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ACTION OFFICE: EDO

To: Leeds, NRR

AUTHOR: Bruce Carlisle

AFFILIATION: MA

ADDRESSEE: CHRM Gregory Jaczko

SUBJECT: Concerns the relicensing of Pilgrim nuclear power station

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THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS
OFFICE OF COASTAL ZONE MANAGEMENT
251 Causeway Street, Suite 800, Boston, MA 02114-2136
(617) 626-1200 FAX: (617) 626-1240

May 21, 2012

Pine duBois, Executive Director
Margaret Sheehan, Esq.
Anne Bingham, Esq.
Jones River Watershed Association/Pilgrim Watch
55 Landing Road, PO Box 73
Kingston, MA 02364

Dear Ms. duBois, Ms. Sheehan, and Ms. Bingham:

The Massachusetts Office of Coastal Zone Management (CZM) has reviewed your April 4, 2012 letter requesting that CZM: 1) suspend our July 11, 2006 Consistency Certification for the U.S. Nuclear Regulatory Commission (NRC) relicensing of Pilgrim Nuclear Power Station, and 2) notify Entergy Nuclear Generation Company ("Entergy"), the owner and operator of Pilgrim Nuclear Power Station, that supplemental coordination is required for its relicensing application. In the letter, Jones River Watershed Association/Pilgrim Watch states that the 2006 consistency determination is invalid because the continued operation of Pilgrim Nuclear Power Station as proposed by Entergy is inconsistent with CZM's enforceable program policies.

On February 3, 2006, Entergy requested that a federal consistency review be conducted by CZM of the NRC Operating License application for Pilgrim Nuclear Power Station. The consistency review was initiated on February 3, 2006, and a public notice of the review was published in the Executive Office of Environmental Affairs MEPA *Environmental Monitor*, with a 21-day public comment period. After review and analysis, CZM issued a determination on July 11, 2006 concurring that Entergy's consistency certification for the NRC license was consistent with the enforceable policies of the Massachusetts Coastal Program. The concurrence determination from CZM remains in effect until such time as a new NRC license application is submitted. Regulations governing Federal Consistency With Approved Coastal Management Program (at 15 CFR §930 *et seq.*) do not contain provisions for the suspension of federal consistency certification concurrence. As described below and referenced in your letter, the regulations, at 15 CFR §930.66, do provide for supplemental coordination for activities that were previously reviewed and determined to be consistent, if the activity is having effects on coastal resources or uses that are substantially different than originally described.

As a point of record, with regard to the Pilgrim Nuclear Power Station federal consistency review, in 1994 CZM also conducted federal consistency review for the U.S. Environmental Protection Agency's (EPA) NPDES permit. Following a 21-day public comment period and public notice in the MEPA *Environmental Monitor*, CZM completed its review and analysis and issued a federal consistency concurrence on August 29, 1994. Prior to the issuance of the concurrence

DEVAL L. PATRICK GOVERNOR TIMOTHY P. MURRAY LIEUTENANT GOVERNOR RICHARD K. SULLIVAN JR. SECRETARY BRUCE K. CARLISLE DIRECTOR

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determination, CZM received a copy of the Massachusetts Department of Environmental Protection's 401 Water Quality Certificate for the NPDES permit on July 8, 1994. It is our understanding that the 1994 NPDES permit has been administratively extended by the EPA since that time. Again, the concurrence determination from CZM remains in effect until such time as a new NPDES permit application is submitted.

On February 15, 2012, Entergy requested clarification from CZM that the 2006 consistency certification of the NRC license renewal for the Pilgrim Nuclear Power Station was still valid. On February 29, 2012, CZM issued a response to Entergy, stating that until such time as CZM is notified that a change has occurred to the license reviewed for the July 11, 2006 concurrence, or until a new license application is submitted, the concurrence determination remains valid.

As referenced above and in your letter, federal regulations at 15 CFR §930.66 govern supplemental coordination for proposed activities that were previously determined by the State agency to be consistent with the management program but which have not yet begun. Such supplemental coordination would be allowed if the proposed activity will affect any coastal use or resource substantially different than originally described. The rules state that substantially different coastal effects are reasonably foreseeable if:

- “(1) The applicant makes substantial changes in the proposed activity that are relevant to management program enforceable policies; or
- (2) There are significant new circumstances or information relevant to the proposed activity and the proposed activity's effect on any coastal use or resource; or
- (3) Substantial changes were made to the activity during the period of the State agency's initial review and the State agency did not receive notice of the substantial changes during its review period, and these changes are relevant to management program enforceable policies and/or affect coastal uses or resources.”

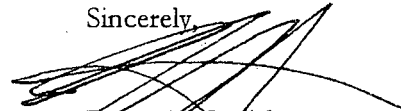
In the April 4 letter, Jones River Watershed Association/Pilgrim Watch lists ten points of information showing what it believes are violations of CZM's Water Quality Policy #1 and Habitat Policies #1-2. The letter goes on to state that the information provided demonstrates that supplemental coordination is required, and that Entergy shall further coordinate with CZM and prepare a supplemental consistency certification.

On April 11, 2012, CZM received a letter from Goodwin Proctor LLP on behalf of Entergy regarding the Jones River Watershed Association/Pilgrim Watch April 4 letter requesting CZM's suspension of our Consistency Certification for the NRC relicensing and for supplemental coordination with Entergy. The April 11, 2012 Entergy letter maintains that the proposed activity's reasonably foreseeable coastal effects are not substantially different than originally described in the 2006 consistency certification and record. The letter further states that the federal consistency review for the NRC license and the NPDES permit are two separate actions, and the State's concurrence involves two different federal agency license and permit authorizations.

CZM has thoroughly reviewed both letters and conducted an assessment and analysis of the arguments and information contained in each. As a result of our review, CZM does not believe that supplemental coordination for our consistency certification for the NRC license is warranted at this

time, as there have been no substantial changes in the proposed license activity, and the proposed license activity will not affect coastal uses or resources in a manner substantially different than originally described. Specifically, we do not find that there are significant new circumstances or information regarding the proposed federal license activity or its consistency with Water Quality Policy #1 and Habitat Policies #1-2 and their underlying state authorities as they were in effect for CZM's concurrence of the 2006 consistency certification.

Sincerely,



Bruce K. Carlisle
Director

Attachments:

April 4, 2012 Letter from Jones River Watershed Association/Pilgrim Watch
April 11, 2012 Letter from Goodwin Proctor LLP on behalf of Entergy

Cc:

Donna Wieting, Office of Ocean and Coastal Resource Management, National Oceanic and
Atmospheric Administration
Gregory Jaczko, U.S. Nuclear Regulatory Commission
David Webster, U.S. Environmental Protection Agency, Region 1
Al Dodds, Entergy Nuclear Generation Company
Elise Zoli, Goodwin Proctor

*Jones River Watershed Association*Pilgrim Watch*

April 4, 2012

By Express Mail

Bruce K. Carlisle
Director
Massachusetts Office of Coastal
Zone Management
251 Causeway Street
Suite 800
Boston MA 02114

Re: MCZM July 11, 2006 Consistency Certification for Entergy's Nuclear
Pilgrim Nuclear Power Station, Plymouth MA

Dear Mr. Carlisle,

We are writing to request that your office immediately suspend its July 11, 2006 Coastal Zone Management Act (CZMA) Consistency Certification for the Nuclear Regulatory Commission (NRC) relicensing of the Entergy Nuclear Generation Company and Entergy Nuclear Operations Inc. (Entergy) Pilgrim Nuclear Power Station (PNPS). Entergy has inaccurately certified to the NRC that relicensing will be consistent with the MCZM program. The facts show that continued operation of PNPS as proposed by Entergy will be inconsistent with enforceable state coastal zone management policies, as codified at 301 CMR §§ 20.00 to 26.00 (MCZM program), and therefore the 2006 consistency determination is invalid. Time is of the essence as Entergy's current NRC operating permit expires June 8, 2012 and relicensing based on MCZM's 2006 consistency determination is likely to occur before May 29, 2012.

We further request that your office notify Entergy that a supplemental coordination is required for the relicensing application. See, 10 C.F.R. § 930.66 and CZMA, 16 U.S.C.S. §§ 1451 *et seq.*

Entergy's NRC application states that during the relicensing period (2012 to 2032) it plans to continue its 40-year use of its once-through cooling water system. It is documented that this system has had destructive impacts on Cape Cod Bay coastal zone resources and uses due to impingement, entrainment, thermal discharges, and discharges of other pollutants including chlorine and biocide residuals. Entergy's 2006 Coastal Zone Management Consistency Certification (CZM Report) certified that operations during relicensing will be consistent with MCZM policies. Some of these statements were not true at the time they were made, and others are no longer true.

