UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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| In the Matter of: | ) | |
| | ) | |
| THE DETROIT EDISON COMPANY | ) | Docket No. 52-033-COL |
| | ) | |
| (Fermi Nuclear Power Plant, Unit 3) | ) | |

# APPLICANT'S ANSWER TO PROPOSED NEW CONTENTIONS

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February 6, 2012

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APPLICANT'S ANSWER TO PROPOSED NEW CONTENTIONS

## I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h), the Detroit Edison Company ("Detroit Edison") hereby answers the "Motion for Leave to Late-File Amended and New Contentions" ("Motion to Late-File"), dated January 11, 2012, and the "Motion for Resubmission of Contention 10, to Amend/Resubmit Contention 13, and for Submission of New Contentions 17-24" ("New Contentions"), dated January 11, 2012, filed by the Intervenors.[1] For the reasons discussed below, the proposed new contentions are late without good cause, do not meet the criteria for timeliness of contentions based on environmental review documents, and are otherwise inadmissible.

## II. BACKGROUND

On September 18, 2008, Detroit Edison filed its application for a combined operating license ("COL") for Fermi 3, to be located in Monroe County, Michigan. The COL

[1] The "Intervenors" are: Beyond Nuclear, Citizens for Alternatives to Chemical Contamination, Citizens Environmental Alliance of Southwestern Ontario, Don't Waste Michigan, Sierra Club, Keith Gunter, Edward McArdle, Henry Newman, Derek Coronado, Sandra Bihn, Harold L. Stokes, Michael J. Keegan, Richard Coronardo, George Steinman, Marilyn R. Timmer, Leonard Mandeville, Frank Mantei, Marcee Meyers, and Shirley Steinman.

application references the application for certification of the Economic Simplified Boiling Water Reactor ("ESBWR") design. The Nuclear Regulatory Commission ("NRC") Staff issued the Final Design Approval and Final Safety Evaluation Report ("FSER") for the ESBWR on March 9, 2011. The ESBWR design is now the subject of an ongoing design certification ("DC") rulemaking in accordance with 10 C.F.R. Part 52.[2]

In LBP-09-16, dated July 31, 2009, the Atomic Safety and Licensing Board ("Licensing Board") admitted four contentions for hearing (Contentions 3, 5, 6, and 8). Later, in LBP-10-09, dated June 15, 2010, the Licensing Board admitted another contention for hearing (Contention 15). Two of the admitted contentions (Contentions 3 and 5) have been resolved through motions for summary disposition.[3] Hearings on the remaining environmental contentions (Contentions 6 and 8) are linked to the issuance of the NRC Staff review documents — in particular, the Final Environmental Impact Statement ("FEIS"), which is currently scheduled for completion in November 2012. Hearings on the remaining safety contention (Contention 15) are currently linked to issuance of the Staff's FSER for the Fermi 3 COL, which is currently scheduled for completion in May 2013.

Separately, the Licensing Board issued a Scheduling Order establishing certain milestones for hearings on the remaining admitted contentions in this matter.[4] The Scheduling Order specifically provides an opportunity for filing new or amended environmental contentions based upon the NRC Staff's environmental review documents. Contentions based on the Draft

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2 "ESBWR Design Certification; Proposed Rule," 76 Fed. Reg. 16549 (Mar. 24, 2011).

3 *See* Order (Granting Motion for Summary Disposition for Contention 3), dated July 9, 2010 (unpublished); Order (Granting Motion for Summary Disposition of Contention 5), dated March 1, 2011 (unpublished).

4 *See* Order (Establishing schedule and procedures to govern further proceedings), dated September 11, 2009 (unpublished) ("Scheduling Order").

Environmental Statement ("DEIS") were due within 60 days of the DEIS, which was issued on October 28, 2011.[5]

## III. THE PROPOSED NEW CONTENTIONS ARE UNTIMELY

Intervenors submitted the New Contentions on January 11, 2012 — 75 days after issuance of the DEIS. Intervenors, in the Motion to Late-File, acknowledge that they missed the 60-day deadline for new proposed environmental contentions established in the Scheduling Order. Intervenors nonetheless ask the Licensing Board to accept the proposed new contentions. This motion should be denied. Intervenors have provided no good cause for their tardiness. The Licensing Board should deny as untimely the proposed New Contentions in their entirety.

