UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	**Docket # 50-293 LR**
Entergy Nuclear Generation Company)	
Entergy Nuclear Operations Inc.)	**ASLBP No. 12-920-07-LR-BD01**
Pilgrim Nuclear Power Station)	
License Renewal Application)	
)	

JONES RIVER WATERSHED ASSOCIATION AND PILGIM WATCH PETITION FOR REVIEW OF MEMORANDUM AND ORDER (Denying Petition for Intervention and Request to Reopen Proceeding and Admit New Contention) LBP 12-11, June 18, 2012

Filed: July 3, 2012

Pursuant to 10 C.F.R. § 2.341, Jones River Watershed Association (JRWA) and Pilgrim Watch (PW) (collectively, Petitioners) hereby petition the Nuclear Regulatory Commission (Commission) to review, reverse, and remand the June 18, 2012 Memorandum and Order of the ASLB in LBP-12-11 (the Decision). The Decision denied Petitioners' May 2, 2012 motion to reopen a closed record, request for hearing, and permission to file a new contention on violations of the federal Endangered Species Act, 16 U.S.C. § 1536(c)(1) (ESA) and the National Environmental Policy Act (NEPA) with regard to the Roseate Tern.[1]

While denying the Motion for failure to meet the standards of 10 C.F.R. §§ 2.326

[1] *Jones River Watershed Association and Pilgrim Watch Motion to Reopen, Request for Hearing and Permission to file New Contention in the Above-Captioned License Renewal Proceeding on Violations of the Endangered Species Act with Regard to the Roseate Tern.* (Motion)

and 2.309, the ASLB found that the NRC staff committed a procedural violation ("there is no evidence that the FSEIS was ever submitted to USFWS as required by the ESA regulations.") Decision at 10. Petitioners' motion also established substantive violations of the ESA.

Petitioners have filed a request with the U.S Fish and Wildlife Service (FWS) to reinitiate consultation under the ESA regulations at 50 C.F.R. § 402.16 for the Roseate Tern, which, if granted, may render the instant § 2.341 petition for review moot. Nonetheless, Petitioners file this petition in an abundance of caution. For the reasons stated herein, the Commission should grant the petition for review.

I. SUMMARY OF 10 C.F.R. 2.341(b)(2) Factors

Pursuant to 10 C.F.R. § 2.341(b)(2)(i), Petitioners provide the following concise summary of the Decision. On May 2, 2012, Petitioners filed a motion under 10 C.F.R. § 2.326 to reopen a closed record, to make a nontimely filing under 10 C.F.R. § 2.309(c) and (f), for a hearing and intervention under 10 C.F.R. § 2.309(a) and (d), and for discretionary intervention under 10 C.F.R. § 2.309(e) in the event standing was denied. The Petition described how the factors of 10 C.F.R. 2.309(f)(1) were met and was accompanied by an affidavit from Dr. Ian Nisbet, an expert on the endangered Roseate Tern. Petition at 6-28.

At the crux of the controversy is whether the NRC staff and the FWS properly evaluated the impacts to the Roseate Tern from the future use by the applicant, Entergy Nuclear Generating Corporation (Entergy) of a 40-year old once-through cooling water

system that draws over 510 million gallons a day of sea water from Cape Cod Bay, impinging and entraining sea life, including the food supply for the Roseate Tern, and discharging pollutants, including heated water. Essentially, the NRC staff and the FWS were required to review certain information and make a determination under the ESA as to whether the relicensing of PNPS was like to adversely affect the Roseate Tern, and if so, to what extent.

Petitioners presented new information to show that the original 2007 determination by the FWS and the NRC staff - that the relicensing is "not likely to adversely affect" the Tern - was erroneous and that the record should be reopened. Despite this showing, the ASLB concluded that Petitioners' contention "fails to satisfy the criteria for reopening a closed record under 10 C.F.R. § 2.326…and fails to satisfy the admissibility criterion of 10 C.F.R. § 2.309(f)(2) and § 2.309(c)." Decision at 11.

Pursuant to § 2.341(b)(2)(ii), Petitioners provide the following statement of where matters of fact or law raised were previously raised before the ASLB. The matters of fact and law raised here were previously raised in the Petition.

