UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
ENTERGY NUCLEAR GENERATION COMPANY AND ENTERGY NUCLEAR OPERATIONS, INC.	)	Docket No. 50-293-LR-ESA Roseate-Tern
	)	
(Pilgrim Nuclear Generating Station)	)	

NRC STAFF'S ANSWER TO JONES RIVER WATERSHED ASSOCIATION AND PILGRIM WATCH'S PETITION FOR REVIEW OF MEMORANDUM AND ORDER (DENYING PETITION FOR INTERVENTION AND REQUEST TO REOPEN PROCEEDING AND ADMIT NEW CONTENTION)

Joseph A. Lindell
Counsel for NRC Staff

July 13, 2012

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Page

JUDICIAL DECISIONS

ADMINISTRATIVE DECISIONS

Commission

REGULATIONS

STATUTES

FEDERAL REGISTER NOTICES

July 13, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
ENTERGY NUCLEAR GENERATION COMPANY AND ENTERGY NUCLEAR OPERATIONS, INC.	)	Docket No. 50-293-LR-ESA Roseate-Tern
	)	
(Pilgrim Nuclear Generating Station)	)	

NRC STAFF'S ANSWER TO JONES RIVER WATERSHED ASSOCIATION AND PILGRIM WATCH'S PETITION FOR REVIEW OF MEMORANDUM AND ORDER (DENYING PETITION FOR INTERVENTION AND REQUEST TO REOPEN PROCEEDING AND ADMIT NEW CONTENTION)

INTRODUCTION

Pursuant to 10 C.F.R. § 2.341(b)(3), the staff of the U.S. Nuclear Regulatory Commission ("Staff" or "NRC Staff") hereby files its answer in opposition to Jones River Watershed Association ("JWRA") and Pilgrim Watch's ("PW") (collectively "Petitioners") Petition for Review ("Petition")[1] of the Memorandum and Order of the Atomic Safety and Licensing Board ("Board") (Denying Petition for Intervention and Request to Reopen Proceeding and Admit New Contention) ("LBP-12-11").[2] That order denied admission of a new contention alleging that the NRC Staff failed to adequately consider the impacts of renewing the operating license on the roseate tern under the Endangered Species Act ("ESA") and the National

[1] Petition for Review of the Memorandum and Order of the Atomic Safety and Licensing Board (Denying Petition for Intervention and Request to Reopen Proceeding and Admit New Contention) (Jul. 3, 2012) (Agencywide Documents and Access Management System ("ADAMS") Accession No. ML12185A138).

[2] *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-12-11, 75 NRC __ (Jun. 18, 2012) (slip op.).

Environmental Policy Act ("NEPA"). Because Petitioners have not shown that the Board erred in finding that the new contention did not meet the reopening standard in 10 C.F.R. § 2.326, and the timeliness standards in 10 C.F.R. § 2.309(f)(2) and 10 C.F.R. § 2.309(c), the Commission should deny the appeal.

PROCEDURAL BACKGROUND

The NRC Staff has thoroughly presented the procedural background of this case elsewhere and will only highlight the elements of this license renewal that are relevant to the instant Petition.[3] Just over six years ago, PW submitted a hearing request on Entergy's application for license renewal for Pilgrim. The Board admitted two contentions – Contention 1, challenging Entergy's aging management program for buried piping, and Contention 3, challenging Entergy's severe accident mitigation alternatives analysis.[4] On October 30, 2007, a Board majority granted a motion for summary disposition of Contention 3.[5] On April 10, 2008, the Board held an evidentiary hearing on Contention 1, and shortly thereafter, on June 4, 2008, the Board formally closed the evidentiary record.[6] The Board issued an initial decision on Contention 1 on October 30, 2008.[7]

On appeal, the Commission reversed the summary disposition of Contention 3 and

---

[3] *E.g.,* NRC Staff's Answer to Pilgrim Watch's Petition for Review of Memorandum and Order (Denying Pilgrim Watch's Requests for Hearing on New Contentions Relating to Fukushima Accident), at 2-5 (Oct. 3, 2011) (ADAMS Accession No. ML11276A191) ("Staff Answer to Appeal of LBP-11-23").

[4] *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 348-49 (2006).

[5] *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-07-13, 66 NRC 131 (2007).

[6] Memorandum and Order (Ruling on Pilgrim Watch Motions Regarding Testimony and Proposed Additional Evidence Relating to Pilgrim Watch Contention 1), at 3 (June 4, 2008).

[7] *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-08-22, 68 NRC 590 (2008).

remanded it to the Board for further proceedings as limited by the Commission's Order.[8] On July 29, 2011, the Board issued a partial initial decision finding in favor of the Applicant on the remanded Contention 3.[9] On appeal, the Commission affirmed the Board's decision on the remanded Contention 3.[10] After the Commission remanded Contention 3, PW and the Commonwealth of Massachusetts filed several new contentions before the Board. The Board declined to admit any of those contentions, and the Commission has affirmed those rulings.[11] On March 8, 2012, the Petitioners filed a new contention that brought several challenges to the NRC Staff's review of the impacts of license renewal on aquatic species under the ESA, NEPA, and the Magnuson-Stevens Fishery Conservation and Management Act.[12] The Board denied that contention on May 24, 2012.[13] Petitioners did not appeal. On May 14, 2012, Petitioners filed another contention challenging Entergy's compliance with various water quality laws.[14]

---

[8] *Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 317 (2010).

[9] *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-11-18, 74 NRC __ (July 19, 2011) (slip op.).

[10] *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-01, 75 NRC __ (Feb. 9, 2012) (slip op.).