In this proceeding, the Scheduling Order allows that, "with respect to new or amended contentions based on new and material information in the [DEIS] . . . a proposed new or amended contention shall be deemed timely [] if it is filed within sixty (60) days [of publication of the DEIS]."[6] This time frame, in effect, doubled the usual 30-day timeframe allowed for timely of new or amended contentions based on new information. The Licensing Board found it reasonable to double the allowable time-frame for DEIS-based new contentions because of the DEIS's expected "length and complexity" and the fact that the extension would not interfere with the rest of the schedule.[7] Accordingly, the clear deadline for filing new or amended contentions based on the DEIS was December 27, 2011 (60 days from publication of the DEIS on October 28, 2011).

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5 NUREG-2105, Volumes 1 and 2, "Draft Environmental Impact Statement for Combined License (COL) for Enrico Fermi Unit 3." The Notice of Availability was published on October 28, 2011. 76 Fed. Reg. 66998.

6 Scheduling Order at 2.

7 *Id*. at 2-3.

Despite the built-in extension, Intervenors filed their New Contentions (and their Motion to Late-File) two weeks after the deadline set by the Licensing Board. Intervenors assert only that their "[c]ounsel inadvertently did not realize the deadline" as he was "preoccupied with major filings."[8] However, inattention and preoccupation with other matters do not establish good cause for missed deadlines or late filings.[9] If counsel for Intervenors was burdened with other casework, it was incumbent upon counsel to seek an extension from the Licensing Board, based on good cause shown, *prior to the deadline*.

At a minimum, under Section 2.309(c)(1), the Licensing Board must weigh the following five factors in considering late-filed contentions: (1) good cause, if any, for the failure to file on time; (2) the availability of other means whereby the requestor's interest will be protected; (3) the extent to which the requestor's interests will be represented by existing parties; (4) the extent to which the requestor's participation will broaden the issues or delay the proceeding; and (5) the extent to which the requestor's participation may reasonably be expected

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8 Mot. to Late-File at 1.

9 *See Puget Sound Power & Light Co.* (Skagit Nuclear Power Project, Units 1 & 2), LBP-79-16, 9 NRC 711, 714 (1979) (not accepting as an excuse for late intervention the claim that petitioner, a college organization, could not meet a deadline because most of its members were away from school and hence unaware of developments in the case). Since 1981, the established policy of the Commission has been that:

> Fairness to all involved in NRC's adjudicatory procedures requires that every participant fulfill the obligations imposed by and in accordance with applicable law and Commission regulations. While a board should endeavor to conduct the proceeding in a manner that takes account of the special circumstances faced by any participant, the fact that a party may have personal or other obligations or possess fewer resources than others to devote to the proceeding does not relieve that party of its hearing obligations. When a participant fails to meets its obligations, a board should consider the imposition of sanctions against the offending party.

*Statement of Policy on Conduct of Licensing Proceedings,* CLI-81-8, 13 NRC 452, 454 (1981).

to assist in developing a sound record.[10] The first factor, good cause for lateness, carries the most weight in the balancing test, and the lack thereof requires the petitioner to make a "compelling case" relative to the remaining factors.[11] The proponent of a late-filed contention should affirmatively address the criteria of 10 C.F.R. § 2.309(c)(1).[12] Failure to do so results in the petitioner's failure to meet its burden to establish the admissibility of such contentions.[13]

Here, the Intervenors have not established good cause. The Motion to Late-File barely attempts to address the other factors. Intervenors primarily contend that the National Environmental Policy Act ("NEPA") somehow weighs in favor of granting their Motion to Late-File.[14] Intervenors are correct in their assertions that NEPA requires the NRC to "adequately study the environmental issues" associated with the DEIS, and that NEPA "imposes continuing obligations" on the NRC to "re-evaluate [its analysis] in light of new and significant information."[15] NEPA does not, however, excuse untimely filings.[16] The NRC Staff will satisfy its NEPA obligations through its ongoing evaluation of the COL application and, ultimately,

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10 10 C.F.R. § 2.309(c)(1)(i), (v)-(viii).

