UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of	)	
	)	
Entergy Nuclear Generation Company and	)	Docket No. 50-293-LR – ESA-Roseate Tern
Entergy Nuclear Operations, Inc.	)	ASLBP No. 12-920-07-LR-BD01
	)	
(Pilgrim Nuclear Power Station)	)	

ENTERGY'S ANSWER OPPOSING JONES RIVE WATERSHED ASSOCIATION AND PILGRIM WATCH'S PETITION FOR REVIEW OF LBP-12-11

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Pursuant to 10 C.F.R. § 2.341, Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (collectively "Entergy") respond in opposition to the Petition for Review of LBP-12-11 submitted by the Jones River Watershed Association and Pilgrim Watch ("JRWA/PW") on July 3, 2012.[1] The Petition seeks review of the Atomic Safety and Licensing Board ("Board") decision in LBP-12-11[2] denying a motion to reopen the Pilgrim license renewal proceeding for a hearing on a new contention related to the adequacy of the Nuclear Regulatory Commission's ("NRC" or "Commission") consultation with the U.S. Fish and Wildlife Service ("FWS") on the roseate tern. The Commission should deny the Petition because JRWA/PW do not identify any substantial question warranting review, or any error of fact or law in the Board's rulings.

In essence, this case involves petitioners who waited five years before challenging the consultation and conclusions described in the NRC's 2007 final Supplemental Environmental

[1] Jones River Watershed Association and Pilgrim Watch Petition for Review of Memorandum and Order (Denying Petition for Intervention and Request to Reopen Proceeding and Admit New Contention) LBP-12-11, June 18, 2012 (July 3, 2012) ("Petition").

[2] Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), LBP-12-11, 75 N.R.C. __, slip op. (June 18, 2012) ("LBP-12-11").

Impact Statement ("FSEIS")[3] for license renewal of the Pilgrim Nuclear Power Station ("Pilgrim" or "PNPS"). Indeed, JRWA/PW waited until about a month before the Pilgrim license was set to expire before launching this challenge. The gravamen of this late-filed contention was that the NRC Staff should have prepared a separate Biological Assessment ("BA"), even though the FWS had already informed the NRC Staff that license renewal for PNPS is not likely to affect federally-listed species subject to FWS's jurisdiction and that formal consultation is not required. In LBP-12-11, the Board properly found that this contention was untimely and failed to meet the reopening standards. That decision was clearly correct and should be affirmed.

I. STATEMENT OF THE CASE

This proceeding involves the Application submitted by Entergy six and a half years ago seeking renewal of the Pilgrim operating license.[4] Prior to submitting the Application to the NRC, Entergy contacted FWS in order to facilitate the consultation that would later occur between FWS and NRC under Section 7 of the Endangered Species Act ("ESA"). By letter dated February 3, 2005, Entergy submitted a letter to FWS requesting information on threatened or endangered species in the vicinity of the Pilgrim plant in order to assess the impact of Pilgrim's license renewal on any such species.[5] Entergy stated that "no Federally listed terrestrial species occur on the PNPS site proper," but noted that "[s]everal listed terrestrial species are known to occur in the general vicinity of the PNPS site," including the roseate tern,

[3] NUREG-1437, Supplement 29, Generic Environmental Impact Statement for License Renewal of Nuclear Plants Regarding Pilgrim Nuclear Power Station (July 2007) ("FSEIS").

[4] See 71 Fed. Reg. 15,222 (Mar. 27, 2006).

[5] Pilgrim Nuclear Power Station, Applicant's Environmental Report ("ER") Attachment B, Special Status Species Correspondence at 1 ("Entergy Feb. 2005 Letter to FWS").

and that those species "cannot be ruled out as occasional visitors to the PNPS site." Entergy Feb. 2005 Letter to FWS at 1, 2. Entergy's letter further explained that

> [t]he roseate tern nests in colonies along the Massachusetts coast in summer. The roseate tern nests in dune areas with thick vegetative cover, always in association with the common tern. Although suitable nesting habitat has not been identified at PNPS, migrating terns may move through the site in late spring (en route to nesting areas in Maine and Nova Scotia) and late summer (en route to wintering areas in the West Indies and Latin America).

Id. at 2. Entergy's letter also explained that it "has no plans to alter current operations over the license renewal period," "[a]ny maintenance activities necessary to support license renewal would be limited to previously disturbed areas," and that "[n]o expansion of existing facilities is planned, and no additional land disturbance is anticipated in support of license renewal." Id. at 3. Accordingly, Entergy requested that FWS concur with its "determination that license renewal would have no effect on threatened or endangered species . . . and that formal consultation is not necessary." Entergy Feb. 2005 Letter to FWS at 3.

By letter dated March 9, 2005, FWS responded to Entergy's February 3, 2005 letter and concurred with Entergy's determination that formal consultation was not required.[6] FWS stated that the "federally-endangered roseate tern . . . [is] known to occur along Plymouth Beach, just north of the PNPS," but that "none . . . are known to frequent the immediate vicinity of PNPS and, therefore, the presence of [this] species near the power station is probably transient in nature." FWS Mar. 2005 Letter to Entergy at 1. Thus, FWS concluded that,

> [s]ince no expansion of existing facilities is planned and no additional land disturbance is anticipated, we concur with your determination that license renewal for PNPS is not likely to adversely affect federally-listed species subject to the jurisdiction of the [FWS], and that formal consultation with us is not required.

Id. at 2 (emphasis added).

[6] Pilgrim Nuclear Power Station, ER Attachment B, Special Status Species Correspondence at 6 ("FWS Mar. 2005 Letter to Entergy").

