UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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 OPPOSING PETITIONS/MOTIONS TO REOPEN, INTERVENE, AND FOR HEARING ON ROSEATE TERN CONTENTION

Filed May 23, 2012

Pursuant to 10 C.F.R. § 2.323(c), Jones River Watershed Association, Inc. (JRWA) and Pilgrim Watch (PW) (Petitioners) respectfully request permission to submit this Reply to the May 16, 2012 answers of NRC Staff and Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (Entergy) (Respondents' Answers) to Petitioners' May 2, 2012 motions to intervene and/or file new contentions with regard to the roseate tern.[1] Petitioners make this request because they could not have reasonably anticipated that, as set forth in this Reply, the NRC staff and Entergy answers would incorrectly attempt to characterize the final environmental impact

[1] Jones River Watershed Association Motion to Reopen, Request for Hearing and Permission to File New Contention in the Above Captioned License Renewal Proceeding on Violations of the Endangered Species Act with Regard to the Roseate Tern (Petitioners' Motion), filed May 2, 2012. (Petitioners' Motion)

statement (PNPS EIS) as a "biological assessment" within the meaning 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.* (ESA), and put information the record without supplementing the PNPS EIS as required by NEPA, using testimony that ignores the clear mandates of the Act.

Petitioners have met the standards for a contention under 10 CFR § 2.309(f)(1) and (2), for reopening under § 2.326,[2] for intervention under § 2.309(a) and (d), and for nontimely filings under §2.309(c).

1. The PNPS EIS is not a "biological assessment" as Respondents claim.

The underpinning of the NRC staff and Entergy arguments is the wholly spurious claim that the "NRC Staff's SEIS for Pilgrim constituted a BA." See, NRC Answer p. 20; Entergy Answer p., 11. The SEIS could not be the basis of an ESA § 7 consultation with FWS because *both the draft and final EIS* documents post-date the FWS letters that Respondents claim constitute the NRC and FWS "consultation." That is, the March 9, 2005 FWS letter to Entergy and the May 23, 2006 FWS letter to the NRC, which the NRC and Entergy claim constitute the ESA § 7 "consultation" pre-date the PNPS EIS document that they claim to have consulted about. See, Entergy's Answer, pp. 4-5. It is not possible to "consult" about a document that did not exist when the FWS issued its 2005/2006 letters. Indeed, there is no record that FWS ever even had a copy of the draft or final EIS, never mind reviewed and weighed its contents in decision making. Respondents claim then, that the NRC

[2] Petitioners position remains that a motion to reopen under 10 C.F.R. § 2.236 is not required in an on-going proceeding that is unrelated to anything that has been litigated or one as to which any record has been closed, and that the Board's decisions to reject PW's previous contentions on the ground that a motion to reopen was required were wrong. Those decisions are now the subject of Petitions for Review to the Commission. However, to avoid unnecessary procedural wrangling, and without waiving its current and previous position, PW moves, along with JRWA, in the alternative that this new contention should be accepted pursuant to any portions of 10 C.F.R. 2.236 that may be deemed by the ASLB as pertinent here.

can write an EIS and retroactively assert that it was the basis for and ESA § 7 consultation with the jurisdictional agency (FWS) that never even saw it– a position unsupported by law.

2. Respondents are estopped from arguing that Petitioners' do not meet the standards for a nontimely filing under 2.309(c)

Respondents' argument that the PNPS EIS is now suddenly transformed into the "biological assessment" for the roseate tern is part and parcel of the "bait and switch" that characterizes the entire environmental review process in this relicensing proceeding: the NRC staff makes representations and promises in the PNPS EIS to the public about actions that it, or other agencies, will carry out prior to relicensing – and then, here we are, 18 days before the license expires, and these promised actions still haven't happened.[3] This bait and switch and blatant disregard for the interests of the public in the sound and reasonable application of the law warrant application of the doctrine of estoppel. The attempt by the NRC staff to postpone actions that should occur prior to approval of Entergy's relicensing application eliminates any opportunity for public input and means that these approvals are not legally enforceable in connection with the operating license itself.