Entergy's continued operation of the Pilgrim station for the relicensing period will violate at least MCZM Water Quality Policy #1, 301 CMR 21.98(3), and Habitat Policies, #1-2, 301 CMR 21.98(4), in the following ways:¹

1. Noncompliance with its Clean Water Act NPDES permit: Since 1999, Entergy has failed to obtain state and federal approval of its Biological Monitoring plans, in violation of its NPDES permit, Part A.8, and has failed to conduct the Biological Monitoring it did do, under the oversight of the Pilgrim Advisory Technical Committee, in violation of Part 8.d.

2. Entergy's NPDES permit expired in 1996, but has been administratively extended since that time. EPA and MassDEP do not have the capacity to issue a new NPDES permit before June 8, 2012, the NRC relicensing deadline

3. Entergy's last § 316 demonstration project was provided to U.S EPA in 1977, Additional information for a new review was submitted to EPA by ENSR in 2000 but the review was never completed. MCZM staff comments on the 2000 ENSR report forcefully stated that this submittal failed to demonstrate § 316 and MCZM standards were met.

4. Since 2006, Entergy has annually violated the state's moratorium on the taking of river herring, 322 CMR 6.17(3), and river herring is now a candidate species under the federal Endangered Species Act. 76 Fed. Reg. 67652 (11/2/2011) River herring are the third most impinged species at PNPS.

5. Entergy's CZM Report stated there would be "no effects" on endangered and threatened species. On March 26, 2012, the U.S. Fish and Wildlife Service informed the NRC Staff it does not agree that there will be "no effects" on Cape Cod Bay endangered and threatened species from PNPS operations.

6. MCZM's 2006 certification fails to address or acknowledge impacts to marine mammals such as whales, porpoise, and dolphin, which are known to be present in the PNPS area and in Cape Cod Bay, and which are protected by the federal Marine Mammal Protection Act, 16 U.S.C.S. §§ 1362 (13), 1372 (a).

7. Impacts to species listed under the Massachusetts Endangered Species Act were ignored or inadequately assessed, including impacts to hawksbill turtle, humpback whale, roseate tern, and arctic tern.

8. New discharges of radioactive tritium to groundwater at the Pilgrim station are being documented, and this groundwater is reported to flow toward Cape Cod Bay. It is unknown for how long this discharge has been occurring. MCZM has not determined whether discharges of this radioactive material, combined with PNPS point source discharges of radioactive wastewater to Cape Cod Bay, is consistent with MCZM policies.

¹ This is not a comprehensive list of all the ways in which continued operations will violate MCZM policies, but only examples. More information is available upon request.

9. An Essential Fish Habitat consultation with NMFS as required by Magnuson-Stevens Fishery Conservation and Management Act has not been completed and will not be done prior to June 8, 2012, the relicensing deadline. Instead, the NRC has postponed the EFH consultation indefinitely to the NPDES permit renewal process. Therefore the MCZM's consistency review was done without the benefit of the results of this consultation.

10. Entergy has not demonstrated compliance with MassDEP's 2006 cooling water intake structure water quality standards, upheld by the Massachusetts Supreme Judicial Court in April 2011, following a legal challenge by Entergy. Entergy Nuclear Generation Company v. Department of Environmental Protection, 459 Mass. 319 (2011). These regulations are designed, *inter alia*, to minimize impacts on aquatic life through entrainment, impingement and thermal discharge. See, 314 CMR § 4.05(b)(2)(d), 4.05(3)(c)(2)(d), 4.05(4)(a)(2)(d), 4.05(4)(b)(2)(d), 4.05(4)(c)(2)(d).

Entergy should have provided all of the information listed above to MCZM, pursuant to 16 U.S.C.S. 1456(c)(3)(A), which requires an applicant to submit "all material relevant to a State's management program...." 15 CFR 930.58; 301 CMR 21.07(3). See, e.g. Conservation Law Foundation v. Lujan 560 F.Supp. 561 (D.Mass. 1983).

Under 15 C.F.R. § 930.66(a), applicants for federal consistency review "shall further coordinate with the State agency and prepare a supplemental consistency certification if the proposed activity will affect any coast use or resource substantially different than originally described." Significant new circumstances or information and substantial changes both warrant such supplemental review. *Id.* § 930.66(a)(1)-(3). The information we have indicated above shows a supplemental coordination is required. Facts, documents, and data establishing this information were obtained from agency files.

About two weeks ago we requested a meeting with your staff to discuss this, and we remain willing to do so, in order to reach a mutually agreeable resolution of the concerns raised here. We are ready and able to provide you with full documentation of these facts and others that show that NRC relicensing of PNPS will violate MCZM policies.

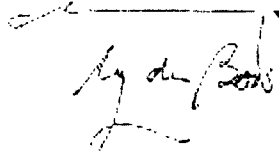
In the meantime, we reiterate our request that you immediately suspend the 2006 Consistency Certification and so notify the NRC, and inform Entergy that supplemental coordination is needed under 15 C.F.R. § 930.66.

Thank you for consideration of our information. Please contact Pine duBois, Executive Director, Jones River Watershed Association, 781-585-2322 or pine@jonesriver.org should you have any questions or concerns.

Very truly yours,

Jones River Watershed Association, Inc.

By:

A handwritten signature in dark ink, appearing to read "Pine duBois", written over a horizontal line.

Pine duBois, Executive Director

Margaret E. Sheehan, Esq., Volunteer

Anne Bingham, Esq.

Cc: Representative Edward Markey
The Hon. Duval Patrick, Governor
Senator Therese Murray
Provincetown Center for Coastal Studies
James McCaffrey, Director, Sierra Club, Massachusetts
Susan M. Reid, Conservation Law Foundation
Curt Spaulding, Regional Administrator, USEPA Region 1
David Webster, US EPA
Kenneth Kimmel, Commissioner, MassDEP
Beth Card, MassDEP
State Senators and Representatives
Whale and Dolphin Conservation Society
Pilgrim Coalition
Herring Alliance
Cape Cod Hook Fisherman's Association
Trout Unlimited, Massachusetts Chapter
Massachusetts Rivers Alliance
Cape Cod Commission

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April 11, 2012

VIA FACSIMILE (617) 626-1240
VIA FEDEX

APR 12 2012

Bruce K. Carlisle
Director
Massachusetts Office of Coastal Zone
Management
251 Causeway Street, Suite 800
Boston, MA 02114

Re: **Entergy's Response to Jones River Watershed Association's and Pilgrim Watch's
Request Concerning CZM Office's License Renewal Concurrence for Pilgrim
Nuclear Power Station (Plymouth, MA)**

Dear Director Carlisle:

We write on behalf of Entergy Nuclear Generating Company and Entergy Nuclear Operations, Inc. (collectively, "Entergy") regarding the April 4, 2012 request by the Jones River Watershed Association and Pilgrim Watch (collectively, "JRWA") to the Massachusetts Office of Coastal Zone Management (the "CZM Office"), attached hereto as Exhibit A. Briefly, JRWA contends that the CZM Office must suspend or alter its federal consistency concurrence related to the Pilgrim Nuclear Power Station's ("Pilgrim" or "Pilgrim Station") license renewal application (the "Application") to the Nuclear Regulatory Commission ("NRC"), which the CZM Office issued on July 11, 2006 (the "2006 License Renewal Concurrence") and confirmed on February 29, 2012 (the "2012 CZM Confirmation"). JRWA's claim rests almost exclusively on purported concerns about continued operation of Pilgrim's cooling water intake structure and associated thermal discharges (the "cooling water system"). See Exhibit A at 1-3.

As detailed below, JRWA's challenge to the CZM Office's action with respect to Pilgrim misapprehends applicable law and procedure regarding CZM Office federal consistency concurrences, which do not authorize reopening prior consistency determinations absent a

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material change in Pilgrim's Application – circumstances that do not exist here. *See, infra*, Section I. Further, JRWA's request impermissibly conflates two separate and distinct federal actions, *i.e.*, the NRC's license renewal determination and the United States Environmental Protection Agency's ("EPA") National Pollutant Discharge Elimination System ("NPDES") permit renewal, in a manner inconsistent with the CZMA, not to mention the federal agencies' respective jurisdictions. *See, infra*, Section II. Finally, none of the purported factual issues raised by JRWA, which could have been raised years ago when the CZM Office undertook its twin federal consistency reviews for the NPDES permit renewal and License Renewal and provided an opportunity for public comment, is new or has merit. For this reason, JRWA's purported factual issues are not appropriately addressed here, but instead are separately addressed in Appendix A, and solely to provide the CZM Office with an accurate presentation of the facts. In the final analysis, JRWA's request to the CZM Office offers neither a credible basis for reopening, nor promises any discernible environmental benefit from a reconsideration of a federal consistency concurrence that Entergy and the CZM Office handled in a manner consistent with applicable law. As such, and for the reasons detailed below, JRWA's challenge to the CZM Office's federal consistency determinations for Pilgrim should be rejected.