Pursuant to § 2.341(b)(2)(iii), Petitioners provide the following concise statement of why the decision or action is erroneous.

Errors of Law:

- Misapplied reopening rule, 10 C.F.R. § 2.326(a)(1), which provides that an untimely filing will be allowed for an "exceptionally grave issue," by ruling that

this exception applies only to a "threat to public safety" and not to an environmental issue such as endangered species. Decision at 10.

- Misapplied reopening rule 10 C.F.R. § 2.326(a)(3) by ruling that Petitioners had failed to show how the new information "would alter the actual conclusions" of FWS or the NRC, and that Petitioners' expert Dr. Nisbet has "not explained how this or related information would alter the USFWS or NRC conclusions." Decision at 9.

- Misapplied the standard for an untimely filing under 10 C.F.R. § 2.309(f)(2) by ruling that the Motion had to be "submitted in a timely fashion, based on new information that is materially different from information that is previously available." Decision at 3. The rule provides that *if* the motion or contention is untimely, then Petitioners must make a showing that the information upon which it is based is "materially different than information previously available" and does not require a showing of both being timely and materially different information.

- Relies heavily on a "thirty day rule" for late-filed contentions and motions that does not exist. Decision at 6.

- Ignored and failed to address Petitioners' showing under 10 C.F.R. § 2.309(c) that the balancing of the eight factors of § 2.309(c) tips in Petitioners' favor, and that the Respondents should be estopped from arguing untimeliness. Decision at 10.

- Ignores NEPA: while the Decision provides that the NRC violated NEPA by failing to provide FWS with the SEIS, it does not address reopening NEPA.

Erroneous Findings of Material Fact

- Erroneous findings and conclusions of law about Dr. Nisbet's testimony: (1) Found that sighting of roseate terns is neither new nor "not materially different from information previously available," Decision at 7.whereas Dr. Nisbet affirmatively testifies that there are more Roseate Terns nesting in the vicinity of PNPS in 2011 than in previous years; (2) Found that Dr. Nisbet's testimony is not materially different than what FWS and NRC found, which was "not likely to adversely affect" the Roseate Tern, whereas Dr. Nisbet found there is a "significant potential for adverse effects" on roseate terns; and (3) Ignores Dr. Nisbet testimony that neither Entergy nor USFWS "appears to have considered the potential for adverse effects on roseate terns or their fish prey by the pollutants discharged from the facility." Nisbet Aff. ¶ 8.

- Erroneously found Petitioners failed to "explain…why they were unable to locate the [ENSR 2000] report in the NRC's electronic public document system. Decision at 8, and failed to "explain why they did not request the 12-year old report earlier." Decision at 8.
- Erroneously accepts Entergy and Staff after-the-fact argument that "the analysis of endangered species in the Staff's EIS operated as the equivalent of the BA." Decision at 6. Nowhere does the PNPS EIS say that it is the equivalent of a BA. Decision at 6-7.

Pursuant to §2.341(b)(2)(iv), Petitioners provide a concise statement as to why Commission review should be exercised. Due to the findings of material fact that are

clearly erroneous, the erroneous legal conclusions, and the substantial and important questions of law, policy and discretion that have been raised by the Petitioners, the Commission should exercise review of their contentions.

II. ARGUMENT: The petition for review of the Decision should be granted because there are substantial questions with respect to erroneous findings of fact, conclusions of law, and substantial questions of law, policy and discretion that are posed by the Decision.

A. 2.341(b)(4)(i): Findings of material fact are clearly erroneous

Dr. Nisbet Testimony

The Decision contains erroneous findings of fact and conclusions of law about Dr. Nisbet's testimony. First, the Decision found that that sightings of roseate terns that he described is either "not new or materially different from information previously available." Decision at 7. This is inaccurate. At the crux of the FWS finding about the Roseate Tern, incorporated into the NRC's SEIS, is that the presence of the terns is "probably transient in nature." Motion at 18. The Nisbet Affidavit shows they are not "transient", but that they stage, nest, roost, forage and feed in the vicinity of PNPS. Nisbet Aff. ¶s 13-14.

