LBP-12-10

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

In the Matter of	Docket No. 50-293-LR
ENTERGY NUCLEAR GENERATION COMPANY and ENTERGY NUCLEAR OPERATIONS, INC. (Pilgrim Nuclear Power Station)	ASLBP No. 12-917-05-LR-BD01 May 24, 2012

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

On March 8, 2012, petitioner Jones River Watershed Association (JRWA) and intervenor Pilgrim Watch (collectively, Challengers) jointly filed a petition to intervene respecting JRWA, which previously was not a party to this proceeding, and a motion to reopen the proceeding, accompanied by a new contention sponsored by both Challengers.[1] The contention challenges the application by Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (collectively, Entergy) for renewal of its operating license for the Pilgrim Nuclear Power Station (Pilgrim) for an additional twenty-year period.[2] Specifically, the contention asserts that the NRC's environmental review of the application has not met the requirements of the Endangered Species Act (ESA) and the Magnuson-Stevens Fishery Conservation and Management Act

[1] [JRWA] Petitions for Leave to Intervene and File New Contentions Under 10 C.F.R. § 2.309(a), (d) or in the Alternative 10 C.F.R. § 2.309 (e) and [JRWA] and Pilgrim Watch Motion to Reopen Under 10 C.F.R. 2.326 and Request for a Hearing Under 10 C.F.R. § 2.309(a) and (d) in the Above Captioned License Renewal Proceeding (Mar. 8, 2012) [hereinafter Petition].

[2] See 71 Fed. Reg. 15,222, 15,222 (Mar. 27, 2006) [hereinafter Entergy's LRA].

(MSA). In this ruling, a majority of this licensing board, for the reasons discussed below, denies the petition and motion, finding, inter alia, that, although JRWA and Pilgrim Watch each has standing to intervene, Challengers have failed to satisfy the requirements for reopening the record under 10 C.F.R. § 2.326 and have failed to proffer an admissible contention under 10 C.F.R. § 2.309(f)(1).

I. PERTINENT BACKGROUND

The lengthy procedural background of this proceeding has been discussed in orders of the prior licensing board that presided over other aspects of this adjudication and need not be fully recounted here. In brief, Pilgrim Watch first petitioned to intervene in opposition to Entergy's license renewal application (LRA) in 2006.[3] The previous licensing board granted the petition[4] and, in the ensuing six years of litigation, adjudicated two of Pilgrim Watch's contentions following evidentiary hearings[5] and ruled on the admissibility of numerous others.[6] Most recently, in January of this year that licensing board ruled inadmissible Pilgrim Watch's final outstanding contention and terminated the proceeding before the board.[7]

Challengers filed the instant Petition on March 8, 2012. Because of their uncertainty as to the proper forum, Challengers filed the Petition before the Commission and attempted to file it before the prior licensing board, which at that time was no longer constituted. On March 15,

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

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

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

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

[7] LBP-12-01, 75 NRC __, __ (slip op. at 27) (Jan. 11, 2012). Pilgrim Watch's appeal of this decision is pending before the Commission.

Challengers submitted a Correction and Supplement to the Petition, also before the Commission and attempted before the previous board.[8] Pleadings thereafter were filed before the Commission only. Entergy[9] and the NRC Staff[10] filed their answers before the Commission on March 19th. The NRC Staff also submitted an answer to Challengers' Correction and Supplement.[11] Challengers replied to Entergy and the Staff's answers on March 26.[12]

On March 30, the Commission referred Challengers' Petition to the Atomic Safety and Licensing Board Panel,[13] and, on April 2, this licensing board was established.[14] On April 5, Entergy submitted to this board a Motion to Strike portions of Challengers' reply as well as a reply affidavit submitted by Challengers;[15] Challengers answered the motion on April 16.[16]

Finally, on May 22, the Staff filed with this licensing board a response from the National Marine Fisheries Service (NMFS), dated May 17, concluding that "all effects to listed species

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[8] Correction and Supplement to [Petition] (Mar. 15, 2012) [hereinafter Supplement to Petition].

[9] Entergy's Answer Opposing [JRWA]'s and Pilgrim Watch's Motion to Reopen and Hearing Request (Mar. 29, 2012) [hereinafter Entergy Answer].

[10] NRC Staff's Answer to [JRWA] amd Pilgrim Watch's Petitioner for Leave to Intervene and Motions to Reopen the Record (Mar. 19, 2012) [hereinafter NRC Staff Answer].

[11] NRC Staff's Answer to Correction and Supplement to [JRWA] and Pilgrim Watch's Petitions to Intervene and Motions to Supplement (Mar. 26, 2012) [hereinafter NRC Staff Supplement Answer].

[12] [JRWA] and Pilgrim Watch Reply to Answers of NRC Staff and Entergy to [JRWA] Petitions to Intervene and for Hearing Under 10 C.F.R. § 2.309 (Mar. 26, 2012) [hereinafter Challengers Reply].

[13] Memorandum from Andrew L. Bates, Acting Secretary, to E. Roy Hawkens, Chief Administrative Judge, Atomic Safety and Licensing Board Panel, at 1 (Mar. 30, 2012).

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

[15] Entergy's Motion to Strike Petitioners' Affidavit and Portions of Petitioners' Reply (Apr. 5, 2012) [hereinafter Entergy Motion to Strike].

[16] Petitioners' Opposition to Entergy's Motion to Strike Petitioners' Affidavit and Portions of Petitioners' Reply (Apr. 16, 2012).

will be insignificant or discountable" and that "the continued operation of Pilgrim under the terms of a renewed operating license is not likely to adversely affect any listed species under NMFS jurisdiction."[17] NMFS also made suggestions to, and requests of, the NRC Staff which we discuss in depth below.[18]

II. RULING ON STANDING

As the prior licensing board ruled in LBP-06-23 that Pilgrim Watch had established standing to intervene in the previous (presently closed) proceeding,[19] we too find that Pilgrim Watch has established standing sufficient for the present challenge. We must, however, address the standing of JRWA, which seeks for the first time to intervene.

An organization, such as JRWA, that seeks to establish standing to intervene under section 189a of the Atomic Energy Act (AEA),[20] may do so by demonstrating either organizational standing or representational standing. In order to establish organizational standing a group like JWRA must show that its interests will be harmed by the licensing action, while an organization seeking representational standing must demonstrate that the interests of at least one of its members will be harmed.[21] For an organization to establish representational standing, the organization must: (1) show that at least one of its members may be harmed by the licensing action and, accordingly, would have standing to sue in his or her own right; (2)

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[17] Letter from Daniel S. Morris, NMFS Acting Regional Administrator, to Andrew S. Imboden, Chief, Environmental Review and Guidance Update Branch, Office of Nuclear Reactor Regulation (May 17, 2012) at 30 [hereinafter NMFS Letter].

[18] Id. at 31.

[19] See LBP-06-23, 64 NRC at 269-71.

[20] 42 U.S.C. § 2239(a)(1)(A). The Commission has implemented the standing requirement in its regulations at 10 C.F.R. § 2.309.

[21] See Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998).

identify that member by name and address; (3) show that the organization is authorized to request a hearing on behalf of that member, and (4) show that the interests that the representative organization seeks to protect are germane to its own interests.[22]

Commission precedent relative to reactor operating license renewal proceedings provides for a "proximity presumption," respecting standing for an individual who resides within a 50-mile radius of a nuclear power plant.[23] Under that precedent, an individual who resides within that radius is not required to specifically plead injury, causation, and redressability to establish his or her standing to intervene.[24]

Because JRWA's representative, E. Pine duBois, satisfies the requirements of the "proximity presumption," and because she has authorized JRWA to represent her herein,[25] the NRC Staff does not dispute that JRWA has demonstrated representational standing.[26] Likewise, Entergy does not challenge JRWA's standing to participate in this proceeding.[27] In addition, JWRA satisfies the fourth part of the test set out above because the interests it seeks to protect are germane to its own interests.

Given these circumstances, we find that JRWA has demonstrated representational standing to participate under AEA § 189a and the Commission's rules.[28]

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[22] See Consumers Energy Co. (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 409 (2007).

[23] See Calvert Cliffs 3 Nuclear Project, LLC (Calvert Cliffs Nuclear Plant, Unit 3), CLI-09-20, 70 NRC 911, 916-17 (2009); Florida Power & Light Co. (Turkey Point Nuclear Generating Plants, Units 3 and 4), LBP-01-06, 53 NRC 138, 146-150 (2001).

[24] See Calvert Cliffs, CLI-09-20, 70 NRC at 915.

[25] See Affidavit of E. Pine duBois (Mar. 6, 2012) at 1-2 [hereinafter duBois affidavit].

[26] See NRC Staff Answer at 6.

[27] Entergy makes no mention of standing in its Answer.

[28] See, e.g., 10 C.F.R. § 2.309(d); Yankee, CLI-98-21, 48 NRC at 195; Georgia Tech, CLI-95-2, 42 NRC at 115; Turkey Point, LBP-01-6, 53 NRC at 146-50.

III. APPLICABLE LEGAL STANDARDS

A. Motion to Reopen the Record and Contention Admissibility

Because the previous licensing board terminated the adjudicatory proceeding that was convened to consider challenges to the Pilgrim operating license application, Challengers must satisfy the stringent requirements of 10 C.F.R. § 2.326 in order to reopen that proceeding so that their request to admit a new contention can be considered. Those requirements are as follows:

> (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;
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> (2) The motion must address a significant safety or environmental issue; and
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> (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.[29]

The reopening standard "is intended to impose a 'deliberately heavy' burden on parties seeking to supplement the evidentiary record at the 11th hour, after the record has closed."[30]

Further, as the prior board noted in several rulings, a motion to reopen 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."[31] In such affidavits, "[e]ach of the criteria must be separately addressed, with a specific explanation of why it has been met."[32] These requirements are interpreted strictly.[33]

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[29] 10 C.F.R. § 2.326(a).

[30] CLI-12-10, 75 NRC __, __ (slip op. at 21).

[31] Id. § 2.326(b).

[32] Id. (emphasis added).

[33] See CLI-12-03, , 75 NRC __, ___ (slip op. at 18 n.86) ("Litigants seeking to reopen a record must comply fully with section 2.326(b)"); Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-08, 74 NRC __, __ (slip op. at 8-9) (Sept. 27, 2011) (motion to reopen "could have been rejected solely on the basis of the Appellants' failure" to (continued…)

Additionally, because the motion in this instance "relates to a contention not previously in controversy among the parties, [Challengers] must also satisfy the requirements for nontimely contentions in [10 C.F.R.] § 2.309(c)."[34] Those factors likewise are discussed in their entirety in the previous rulings referred to above.

Finally, any new contention such as the one proposed here must also satisfy the admissibility requirements of 10 C.F.R. § 2.309(f)(1).

B. Endangered Species Act

The Endangered Species Act of 1973 (ESA) requires each Federal agency to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species."[35] In making the determination that the action is not likely to jeopardize species or modify habitat, the acting agency is to proceed "in consultation with and with the assistance of the Secretary" of Interior or Commerce.[36] The NRC's own regulations refer to the ESA in 10 C.F.R. Part 51, Table B-1 of Appendix B to Subpart A, requiring that a supplemental environmental impact statement (EIS) be prepared, but the actual mechanics of the consultation process are delineated in the regulations of the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS; collectively, the Services), the agencies with primary responsibility for administering the Act. Those regulations effectuate the legislative intent underpinning the ESA by requiring the Services to, among other things, make appropriate recommendations to other

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address the reopening standards in the supporting affidavit).

[34] Id. § 2.326(d).

[35] Endangered Species Act of 1973 § 7(a)(2), 16 U.S.C. § 1536(a)(2).

[36] Id. In practice the Secretaries of Interior and Commerce have delegated these responsibilities to the U.S. Fish and Wildlife Service and the National Marine Fisheries Service, respectively.

affected agencies.[37]

The joint regulations set out procedures for agencies to follow in consulting with the FWS or the NMFS.[38] Those procedures provide that each agency proposing to take an action that might be covered by the ESA is to "review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat."[39] "Formal consultation" is only required if the acting agency makes a determination that its action may have such an effect.[40] Moreover, "the determination of possible effects is ultimately the [acting] agency's responsibility."[41]

Where the acting agency is engaged in "major construction activities," the regulations of the Services provide that the acting agency is to evaluate whether the action is "likely to adversely affect" species or habitat through preparation of a "biological assessment" (BA).[42] To

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[37] See Babbitt v. Sweet Home, 515 U.S. 687, 708 (1995) ("When it enacted the ESA, Congress delegated broad administrative and interpretive power to the Secretary.") (citing 16 U.S.C. §§ 1533, 1540(f) ("The Secretary [is] authorized to promulgate such regulations as may be appropriate to enforce this chapter.")). Those regulations, as we note below, reflect the separate jurisdictions of the various Federal agencies as well as the separate nature of authority of various State agencies, and provide that the Services will make "recommendations" to other agencies.

[38] In general, FWS implements the ESA with respect to terrestrial species, while NMFS is concerned with marine species.

[39] 50 C.F.R. § 402.12(a).

[40] Id.; see also Ctr. for Biological Diversity v. U.S. Dep't of Interior, 563 F.3d 466, 475 (D.C. Cir. 2009) ("If the agency determines that its action will not affect any listed species or critical habitat, however, then it is not required to consult with NMFS."). Formal consultation includes the preparation of a biological opinion by the Service, detailing the likely effects of the action on listed species or habitat as well as mitigation alternatives. Id. § 402.14(g)-(h).