11 *State of New Jersey* (Department of Law and Public Safety's Requests Dated October 8, 1993), CLI-93-25, 38 NRC 289, 296 (1993) (citations omitted).

12 *Consumers Power Co.* (Midland Plant, Units 1 & 2), LBP-82-63, 16 NRC 571, 578 (1982) (internal citations omitted).

13 *Baltimore Gas and Electric Co*. (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), LBP-98-26, 48 NRC 232, 241 (1998); *Baltimore Gas and Electric Co*. (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 347 n.9 (1998).

14 *Id*. at 5.

15 *Id*.

16 NEPA also does not provide for a hearing. The right of interested persons to intervene as a party in a licensing proceeding stems from the Atomic Energy Act, not from NEPA. Nevertheless, the Commission has elected to permit challenges to NEPA documents, subject to compliance with Part 2.

through issuance of the FEIS. The Licensing Board is not somehow obligated under NEPA to accept late-filed contentions, and NEPA does not somehow justify Intervenors' tardiness. The Motion to Late-File should be denied.

Further, many of the materials relied upon by Intervenors in support of their Motion for New Contentions, including the declaration of their experts, are dated after the December 27, 2011 deadline. The declarations of Joseph Mangano and Ned Ford are both dated January 11, 2012. Intervenors also rely upon comments of the Great Lakes Environmental Law Center ("GLELC") and the Environmental Law and Policy Center ("ELPC"), which are also dated January 11, 2012.[17] Intervenors' reliance upon documents issued after the deadline established by the Scheduling Order suggests that Intervenors held off on filing their Motion to Late-File and Motion for New Contentions pending the completion of their expert reports and submittal of GLELC's filing. Again, to meet their obligations to this proceeding, these reviews and analyses should have been completed on a schedule consistent with the Board's Order in this proceeding. And, at a minimum, if the work was not ready, the Intervenors should have filed a motion seeking an extension rather than merely letting the deadline pass.

At this point the Intervenors' comments, and those of their consultants, can and will be addressed by the NRC Staff as part of its process leading to issuance of the FEIS. The Intervenors' interests, as reflected in these comments, will be protected by the normal Staff review process in accordance with NEPA. Further consideration of these issues in this proceeding will clearly broaden the issues in this case. And, as discussed below for each of the

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[17] Great Lakes Environmental Law Center, "Re: Draft Environmental Impact Statement/Environmental Impact Report for the Combined License (COL) for Enrico Fermi 3, NUREG-2105, Vol. 1," dated January 11, 2012; Environmental Law and Policy Center, "Re: Draft Environmental Impact Statement for Combined License (COL) for Enrico Fermi 3, NUREG-2105, Docket No. NRC-2008-0566," dated January 11, 2012.

New Contentions, there is no showing that the Intervenors will assist in developing a sound record on material issues. In the absence of good cause, the factors in 10 C.F.R. § 2.309(c)(1) clearly weigh against the Intervenors. The tardy Motion to Late-File should be denied.

## IV. LEGAL STANDARDS GOVERNING ADMISSIBILITY OF NEW CONTENTIONS

Even if Intervenors had timely filed their New Contentions in accordance with the Scheduling Order, the timeliness and admissibility of the proposed contentions must still be evaluated in accordance with the Commission's standards in 10 C.F.R. Part 2. In general, a contention must be based on the COL application or other documents available at the time the hearing request and petition to intervene is filed.[18] The regulation provides that Intervenors may file a new or amended environmental contention if there are data or conclusions in the DEIS or FEIS that "differ significantly from the data or conclusions in the applicant's documents."[19] Otherwise, a new contention may be considered only if: (1) the information upon which the new or amended contention is based was not previously available; (2) the information upon which the new or amended contention is based is materially different from information previously available; and (3) the new or amended contention has been submitted in a timely fashion based on the availability of subsequent information.[20]

The standards in 10 C.F.R. § 2.309(f)(2) for new or amended contentions address two situations. First, 10 C.F.R. § 2.309(f)(2) states that contentions may be filed on the DEIS/FEIS where the Staff review document differs significantly from the applicant's document,

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18 10 C.F.R. § 2.309(f)(2); *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-00-27, 52 NRC 216, 223 (2000) (time to submit contentions tolls when the information on which the contention is based first becomes available).