In January 2006, Entergy submitted the Application which included an Environmental Report ("ER") providing an assessment of ESA-listed species that may occur in the vicinity of the station. ER, §§ 2.5, 4.10. With respect to the roseate tern, the ER noted that the species is "known to occur in the general vicinity of the PNPS site . . . and cannot be ruled out as [an] occasional visitor[] to the PNPS site and environs." ER at 2-9. More specifically, the ER stated:

> [T]he roseate tern nests in colonies along the Massachusetts coast in summer . . . . The roseate tern nests in areas with thick vegetative cover, always in association with the common tern. Although suitable nesting habitat has not been identified at PNPS, migrating terns may move through the site in late spring (en route to nesting areas in Maine and Nova Scotia) and late summer (en route to wintering areas in the West Indies and Latin America).

Id. at 2-10. The ER further explained that:

> Entergy has no plans to conduct refurbishment or construction activities at PNPS during the license renewal term. Therefore, there will be no impact to threatened or endangered species from refurbishment activities.

Id. at 4-18. Entergy's assessment concluded:

> Renewal of the operating license for PNPS is not expected to result in the taking of any threatened or endangered species. Renewal of the license is not likely to jeopardize the continued existence of any threatened or endangered species or result in the destruction or adverse modifications of any critical habitat.

Id. The ER included copies of the correspondence between Entergy and FWS. See ER Attachment B.

By letter dated April 25, 2006,[7] the NRC notified FWS that it was reviewing the Application and preparing a supplemental environmental impact statement analyzing "pertinent environmental issues, including endangered or threatened species and impacts to fish and wildlife." NRC April 2006 Letter to FWS at 1. The NRC letter noted that the "Pilgrim industrial

[7] Letter from Mr. Rani Franovich, NRC, to Mr. Michael Bartlett, U.S. Fish and Wildlife Service, Subject: Request for a List of Protected Species Within the Area Under Evaluation for the Pilgrim Nuclear Power Station License Renewal Application Review (Apr. 25, 2006) (ADAMS Accession No. ML061160303) ("NRC April 2006 Letter to FWS").

facility covers approximately 140 acres" and that the "proposed action would include the use and continued maintenance of existing plant facilities and transmission lines," id., and did not indicate that renewal of Pilgrim's operating license would result in any expansion of existing facilities, or construction of new facilities. The NRC requested "a list of species and information on protected, proposed, and candidate species and critical habitat that may be in the vicinity of Pilgrim" in order to "support the SEIS preparation process and to ensure compliance with Section 7 of the [ESA]." Id. at 2.

By letter dated May 23, 2006, FWS responded to the NRC's request by transmitting its March 9, 2005 response to Entergy's February 3, 2005 letter, which provided the FWS determination that "license renewal for PNPS is not likely to adversely affect federally-listed species subject to the jurisdiction of the [FWS] and that formal consultation . . . is not required."[8]

On May 25, 2006, Pilgrim Watch filed a petition to intervene requesting a hearing on five proposed contentions, none of which sought to raise any issue concerning impact on ESA-listed species, including the roseate tern.[9] JRWA did not seek to intervene in the proceeding.

In December 2006, the NRC published its draft supplemental environmental impact statement ("DSEIS").[10] The DSEIS identifies the roseate tern as a Federally-listed endangered species that nests in Massachusetts on coastal beaches, and is "known to occur along Plymouth Beach just north of PNPS" and "may pass through the PNPS site during northward migration in late spring or southward migration in early fall." DSEIS at 2-96; see also id. at 2-92, 4-58. Although the northeastern U.S. roseate tern population has declined by approximately 70% since

[8] Letter from Michael J. Amaral, Endangered Species Specialist, New England Field Office, US FWS, to Rani Franovich, NRC (May 23, 2006) (ADAMS Accession No. ML061650016) ("FWS May 2006 Letter to NRC").

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

[10] NUREG-1437, Supplement 29, Generic Environmental Impact Statement for License Renewal of Nuclear Plants Regarding Pilgrim Nuclear Power Station – Draft Report for Comment (Dec. 2006) (ADAMS Accession No. ML063260173) ("DSEIS").

1935 "due to factors such as alteration of nesting habitats, displacement from nesting areas by gulls, erosion, flooding, and human predation on their wintering grounds," id. at 2-96, the roseate tern population in Massachusetts has been increasing during the period in which PNPS has been operating – from 1600 breeding pairs in 1978 to 1810 breeding pairs in 1999. Id. at 4-58. The NRC Staff found that "there is no evidence that these species have been adversely affected by previous operation of the PNPS facility" and concluded that, "[g]iven that no expansion of existing facilities or disturbance of additional land is anticipated," the roseate tern and other Federally- and State-listed species are "unlikely to be adversely affected during the renewal period." Id. Because FWS had already determined that formal consultation was not required, the NRC Staff did not prepare a separate biological assessment ("BA") on the roseate tern or any other terrestrial or freshwater aquatic species. Id. at 4-59.