[41] Water Keeper Alliance v. U.S. Dept. of Defense, 271 F.3d 21, 25 (1st Cir. 2001) (citing Interagency Cooperation—Endangered Species Act of 1973, as Amended; Final Rule, 51 Fed. Reg. 19926, 19949 (June 3, 1986)).

[42] Id. § 402.12(a), (b)(1); see also ESA § 7(c), 16 U.S.C. § 1536(c). A "major construction activity" is 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 as referred to in the National Environmental Policy Act [NEPA, 42 U.S.C. (continued…)

prepare the BA, the acting agency must first request from the Services a list of endangered or threatened species or habitat that may be present in the area of the action, or provide to the Services its own list for their review.[43] Upon completion, the acting agency submits its BA to the appropriate Service and awaits its determination of concurrence or non-concurrence, which under the Services' regulations is to be returned within 30 days.[44] In the present case, the NRC Staff prepared a BA in 2006 and a supplemental BA in February 2012 to reflect recent modifications in categorization of certain aquatic species. In these assessments, the NRC Staff determined that "continued operation of [Pilgrim] for an additional 20 years would not have any adverse impact on any threatened or endangered marine aquatic species."[45]

If the acting agency makes a "likely to affect" determination in the BA, the regulations of the Services provide that it is required to enter into "formal consultation" with the appropriate Service.[46] If, on the other hand, the acting agency concludes in the BA that the action is not likely to affect listed habitats or species, and the Service concurs, the regulations provide that

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4332(2)(C)]." 50 C.F.R. § 402.02.

[43] 50 C.F.R. § 402.12(c), (d).

[44] Id. § 402.12(j).

[45] Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Regarding Pilgrim Nuclear Power Station - Final Report, NUREG-1437, Supplement 29 at E-73 (2007) [hereinafter Pilgrim FSEIS]; see also Request for Concurrence on Determination of Effects Concerning Atlantic Sturgeon at Pilgrim Nuclear Power Station, Enclosure (Feb. 29, 2012) at 3 (ADAMS Accession No. ML12047A119) [hereinafter Supplemental BA]. The NRC Staff made a finding with respect to each listed species known to be present in the area of Pilgrim that relicensing would have "no effect." See Pilgrim FSEIS at E-67 (no effect on loggerhead turtle or Kemp's ridley turtle), E-68 (no effect on leatherback turtle), E-69 (no effect on green sea turtle), E-70 (no effect on North Atlantic right whale), E-71 (no effect on humpback whale or fin whale), E-72 (no effect on sei whale or sperm whale), E-73 (no effect on shortnose sturgeon); Supplemental BA at 3 (no effect on Atlantic sturgeon).

[46] See id. §§ 402.12(k), 402.14(a). Formal consultation includes the preparation of a biological opinion by the Service, detailing the likely effects of the action on listed species or habitat as well as mitigation alternatives. Id. § 402.14(g)-(h).

the acting agency need not enter formal consultation.[47] If the Service does not concur with the agency's "not likely to affect" determination, it may request that the acting agency enter into formal consultation.[48] The regulations of the Services do not purport to mandate that the acting agency enter into formal consultation at the Service's request. NMFS and FWS acknowledge that "[t]he Service performs strictly an advisory function under section 7" of the ESA, and "the Federal agency [here, NRC] makes the ultimate decision as to whether its proposed action will satisfy the requirements of section 7(a)(2)."[49] Indeed, the Services' Consultation Handbook plainly states that "[t]he Services cannot force an action agency to consult."[50] Thus the question of whether or not the NRC Staff undertakes formal consultation with the Services in the event that they disagree with a finding by the NRC of "no effect" or "not likely adversely to affect" depends upon the NRC's own regulations and its interpretation of its duty under the ESA to "insure that any action . . . is not likely to jeopardize" listed species or habitat.[51]

The NRC's internal regulations require that license renewal applicants "assess the impact of the proposed action on threatened or endangered species in accordance with the Endangered Species Act" as part of their Environmental Report.[52] The regulations also acknowledge that the agency will consult to determine the impact of renewing a license on listed species. Specifically, the regulations provide that "consultation with appropriate agencies would be needed at the time of license renewal to determine whether threatened or endangered

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[47] Id. § 402.14(b)(1).

[48] Id. § 402.14(a).

[49] Interagency Cooperation—Endangered Species Act of 1973, as Amended; Final Rule, 51 Fed. Reg. 19,926, 19,928 (June 3, 1986).

[50] U.S. Fish &Wildlife Service and National Marine Fisheries Service, Endangered Species Consultation Handbook 2-10 (1998) [hereinafter Consultation Handbook].

[51] ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2).

[52] 10 C.F.R. § 51.53(c)(ii)(E).

species are present and whether they would be adversely affected."[53] This obligation as to the determination of presence is satisfied by the NRC seeking and obtaining a list of such species from the Services. As to the portion of this obligation respecting consultation regarding whether a present and listed species is adversely affected, where a "no effect" determination has been made by the NRC, our regulations do not mandate further consultation.[54]

C. Magnuson-Stevens Fishery Conservation and Management Act

Like the ESA, the Magnuson-Stevens Fishery Conservation and Management Act (MSA) mandates interagency coordination for the purposes of conservation. The goal of the MSA is to preserve commercial and recreational fishery resources through the protection of "Essential Fish Habitat" (EFH).[55] The MSA provides that "[t]he Secretary [of Commerce] shall coordinate with and provide information to other Federal agencies to further the conservation and enhancement of essential fish habitat" and "[e]ach Federal agency shall consult with the Secretary with respect to any action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken, by such agency that may adversely affect any essential fish habitat," thereby imposing a direct consultation obligation on the NRC if the NRC determines that the approval of the requested license renewal "may adversely affect any essential fish habitat."[56] As with the ESA, the NMFS has issued regulations implementing its responsibilities under the MSA and setting out the mechanics of the consultation process.[57]

The NMFS regulations specifically provide that the consultation duty applies to license

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[53] 10 C.F.R. Part 51, Table B-1 of Appendix B to Subpart A.

[54] As more fully described below, in this circumstance NRC undertook "informal consultation" with NMFS.

[55] See 16 U.S.C. § 1801.

[56] Id. § 1855(b)(1)(D), (b)(2) (emphasis added). The details of the consultation process are not, however, delineated in the MSA .

[57] The Act states that "The Secretary may promulgate such regulations . . . as may be necessary . . . to carry out any other provision of this Act." 16 U.S.C. § 1855(d).

renewals[58] and should be initiated by the acting agency "as early as practicable."[59] In particular, "[f]or any federal action that may adversely affect EFH, Federal agencies must provide NMFS with a written assessment of the effects of that action on EFH."[60] The EFH Assessment must describe the action, its potential effects on EFH, and proposed mitigation activities, if any.[61] When the preparation of the Assessment is consolidated with other environmental review procedures such as those under the National Environmental Policy Act (NEPA) or the ESA, NMFS regulations provide that it is to have "timely notification of actions that may adversely affect EFH," and "[w]henever possible, NMFS should have at least 60 days notice prior to a final decision on an action."[62] In response to the acting agency's EFH Assessment, similar to the process under the ESA, NMFS issues "recommendations" (referred to therein as "Conservation Recommendations") to that agency, and, while not explicitly emphasizing that it makes "recommendations" only, the regulations note another limitation of its authority: "NMFS will not recommend that state or Federal agencies take actions beyond their statutory authority."[63] In this instance, the NMFS has indeed made requests and suggestions of NRC,[64] discussed in more depth below.

D. National Environmental Policy Act

NEPA requires that before implementing any "major federal action significantly affecting the quality of the human environment," the agency must prepare an EIS that describes the

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[58] 50 C.F.R. § 600.905(a)(1).

[59] Id. § 600.905(a)(3).

[60] Id. § 600.920(e)(1).

[61] Id. § 600.920(e)(3).

[62] Id. § 600.920(f)(1).

[63] Id. § 600.925(a)-(b)).

[64] NMFS Letter at 31.

action, its effects, and alternatives to the proposed action.[65] Under NEPA, agencies must take a "hard look" at the environmental consequences of an action before proceeding.[66] For power plant license renewals, the NRC Staff prepares a supplement to its generic EIS, NUREG-1437.[67] Under NRC regulations, matters respecting endangered/threatened species are a "Category 2" issue that requires site-specific analysis in the supplemental EIS.[68]

The regulations adopted by the Services implementing the ESA and MSA consultation procedures encourage agencies to incorporate these procedures into their NEPA review.[69] However, no provision of NEPA, nor any regulation of the NRC, requires that an agency complete a consultation required by another statute as a condition of complying with NEPA.[70]

IV. CHALLENGERS' NEW CONTENTION

Challengers' new contention generally charges that the NRC may not relicense Pilgrim because it has not fulfilled its duties under the ESA, the MSA, and NEPA. Specifically, the contention consists of the following four components:

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[65] 42 U.S.C. § 4332(2)(C).

[66] See Natural Res. Defense Council v. Morton, 458 F.2d 827, 838 (D.C. Cir. 1972).

[67] 10 C.F.R. § 51.95(c). The findings of the GEIS are codified at 10 C.F.R. Part 51, Appendix B.

[68] 10 C.F.R. Part 51, Table B-1 of Appendix B to Subpart A.

[69] See 50 C.F.R. § 402.06(a) ("Consultation, 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). . . . Satisfying the requirements of these other statutes, however, does not in itself relieve a Federal agency of its obligations to comply with the procedures set forth in this part or the substantive requirements of section 7."); Id. § 600.920(e) ("Federal agencies may incorporate an EFH Assessment into documents prepared for other purposes such as . . . National Environmental Policy Act (NEPA) documents.").

[70] NEPA requires that prior to preparing an EIS, "the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved." 42 U.S.C. § 4332(C). But the mechanics of this consultation are not defined, and thus need not accord with the consultation required by the ESA or the MSA.

- The NRC has failed to complete the § 7 consultation process under the Endangered Species Act (ESA), 16 U.S.C. §§ 1531 et seq., for ten listed endangered and threatened species (five whales, four turtles, and the Atlantic sturgeon).
- Contrary to the NMFS Consultation Handbook and recommendations in the ESA regulations, NRC Staff and Entergy have failed to conduct a specific assessment of the impact of relicensing on river herring, the third most commonly impinged species at PNPS, and have not considered ways to avoid or minimize adverse effects to river herring.
- The NRC Staff has failed to comply with the Magnuson-Stevens Fishery Conservation and Management Act (MSA) of 1976., 15 U.S.C. §§ 1801 et seq., and implementing regulations at 50 C.F.R. 600.905 et seq. with regard to the PNPS relicensing.
- The environmental impact statement for PNPS is prima facie defective because a final EIS can only be issued following the completion of the ESA § 7 process and an essential fish habitat consultation and assessment under the MSA. Further, NEPA requires that new and significant information must be considered before the PNPS may be re-licensed. 10 C.F.R. § 51.92.[71]

Challengers expand upon and explain these assertions as follows:

A. ESA Consultation – 2006 Biological Assessment

Challengers argue that the NRC's consultation process under the ESA is incomplete principally because the NMFS has not responded to a BA submitted by NRC in December 2006 and included in the final supplemental environmental impact statement (FSEIS) for Pilgrim.[72] Challengers note that the NRC determined in the BA that the relicensing of Pilgrim would have no adverse impact on listed species;[73] however, Challengers assert that NMFS has failed to fulfill a commitment made in January 2007 correspondence to the NRC to provide comments on the BA.[74]

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[71] Petition at 3-4.

[72] Id. at 19-20, 24-25.

[73] Id. at 18 (citing Pilgrim FSEIS at E-73). Challengers also object to the NRC's failure to include a determination of the effect of relicensing on critical habitat for the North Atlantic right whale. Id.

[74] See id. (citing Pilgrim FSEIS at E-44 to -45). In the letter from NMFS, which primarily responded to the EFH Assessment included in the Draft EIS, NMFS wrote to NRC that its comments relative to ESA Section 7 consultation would be provided under separate cover. However, no such comments have yet been received by the NRC.

Challengers submit that in December 2011, JRWA staff "began research to try to ascertain the results of the consultation," and that they had not done so earlier because they had "relied upon the statements in the NRC and NMFS correspondence that the ESA § 7 consultation was pending."[75] On February 29, 2012, NRC Staff wrote to NMFS asking for concurrence on the 2006 BA. Thus, assert Challengers, "[t]he NRC expressly acknowledged that the ESA § 7 consultation is incomplete for the 2006 BA."[76]

Challengers further argue that, until NRC receives concurrence from NMFS, its consultation obligations under the ESA are not complete, and thus the renewed license for Pilgrim cannot issue:

> While consultation with NMFS is ongoing, ESA § 7(d) prohibits the Federal agency or project applicant from making an "irreversible or irretrievable" commitment of resources "which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative" to the agency action. ESA Section 7(d); 1536 U.S.C. § 1536(d); 50 C.F.R. 402.09. Entergy admits that "continued operation of [Pilgrim] for the period of extended operation will result in irreversible and irretrievable resource commitments . . . ." Entergy ER § 6.4.2. Therefore, until the § 7 consultation is completed and the PNPS EIS properly supplements, [Pilgrim] cannot be relicensed.[77]

Challengers assert that because NMFS has not responded to NRC's BA, consultation is "ongoing" and NRC's obligations under the ESA will not be complete until it obtains NMFS' written concurrence.[78] Additionally, they point to a provision of the NRC's regulations concerning NEPA that states "consultation with appropriate agencies would be needed at the time of license renewal to determine whether threatened or endangered species are present

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[75] Id. at 19.

