

June 4, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
Entergy Nuclear Generation Co., and) Docket No. 50-293-LR-2
Entergy Nuclear Operations, Inc.)
)
(Pilgrim Nuclear Power Station))

NRC STAFF'S ANSWER TO MOTION FOR LEAVE TO REPLY TO NRC STAFF AND
ENTERGY'S OPPOSITION TO THE ROSEATE TERN CONTENTION

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the staff of the U.S. Nuclear Regulatory Commission ("NRC Staff" or "Staff") answers Jones River Watershed Association and Pilgrim Watch's (collectively "Petitioners") "Reply to Answers of NRC Staff and Entergy Opposing Petitions/Motions to Reopen, Intervene, and for Hearing on Roseate Tern Contention" ("Reply").¹ The Petitioners "respectfully request permission to submit this Reply" "[p]ursuant to 10 C.F.R. § 2.323(c)."² As discussed fully below, the Staff opposes the Reply.

DISCUSSION

As grounds for their request to file the Reply, Petitioners assert that they "could not have reasonably anticipated that [the NRC Staff] would incorrectly attempt to characterize the final environmental impact statement [in this proceeding] as a 'biological assessment' within the

¹ Jones River Watershed Association and Pilgrim Watch Reply to Answers of NRC Staff and Entergy Opposing Petitions/Motions to Reopen, Intervene, and for Hearing on Roseate Tern Contention (May 23, 2012) (Agencywide Documents Access and Management System ("ADAMS") Accession No. ML12144A214).

² *Id.* at 1.

meaning of the Endangered Species Act” (“ESA”).³ However, as the Staff explained in its answer to Petitioners’ motion to reopen, the plain language of the ESA specifically provides that a biological assessment (“BA”) “ ‘may be undertaken as part of a Federal agency’s’ ” environmental impact statement (“EIS”).⁴ Consequently, the explicit language of the ESA undermines Petitioners’ claim that they could not have anticipated the Staff’s reliance on the EIS to meet the BA requirement.

In support of their argument, Petitioners assert that the Staff’s EIS “post-date[s] the FWS letters that Respondents claim constitute the NRC and [the Fish and Wildlife Service (“FWS”)] ‘consultation.’ ”⁵ Consequently, the Petitioners allege that “[i]t is not possible to ‘consult’ about a document that did not exist when the FWS issued its 2005/2006 letters.”⁶ But, the NRC and FWS utilized the informal consultation process to conclude consultation for this proceeding under section 7 of the ESA.⁷ The federal register notice accompanying the regulations implementing the ESA provides that “ ‘the biological assessment process may be conducted simultaneously with informal consultation.’ ”⁸ “The plain meaning of the word simultaneously is

³ *Id.* at 1-2.

⁴ NRC Staff’s Answer to Jones River Watershed Association and Pilgrim Watch’s Motion to Reopen the Record and Request for a Hearing with Regard to the Roseate Tern, at 20-21 (May 16, 2012) (ADAMS Accession No. ML12137A858) (“Answer”) (*quoting* 16 U.S.C. § 1536(c)(1); *citing* *Sierra Club v. U.S. Army Corps of Engineers*, 295 F.3d 1209, 1219 (11th Cir. 2002) (“When an agency prepares an EIS, it is complying with the BA requirement, provided that one of the environmental impacts discussed is the impact on threatened and endangered species.”)).

⁵ Reply at 2.

⁶ *Id.*

⁷ Answer at 22-23 (*citing* 50 C.F.R. § 402.13).

⁸ *Id.* at n.122 (*quoting* Interagency Cooperation – Endangered Species Act of 1973, as Amended, 51 Fed. Reg. 19,926, 19,948 (Jun. 3, 1986)).

'in a simultaneous manner: at the same time.'⁹ Logically, for the BA process to occur "simultaneously" with informal consultation, the informal consultation must not necessarily rely on the BA. Otherwise, the informal consultation process would need to await the finished BA, and the two processes could not occur "at the same time."¹⁰ Consequently, in choosing to end informal consultation before the Staff prepared a BA, FWS acted in accord with its long-expressed policy that informal consultation may occur independently of the process for preparing a biological assessment.¹¹

Next, the Petitioners contend that the analysis in the EIS cannot constitute a valid BA because it does not "identify the action area" or describe the " 'cumulative effects' or even the 'effects of the action.' "¹² But, the regulations implementing the ESA explicitly provide that "[t]he contents of a biological assessment are at the discretion of the Federal agency and will depend on the nature of the Federal action."¹³ Moreover, as the Staff explained at length in its Answer, the Petitioners have not provided any evidence that suggests that the analysis in the EIS regarding the roseate tern was unreasonable in light of the nature of the Federal action.¹⁴ If anything, the Petitioners' evidence that the roseate tern population near Pilgrim is increasing

⁹ *Linear Technology Corp. v. Impala Linear Corp.*, 379 F.3d 1311, 1324 (Fed. Cir. 2004) (*quoting Webster's Ninth New Collegiate Dictionary* 1099 (1991)).