With regard to the roseate tern, the NRC staff affirmatively misled the public stating in response to comments on the draft EIS, **"**Regarding endangered species, the NRC has consulted with the US FWS and the NMFS Protection Resources Division regarding potential impacts to terrestrial and aquatic species. The results of this assessment will be reported in a Biological Assessment (as required by Section 7 of the Endangered Species Act) and in Chapter 4 of the SEIS." PNPS EIS, Appendix A, p. A-9-10. No such separate biological assessment "as required by Section 7" was ever produced by the NRC staff for the roseate tern. Instead, the NRC asserts that

[3] See, Petitioners' March 6, 2012 petition showing that the NRC staff punted the Magnuson-Fisheries Act process to the U.S. EPA NPDES process, which will not be complete by June 8, 2012, and May 14, 2012 contention showing there is no valid water quality certification, NPDES permit, or state coastal zone management certification.

the very document that contains the comments was the biological assessment-since as shown below, there were no changes made between the draft and final EIS documents on the roseate tern.

Similarly, the NRC misrepresented to the public that the review of Entergy's expired, 16-year old Clean Water Act NPDES permit, which would address the appropriateness of measures to mitigate impacts on fisheries and pollution, including impacts on the roseate tern food supply and foraging habitat, would be done prior to relicensing. The PNPS EIS states at p. xx: "Additional mitigation to minimize the impacts of entrainment and impingement may be justified. EPA Region I is currently in the process of reviewing the National Pollutant Discharge Elimination System permit renewal application for PNPS. It is expected that this evaluation would evaluate the need for and feasibility of any additional mitigation measures." This "evaluation" of the massive destruction of Cape Cod Bay natural resources from Entergy's cooling water system, including impacts on sand lance, Atlantic herring, and hake, that may require "additional mitigation" pursuant to the Clean Water Act Sections 316(a) and (b) will not be done before relicensing, however, despite the NRC's representation that this would happen. The relicensing deadline is 18 days away, and there is no new NPDES permit anywhere on the horizon.

The PNPS EIS *in toto*, then is a massive bait and switch by the NRC: it represents that the Clean Water Act review of fish kills of sand lance, Atlantic herring, and hake and the thermal and toxic pollution discharges to Cape Cod Bay is "expected" and that a biological assessment will be done for the roseate tern – but they will not.

The doctrine of estoppel has been applied against the NRC in deciding on timeliness under 2.309(c)((1)(i), as Petitioners cite in their Motion. Not surprisingly, the NRC tries to distinguish away any precedent that might mean estoppel should be applied here. The NRC takes a narrow

reading of Armed Forces Radiobiology Research Institute (Cobalt-60 Storage Facility), LBP-82-24, 15 NRC 652, 658 (1982), NRC p. 14-15, n 75, where a petitioner citizen group relied to its detriment on NRC Staff's representations about the timing of a license. The board ruled that notions of elementary fairness required that the citizen group's petition to intervene be considered even though it was filed after the issuance of the license renewal to which it pertained. The board stated,

> We hold also that the issue of timeliness is not determinative even though the Petition for Leave to Intervene was filed after the issuance of the license because justice and fair play require consideration of the petition. The representation of staff to Intervenor's counsel has not been denied. The action of staff, we hold, is an estoppel that may be asserted -- even against the government. We think petitioners relied to their detriment on staff's representations. To hold otherwise would violate our notions of "elementary fairness" *Moser v. United States* 341 U.S. 41 at 47, 71 S.Ct 553, 95 L. Ed 729 (1951); *USA v. Lazy FC Ranch* 481 F.2d 985 (1973). See also *Wisconsin Public Service Corporation, Kewaunee Nuclear Power Plant*, LBP-78-24, 8 NRC 78 (1978) where our brethren held that confusing and misleading letters from the staff to a prospective *pro se* petitioner for intervention and the failure of the staff to respond."

While the board went on to deny the petition on standing grounds, this decision was later overturned. The appeals board found that the petitioner should be allowed to intervene and given the chance to establish standing. 16 NRC 150 (July 16, 1982). The board noted that, "[t]he factual circumstances of the instant case -- a very large source of radioactive material accompanied by an interest in the safety of the facility by a local civic group that may have been misled somewhat by a Government spokesman" —mitigated in favor of allowing a remedy.