[76] Id. at 20.

[77] Id. at 25.

[78] See id. at 8, 25. We note that after the filing of all pleadings in this hearing, and during the period of our deliberations, the NMFS did indeed (finally) file its written response to NRC, in substance concurring with the NRC's findings (disagreeing only in that NRC found that relicensing would have "no effect" on listed species, whereas NMFS concluded that relicensing is "not likely to adversely affect" species, coupled with a variety of specific findings that the effects are insignificant, or discountable or extremely unlikely). NMFS Letter at 12-14, 20-25.

and whether they would be adversely affected."[79] Thus, Challengers seem to claim, as they argue elsewhere, that in addition to being out of compliance with the ESA, NRC's relicensing of Pilgrim without a supplemental EIS that takes into account the completed consultation would violate NEPA.[80]

In response, Entergy argues that the NRC was not required to initiate any consultation with NMFS because it concluded in its BAs and in the FSEIS that relicensing Pilgrim would have "no effect" on threatened or endangered species.[81] Entergy asserts that NMFS' five-year delay in responding to the 2006 BA should be deemed a waiver of its concurrence, especially since, under ESA section 7, "[t]he Service performs strictly an advisory function."[82]

The NRC Staff, for its part, does not argue that the agency was not required to conduct any consultation, but rather that it fulfilled its consultation obligation when it submitted the 2006 BA.[83] The Staff cites to federal case law holding that "formal consultation follows only if a biological assessment shows that the action 'may affect listed species or critical habitat.'"[84] Because the 2006 BA concluded that renewing the Pilgrim license would have "no effect" on listed species, the Staff asserts that formal consultation was not required. Consequently, in the Staff's view, "it is unnecessary for the NRC . . . to wait for a written concurrence from NMFS" before granting the license renewal.[85] The foregoing notwithstanding, the NMFS indeed

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[79] Id. at 8 (citing 10 C.F.R. Part 51, Table B-1 of Appendix B to Subpart A).

[80] See id. at 26 ("NEPA requires that the PNPS EIS be supplemented with information from a completed ESA § 7 process.").

[81] See Entergy Answer at 31-32.

[82] Id. at 33 (citing Interagency Cooperation—Endangered Species Act of 1973, as Amended; Final Rule, 51 Fed. Reg. at 19,928).

[83] See NRC Staff Answer at 8-12.

[84] Water Keeper Alliance v. U.S. Dept. of Defense, 271 F.3d 21, 31-32 (1st Cir. 2001).

[85] NRC Staff Answer at 11.

responded to the NRC's finding of no effect on May 17, 2012, stating that although NMFS does not agree with the NRC's "no effect" determination, it does agree that "continued operation of Pilgrim may affect, but is not likely to adversely affect, any species listed as endangered or threatened by NMFS."[86] NMFS goes on to conclude in a detailed species-by-species analysis, with respect to each species and with respect to all critical habitat that the effects are insignificant and, in many instances discountable, and as to habitat effects, extremely unlikely to have an adverse effect.[87]

In addition to highlighting the procedural deficiencies of the consultation procedure, Challengers now attack the sufficiency and scientific credibility of the 2006 BA. They submit that "at the time the 2006 BA was prepared, a wide and varied body of information concerning endangered species in Cape Cod Bay [existed] which was not used in preparing the 2006 BA," and that these sources reveal "the presence of large numbers of endangered right whales within the 'critical area'" of Pilgrim operations, contrary to the conclusion of the BA.[88]

Entergy argues that the information presented by Challengers fails to demonstrate that the conclusions of the 2006 BA are wrong. Rather, Entergy asserts that the Challengers "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."[89] In particular, Entergy charges that the Petition and the supporting affidavit of Alex Mansfield fail to show how an increased presence of North Atlantic right whales would contradict NRC's conclusion that Pilgrim's operations would not

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[86] NMFS Letter at 2.

[87] Id. at 12-14, 20-27.

[88] Id. at 20-21 (citing Affidavit of Alex Mansfield ¶¶ 10-20 (Mar. 6, 2012) [hereinafter Mansfield Affidavit]).

[89] Entergy Answer at 21.

affect them.[90] Entergy includes its own affidavit to rebut the data and conclusions used by Mr. Mansfield and defends the NRC's analysis in the EIS and BA as "complete, comprehensive, and searching."[91]

The NRC Staff contests the Challengers' assertion that the 2006 BA did not evaluate the impact of relicensing Pilgrim on critical habitat of the North Atlantic right whale. The Staff argues that it described in the 2006 BA the lack of intersection between Pilgrim's thermal plume and the critical habitat area, and that, at any rate, its conclusion that renewing the license would have no effect on the North Atlantic right whale encompasses a finding that the action would not affect critical habitat.[92] Additionally, the Staff argues that the Petition and the Mansfield Affidavit do not present any information that NRC was required to consider in its review, and that the information does not call into doubt NRC's conclusion that the relicensing will not affect any listed species.[93]

B. Atlantic Sturgeon Consultation

Challengers also allege that the ESA consultation process is incomplete as to the Atlantic sturgeon, which was listed as threatened in February 2012, with an effective date of April 6, 2012.[94] The NRC prepared a supplemental BA respecting the Atlantic sturgeon and submitted it to NMFS on February 29, 2012, seeking concurrence on its finding that the

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[90] Id. at 21-22.

[91] Id. at 23-26; see also Affidavit of Michael D. Scherer, Ph.D. in Support of Entergy's Answer Opposing [JRWA]'s and Pilgrim Watch's Motion to Reopen and Hearing Request (Mar. 19, 2012) [hereinafter Scherer Affidavit].

[92] See NRC Staff Answer at 12-13; put plainly, the Staff's argument boils down to a statement of the obvious; if there is no overlap between the area affected by the thermal plume and the habitat at issue, then there cannot be any effect of that plume on the habitat.

[93] Id. at 15-17.

[94] See Endangered and Threatened Wildlife and Plants; Threatened and Endangered Status for Distinct Population Segments of Atlantic Sturgeon in the Northeast Region, 77 Fed. Reg. 5880 (Feb. 6, 2012).

relicensing will have no effect on the Atlantic sturgeon. At the time of the Petition, no reply from NMFS had been received.[95] Without concurrence, assert Challengers, the NRC has failed to comply with the ESA, for the same reasons it asserts failure respecting the 2006 BA. Challengers also note that the final EIS, published in 2007, does not address the information contained in the 2012 supplemental BA, although they acknowledge that the EIS did address the sturgeon, albeit briefly.[96]

Entergy and the NRC Staff both argue that because NRC prepared a supplemental BA concluding that the Pilgrim license renewal would have no effect on the Atlantic sturgeon, and because NRC has submitted that supplemental BA to NMFS, the agency has fulfilled its consultation obligations.[97]

C. River Herring Consultation

A final deficiency under the ESA alleged by the Challengers is the failure of the NRC to seek consultation as to the effects of relicensing Pilgrim on alewife herring and blueback herring, two species collectively referred to as "river herring."[98] Challengers assert that "ESA regulations and policy require assessment of the adverse impacts of [Pilgrim] operations on river herring."[99] This assertion rests on the November 2011 response by NMFS to a petition from the Natural Resources Defense Council requesting that river herring be listed as threatened, in which NMFS determined that listing may be warranted and designated the two

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[95] See Petition at 20. This despite the requirement of their own regulations that they respond within 30 days. See 50 C.F.R. § 402.12(d).

[96] Id. The EIS states that "[p]opulations of Atlantic sturgeon have been documented in the Merrimack and Taunton Rivers in eastern Massachusetts; however, none have been observed in the Plymouth area." Pilgrim FSEIS at 2-86.

[97] See Entergy Answer at 34-35; NRC Staff Answer at 13-14.

[98] See Petition at 9.

[99] Id. at 5.

species of river herring as "candidate species."[100] In support of their position, Challengers point to the Consultation Handbook, which recommends discussing ways to reduce adverse effects on candidate species during the consultation process.[101] They also highlight a finding in the EIS that the alewife herring "is one of the most commonly impinged species" at Pilgrim."[102] Despite this, assert Challengers, "[t]he record contains no evidence that Entergy or NRC Staff has ever consulted with NMFS on river herring under the ESA § 7."[103]

Entergy argues that, because the river herring species have not been listed as threatened or endangered, and are merely "candidate species," they have no legal protection under the ESA and the NRC is not obligated to take any action with respect to them.[104] Because the issue is raised that the river herring may be listed in the future, Entergy asserts that Challengers' claim on this point is unripe. Additionally, Entergy notes that the Challengers do not challenge the discussion of river herring in the EIS.[105]

The NRC Staff also contends that there is no legal obligation under the ESA to address candidate species, such as the river herring.[106] The Staff characterizes this portion of the contention as an inadmissible policy argument that lacks a legal or factual basis.[107]

D. MSA Consultation

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[100] Listing Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To List Alewife and Blueback Herring as Threatened Under the Endangered Species Act, 76 Fed. Reg. 67652, 67656 (Nov. 2, 2011).

[101] Petition at 10 (citing Consultation Handbook at 3-7).

[102] Id. at 21 (citing Pilgrim FSEIS at 2-34).

[103] Id. at 22.

[104] See Entergy Answer at 38.

[105] Id. at 38-39.

[106] NRC Staff Answer at 14.

[107] Id. at 15.

Challengers argue next that the NRC has failed to complete the required consultation under the MSA. They point to language in the January 2007 letter from NMFS to NRC stating 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 [Pilgrim]."[108] Challengers assert that this means that "NRC has attempted to defer its mandatory MSA duties to the EPA NPDES permit process," which, Challengers observe, will not be complete prior to the expiration of the current license for Pilgrim.[109] Despite the statement by NMFS in its correspondence that it had "conclud[ed] the EFH consultation" process with NRC,[110] in Challengers' view the alleged deferral of consultation under the MSA to another permitting process is unlawful under both the MSA and NEPA.[111]

In their Supplement to the Petition, Challengers admit to a factual error regarding the NRC Staff's preparation of an EFH. Contrary to their arguments in the Petition, Challengers now note that the NRC had in fact submitted an EFH Assessment to NMFS, which was included in the 2007 Final EIS.[112] But because "[t]here is no record that the EFH consultation process under the MSA has been completed," Challengers maintain that their contention is unaffected by the factual correction.[113] Additionally, Challengers attempt to critique the EFH Assessment on substantive grounds.[114]

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[108] Id. at 23 (citing Pilgrim FSEIS at E-44).

[109] Id.

[110] Pilgrim FSEIS at E-45.

[111] See id. at 25-26.

[112] Supplement to Petition at 2.

[113] Id.

[114] Id. at 3-6.

Entergy argues that the January 2007 letter from NMFS did not deflect NRC's obligations under the MSA to EPA, but rather expressed NMFS' decision not to provide conservation recommendations to NRC, along with a separate decision to "potentially provide EFH conservation recommendations" to EPA during the NPDES permit review.[115] Entergy claims that NMFS' decision not to provide NRC with recommendations was consistent with the MSA regulations, which provide that "NMFS will not recommend that . . . Federal agencies take actions beyond their statutory authority."[116] Entergy further asserts that even if NMFS was required to provide conservation recommendations, NRC does not have authority to superintend the administrative reviews of other agencies, and therefore this issue is outside the scope of this proceeding.[117] Further, Entergy argues that the Challengers' supplementary arguments against the substance of the EFH Assessment do not present any information that is materially different from that which NRC already has considered, or that contradicts NRC's conclusion of a minimal adverse effect on EFH.[118]

The NRC Staff argues that the MSA consultation process was completed when it submitted its EFH Assessment and NMFS responded in January 2007 that it was "concluding the EFH consultation process."[119] The Staff asserts that the January 2007 letter reflects that NMFS was not required to provide NRC with conservation recommendations.[120] Finally, the Staff argues that none of the information put forward by Challengers in their Supplement

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[115] See Entergy Answer at 35-36 (citing Pilgrim FSEIS at E-45).

[116] Id. at 36 (citing 50 C.F.R. § 600.925(a)).

[117] Id. at 37.

[118] See id. at 26-28.

[119] NRC Staff Answer at 21-23; NRC Staff Supplement Answer at 6.

[120] See NRC Staff Answer at 24-26; NRC Staff Supplement Answer at 6. In this regard, NRC Staff states that the statutory authority to implement mitigation measures rests with EPA, not NRC.

presents a genuine dispute with the findings of the EFH Assessment.[121]

V. RULING ON NEW CONTENTION

For this new contention to be admissible, there are several legal thresholds to be passed: the requirements of 10 C.F.R. § 2.326; the requirements for a nontimely contention set out in 10 C.F.R. § 2.309(c); and all of the requirements for an admissible contention under 10 C.F.R. § 2.309(f)(1).

A. The New Contention Fails to Satisfy the Requirements for Reopening

1. 10 C.F.R. § 2.326(b): Affidavits

We begin with the requirements respecting affidavits because for each of the contentions submitted to the prior Pilgrim licensing board following closing of the record before that board, the absence of sufficient affidavits was found to be fatal to the pleadings.[122] A motion to reopen the record must be accompanied by affidavits that specifically address each of the criteria of 10 C.F.R. § 2.326(a) and explain why each has been met.[123] As with the earlier post-record-closing petitions, the affidavits submitted by Challengers here[124] fail to do so. As Entergy and the NRC Staff each observe,[125] none of the affidavits even mentions the reopening standards. While the information offered in the affidavits appears to address, at least in part,

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[121] See NRC Staff Supplement Answer at 6-10.