[11] Staff Answer to Appeal of LBP-11-23 at 3-5; *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-03, 75 NRC __ (Feb. 22, 2012) (slip op.); *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-06, 75 NRC __ (Mar. 8, 2012) (slip op.); *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-10, 75 NRC __ (Mar. 30, 2012) (slip op.); *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-15, 75 NRC __ (Jun. 7, 2012) (slip op.).

[12] Jones River Watershed Association 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 Jones River Watershed Association 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 (March 8, 2012) (ADAMS Accession Nos. ML12068A282, ML12068A183).

[13] *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-12-10, 75 NRC __ (May 24, 2012) (slip op.).

[14] Jones River Watershed Association (JRWA) and Pilgrim Watch (PW) Request to Reopen, for a Hearing, and to File New Contentions and JRWA Motion to Intervene on Issues of: (1) Violations of State and Federal Clean Water Laws; (2) Lack of Valid State § 401 Water Quality Certification; (3) Violation of (…continued)

That contention is currently pending before the Board. Earlier, on May 2, 2012, the Petitioners filed the motion to reopen, hearing request, and proposed new contention ("Roseate Tern Contention") that is the subject of this particular appeal before the Commission.[15] That contention alleged,

> Petitioners proffer evidence of procedural and substantive violations of the ESA with regard to the roseate tern by showing: (1) that the NRC staff was required to conduct a biological assessment pursuant to ESA § 7, 16 U.S.C. § 1536(c)(1), and it did not, (2) that Entergy's license application is inaccurate and incomplete in material aspects regarding the roseate tern, (3) that the U.S. Fish and Wildlife Service (USFWS) unlawfully ignored the requirement for a biological assessment and without a scientific basis declared the roseate tern to be "probably transient," contrary to widely known and available data, (4) that there is significant potential for adverse effects on roseate terns during the relicensing period, (5) that the NRC staff environmental impact statement [EIS] contradicts the USFWS finding that the roseate tern is present at PNPS but is "probably transitory," rendering the statement inadequate, and (6) that therefore, the NRC staff should be ordered to conduct a biological assessment on the Roseate tern and to supplement the environmental impact statement with this data.[16]

On June 18, 2012 the Board denied the Roseate Tern Contention.[17] Petitioners filed a timely appeal.[18] For the reasons discussed below, the Commission should deny that appeal.

ARGUMENT

I. Legal Standards

A. The Standard for Review of a Board Decision

The procedural regulations at 10 C.F.R. § 2.341(a)(1) govern the petition for review. Subsection (b)(4) provides that the Commission may grant a petition for review "giving due

---

State Coastal Zone Management Policy; and (4) Violation of NEPA (May 14, 2012) (ADAMS Accession No. ML12135A617).

[15] 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 (May 2, 2012) (ADAMS Accession No. ML12123A473).

[16] Roseate Tern Contention at 5-6.

[17] LBP-12-11.

[18] Petition.

weight to the existence of a substantial question" with respect to one or more of the following considerations:

> (1) a clearly erroneous finding of fact;
>
> (2) a necessary legal conclusion is without precedent or conflicts with existing law;
>
> (3) the appeal raises a substantial and important question of law or policy;
>
> (4) the proceeding involved a prejudicial procedural error; or
>
> (5) any other consideration the Commission determines to be in the public interest.[19]

The Commission has stated that the standard regarding "clear error" is quite high, requiring a showing that the Board's findings are "not even plausible in light of the record viewed in its entirety."[20] The Commission defers to a licensing board's findings of fact as long as the "Licensing Board has issued a plausible decision that rests on carefully rendered findings of fact[.]"[21] Thus, the Commission will reject or modify a Licensing Board's findings only if, after accounting for appropriate deference to the "primary fact finder," the Commission is "convinced that the record *compels* a different result."[22] The Commission will not overturn a board's findings simply because it might have reached a different result or because the record could support a view different from that of the board.[23] With respect to a board's conclusions of law, a

---

[19] 10 C.F.R. § 2.341(b)(4).

[20] *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11, 25-26 (2003) ("PFS") (*citing Anderson v. Bessemer City*, 470 U.S. 564, 573-76 (1985)).

[21] *Id.*

[22] *General Public Utilities* (Three Mile Island Nuclear Station, Unit No. 1), ALAB-881, 26 NRC 465, 473 (1987) (*citing Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Unit 2), ALAB–264, 1 NRC 347, 357 (1975)) (emphasis added).

[23] *See Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1; Sequoyah Plants, Units 1 & 2; Browns Ferry Nuclear Plant, Units 1, 2 & 3), CLI-04-24, 60 NRC 160, 189 (2004) ("TVA"); *PFS*, CLI-03-8, 58 NRC at 26 (*quoting Kenneth G. Pierce* (Shorewood, Illinois), CLI-95-6, 41 NRC 381, 382 (1995)).

petitioner must show an "error of law or abuse of discretion" by the board.[24] The Commission will reverse a board's legal conclusions only "if they are a departure from or contrary to established law."[25] As explained more fully below, Petitioners have failed to demonstrate that the Board's factual findings are clearly erroneous or that the Board's legal conclusions depart from or are contrary to established law. Therefore, Petitioners have not met their burden under 10 C.F.R. § 2.341(b)(4), and their petition for review should be denied.