19 *Id*.

20 10 C.F.R. § 2.309(f)(2)(i)-(iii).

which in this case is the Fermi 3 Environmental Report ("ER").[21] "All other new or amended contentions," must satisfy the criteria in 10 C.F.R. § 2.309(f)(2)(i)-(iii) to be admitted based on new information.[22] If new information arises related to the ER, then under the criteria of 10 C.F.R. § 2.309(f)(2)(i)-(iii) an intervenor must raise this new information in a timely fashion and not wait until the DEIS is issued.[23] In addition, merely meeting the § 2.309(f) criteria is not sufficient to warrant admission of a new contention.[24] The petitioner must also address the criteria in 10 C.F.R. § 2.309(c)(1).[25] The criteria in Section 2.309(f)(2), in effect, codify only the test for establishing "good cause."

Finally, any late-filed contentions also must meet the admissibility standards that apply to all contentions. As set forth in 10 C.F.R. § 2.309(f)(1), a proposed contention must contain: (1) a specific statement of the issue of law or fact raised; (2) a brief explanation of the basis for the contention; (3) a demonstration that the issue is within the scope of the proceeding;

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21 Revision 0 was dated October 8, 2008. Revision 2, which is the most recent revision, is dated March 21, 2011.

22 *Id*.

23 *Exelon Generating Company, LLC* (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 160-64 (2005).

24 *See Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045-50 (1983). The late-filed factors in Section 2.309(c)(1) apply fully even in cases where contentions are filed late only because the information on which they are based was not available until after the filing deadline. Although the Commission has ruled that the first factor — good cause for filing late — is met in such circumstances, the other factors, if implicated, permit the denial of the contention in a given case. *Id*.; *see also Union of Concerned Scientists v. NRC*, 920 F.2d 50, 52 (D.C. Cir. 1990).

25 The requirement to apply the factors in 10 C.F.R. § 2.309(c) did not change with the promulgation of the revised 10 C.F.R. Part 2. *See* "Changes to Adjudicatory Process; Final Rule," 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004) ("If information in [a new Staff document] bears upon an existing contention or suggests a new contention, it is appropriate for the Commission to evaluate under § 2.309(c) the possible effect that the admission of amended or new contentions may have on the course of the proceeding.").

(4) a demonstration that the issue is material to the findings that the NRC must make regarding the action which is the subject of the proceeding; (5) a concise statement of the alleged facts or expert opinions supporting the contention; and (6) sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact.

The Commission has emphasized that the rules on contention admissibility are "strict by design."[26] Failure to comply with any of these requirements is grounds for the dismissal of a contention.[27] "Mere 'notice pleading' does not suffice."[28] The general contention admissibility requirements apply to contentions based on the DEIS just as they would to any other proposed contention.[29]

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[26] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *pet. for reconsideration denied*, CLI-02-01, 55 NRC 1 (2002).

[27] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

[28] *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 119 (2006) (internal quotation omitted).

[29] *See*, *e.g.*, *Exelon Generating Company, LLC* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 808-09 (2005) (applying 10 C.F.R. § 2.309(f) standards to DEIS contentions).

## V. THE PROPOSED NEW CONTENTIONS ARE INADMISSIBLE

### *A. Contention 10 (Amended): The Walpole Island First Nation has learned of these proceedings and has petitioned the government of Canada for consultation and accommodation prefatory to joining these proceedings on the ground that tribal hunting and fishing rights, property rights and other concerns on the Great Lakes may be impaired by the construction and operation of Fermi 3.*

#### 1. Timeliness

As noted by the Intervenors, Contention 10 was first proposed in 2009.[30] Subsequently, the "Intervenors withdrew that contention voluntarily because of an inability to secure the [Walpole Island First Nation ("WIFN")] commitment to join these proceedings."[31] Amended Contention 10 simply renews the prior contention, which alleged that the NRC must notify and consult with the WIFN. The contention is not based upon any new data or conclusions in the DEIS. Therefore, timeliness must be evaluated under 10 C.F.R. § 2.309(f)(2)(i)-(iii). Proposed Amended Contention 10 fails to meet these requirements.