[122] See LBP-12-01, 75 NRC at __-__ (slip op. at 17-18); LBP-11-35, 74 NRC at __-__ (slip op. at 59-63); LBP-11-23, 74 NRC at __-__ (slip op. at 17-18); LBP-11-20, 74 NRC at __, __ (slip op. at 13, 20).

[123] 10 C.F.R. § 2.326(b).

[124] See Mansfield Affidavit; duBois Affidavit; Affidavit of Anne Bingham (Mar. 6, 2012) [hereinafter Bingham Affidavit]. Challengers also submitted a "Reply Affidavit" of Alex Mansfield as a rebuttal to the Scherer Affidavit accompanying Entergy's Answer. Because this affidavit did not accompany the motion to reopen, we do not consider it in determining whether Challengers have satisfied section 2.326(b).

[125] See Entergy Answer at 14; NRC Staff Answer at 45.

the technical matters in Challengers' contention, and may be relevant to the section 2.326(a) factors, they fail on their face to satisfy the requirements of section 2.326(b).[126] This board is not empowered to rehabilitate that failure; indeed, as the Commission recently declared in this Pilgrim relicensing proceeding, in a ruling upholding the licensing board's denial of a motion to reopen on the basis of an identical failure of the affidavits to comply with the reopening standards, "[w]e do not expect boards to search the pleadings for information that would satisfy our reopening requirements."[127] "Litigants seeking to reopen a record must comply fully with section 2.326(b)."[128] Accordingly, the failure of the affidavits to specifically address the reopening criteria is a flaw fatal to the admissibility of the entirety of Challengers' contention.

In an effort to rehabilitate the failure of the affidavits, in their reply to the Answers of Entergy and the NRC Staff Challengers include a table that seeks to relate specific sections of the affidavits to the section 2.326(a) factors.[129] We find that the table does not cure the defects in the Petition. Moreover, even had we accepted the concept that such a reference table could, as a matter of substance over form, salvage the affidavits and overcome binding holdings of the Commission requiring the criteria be explicitly satisfied, we find that that the cited portions of the affidavits do not themselves address (and therefore do not satisfy) the requirements of section 2.326(b). For example, the table cites portions of the duBois Affidavit as addressing the timeliness requirements of 10 C.F.R. § 2.326(a)(1). The cited paragraphs put forth facts related

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[126] See Amergen Energy Co. LLC (Oyster Creek Nuclear Generating Station), CLI-09-07, 69 NRC 235, 287 (2009) (movant has burden to present information in a manner that complies with section 2.326(b)).

[127] CLI-12-03, 75 NRC __, __ (slip op. at 18 n.86) (Feb. 22, 2012) (affirming LBP-11-23); see also Vogtle, CLI-11-08, 74 NRC at __ (slip op. at 8-9) (Boards should not "hunt for information that the agency's procedural rules require be explicitly identified and fully explained."). The previous board also denied motions to reopen for failure of the affidavits to address the reopening standards in LBP-11-20, which was upheld by the Commission on appeal.

[128] Id. (internal quotation omitted).

[129] See Challengers Reply at 22.

to JRWA's communications with EPA and NMFS, but nowhere explain, nor even address, why these facts render the contention timely, as required by section 2.326(b).[130] Similarly, Challengers' table refers us to portions of the Mansfield Affidavit as addressing the requirement of section 2.326(a)(2) that their claim with respect to river herring would likely have produced a materially different result if considered initially by the NRC. But that affidavit only gives facts as to impingement rates of river herring and its food sources, and how the herring is addressed in the GEIS;[131] it fails to articulate a basis for, or to make, any assertion that these facts would likely produce a materially different result.

2. Only the Portion of the Contention Respecting the Atlantic Sturgeon Satisfies the Timeliness Requirements of 10 C.F.R. § 2.326(a)(1)

In addition to failing to satisfy the affidavit requirements for reopening the record, which in and of itself is fatal to the petition, all but one of the individual claims of the contention fail to meet the criteria of section 2.326(a).

We find that the portion of Challengers' contention dealing with the Atlantic sturgeon is timely. Challengers' claim of an incomplete consultation process for the Atlantic sturgeon stems from the submission to NMFS on February 29, 2012, of the NRC's supplemental BA, to which NMFS had not yet responded when Challengers filed their petition. Although the conclusion of the supplemental BA that the relicensing of Pilgrim will have no effect on the Atlantic sturgeon does not differ from conclusions in the FSEIS, the reclassification of the Atlantic sturgeon reflected in the supplemental BA constitutes new and significant information with respect to Challengers' consultation claim, and Challengers filed their contention promptly after its issuance.

Moreover, the motion is untimely with respect to all other aspects of the contention.

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[130] See duBois Affidavit at ¶¶ 2, 21, 23-25.

[131] See Mansfield Affidavit at ¶¶ 23-29.

First, the motion is untimely with respect to its claim of deficiencies in the 2006 BA. The NRC Staff completed the BA and submitted it to NMFS in December 2006, and included it in the Final EIS that was published in July 2007. Any challenge to the substantive validity of that BA, such as the one Challengers raise now about the North Atlantic right whale, should have and could have been raised within a reasonable time after the FSEIS was published. Boards have typically found new contentions to be timely when filed within thirty days of the date that asserted foundational information became available.[132] Therefore, the filing by Challengers nearly six years after the latest date plausibly argued to present foundational new information cannot be considered timely.

The claim that ESA section 7 consultation is not complete with respect to the 2006 BA is similarly untimely (as well as now being, as explained below, moot), and we find unavailing Challengers' arguments that their five-year tardiness is justified by their reliance "upon the statements in the NRC and NMFS correspondence that the ESA § 7 correspondence was pending," and that they "relied on written NRC Staff statements in 2007 that the ESA § 7 consultation was being conducted".[133] Such reliance might have justified waiting to see the correspondence, but waiting five years after expiration of the 30-day deadline in the NMFS regulations for the response from NMFS without so much as a peep belies the assertion of reliance.[134] Further, the fact that the NRC Staff requested, in February 2012, that NMFS provide the promised comments, cannot serve to rehabilitate Challengers' delay.

For essentially the same reasons, Challengers' claim now that the NRC has not completed the required consultation under the MSA is similarly untimely. Years have elapsed

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[132] See, e.g., Vogtle, CLI-11-08, 74 NRC at __ (slip op. at 3 & n.8).

[133] Petition at 19, 46.

[134] The publication of the FSEIS in July 2007, which included the BA but no concurrence from NMFS, should certainly have served as sufficient notice of the absence of concurrence of which Challengers now complain.

since the communication from NMFS to NRC that Challengers say "defer[red] the EFH Assessment to the EPA NPDES permit renewal process."[135] Challengers have put forward no reasonable justification for this delay.

Finally, Challengers' claim regarding river herring is also inexcusably untimely. To begin, as we noted above, there is no presently adjudicable issue because the designation as an endangered or threatened species has not occurred. If, however, the designation as a "candidate species" would give rise to an adjudicable issue, that designation took place on November 2, 2011—more than four months prior to the filing of this contention by Challengers. Challengers have provided no explanation for their delay beyond the customary 30-day period.[136]

Moreover, nothing in the affidavits supplied in connection with the Petition addresses these timeliness requirements.[137]

3. Challengers' Contention Presents Neither an Exceptionally Grave Issue nor a Significant Environmental Issue

Challengers next argue that even if the contention is untimely, they satisfy the alternative requirement of section 2.326(a)(1) by showing that they have raised an "exceptionally grave issue" which the Board should admit in its discretion.[138] They allege that because "consultations and preparation of relevant information required by the ESA and MSA have not been completed

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[135] Id. at 25.

[136] We note that Challengers' arguments as to good cause for late filing concentrate on the 2006 BA and make no reference to the river herring.

[137] Because the vast majority of the contention is untimely and based on information that was previously available, we also find that it fails to satisfy the criteria of 10 C.F.R. § 2.309(f)(2)(i)-(iii) for submitting new or amended contentions.

[138] Id. at 36. However, elsewhere in the Petition, Challengers claim that the "affidavits, accompanying documents, and documentation from the NRC record, establish that the motion is timely as required by §2.326(a)(1)."

… the [Pilgrim] EIS [is] prima facie invalid."[139] Challengers state that the alleged failure to comply with the mandatory procedures of the ESA, MSA and NEPA runs counter to the public policy concerns that led Congress to enact those statutes. They assert this failure to be exceptionally grave, and argue that it is ipso facto a "significant environmental issue" under section 2.326(a)(2).[140]

Entergy disputes that Challengers have presented "any issue that could be characterized as a sufficiently grave threat to public safety."[141] Entergy further argues that the petition presents no significant environmental issue, summarizing its assertions as follows:

> 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 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.[142]

Likewise, the NRC Staff argues that, because Challengers' allegations do not call into question the safety of Pilgrim's operations, the Petition does not present an exceptionally grave issue.[143] Additionally, the Staff asserts that the Petition presents no significant environmental issue because, where a motion to reopen is untimely, "the § 2.326(a)(1) 'exceptionally grave'

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[139] Id.

[140] Id. at 37. These assertions, therefore rest upon the premise that the failure to complete consultations establishes a prima facie deficiency in the EIS that precludes the agency from taking the licensing action that is the subject of the EIS.. But not only is there no failure of the NRC Staff to undertake necessary consultation, Challengers offer only bare unsupported assertions for their premise that such a failure would constitute prima facie evidence of an invalid EIS which creates, ipso facto, a significant environmental issue.

[141] Entergy Answer at 20.

[142] Id. at 20-21.

[143] NRC Staff Answer at 41-42.

test supplants the § 2.326(a)(2) 'significant safety or environmental issue' test."[144] Even if the claims are timely, the Staff argues that the Challengers have not met the Commission's test of showing that the proffered information would "paint a seriously different picture of the environmental landscape" that would require supplementation of an EIS.[145]

In this circumstance we find binding the Commission's definition of the relevant legal standard: an exceptionally grave issue is one which raises "a sufficiently grave threat to public safety."[146] Nothing averred by the Challengers, and nothing set out in the supplied affidavits, supports a proposition that the failure to consider the information referred to by Challengers raises any grave threat to public safety respecting the Pilgrim plant.[147]

Further, as the NRC Staff correctly states, and as is pertinent to this particular contention, the Commission has delineated the standard for when an environmental issue is "significant" for the purposes of reopening a closed record, equating it to the standards for when an environmental impact statement (EIS) is required to be supplemented—there must be new and significant information that will paint "a seriously different picture of the environmental impact of the proposed project from what was previously envisioned."[148] Nothing presented by Challengers, beyond the bare assertions noted above, indicates that further consultation could cause any change in the environmental impact of the proposed license extension with respect to

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[144] Id. at 43 (citing Vogtle, CLI-11-08, 74 NRC at __ (slip op. at 14 n. 44)).

[145] Id. (citing Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation, CLI-06-03, 63 NRC 19, 29 (2006)).

[146] Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,536 (May 30, 1986).

[147] We find that the failure to receive replies from the Services respecting the NRC's finding of no effect can not reasonably be considered to raise either any grave threat to public safety or any significant environmental issue as the term has been interpreted by the Commission.

[148] Union Elec. Co. d/b/a Ameren Missouri (Callaway Plant, Unit 2), CLI-11-05, 74 NRC __, __ (Sept. 9, 2011) (slip op. at 31).

any of the asserted failures (including the reclassification of the Atlantic sturgeon).[149] Challengers fail to present information upon which we could reach such a conclusion. Moreover, as we discuss below, as a matter of law, the NRC has fulfilled its obligations under the ESA, the MSA, and NEPA, so there is no legal basis for any such assertion.

The NRC fully satisfied its obligations under the ESA regulations upon submittal of its two biological assessments setting out a "no effect" determination. As Entergy correctly observed, "[n]either 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."[150] The ESA regulations provide that "[a] Federal agency need not initiate formal consultation if, as a result of the preparation of a biological assessment . . . the Federal agency determines, with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species or critical habitat." This cannot be read to imply the inverse: the present regulatory provision that consultation is not necessary if the Director concurs with the acting agency's "not likely to adversely affect" determination cannot be inverted to impose a requirement that the acting agency must initiate formal consultation if the Director fails to provide concurrence. Even if NMFS disagrees with the agency's determination, the ESA regulations provide only that it may request that NRC enter formal consultation, and nothing in the regulations of the Services or of the NRC requires NRC to consent to the request.[151]

We concur with the NRC Staff's position that the only mandatory trigger for initiating formal consultation is if the acting agency itself determines that its action "may affect listed

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[149] Indeed, the NMFS Letter bears out this assertion, as the NMFS reached conclusions having the same substantive effect as those of the Staff.

[150] Entergy Answer at 4 (citing Ctr. for Biological Diversity v. U.S. Dep't of Interior, 563 F.3d 466, 475 (D.C. Cir. 2009)).

[151] 10 C.F.R. §§ 402.12(k)(2), 402.14(a). And, as we noted above, in any event, the Services have made no such request.

species or critical habitat."[152] In the present circumstances, where the NRC has made the opposite determination with respect to all species and habitat at issue, there is no additional legal obligation imposed on NRC regarding further consultation; i.e., there is no requirement that the NRC enter into formal consultation whether or not NMFS disagreed with the NRC's conclusions.[153] That said, the NMFS did concur with the NRC that the relicensing action is "not likely to affect" listed species and critical habitat, concluding that any effects would be "insignificant" and "extremely unlikely."[154] NMFS ended the informal consultation process with NRC without requesting that NRC enter formal consultation.[155]

Although each of the BAs concludes with a "no effect" determination, Challengers claim that a contrary determination made in one portion of the 2006 BA that listed species may be affected is tantamount to a determination that triggers the consultation requirement.[156] And

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[152] Id. § 402.14(a).