Dr. Nisbet also testifies there are more Roseate Terns nesting in the vicinity of PNPS in 2011 than in previous years, and that studies from 2007-2009 found that the area had become a major staging site. Id. at ¶ 11. Finally, the Decision ignores Dr. Nisbet's testimony that neither Entergy nor USFWS "appears to have considered the potential for adverse effects on roseate terns or their fish prey by the pollutants discharged from the

facility." Id. at ¶ 8.

On their face, these facts are materially different from the findings of the NRC and the FWS, as shown in the Motion at 15-24. Similarly, Dr. Nisbet's opinion that there is a "significant potential for adverse effects" on roseate terns is materially different from Entergy's Environmental Report, accepted by the NRC, which found there were "no effects" Motion at 23, and that relicensing was "not likely to adversely affect" the tern. Motion at 18.

For purposes of § 2.326(a), the Decision erroneously confuted the "timeliness" question with the separate and distinct inquiry about "materially different results" under 2.326(a)(3).. Under §2.326, the reopening section, there is an exception to the deadline for filing an initial contention, if the issue is "exceptionally grave." Such a late-filed contention on an "exceptionally grave issue" must meet the separate standard of §2.326(3) by demonstrating that a "materially different result would be or *would have been likely* had the newly proferred evidence been considered initially." (emphasis supplied) See also, § 2.309(f)(2)(ii). Timeliness is a separate inquiry from a materially different result, but the Decision erroneously combines the two.

Moreover, Petitioners showed a materially different result would obtain, or would have been likely if their evidence had been considered initially. By providing the expert opinion of Dr. Nisbet that there is a "significant potential for adverse effects" on the Roseate Tern, Nisbet Aff. ¶ 19 and 21, petitioners made the *prima facie* showing under 2.326(a)(3) as to a materially different result for purposes of reopening. The similar prong of 2.309(f)(2)(ii) was also met.

By purporting to require more than this, the ASLB is asking Petitioners to do the job what the NRC and FWS were required to do pursuant to ESA procedures. When proper procedures have not been followed under the ESA, such as here, where the NRC never provided the EIS to FWS, it is not the Petitioners' responsibility to prove the effect of a proposed action on an endangered species. Thomas v. Peterson, 753 F. 2d 754, 763 (9th Cir. 1985). ("Congress has assigned to the agencies and to the Fish & Wildlife Service the responsibility for evaluation of the impact of agency actions on endangered species, and has prescribed procedures for such evaluation. Only by following the procedures can proper evaluations be made. It is not the responsibility of the plaintiffs to prove, nor the function of the courts to judge, the effect of a proposed action on an endangered species when proper procedures have not been followed.") It was an error of fact and law for the ASLB to impose this duty on Petitioners after they made the prima facie showing for purposes of § 2.236(a)(3).

Failure to Provide Access to Documents Relied on by Entergy and NRC Staff

The primary effects to endangered Roseate Terns result from Entergy's operation of its cooling water intake structure (CWIS). The NRC staff EIS relies in large part on Entergy's ENSR 2000 report to conclude that there will be "no effects" on the Roseate Tern from the continued operation of this system. Motion at 23. The ENSR report was not added to the NRC's electronic public document system and made publicly available until April 16, 2012, two weeks before the Motion was filed. Motion at 23.

Thus, the Decision is based on a factual error about the availability of information critical to the contention: it states Petitioners failed to "explain…why they were unable to

locate the [ENSR 2000] report in the NRC's electronic public document system. Decision at 8. The Petitioners were unable to locate it in the document system because it was not there. The Petitioners provided this explanation in the Motion at 23.

The conclusion of the ENSR report goes to the core of Petitioners' claim about the effects of relicensing on the Roseate Tern and its prey. The report states,

> Specifically, this Demonstration concludes
>
> > Existing thermal discharges, essentially unchanged since operation of the Station, affect only a small area in the immediate vicinity of PNPS, and have resulted in no adverse impacts to the RIS populations or to the integrity of the aquatic ecosystem of Cape Cod Bay. Therefore, the thermal discharge does not adversely affect the propagation or protection of a balanced, indigenous population of fish, shellfish, and wildlife in Cape Cod Bay.
> > The conditional mortalities confirm that impingement and entrainment have caused no adverse impacts to any RIS population, or to the integrity of the aquatic ecosystem of Cape Cod Bay."