B. The Standard for Reopening the Record

Once the record is closed, it will not be reopened except upon a strong, well-supported showing of singular circumstances. Accordingly, the regulations provide that a motion to re-open the record will not be granted unless it satisfies the following three criteria:

> (1) The motion must be timely, except that an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented;
>
> (2) The motion must address a significant safety or environmental issue; and
>
> (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.[26]

The motion must be accompanied by an affidavit that provides the factual and/or technical bases for the movant's claim that the three criteria in 10 C.F.R. § 2.326(a) are satisfied.[27] The evidence supporting the motion must satisfy the Commission's admissibility standards in 10 C.F.R. § 2.337(a); it must be "relevant, material, and reliable."[28] Moreover, "the moving papers

---

[24] *USEC, Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 439 n.32 (2006).

[25] *TVA*, CLI-04-24, 60 NRC at 190 (internal quotations omitted).

[26] 10 C.F.R. § 2.326(a); *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 668 (2008).

[27] 10 C.F.R. § 2.326(b).

[28] *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-12, 68 NRC 5, 16 (2008).

must be strong enough, in the light of any opposing filings, to avoid summary disposition."[29] In addition, 10 C.F.R. § 2.326(d) expressly states that where the contention raises an issue not previously in controversy, the contention must satisfy the requirements for admission of nontimely contentions at 10 C.F.R. § 2.309(c). Finally, the contention must meet the general admissibility requirements in 10 C.F.R. § 2.309(f)(1).

II. The Board Properly Applied the Reopening Standard to the Roseate Tern Contention

A. Timeliness

Under 10 C.F.R. § 2.326(a)(1), a motion to reopen the record "must be timely." The Commission has stated that "[t]here simply would be no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements and add new contentions at their convenience during the course of a proceeding based on information that could have formed the basis for a timely contention at the outset of the proceeding."[30] Under NRC practice, "Boards have typically found new contentions to be timely when filed within thirty days of the date that asserted foundational information becomes available."[31]

In light of the foregoing precedent, the Board correctly determined that the Petitioners' contention was not timely raised because, contrary to the Petitioners' assertions, none of the information they relied upon was new or materially different from that previously available.[32] First, the Board found that the alleged procedural violations of the ESA were based on

---

[29] *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 (2005).

[30] *Amergen Energy Company, LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 272 (2009).

[31] *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-12-01, 75 NRC __, __ (Jan. 11, 2012) (slip op. at 13) (*citing Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant Units 3 and 4), CLI-11-08, 74 NRC __, __ (Sept. 27, 2011) (slip op. at 3 & n.8).

[32] *See* 10 C.F.R. § 2.309(f)(2)(i)-(iii).

information and events from 2007 or earlier.[33] Second, the Board determined that what Petitioners claim is "new" information cited in the Nisbet affidavit was either not new or not materially different than information previously available.[34] Specifically, the Board noted that the most recent information contained in the affidavit, which concerned the sighting of roseate terns near Pilgrim, was from August 2011—well outside the bounds of timeliness.[35] Third, the Board determined that although the Petitioners only, in April 2012, accessed the report prepared in 2000 by Entergy's consultant ENSR, the Petitioners did not provide a sufficient justification as to why they could not have requested the document from the NRC earlier.[36] Nor did they show how the information in the ENSR report was materially different from what was already available in Entergy's environmental report ("ER") or the Final Supplemental Environmental Impact Statement for Pilgrim ("Pilgrim SEIS").[37]

Petitioners' claims that the Board erred are unpersuasive. First, Petitioners assert that the Board incorrectly applied the requirements for nontimely filings at 10 C.F.R. § 2.309(f)(2) by requiring the Petitioners to show that their contention was both timely and based on materially different information than that which was previously available.[38] Yet this is exactly what the regulations prescribe—that the new contention be submitted in a timely manner after the materially different information becomes available.[39]

---

[33] LBP-12-11 at 7.

[34] *Id*.

[35] *Id.*

[36] *Id.* at 7-8.

[37] *Id.* at 8.

[38] Petition at 4.

[39] 10 C.F.R. § 2.309(f)(2)(ii)-(iii) ("The information upon which the amended or new contention is based [must be] materially different than information previously available; *and* [t]he amended or new contention [must be] submitted in a timely fashion based on the availability of the subsequent information.") (emphasis added).

Second, Petitioners assert that the "30 day rule" for filing contentions based on newly available information "does not exist."[40] While Petitioners are correct that NRC regulations do not set a deadline for submitting a late-filed contention after the availability of new information, and that the NRC has stated that it "sees no reason to impose an arbitrary cutoff,"[41] several licensing boards have set 30 day limits, and 30 day limits have also been recognized by the Commission.[42] Regardless, as the Board noted, Petitioners claims should have been filed "at a time significantly earlier than five years later."[43]

Third, Petitioners claim that the Board failed to address its arguments for the admission of its contention as nontimely under 10 C.F.R. § 2.309(c).[44] That section contains eight factors, the most important of which is the first, "good cause."[45] Yet contrary to Petitioners' assertion, the Board did address 10 C.F.R. § 2.309(c), and stated, "No good cause has been shown for

---

[40] Petition at 4; 13-14.

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

[42] *See, e.g.*, *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 574 (2006) ("Several boards have established a 30-day rule [after receipt of relevant new information] for new contentions."); *Vogtle*, CLI-11-08, 74 NRC __ (slip op. at 3 n.8) ("A thirty-day window is in line with our general practice in analogous situations"); *Oyster Creek*, CLI-09-7, 69 NRC at 288 (finding motion to reopen filed within 30 days of new information timely); *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 & 2), CLI-10-27, 72 NRC 481, 495-96 (2010) (finding a contention untimely where information had been available for two months). The Board in Pilgrim also stated at the outset of the proceeding in its scheduling order that the deadline for contentions based on new information would be 30 days from when the information was received or became reasonably available. Order (Establishing Schedule for Proceeding and Addressing Related Matters), at 7 (Dec. 20, 2006) (ADAMS Accession No. ML063540494).