[153] Challengers err in their assertions that the consultation process does not terminate, and Pilgrim cannot be relicensed, until the NMFS has given its written concurrence on the NRC's BAs. Challengers' reliance upon cases that essentially restate the provisions in 10 C.F.R. § 402.12(a) and (b), providing that formal consultation is required when the acting agency concludes that the action "may affect" listed species or habitat, is misplaced. See Reply at 4-5. None of the cited cases addresses the issue presented here: whether an acting agency must wait for the appropriate Service's concurrence on its "no effect" determination before proceeding with the action. A closer analogue to the present case is found in Southwest Center for Biological Diversity v. U.S. Forest Service. 100 F.3d 1443 (9th Cir.1996). There, the Forest Service prepared a BA that determined the proposed action (a timber sale) would have "no effect" on listed species. The court relied on Ninth Circuit precedent that "if the agency determines that a particular action will have no effect on an endangered or threatened species, the consultation requirements are not triggered," and held that the finding of no effect "obviates the need for formal consultation under the ESA." Id. at 1447 (citing Pacific Rivers Council v. Thomas, 30 F.3d 1050, 1054 n. 8 (9th Cir.1994). Here, the NRC similarly concluded in its 2006 BA and the Supplemental BA that relicensing Pilgrim would have no effect on listed species or habitat.

[154] NMFS Letter at 30.

[155] The Services' ESA regulations classify as "informal consultation" any communication between the acting agency and one of the Services designed to assist the acting agency in determining whether formal consultation is required. 50 C.F.R. § 402.13(a).

[156] See 50 C.F.R. § 402.14(a).

indeed, the 2006 BA does state that the NRC Staff had identified, based on its correspondence with NMFS, ten listed species "that have a reasonable potential to occur in the vicinity of [Pilgrim], and, therefore, may be affected by continuing operations of [Pilgrim]."[157] We find, however, that Challengers' arguments overreach regarding the substance of the referenced statement in that they fail to address explicit contradictory statements in the BA that essentially superseded the referenced superficial observation with a detailed finding in the BA for each species at issue that relicensing would have "no effect." The 2006 BA reflects that the NRC Staff began its analysis with a presumption that the identified species may be affected, but its further examination led Staff to the determination that the action would have no effect.

Finally, Challengers insist that, under section 7(a)(2) of the ESA, an agency cannot "unilaterally" determine that an action will not jeopardize listed species.[158] But NRC has not acted unilaterally. NRC has followed the consultation procedures set out in NMFS' regulations, first by requesting NMFS to identify species that might be in the area of Pilgrim, and then by preparing its BA, in which it set forth its determination as to each species, and submitting it to NMFS. Having made and submitted to NMFS a "no effect" determination, no more was required of the NRC. And the NMFS Letter reflects that the two agencies indeed entered into informal consultations and that, although the NMFS could not agree with the NRC's finding of "no effect", it agreed that the requested renewed license was not likely to adversely affect any listed species or critical habitat.[159]

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[157] Pilgrim FSEIS at E-73.

[158] See Reply at 5-6 (citing Washington Toxics Coalition v. U.S. Dept. of Interior, 457 F. Supp. 2d 1158, 1179-1180 (W. Dist. Wa. 2006).

[159] We note that, as a purely scientific matter, we do not see how any finding of "no effect" can be made, as even de minimis, miniscule, immaterial and unmeasurable physical conditions discussed regarding the listed species and habitat would have some effect. Thus we find to be perfectly scientifically reasonable NMFS' findings that they cannot agree with a "no effect" determination, but that they agree that license renewal is not "likely to adversely effect" and their detailed findings that specific phenomena of interest have insignificant, sometimes (continued…)

We likewise find that Challengers' additional claim, that the NRC failed in its duty to consult in regard to the river herring, fails to raise an adjudicable issue because no such duty exists. The two species of river herring have been designated "candidate species," and neither the ESA nor the regulations of the Services imposes any obligation on an acting agency with respect to candidate species; a fact that Challengers' own Petition makes clear.[160] In addition to noting the provisions of the ESA regulations, Challengers reference the Services' Consultation Handbook, which states that although the Services "may recommend ways [for the acting agency] to reduce adverse effects" on candidate species, "[l]egally, the action agency does not have to implement such recommendations."[161]

In addition to their consultation-related concerns, Challengers observe that because a decision on whether to list the river herring as threatened or endangered is due on August 2, 2012, after the Pilgrim license expires, "NMFS could list river herring . . . before the NRC makes its decision" to relicense Pilgrim.[162] "By addressing candidate river herring now," Challengers note, "NRC Staff can make informed decisions about relicensing [Pilgrim]."[163] But this also fails to raise a litigable challenge. As the Commission succinctly noted, "an application-specific NEPA review represents a 'snapshot' in time, and while NEPA requires that we conduct our environmental review with the best information available today, it does not require that we wait until inchoate information matures into something that later might affect our review."[164] The

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undetectable, effects.

[160] Challengers, quoting directly from the ESA regulations, observe that "candidate species have no legal status and are accorded no protection under the Act." Petition at 9 (quoting 50 C.F.R. § 402.12(d)).

[161] Id. at 10 (quoting Consultation Handbook at 3-7).

[162] Petition at 9.

[163] Id. at 28.

[164] S. Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4), CLI-12-07, 75 (continued…)

NRC Staff need only assess the river herring as it is currently classified; a speculative reclassification is simply not a matter that comes within the scope of this proceeding.

Finally, Challengers err in their claim that the MSA consultation process is incomplete. The NRC submitted its EFH Assessment in December 2006, as the Challengers now acknowledge. The NMFS responded on January 23, 2007 with a letter declaring that "NMFS is concluding the EFH consultation."[165] Since NRC and NMFS agree that the consultation is complete, the requirements of the MSA have been fulfilled, and NRC has no further obligation.[166]

For the reasons set forth above, as a matter of law, the NRC has fulfilled its obligations under the ESA, the MSA, and NEPA. Because Challengers' contention questioning NRC staff compliance with these statutory provisions has no basis in law or fact, that contention fails to present the "seriously different picture of the environmental impact of the proposed project" which is the gravamen of a significant environmental issue. For the foregoing reasons, we find that Challengers fail to present an exceptionally grave issue, or a significant environmental issue which could reasonably be construed to satisfy the requirements of section 2.326(a)(2).

Moreover, the Challengers' argument that consultation is incomplete is now moot because of the content and context of the recently supplied NMFS Letter setting out explicit findings of the NMFS respecting all listed species and all relevant habitat (including those

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NRC __, __ (slip op. at 12) (Apr. 16, 2012).

[165] Pilgrim FSEIS at E-45.

[166] Challengers complain that consultation was unlawfully deferred to EPA; this "deferral" was done at NMFS' initiative in consideration of NRC's observation 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." Id. at E-44. The MSA regulations give the NMFS the authority to consult with other agencies if, "for example, only one of the agencies has the authority to implement measures necessary to minimize adverse effects on EFH and that agency does not act as the lead agency." 50 C.F.R. § 600.920(b). Here, NMFS permissibly identified EPA as the agency with authority to mitigate impacts on EFH. NRC's responsibilities are complete, and this portion of the contention presents no environmental issue.

relating to the Atlantic sturgeon). In that letter, NMFS makes specific requests, suggestions and recommendations to NRC, as is permitted by the relevant legislation, and concludes the consultation.[167] As we noted above, the NRC had completed its consultation obligations by supplying the BA and the supplement thereto making its determinations of "no effect" on listed species and relevant habitat. But there can be no doubt that the responses of the NMFS to the NRC's findings complete the consultation process between the NMFS and the NRC under both the ESA and the MSA. Any response which the NRC may elect to make to the suggestions, requests and recommendations of the NMFS is outside of that consultation, and purely optional on the part of the NRC. Therefore, because the consultation process is complete in all aspects, any claim that it is not is moot.

Challengers also raise substantive objections to the conclusions of the EFH Assessment in their Correction and Supplement to the Petition. Although consideration of these arguments is unnecessary for the conclusions we have reached herein, we note that were we to consider these arguments we would find them untimely and without an adequate explanation or justification for their lateness.

4. There is No Demonstration of the Likelihood of a Materially Different Result

As to the requirements of section 2.326(a)(3), Challengers claim that their motion demonstrates that a "materially different result would be or would have been likely had the newly proffered evidence been considered initially." They explain:

> Specifically, a materially different result would have been likely because: (1) there would be a completed ESA § 7 process for the ten endangered and threatened species in the 2006 BA and for Atlantic sturgeon, and there is not; (2) there would be information in the record about river herring documentation of compliance with NMFS guidelines and regulations, and there is not; (3) there would be a record of an essential fish habitat assessment, and there is not, and (4) the NEPA SEIS would contain the information in (1) to (3).[168]

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[167] See NMFS Letter at 31.

[168] Id.

Thus, argue Challengers, the insertion of additional information from the completed consultations and an EIS with additional analyses would be in and of themselves a materially different result.[169]

Entergy asserts that the Challengers have not met the heavy burden to demonstrate the likelihood of a materially different result. Entergy cites several Commission decisions that stress the high level of support needed to succeed on a motion to reopen, including the Commission's statement in this proceeding that "the level of support required . . . is greater than that required for a contention under the general admissibility requirements of 10 C.F.R. § 2.309(f)(1)."[170] Entergy further asserts that Challengers' claims concerning consultation "are simply wrong," and therefore Challengers can not and have not shown that a materially different outcome would result from any of their allegations.[171]

The NRC Staff also disagrees with Challengers' assertions that a different result would be likely: "the ESA consultation process is complete, the NRC is not required to consider the river herring, there is an EFH assessment, and the FSEIS adequately addresses these topics."[172] The Staff argues that because Challengers' claim of likelihood is conclusory, with no attempt to show how they would be likely to prevail, the motion to reopen "falls far short" of meeting the requirements of section 2.326(a)(3).[173]

We find that Challengers have failed to demonstrate that a materially different result would be likely had their newly proffered evidence been considered initially. To begin with, the Contention rests upon the faulty premise that consultation obligations remain for the NRC, but

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[169] Id. ("[H]ad Petitioners' newly proffered evidence been considered initially . . . the [Pilgrim] EIS would have been more likely to be in compliance with NEPA.")

[170] Entergy Answer at 30-31 (citing CLI-12-06, 75 NRC __ (slip op. at 18)).

[171] Id. at 30.

[172] NRC Staff Answer at 44.

[173] Id. at 44-45 (citing Oyster Creek, CLI-09-07, 69 NRC at 290-91 (2009)).

there are (even without considering the impact of the NMFS Letter) no such remaining consultation obligations. Moreover, for there to be any different result, there must be some reason to believe that further discussion or consultation between the NRC and the Services could cause that change, but Challengers have not provided any reasoning to support that premise nor have they provided any legal foundation for their assertion that the mere fact of additional analysis is itself a materially different result. Indeed, as with the failures of affidavits presented to the previous board, the absence of discussion of this matter within the affidavits submitted by Challengers here deprives us of the opportunity to evaluate either the foundation for their assertions or the "likelihood" of any such different result.

Additionally, Challengers do not demonstrate how the FSEIS' conclusions regarding the impact of Pilgrim on any species are in error. The Petition and the Mansfield Affidavit allege that, contrary to a statement in the FSEIS, North Atlantic right whales have been spotted in the immediate vicinity of Pilgrim.[174] But even if this information is reliable and accurate, the Challengers present no information or analysis which addresses how the presence of the whales near Pilgrim could affect the species. The Mansfield Affidavit similarly falls well short of the requisite level of information with its claim, without citation to any credible scientific authority and without scientific explanation, that climate change could cause listed sea turtles to adjust their migratory range to include the area around Pilgrim. This otherwise unsupported assertion simply fails to offer any information which might enable us to determine that these turtles could be affected.[175] Read in their totality, the supplied affidavits present no facts or data, and no analysis, that disputes the NRC's findings; they cannot be read to provide information which can reasonably be said to "demonstrate" that a materially different result would be, or would have

[174] See Petition at 21; Mansfield Affidavit at 3-6.

[175] See Mansfield Affidavit at 7.

been, likely had the newly proffered evidence been considered initially.[176]

That said, we note that the NMFS has, in its letter confirming that formal consultation under the ESA is not required, performed an in-depth analysis of the environmental impacts of the relicensing action upon the listed species and their critical habitat. NMFS informed NRC that it had identified additional information that would be useful for characterizing the effect of the Pilgrim facility, and "[w]hile this information was not necessary to complete this consultation, we request that you consider adding conditions to any new license for Pilgrim to require:

> (i) (1) monitoring and reporting zooplankton entrainment, including copepods (particularly, *Calanus finmarchus, Pseudocalanus* spp. and *Centropages* spp); (2) monitoring zooplankton at nearfield and farfield locations to serve as a check on [the NRC's] determination that the effects of Pilgrim on zooplankton are small and localized; (3) establishing a monitoring program for ambient water temperatures and thermal effluent to better understand how any changes in ambient water temperatures during the relicensing period, which may partly related to global and/or regional climatological changes, may change the characteristics and distribution of the thermal plume; and (4) revising the species sampled in the REMP to include species that serve as forage for listed species and species that occupy similar ecological niches as Atlantic sturgeon, whales and sea turtles and could be surrogate species for radionuclide testing . . . [and]
>
> (ii) [As to blueback herring and alewife, which] are candidate species that could be listed under the ESA in the future, we encourage you to work with Entergy to minimize effects to these species to the maximum extent possible. Monitoring requirements for these species should be incorporated into the new license."[177]

We see no reason to believe that the NRC is under any obligation to implement any of the elements it has been requested to consider. The mere fact that these requests have been made cannot serve, and could not have served if the NMFS Letter had been available to the Parties during their preparation of pleadings in this matter, to satisfy the requirements for demonstrating the likelihood of a materially different result.

