delay it indefinitely while it continues to operate in a manner that the NRC staff admits "may affect" EFH.

No law precludes the NRC from directing Entergy to comply with any § 1855(b)(4)(A) recommendations that NMFS may provide if it finds that relicensing PNPS "would adversely

affect an essential fish habitat." Requiring Entergy to comply with NMFS recommendations would not require the NRC to overstep its bounds into EPA's authority under the Clean Water Act: the MSA is a distinct and separate statute that requires a specific consultation under the timeframe set out in § 1855(b)(4)(A). (E.g., 30 days after receiving the recommended conservation measure under § 1855(b)(4)(A), the NRC must respond to NMFS with "a description of measures proposed by the agency for avoiding, mitigating, or offsetting the impact of the activity on such habitat.")

Petitioners agree with Entergy's assertions that the NRC has no jurisdiction to demand that the NMFS provide conservation recommendations under § 1855(b)(4). Here again, Entergy confutes procedural and substantive issues. Petitioners charge that the NRC Staff must follow the procedures of § 305(b) and the regulations, including, if appropriate, § 600.925. Compliance with these procedures assures that the conservation and management of fisheries resources intended by the MSA is achieved. See, 16 U.S.C. § 1801.

IV. Respondents "30 day clock" lacks a legal basis and Petitioners meet the timeliness standards of §2.309(c) and §2.326

As to timeliness for filing a new contention based on new information, the NRC and Entergy admit they are unsure as to when a contention based on new information must be filed; but they try to create a "30-day clock" rule. See, e.g. Entergy answer at p. 15. NRC regulations at 10 C.F.R. Part 2 contain many rules specifying time limits in which certain pleadings must be filed. No rule sets a designated number of days for submitting a late-filed contention. This is consistent with the purpose of the provision, to allow the inclusion of important new information discovered after the proceedings have commenced. "Timely" requires that Petitioners acted reasonably; but not within a specific number of days.

The NRC Staff, p. 34, admits, "Although the Commission's regulations do not define "timeliness," new or amended contentions and motions are generally deemed timely if filed within 30 days of the availability of the new information supporting the answer or amended contention or motion to reopen. These timeliness requirements are not simply a matter of legal rules, but rather practicality." "Practicality" is a watchword for the ultimate fairness of late filings upon the parties to an ongoing proceeding, an equitable concept balancing the propriety and efficiency of including new or newly discovered evidence against the potential prejudice of an expanded record upon existing parties and the efficient administration of justice. Here, the proceedings are not closed, the issues raised by the Petitioners are significant to many federal statutes addressing environmental protection, and Petitioners' filing was made without delay, referencing 2012 occurrences,. Thus, no untoward inequity or delay has burdened the other parties. Moreover, given the newly discovered evidence that existing data was not contained in the 2006 BA, and that conclusion of the ESA and MSA review processes were delayed and sidelined, the equities of this fairness analysis inure in Petitioners' favor.

Entergy says that, "The NRC typically applies a '30-day clock' to the filing of a new contention based on new information." Entergy answer, p. 15. But Entergy argued for a different "clock" in *Entergy's Answer to Pilgrim Watch Request for Hearing on a New Contention Regarding Inadequacy of Environmental Report, Post Fukushima*, December 13, 2011, pg., 14. In that filing Entergy said, "Licensing Boards generally consider approximately 30-60 days as the limit for timely filings based on new information." (Emphasis added) However Entergy's use of the words - "approximately," and "generally," – makes patent that there is no inflexible, calendar limited rule.

Significantly, Entergy again misrepresents the facts in its March 19 Answer p. 15, in stating "The NRC typically applies a '30-day clock' to the filing of a new contention based on new information, and this has been the standard established in this proceeding," citing the December 20, 2006 Order (Establishing Schedule for Proceeding and Addressing Related Matters) at pp. 6-7. That Order specifically provided a Schedule for the already admitted proceeding-the contentions accepted in 2006 and any new contentions based on the preliminary/final SER and SEIS. It was not, and could not be, a schedule for entirely new contentions based on Petitioners' ESA and MSA claims that require consideration under NEPA of the significant environmental factors relating to endangered, threatened and candidate species and essential fish habitat, assertions that were raised before a final decision on Entergy's application is made by NRC.