[43] LBP-12-11 at 7.

[44] Petition at 6.

[45] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 125-26 (2009).

the contention's untimeliness, and under the circumstances discussed herein, we find no other considerations weigh sufficiently in Petitioners' favor to admit the contention."[46]

Fourth, Petitioners claim that the Board "confuted the 'timeliness' question [of 10 C.F.R. § 2.326(a)] with the separate and distinct inquiry about 'materially different results' under 2.326(a)(3)."[47] This is not the case. The Board addressed timeliness extensively,[48] and then concluded that "the motion to reopen and accompanying contention are untimely under both 10 C.F.R. § 2.326 and § 2.309(f)(2)."[49] In the following paragraph, the Board discussed the requirement for "materially different results" under 10 C.F.R. § 2.326(a)(3) in the context of its holding that "Dr. Nisbet in his affidavit does not substantively address the reopening criteria as required by 10 C.F.R. § 2.326(b)."[50] The Board found that Dr. Nisbet did not explain how his information on the roseate tern "would *alter the actual conclusions* of the USFWS or the NRC regarding the effects of the additional operation of Pilgrim on the tern."[51] In other words, the Board held that Petitioners provided no evidence that their "new" information would lead to a materially different result. In any event, the plain language of 10 C.F.R. § 2.326(a) indicates that all three of its factors must be satisfied if the reopening standard is to be met. The Board need not address § 2.326(a)(3) if it finds that either § 2.326(a)(1) (timeliness) or § 2.326(a)(2) (significance) have not been met.

---

[46] LBP-12-11 at 10. The Board cited and accepted the discussion in the NRC Staff's Answer as to why the Petitioners failed to satisfy the remainder of the eight factor test. LBP-12-11 at 10 n.48.

[47] Petition at 7.

[48] LBP-12-11 at 7-9.

[49] *Id.* at 9.

[50] *Id.*

[51] *Id.* (emphasis added).

Fifth, Petitioners assert that the Board erred in its finding that Petitioners could have accessed the ENSR report.[52] But while Petitioners were unable to access the ENSR report on the public ADAMS system before April 2012, they, as the Board explained, have not provided an adequate justification as to why they did not request the report from the NRC before that time.[53] Since the Pilgrim SEIS references the ENSR report extensively, Petitioners had reason to be aware of its existence by the time the Pilgrim SEIS was published in 2007.[54]

Petitioners respond, based on an affidavit from JWRA's Executive Director, that they did not request the report because they expected the NRC and the Environmental Protection Agency ("EPA") to "perform their responsibilities" to do a thorough review of the effects of relicensing on aquatic resources.[55] To the extent that Petitioners are rehashing prior arguments that the NRC should be estopped from arguing that a contention is untimely because the Petitioners relied on the agency to "do its job," that argument is wholly unsupported by case law.[56] Allowing petitioners to delay filing contentions on the assumption that the Staff's review will address their concerns would undo the Commission's repeated emphasis that petitioners have an "iron-clad obligation to examine the publicly available documentary material . . . with

---

[52] Petition at 8-9.

[53] LBP-12-11 at 8 (Petitioners do not "explain why they did not request the 12-year-old report earlier").

[54] *See generally* NUREG-1437, Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 29 Regarding Pilgrim Nuclear Power Station Final Report – Appendices, (Jul. 2007) (ADAMS Accession No. ML071990027) ("Pilgrim SEIS"). Petitioners also admit that the Pilgrim SEIS references the ENSR report. Petition at 9.

[55] Petition at 10-11.

[56] *See* 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 14 n.75 (May 16, 2012) (ADAMS Accession No. ML12137A858) ("NRC Staff's Answer").

sufficient care to enable [them] to uncover any information that could serve as the foundation of a specific contention."[57]

Moreover, the Petitioners provide no evidence to counter the NRC Staff's argument that "the relevant conclusions of the ENSR report were previously available."[58] If anything, their citation to the conclusion of the report which states that there have been "no adverse impacts" to the "integrity of the aquatic ecosystem of Cape Cod Bay" due to Pilgrim's operation both mirrors and buttresses the findings in the Pilgrim SEIS.[59] Available information does not become new when it is repackaged in a report.[60]

Petitioners also reassert their claim from below that the NRC "prevent[ed] access" to an "EPA-financed Tetra Tech report critiquing the conclusions of the [ENSR] report."[61] However, as the Petitioners readily admit, the Tetra Tech report is an EPA controlled document, and they submitted a Freedom of Information Act ("FOIA") request for its release to EPA, not to the NRC.[62] Indeed, the NRC had no reason to be aware of the existence of this report until the Petitioners attached a record of the FOIA appeal to EPA in their May 2, 2012 filing before the Board.[63] Consequently, the NRC did not rely on the Tetra Tech report in the Pilgrim SEIS or in any other document related to the Pilgrim license renewal. In any event, the Petitioners

---

[57] *Prairie Island*, CLI-10-27, 72 NRC at 496.

[58] LBP-12-11 at 8.

[59] *See* Petition at 9; LBP-12-11 at 8 n.40.

[60] *Prairie Island*, CLI-10-27, 72 NRC at 495-96.

[61] Petition at 9-10 (alterations in original). *See also* Roseate Tern Contention at 50.

[62] *See* Roseate Tern Contention at 24 and Exhibit 1.