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[176] As the previous board stated, "the absence of such [expert-supported] information directly causes a failure to demonstrate (as is required), and therefore deprives us of the ability – even the opportunity – to substantively consider, whether a materially different result would be obtained, as is required by our reopening standards." LBP-11-20, 74 NRC at __ (slip op. at 20).

[177] NMFS Letter at 31.

B. No Portion of the Contention Satisfies the General Contention Admissibility Standards

For any contention to be admissible, regardless of when it is filed, it must satisfy each of the six criteria of 10 C.F.R. § 2.309(f)(1). For the same reasons discussed in part V.A.3, above, that establish that the contention now before us does not present a significant environmental issue, we find that the contention likewise is inadmissible under 10 C.F.R. § 2.309(f)(1)(vi) for failing to raise a genuine dispute with the license application on a material issue of law or fact.

This contention rests upon the premise that the NRC has outstanding consultation obligations, but the NRC has no such outstanding obligations under either the ESA or the MSA, and, because the NRC has completed the required consultations, no supplement to the FSEIS is necessary under NEPA. Challengers' contention thus presents no material issue of law.

Moreover, as we discussed above, Challengers' asserted factual disputes with the FSEIS do not raise a genuine, material issue of fact as to impacts on any marine species.[178] Because the contention is inadmissible for its failure to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(vi), we need not examine the remaining admissibility factors.

C. If There Were a Substantively Admissible Contention, Only the Portion Respecting the Atlantic Sturgeon Meets the Requirements for Nontimely Contentions

[178] As discussed above, the Mansfield Affidavit raises concerns about the presence of North Atlantic right whales near Pilgrim and the effect of climate change on sea turtles, but offers no explanation as to how these alleged facts, if true, call into question the NRC Staff's conclusion that relicensing Pilgrim will have no effect on those species. The Petition and the Mansfield Affidavit also purport to criticize the discussion in the FSEIS of river herring, but they do not suggest that any of the data in the FSEIS are incorrect. See Petition at 21-23; Mansfield Affidavit at 8-12. Rather, Challengers state that the FSEIS "minimizes" the impact from Pilgrim operations on river herring. They do not, however, offer any guide to what additional information the NRC Staff should have included. Because the Challengers do not contest the accuracy of the FSEIS' information regarding river herring, and because they fail to specify any omissions in the FSEIS, the contention does not present a genuine dispute of material fact with regard to the river herring.

Challengers argue that the Petition satisfies the requirements of section 2.309(c) for nontimely contentions.[179] As we discussed in Part V.A.2, above, Challengers' good cause argument with regard to the reclassification of the Atlantic sturgeon is sufficiently based upon new information to pass muster as to good cause, but fails with respect to all the other claims. With the exception of the 2012 Supplemental BA, all of the information supporting the contention was available well before the date of the Petition, and Challengers have failed to justify the delays. Challengers' assertion that they should be excused from timely filing their contention due to reliance on statements by NRC and NMFS that consultation was ongoing is without merit given that the lack of an NMFS response, which has been apparent for some considerable period, is ultimately at the heart of their contention. We therefore find that Challengers have not established good cause to raise any portion of the contention except those respecting the Atlantic sturgeon.[180] As to the portion of the contention that concerns that species, good cause lies. However, as we noted in Part III.B and ruled in Part V.A.3, above, the NRC has fully satisfied its consultation obligations so that Challengers have failed to raise an admissible contention.

VI. CONCLUSION AND ORDER

For the foregoing reasons, we find that Pilgrim Watch and JRWA's new contention:

a. Fails to satisfy the criteria for reopening a closed record under 10 C.F.R. § 2.326; and

b. Fails to satisfy the contention admissibility criteria of 10 C.F.R. § 2.309(f)(1).

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[179] This requirement is triggered because the motion to reopen relates to a contention not previously in controversy. See 10 C.F.R. §2.326(d).

[180] Good cause is the most important of the factors in the 2.309(c) balancing test, and in the absence of good cause, a party must make an especially strong showing on the other factors to justify admission of a nontimely contention. See Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-05-24, 62 NRC 551, 565 (2005). Challengers have not made such a showing, with the exception of their timely filed claim regarding Atlantic sturgeon.

Each of these failures separately requires denial of this request for hearing by Pilgrim Watch and JRWA. The petition to intervene and motion to reopen are therefore both DENIED. The evidentiary record in this proceeding remains closed.

Pursuant to 10 C.F.R. § 2.341(a), this decision will constitute a final decision of the Commission forty (40) days from the date of issuance, i.e., on July 3, 2012, unless a petition for review is filed in accordance with 10 C.F.R. § 2.341(b), or the Commission directs otherwise. Any party wishing to file a petition for review on the grounds specified in section 2.341(b)(4) must do so within fifteen (15) days after service of this decision. A party must file a petition for review to have exhausted its administrative remedies before seeking judicial review. Within ten (10) days after service of a petition for review, any other party to the proceeding may file an answer supporting or opposing Commission review. Any petition for review and any answer shall conform to the requirements of 10 C.F.R. § 2.341(b)(2)-(3).

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD[181]

/RA/

_____
Dr. Paul B. Abramson
ADMINISTRATIVE JUDGE

/RA/

_____
Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

Rockville, Maryland
May 24, 2012

[181] Judge Young's concurring opinion follows below.

Administrative Judge Ann Marshall Young, Concurring

I concur that Petitioners have standing but have submitted no new admissible contention in their March 8, 2012, filing. I find some issues they pose warrant some concern, however, and write separately to focus attention on these aspects of the matters raised.

Introduction

The issues raised by Petitioners are, I agree, untimely and/or otherwise inadmissible in this adjudicatory proceeding under relevant NRC rules. But I find Petitioners have raised several concerns that the NRC Staff might appropriately choose to address in a supplement to the FSEIS. Although the life of this case has extended significantly longer than those of most other NRC proceedings, if inherently valid issues warrant continued attention as matters of common sense and/or in the public interest in environmental protection, this would be of value and may indeed be required under NEPA. As I have previously observed,[1] because Entergy's license for the Pilgrim plant remains in effect until action is taken on its renewal application, no significant harm should ensue from any such action on the part of the NRC Staff. Indeed, in comparison to the 16 years that Pilgrim's National Pollutant Discharge Elimination System (NPDES) permit has apparently remained in effect pending a determination on the renewal application for it,[2] any such period in question herein may be expected to be relatively insignificant, even given some delays in this proceeding beyond those more typical in such cases.

As to the matters now at issue, as noted by the Majority, Petitioners have raised four claims in their new contention. In the first two, based on the Endangered Species Act (ESA), it

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[1] LBP-12-01, 74 NRC __, __, Dissent of Administrative Judge Ann Marshall Young at 19 (Jan. 11, 1012) [hereinafter LBP-12-01, Young Dissent].

[2] *See infra* n.41 and accompanying text.

is alleged (A) that the ESA "§ 7 consultation process for listed and candidate species and critical habitat is incomplete," and (B) that ESA-required "assessment of the adverse impacts of [Pilgrim Nuclear Power Station] operations on river herring, newly identified as 'candidate species' . . . has not occurred." In the third claim, it is alleged (C) that the NRC has "unlawfully attempted to defer" certain requirements of the Magnuson-Stevens Fisheries Act (MSA), regarding consultation with the National Marine Fisheries Service (NMFS) and preparation of an essential fish habitat (EFH) assessment before relicensing the plant, to the federal Clean Water Act NPDES permit renewal process for the plant. Finally, based on the first three claims, it is alleged (D) that the EIS for the plant must be revised and supplemented under requirements of the National Environmental Policy Act (NEPA).[3] Petitioners seek the following relief:

> Essentially, . . . complete the ESA § 7 process for Atlantic sturgeon and river herring, obtain concurrence on the NRC staff BA, conduct a EFH assessment, and add this information to the NEPA record. These are narrow issues, and steps that should have been taken by regulatory agencies and Entergy in the past six years upon filing the renewal application.[4]

Endangered Species Act Consultation

Petitioners' claim that required ESA consultation is not complete is based on their assertion that concurrence by the appropriate ESA consultation agency must be sought and received.[5] This claim involves both the NRC's 2006 biological assessment with respect to

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[3] *See* Jones River Watershed Association [hereinafter JRWA] Petitions for Leave to Intervene and File New Contentions Under 10 C.F.R. § 2.309(a), (d) or in the Alternative 10 C.F.R. § 2.309(e) and [JRWA] and Pilgrim Watch [hereinafter PW] Motion to Reopen Under 10 C.F.R. § 2.326 and Request for Hearing Under 10 C.F.R. § 2.309(a) and (d) in Above Captioned License Renewal Proceeding (Mar. 8, 2012) at 5 [hereinafter Petition].

[4] *Id.* at 51.

[5] *Id.* at 8. The two agencies that are responsible for implementing ESA consultation requirements are the National Marine Fisheries Service (NMFS), a part of the National Oceanic and Atmospheric Administration (NOAA) of the U.S. Department of Commerce, and the Fish and Wildlife Service (FWS), a part of the Department of the Interior. NMFS is the agency responsible for the consultation in question in this proceeding.

several listed endangered species of whales and sea turtles, and a supplemental assessment on the Atlantic sturgeon, a species that was newly listed as endangered in January 2012. As noted by the Majority, in both of these assessments, the NRC Staff concluded that continued operation under a renewed Pilgrim license would have "no effect" on the relevant listed species, and both Staff and Applicant argue that no consultation is required by the ESA if an agency finds that a proposed activity "will not affect" any listed species or critical habitat. Petitioners argue that such a unilateral determination of no effect is inconsistent with the law, citing a Supreme Court case[6] and a Federal District Court case[7] in support of their position.

I note first that the consultation issue does, as the majority states, appear to be moot at this point, based on the recent letter from NMFS that was provided to us on May 22, 2012.[8] In this letter NMFS responds to the Staff's two biological assessments and "provide[s its] justification for concluding consultation informally."[9] Assuming, however, that any issue remains on the consultation question (and recognizing, for example, that NMFS in its letter speaks of the possible need for "reinitiation" of consultation in various circumstances[10]), I note that all parties have presented interesting arguments on a matter that I find to be more subtle than it might seem on the surface.

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[6] *Tennessee Valley Authority v. Hill*, 437 U.S. 154 (1978), *cited in* [JRWA] and [PW] Reply to Answers of NRC Staff and Entergy to [JRWA] Petitions to Intervene and for Hearing Under 10 C.F.R. § 2.309 [hereinafter JRWA Reply] at 1 (Mar. 26, 2012).

[7] *Washington Toxics Coalition v. U.S. Dept. of Interior; FWS*, 457 F.Supp. 2d 1158 (W.D.Washington 2006), *cited in* JRWA Reply at 5.

[8] Letter to Administrative Judges from Susan L. Uttal (May 22, 2012), Attached Letter to Andrew S. Imboden from Daniel S. Morris (May 17, 2012) [hereinafter NMFS 5/17/12 Letter].

[9] NMFS 5/17/12 Letter at 2.

[10] *See id.* at 28-32.

I begin my own analysis by looking to the actual wording of ESA Section 7, which states in relevant part as follows:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an ‘‘agency action’’) is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.[11]

Petitioners in their first claim are concerned with the consultation required under this section, which is initiated by NRC as the "action" agency with, in this instance, NMFS as the ESA consultation agency.

As to compliance with substantive ESA requirements, it appears to be undisputed that it is the "action" agency – here the NRC – that is ultimately responsible for such compliance. As Entergy has pointed out, the background comments accompanying the 1986 promulgation of implementing rules by the Departments of Interior and Commerce, through FWS and NMFS, provide some elucidation on the respective roles of the "action" and "consulting" agencies:

> The Service [*i.e.* NMFS or FWS] 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. As part of its role, the Service issues biological opinions to assist the Federal agencies in conforming their proposed actions to the requirements of section 7. 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.[12]

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[11] 16 U.S.C. § 1536(a)(2).

[12] Interagency Cooperation – Endangered Species Act of 1973, as Amended (Final Rule), 51 Fed. Reg. 19,926, 19,928 (June 3, 1986); *see* Entergy's Answer Opposing [JRWA]'s and [PW]'s Motion to Reopen and Hearing Request at 4 (Mar. 19, 2012) [hereinafter Entergy Answer].

A few years earlier, in 1978, the Supreme Court had addressed, among other things, the "substantive command," or purpose, of Section 7. As pointed out by Petitioners, the Court in *Tennessee Valley Authority* emphasized that:

> [o]ne 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.[13]

More generally, the Court observed:

> 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 . . . ." 16 U.S.C. § 1531(b) (1976 ed.). 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 . . . ." 16 U.S.C. § 1531(c) (1976 ed.). 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." § 1532(2). 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, 16 U.S.C. § 1538 (1976 ed.), except in extremely narrow circumstances, see § 1539(b). The Secretary was also given extensive power to develop regulations and programs for the preservation of endangered and threatened species.[14]

The Court in TVA also considered the history of the ESA as it informed its purposes, noting that the 1973 Act removed certain qualifying language that was in the earlier 1966 Act:

> Section 7 of the Act . . . provides a particularly good gauge of congressional intent. As we have seen, this provision had its genesis in the Endangered Species Act of 1966, but that legislation qualified the obligation of federal

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[13] *TVA*, 437 U.S. at 173 (emphasis in original), *quoted in* JRWA Reply at 2.