Contrary to the NRC staff position here, there is no reason that the Armed Forces holding that estoppel may preclude the NRC from objecting to an untimely filed petition applies only when the agency's misrepresentation pertains to a time deadline. Petitioners relied to their detriment on the NRC's statements about a biological assessment and a Clean Water Act review of the destructive

impact of the cooling water system on roseate tern's food supply. Instead, what they are getting 6 years later, is the NRC staff attempt to pass off a few sentences in the PNPS EIS as a biological assessment, and no Clean Water Act review. See also, U. S. ex rel. Keepkins v. Gambro Healthcare, Inc., 115 F.Supp. 2d 35 (D. Mass 2000) (Estoppel has been applied against the government to avoid manifest injustice.) The Petitioners Motion explains that they reasonably relied on regulatory agencies to follow the strict mandates of federal laws pertaining to wildlife that is present in the PNPS area. duBois Affidavit ¶¶s 19-27. The Respondents' should be estopped from asserting that the Petitioners' Motion is untimely, particularly given the importance placed on compliance with ESA procedural requirements by the Supreme Court, see, Petitioners' Motion, pp. 9-12.

Similarly, the NRC, p. 16, asserts that Petitioners misread the law in Westinghouse Electric Corporation (Nuclear Fuel Export License for Czech Republic -Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 329 (1994), claiming Petitioners cannot rely on this case alone to show the factor of 10 C.F.R. § 2.309(c)(v). That is not, in fact, what Petitioners claim–rather they assert this factor weights in their favor. Petitioners' Motion, p. 48. The NRC fails to acknowledge that Temelin was an export licensing case, and the Commission "made it clear elsewhere that it looks with particular disfavor on untimely filed petitions in the export licensing context," due to the strict Congressional mandates on time deadlines in the Nuclear Non-Proliferation Act of 1978, which applied in that case, but do not apply here. Temelin still stands for the proposition that good cause is a factor to be considered along with the availability of other means for representing petitioner's interests, and expanding the scope of the hearing or causing delay. Here, there is a contention appeal pending in the First Circuit, and one outstanding contention filed by Pilgrim Watch before the Commission. Delay should be viewed in that context. Additionally, given that ESA violations are in contention, that the NRC made representations that a biological assessment would be done,

and other mitigating factors, means that timeliness should take a lower priority over the goals of the Act as set forth by Congress.

3. Petitioners' Motion meets general requirements for contentions under 2.09(a) and (f)

In an attempt to show that Petitioners' Motion does not meet the general requirements for a contention under 10 C.F.R. § 2.309(a) and (f), Entergy submits two affidavits and the NRC claims that Petitioners specific statement under § 2.309(f)(1)(i) is a "jumble." The fundamental problem with both Respondents' arguments is that they have no basis in fact or law: Entergy's affidavits are merely snapshots in time, giving body counts of fish, larvae, and fish eggs killed on a few specific dates over the relevant 60 year period of PNPS operations, without regard to the "cumulative effects" of Entergy's destructive cooling water intake structure. Entergy v. MassDEP, 359 Mass. 319 (2011). Similarly the NRC's so-called "BA" does not even pay lip service to the most basic of requirements under the ESA.

The totality of the so-called "BA" that the NRC and Entergy create out of whole cloth after the fact consists of about four pages in the PNPS EIS, containing a few simplistic paragraphs on the roseate tern –paragraphs that regurgitate the same statements over and over. They also rely on the 2005 and 2006 FWS and Entergy letters that predate the PNPS EIS and similarly repeat the same facts. See, Entergy's Reply, p. 6, citing to PNPS EIS at 2-92, 2-96, 4-64 to 4-66, and 4-77. The sum total of the scientific references in the PNPS EIS for the NRC's conclusion of "no effects" is a one page "fact sheet" on the Roseate Tern and the 2006 USFWS letters EIS – which themselves are based on nothing, and accompanied by not one citation or reference. See, Section 4 of PNPS EIS; "Rare Species Fact Sheet," p. 4-89. Compare, Nisbet Affidavit. Moreover, instead of making even a cursory assessment of the public comment on the draft PNPS EIS, which stated that roseate terns

"reside or have once resided in and around the PNPS area…and depend on the PNPS area and surrounding area for survival…" PNPS EIS p. A-104 to 105, the NRC totally ignored this information and made no change in the final EIS, and as Entergy rightly explains, "the information, data, and conclusions" in the final EIS are identical to those in the draft. Entergy Answer, p. 6.