The Staff published the FSEIS in July 2007, and the information, data, and conclusions provided therein with respect to the roseate tern are identical to those presented in the DSEIS. See FSEIS at 2-92, 2-96, 4-64 – 4-65 (the roseate tern is "unlikely to be adversely affected during the renewal period"). The FSEIS states that "[n]o Federally or State-listed threatened or endangered terrestrial species have been observed on the PNPS site," and that although the roseate tern and other "Federally listed birds occur in the vicinity of" PNPS, "they are not dependent on habitats within the facility and are unlikely to be affected by facility operations." Id. at 4-64. In response to a comment received on the DSEIS concerning the need to "resolve[]" any issues with Federally-listed species, including the roseate tern, related to continued operation of Pilgrim, the Staff summarized its conclusion that impacts to Federally-listed species would be small, stated that it had consulted with FWS under ESA Section 7, and noted that FWS had concurred with the NRC's conclusion and informally concluded the consultation. Id. at A-104 –

A-105. The Staff reiterated its ultimate conclusions and determination not to prepare a BA. Id. at 4-64 – 4-66 ("[g]iven that no expansion of existing facilities or disturbance of additional land is anticipated," the roseate tern and other Federally- and State-listed species are "unlikely to be adversely affected during the renewal period"; and the impacts on ESA-listed species "of an additional 20 years of operation and maintenance of PNPS . . . would be SMALL, and no additional mitigation would be warranted").

Although Pilgrim Watch was an admitted party to the proceeding when the DSEIS and FSEIS were published, Pilgrim Watch never sought to challenge the adequacy of the ESA Section 7 consultation between the NRC and FWS, or the information, data, and conclusions reached with respect to the roseate tern at those times. Similarly, the publication of those documents did not prompt any hearing request from JRWA. In addition, neither Pilgrim Watch nor JRWA submitted any comments relating to the Staff's consultation and assessment concerning the roseate tern.

Nearly five years later, after the Board had terminated the proceeding[11] JRWA/PW filed the seventh motion to reopen the proceeding, this time claiming that (1) the NRC Staff failed to prepare a BA on the roseate tern and should be required to do so; (2) FWS erroneously consented to the NRC Staff's decision to not prepare a BA; (3) information contained in the Application and the FSEIS concerning the roseate tern is materially incomplete and inaccurate; and (4) "there is significant potential for adverse effects on the roseate terns during the relicensing period."[12] This Motion was opposed by both the NRC Staff and Entergy on multiple grounds, including JRWA/PW's failure to adequately address or satisfy the standards for reopening, and

[11] Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), LBP-12-01, 75 N.R.C. __, slip op. at 2, 27 (Jan. 11, 2012).

[12] 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) ("JRWA/PW Motion") at 5-6.

JRWA/PW's failure to demonstrate the existence of any genuine dispute.[13] JRWA/PW submitted a reply,[14] which the NRC Staff opposed.[15]

In LBP-12-11, the Board denied the JRWA/PW Motion, finding that the Motion and contention were untimely and failed to satisfy the requirements for reopening or admission of a late-filed contention. LBP-12-11 at 2. JRWA/PW's Petition now seeks review of this decision.

II. STANDARD OF REVIEW

A petition for review is granted only at the discretion of the Commission, "giving due weight to the existence of a substantial question with respect to the following relevant considerations": (i) a finding of material fact that is "clearly erroneous" or conflicts with a finding as to the same fact in a different proceeding; (ii) a necessary legal conclusion that is "without governing precedent" or "contrary to established law;" (iii) the raising of a "substantial and important question of law, policy, or discretion;" (iv) "the conduct of the proceeding involved a prejudicial procedural error;" or (v) the raising of "any other consideration which the Commission may deem to be in the public interest."[16] An appeal that simply restates the contention with additional support will not meet the requirements for a valid appeal.[17]

The Commission is free to affirm a licensing board's decision on any ground finding support in the record, whether previously relied on or not.[18] In addition, the Commission gives

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[13] NRC Staff's Answer to [JRWA] and Pilgrim Watch's Motion to Reopen the Record and Request for a Hearing with Regard to the Roseate Tern (May 16, 2012); Entergy's Answer Opposing [JRWA]'s and Pilgrim Watch's Motion to Reopen Hearing Request on Contention Related to the Roseate Tern (May 16, 2012) ("Entergy Answer").

[14] 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).

[15] NRC Staff's Answer to Motion for Leave to Reply to NRC Staff and Entergy's Opposition to the Roseate Tern Contention (June 4, 2012).

[16] 10 C.F.R. § 2.341(b)(4); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation) ("PFS"), CLI-03-8, 58 N.R.C. 11, 17 (2003) (footnote omitted).

[17] Shieldalloy Metallurgical Corp. (Amendment Request for Decommissioning of the Newfield, New Jersey Facility), CLI-07-20, 65 N.R.C. 499, 503-05 (2007).

[18] PFS, CLI-05-1, 61 N.R.C. 160, 166 (2005) .

substantial deference to its licensing boards' determinations on threshold issues, such as whether a contention is admissible or a pleading meets the requirements of Section 2.326, and "will not sustain an appeal [on such issues] that fail to show a board committed clear error or abuse of discretion."[19]

Further, the Commission does not look with favor on amended or new contentions filed after the initial filing. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 N.R.C. 631, 638 (2004). As the Commission has repeatedly stressed,

> our contention admissibility and timeliness rules require a high level of discipline and preparation by petitioners "who must examine the publicly available material and set forth their claims and the support for their claims at the outset." There 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. Our expanding adjudicatory docket makes it critically important that parties comply with our pleading requirements and that the Board enforce those requirements.

Oyster Creek, CLI-09-7, 69 N.R.C. at 271-72 (emphasis added) (citations omitted).

Where, as here, the adjudicatory record has been closed, the Commission's rules specify that a motion to reopen the record to consider additional evidence – including evidence on a new contention (see 10 C.F.R. § 2.326(d)) – will not be granted unless the following criteria are satisfied:

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

[19] Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-08, 74 N.R.C. __, slip op. at 5 (Sept. 27, 2011; AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 N.R.C. 235, 260 (2006).

> (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.