[14] *Id.* at 180, *quoted in* JRWA Reply at 3.

> agencies by stating that they should seek to preserve endangered species only "*insofar as is practicable and consistent with the[ir] primary purposes* . . ."
> . . . .
> What is very significant . . . is that the final version of the 1973 Act carefully omitted all of the reservations described above.[15]

In the *Washington Toxics Coalition* case, also cited by Petitioners, the U.S. District Court for the Western District of Washington addressed the consultation requirement of Section 7 with respect to certain rules that permitted the Environmental Protection Agency (EPA) to make "not likely to adversely affect (NLAA)" determinations without consultation or concurrence of NMFS or the Fish and Wildlife Service (FWS).[16] The Court, relying on various decisions of the Ninth Circuit Court of Appeals, stated that it could not 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 regarding NLAA actions," and found the regulations in question, which "permit[ed] no [NMFS or FWS] consultation on NLAA actions," not to be in accordance with the law."[17] The Court did not, however, address the "no effect" determination question at issue herein.[18]

Although the general reasoning of the *Washington Toxics* court on "not likely to affect" determinations might arguably be logically applied to the "no effect" issue, this does not appear to have occurred. To the contrary, several Circuit Courts of Appeal have spoken, in dicta at least, on the issue of the need for consultation on an action agency's "no effect" determination, indicating that the need for consultation is *not* triggered under the ESA when the action agency

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[15] *Id.* at 181-182 (emphasis in original).

[16] *Washington Toxics Coalition*, 457 F.Supp. 2d at 1163.

[17] *Id.* at 1179-80.

[18] The Court noted in passing that "[n]o consultation is required for actions that have no effect on listed species," *id.* at 1163, but did not address the issue the in any detail, as it was not before the court.

determines its proposed activity will have no effect on any listed species or critical habitat.[19] There appears to be no relevant authority to the contrary.

As the NRC Staff has asserted, the conclusion that no consultation is required in such instances is also supported by the literal language of 50 C.F.R. §402.14(a), which provides in relevant part that "[e]ach Federal agency shall review its actions at the earliest possible time to determine whether any action *may affect* listed species or critical habitat. *If such a determination is made*, formal consultation is required."[20] In addition, there are references in

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[19] *See Ctr. for Biological Diversity v. Dep't of Interior*, 563 F.3d. 466, 475 (D.C. Cir. 2009); *Newton Co. Wildlife Ass'n. v. Rogers*, 141 F.3d 803, 810-11 (8th Cir. 1998); *SW. Ctr. For Biological Diversity v. U.S. Forest Svc.*, 100 F.3d 1443, 1447-48 (9th Cir. 1996); *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1054 n.8 (9th Cir. 1994) ("[I]f the agency determines that a particular action will have no effect on an endangered or threatened species, the consultation requirements are not triggered."), *cert. denied* 514 U.S. 1082(1995).

[20] 50 C.F.R. § 402.14(a) (emphasis added); *see* NRC Staff's Answer to [JRWA and PW]'s Petitions for Leave to Intervene and Motions to Reopen the Record (Mar. 19, 2012) at n.39. Section 402.14(a), on the requirement for formal consultation, states in full:

> Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required, except as noted in paragraph (b) of this section. The Director may request a Federal agency to enter into consultation if he identifies any action of that agency that may affect listed species or critical habitat and for which there has been no consultation. When such a request is made, the Director shall forward to the Federal agency a written explanation of the basis for the request.

Section 402.14(b) states:

> A Federal agency need not initiate formal consultation if, as a result of the preparation of a biological assessment under § 402.12 or as a result of informal consultation with the Service under § 402.13, the Federal agency determines, with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species or critical habitat. . . .

An agency may also choose to engage in "informal consultation," which is an "optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency . . . , designed to assist the Federal agency in determining whether formal consultation or a conference is required." 50 C.F.R. § 402.13(a). The NRC Staff's communications with NMFS, *see supra* n.8, *infra* n.22, fall within this designation.

50 C.F.R. §402.12 to the action agency's biological assessment being used *by the Federal agency* in "determining *whether* formal consultation or a conference is necessary."[21]

Interestingly, notwithstanding the preceding considerations and as indicated above, the NRC Staff chose to initiate "informal consultation" and seek NMFS concurrence on its "no effect" determinations, and NMFS has responded, as noted above, most recently "concluding the consultation informally."[22] In any event, any challenge regarding the 2006 assessment is untimely and, although I agree that the challenge to the assessment on the Atlantic sturgeon is timely, I must also agree that relevant ESA rules require nothing further of the NRC in this

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[21] 50 C.F.R. § 402.12(a) (emphasis added); *see* 50 C.F.R. § 402.12(k). A conference is required on any action "likely to jeopardize the continued existence of any proposed species or result in the destruction or adverse modification of proposed critical habitat." 50 C.F.R. §402.10(a).

I note that the contention at issue herein is distinguishable from that admitted in *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), Memorandum and Order (Ruling on Pending Motions for Leave to File New and Amended Contentions) (July 6, 2011) (Unpublished Licensing Board Issuance at 60-72), in that the contention in *Indian Point* concerned a biological assessment in which the NRC Staff recognized that there *was* a potential for an adverse effect on a listed species, in contrast to the Staff's finding of "no effect" in the instant case. *See* Riverkeeper Inc. Consolidated Motion for Leave to File a New Contention and New Contention Concerning NRC Staff's Final Supplemental Environmental Impact Statement (Feb.3, 2011) at 7; NRC Staff's Answer to Riverkeeper, Inc.'s Motion for Leave to File a New Contention, and New Contention EC-8 Concerning NRC Staff's Final Supplemental Environmental Impact Statement (Mar. 7, 2011) at 9.

[22] NMFS 5/17/12 Letter at 2; *see also* Petition, Attached Letter to Patricia A Kurkul, NMFS, from Andrew S. Imboden, NRC (Feb. 29, 2012); NRC Staff's Answer to Correction and Supplement to [JRWA] and [PW]'s Petitions to Intervene and Motions to Supplement (Mar. 26, 2012) at n.15 and Attached Letter to Andrew S. Imboden from Daniel S. Morris, Acting Regional Administrator, U.S. Dept. of Commerce, NOAA, NMFS (Mar. 26, 2012).

I note that NMFS in its most recent letter indicates that the "agencies agreed . . . to engage in informal consultation to determine *whether formal consultation was necessary* or if consultation could be concluded with a 'not likely to adversely affect' finding." NMFS 5/17/12 Letter at 30. Under its rules NMFS may "request the [NRC] to initiate formal consultation" if it finds this to be appropriate. *See* 50 C.F.R. §§ 402.12(k)(2), 402.14(a).

regard at this point, leaving no genuine dispute on the matter. As the Majority notes, NMFS has found that "all effects to listed species will be insignificant or discountable."[23]

NMFS has further indicated that it has "identified several areas where additional and/or more recent information would be helpful to better characterize effects of the Pilgrim facility," and has also, as noted by the Majority, requested that the NRC consider adding certain conditions to Pilgrim's renewed license with respect to listed species, which would require:

> (1) monitoring and reporting zooplankton entrainment, including copepods (particularly, *Calanus finmarchus, Pseudocalanus* spp. and *Centropages* spp);
>
> (2) monitoring zooplankton at nearfield and farfield locations to serve as a check on your determination that effects of Pilgrim on zooplankton are small and localized;
>
> (3) establishing a monitoring program for ambient water temperatures and the thermal effluent to better understand how any changes in ambient water temperatures during the relicensing period, which may partly be related to global and/or regional climatological changes, may change the characteristics and distribution of the thermal plume; and
>
> (4) revising the species sampled in the REMP to include species that serve as forage for listed species and species that occupy similar ecological niches as Atlantic sturgeon, whales and sea turtles and could be considered surrogate species for radionuclide testing.[24]

Requiring these proposed conditions would be in the discretion of the NRC, but NMFS's request and reasoning therefor might well be construed to constitute new and significant information warranting further consideration under NEPA. In this regard, I note that NMFS in its letter also states that if there is any incidental "take" of a listed species "reinitiation of consultation would be required,"[25] and directs that any instance of whales, sea turtles, or Atlantic sturgeon being "observed at or near Pilgrim, including in the discharge canal, at the trash racks

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[23] NMFS 5/17/12 Letter at 30.

[24] *Id.* at 31.

[25] *Id.* at 30. NMFS explains that "take" is "is defined in the ESA as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct." *Id.*

or on the intake screens" be "immediately reported."[26] Petitioners have not, however, shown that any such conditions or other considerations must be addressed in the context of the adjudicatory proceeding.

Endangered Species Act Assessment Regarding River Herring

Petitioners are also concerned about the "alewife (*Alosa pseudoharengus*) and blueback herring (*Alosa aestivalis*), collectively referred to as 'river herring,'" with respect to which NMFS on November 2, 2011, issued a "90-day finding on a petition to list" the species and to "designate critical habitat concurrent with any listing.'"[27] The final decision on the proposed listing is due within twelve months of the August 5, 2011, petition to list the species that prompted the 90-day finding.[28]

In support of this claim Petitioners present facts including that river herring larvae have been found in entrainment samplings at Pilgrim, despite it being "contrary to normal river herring breeding patterns to find larvae in a saltwater environment like [Pilgrim's] salt-water intake, several miles from suitable freshwater habitat in the area" in two rivers.[29] Petitioners also cite among other things an NMFS regulation that provides as follows:

> In addition to listed and proposed species, [NMFS] will provide a list of candidate species that may be present in the action area. Candidate species refers to any species being considered by the Service for listing as endangered or threatened species but not yet the subject of a proposed rule. Although candidate species have no legal status and are accorded no protection under the Act, their inclusion will alert the Federal agency of potential proposals or listings.[30]

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[26] *Id.* at 30-31.

[27] Petition at 9 (citing 76 Fed. Reg. 67,652 (Nov. 2, 2011)).

[28] 76 Fed. Reg. at 67,656.

[29] Petition at 21.

[30] 50 C.F.R. § 402.12(d), *cited in* Petition at 9.

This language contains both the answer to the question with respect to river herring – having "no legal status and . . . no protection under the Act," they are not legally required to be addressed by the NRC at this time – and the kernel of a different issue, whether the NRC *should* nonetheless consider the effect of continued operation of the Pilgrim plant on these fish. Petitioners quote an NMFS handbook in which it is stated that NMFS biologists "should notify agencies of candidate species in the action area" and "urge other Federal agencies to address candidate species in their Federal programs," and that "[a]ddressing candidate species at this stage of consultation provides a focus on the overall health of the local ecosystem and may avert potential future conflicts."[31]

In its May 17 letter, NMFS includes a section entitled, "Technical Assistance for Candidate Species," indicating that a "status review" for the blueback herring and alewife "is currently ongoing."[32] NMFS notes that "Blueback herring and alewife are impinged annually and occasionally entrained at Pilgtim," and "encourage[s the NRC] to work with Entergy to minimize effects to these species to the maximum extent possible."[33] In addition, it recommends that "[m]onitoring requirements for these species should be incorporated into the new license," asks that "any monitoring reports produced that contain information on these species be provided" to NMFS, and requests that NRC "work with Entergy to .investigate why early life stages (larvae)

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[31] Endangered Species Consultation Handbook, *Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act,* U.S. Fish & Wildlife Service, [NMFS] (March 1998) at 3-7 *available at* http://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf (last consulted April 19, 2012), *quoted and cited in* Petition at 10, 28.

[32] NMFS 5/17/12 Letter at 31. NMFS also indicates that the definition for "Candidate Species" has been revised, *id.* (citing 69 Fed. Reg. 19, 975 (April 15, 2004), 71 Fed. Reg. 61,022 (Oct. 17,2006)), *but see supra* text accompanying n.30, which quotes the current rule.

[33] NMFS 5/17/12 Letter at 31.

of alewife are present near the intakes (as evidenced by entrainment.)"[34] Because "[a]lewife normally spawn in freshwater and presence of early life stages in marine waters, such as the Pilgrim intake, is unexpected," NMFS states that further investigation is warranted "to determine if the operations of Pilgrim contribute to this unusual behavior or if it is due to unrelated factors."[35] Finally, NMFS states that, "[s]hould either species be listed under the ESA in the future, reinitiation of consultation would be necessary."[36]

I must agree with my colleagues that Petitioners are untimely in presenting their claim relating to the river herring and ESA consultation. Also, as noted above, NRC is not required under ESA to take any further action at this point with respect to either species of river herring. However, I do find that Petitioners' concerns regarding these small fish have some merit, even if not in this adjudicatory proceeding. NMFS's recommendations of further actions and investigation, which track fairly closely the concerns of Petitioners, would seem to be warranted under the "hard look" requirement of NEPA.[37]

Magnuson-Stevens Fisheries Act Consultation and Essential Fish Habitat Assessment

After filing their initial Petition, Petitioners filed a "Correction and Supplement," in which they acknowledge that the NRC did actually submit the EFH assessment at issue,[38] but still

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[34] *Id.* NMFS cites the FSEIS, NUREG-1437, Supp. 29 (2007) (ADAMS Accession No. ML071990020), for the information on entrainment of the river herring, and indeed, it appears to be undisputed that the "alewife is common in Cape Cod Bay, and is one of the most commonly impinged species at PNPS," having "the third highest number of individuals impinged at PNPS, based on annual extrapolated totals," over the 25-year period from 1980 through 2005." FSEIS at 2-34 to -35; *see id.* at 4-30 .