Background

The CZM Office has played a continuing, active role in the review of federally authorized action associated with Pilgrim Station, fulfilling that role in a legally supported and appropriate manner.

First, in 1991, when EPA last renewed Pilgrim's NPDES permit, including by authorizing Pilgrim's existing cooling water system, the CZM Office issued an official consistency concurrence (the "1991 NPDES Concurrence") in satisfaction of the federal Coastal Zone Management Act (16 U.S.C. § 1451 *et seq.* (the "CZMA")) requirement that federal licensing activities be consistent with state coastal management programs approved by the National Oceanic and Atmospheric Administration ("NOAA") under the CZMA. *See, e.g.*, 16 U.S.C. § 1456(c)(1)(A). The 1991 NPDES Concurrence determined that Pilgrim's operations under the NPDES permit complied with the NOAA-approved Massachusetts coastal zone management program (the "MCZM Policies"). *See* Correspondence from Jeffery R. Benoit, Director, CZM Office, to John P. Seferiadis, Boston Edison (Apr. 17, 1991). EPA has since proposed no renewal of or substantial modification to Pilgrim's NPDES permit, but continuously has sought from Entergy information about Pilgrim's cooling water system and its potential aquatic impacts; Entergy has complied promptly with such requests. *See, e.g.*, Correspondence from Elise N. Zoli, Goodwin Procter to Damien Houlihan, EPA (Jul. 8, 2008) (providing response to EPA's most recent [July 31, 2007] request under §308 of the Clean Water Act for information on Pilgrim's cooling water system). That EPA has not yet acted on Entergy's timely application to renew or modify Pilgrim's NPDES permit is unsurprising, as EPA is *currently*

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undergoing a highly publicized, nationwide rulemaking to address cooling water intake structures at certain large-scale power plants, such as Pilgrim Station. *See* EPA, National Pollutant Discharge Elimination System – Cooling Water Intake Structures at Existing Facilities and Phase I Facilities, Proposed Rule, 76 Fed. Reg. 22174 (Apr. 20, 2011) (hereinafter “Proposed Rule”). If and when EPA proposes to renew or substantially modify Pilgrim’s NPDES permit pursuant to its Proposed Rule or otherwise, the CZM Office will again conduct a federal consistency review. JRWA may participate in any such CZMA federal consistency process at that time.

Second, on July 11, 2006, the CZM Office officially concurred (the “2006 License Renewal Concurrence”) with Entergy’s consistency certification relating to Entergy’s January 2006 Application seeking a twenty-year renewal of Pilgrim’s existing NRC-issued license to operate (“License Renewal”). *See* Correspondence from Susan Snow-Cotter, CZM Office to Stephan Bethay, Entergy (July 11, 2006). As with the 1991 NPDES Concurrence, the 2006 License Renewal Concurrence was issued by the CZM Office in satisfaction of its CZMA obligations, based on an assessment of MCZM Policies. *See, e.g.*, 16 U.S.C. § 1456(c)(1)(A). The CZM Office’s 1991 NPDES Concurrence was known to the CZM Office and necessarily was taken into account when it issued the 2006 License Renewal Concurrence. While NRC’s License Renewal assessment also addresses the National Environmental Policy Act (“NEPA”), that statute as discussed below does not give NRC any NRC jurisdiction over NPDES considerations. Additionally, although NRC possesses no jurisdiction over NPDES considerations, Entergy’s consistency certification (“Consistency Certification”) described operations of Pilgrim, including Pilgrim’s existing cooling water system operated in accordance with its NPDES permit. *See* Correspondence from Stephan Bethay, Pilgrim Nuclear Power Station to Truman Henson, Massachusetts CZM Office 5 (Jan. 27, 2006) (hereinafter, “Consistency Certification”) (“The [Pilgrim] NPDES permit, issued August 30, 1994, by EPA Region I, constitutes the current CWA Section 316(b) determination for [Pilgrim].”). As importantly, Entergy’s Consistency Certification also included a comprehensive Environmental Report, submitted to NRC pursuant to NEPA. *See* Consistency Certification (attaching the following document: Entergy, License Renewal Application, Pilgrim Nuclear Power Station, Environmental Report Appendix E (Jan. 27, 2006) (hereinafter, “ER”). Consistent with NEPA, that ER described the potential environmental impacts of continued operation of Pilgrim, including under its NPDES-permitted cooling water system. *See* ER § 4.0. There has been no modification of Pilgrim’s License Renewal Application that affect the cooling water system since the 2006 License Renewal Concurrence, and JRWA tellingly identifies none.

On February 29, 2012, the CZM Office confirmed (the “2012 CZM Confirmation”) that its 2006 License Renewal Concurrence remains valid. *See* Correspondence from Robert L. Boeri, CZM Office to Al Dodds, Entergy (Feb. 29, 2012).

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I. JRWA's Request Is Procedurally Improper and Substantively Groundless.

JRWA's challenge to the 2006 License Renewal Concurrence rests on the notion that reopener is required. *See* Exhibit A at 1. JRWA's position is without merit.

Under NOAA regulations implementing CZMA federal consistency review, as set forth in 15 C.F.R. Part 930, a consistency concurrence made by a state's coastal management agency in connection with federal licensing activities ("Federal Consistency Review") may be reconsidered only under limited circumstances. *See* 15 C.F.R. §§ 930.51 and 930.66. Under the circumstances at issue here, reconsideration would be proper only if Entergy proposed material changes to its federally permitted activity, *i.e.*, the NRC License Renewal Application, that would cause coastal effects "substantially different" than those originally described. *Id.*

The legal standard for reopener under the CZMA is not met here. As discussed in the background section above, the 2006 License Renewal Concurrence addressed all relevant aspects of the NRC License Renewal process, including Pilgrim's existing NPDES-authorized cooling water system. No material change to Pilgrim's cooling water system or the manner in which it is operated, or to any other activity that would adversely affect the coastal zone during the License Renewal period has been proposed by Entergy. As such, there is no basis for concluding that a change to Pilgrim's NRC-licensed activities exists that could create coastal effects "substantially different" from those reviewed by the CZM Office when it issued its 2006 License Renewal Concurrence. Accordingly, JRWA's challenge to the 2006 License Renewal Concurrence has failed to meet the CZMA standard for reopener, and must be rejected.

II. JRWA's Challenge Impermissibly Conflates Separate NRC and EPA Proceedings.

JRWA's challenge to the 2006 License Renewal Concurrence effectively asks the CZM Office to introduce future NPDES considerations into the current and nearly complete NRC License Renewal. *See* Exhibit A at 1-3. JRWA's position lacks legal, procedural and practical merit.

First, NRC has no jurisdiction to resolve the application of the federal Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* (the "CWA"), to Pilgrim's cooling water system, but rather expressly has deferred to EPA on the matter, including in the context of Pilgrim's License Renewal. *See* NRC, Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 29 Regarding Pilgrim Nuclear Power Station Final Report, 4-10, 4-39 note (b) (Jul. 2007) (hereinafter, "FSEIS"), available at: <http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1437/supplement29/v1/sr1437s29v1.pdf> ("Section 316(b) of the Clean Water Act of 1977 (CWA) ... requires that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse

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environmental impacts (33 U.S.C. 1326). Entrainment of fish and shellfish into the cooling water system is a potential adverse environmental impact that can be minimized by the use of best technology available. Licensees may be required as part of the NPDES permit renewal to alter the intake structure, redesign the cooling system, modify facility operation, or take other mitigative measures.”) (emphasis added). In its 1991 NPDES and 2006 License Renewal Concurrences, the CZM Office has recognized these jurisdictional limitations of NRC and EPA, and there is no sound reason for that approach to change. Specifically, prior to the 1972 CWA, NRC’s predecessor agency, the Atomic Energy Commission (“AEC”), exercised authority over water permitting for nuclear power plants. In 1972, Congress amended the CWA to assign statutory authority over water quality matters to the EPA, eliminating duplicative authority among other federal agencies, including NRC. See CWA § 511(c)(2) (prohibiting federal agencies from reviewing cooling water systems pursuant to NEPA); see also, e.g., *In re Consolidated Edison Co. of New York, Inc.*, 13 N.R.C. 448, 449 (1981) (“It is well established, by the terms of the Clean Water Act and Commission precedent, that the NRC must defer to final decisions of the EPA with respect to the type of cooling water system to be employed by nuclear power plants.”). After the 1972 CWA amendments, the AEC entered into a memorandum of understanding with EPA establishing EPA’s exclusive authority over NPDES issues, particularly cooling water systems. See Second Memorandum of Understanding Regarding Implementation of Certain NRC and EPA Responsibilities (“MOU”), Appendix A-Policy Statement on Implementation of Section 511 of the Federal Water Pollution Control Act, 40 Fed. Reg. 60115, 60120 (Dec. 31, 1975) (eff. Jan. 30, 1976) (“cooling water intake structure location, design, construction, and capacity ... will [not] be considered by NRC” if a particular alternative is required by Sections 401 or 402 of the CWA); 10 C.F.R. § 51.53(c)(3)(ii)(B) (requiring applicants to provide documentation of compliance with EPA’s regulations governing CWA § 316(a) and (b)). That MOU remains in effect. Consequently, during the License Renewal process at Pilgrim, NRC properly deferred to EPA regarding NPDES-related decisions about cooling water systems.