Nowhere does the PNPS EIS address in any meaningful way the core requirements of the ESA findings that are needed to ensure that the federal action is "not likely to jeopardize" the continued existence and recovery of the roseate tern. ESA § 7(a)(2), Conner v. Burford, 848 F. 2d 1441, 1454 (9th Cir. 1988). The so-called BA does not "facilitate compliance with § 7(a)(2)" or meet even the basic requirements for a BA. The ESA regulations set forth five factors to consider in the BA. 50 C.F.R. § 402.12(f)(1)-(5). Although the contents of the biological assessment are discretionary and depend on the nature of the Federal action, it must be based on species and habitat data sufficient to make an "informed" assessment of the impacts of the Federal agency action. Bob Marshall Alliance v. Watt, 685 F. Supp. 1514, (D. Mt. 1986), aff'd in part and rev'd in part and rev'd in part on other grounds, 852 F.2d 1223 (9th Cir.) *cert. den*. 489 U.S. 1066 (1989); Sierra Club v. Flowers, 423 F. Supp. 2d 1273 (S.D. Fl. 2006) (it is the agency's responsibility to explain its decision under the ESA and…to do so with a reasoned analysis), vacated, remanded on other grounds, 526 F.3d 1353 (2008); aff'd Sierra Club v. Van Antwerp, 362 Fed. Appx. 100 (11th Cir. Fl. 2010).

Even if one considers the PNPS EIS to be a BA for the sake of argument, no where does it identify the "action area," describe the "cumulative effects" or even the "effects of the action." [4]

[4] Relevant definitions under the ESA regulations are at 50 C.F.R. § 402.02 which provides:

> *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.

The PNPS EIS and the FWS letters are merely directed at whether Pilgrim station will result in a direct mortality of a roseate tern from it flying into the station, or disturbing a nesting site on the property. Nowhere does it address how the cumulative impact of 60 years of discharging pollution and killing the roseate terns food supply might reasonably be "expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, number or distribution of that species." ESA, § 7(a)(2). Further, no where does the purported "BA" address the impact on the roseate tern and its food supply of aqueous discharges in the event of a severe accident at PNPS.

Entergy's two Affidavits and the NRC's Answer suffer from a similar fatal flaw: they do not address the "cumulative effects" or "effects of the action" as defined by 50 C.F.R. 402.02. Instead, Entergy and the NRC rely on "body counts" and compare the number of fish killed by Pilgrim to the total number of fish in the sea. This approach has several flaws. First, the Scherer/ Barnum and

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> *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.

Scheffer affidavits cherry pick "body counts" out of a few years of data produced by Entergy about kills of roseate tern prey species and their larvae and eggs. See, Entergy p. 7, which states there is "no indication of lack of prey"; Entergy, p. 24, comparing the amount of food eaten by a roseate tern to that of a humpback whale. Second, the Scherer/Barnum Affidavit compares whale consumption to tern consumption of fish, but does not identify any other species that eat the same food, or any other threats to the prey species from impacts such as overfishing or pollution. No where do they provide current information, combined with cumulative data, about the effects on Cape Cod Bay and the roseate tern food supply from things like climate change and shifting species distribution. Third, the Scherer/Barnum Affidavit, ¶ 10 says roseate tern "may forage 25-30 km (about 15 to 18 miles) away from the breeding colony…" but then uses the biomass numbers for the entire Gulf of Maine. The breeding and staging roseate terns residing around PNPS are is not flying more than 15 to 18 miles to forage while staging and breeding around Pilgrim, so the total number of fish in the expansive Gulf of Maine is a meaningless comparison. Similarly, the NRC, p. 28, compares Entergy's fish and larvae kills to "total Atlantic herring stock biomass" – an irrelevant comparison.

As to pollution impacts, the Scheffer Affidavit, ¶ 8 claims "metals are believed to be absent" from Entergy's pollution discharges to Cape Cod Bay. A "belief" hardly meets the standard of the ESA – especially when it is possible would be possible to obtain the data by sampling Entergy's toxic waste stream.

All of these examples highlight the flaws in the Respondents' arguments and testimony: the ESA requires looking at the "cumulative impacts" and "assessing" all aspects of the 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.