[35] NMFS 5/17/12 Letter at 31.

[36] *Id.*

[37] *See infra* section on NEPA.

[38] Correction and Supplement to: [JRWA] Petitions for Leave to Intervene and File New Contentions Under File New Contentions Under 10 C.F.R. § 2.309(a), (d) or in the Alternative 10 C.F.R. § 2.309(e) and [JRWA] and Pilgrim Watch [hereinafter PW] Motion to (continued. . .)

assert that the EFH consultation process is not complete, and that there has been inadequate scrutiny of related water quality issues. As to their initial MSA-related arguments, Petitioners cite NRC regulations requiring license renewal applicants whose plants use once-through cooling systems, as Pilgrim does,[39] to provide "a copy of current Clean Water Act 316(b) determinations and, if necessary, a 316(a) variance in accordance with 40 CFR part 125, or equivalent State permits and supporting documentation."[40] Petitioners further note that "Entergy's 'current' 316(b) determination and 316(a) variance, contained in its Clean Water Act (CWA) NPDES permit, expired 16 years ago, although it has been administratively extended."[41] In Petitioners' view, this does not satisfy certain requirements on consultation and fish habitat assessments found in the the Magnuson-Stevens Fishery Conservation and Management Act.of 1976 (MSA). The purpose of this Act, as they point out, is "to promote the protection of essential fish habitat in the review of projects conducted under Federal permits, licenses, or other authorities that affect or have the potential to affect such habitat."[42] The need for the Act arose out of Congress' finding that "one of the greatest long-term threats to the viability of commercial and recreational fisheries is the continuing loss of marine, estuarine, and other aquatic habitats," which warranted "increased attention for the conservation and management of

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(. . .continued)

Reopen Under 10 C.F.R. § 2.326 and Request for Hearing Under 10 C.F.R. § 2.309(a) and (d), Originally Filed on March 8, 2012 in Above Captioned License Renewal Proceeding (Mar. 15, 2012) at 2 [hereinafter Correction and Supplement].

[39] *See* FSEIS at 2-7.

[40] 10 C.F.R. § 51.53(c)(3)(ii)(B).

[41] Petition, Attached Affidavit of Anne Bingham ¶ 5 [hereinafter Bingham Affid.]; Correction and Supplement at 4. There appears to be no dispute that the NPDES permit is currently administratively extended pending final determination on a 1995 renewal application. *See* Entergy Answer at 18-19.

[42] 16 U.S.C.S. §1801(b)(7).

fishery resources of the United States."[43] Petitioners point out that the Massachusetts Supreme Judicial Court has noted the harms associated with cooling water intake structures,[44] and are concerned that these harms are not adequately being addressed.

The NRC Staff insists that Petitioners have presented no material issue with respect to their MSA-related allegations.[45] Staff agrees that Section 305(b)(2) of the MSA "requires all Federal agencies to consult with the NMFS on any proposed actions that may adversely affect essential fish habitat [EFH]," and that NMFS implement these requirements and related procedures in its regulations.[46] Agencies are advised to "consult with NMFS as early as practicable for any federal action that may adversely affect EFH, including renewals of licenses,"[47] and it is required that they "provide a written assessment of the effects of that action on EFH."[48] Staff argues, however, that, while NMFS recommends to agencies measures to conserve EFH that might be "adversely affect[ed]," which require detailed responses, NMFS regulations "do not require a federal agency to implement conservation recommendations where that agency does not have the statutory authority to implement those recommendations."[49] The regulations in question provide that, where there are overlapping responsibilities among more than one agency, and the "agency acting as the lead agency does not have the statutory authority to implement the conservation recommendations, the lead agency will prepare the

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[43] 16 U.S.C. S. § 1801(a)(9).

[44] Petition at 23-24 (citing *Entergy Nuclear Generation Co. v. Dept. of Envir'l Protection*, 949 N.E.2d 1027, 1037 (Mass. 2011)).

[45] NRC Staff's Answer to [JRWA] and [PW]'S Petitions for Leave to Intervene and Motions to Reopen the Record (Mar, 19, 2012) at 19.

[46] *Id.* (citing 16 U.S.C. § 1855(b)(3); 50 C.F.R. §§ 600.905, 600.920(a)(1)-(3)).

[47] *Id.*

[48] *Id.* (citing 50 C.F.R. § 600.920(a)(1)-(3), (e)(1-4)).

[49] *Id.* at 20 (citing 16 U.S.C. § 1855(b)(4)(A); 50 C.F.R. §§ 600.925(a), 600.920(k)).

EFH Assessment but NMFS will not provide them with conservation recommendations," and instead the agency with authority to implement conservation recommendations must consult with NMFS on implementation of any conservation recommendations.[50]

The NRC prepared an EFH assessment, provided it to NMFS[51] – which Staff contends concluded the consultation process for the NRC – and documented this in the EIS in July 2007.[52] Moreover, as Staff points out, NMFS noted Staff's position that the EPA "had sole authority over operational conditions and mitigation conditions affecting the EFH," and specifically stated in a January 2007 letter that it "determined that our issues of concern relative to living marine resources and EFH would be most appropriately addressed through the EPA's NPDES [National Pollutant Discharge Elimination System] permit renewal process."[53] NMFS therefore did not provide the NRC with EFH conservation recommendations on the Pilgrim license renewal, but instead stated that it would "perform a detailed review of the proposed project within the NPDES permit renewal process and potentially provide EFH conservation recommendations at that time," and that it was "concluding the EFH consultation process [with NRC] without providing conservation recommendations."[54] In its letter to the NRC, NMFS indicated that EPA was "currently in the process of developing a demonstration document for reissuance of the NPDES permit."[55]

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[50] *Id.* (citing 50 C.F.R. § 600.920(b), 600.925(a)).

[51] 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. 8, 2006) ADAMS Accession No. ML063390166); *see also* FSEIS at E-44 to -45, E-51, E-80.

[52] Staff Answer at 21-22 (citing FSEIS, App. E).

[53] *Id.* at 22 (citing FSEIS, E-44 to -45; 50 C.F.R. § 600.920(b)).

[54] *Id.* at 22-23 (citing 50 C.F.R. § 600.920(b); FSEIS at E-44 to -45, E-135, A-114).

[55] FSEIS at E-44..

I agree that Petitioners, in not addressing information that was available in 2007, are untimely in their arguments on MSA requirements; nor does there appear to be a question that the NRC complied with relevant requirements in this regard. What appears to most concern Petitioners is the apparently undisputed circumstance that the Pilgrim plant received its first NPDES permit in 1991, but that it expired in 1996 and has not been renewed since that time, remaining instead in effect administratively until such time as action is taken on the renewal by the EPA.[56]

Although Applicant did apparently inquire about Clean Water Act requirements relating to the renewal in 2005,[57] it is not altogether clear what has happened since that time. Petitioners, through the Affidavit of Ms. Anne Bingham, former senior attorney for the Massachusetts Department of Environmental Protection, Division of Water Pollution Control, assert that nothing is happening with respect to the pending permit application,[58] and that no permit can be issued "unless Massachusetts issues a 'water quality certification' stating that EPS's permit does not violate the state water quality standards."[59] According to Ms. Bingham, it is unlikely that a new NPDES permit can be issued by June 2012, when the current license expires.[60]

Although the NPDES permitting process does not excuse NRC from addressing relevant water quality issues in its EIS,[61] Petitioners herein have not raised such issues in an appropriate

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[56] *See* Petition, Attached Affid. of Anne Bingham ¶ 5.

[57] *See id.* ¶ 6.

[58] *Id.* ¶¶ 6, 7.

[59] *Id.* ¶ 8.

[60] *Id.* ¶¶ 8-11.

[61] *See Calvert Cliffs Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1123; *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-09-16, 70 NRC 227, 278-79 (2009).

manner or at an appropriate time for them to be admitted into this adjudication proceeding. To the extent the issues they raise are valid, of course, the NRC should address them, as it should address any significant water quality or other environmental issue as part of its responsibility under NEPA. The Massachusetts Court has noted what it appears to consider significant issues with the cooling water intake structure used at Pilgrim,[62] and it may be that the NRC itself should undertake to look further into such issues prior to making a final determination on the pending renewal Application.[63] Further, I note that NMFS has provided EPA with a copy of its May 17, 2012, letter, and states in its letter to the NRC that, "[i]f in the future EPA issues a revised NPDES permit for this facility, reinitiation of this consultation, involving both EPA and NRC, is likely to be necessary."[64] In addition, NMFS notes its understanding that "revised CWA 316(b) regulations may be issued by EPA in 2012," stating that, "[i]f there are any modifications to the Pilgrim facility resulting from the implementation of these regulations, reinitiation of this consultation is likely to be necessary."[65]

NEPA and Asserted Requirement for Supplement to EIS

I have previously noted the requirement, also herein argued by Petitioners,[66] that a "'hard look' [must be taken] at the environmental consequences"[67] of renewing the license for

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[62] *See supra* n.44.

[63] With respect to the requirement for a State water quality certification and the impact of this on NRC's authority to issue a renewed license, a dispute relating to the Vermont Yankee license renewal is currently before the D. C. Circuit Court of Appeals in the Matter of Vermont Dept. of Public Service v. NRC, No's. 11-1168, 11-1177, oral argument on which was heard May 9, 2012. On May 14 Petitioners filed a new contention raising matters specifically including the water quality certification issue.

[64] NMFS 5/17/12 Letter at 32.

[65] *Id.*

[66] *See* Petition at 12-14.

the Pilgrim plant. I have also recognized NEPA's "'dual purpose' [of] ensur[ing] that federal officials *fully take into account* the environmental consequences of a federal action *before* reaching major decisions, and [ ] inform[ing] the public, Congress, and other agencies of those consequences,"[68] further noting that NEPA exists in part to "ensure[ ] that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast."[69] Given the outcomes on Petitioners' first three claims, they have little to support a favorable conclusion on their fourth, in this adjudicatory proceeding at this time. However, even though such matters may not be admissible in this adjudicatory proceeding, concerns have been raised, both by Petitioners and by NMFS, that may well warrant a "hard[er] look" than they have received to this point.

For example, the NRC in the Pilgrim FSEIS has a section on the alewife, in which it describes the fish, stating that "[a]lewife larvae and juveniles have been collected in the PNPS entrainment sampling," that "[j]uveniles and/or adults have been consistently collected in the PNPS impingement sampling program," and that, "[o]ver the last 25 years (1980 to 2005), alewives have had the third highest number of individuals impinged at PNPS, based on annual

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(. . .continued)

[67] *Baltimore Gas and Elec. Co v. Natural Res. Defense Council*, 462 U.S. 87, 97 (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)); *see* LBP-12-01, Young Dissent at 14.

[68] *Private Fuel Storage, L.L.C*. (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 348 (2002) (emphasis added) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989); *Baltimore Gas and Elec*., 462 U.S. at 97; *Dubois v. US Dept. of Agriculture*, 102 F.3d 1273, 1291 (1st Cir. 1996)); *see* LBP-12-01, Young Dissent at 13.

[69] *Robertson*, 490 U.S. at 349; *see* LBP-12-01, Young Dissent at 16. As I noted in my Dissent to LBP-12-01, at 16 n.48, Pilgrim Watch has previously cited *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989), for the principle that "it would be incongruous with NEPA's 'action-forcing' purpose to allow an agency to put on 'blinders to adverse environmental effects,' just because the EIS has been completed."

extrapolated totals."[70] The FSEIS does not, however, address the questions, raised by both Petitioners and NMFS, *why* alewife larvae are present near Pilgrim's cooling water intakes and whether this is due to the operations of the Pilgrim plant.[71] Although it would be inappropriate for me to direct the NRC Staff in its actions, the Staff might appropriately choose to proceed with a supplemental EIS in which these questions might be among the issues addressed.[72]

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[70] FSEIS at 2-34 to -35.

[71] *See supra* nn.32-35 and accompanying text.

[72] Although the various license conditions proposed by NMFS are not part of the matters now at issue before us, the letter containing this information has been provided to us to consider in our deliberations on the current contention, the information is obviously related to aspects of the contention, and as such, these matters would also seem to be appropriate subjects for further consideration by NRC Staff under NEPA, as would any occurrence of any of the circumstances recounted by NMFS that might warrant reinitiation of ESA consultation. *See supra* n.10.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
ENTERGY NUCLEAR GENERATION CO.	)	Docket No. 50-293-LR-ESA-MSA
AND	)	
ENTERGY NUCLEAR OPERATIONS, INC.	)	ASLBP No. 12-917-05-LR-BD01
	)	
(Pilgrim Nuclear Power Station)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Denying Petition for Intervention and Request to Reopen the Proceeding and Admit New Contention) (LBP-12-10),** have been served upon the following persons by Electronic Information Exchange (EIE) and by electronic mail as indicated by an asterisk*.

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Docket No. 50-293-LR-ESA-MSA
ASLBP No. 12-917-05-LR-BD01
MEMORANDUM AND ORDER (Denying Petition for Intervention and Request to Reopen the Proceeding and Admit New Contention) (LBP-12-10)

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Dated at Rockville, Maryland
This 24th day of May 2012