[63] *Id.* at Exhibit 1. The Tetra Tech report is not in the NRC's ADAMS database.

nowhere show that the information in the Tetra Tech report would likely demonstrate an adverse effect on the roseate tern.[64]

B. Exceptionally Grave Issue

Where a motion to reopen is untimely, the standards for a motion to reopen provide a limited exception to the first reopening factor for cases that raise "an exceptionally grave issue" to be considered at the discretion of the presiding officer.[65] The Board concluded that the Petitioners' environmental contention could not be "an exceptionally grave issue" because it does not raise "a sufficiently grave threat to public safety."[66]

Petitioners argue that the Board cited no precedent which explicitly precluded an environmental concern or an ESA compliance issue from being deemed "an exceptionally grave issue."[67] Petitioners contend that neither the *Hydro Resources* case, which itself concerned safety, nor the Commission's Statements of Consideration for the reopening rule specifically exclude environmental matters when defining "exceptionally grave issue" as related to public safety.[68] Yet this is an unnecessarily narrow reading; Commission precedent explicitly states that the exception to the first reopening factor considers only those issues "calling into question

[64] Petitioners also state that requiring them to demonstrate that the information in the ENSR and Tetra Tech reports would "alter the actual conclusions of the USFWS or NRC regarding the effects of the additional operation of Pilgrim on the tern" reverses ESA Section 7 standards that place the burden of ESA compliance on the agency. Petition at 10. While Petitioners are correct in that it is the duty of the agency to comply with the ESA in the first instance, they fail to reference any ESA provision that would shift the burden of proof from petitioners to the agency in an action challenging an agency's compliance with Section 7. Such a result would also be incongruous with the Commission's reopening standards, which require the Petitioner to satisfy the heavy burden of meeting each of its requirements. *Oyster Creek*, CLI-09-7, 69 NRC at 287. Petitioners' claim that the NRC "withheld" the ENSR and Tetra Tech reports in contravention of NEPA's and ESA's emphasis on transparent decision-making is likewise meritless because, as explained above, the NRC withheld neither document. Petition at 10.

[65] 10 C.F.R. § 2.326(a)(1); LBP-12-11 at 9-10.

[66] LBP-12-11 at 10 (citing 51 Fed. Reg. at 19,536; *Hydro Res., Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-00-12, 52 NRC 1, 5 (2000) ("we will reopen the record only when the new evidence raises an 'exceptionally grave issue' calling into question the safety of the licensed activity")).

[67] Petition at 12.

[68] *Id.*

the safety of the licensed activity."[69] Furthermore, the Petitioners fail to cite any case in which an environmental concern did rise to the level of "exceptionally grave." The Board did not clearly err in interpreting Commission precedent to limit "exceptionally grave issues" to safety concerns only. Moreover, the Petitioners overlook the Commission's statement that it "anticipates that this exception will be granted rarely and only in truly extraordinary circumstances."[70] Neither below nor on appeal have Petitioners provided more than bare assertions of a potential for adverse effects on the tern and inapposite citations to the importance of the ESA.[71]

C. Significance

Additionally, under 10 C.F.R. § 2.326(a)(2), a motion to reopen "must address a significant safety or environmental issue." The Commission recently explained, "when a motion to reopen is untimely, the § 2.326(a)(1) 'exceptionally grave' test supplants the § 2.326(a)(2) 'significant safety or environmental issue' test."[72] As discussed above, the Roseate Tern Contention was untimely and did not raise an exceptionally grave issue, a category reserved for grave threats to public safety. The Board did not address significance separately. Likewise, the Petitioners do not argue on appeal that the Board erred in omitting this discussion.

---

[69] *Hydro Res., Inc,* CLI-00-12, 52 NRC at 5. Petitioners also argue that the words "exceptionally grave issue" in 10 C.F.R. § 2.326(a)(1) should be construed to include environmental matters because the second reopening factor provides for reopening in the case of a "significant . . . environmental issue." 10 C.F.R. § 2.326(a)(2). Petition at 14. However, when a contention is untimely, the "exceptionally" grave test under (a)(1) supplants the "significance" factor in (a)(2). *Vogtle*, CLI-11-08, 74 NRC __ (slip op. at 14 n.44); *see also infra* at 14 (significance discussion). In other words, a timely contention to reopen the record concerning environmental issues may be admitted if "significant." However, the only untimely contentions that could merit the reopening of a closed record are those that pose "a grave threat to public safety."

[70] 51 Fed. Reg. at 19536.

[71] *See* Petition at 7; 14. *See generally* Roseate Tern Contention.

[72] *Vogtle*, CLI-11-08, 74 NRC __ (slip op. at 14 n.44).

In any event, even if one were to assume that the Petitioners met the standard in § 2.326(a)(1) for timeliness, they did not meet the standard in § 2.326(a)(2) for "significance." The Commission has found that the standard for showing significance to reopen a closed record for environmental contentions is the same as the standard for supplementing an EIS.[73] In both instances, the proffered information "must paint a *seriously* different picture of the environmental landscape."[74] Petitioners' allegations regarding the potential impacts on the tern fail to meet this standard because their new information does not demonstrate any specific impact on the roseate tern and largely supports the findings in the Pilgrim SEIS.[75]

D. Materially Different Result

Under 10 C.F.R. § 2.326(a)(3), a motion to reopen a closed record "must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially." While "the quality of evidence presented for reopening must be at least of a level sufficient to withstand a motion for summary disposition, [the Commission has also] made clear that the reopening standard requires more."[76] Under that standard, "[t]he evidence must be sufficiently compelling to suggest a likelihood of materially affecting the

---

[73] *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-06-03, 63 NRC 19, 29 (2006).