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

Moreover, it is not for ASLB to decide, *post hoc*, in the context of deciding whether to admit Petitioners' contention, whether Entergy is right or wrong in the way it skews the data. That job is properly left to FWS in this instance in a process that complies with ESA procedures. Congress has assigned the statutory duty of determining whether a federal action will "jeopardize" the existence or recovery of a species to the Department of the Interior, acting through the Services, under § 7(a) – not to the NRC staff. Here, the FWS must provide a written concurrence on a biological assessment under § 7(c) - and a letter that pre-dates the PNPS EIS does not constitute such a concurrence.

There is no dispute among the parties that roseate terns "may be present" at PNPS, thus a BA is legally required. The NRC staff attempts to show that Petitioners fail to demonstrate a "material dispute" with the FWS and NRC conclusions under the ESA, by confuting vague verbiage in the FWS letters, NRC Staff, pp. 23-27 about who said what about the presence of roseate terns in the "vicinity" of PNPS. This argument misses the point: once the species is determined to be present in the area impacted by the federal action – and there is no dispute about that-- a biological assessment is required under the ESA, § 7(c).

4. The ESA procedural provisions are clear

The ESA procedural provisions are clear and offer Respondents' no escape: these provisions are the way to ensure compliance with substantive provisions. Thomas v. Peterson, 753 F. 2d, 763 (9th Cir. 1985); Tennessee Valley Authority v. Hill, 437 U.S. 154, 173 (1978) (federal agencies to use *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.") As stated in Strahan v. Linnon, 967 F. Supp. 581, 618 (D. Mass. 1995), "The Endangered Species Act is a powerful and substantially unequivocal statute…The plain language of the Act, buttressed by its legislative history, shows clearly that Congress viewed the value of endangered species as 'incalculable.' …Finally, there are no exemptions in the Endangered Species Act for federal agencies…" Id. 618.

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 (here, FWS) to bear when an action agency identifies that ESA species or habitat "may be affected."

Entergy's argument that biological assessments need only be prepared for major construction activities is so far afield from what the case law actually stands for that the NRC disagrees with Entergy. See, Entergy Answer, p. 9-10. The NRC's own regulations require ESA compliance for relicensing, and as noted, supra, the NRC stated that a BA would be prepared for Pilgrim relicensing. (The NRC staff has prepared two biological assessments for marine aquatic species in this proceeding.)

The 9th Circuit holding in Citizens for Better Forestry v. Jopple, 481 F.Supp. 2d 1059, 1091-1092 (N.D.Calif. 2007) is instructive here. There, the court addressed the importance of the procedural provisions of the ESA. Citing to Thomas, it noted that the action agency could not "without preparation of a BA or consultation with the FWS" use its own study to satisfy the ESA. Here, that is what NRC is trying to do: used the PNPS EIS, which has *not* been reviewed by FWS or subject to a consultation. Thomas compared an ESA violation to a NEPA violation, noting that it was a "substantial procedural violation" that warranted an injunction of the project pending compliance with the ESA. Thomas, supra, at 764.

The Citizens court noted that the parties were "putting the cart before the horse to the extent they urge the court to make any findings beyond one that the [agency action] "may affect listed species and habitat. …it is impossible for the court to measure precisely the effects or degree of causation associated with the [agency action] without the benefit of any record typically associated with a BA or consultation below, both of which the USDA chose to forego. See Washington Toxics Coalition, 413 F. 2d at 1035 ("It is not the responsibility of plaintiffs to prove nor the function of courts to judge, the effect of a proposed action on endangered species *when proper procedures have not been followed."* Here, there has been no BA, nor any functional equivalent, or any consultation that meets even the bare bones of what is legally required under the ESA. In Citizens, the court found that given the agency actions "potential indirect effects on listed species, combined with the USDA's lack of documentation in support of their "no effect" determination, the failure to consult and/or prepare any type of biological analysis in conjunction with the [agency action] was arbitrary and capricious. *Id.* at 1097. Here, there is no record that FWS reviewed the PNPS EIS, which the NRC and Entergy say constitutes the biological assessment required by the ESA § 7(c). The only "record" consists of the three letters that predate the PNPS EIS and the few paragraphs in the EIS itself. There is a shocking lack of scientific data that would support the FWS, Entergy, and NRC staff conclusions about the lack of effects on the roseate tern. Clearly, the absence of data shows that the NRC and Entergy intended to pay nothing but lip service to the clear-cut, strongly worded provisions of the ESA in this licensing proceeding.