Intervenors cite a December 21, 2011 letter from the WIFN to the Canadian Minister of the Environment as the basis for Amended Contention 10. In the letter, WIFN expresses its understanding that "Canada is required to consult and accommodate our First Nation . . . regarding whatever position Canada takes concerning this project."[32] Intervenors speculate that "such consultation and accommodation will occur between the tribe and the federal government of Canada, based upon Canadian legal precedent, and that the end result will be that the [WIFN] will petition this Board to intervene."[33] However WIFN has *not* petitioned to

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30 New Cont. at 5.

31 *Id.* at 6.

32 *Id*. at 6-7.

33 *Id.* at 7.

intervene in this proceeding,[34] nor have the Intervenors provided any indication that the WIFN has chosen the Intervenors to represent their interest in this proceeding.[35] And, Intervenors provide no basis in the letter referenced to resuscitate a contention *voluntarily abandoned over two years ago*.[36]

The Intervenors themselves contacted the WIFN in 2009 in an attempt to encourage the tribe to participate in these proceedings. At the hearing on May 5, 2009, counsel for Intervenors stated that WIFN notified the Intervenors that, "while they are still interested and while they do believe that some of the interests of the tribe may be affected by this proceeding, that they are not able to participate in any formal type of fashion."[37] Now, WIFN is seeing action from the Canadian government. But, there is nothing in this action, or the Commission's rules or jurisprudence, that requires the Licensing Board to breathe new life into an opportunity for hearing, long after the filing deadline for that opportunity.[38] Having made the decision not to

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34 In NRC proceedings, organizations may not represent persons other than their members without express authorization to do so. *See Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989); *Long Island Lighting Co*. (Shoreham Nuclear Power Plant, Unit 1), LBP-77-11, 5 NRC 481, 483-84 (1977).

35 Detroit Edison preserves its right to challenge the standing of WIFN if the tribe does ever petition to intervene in this proceeding. Because the Fermi 3 site is not within the boundaries of the WIFN reservation, the tribe would have to seek standing if it wished to participate as an intervenor. *See* 10 C.F.R. § 2.309(d)(2), which states that a state, local governmental body, or affected Federally-recognized Indian tribe does not need to address the standing requirements only for a facility *within its boundaries* (emphasis added).

36 In the absence of good cause for late-filing, the Intervenors have not made the necessary showing on the other factors of 10 C.F.R. § 2.309(c)(1), as discussed in Section III above.

37 Tr. at 10:17-20.

38 *Gen. Elec. Co.* (Vallecitos Nuclear Center), LBP-00-3, 51 NRC 49, 50 (2000).

participate in 2009, any effort of the WIFN to participate in this proceeding now, in 2012, would be untimely. The opportunity to raise a consultation issue has passed.

2. Admissibility

In amended Contention 10, the Intervenors recycle arguments from their initial proposed contention. They contend that the NRC Staff failed to provide adequate notification to WIFN. Intervenors' proposed remedy is that these proceedings "be waylaid to allow the Walpoles an opportunity to intervene and participate."[39] Yet, as discussed above, WIFN received notice of these proceedings no later than May 5, 2009, at which time the tribe chose not to participate. In any event, as discussed below, the proposed amended contention remains outside the scope of this proceeding. Intervenors' claims on behalf of the WIFN are not redressable by the Licensing Board.

NRC licensing proceedings are limited to specific findings that must be made by the NRC under the Atomic Energy Act and NEPA. Contention 10 raises issues that are not redressable by the NRC under either statute. Intervenors focus, for example, on alleged insufficiencies in the NRC Staff's notice to WIFN. However, WIFN is not a U.S. federally-recognized tribe and is not considered a "tribe" under the National Historic Preservation Act.[40] Thus, the "obligations" of the NRC Staff asserted by Intervenors do not extend to WIFN.[41]

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39 New Cont. at 10.