[74] *Id.* (emphasis in original).

[75] *See* NRC Staff Answer at 31-33. Case law indicates that with respect to impacts on nearby species, new and significant information worthy of supplementing an EIS must show that the project will have a major impact on a species in the area. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 363-64 (1989). In their contention, Petitioners produced evidence that the roseate tern has a non-migratory presence on beaches near Pilgrim, noted that Pilgrim has entrained or impinged prey species for the roseate tern, and speculated that Pilgrim may release pollutants that could harm the roseate tern. Roseate Tern Contention at 15-24. But the Petitioners have not alleged, let alone shown, what effect these impacts from Pilgrim may have on the roseate tern beyond those discussed in the Pilgrim SEIS. If anything, the Petitioners' evidence confirms the Staff's recognition that the roseate tern may frequent the beaches near Pilgrim and the Staff's conclusion that the roseate tern population has actually increased in the area around Plymouth during Pilgrim's initial 40 year licensing term. *Id.* at 17-19. Petitioners have certainly not alleged that there would be a major impact on the species that would result in a "seriously different picture of the environmental landscape."

[76] *Pilgrim*, CLI-12-10, 75 NRC __ (slip op. at 25).

ultimate results in the proceeding."[77] The Board found that the Nisbet affidavit "provides a great deal of information about the roseate tern, but does not, with any specificity, explain how this information would *alter the actual conclusions* of the USFWS or NRC regarding the effects of the additional operation of Pilgrim on the tern."[78]

On appeal, Petitioners argue that much of the information in Dr. Nisbet's affidavit is materially different from that previously available.[79] In particular, the Petitioners point to findings that the tern's presence near Pilgrim is non-transient, that there have been more observations of terns near the Pilgrim site in recent years, and that there is a "significant potential for adverse effects" on roseate terns from Pilgrim's continued operation.[80] Petitioners argue that as a matter of law, Dr. Nisbet's bald assertion of a "significant potential for adverse effects" on the tern is "a *prima facie* showing under 2.326(a)(3) as to a materially different result for purposes of reopening."[81] This is incorrect. It ignores the plain meaning of the regulation, which requires a demonstration of the likelihood of a different result.[82] The Commission has found an argument that simply states that new information "contradicts some of the Board's factual findings, and

---

[77] *Id*.

[78] LBP-12-11 at 9 (emphasis added).

[79] Petition at 6-7.

[80] *Id.* Petitioners assert that the Board erred as to a matter of fact in finding that this information was "either not new or not materially different from information that was previously available." LBP-12-11 at 7. Petitioners contend that Dr. Nisbet's information was "materially different than the findings of the NRC and the FWS" because it reached different conclusions. Petition at 7. However, the decision rests on a finding that Petitioners presented no new (timely) information and does not reach the merits of the contention. LBP-12-11 at 10. The Board's statement that Dr. Nisbet's information was not new or materially different was a timeliness finding that went to 10 C.F.R. § 2.309(f)(2) and 10 C.F.R. § 2.326(a)(1); it was not a ruling on whether the NRC had drawn the appropriate conclusions regarding effects on the tern. Nevertheless, the NRC Staff has addressed Dr. Nisbet's findings in their Answer filed with the Board and argued that Dr. Nisbet's findings do not undermine the NRC's conclusions regarding potential effects on the species and do not provide an adequate basis for his assertion that there is the potential for adverse impacts. NRC Staff's Answer at 23-27.

[81] *Id.* at 7.

[82] 10 C.F.R. § 2.326(a)(3).

then states that this prong of the reopening test is met . . . falls far short of meeting" § 2.326(a)(3)'s requirements.[83] The mere fact that materially different information exists does not equal the likelihood of a materially different result. Neither below nor on appeal have Petitioners provided more than conclusory statements as to how Dr. Nisbet's evidence compels or even suggests a different finding regarding the roseate tern.[84]

Petitioners contend that because the NRC Staff allegedly failed to submit its EIS to FWS as required by Section 7 procedures, the Petitioners cannot now be required to demonstrate "materially different results."[85] Such an unprecedented alchemic admixture of estoppel and ESA requirements has little to support it. The case cited by Petitioners, *Thomas v. Peterson*, concerns a situation in which the Forest Service failed to prepare a Biological Assessment ("BA") despite FWS's findings that endangered species were present in the area.[86] The Ninth Circuit held that the procedural failure to prepare a BA meant that the effect of the proposed project on the ESA's substantive provisions would remain unknown, which was enough of a reason to grant an injunction.[87] Here, as discussed below, the Pilgrim SEIS's discussion of the roseate tern constituted a BA,[88] and FWS concluded consultation by sending the NRC a letter referencing an earlier conclusion that Pilgrim's continued operation is "not likely to adversely

---

[83] *Oyster Creek*, CLI-09-7, 69 NRC at 290-91 (internal quotations omitted).

[84] If Petitioners had shown that renewing the Pilgrim operating license may adversely affect the roseate tern, the FWS's regulations would have required formal consultation and preparation of a biological opinion, which may have contained reasonable and prudent measures to mitigate those adverse effects or an incidental take statement. 50 C.F.R. § 402.14(g), (h), (i). These steps may well have led to a materially different result. But the Petitioners have not provided any indication of how their evidence leads to a conclusion that renewing the Pilgrim operating license will adversely affect the roseate tern during the renewal period. *See* NRC Staff's Answer at 23-30.

[85] Petition at 8.