Indeed, where NRC staff has attempted to impose more stringent or merely different water quality requirements on applicants than those imposed by EPA in its NPDES permits, those attempts have been struck down on an intra-agency appeal. See, e.g., *In re Tennessee Valley Auth.* (Yellow Creek Nuclear Plant, Units 1 and 2), ALAB-515, 8 NRC 702, 713-715 (1978). NRC staff is required to defer to EPA’s determinations about open-cycle cooling. *In re Carolina Power and Light Co.* (H. B. Robinson, Unit No. 2), ALAB-569, 10 NRC 557, 561-562 (1979). Even when EPA’s NPDES permit is under administrative extension at the time of NRC’s review, the Atomic Safety and Licensing Board (“ASLB”) has ruled that NRC is obligated to defer to EPA’s then-current water quality determinations and NPDES permit. See *In re Entergy Nuclear Operations Inc.* (Indian Point Nuclear Generating Units 2 and 3), ASLB-08-13, 68 NRC 43, 155-158 (2008). In doing so, the ASLB reasoned:

GOODWIN PROCTER

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It would be futile for the Board to review any of the CWA determinations, given that it is not possible for the Commission to implement any changes that might be deemed appropriate.

Id. at 156-157 (internal footnotes omitted).

JRWA's request erroneously seeks to import NPDES-related cooling water system considerations that are the province of EPA into the License Renewal process, and should be rejected as inconsistent with settled federal law.

Second, JRWA's request is too little, too late, inasmuch as it does not rest on a credible and timely allegation of relevant new information. To support its challenge to the 2006 License Renewal Concurrence, JRWA relies heavily on a June 27, 2000 CZM Office correspondence to EPA expressing concerns about the then-existing CWA § 316 demonstration report for Pilgrim. Setting aside the fact that the June 27, 2000 letter relates to the 1991 NPDES Concurrence and, therefore, is outside the scope of NRC's License Renewal as a matter of law, JRWA's characterization of the June 27, 2000 letter is improper. In that letter, issued six years prior to the 2006 License Renewal Concurrence, the CZM Office simply requested that additional information be provided before it could conclude, "unequivocally," that the scientific evidence proved that there were no long-term adverse environmental impacts at Pilgrim as the result of entrainment. See Correspondence from Thomas W. Skinner, CZM Office to Dave Webster, EPA (June 27, 2000). The CZM Office's request for additional scientific evidence in 2000 in no way invalidates or contradicts its 2006 License Renewal Concurrence. As such, it in no way supports JRWA's challenge to the 2006 License Renewal Concurrence and request for reopener.

Finally, JRWA's request lacks a common sense foundation that advances legitimate environmental goals. It is undisputed that EPA will address Pilgrim's cooling water system when it renews Pilgrim's NPDES permit, at which time the CZM Office will undertake its role in issuance of a federal consistency concurrence. JRWA will be able to participate in that process if it so chooses. There is nothing to be gained by importing EPA's future actions – actions unknown today – into a nearly complete NRC proceeding as a form of reopener. As such, the CZM Office should not accept JRWA's challenge to its 2006 License Renewal Concurrence.

For all of the above-stated reasons, and as supported by the information provided in Appendix A, the CZM Office should decline JRWA's request to suspend or otherwise reopen the 2006 License Renewal Concurrence as reconfirmed in 2012 for Pilgrim Nuclear Power Station.

GOODWIN PROCTER

Bruce K. Carlisle
April 11, 2012
Page 7

As always, should you require additional information to conclude this matter, please do not hesitate to contact us.

Thank you for your time and consideration.

Sincerely,

A handwritten signature in black ink that reads "Elise N. Zoli (CB)". The signature is written in a cursive, flowing style.

Elise N. Zoli

ENZ

Attachments:

Exhibit A
Appendix A

cc:

Fred Mogolesko, Entergy Corporation
Jacob J. Scheffer, Entergy Nuclear, Inc.
David R. Lewis, Esq., Pillsbury Winthrop Shaw Pittman LLP.
Kelli M. Dowell, Esq., Entergy Services, Inc.
William B. Glew, Jr., Entergy Services, Inc.
Joseph R. Lynch, Entergy Nuclear Operations
Al Dodds, Entergy Nuclear Operations

Exhibit A

*Jones River Watershed Association*Pilgrim Watch*

April 4, 2012

By Express Mail

Bruce K. Carlisle
Director
Massachusetts Office of Coastal
Zone Management
251 Causeway Street
Suite 800
Boston MA 02114

Re: MCZM July 11, 2006 Consistency Certification for Entergy's Nuclear
Pilgrim Nuclear Power Station, Plymouth MA

Dear Mr. Carlisle,

We are writing to request that your office immediately suspend its July 11, 2006 Coastal Zone Management Act (CZMA) Consistency Certification for the Nuclear Regulatory Commission (NRC) relicensing of the Entergy Nuclear Generation Company and Entergy Nuclear Operations Inc. (Entergy) Pilgrim Nuclear Power Station (PNPS). Entergy has inaccurately certified to the NRC that relicensing will be consistent with the MCZM program. The facts show that continued operation of PNPS as proposed by Entergy will be inconsistent with enforceable state coastal zone management policies, as codified at 301 CMR §§ 20.00 to 26.00 (MCZM program), and therefore the 2006 consistency determination is invalid. Time is of the essence as Entergy's current NRC operating permit expires June 8, 2012 and relicensing based on MCZM's 2006 consistency determination is likely to occur before May 29, 2012.

We further request that your office notify Entergy that a supplemental coordination is required for the relicensing application. See, 10 C.F.R. § 930.66 and CZMA, 16 U.S.C.S. §§ 1451 *et seq.*

Entergy's NRC application states that during the relicensing period (2012 to 2032) it plans to continue its 40-year use of its once-through cooling water system. It is documented that this system has had destructive impacts on Cape Cod Bay coastal zone resources and uses due to impingement, entrainment, thermal discharges, and discharges of other pollutants including chlorine and biocide residuals. Entergy's 2006 Coastal Zone Management Consistency Certification (CZM Report) certified that operations during relicensing will be consistent with MCZM policies. Some of these statements were not true at the time they were made, and others are no longer true.

Entergy's continued operation of the Pilgrim station for the relicensing period will violate at least MCZM Water Quality Policy #1, 301 CMR 21.98(3), and Habitat Policies, #1-2, 301 CMR 21.98(4), in the following ways:¹

1. Noncompliance with its Clean Water Act NPDES permit: Since 1999, Entergy has failed to obtain state and federal approval of its Biological Monitoring plans, in violation of its NPDES permit, Part A.8, and has failed to conduct the Biological Monitoring it did do, under the oversight of the Pilgrim Advisory Technical Committee, in violation of Part 8.d.

2. Entergy's NPDES permit expired in 1996, but has been administratively extended since that time. EPA and MassDEP do not have the capacity to issue a new NPDES permit before June 8, 2012, the NRC relicensing deadline

3. Entergy's last § 316 demonstration project was provided to U.S. EPA in 1977, Additional information for a new review was submitted to EPA by ENSR in 2000 but the review was never completed. MCZM staff comments on the 2000 ENSR report forcefully stated that this submittal failed to demonstrate § 316 and MCZM standards were met.

4. Since 2006, Entergy has annually violated the state's moratorium on the taking of river herring, 322 CMR 6.17(3), and river herring is now a candidate species under the federal Endangered Species Act. 76 Fed. Reg. 67652 (11/2/2011) River herring are the third most impinged species at PNPS.