10 C.F.R. § 2.326(a). Further, under the NRC rules,

> The motion must be accompanied by affidavits that set forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) of this section have been satisfied. Affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. Evidence contained in affidavits must meet the admissibility standards of this subpart. Each of the criteria must be separately addressed, with a specific explanation of why it has been met. When multiple allegations are involved, the movant must identify with particularity each issue it seeks to litigate and specify the factual and/or technical bases which it believes support the claim that this issue meets the criteria in paragraph (a) of this section.

10 C.F.R. § 2.326(b) (emphasis added). "All of the factors in section 2.326 must be met in order for a motion to reopen to be granted." Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-12-03, 75 N.R.C. __, slip op. at 15 (Feb. 22, 2012) ("CLI-12-03").

III. ARGUMENT

Pursuant to 10 C.F.R. § 2.341, the Commission should deny the Petition because, as set forth below, JRWA/PW have failed to identify any clear error of fact, error of law, procedural error, or abuse of discretion by the Board. As the Commission has repeatedly emphasized, "[t]he burden of satisfying the reopening requirements is a heavy one." Oyster Creek, CLI-09-7, 69 N.R.C. at 287 (citing Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 N.R.C. 1, 5 (1986)). "[P]roponents of a reopening motion bear the burden of meeting all of [these] requirements." Id. (citing Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-10, 32 N.R.C. 218, 221 (1990)). As discussed below, the Board correctly found that JRWA/PW did not meet any of the reopening standards, committed no error of fact, law or procedure in reaching this determination, and acted entirely within the bounds of its discretion.

A. The Motion Was Properly Denied Because JRWA/PW's Affiants Failed to Address the Reopening Criteria as Required by 10 C.F.R. § 2.326(b)

LBP-12-11 should be affirmed because the Board was correct in finding that JRWA/PW's affiant, Dr. Nisbet, did "not substantively address the reopening criteria as required by 10 C.F.R. § 2.326(b), providing only the cursory and conclusory statement that, '[in his] professional opinion, this is a significant environmental issue and a materially different result would have been likely if the evidence proffered in this affidavit had been considered in a timely fashion.'" LBP-12-11 at 9 (footnote omitted). JRWA/PW do not challenge this ruling, which is fatal to their appeal.[20] JRWA/PW's failure to meet the requirements of Section 2.326(b) was sufficient grounds by itself to reject the Motion. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 N.R.C. 62, 76 (1992), citing Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-89-1, 29 N.R.C. 89, 93-94 (1989).[21]

Dr. Nisbet's Affidavit neither addressed nor explained why the timeliness requirement in 10 C.F.R. § 2.326(a)(1) had been met. Nevertheless, the Board scrutinized that affidavit and found that "the most recent information in the Nisbet Affidavit concerning sighting of roseate terns is from August 2011, seven months before the motion was filed." LBP-12-11 at 7 (emphasis added) (footnote omitted). Thus, the Nisbet Affidavit provided no basis for a claim of timeliness. Further, the Board found that Dr. Nisbet did not even "suggest that the information he presents demonstrates an 'exceptionally grave issue,' within the terms of 10 C.F.R. §

[20] The JRWA/PW Motion also included a previously submitted Affidavit from E. Pine duBois, but it did not address the Section 2.326(a) criteria.

[21] See also Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-12-03, 75 N.R.C. __, slip op. at 16 (Feb. 22, 2012) (ruling that Pilgrim Watch failed to meet the Section 2.326 reopening standards because it did "not demonstrate, with the level of support required under section 2.326(b), that a materially different result would have been likely") (emphasis added).

2.326(a)(1), which allows a motion to reopen to be granted, 'even if untimely presented.'…" LBP-12-11 at 9.

Moreover, Dr. Nisbet's cursory and conclusory statement did not come close to satisfying the criteria in 10 C.F.R. § 2.326(a)(2) and (3). As the Board found, "[t]he 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." LBP-12-11 at 9. Indeed, Dr. Nisbet never stated in his Affidavit that a single roseate tern had been affected by the last forty years of Pilgrim's operation, or would be affected by its continued operation. All he asserted was that there was a significant "potential" for adverse effects. As the Commission has held, such bare assertions and speculation are insufficient to meet the requirements of Section 2.326. Oyster Creek, CLI-09-7, 69 N.R.C. at 287.

B. The Board Was Correct in Finding the Contention Untimely

LBP-12-11 should be also affirmed because the Board was correct in finding that "Petitioners' new contention is inadmissible primarily because it has not been timely presented, nor has it been shown that it should nonetheless be admitted under any other relevant criteria." LBP-12-11 at 6. Recognizing that "Petitioners' essential complaint is that the NRC never prepared a BA for the roseate tern" (LBP-12-11 at 5), the Board held that "Petitioners' ESA claim may properly be viewed as arising with publication of the FSEIS in July 2007, and should have been filed, if not within 30 days of that time, then certainly at a time significantly earlier than nearly five years later." Id. at 7. That conclusion is unassailable.

Further, the Board methodically examined all of the other "pieces of information" that JRWA/PW claimed as new information rendering the contention timely, and found each "either

not new or not materially different from information previously available."[22] Id. As already discussed, the Board found that the most recent information in the Nisbet Affidavit concerning sighting of roseate terns was at least seven months old. Id. JRWA/PW challenge this finding as inaccurate, arguing that the Nisbet Affidavit shows that terns are not transient contrary to what JRWA/PW describe as the "crux of the FWS finding [presumably alluding to the 2005 FWS letter] about the Roseate Tern, incorporated into the NRC's SEIS." Petition at 6. This argument is wide of the mark. That Dr. Nisbet may be taking issue with the FWS's 2005 finding does not make his claims timely. Rather, timeliness depends on how long the information on which that claim is based has been available.