40 *See* 36 C.F.R. 800.16 (defining "Indian tribes" as tribes that are eligible for services provided by the United States).

41 *See* New Cont. at 7-8.

Intervenors' opinion as to what applicable regulations should (but do not) require cannot serve as a basis for a contention.[42]

The Intervenors have also failed to demonstrate that the NRC Staff's notice was deficient. In fact, the NRC Staff complied fully with the requirement to publish a notice of an opportunity to request a hearing in this proceeding.[43] A notice regarding environmental scoping comments or a notice of an opportunity to intervene in hearings before the Commission, published in the *Federal Register*, is a notice to all the world.[44] Once the notice is published, no party or potential intervenor may claim ignorance of the contents of the notice, including time limits.[45] Moreover, there is no requirement that the rights of interested local governmental bodies (such as tribes) be spelled out in the notice of opportunity for hearing. A notice of opportunity for hearing is not defective simply because it fails to specifically state the right of an interested governmental body to participate in a proceeding or offer comments.[46] In this context, Intervenors have failed to articulate a basis for the proposed contention.

Additionally, the contention raises an issue primarily under the authority and responsibility of the Canadian government, not the U.S. government or the NRC. The 2011

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42 *See Georgia Inst. of Tech.* (Georgia Tech Research Reactor), LBP-95-6, 41 NRC 281, 303 (1995).

43 *See, e.g.*, "Detroit Edison Company; Notice of Hearing, and Opportunity To Petition for Leave To Intervene and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation on a Combined License for Fermi 3," 74 Fed. Reg. 836 (Jan. 8, 2009).

44 42 U.S.C. § 2239a.(1)(A); *see Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1085 (1982).

45 *Sequoyah Fuels Corp*. (Gore, Oklahoma Site), LBP-03-24, 58 NRC 383, 389 (2003).

46 *Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 585 (1978).

letter from the WIFN to the Canadian Minister of the Environment, relied upon by the Intervenors, argues that Canada is "required to consult and accommodate our First Nation" and to petition to intervene in this proceeding. That is an issue that the WIFN must pursue with the Canadian authorities. The NRC and Licensing Board cannot resolve — and are under no obligation to resolve — that issue. If a late petition is filed, then the NRC will act upon that petition in accordance with its regulations.

Finally, a petitioner must establish standing for every single claim. Merely establishing standing for one claim does not grant a petitioner standing for all contentions.[47] "A free-floating assertion of a procedural violation, without a concrete link to the interest protected by the procedural rules, does not constitute an injury in fact."[48] Because Intervenors failed to demonstrate an actual injury-in-fact relating to notification of and consultation with WIFN, Intervenors have no standing to support proposed Amended Contention 10.

*B.* *Contention 13 (Amended): The Draft Environmental Impact Statement ("DEIS") is inadequate to meet the requirements of NEPA or the Atomic Energy Act because it does not provide a reasonable cost/benefit basis for the NRC to decide to issue a combined operating license for the proposed Fermi 3 nuclear reactor. The DEIS analyses of Need for Power, Energy Alternatives and Cost/Benefit analysis are flawed and based on inaccurate, irrelevant and/or outdated information.*

1. Timeliness

In substance, proposed Contention 13 is a rehash of arguments that were previously considered and rejected by the Licensing Board in connection with Intervenors' original Contention 13. The contention is not based on new data or conclusions in the DEIS and

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47 *See Laidlaw*, 528 U.S. at 706; *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) ("[S]tanding is not dispensed in gross.").

48 *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 938 (9th Cir. 2005).

therefore should be rejected as untimely. The information relied upon by the Intervenors either was previously available or is not materially different from information previously available.