5. Entergy's CZM Report stated there would be "no effects" on endangered and threatened species. On March 26, 2012, the U.S. Fish and Wildlife Service informed the NRC Staff it does not agree that there will be "no effects" on Cape Cod Bay endangered and threatened species from PNPS operations.

6. MCZM's 2006 certification fails to address or acknowledge impacts to marine mammals such as whales, porpoise, and dolphin, which are known to be present in the PNPS area and in Cape Cod Bay, and which are protected by the federal Marine Mammal Protection Act, 16 U.S.C.S. §§ 1362 (13), 1372 (a).

7. Impacts to species listed under the Massachusetts Endangered Species Act were ignored or inadequately assessed, including impacts to hawksbill turtle, humpback whale, roseate tern, and arctic tern.

8. New discharges of radioactive tritium to groundwater at the Pilgrim station are being documented, and this groundwater is reported to flow toward Cape Cod Bay. It is unknown for how long this discharge has been occurring. MCZM has not determined whether discharges of this radioactive material, combined with PNPS point source discharges of radioactive wastewater to Cape Cod Bay, is consistent with MCZM policies.

¹ This is not a comprehensive list of all the ways in which continued operations will violate MCZM policies, but only examples. More information is available upon request.

9. An Essential Fish Habitat consultation with NMFS as required by Magnuson-Stevens Fishery Conservation and Management Act has not been completed and will not be done prior to June 8, 2012, the relicensing deadline. Instead, the NRC has postponed the EFH consultation indefinitely to the NPDES permit renewal process. Therefore the MCZM's consistency review was done without the benefit of the results of this consultation.

10. Entergy has not demonstrated compliance with MassDEP's 2006 cooling water intake structure water quality standards, upheld by the Massachusetts Supreme Judicial Court in April 2011, following a legal challenge by Entergy. Entergy Nuclear Generation Company v. Department of Environmental Protection, 459 Mass. 319 (2011). These regulations are designed, *inter alia*, to minimize impacts on aquatic life through entrainment, impingement and thermal discharge. See, 314 CMR § 4.05(b)(2)(d), 4.05(3)(c)(2)(d), 4.05(4)(a)(2)(d), 4.05(4)(b)(2)(d), 4.05(4)(c)(2)(d).

Entergy should have provided all of the information listed above to MCZM, pursuant to 16 U.S.C.S. 1456(c)(3)(A), which requires an applicant to submit "all material relevant to a State's management program...." 15 CFR 930.58; 301 CMR 21.07(3). See, e.g. Conservation Law Foundation v. Lujan 560 F.Supp. 561 (D.Mass. 1983).

Under 15 C.F.R. § 930.66(a), applicants for federal consistency review "shall further coordinate with the State agency and prepare a supplemental consistency certification if the proposed activity will affect any coast use or resource substantially different than originally described." Significant new circumstances or information and substantial changes both warrant such supplemental review. *Id.* § 930.66(a)(1)-(3). The information we have indicated above shows a supplemental coordination is required. Facts, documents, and data establishing this information were obtained from agency files.

About two weeks ago we requested a meeting with your staff to discuss this, and we remain willing to do so, in order to reach a mutually agreeable resolution of the concerns raised here. We are ready and able to provide you with full documentation of these facts and others that show that NRC relicensing of PNPS will violate MCZM policies.

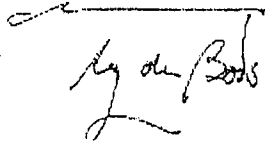
In the meantime, we reiterate our request that you immediately suspend the 2006 Consistency Certification and so notify the NRC, and inform Entergy that supplemental coordination is needed under 15 C.F.R. § 930.66.

Thank you for consideration of our information. Please contact Pine duBois, Executive Director, Jones River Watershed Association, 781-585-2322 or pine@jonesriver.org should you have any questions or concerns.

Very truly yours,

Jones River Watershed Association, Inc.

By:

A handwritten signature in dark ink, appearing to read "Pine duBois", written over a horizontal line.

Pine duBois, Executive Director

Margaret E. Sheehan, Esq., Volunteer

Anne Bingham, Esq.

Cc: Representative Edward Markey
The Hon. Duval Patrick, Governor
Senator Therese Murray
Provincetown Center for Coastal Studies
James McCaffrey, Director, Sierra Club, Massachusetts
Susan M. Reid, Conservation Law Foundation
Curt Spaulding, Regional Administrator, USEPA Region 1
David Webster, US EPA
Kenneth Kimmel, Commissioner, MassDEP
Beth Card, MassDEP
State Senators and Representatives
Whale and Dolphin Conservation Society
Pilgrim Coalition
Herring Alliance
Cape Cod Hook Fisherman's Association
Trout Unlimited, Massachusetts Chapter
Massachusetts Rivers Alliance
Cape Cod Commission

Appendix A:

A Detailed Review of JRWA's Factual Allegations of "Non-Compliance" with State and Federal Permitting Requirements

In their April 4, 2012 letter to the Massachusetts Office of Coastal Zone Management (the "CZM Office"), attached as Exhibit A, the Jones River Watershed Association and Pilgrim Watch (collectively, "JRWA") challenge Entergy Nuclear Generating Company's and Entergy Nuclear Operations, Inc.'s (collectively, "Entergy") federal consistency concurrence related to the Pilgrim Nuclear Power Station's ("Pilgrim" or "Pilgrim Station") license renewal application (the "Application") to the Nuclear Regulatory Commission ("NRC"), which the CZM Office concurred with on July 11, 2006 (the "2006 License Renewal Concurrence"), and affirmed their confirmation with on February 29, 2012 (the "2012 CZM Confirmation"). JRWA provides ten (10) separate factual bases for their challenge. *See* Exhibit A at 2-3. An analysis of each basis is provided below, which demonstrates that none of JRWA's factual claims has merit.

Allegations regarding Pilgrim's NPDES permit status and compliance (Issues #1, 2, and 10).

JRWA acknowledges that Pilgrim's National Pollution Discharge Elimination System Permit ("NPDES") permit is current, having been administratively continued, but alleges – without support – instances by Pilgrim of supposed noncompliance with its NPDES permit terms, as well as federal and Commonwealth requirements relating to cooling water systems. *See* Exhibit A at 2.

JRWA is in error. First, Pilgrim's current NPDES permit expressly memorializes Pilgrim's compliance with the cooling water system requirements of the CWA and Commonwealth law. *See* National Pollutant Discharge Elimination System (NPDES) Permit modification for Pilgrim Nuclear Power Station (NPDES #MA0003557) (Aug. 30, 1994), Section A(1)(i), p. 3 of 15 ("It has been determined, based on engineering judgment, that the circulating water intake structures presently employs the best available technology for minimizing adverse environmental impacts. ... The present design shall be reviewed for conformity to regulations pursuant to Section 316(b) of the Act when such are promulgated."). Unless and until either the U.S. Environmental Protection Agency ("EPA") or the Commonwealth successfully issue a renewed or modified final NPDES permit with different terms, Pilgrim's existing system remains, as it has to date, officially and finally authorized.

JRWA's claims about Pilgrim's alleged noncompliance likewise are incorrect. EPA is mid-process in a federal rulemaking to address cooling water systems, *see* EPA, National Pollutant Discharge Elimination System – Cooling Water Intake Structures at Existing Facilities and Phase I Facilities, Proposed Rule, 76 Fed. Reg. 22174 (Apr. 20, 2011) (hereinafter "Proposed Rule"), which means that EPA's current direction for power plants, such as Pilgrim Station, remains unknown. What is known is that EPA's official position with respect to Pilgrim in its prior (now suspended on other grounds) rulemaking was that Pilgrim Station needed to take no additional action. *See* EPA, National Pollutant Discharge Elimination System – Final Regulations to Establish Requirements for Cooling Water Intake Structures at Phase II Existing Facilities, Final Rule, 69 Fed. Reg. 41576, 41677 (July 9, 2004) (allocating no EPA Technology upgrade costs to Pilgrim); EPA, National Pollutant Discharge Elimination System – Suspension of Regulations Establishing Requirements for Cooling Water Intake Structures at Phase II Existing Facilities, Suspension of Final Rule, 72 Fed. Reg. 37107 (July 9, 2007) (suspending the rule).