¹⁰ *Id.*

¹¹ 51 Fed. Reg. 19,948 ("The Service declines to specify uniform levels of contact that must be followed in conducting informal consultations. Existing relationships between the Service's field or regional offices and particular Federal agencies mandate maximum flexibility. The present system is working well and efficiently addresses the needs of other Federal agencies, and it is therefore retained.").

¹² Reply at 8.

¹³ 50 C.F.R. § 402.12(f); Answer at 20.

¹⁴ Answer at 23-30.

buttresses the conclusion in the EIS that past operation of Pilgrim has not hurt the roseate tern.¹⁵

Petitioners cite *Gifford Pinochet Task Force v. U.S. Fish and Wildlife Service*,¹⁶ for the proposition that the ESA requires the Staff to address “cumulative impacts” and assess “all aspects of the issues.”¹⁷ But that case considered the standards that a *biological opinion* must meet.¹⁸ In contrast to a BA, the contents of which are discretionary, a biological opinion must include a “detailed discussion of the effects of the action on listed species or critical habitat.”¹⁹ Consequently, *Gifford* is distinguishable because it considers the required contents of a biological opinion, which are different by regulation from the contents of a BA, the issue in this proceeding.

Therefore, the Petitioners have not advanced any reason to justify their surprise that the NRC Staff met the BA requirement through its EIS in this proceeding.²⁰ Such a practice is

¹⁵ *Id.* at 25-26 (*citing* NUREG-1437, Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 29 Regarding Pilgrim Nuclear Power Station Final Report, at 4-64 (Jul. 2007) (ADAMS Accession Number ML071990020) (“Pilgrim SEIS”). Petitioners allege that the NRC Staff ignored a comment regarding the roseate tern’s presence near Pilgrim, but the Staff fully acknowledged the roseate tern’s presence near pilgrim in the EIS. *Compare* Reply at 8 (*citing* Pilgrim SEIS at A-104 to A-105), *with* Pilgrim SEIS at 4-64.

¹⁶ 378 F.3d 1059 (9th Cir. 2004).

¹⁷ Reply at 10.

¹⁸ *Gifford*, 378 F.3d at 1065.

¹⁹ 50 C.F.R. § 402.14(h)(2).

²⁰ Petitioners also claim that their initial filing was timely because the Pilgrim SEIS stated, “Regarding endangered species, the NRC has consulted with the US FWS and the [National Marine Fisheries Service] regarding the potential impacts to terrestrial and aquatic species. The results of this assessment will be reported in a Biological Assessment (as required by Section 7 of the Endangered Species Act) and in Chapter 4 of the SEIS.” Reply at 3 (*citing* Pilgrim SEIS at A-19 to A-10). But, this response answered a scoping comment, received early in the process, and was clearly superseded by the Staff’s developing review. For example, Petitioners explicitly note that the NRC ultimately prepared BAs for marine aquatic species. Reply at 13. Likewise, as discussed in the Answer, the Staff reasonably determined not to prepare a separate BA for terrestrial species in light of the FWS’s response in informal (continued. . .)

explicitly contemplated by the ESA.²¹ Although the Staff's BA post-dated the conclusion of informal consultation in this case, the agencies responsible for implementing the ESA have noted that the process for preparing a BA may occur independently of informal consultation.²² Moreover, the FWS, one of those agencies tasked with implementing the ESA, approved of that practice in this case by ending informal consultation before the Staff finished the BA.²³ Finally, although the Petitioners allege that the EIS cannot be a legal BA because of its contents, the FWS's regulations explicitly decline to mandate specific requirements for BAs and leave the contents to the agency's discretion.²⁴ Consequently, none of the arguments advanced by the Petitioners adequately explain why they could not have foreseen that the EIS constituted a BA in this proceeding.

CONCLUSION

For the reasons set forth above, the Petitioners have not demonstrated that the Staff's reliance on its EIS to meet the BA requirement, as provided for in section 7 of the ESA, was unforeseeable. Consequently, they have not provided a sufficient reason to justify their reply under 10 C.F.R. § 2.323(c).

/Signed (electronically) by/
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Counsel for NRC Staff

(. . .continued)

consultation. Answer at 22-23. In any event, the absence of a separate BA for terrestrial species has been evident for years, and the time to challenge that determination has long passed.

²¹ 16 U.S.C. § 1536(c)(1).

²² 51 Fed. Reg. 19,948.

²³ Answer at 22-23.

²⁴ 50 C.F.R. § 402.14(f).

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ENTERGY NUCLEAR GENERATION)
COMPANY AND ENTERGY NUCLEAR) Docket No. 50-293-LR-2
OPERATIONS, INC.)
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(Pilgrim Nuclear Generating Station))

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S ANSWER TO MOTION FOR LEAVE TO REPLY TO NRC STAFF AND ENTERGY'S OPPOSITION TO THE ROSEATE TERN CONTENTION" have been served upon the following by the Electronic Information Exchange this 4th day of June, 2012:

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Dated at Rockville, Maryland
this 4th Day of June 2012