[86] *Thomas v. Peterson*, 753 F.2d 754, 763 (9th Cir. 1985).

[87] *Id.* at 763-64.

[88] 16 U.S.C. § 1536(c)(1); *Sierra Club v. U.S. Army Corps of Engineers*, 295 F.3d 1209, 1219 (11th Cir. 2002).

affect" the tern.[89] Therefore, the substantive effects of the NRC's action were both evaluated and made known to FWS. Petitioners cite the Ninth Circuit's statement in *Peterson* that since no BA was prepared, it would be inappropriate to allow the district court to find "no effect" on endangered species and place the burden of proof on the plaintiff to demonstrate otherwise.[90] But contrary to Petitioners' assertion, this statement does not sanction a reversal of the burden of proof from a petitioner to the NRC in every situation where there is an alleged violation of ESA procedure, particularly not when the strict reopening requirements are involved.

E. Expert Affidavit

10 C.F.R. § 2.326(b) requires that "[e]ach of the criteria [of 10 C.F.R. § 2.326(a)] must be separately addressed, with a specific explanation of why it has been met." The Board found that "Dr. Nisbet in his affidavit does not substantively address the reopening criteria as required by 10 C.F.R. § 2.326(b)" and instead made only "cursory and conclusory statements" to that effect.[91] On appeal, the Petitioners do not contest this deficiency in their proposed contention.

III. The Requirements of 10 C.F.R. § 2.309(f)(1)

The Board determined that because "the motion and contention are untimely and fail to meet the reopening criteria, it need not rule on other contention admissibility requirements under 10 C.F.R. § 2.309(f)(1), or delve any further into the substantive allegations of the contention."[92] However, the Board cautioned the NRC Staff that appropriate ESA and NEPA procedures may not have been followed in this case and that Dr. Nisbet's information may warrant further

[89] Pilgrim SEIS at E-12; E-8.

[90] *Peterson*, 753 F.2d at 765.

[91] LBP-12-11 at 9.

[92] *Id.* at 10.

attention.[93] In particular, the Board stated that if the Pilgrim SEIS served as the functional equivalent of the BA, there is no evidence that it was submitted to FWS per regulations.[94]

On appeal, Petitioners assert that "proper procedures have not been followed under the ESA" because "the NRC never provided the EIS to FWS."[95] 50 C.F.R. § 402.12(j) states, "The Federal agency shall submit the completed biological assessment to the [FWS] for review." However, this argument could have been, but was not raised below. Once Petitioners learned from the Staff's Answer on May 16, 2012, that the NRC considered the Pilgrim SEIS to be its BA, Petitioners, in their May 23, 2012 reply could have noted the NRC's alleged failure to submit the Pilgrim SEIS to FWS.[96] The Commission has stated, "New claims cannot be raised for the first time on appeal."[97]

Moreover, after the NRC initiated informal Section 7 consultation with FWS under 50 C.F.R. § 402.13, FWS sent the NRC a letter thanking them for their coordination[98] and referring the NRC to a letter sent to Entergy with a finding that Pilgrim's continued operation was "not likely to adversely affect federally listed species subject to the jurisdiction" of FWS.[99] Since FWS considered consultation to have been concluded and made a "not likely to adversely affect" finding, any failure to submit the Pilgrim SEIS was at most harmless error.[100]

---

[93] *Id.*

[94] *Id.*

[95] Petition at 8.

[96] 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) (ADAMS Accession No. ML12144A214).

[97] *Pilgrim*, CLI-12-01, 75 NRC __ (slip op. at 27).

[98] Pilgrim SEIS at E-12.

[99] *Id.* at E-8.

[100] After the Board's decision was issued, the NRC Staff submitted the Pilgrim SEIS to FWS to ensure compliance with 50 C.F.R. § 402.12(j). Email from Briana Balsam, NRC to Tom Chapman, FWS, (…continued)

Petitioners also claim that the Board erroneously accepted the NRC Staff's argument that the Pilgrim SEIS operated as the equivalent of a BA.[101] This is not the case. The Board merely stated that the NRC Staff's argument "may be correct," but "declined to delve any further into the substantive allegations of the contention."[102] Nevertheless, the NRC Staff stands by its argument. The plain language of the ESA at 16 U.S.C. § 1536(c)(1) specifically provides that a BA "may be undertaken as part of a Federal agency's" EIS. The Eleventh Circuit has held, "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."[103] Contrary to Petitioners' assertion on appeal, the Pilgrim SEIS did not need to state that it functioned as a BA.[104] And although the Pilgrim SEIS states that "[b]ecause formal consultation is not required by the FWS, a BA was not developed to evaluate the potential impacts of continued operation of [Pilgrim] on Federally listed terrestrial and freshwater aquatic species,"[105] this statement simply explains why the Staff did not prepare a separate BA for the species under FWS's jurisdiction as it did for those under the National Marine Fisheries Services' jurisdiction. The statement does not rob the Pilgrim SEIS of its status as the legal equivalent of a BA. Rather, because the Pilgrim SEIS analyzed the impact of the agency action on listed species, it necessarily constituted a BA.[106] Likewise, the NRC Staff merely indicated that if

---

"Pilgrim Nuclear Power Station: Transmittal of final supplemental EIS" (Jun. 29, 2012) (ADAMS Accession No. ML12184A005). 50 C.F.R. § 402.12(j) contains no deadline for the agency's submission of its BA.

[101] Petition at 11.

[102] LBP-12-11 at 10.

[103] *Sierra Club*, 295 F.3d at 1219.

[104] *Id.*

[105] Pilgrim SEIS at 4-67.