JRWA's claims about "new" Commonwealth law cannot be reconciled with the findings of the Massachusetts Supreme Judicial Court (the "SJC"), which reviewed the Massachusetts Department of Environmental Protection's ("MDEP") cooling water intake structure regulations, and concluded that the regulations contained no new substantive requirements. *See Entergy Nuclear Generation Co. v. Dep't of Env'tl. Prot.*, 459 Mass 319, 327 (2011) ("The literal terms of the regulations go no further than declaring that the department has the authority to regulate CWISs.") (emphasis in original). Consequently, it is not possible for Pilgrim to be in non-compliance with the new regulations, as JRWA contends.

Finally, JWRA's claims regarding Entergy's non-compliance with its NPDES permit biological monitoring requirements are vague and unclear. Entergy has provided, on a yearly basis and via certified mail, plans for its yearly Biological Monitoring program to MDEP, and to EPA, as required by Section A.8 of its NPDES permit. *See, e.g.*, Correspondence from Stephen Bethay, Entergy to EPA and MDEP (Dec. 16, 2010) (providing its 2011 Biological Monitoring program for the agencies' consideration). Since 1999, both EPA and MDEP have failed to reply to Entergy's Biological Monitoring program submission. Further, Entergy understands that the Pilgrim Advisory Technical Committee ("PATC") stopped formally meeting in approximately 2001. Yet, Entergy still provides, on a yearly basis, copies of its annual Marine Ecology Reports to the individuals that sat on the PATC when it stopped meeting. *See, e.g.*, Correspondence from Jacob Scheffer, Entergy, to Dr. Todd Callaghan, MA Coastal Zone Management Office (May 11, 2009) (enclosing "a copy of Pilgrim Nuclear Power Station's Annual Marine Ecology Studies Report for 2008"). Occasionally, Entergy receives questions on the Biological Monitoring program from PATC agency members, but no substantive comments have been received from the PATC since it stopped formally meeting.

Allegations relating to River Herring (#4)

JWRA claims that "[s]ince 2006, Entergy has annually violated the state's moratorium on the taking of river herring 322 CMR 6.17(3), and river herring is now a candidate species under the [ESA]." *See* Exhibit A at 2.

To the contrary, Massachusetts's moratorium on the "taking" of river herring is a restriction placed only on commercial and recreational fishing, such that Pilgrim cannot be in violation of it. The moratorium referenced by JRWA, entitled "Taking and Possession of River Herring in Waters under the Jurisdiction of the Commonwealth," is enforced by the Massachusetts Department of Marine Fisheries ("MDMF"). *See* MDMF, Marine Fisheries Regulation Summaries (July 2011), available at: http://www.mass.gov/dfwele/dmf/commercialfishing/reg_summary_062411.pdf (summarizes fishing regulations administered by MDMF). Importantly, and as JRWA fails to mention, the specific statute that authorizes MDMF, M.G.L. c. 130 § 17A, allows MDMF to promulgate regulations governing fishing activities, not power plants. *See* M.G.L. c. 130 § 17A; *see, e.g.*, 322 CMR 3.02 ("Taking of White Perch from the Agawam River, Wareham"); 3.05 ("Taking of Anadromous Fish, Except Alewives and River Herring, in the Territorial Waters of Massachusetts"); and 3.06 ("Taking of Coho Salmon (*Oncorhynchus kisutch*)"); 322 CMR 6.01 ("Lobster Maximum and Minimum Sizes"); and 6.07 ("Striped Bass Fishery"). As such, it is incorrect as a matter of law to state that Pilgrim Station is "in violation" of the moratorium, and,

moreover, would be wholly inappropriate to import a regulation that manages marine fisheries into the NRC relicensing context.

Allegations regarding ESA, MESA and Related Species (# 5, 6 and 7)

JRWA asserts that the 2006 License Renewal Concurrence should be suspended because Entergy (and by extension the CZM Office) have somehow failed to adequately address or acknowledge the potential impact of Pilgrim's continued operation on certain aquatic and terrestrial species listed as endangered, threatened, or otherwise protected under the federal Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq.*, the Massachusetts Endangered Species Act ("MESA") M.G.L. c. 131A, and/or the federal Marine Mammal Protection Act ("MMPA"), 16 U.S.C. §§ 1362 *et seq.* See Exhibit A at 2.

To the contrary and as JRWA is aware based upon both the NRC Staff's and Entergy's response to its proposed new contention in the NRC License Renewal proceeding: (1) appropriate consideration was given to all relevant listed species having a reasonable potential to occur at or in the vicinity of Pilgrim; (2) continued operation of Pilgrim is not expected to have a discernible effect on any such species;² and, as such (3) the CZM Office's 2006 License Renewal Concurrence (and its 2012 CZM Confirmation) was in all respects legally and factually sound.

First, the CZM Office's federal consistency review is limited to a review of the proposed License Renewal for compliance with the enforceable Massachusetts coastal zone management program policies (the "MCZM Policies"). See 301 CMR 21.07(3)(f) and 21.98(1) (outlining MCZM Policies and scope of federal consistency review by the CZM Office); see also 15 C.F.R. § 930.63(a), (b) and (c) (state agency objections must either "describe how the proposed activity is inconsistent with specific enforceable policies of the management program," or "be based upon a determination that the applicant failed ... to supply the information required"). As such,

¹ The fact that National Marine Fisheries Service ("NMFS") recently declared river herring to be a "candidate species" for ESA listing does not change this calculus. See NMFS, 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 (Nov. 2, 2011). The ESA's procedural and substantive requirements, as embodied in the Section 7 consultation between NMFS and NRC, apply only to species that have been listed as "endangered" or "threatened" or, at a minimum, formally proposed for listing. See 16 U.S.C. § 1536(a), (c). Indeed, NMFS has explicitly stated that "designation [as a candidate species] does not confer any procedural or substantive protections of the ESA on the candidate species." See NMFS, Endangered and Threatened Species; Establishment of Species of Concern List, Addition of Species to Species of Concern List, Description of Factors for Identifying Species of Concern, and Revision of Candidate Species List Under the Endangered Species Act, 69 Fed. Reg. 19975, 19976 (Apr. 15, 2004). Furthermore, river herring are not a protected species under the Massachusetts Endangered Species Act ("MESA"), M.G.L. c. 131A. See 321 CMR 8.01, 10.90 (official list of MESA-protected species). Thus, JRWA's assertion that river herring are an ESA "candidate species" is legally irrelevant to the CZM Office's 2006 License Renewal Concurrence or its 2012 CZM Confirmation.

² NRC Staff's Answer to Jones River Watershed Association and Pilgrim Watch's Petitions for Leave to Intervene and Motions to Reopen the Record (March 19, 2012); Entergy's Answer Opposing Jones River Watershed Association's and Pilgrim Watch's Motion to Reopen and Hearing Request (March 19, 2012); NRC Staff's Answer to Correction and Supplement to Jones River Watershed Association and Pilgrim Watch's Petitions to Intervene and Motions to Supplement (March 26, 2012).

evaluation of ESA, MESA and MMPA considerations during consistency review is appropriate solely to the extent it is part of the enforceable MCZM Policies.

As an initial matter, evaluation of MMPA-specific species is neither required, nor authorized, during federal consistency review, because the MMPA is incorporated into none of the enforceable MCZM Policies.³ See 301 CMR 21.98 (setting forth the enforceable MCZM Policies); Massachusetts Office of Coastal Zone Management, Policy Guide (Oct. 2011) (hereinafter, "Policy Guide") (failing to identify the MMPA as a source of law for the enforceable MCZM Policies). Further, while MESA provides authority for select MCZM Policies, *i.e.*, Energy #1; Habitat #1, #2; Ocean Resources #1, #2, the operative prohibition is on the unauthorized "take" of relevant MESA-listed species, including species listed under the federal ESA, or the alteration of significant habitat of ESA- or MESA-listed species. See Policy Guide at 147 (identifying MESA as a source of law for certain MCZM Policies); 321 CMR 10.03(4) (species "listed as endangered or threatened under the provisions of the Federal Endangered Species Act shall be listed in an equivalent category on the state list"); 321 CMR 10.00 (rules and prohibitions regarding activities which "take" MESA-listed species or alter designated significant habitats). Thus, to implicate the ESA or MESA, a credible "take" must be established.

In fact, however, JRWA provides no evidence that Pilgrim's operations take ESA or MESA-listed species or alter significant habitats for such species. To the contrary, Entergy's and NRC's reviews of ESA, MESA and, to the extent overlapping, MMPA-listed species indicate that no "takes" are reasonably considered to have occurred, a conclusion with which the federal agencies that implement the ESA appear to agree. See Correspondence from Michael J. Amaral, USFWS to Rani Franovich, NRC (May 23, 2006) (referencing correspondence that concurs with Entergy's determination that License Renewal is not likely to adversely affect federally-listed species under USFWS jurisdiction); Correspondence from Daniel S. Morris, NMFS to Andrew S. Imboden, NRC (Mar. 26, 2012) (hereinafter, "NMFS' March 2012 Correspondence") (responding to NRC's request for a concurrence in the ESA Section 7 consultation).