Here, the Board acted well within its discretion in considering Dr. Nisbet's Affidavit untimely when even the most recent information in the Nisbet Affidavit concerning sighting of roseate terns was at least seven months old. Moreover, the Nisbet Affidavit makes it clear that similar information has been available for years – even before the 2005 FWS letter. See Nisbet Affidavit at ¶ 16 ("It was known within the scientific community in 2005 that roseate terns occurred in significant numbers at times at [Long Beach, Plymouth ("LBP")] in the staging period in August and September (including late summer, but not exclusively on migration en route to wintering areas." See also id. at ¶ 7 (Between 2007 and 2009, personnel of the Massachusetts Audubon Society (MAS) conducted intensive studies of roseate terns staging around Cape Cod, including 76 visits to LBP; three annual reports were issued by MAS's Coastal Waterbird Program."); id. at ¶ 20 ("The studies by MAS have shown that LBP is now a

[22] The Board's examination whether the contention was based on new (i.e., not previously available) information or on information materially different from that previously available mirrors the Commission's standards at 10 C.F.R. § 2.309(f)(2). JRWA/PW assert that "this rule provides that if the motion or contention is untimely, then Petitioners must make a showing that the information upon which it is based is "materially different than information previously available" and "does not require a showing of both being timely and materially different information." Petition at 4. This assertion is incorrect. After the initial filing deadline, a new contention must meet each of the criteria in 10 C.F.R. § 2.309(f)(2)(i)-(iii).

major site for staging roseate terns (supporting at times up to half the entire regional population)."

In any event, JRWA/PW's claim that these sightings and reports are inconsistent with the 2005 FWS letter is a fabrication. Entergy's February 2005 letter to FWS stated that "[s]everal listed terrestrial species are known to occur in the general vicinity of the PNPS site," including the roseate tern, and that those species "cannot be ruled out as occasional visitors to the PNPS site." Entergy Feb. 2005 Letter to FWS at 1, 2. The March 2005 FWS response to Entergy stated that the "federally-endangered roseate tern . . . [is] known to occur along Plymouth Beach, just north of the PNPS," but that "none . . . are known to frequent the immediate vicinity of PNPS and, therefore, the presence of [this] species near the power station is probably transient in nature." FWS Mar. 2005 Letter to Entergy at 1 (emphasis added). The NRC Staff stated that the roseate tern is "known to occur along Plymouth Beach just north of PNPS" and "may pass through the PNPS site during northward migration in late spring or southward migration in early fall." DSEIS at 2-96 (emphasis added). FWS's statement that the roseate tern's presence near the power station is probably transient obviously refers to any presence in the immediate vicinity of PNPS and not to its presence at LBP.

Similarly missing the mark is JRWA/PW's argument that "the Decision ignores Dr. Nisbet's testimony that neither Entergy nor USFWS 'appears to have considered the potential for adverse effects on roseate terns or their fish prey by the pollutants discharged from the facility.'" Petition at 6-7. Obviously, this criticism of the 2005 FWS letter and 2007 FSEIS could have been raised over five years ago and are not made timely just because JRWA/PW have waited until now to challenge the assessment in the FSEIS.[23] JRWA/PW also argue that "Dr. Nisbet's

[23] The Board also considered the timeliness of certain NPDES permit exceedances mentioned in the Motion. The Board found that these exceedances began in 2010, and that Petitioners had no excuse for waiting until now to bring

opinion that there is a 'significant potential for adverse effects' on roseate terns is materially different from Entergy's Environmental Report, accepted by the NRC, which found there were 'no effects'." Petition at 7. Again, this assertion bears on whether the new contention raises a dispute with the Application, and not whether that dispute has been timely raised.

Ironically, JRWA/PW assert that "the Decision erroneously confu[s]ed the 'timeliness'" question with the separate and distinct inquiry about 'materially different results' under 2.326(a)(3)." Petition at 7. The Board did nothing of the sort. The portion of the Board's decision addressing whether the information in the Nisbet Affidavit would alter the FWS or NRC conclusions relates to the failure of that Affidavit to assess the reopening criteria as required by 10 C.F.R. § 2.326(b), and occurs after the Board's finding that the motion and contention are untimely. See LBP-12-11 at 9. Indeed, as the previous discussion indicates, it is JRWA/PW who confuse timeliness and materiality.

In addition to its careful scrutiny of the Nisbet Affidavit, which revealed no timely new information, the Board also considered additional claims made by JRWA/PW in its Motion, even though these claims found no support in the Nisbet affidavit. First, the Board examined JRWA/PW's attempted reliance on a 2000 Report by ENSR,[24] which had been cited in both the ER and FSEIS as support for the conclusion that relicensing would have no adverse impact on fish populations. LBP-12-11 at 7-8. The Board found that JRWA/PW never explained why they did not request the 12-year-old Report earlier or had not been able locate the report in the NRC's electronic public document system. Id. at 8. That ruling is clearly correct. As Entergy's Answer demonstrated, the NRC Staff's Environmental Audit Summary had identified the ENSR Report

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their contention. LBP-12-11 at 8-9. In addition, the Board found that the exceedances involved only chlorine, and "neither the motion nor the Nisbet Affidavit draws any connection between chlorine emitted from Pilgrim and any adverse impacts on the roseate tern." Id. at 8. JRWA/PW do not identify any error in this finding.