The Decision asserts that Petitioners should be satisfied with the representations by Entergy and NRC staff that the "relevant ***conclusions*** of the ENSR report were previously available" even though the report was not. Decision at 8.

Petitioners have been denied access to the data and analysis underlying the NRC conclusions in the SEIS for the relicensing, which are based on Entergy's conclusions in the license application and ENSR 2000 report. The PNPS SEIS frankly acknowledges that there is "some debate over the conclusions of the [ENSR] report." PNPS SEIS, p. 4-21; Motion n.22. Petitioners have also been denied access to the 2001 EPA-financed Tetra Tech report critiquing the ENSR 2000 Report conclusions, as reflected in the PNPS SEIS. Petition at 24 and Exhibit 1 thereto.

By denying the Motion, the ASLB has in essence ruled that it is acceptable for the NRC and Entergy to withhold the ENSR report until the last minute and to prevent access to the publicly-funded, third-party Tetra Tech assessment criticizing the conclusions. Such a ruling is contrary to established law under NEPA and the ESA, which call for transparent decision-making. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) (a purpose of NEPA is to "guarantee[] that the relevant information will be made available to the larger audience that may also play a role in both the decision making process and the implementation of that decision," *id.* at 349. The procedural requirements of the ESA are analogous to those of NEPA. Thomas v. Peterson, 753 F. 2d 754, 763 (9th Cir. 1985).

ESA § 7 regulations require specific documentation of compliance with ESA processes and standards. The Decision reverses this legal standard and places on Petitioners' the burden to show how the newly proffered evidence "would alter the actual conclusions of the USFWS or NRC regarding the effects of the additional operation of Pilgrim on the tern." Decision at 9. Then, it allows the NRC to withhold documents that could assist the Petitioners in making a showing that "would alter the actual conclusions" of the agencies.

The Decision is also erroneous because it states the Petitioners' did not "explain why they did not request the 12-year old report earlier" Decision p. 8. Petitioners did explain this in the Affidavit of Pine duBois, ¶ 22, submitted with the Motion. Ms. duBois is Executive Director of JRWA. She states, "JRWA had relied upon U.S. EPA to move forward in a timely manner to renew the PNPS NPDES permit while NRC was reviewing and deciding the parameters for reissuing the facility's operating license. JRWA knew

the NRC's role includes review of the impact of PNPS on marine aquatic resources including endangered, threatened, and candidate species, and fish habitat. JRWA relied on EPA and the NRC to perform their responsibilities in this regard." As stated in the Motion, EPA has not reviewed the NPDES permit, which would address the impacts of Entergy's CWIS on marine aquatic resources in the vicinity used by the Roseate Tern. JRWA further explained why it began its inquiry in early January 2012. "By early February 2012, JRWA learned that the permit process for PNPS was stalled…." This triggered JRWA's inquiry into ESA compliance. ¶ 23.

Post hoc argument that the SEIS is a BA

The ASLB Decision erroneously accepts the after-the-fact argument by Entergy and Staff that "the analysis of endangered species in the Staff's EIS operated as the equivalent of the BA." Decision at 6. Nowhere does the PNPS EIS say that it is the equivalent of a BA. Instead, the PNPS EIS erroneously states that a BA is only needed where a formal consultation is required under 50 C.F.R. 402.14:

> "The staff concluded that the impacts on |Federally or State-listed terrestrial endangered, threatened, proposed, or candidate species of an additional 20 years of operation and maintenance of PNPS and associated transmission lines and ROW would be SMALL, and no additional mitigation would be warranted. Because formal consultation is not required by the FWS, a BA was not developed to evaluate the potential impacts of continued operation of PNPS on Federally listed terrestrial and freshwater aquatic species (FWS 2006)."

PNPS EIS at 4-65.

In fact, a BA is prepared to determine whether a formal consultation or conference is needed. 50 C.F.R. 402.12(a), and one of the factors that may be covered is the need for "an analysis of alternate actions considered by the Federal agency for the proposed action." 402.12(f)(5).

B. Necessary legal conclusions are without governing precedent and a departure from, and contrary to, established law

"Exceptionally grave issue"

The ASLB misinterpreted the reopening standard of 10 C.F.R. § 2.326(a)(1) and ruled that it applies only to an "exceptionally grave" public safety, and not environmental, issue. Decision at 10. This finding was a necessary legal conclusion because the Petitioners' Motion sought to reopen the record in the alternative: if the motion was found to be untimely, it should be allowed nonetheless because it deals with an "exceptionally grave" environmental issue – compliance with the ESA. Motion at 32-34.