Nor can JRWA credibly claim that Entergy's consistency certification was legally or substantively insufficient to support the CZM Office's issuance of the 2006 License Renewal Concurrence. In preparing the NRC-mandated Environmental Report ("ER") for Pilgrim's License Renewal Application, Entergy consulted with the Massachusetts Division of Fisheries and Wildlife ("MADFW") to consider species listed as endangered or threatened under MESA, *see* Entergy, License Renewal Application, Pilgrim Nuclear Power Station, Environmental Report Appendix E § 2.5 & Table 2.1 (Jan. 27, 2006) (hereinafter, "ER"), and to identify

³ To the extent that enforceable MCZM Policies require an evaluation of impacts to certain marine mammals that may also fall under purview of the MMPA, Pilgrim's Environmental Report ("ER") addressed those species in the manner necessary. Specifically, and as discussed below, the ER describes the environmental impacts of continued operation of Pilgrim and its once-through cooling water system. See Entergy, License Renewal Application, Pilgrim Nuclear Power Station, Environmental Report Appendix E § 4.0 (Jan. 27, 2006) (hereinafter, "ER"). In addition, the ER specifically evaluates potential impacts to threatened and endangered whale species that may occur in Cape Cod Bay. *Id.* at § 4.10.5. As such, the information provided in the ER is more than adequate to demonstrate that impacts to relevant marine mammals are not reasonably expected to occur in connection with Pilgrim's License Renewal, such that any evaluation of impacts to marine mammals required by the MCZM Policies is satisfied.

important habitat, *see* ER at § 2.4, as required by NRC regulations on the preparation of License Renewal applications. *See* 10 C.F.R. 51.53(c)(3)(ii)(E) (“All license renewal applicants shall assess the impact of refurbishment and other license-renewal-related construction activities on important plant and animal habitats. Additionally, the applicant shall assess the impact of the proposed action on threatened or endangered species in accordance with the [federal] Endangered Species Act.”). Indeed, Entergy’s ER catalogued more than 80 state-listed endangered and threatened plants and animals believed at that time to potentially occur in the general vicinity of Pilgrim or in Plymouth County. *See* ER at Table 2-1.

The ER went on to specifically address no less than fifteen endangered and threatened species by name, including three of the four species (hawksbill sea turtle, humpback whale, and roseate tern) inexplicably identified in JRWA’s letter as having been “ignored or inadequately assessed.”⁴ Compare Exhibit A at 2 to ER at § 2.5. Importantly, and as both the ER and the NRC’s *Biological Assessment of the Potential Effects on Endangered or Threatened Species from the Proposed License Renewal for the Pilgrim Nuclear Power Station* (the “Biological Assessment”) make clear, the hawksbill turtle, humpback whale, and roseate tern have not been observed at Pilgrim; indeed, as a function of their individual habitat, feeding, and/or nesting preferences, none of those species can be reasonably expected to encounter Pilgrim’s cooling water system or otherwise be impacted by the Pilgrim’s continued operation. *See* ER at § 2.5; NRC, *Biological Assessment of the Potential Effects on Endangered or Threatened Species from the Proposed License Renewal for the Pilgrim Nuclear Power Station* at § 5.0 (Dec. 2006) (prepared as part of the federal ESA Section 7 consultation between NRC and NMFS for License Renewal).

⁴ Further, there is no credible evidence that the fourth MESA-species identified by JRWA – the arctic tern – has been or plausibly could be affected by Pilgrim’s operations. By way of clarification, the arctic tern is not listed as endangered or threatened under federal or state law, but has been designated a species of special concern under MESA. 321 CMR 10.90. This bird occurs as far north as British Columbia, northern Manitoba and Quebec, and as far south as South Africa and the Antarctic ice pack. MADFW, Natural Heritage Endangered Species Program, Arctic Tern Fact Sheet at 1 (Aug. 2008), *available at*: http://www.mass.gov/dfwele/dfw/nhsp/species_info/nhfacts/sterna_paradisaea.pdf. Arctic terns are known to occur in Massachusetts during their breeding season (roughly May to August). *Id.* However, because Massachusetts is at the southern-most edge of the arctic tern’s breeding range, it is possible that this species will always occur in limited numbers in the state, irrespective of any peaks or declines in population. *Id.* at 2. Furthermore, the arctic tern’s preferred nesting habitat is comprised of sandy, gravelly areas on islands and barrier spits. *Id.* at 1. While arctic terns occasionally occur on mainland shores, *id.*, these birds are not known to nest or breed in the immediate vicinity of Pilgrim. Nor does JRWA contend this species has actually been observed at or in the immediate vicinity of Pilgrim. Finally, MADFW identifies predation and human disturbance, not power plant operations, as causes of the arctic tern’s decline. *Id.* at 2. Pilgrim’s site even provides undisturbed beach habitat and limits human disturbance for security purposes. *See* NRC, Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 29 Regarding Pilgrim Nuclear Power Station Final Report, 2-87 (Jul. 2007) (hereinafter, “FSEIS”), *available at*: <http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1437/supplement29/v1/sr1437s29v1.pdf>. Further, impacts to the arctic tern’s prey (e.g., sand lance and herring, *see* Arctic Tern Fact Sheet at 1, from impingement at Pilgrim were evaluated in the ER and found to be small. ER at § 4.3. Under these circumstances, consideration of this species is not reasonably warranted in connection with Pilgrim’s License Renewal.

As required by the CZMA and the CZM Office's regulations, *see* 15 C.F.R. § 930.58(a)(1)(i); 301 CMR 21.07(3)(a); Policy Guide at 11-12, Pilgrim's ER was provided to the CZM Office with its consistency certification. Pilgrim's consistency certification appropriately concluded "that [Pilgrim's] impacts to these [MESA-listed] species are small during current operations and [Pilgrim] has no plans that would change this conclusion for the [L]icense [R]enewal term." Consistency Certification at 7. The information Pilgrim provided to the CZM Office was more than adequate for the CZM Office to concur with Pilgrim's conclusions on the impacts to threatened and endangered species that are expected to occur during License Renewal and fully supports issuance of the 2006 License Renewal Concurrence.

JRWA's attempts to rely on a March 26, 2012 National Marine Fisheries Service ("NMFS") correspondence to make its case on potential impacts. *See* Exhibit A at 2. JRWA neglects to mention NMFS's conclusion in that correspondence that it "may be able to conclude that [License Renewal] may affect, but is not likely to adversely affect, any NMFS listed species [which] is the appropriate conclusion of a Section 7 consultation when listed species or critical habitat are present in the action area, but effects of an action are wholly beneficial, insignificant, or discountable." NMFS' March 2012 Correspondence at 1-2 (emphasis supplied). In short, while the March 26, 2012 letter may reflect NMFS's semantic disagreement with NRC's chosen terminology, it confirms NRC's substantive findings, and therefore underscores the infirmity of JRWA's request.

Allegations regarding Tritium (#8)

JRWA identifies, among its ten (10) enumerated concerns, the presence in groundwater of tritium, a naturally occurring, ubiquitous and low-energy or weak beta particle. *See* Exhibit A at 2; NRC, Fact Sheet Tritium, Radiation Protection Limits, and Drinking Water Standards 2 (Feb. 2011) (hereinafter, "Tritium Fact Sheet"), *available at*: <http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/tritium-radiation-fs.html> (describing tritium).

Contrary to JRWA's implied assertion, this issue is not reasonably construed as a new concern. Rather, the issue of the potential presence of tritium in groundwater at nuclear power plants is one NRC began to address on a nationwide basis in 2006. *See* Tritium Fact Sheet at 1. At that time, the identification of tritium in groundwater at certain nuclear power plants precipitated parallel industry-led and NRC-initiated investigations and reviews of conditions at the majority of nuclear power plants throughout the nation, including at Pilgrim Station. *See, e.g.,* NRC, Liquid Radioactive Release, Lessons Learned Task Force, Final Report i-iv (Sept. 1, 2006), *available at*: <http://pbadupws.nrc.gov/docs/ML0626/ML062650312.pdf>. At Pilgrim, a comprehensive hydrological assessment has been performed, with an array of multiple monitoring wells that continue to monitor tritium conditions even today. *See, e.g.,* Environmental Resources Management, Groundwater Investigation Report for Pilgrim Nuclear Power Station, 5 (prepared on behalf of Entergy Nuclear Operations, Inc.) (Nov. 1 2010) (hereinafter, "ERM Report") (describing Pilgrim's groundwater monitoring activities); Entergy, Pilgrim Nuclear Power Station, Annual Radioactive Effluent Release Report, January 1 through December 31, 2010, 69 (2010) (hereinafter, "Annual Radioactive Effluent Release Report"). This assessment focused on the levels of tritium in groundwater in and around the site and hydrological conditions, among other factors. *See* Annual Radioactive Effluent Release Report

at 69-70; ERM Report at 1. No drinking water wells are present at Pilgrim, or in the near vicinity. *See* ER at § 2.3. Moreover, Pilgrim's groundwater assessment showed no tritium in the majority of on-site monitoring wells, with tritium present at extremely low levels in select monitoring wells, thus underscoring the insignificance of the tritium conditions at Pilgrim Station. *See* ERM Report at 26; Annual Radioactive Effluent Release Report at 71-73.