[24] ENSR Corp., "Redacted Version 316 Demonstration Report - Pilgrim Nuclear Power Station, Prepared for Entergy Nuclear Generation Company" (March 2000) (ADAMS Accession No. ML061390357).

as one of the documents that the NRC had obtained during the audit and provided an ADAMS accession number. Entergy Answer at 19-20 & n.20, citing Summary of Environmental Site Audit Related to the Review of the License Renewal Application for Pilgrim Nuclear Power Station (July 25, 2006), Encl. 2 at 3 (ADAMS Accession No. ML062070305). While JRWA/PW apparently had to ask the NRC's public document room for a copy, the reality is that JRWA/PW simply made no attempt to do so until recently. The Board correctly determined that JWRA/PW's failure to request this document does not make their present claims timely.

On appeal, JRWA/PW claim that the Board erred because the Affidavit of Pine duBois had explained that JRWA had relied upon the U.S. EPA to move forward in a timely manner to renew the NPDES permit and had learned in February 2012 that the permit process had stalled. Petition at 10-11. This purported explanation for a six-year delay in requesting the ENSR Report was not presented to the Board and is therefore improperly raised for the first time on appeal.[25] The duBois Affidavit, which was prepared to support JRWA/PW's previous motion to reopen pertaining to endangered marine species,[26] was cited in the current Motion predominantly to support claims of standing and in any event never mentions the ENSR Report. Further, the sections of the JRWA/PW Motion addressing the timeliness factors in 10 C.F.R. § 2.309(f)(2) or the good cause standard in 10 C.F.R. § 2.309(c) made no claim that JRWA/PW's delay in seeking the ENSR Report was caused by the schedule for renewal the NPDES permit. JRWA/PW Motion at 28-31, 43-44. Even if this concocted argument had been presented to the

[25] Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-12-10, 75 N.R.C. __, slip op. at 22-23 n.87 (Mar. 30, 2012) ("CLI-12-10"); CLI-12-03 at 19 n.87 ("We do not consider arguments made for the first time on appeal");PFS, CLI-04-22, 60 N.R.C. 125, 140 (2004); Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-00-8, 51 N.R.C. 227, 243 (2000); Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 N.R.C. 235, 260 & n.19 (1996).

[26] See 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 Above Captioned License Renewal Proceeding (Mar. 8, 2012).

Board, it would not have justified JRWA/PW's extreme tardiness in challenging the analysis in the FSEIS. JRWA/PW's argument impermissibly ignores the standard governing timeliness in the NRC rules, which requires a showing that a new contention is based on information not previously available. 10 C.F.R. § 2.309(f)(2). As the Commission has stressed, petitioners have an "iron-clad obligation to examine the publicly available documentary material . . . with sufficient care to enable [them] to uncover any information that could serve as the foundation for a specific contention."[27] Nothing in the NRC rules gives a petitioner the right to sit idly by for years and ignore its obligations in an NRC proceeding in the hope that some other agency may address its concerns.

In any event, pertinent data and analysis from the 2000 ENSR Report are presented in Entergy's ER and the Staff's DSEIS and FSEIS (Entergy's Answer at 20, citing ER §§ 4.2-4.4, FSEIS § 4.1), and the Board found that JRWA/PW had not shown that the information in the 2000 ENSR Report is materially different from what was already available in the ER or the FSEIS. LBP-12-11 at 8. JRWA/PW do not identify any error in this finding. JRWA/PW never identified any information from this report that was previously unavailable, or any information from this report on which they were seeking to rely.[28]

Finally, JRWA/PW's complaint that the Board relied heavily on a 30-day rule for late contentions that does not exist in the NRC rules (Petition at 4, 13) is meritless. The Board's decision acknowledged that the NRC regulations do not provide a precise definition of "timely" and merely indicated that licensing boards often find a contention timely if filed within thirty days of the availability of information on which it is based. LBP-12-11 at 6, citing Vogtle, CLI-

[27] Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), CLI-10-27, 72 N.R.C. 481, 496 (2010) (quoting Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 N.R.C. 135, 147 (1993)).

[28] In fact, JRWA/PW did not rely on the ENSR 2000 document to support their claims, but instead disavowed its "sweeping" "no 'adverse impact'" and "no [adverse] effect" conclusion. JRWA/PW Motion at 23, 23 nn.21-22, 34.

11-08, slip op. at 3 & n.8. As the Commission stated in that case, "[a] thirty-day window is in line with our general practice in analogous situations." Moreover, not one of the Board's rulings relied on this 30-day rule. In every instance, the Board found that the information on which JRWA/PW sought to rely had been available for many months or years. See, e.g., LBP-12-11 at 7 ("Petitioners' ESA claim may properly be viewed as arising with publication of the FSEIS in July 2007, and should have been filed, if not within 30 days of that time, then certainly at a time significantly earlier than nearly five years later.) (emphasis added); id. at 8-9 ("Petitioners say they should be excused from application of a 30-day timeliness requirement because they acted reasonably in expecting USFWS and the NRC Staff to comply with proper procedures. We cannot agree that a years-long delay in raising these issues is reasonable.") (emphasis added). Clearly, the Board did not abuse its discretion.

C. The Board Correctly Found that the Contention Did Not Raise a Grave Issue

Having carefully and correctly determined that the contention was untimely, the Board also considered whether JRWA/PW's contention presented an "exceptionally grave" issue which may be considered "in the discretion of the presiding officer" even if untimely presented. See 10 C.F.R. § 2.326(a)(1). As already discussed, the Board found nothing in the Nisbet Affidavit to suggest that an exceptionally grave issue exists. LBP-12-11 at 9. Further, the Board found that the allegations of noncompliance with the ESA do not involve any threat to public safety necessary for an exceptionally grave issue to exist. Id. at 10.