The Decision provides no case precedent where a petitioner alleging an "exceptionally grave" environmental issue was denied reopening on the grounds that §2.326(a)(1) applies only to "safety" issues. In support of its' finding that §2.326(a)(1) applies only to "public safety" issues, the Decision cites to the 51 Fed. Reg. 19,535 (5/30/86) and one case, Hydro Res. Inc., 52 NRC 1, 5 (2000). Decision at 10. These citations do not support the ASLB ruling on this point. The 51 Fed. Reg. 19, 535 citation (Criteria for Reopening Records in Formal Licensing Proceedings) does not say that § 2.326 applies *only* to situations involving a "threat to public safety" or bars reopening where the proffered evidence shows an exceptionally grave environmental issue. It is silent on the issue. As to Hydro Res., Inc., the facts of the case are materially different: Hydro dealt with public health and safety concerns from uranium that contaminated groundwater, and the clean up level, not the effects of a relicensing on endangered wildlife, an environmental issue. Hydro does not say that § 2.326(1)(a) applies only to safety issues.

Other cases in which reopening to address an "exceptionally grave issue" is at issue have used language that allows the possibility that an environmental issue would qualify. See, for example, Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-90-12, 31 NRC 427, 446 (1990), aff'd in part on other grounds, ALAB-934, 32 NRC 1(1990)(simply referring to an "exceptionally grave" issue, not excluding an environmental one); Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 3), LBP-02-5, 55 NRC 131, 140 (2002) (does not say must be a "threat to public safety").

30-Day Clock

There is no legal basis for a "30 day clock" that the Decision relies on so heavily. Decision at 6-7. (Petitioners' ESA claim "may properly be viewed as arising with publication of the FSEIS in July 2007" and should have been filed "if not within 30 days of that time and certainly at a time significantly earlier than five years later.") There is no NRC regulation that sets a designated number of days for submitting a late-filed contention; Part 2 of 10 C.F.R. contains many rules specifying time limits for filing pleadings. This is consistent with the purposes of §§ 2.326 and 2.309 which allow reopening of the record to include important new information discovered after the proceedings have commenced.

Indeed, in responding to a comment on revisions to the former reopening rule, then § 2.734, that the rule should have a specific cut off date, the NRC said "the Commission also sees no reason to impose an arbitrary cutoff." 51 Fed. Reg. 19,535. The Commission referred to Vermont Yankee, 6 AEC 520, 523 (1973), which discussed the exception to the timeliness rule for "exceptionally grave issues." The Commission

construed all parts of § 2.734 together, saying "the requirement of timeliness is not only one of the requirements of § 2.734, and the exception for "exceptionally grave issues" goes only to fulfilling that requirement. It does not exempt the movant from any other requirement of that section…." The Decision wrongly construes § 2.326 in ruling that 2.326(a)(1) only applies to safety issues because it ignores the language in § 2.326(a)(2) that allows a motion to reopen for a "significant….environmental issue."

Petitioners have shown that the Motion is timely; if it is considered untimely, they have shown that it is an "exceptionally grave issue" within the meaning of § 2.326, that may be considered even if untimely. Here, the proceeding is not closed, the Motion is timely, and if untimely, it raises an exceptionally grave issue by virtue of dealing with an endangered species issue. TVA v. Hill, 437 U.S. 154 (1978); Petition 9-10.

Petitioners have raised substantial and important questions of law, policy and discretion and other considerations in the public interest. 2.342(b)(4)(iii) and (v)

The ESA could not be clearer in its statutory directive to federal agencies to insure that their actions do not jeopardize the continued existence of an endangered species. TVA v. Hill at 173. Motion 9-11. Irreparable damage is presumed to flow from the failure to comply with the ESA. Thomas, supra at 763. The continued operation of PNPS using its CWIS and its impact on the Roseate Tern raises public interest considerations warranting review of the Decision.

CONCLUSION

For the reasons stated here, the petition for review should be granted.

Respectfully submitted,

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