

**U.S. House of Representatives**  
**Committee on Natural Resources**  
**Washington, DC 20515**

February 27, 2012

The Honorable Jane Lubchenco  
Under Secretary for Oceans and Atmosphere and Administrator  
National Oceanic and Atmospheric Administration  
1401 Constitution Avenue, NW  
Washington, D.C. 20230

Dear Dr. Lubchenco:

I am writing to request information regarding the National Marine Fisheries Service's (NMFS's) plans to review the biological assessment conducted by the Nuclear Regulatory Commission (NRC) related to the application to re-license Pilgrim Nuclear Power Station (PNPS) in Plymouth, Massachusetts. I am concerned by information submitted to NMFS on February 6, 2012 by the Jones River Watershed Association (attached) providing specific evidence that NRC's biological assessment omits key information. For example, a threatened species, the Atlantic sturgeon and a candidate species, river herring, were not evaluated in NRC's biological assessment dated July 2007. It is my understanding that NMFS has not yet formally responded to the NRC's biological assessment; NMFS must either issue a written concurrence with NRC or write a biological opinion that sets forth its own proposal for the protection of any endangered or threatened species that could be impacted by the license extension for PNPS. NMFS must take action prior to the issuance of the PNPS license extension under the requirements of the ESA.<sup>1</sup>

Under the Atomic Energy Act and NRC regulations, commercial power reactor licenses are limited to 40 years, but may be renewed for another 20 years. Before the NRC can re-license a plant, NRC staff must complete a General Environmental Impact Statement that includes a biological assessment of potential effects on threatened or endangered species. Entergy Nuclear Operations, Inc. (Entergy) has requested permission to continue operating the PNPS for another 20 years. The NRC is currently considering Entergy's application, and in 2007, it released a biological assessment of the proposed action. In this biological assessment, the NRC evaluated ten species that were listed as threatened or endangered and which may be affected if PNPS is re-licensed. The NRC concluded that, "continued operation of PNPS for an additional 20 years would not have any adverse impact on any threatened or endangered marine aquatic species."<sup>2</sup> Under the ESA, NMFS must either issue a written concurrence with NRC's biological assessment or issue its own biological opinion that addresses whether the proposed action would

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<sup>1</sup> 16 U.S.C. § 1536(a)(2); 16 U.S.C. § 1536(b)

<sup>2</sup> <http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1437/supplement29/v2/sr1437s29v2.pdf>, page E-73

jeopardize the species or adversely modify critical habitat.<sup>3</sup> In cases where the biological opinion finds that there would be adverse impacts, the action may not proceed unless NMFS suggests ways to avoid or mitigate those impacts.<sup>4</sup>

On February 6, 2012, NMFS declared that the Gulf of Maine distinct population segment of Atlantic sturgeon (*Acipenser oxyrinchus desotoi*) is “threatened” under the ESA.<sup>5</sup> In addition, two species of river herring (*Alosa pseudoharengus* and *Alosa aestivalis*) are currently candidates for listing.<sup>6</sup> There is reason to believe that these species could be impacted by PNPS’s operations, as they are known to occur in the region. Since the NRC’s biological assessment does not consider Atlantic sturgeon or river herring, it is incomplete and must be revised. As noted above, NMFS must issue a written concurrence or its own biological opinion before PNPS can be re-licensed.

Agency actions – including NMFS actions – are reviewed under the Administrative Procedure Act, which allows a court to overturn an agency action if it was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”<sup>7</sup> Under this standard, agencies “must explain the evidence which is available, and must offer a rational connection between the facts found and the choice made.”<sup>8</sup> As such, NMFS’s decision to concur in a biological assessment may be arbitrary and capricious if NMFS has facts before it, such as the materials provided to NMFS on February 6, 2012 by the Jones River Watershed Association, suggesting the action agency’s finding is incorrect. At the very least, NMFS is required to comment on these facts and give a rational explanation between them and its choice to concur (or not concur) in NRC’s finding.<sup>9</sup>

So that I can better understand the process by which NMFS has considered threatened and endangered species in the re-licensing process for PNPS and other nuclear power plants, I ask that you respond to the following questions and requests for information no later than March 23, 2012:

- 1) Please outline the steps (including a timeline for each step) NMFS is taking to determine whether or not it will concur with the NRC staff biological assessment for PNPS, including the steps being taken to assess the information provided to NMFS by the Jones River Watershed Association.
- 2) Please provide copies of any written correspondence (including but not limited to emails) between the NRC and NMFS regarding, a) which threatened and endangered species

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<sup>3</sup> 16 U.S.C. § 1536(a)(2); 16 U.S.C. § 1536(b)

<sup>4</sup> 16 U.S.C. § 1536(b)(3)(A)

<sup>5</sup> [http://www.nmfs.noaa.gov/pr/pdfs/species/atlanticsturgeon\\_gulfofmaine\\_dps.pdf](http://www.nmfs.noaa.gov/pr/pdfs/species/atlanticsturgeon_gulfofmaine_dps.pdf)

<sup>6</sup> <http://www.nero.noaa.gov/nero/regs/frdoc/11/1190dayindingriverherring.pdf>

<sup>7</sup> 5 U.S.C. § 706(2)(A); *see also* Sierra Club v. Norton, 74 Fed. Appx. 376, 381–82 (5th Cir. 2003) (applying the arbitrary and capricious standard to NMFS’ duty under 50 C.F.R. § 402.14(b)(1)).

<sup>8</sup> Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company, 463 U.S. 29, 52 (1983).

<sup>9</sup> *Id.*

could be affected by PNPS re-licensing, and b) how PNPS re-licensing is expected to affect these threatened or endangered species.

- 3) Please provide copies of any draft concurrences, non-concurrences or biological opinions prepared by NMFS for the license extension application for PNPS.
- 4) Please inform me as to whether NMFS be able to complete the consultation process for PNPS before June 2012, when the current license for PNPS expires. If not, please provide me with an estimate of when NMFS anticipates it will complete the consultation process for PNPS.
- 5) Describe the metrics or assessment NMFS will use to determine whether the NRC's biological assessment is based on the best scientific and commercial data available.
- 6) For the past ten years, please provide copies of, a) all written requests by NRC to NMFS related to NRC's consideration of any application to extend the operating license of any nuclear reactor, b) all NMFS written concurrences and non-concurrences with any of NRC's biological assessments for nuclear reactor license extensions and c) all NMFS biological opinions that were used to form the basis of NRC's ESA compliance for any nuclear reactor license extension.

Thank you for your assistance and cooperation in responding to this request. Should you have any questions about this request, please have your staff contact Jillian Cohen or Michal Freedhoff of the House Committee on Natural Resources Democratic Staff at 202-226-6241.

Sincerely,



Edward J. Markey  
Ranking Democrat  
House Committee on Natural Resources