JRWA/PW now argue, incorrectly, that the Board misinterpreted 10 C.F.R. § 2.326(a)(1) as applying only to issues raising exceptionally grave safety concerns. Petition at 12. Contrary to JRWA/PW's assertion (Petition at 12), the Statement of Considerations for 10 C.F.R. § 2.326(a)(1) fully supports the Board's ruling. There, in promulgating the current standards for reopening, the Commission explained:

> The exception to the timeliness requirements for "exceptionally grave issues" is founded in NRC case law. *Vermont Yankee Nuclear Power Corporation* (Vermont Yankee Nuclear Power Station), ALAB-124, 6 A.E.C. 358, 365 n.10 (1973) (". . . a newly discovered but insignificant matter might not justify a reopening. The converse is not necessarily true, however, for if the problem raised presents a sufficiently grave threat to public safety, a board should reopen the record to consider it even if it is not newly discovered and could have been raised in a timely fashion.")
>
> No pressing reason, other than the avoidance of delay has been advanced for eliminating that exception. The Commission believes that the public interest is better served if this narrow exception is retained. It must be understood that the Commission anticipates that this exception will be granted rarely and only in truly extraordinary circumstances.

Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,536 (May 30, 1986) (emphasis added). Further, the Commission has since explained that "we will reopen the record only when the new evidence raises an 'exceptionally grave' issue calling into question the safety of the licensed activity." Hydro Resources, Inc. (P.O. Box 15910, Rio Rancho, NM 87174), CLI-00-12, 52 N.R.C. 1, 5 (2000) (emphasis added). See also CLI-12-10 at 23 (referring to the "exception for 'exceptionally grave' safety matters"). In sum, the Commission has clearly defined an exceptionally grave issue as one which raises "a sufficiently grave threat to public safety," as the Board correctly discerned (LPB-12-11 at 10).

Further, Dr. Nisbet's conclusory claim of a significant potential for adverse effects on roseate terns fell short of establishing even an exceptionally grave environmental issue. The Nisbet Affidavit did not indicate that a single roseate tern has in fact been impacted by Pilgrim's past operation, or would in fact be impacted by its continued operation. The Commission has held that such conclusory language is insufficient to demonstrate an exceptionally grave issue. Vogtle, CLI-11-08, slip op. at 14 n.44. Moreover, the Board's ability to accept an untimely contention raising an exceptionally grave issue is clearly a matter committed to the Board's discretion (see 10 C.F.R. § 2.326(a)(1)), which the Board in no way abused.

D. JRWA/PW Failed to Demonstrate That A Materially Different Result Would Be Likely

Because the Board found that JRWA/PW's contention was untimely and that the Nisbet Affidavit had failed to address the reopening standards, it did not delve further into the substantive allegations. LBP-12-11 at 10. Thus, for example and contrary to JRWA/PW's claim on appeal (Petition at 5, 11), the Board did not reach the issue whether the FSEIS serves as a Biological Assessment. Nevertheless, the Board's decision may also be sustained on the substantive grounds that JRWA/PW failed to demonstrate that a materially different result would be likely, as required by 10 C.F.R. § 2.326(a)(3), as both Entergy and the NRC Staff demonstrated.

First, JRWA/PW merely speculated about the "significant potential for adverse effects" on the roseate tern. Such speculation is not sufficient to meet the very high standards for reopening a closed record. Pilgrim, CLI-12-03 at 23-24. In contrast, Entergy's Answer included responsive affidavits confirming the lack of any expected adverse impact on the roseate tern.[29] For example, these affidavits demonstrated that the chlorine discharges to which JRWA/PW referred are small, infrequent, and decay quickly, such that there is no expectation they will have any impact on the biota in Cape Cod Bay (Scherer & Barnum, ¶ 15); that the other pollutants about which JRWA/PW speculated are either not present or not a concern (id., Scheffer, ¶ 17-18); and that the evidence indicates that impingement and entrainment will have no discernable impact on the availability of fish species as prey for the roseate tern. (Scherer & Barnum, ¶¶17-28). "'[N]o reopening of the evidentiary hearing will be required if the [documents] submitted in

[29] Affidavit of Michael D. Scherer, Ph.D. and Sarah A. Barnum, Ph.D., in Support of Entergy's Answer Opposing Jones River Watershed Association's and Pilgrim Watch's Motion to Reopen, Request for Hearing and Permission to File New Contention (May 16, 2012) ("Scherer & Barnum"); Affidavit of Jacob J. Scheffer in Support of Entergy's Answer Opposing Jones River Watershed Association's and Pilgrim Watch's Motion to Reopen and Hearing Request on Contention Related to the Roseate Tern (May 16, 2012) ("Scheffer").

response to the motion demonstrate that there is no genuine unresolved issue of fact.'" PFS, CLI-05-12, 61 N.R.C. 345, 350 (2005), citing Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 A.E.C. 520, 523-24 (1973).

Second, Entergy's and the NRC's Staff's Answers demonstrated that there has been no procedural violation of the ESA, as was JRWA/PW's principal claim. As a threshold matter, no BA is required where, as here, the Federal action does not involve any "major construction activities." Entergy Answer at 8-11, 29.

Under ESA Section 7, the NRC is required, in consultation with FWS,[30] to ensure that any NRC action is not likely to jeopardize the continued existence of any threatened or endangered terrestrial species, or result in the destruction or adverse modification of habitat critical to such species. 16 U.S.C. § 1536(a)(2). To facilitate compliance with the consultation requirements, ESA Section 7(c) calls on Federal agencies to prepare a BA only if ESA-listed species may be present in the area of proposed projects involving construction authorized by the agency. 16 U.S.C. § 1536(c). The statute does not, however, specify how a Federal agency should determine whether its actions are likely to affect ESA-listed species in other types of proceedings that do not involve major construction activities (such as renewing the operating license of a nuclear plant).