The NRC Staff, p. 36, acknowledges that "NOAA publicly announced it would list the Atlantic Sturgeon as threatened on January 31, 2012, more than 30 days before the Petitioners filed." Therefore Petitioners filed 37 days after NOAA's announcement, well short of 60 days. Petitioners' March 8 filing was within 7 days of the NRC's February 29, 2012 issuance of the Biological Assessment for Atlantic sturgeon, and the accompanying request to NMFS for concurrence on that BA, and on the 2006 BA. Petitioners acted within a month of learning that the NDPES would not be renewed prior to relicensing, and that there was no ESA and MSA compliance. Bingham Aff.; DuBois Aff. ¶ 23. Thus, as to both their ESA and MSA arguments and hence the underlying NEPA claims, Petitioners have acted in a timely manner.

V. NEPA Requires Consideration of the New, Significant and Material Information Brought Forward By Petitioners

The fundamental purpose of NEPA is to "help public officials make decisions that are based on understanding of environmental consequences, and take decisions that protect, restore and enhance the environment." 40 C.F.R. § 1500.1(c)

NRC cannot excuse itself from its duties as the Staff's response argues; instead, the NRC must ensure that "important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." Robertson v Methow Valley Citizens Council, 490 U.S. 332, 349 (1989). The NRC "ha[s] a duty to take a hard look at the proffered evidence," Marsh v Oregon Natural Resources Council, 490 U.S. 360, 385 (1989), before relicensing.

Before Pilgrim is relicensed, Entergy is required by 10 C.F.R. § 51 to provide an analysis of environmental impacts, even if their probability of occurrence is low. 40 C.F.R. §1502.22(b)(1). To satisfy NEPA, a potential impact must be considered even if, as Entergy and NRC staff argue, without factual basis,, any negative impacts are "not likely" or ultimately non-existent. The NRC cannot unilaterally be the decision-maker without written concurrence from NMFS under the ESA and the consultation required by the MSA. The likelihood of an impact also must be considered even it is not easily quantifiable. NRC regulations require that "to the extent that there are important qualitative considerations or factors that cannot be quantified, these considerations or factors will be discussed in qualitative terms." 10 C.F.R. §51.71.

The indisputable fact is that the PNPS EIS fails to include the written concurrence of NMFS in the 2006 BA. The 2006 BA does not include the 2012 supplemental BA and any future concurrence. There is no dispute that the EFH consultation process has not been concluded, it has been postponed indefinitely pending a decision by U.S. EPA to act on a 16-year

old NPDES permit that expired in 1994; a decision which will not be concluded for at least one year. Bingham Affidavit.

All of this information, and that included in Petitioners' affidavits, are central to weighing the environmental effects of PNPS under NEPA. As the Supreme Court said in *Marsh*, it would be incongruous with NEPA's "action-forcing" purpose to allow an agency to put on "blinders to adverse environmental effects," just because some previous, and inadequate, EIS been completed. *Id.*

The NRC would simply have to do what it is required to do. Davis v. Coleman, 521 F.2d 661, 671 (9th Cir. 1975) ("Compliance with NEPA is a primary duty of every federal agency; fulfillment of this vital responsibility should not depend on the vigilance and limited resources of environmental plaintiffs").

Moreover, the U.S. Supreme Court has made it clear that an agency's NEPA obligations to consider new and significant environmental information continues until the time the action is taken. Marsh v Oregon Natural Resources Council, 490 U.S. 360, 372, (1989).

VI. Respondents' Arguments on Factor Seven, § 2.309 (c)(vii), that Petitioners' Participation Will Broaden the Issues and Delay the Proceeding, are Irrelevant

Entergy and NRC wrongly argue that adding a new contention will delay and broaden the proceeding significantly. Entergy answer, pp. 35-37; NRC Staff answer, pp. 9, 37-38. The NRC Staff, p. 9, incorrectly argues "there is no reason to delay the license renewal proceeding to complete a process **the agency never had an obligation to start**." (Emphasis supplied). Respondents are wrong because the NRC is required to "undertake the assessments and make the determinations required…and supplement and revise the PNPS EIS." NRC p. 38, referencing

Petitioner's at p. 51. The NRC attempts to skirt this responsibility by saying that "[T]he Commission already rejected a request for suspension of this proceeding noting that further delay 'would undermine fair and efficient decision-making." (Citing CLI-12-06) The question becomes, fair to whom? The ASLB and Commission have not looked at this issue before. Until the facts are presented and all parties have completed their evaluations, the NRC cannot claim that a fair and hard look has occurred.

Moreover, this "delay and burden" factor includes only that delay which can be attributed directly to the tardiness of the petition. Jamesport, ALAB-292, 2 NRC at 631; South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-81-11, 13 NRC 420, 425 (1981). Here, there is nothing "tardy" about Petitioners' request for a hearing on its contention. It is based on information that became public only a short time ago (a good deal less than 60 days).