5. NEPA requires supplementation of the record

As the First Circuit has explained, NEPA "seeks to create a particular bureaucratic decision-making process, a process whereby administrators make important decisions with an informed

awareness of how the decision might significantly affect the environment." Strahan, supra at 628, citing Sierra Club v. Marsh, 872 F.2d 497, 497 (1st Cir. 1989) (Breyer, J.); see also Andrus v. Sierra Club, 442 U.S. 347, 349-52, 60 L. Ed. 2d 943, 99 S. Ct. 2335 (1979). In Sierra Club v. Marsh, the court held that a district court must consider the harm to the environment that may result from an agency decision made without an Environmental Impact Statement in deciding whether to grant a preliminary injunction. 872 F.2d at 504-05. The court stated,

> The way that harm arises may well have to do with the psychology of decisionmakers, and perhaps a more deeply rooted human psychological instinct not to tear down projects once they are built. But the risk implied by a violation of NEPA is that real environmental harm will occur through inadequate foresight and deliberation. The difficulty of stopping a bureaucratic steam roller, once started, still seems to us . . . a perfectly proper factor for a district court to take into account in assessing that risk, on a motion for a preliminary injunction.

872 F.2d at 504.

Here, the NRC staff already had its mind made up about roseate tern impacts, no doubt based on Entergy's January 2006 application that contained the 2005 letters between Entergy and FWS. The NRC staff merely incorporated the contents of these letters into the PNPS EIS drafts and finals, added a "fact sheet" from the state website and a table of endangered species, and called it an assessment of the effects of relicensing on the roseate tern. This sham is hardly the basis for "informed awareness" about how Entergy's destruction of the Cape Cod Bay ecosystem upon which the roseate tern relies will impact this endangered species. The attempt by the NRC staff to post hoc claim that the PNPS EIS is a "biological assessment" under the ESA or that it is a basis for reasoned decision making is in reality the antithesis of the adequate "foresight and deliberation" demanded by NEPA. Sierra Club v. Marsh, supra.

6. Oyster Creek is inapposite to Petitioners' 2.309(c) and 2.326 showing

The NRC relies heavily on Amergen Energy Co. (Oyster Creek Nuclear Generating Station) CLI – 09-7, 69 NRC 235 (2009), to argue that Petitioners have not made a timely showing. NRC, p. 8, p. 10. What the NRC fails to acknowledge, however, is the overarching concept that the Third Circuit relied upon on appeal of that decision with regard to 10 C.F.R. § 2.309(f)(1) and (2) and the issue of late filing and admissibility: in reviewing the factors of those two rules, the court noted a particular "reluctance to second guess agency choices involving scientific disputes that are in the agency's province of expertise." New Jersey Environmental Federation v. U.S. Nuclear Regulatory Commission, 645 F. 3d 220, 230 (3d Cir. 2011). The court upheld the decision under § 2.236 to not reopen because the matter was "peculiarly within its [the NRC's] realm of expertise" and reopening will not be required "except upon a clear showing of abuse of discretion or of extraordinary circumstances." Here, when it comes to the ESA, the NRC staff's decision on effects on roseate terns is entitled to no deference at all. Congress has vested the authority to make final ESA determinations in the FWS. The NRC staff recitations in the PNPS EIS, based on grade-school level fact sheets and Entergy's letter, which is regurgitated by the FWS in its 2005 and 2006 letters, are entitled to absolutely no deference in deciding whether Petitioners' have met §§ 2.326 and 2.309 factors.

Moreover, impacts on the endangered roseate tern from the "detrimental effects of aging" –"the most significant safety issued posed by long-term reactor operation" that are the focus of this relicensing proceeding, New Jersey Federation supra, 10 CFR § 54.29(a), are only one aspect of what needs to be considered under the ESA. The NRC's NEPA regulations, aimed at evaluating the detrimental effects of aging, allow the agency to short-cut the type of evaluation that is required

under the ESA. Operation of the cooling water structure itself is both an "aging" and a "safety" but also has the additional issue of effects on endangered species that is not adequately addressed under the NRC's narrow approach to NEPA.

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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May 22, 2012

On May 21, 2012, the Petitioners notified all parties of record of their intent to make this filing. Entergy advised that it objects. The NRC Staff has advised it objects. Massachusetts Attorney General's Office did not respond.

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