At all times during which monitoring has occurred, *i.e.*, from 2007 to date, conditions at Pilgrim have been within NRC limits for radionuclides, *see* Annual Radioactive Effluent Release Report at 74, limits that ensure that radionuclides are maintained at levels considered "as low as reasonably achievable," and without credible potential human health or environmental consequences. *See, e.g.*, 10 C.F.R. §§ 20.1003 (defining "as low as reasonably achievable"), 20.1101 (proscribing "as low as reasonably achievable" standard). Notably, NRC performed an independent assessment of Pilgrim's analysis. As the NRC's ongoing assessment reflects, Pilgrim's highest concentration of tritium was comparable to the levels that EPA has authorized for drinking water providers at the tap. *Compare* NRC, List of Historical Leaks and Spills At U.S. Commercial Nuclear Power Plants (Rev. Dec. 2, 2011), *available at*: <http://pbadupws.nrc.gov/docs/ML1012/ML101270439.pdf> (reflecting a highest concentration of approximately 25,000 picocuries per liter), *to* Tritium Fact Sheet at 6 ("EPA set a maximum contaminant level of 20,000 picocuries per liter (pCi/L) for tritium" based on the assumption that this level yields a dose of 4 mrem per year," though later science has shown that 20,000 pCi/L yields a dose less than 4 mrem). Likewise, NRC's assessment confirms that Pilgrim's current tritium levels are a fraction of the EPA-authorized drinking water levels (again, measured at the tap). *Id.* Further, levels of tritium in Pilgrim's monitoring wells are decreasing. *See* Correspondence from Joseph Lynch, Entergy to Tom Hinchliffe, Massachusetts Department of Public Health (enclosing groundwater monitoring samples from the week of March 20, 2012 which demonstrate "a decreasing trend"). For these reasons, JRWA's claim of a new tritium condition of concern is both factually inaccurate, as these conditions have been known for some time, but also strains credulity, since the condition in question is one that is improving over time.

Second, JRWA's position, inasmuch that it suggests the CZM Office can address radiological considerations, controverts the clear law of federal preemption. Controlling federal precedent holds that NRC retains exclusive jurisdiction over all radiological hazards posed by NRC-licensed nuclear power plants. *See, e.g., Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1149-50 (8th Cir. 1971) ("states possess no authority to regulate radiation hazards unless pursuant to the execution of an agreement surrendering federal control over the three categories authorized under § 2021(b)," not at issue here); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 210 (1983) (quoting § 2021(k) and finding that Congress, "by permitting [State] regulation 'for purposes other than protection against radiation hazards' underscored the distinction drawn in 1954 between the spheres of activity left respectively to the Federal Government and the states."); *Illinois v. Kerr-McGee Chemical Corp.*, 677 F.2d 571, 581 (7th Cir. 1982) ("In line with [other federal cases], we hold that the Atomic Energy Act has expressly and impliedly preempted regulation by the states of the radiation hazards associated with nuclear materials."); *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, No. 1:11-cv-99, 2012 WL 162400,*36 (D. Vt., Jan. 19, 2012) (striking Vermont's attempt to regulate the relicensing of the Vermont Yankee nuclear power plant based

on the conclusion that the state's attempted regulation was both motivated by radiological safety concerns and had the effect of regulating radiological safety aspects of the operation of an NRC-regulated nuclear facility). In short, the case law is clear that the federal government reserves all authority to regulate radiation hazards associated with NRC-licensed power plants. JRWA's efforts to have the CZM Office reopen its review on the basis of tritium conditions at Pilgrim cannot be reconciled with this precedent.

Allegations relating to EFH (#9)

JRWA contends that NRC failed to complete an Essential Fish Habitat ("EFH") consultation with NMFS as required by the Magnuson-Stevens Fishery Conservation and Management Act ("MSA"), 16 U.S.C. § 1855(b), or that such consultation has been postponed indefinitely during the NPDES permit renewal process. See Exhibit A at 3. This contention is incorrect as a matter of law and fact.

First, it is simply incorrect that NRC has failed to complete an EFH consultation with NMFS in relation to the Pilgrim license renewal. In 2006, NRC contacted NMFS requesting information regarding potential EFH in the vicinity of PNPS. See Appendix E to the FSEIS, available at: <http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1437/supplement29/v2/sr1437s29v2.pdf>. On June 8, 2006, NMFS responded with the requested information and NRC prepared an EFH Assessment that it submitted to NMFS (along with the Biological Assessment) on December 8, 2006. See FSEIS at E-38, E-80. On January 23, 2007, NMFS sent a letter to NRC that concurred with NRC's findings and "conclude[ed] the EFH consultation under the MSA." FSEIS at E-45. The NRC subsequently published the EFH Assessment for Pilgrim in the FSEIS. See FSEIS at E-38, E-79. Therefore, NRC in fact completed the EFH consultation, as JRWA elsewhere has acknowledged. See Correction and Supplement at 2.⁵

Moreover, JWRA's claim that NRC has postponed its EFH consultation indefinitely misreads applicable law. Section 305 of the MSA requires, among other things, that if NMFS receives information that a proposed action would adversely affect any essential fish habitat, NMFS "shall recommend to such agency measures that can be taken by such agency to conserve such habitat." 16 U.S.C. § 1855(b)(4). However, and necessarily, NMFS's implementing regulations specifically acknowledge the jurisdictional limitations of federal agencies, providing that "NMFS will not recommend that state or Federal agencies take actions beyond their statutory authority." 50 C.F.R. § 600.925(a). Thus, as detailed above, the EFH process cannot extend NRC's authority to address Pilgrim's cooling water system; rather, that remains EPA's exclusive role, as NMFS has recognized. Indeed, in its January 23, 2007 letter, NMFS expressly acknowledged NRC's jurisdictional limitations, conceding that "EFH would be most

⁵ Correction and Supplement to: 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), Originally Filed on March 8, 2012 in the above Captioned License Renewal Proceeding (March 15, 2012) (ADAMS No. ML12075A029) ("Correction and Supplement").

appropriately addressed through the EPA's NPDES permit renewal process." FSEIS at E-44.⁶ JRWA offers no legal basis to circumvent NMFS, NRC and EPA's jurisdictional limitations, and Entergy is aware of none.

⁶ By letter dated May 25, 2001, NMFS issued a finding under 50 C.F.R. § 600.920(e) accepting EPA's environmental review process under the NPDES permit system to satisfy the EFH consultation requirements for those projects under EPA's direct authority. *See* Correspondence from Rolland A. Schmitt, NMFS to Michael B. Cook, EPA (May 25, 2011), *available at* http://sero.nmfs.noaa.gov/hcd/pdfs/efhdocs/20010525_NMFS_EPA_Findings.pdf.

Joosten, Sandy

From: Boeri, Robert (ENV) [robert.boeri@state.ma.us]
Sent: Tuesday, May 22, 2012 10:24 AM
To: Pine duBois; Meg Sheehan; Annebinghamlaw@comcast.net
Cc: donna.wieting@noaa.gov; CHAIRMAN Resource; Webster.David@epamail.epa.gov; ezoli@goodwinprocter.com; Carlisle, Bruce (ENV)
Subject: MCZM Response to JWRA
Attachments: CZM_JRWA-PilgrimWatch_05-21-12.pdf

Dear Ms. duBois, Sheehan, and Bingham,

I have attached the Massachusetts Office of Coastal Zone Management's review of the Jones River Watershed Association's April 4, 2012 letter regarding the Pilgrim Nuclear Power Plant in Plymouth. A hard copy will be sent via UPS and should arrive tomorrow, May 23, 2012. Please feel free to contact me should you have any questions.

Regards,

Bob Boeri

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