The arguments and information in Contention 13 could have been developed and included in the original Contention 13, and for the most part were included in original Contention 13.[49] For example, in the original Contention 13, the Intervenors asserted that the "[t]he identification, characterization and analysis of need, alternatives to construction, and the mix of conservation and renewable energy sources is wholly inadequate and violates NEPA."[50] They also asserted that the ER does not contain reference to recent economic uncertainty and that the 21st Century Plan is now outdated.[51] The proposed Contention 13 contains the same elements, alleging that the "DEIS analyses of Need for Power, Energy Alternatives and Cost/Benefit analysis are flawed" and missing the "hard, serious look" required by NEPA.[52] And, Intervenors challenge, as they did in their original Contention 13, the analysis of solar photovoltaic and wind power.[53] Intervenors also repeat their arguments the 21st Century Plan is "outdated" because it was published in 2006, prior to the economic recession.[54] The Intervenors made no effort to distinguish their prior contention, which was rejected by the Licensing Board, from the present contention.

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49 "Petition for Leave to Intervene in Combined Operating License Proceedings and Request for Adjudication Hearing" ("Petition"), dated March 9, 2009 ("Pet.").

50 Pet. at 109.

51 Pet. at 113; LBP-01-16 at 78-79 ("The Petitioners argues that the data and the assessment of need in the COLA must be updated to reflect the current economic environment in Michigan.")

52 New Cont. at 10, 21.

53 *Compare* Pet. at 119-121 *to* New Cont. at 16-18.

54 New Cont. at 10-16.

Intervenors also do not identify any new "data or conclusions" in the DEIS that would justify admitting the contention. In its discussion of the need for power in the ER, Detroit Edison specifically relied on the Michigan 21st Century Electric Energy Plan and planning by the Midwest Independent System Operator ("MISO") to demonstrate the need for power.[55] So did the NRC in the DEIS.[56] Both the ER and the DEIS state that the Michigan 21st Century Plan satisfies the NRC's evaluation criteria of being (1) systematic; (2) comprehensive; (3) subject to confirmation; and (4) and responsive to forecast uncertainty.[57] This is consistent with NRC precedent and practice, which permits affected States, regions, or Independent System Operators ("ISOs") to prepare the initial need for power evaluation (rather than the applicant).[58] If the Intervenors believed that the Michigan Public Service Commission ("MPSC") analysis failed to meet one or more of those criteria, they had an obligation to raise those issues at the outset of the proceeding. Because the DEIS reaches the same conclusions and relies on the same data and information as the ER, this aspect of Contention 13 is untimely and it should be rejected on this basis.

Intervenors also discuss in Contention 13 various alternative sources of energy, including wind, solar, and energy storage technologies. Intervenors assert that the DEIS does not

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55 ER at Sections 8.0 to 8.4.

56 DEIS at Sections 8.0 to 8.4.

57 ER at Sections 8.0 and 8.1; DEIS at Section 8.1.3.1 and 8.4; *see also* NUREG-1555, at 8.1-2 (explaining the evaluation criteria).

58 The U.S. Supreme Court has noted that there is little doubt that, under the AEA, State public utility commissions or similar bodies are empowered to make the initial decision regarding the need for power. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978). And, under NEPA, the NRC may place heavy reliance on the judgment of local regulatory bodies charged with energy planning. *Rochester Gas and Electric Corporation* (Sterling Power Project, Nuclear Unit No. 1), ALAB-502, 8 NRC 383, 388-389 (1978).

make "a reasonable forecast of the future need and economic justification for [Fermi 3 . . . which has] direct implications for meaningful consideration of [energy] alternatives."[59] Intervenors cite to no portion of the DEIS; instead, they make the general allegation that "a hard, serious look [] is missing from the DEIS discussion of alternatives because of the incomplete and skewed need analysis presented by the NRC Staff."[60] Similar arguments were rejected by the Licensing Board in its decision on initial Contention 13.[61] In any event, wind, solar and energy storage technologies were discussed in the ER (Section 9.2.2.1) and are evaluated by the NRC Staff in the DEIS (Sections 9.2.3.2 and 9.2.3.3). Intervenors do not point to any differences between the ER and the DEIS, and therefore do not provide a basis for consideration of a contention at this stage of the proceeding.