[106] *Sierra Club*, 295 F.3d at 1219.

formal consultation had been required, they would likely have prepared a *separate* BA.[107] They made no legal determination that a BA is only required when formal consultation is initiated.[108]

Petitioners contend that the Board "ignored" their NEPA claims which alleged that the NRC must supplement the Pilgrim SEIS to address "new and significant information" concerning the roseate tern.[109] But once again, this was not an error, as the Board specifically "declined to delve any further into the substantive allegations of the contention" because the Roseate Tern Contention was untimely and failed to meet the reopening criteria.[110] Such is within the Board's discretion. Neither a Board nor the Commission must reach the merits of an issue not necessary to resolve the case before it.[111] In any event, the Pilgrim SEIS need not be updated. Under NRC precedent, to require supplementation of an EIS, new information "must reveal a seriously different picture of the environmental impact of the proposed project."[112] Petitioners' allegations regarding the potential impacts on the tern fail to meet this standard because they do not demonstrate what impact the subjects of their allegations may have on the roseate tern.[113]

---

[107] Pilgrim SEIS at 4-67.

[108] *See* 50 C.F.R. § 402.12(a) ("A biological assessment . . . is used in determining whether formal consultation or a conference is necessary."). To the extent that the Petitioners allege that the Pilgrim SEIS cannot be a legal BA because its contents are deficient, 50 C.F.R. § 402.12(f) provides 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."

[109] Petition at 4.

[110] LBP-12-11 at 10.

[111] *See Nuclear Mgmt. Co.* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006) ("By stressing untimeliness, we by no means suggest that the new information in Petitioners' Combined Reply amounts to an admissible contention. . . . But because Petitioners' original contention was inadequate on its face, and the Combined Reply unjustifiably late, we need not rule on the extent to which section 50.61 narrows embrittlement challenges that may properly be raised in a license renewal proceeding.").

[112] *Hydro Resources, Inc.* (P.O. Box 15910 Rio Rancho, NM 87174), CLI-01-04, 53 NRC 31, 52 (2001).

[113] *See supra* at 15 n.75 and NRC Staff's Answer at 31-33.

CONCLUSION

For the foregoing reasons, the Staff respectfully requests that the Commission deny the Petitioners' appeal of the Board's order in LBP-12-11.

/Signed (electronically) by/
Joseph A. Lindell
Counsel for NRC Staff

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
ENTERGY NUCLEAR GENERATION COMPANY AND ENTERGY NUCLEAR OPERATIONS, INC.	)	Docket No. 50-293-LR-ESA Roseate-Tern
	)	
(Pilgrim Nuclear Generating Station)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S ANSWER TO JONES RIVER WATERSHED ASSOCIATION AND PILGRIM WATCH'S PETITION FOR REVIEW OF MEMORANDUM AND ORDER (DENYING PETITION FOR INTERVENTION AND REQUEST TO REOPEN PROCEEDING AND ADMIT NEW CONTENTION)" have been served upon the following by the Electronic Information Exchange this 13th day of July, 2012:

Administrative Judge
Richard F. Cole
Atomic Safety and Licensing Board
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Richard.Cole@nrc.gov

Administrative Judge
Paul B. Abramson
Atomic Safety and Licensing Board
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Paul.Abramson@nrc.gov

Administrative Judge
Ann Marshall Young, Chair
Atomic Safety and Licensing Board
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Ann.Young@nrc.gov

Office of Commission Appellate Adjudication
Mail Stop: O-16G4
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail:

Atomic Safety and Licensing Board
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(VIA INTERNAL MAIL ONLY)

Office of the Secretary
Attn: Rulemakings and Adjudications Staff
Mail Stop: O-16G4
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Hearing.Docket@nrc.gov

Sheila Slocum Hollis
Duane Morris LLP
505 9th St., NW, Suite 1000
Washington, DC 20004
E-mail: sshollis@duanemorris.com

Terence A. Burke, Esq.
Entergy Nuclear
1340 Echelon Parkway
Mail Stop: M-ECH-62
Jackson, MS 39213
E-mail: tburke@entergy.com

Mary Lampert
148 Washington Street
Duxbury, MA 02332
E- mail: mary.lampert@comcast.net

David R. Lewis, Esq.
Paul A. Gaukler, Esq.
Pillsbury, Winthrop, Shaw, Pittman, LLP
2300 N Street, NW
Washington, DC 20037-1137
E-mail: david.lewis@pillsburylaw.com
paul.gaukler@pillsburylaw.com

Chief Kevin M. Nord
Fire Chief & Director Duxbury Emergency
Management Agency
668 Tremont Street
Duxbury, MA 02332
E-mail: nord@town.duxbury.ma.us

Town Manager
Town of Plymouth
11 Lincoln St.
Plymouth, MA 02360
E-mail: marrighi@townhall.plymouth.ma.us

Richard R. MacDonald
Town Manager
878 Tremont Street
Duxbury, MA 02332
E-mail: macdonald@town.duxbury.ma.us

Matthew Brock
Assistant Attorney General
Commonwealth of Massachusetts
One Ashburton Place
Boston, MA 02108
Martha.Coakley@state.ma.us
Matthew.Brock@state.ma.us

Margaret Sheehan
61 Grozier Road
Cambridge, MA 02138
E-mail : meg@ecolaw.biz

Anne Bingham
78A Cedar St.
Sharon, MA 02067
Email:annebinghamlaw@comcast.net

/Signed (electronically) by/
Joseph A. Lindell
Counsel for NRC Staff

Dated at Rockville, Maryland
this 13th day of July 2012