Potential delay in the proceeding is not relevant if the significant new information could reasonably change the outcome of the EIS, or if delay is essential to NEPA's requirement for NRC to consider new information before acting on Pilgrim's license. Any potential harm to Entergy is minimal because it can continue to operate on their original license until NRC rules on its application.

VII. Respondents' Arguments on Factor 8, § 2.309(c)(viii), that Petitioners' Participation Will Not Assist In Developing A Sound Record, Fall Flat

Entergy and NRC Staff, with a good deal of arrogance and wishful thinking, say "it cannot be reasonably expected that Pilgrim Watch will assist in developing a sound record." Entergy p. 42, NRC Staff, p. 38. What's wrong with their argument?

It is clear from the Petitioners' filing that *only* the Petitioners can assist in developing a sound record. Entergy's responses show that they will not; and Staff shows no interest in seeing

a sound record developed in this proceeding. For 6 years, Entergy and the NRC Staff paid no attention to the ESA, MSA and NEPA issues Petitioners raise, perhaps anticipating that the fatal flaws and derogation of duty would never be exposed.

The NRC Staff lays out its refusal to assist in developing a sound record in its statements on p. 39. Its' claim that the Petitioners have failed to "bring forth any colorable legal claims" contrasts starkly with the well-established case law and clear statutory directive: "Congress expressly stated in § 2 (c) that "all Federal departments and agencies *shall* seek *to conserve endangered species* and threatened species…Lest there be any ambiguity as to the meaning of this statutory directive, the Act specifically defined "conserve" as meaning "to use and the use of *all methods and procedures which are necessary* to bring *any endangered species* or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." Tennessee Valley Authority, cited supra. NRC simply cannot and has not produced a record showing compliance with the ESA and MSA. Instead, the NRC and Entergy both covertly and with blatant disregard for the law, seek to undermine development of a sound record, demonstrating the Petitioners' participation is, indeed, the only way one will be developed.

VIII. Petitioners' specifically address the 10 C.F.R. § 2.326 requirements

Respondents claim that Petitioners' affidavits fail to address the § 2.326 reopening standards. This is untrue, and to further demonstrate compliance with § 2.326 requirements, Petitioners provide the following chart tying their affidavits to the § 2.326 factors for each issue in contention.

§ 2.326 Factor	ESA § 7 Claim	MSA: EFH Claim	River Herring Claim
(a)(1) timely	DuBois ¶s 2, 21,23, 24 25	DuBois Aff. ¶s 13,21, 23, 27; 19-23, 27; CZM letter attached to DuBois (winter flounder); Bingham Aff. ¶ 5-11 (no NPDES permit thus no EFH completion)	DuBois ¶s 12-18, 23, 24
(a)(1) exceptionally grave	Mansfield Aff. ¶s 8-21; DuBois Aff. ¶ 20, 21, 26, 27	CZM letter attached to DuBois (winter flounder); DuBois Aff. ¶ 6, 9, Jones River as EFH; 20, 21, 26, 27	Mansfield Aff. ¶s 22-30; DuBois Aff. ¶s 11, 12, 15, 16, 17, 18, 23, 26, 27
(a)(2) significant environmental issue	Mansfield Aff. ¶s 8-21; DuBois Aff. ¶s 20, 21, 26, 27	CZM letter attached to DuBois (winter flounder); DuBois Aff. ¶ 6, 9, Jones River as EFH; 20, 21, 26, 27	Mansfield Aff. ¶s 22-30; DuBois Aff. ¶s 11, 12, 15, 16, 17, 18, 23, 26, 27
(a)(3) materially different result	Mansfield Aff. ¶s 10-23; 30	Mansfield Aff. ¶s 23-29; CZM letter attached to DuBois (winter flounder); DuBois Aff. ¶S 6, 9, Jones River as EFH; 20, 21, 26, 27	Mansfield Aff. ¶s 23-29

As to Petitioners' NEPA claim, all of the information in the above chart directly to relates to and strengthens that claim, and the need to supplement the PNPS EIS

VIII. Conclusion

Petitioners have made the requisite showings for a motion to reopen, to intervene and file contentions, and have met the standards for non-timely filings. Their request for a hearing should be granted. The Respondents' answers are directly contrary to statutory language

expressly designed to insure the full development and consideration of environmental impacts of agency action, and of consistent and strongly supportive case law, and should be rejected.

Respectfully submitted,

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