The FWS regulations implementing ESA Section 7 mirror the requirements of the statute: in the case of "major construction activities," the Federal agency authorizing the construction activity must prepare a BA. 50 C.F.R. § 402.12(b). But for Federal actions that do not involve major construction activities, no BA is required. When promulgating Part 402, FWS explicitly stated that it

[30] The ESA refers to the Secretary of Commerce and the Secretary of the Interior, but these Departments have delegated their authority to the National Marine Fisheries Service ("NMFS") and FWS.

> will not require biological assessments for actions that do not involve construction or activities having physical impacts similar to construction, such as dredging, blasting, etc. This limitation derives support from the 1979 Conference Report reference to actions designed *primarily to result* in the building or erection of various projects.

Final Rule, Interagency Cooperation, Endangered Species Act of 1973, 51 Fed. Reg. 19,926, 19,936 (June 3, 1986) (emphasis in original). A "major construction activity" "encompasses dams, buildings, pipelines, roads, water resource developments, channel improvements, and other such undertakings which significantly modify the physical environment." Id. The Statement of Considerations is clear that a BA is required only for major Federal actions that are also construction projects. Id.

Federal Courts have held that a BA must be prepared only for major construction activities. In Water Keeper Alliance v. U.S. Department of Defense, 271 F.3d 21 (1st Cir. 2001), the First Circuit ruled that "[w]hat triggers the requirement of a biological assessment is that the action is a major construction activity." 271 F.3d at 31. Similarly, the Eighth Circuit has held that the requirement to prepare a BA does not apply to timber sales because such sales are not "major construction activities" under 50 C.F.R. § 402.12. Newton County Wildlife Ass'n v. Rogers, 141 F.3d 803, 811 (8th Cir. 1998).

Applying the requirements of ESA Section 7 and its implementing regulations, and Federal case law interpreting those provisions to the circumstances here, the NRC was not required to prepare a BA for the renewal of Pilgrim's operating license. The record is clear that, during the license renewal term, Entergy planned "[n]o expansion of existing facilities" and anticipated "no additional land disturbance." Entergy Feb. 2005 Letter to FWS at 3. See also FWS Mar. 2005 Letter to Entergy at 2; DSEIS at 4-58; FSEIS at 4-64. Thus, renewal of Pilgrim's operating license does not involve "major construction activities." Consequently, the NRC was not required to prepare a BA.

In any event, even if a BA were required, the existing NRC Staff NEPA analysis satisfies the requirements established for a BA. ESA Section 7 expressly provides that a BA "may be undertaken as part of a Federal agency's compliance with the requirements of section 102" of NEPA (42 U.S.C. § 4332), i.e., the preparation of an environmental impact statement. 16 U.S.C. 1536(c)(1). The statute does not prescribe the contents of a BA other than to say that it must be based on the "best scientific and commercial data available." Id. The FWS regulations make clear 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," and "may" include (among other things) whether "listed . . . species are present or occur seasonally," "[a] review of the literature and other information," and "an analysis of the effects of the action on the species and habitat, including consideration of cumulative effects." 50 C.F.R. § 402.12(f) (emphasis added). As previously discussed, the NRC Staff NEPA analysis addressed impacts on the roseate tern. See DSEIS at 2-92, 2-96, 4-58, 4-59; FSEIS at 2-92, 2-96, 4-64 – 4-66, A-104 – A-105.

Seizing on and mischaracterizing dicta in the Board's decision, JRWA/PW assert that "the ASLB found that the NRC staff committed a procedural violation ('there is no evidence that the FSEIS was ever submitted to USFWS as required by the ESA regulations.')." Petition at 2. JRWA/PW did not claim before the Board that the FSEIS needed to be submitted to the FWS, even in its Reply after learning that the FSEIS could be considered the functional equivalent of a BA. Thus, this issue is improperly raised for the first time on appeal. Further, contrary to JRWA/PW's characterization, the Board merely indicated that JRWA/PW had raised genuine procedural concerns. See LBP-12-11 at 10. In point of fact, the FWS regulations provide that "if during informal consultation, it is determined by the Federal agency, with the written concurrence of the Service, that the action is not likely to adversely affect listed species or

critical habitat, the consultation process is terminated, and no further action is necessary." 50 C.F.R. § 402.13 (a) (emphasis added). Thus, even if a BA had been required (as previously discussed, it was not), once the FWS informed the NRC of its determination that "license renewal for PNPS is not likely to adversely affect federally-listed species subject to the jurisdiction of the [FWS] and that formal consultation . . . is not required" (FWS May 2006 Letter to NRC), "no further action" was required under the express terms of the FWS regulations.

IV. CONCLUSION

For the reasons set forth above, the Commission should reject Jones River Watershed Association and Pilgrim Watch's Petition.

Respectfully Submitted,

/signed electronically by David R. Lewis/

_____

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Dated: July 13, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of	)	
	)	
Entergy Nuclear Generation Company and	)	Docket No. 50-293-LR – ESA-Roseate Tern
Entergy Nuclear Operations, Inc.	)	ASLBP No. 12-920-07-LR-BD01
	)	
(Pilgrim Nuclear Power Station)	)	

CERTIFICATE OF SERVICE

I hereby certify that Entergy's Answer Opposing Jones River Watershed Association and Pilgrim Watch's Petition for Review of LBP-12-11, dated July 13, 2012, was provided to the Electronic Information Exchange for service on the individuals below, this 13th day of July, 2012.

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