The Intervenors also failed to file new contentions in a timely manner when new information became available. For example, Intervenors mention demand forecasts by the U.S. Energy Information Administration ("EIA") and MISO. These forecasts were published in April and August 2011, and July 2010, respectively.[62] Any challenge to the Fermi 3 application based on these documents should have been made at the time the information first became available.[63] The finding of good cause for late-filing of contentions in 10 C.F.R. § 2.309(f)(2) is related to

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59 New Cont. at 20.

60 *Id*. at 21.

61 *See* LBP-09-16 at 81-82.

62 U.S. Energy Information Administration, "Annual Energy Outlook 2011: Regional Energy Consumption and Prices by Sector—Energy Consumption by Sector and Source, Table 3 – East North Central," dated Apr. 26, 2011; U.S. Energy Information Administration, "Annual Energy Outlook 2010," dated Aug. 18, 2011; Global Energy Partners, LLC, "Assessment of Demand Response and Energy Efficiency Potential for Midwest ISO (Draft),"dated July 2010.

63 *See* 10 C.F.R. § 2.309(f)(2)(i)-(iii); *Private Fuel Storage, LLC*, 52 NRC at 223.

the *total previous unavailability* of information.[64] A new contention must be based on new information that is materially different from information previously available.[65] The fact that Intervenors rely on materials that reference the EIA and MISO forecasts does not resuscitate these forecasts as "new" information under 10 C.F.R..§2.309(f)(2).[66] Likewise, the testimony of Mr. Ford also summarizes previously available information and any challenge based on this information should have been made previously.[67] Contention 13 should be rejected as untimely.

2. Admissibility

According to the Intervenors, the DEIS analyses of need for power, energy alternatives, and the cost and benefits of the proposed Fermi 3 are "flawed and based on inaccurate, irrelevant and/or outdated information."[68] In support of Contention 13, the Intervenors rely on comments submitted by the Environmental Law and Policy Center ("ELPC") and Mr. Ford. In addition to being untimely, as discussed below none of the asserted bases for Contention 13 support an admissible. Contention 13 does not directly challenge the relevant aspects of the DEIS or provide sufficient support for a genuine dispute with the DEIS.

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64 *Philadelphia Elec. Co.* (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 69 (1983).

65 *See Clinton ESP*, LBP-05-19, 62 NRC at 163 (to be "new," information must "differ significantly" from information available previously, and these differences must be "material" to the outcome of the proceeding).

66 A newly-created document that is a compilation or repackaging of previously-existing information is not equivalent to, and does not provide, information that is "materially different" under 10 C.F.R. § 2.309(f)(2)(ii). *See Tennessee Valley Authority* (Bellefonte Nuclear Power Units 3 and 4), Memorandum and Order (Ruling on Request to Admit New Contention) (unpublished), slip op. at 8 (Apr. 29, 2008).

67 *Id*. In the absence of good cause for late-filing, the Intervenors have not made the necessary showing on the other factors of 10 C.F.R. § 2.309(c)(1), as discussed in Section III above.

68 New Cont. at 10.

a. Need for Power

Amended Contention 13 argues that the ER does not contain any reference to recent economic uncertainty and that the 21st Century Plan is now outdated.[69] This aspect of the proposed contention is inadmissible because it fails to present expert or factual support that establishes a genuine dispute with the application.

The Intervenors repeatedly argue that "peak demand" for electricity has declined and that annual average electricity sales have decreased.[70] However, neither measure is relevant to the purpose and need for Fermi 3. The purpose of the proposed reactor is (1) to generate approximately 1535 MW(e) of baseload electricity; (2) to compensate for the future retirement of existing, aging baseload generating units and the diminishing availability of baseload generation capacity in the MISO service area; and (3) to provide price stability by minimizing the importation of power into the Detroit Edison service area.[71] Changes in peak demand or declining sales are irrelevant to the need for baseload power to offset retiring units or reduce transmission congestion.

As discussed above, the Intervenors' challenge to the need for power identified by the MPSC is untimely. However, even if a challenge to the NRC Staff's conclusion were permitted, the Intervenors have failed to identify significant new information relevant to a need

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69 *Id*. at 11-13. This is the same argument that the Intervenors made previously. *See* Pet. at 113.

70 New Cont. at 12.

71 DEIS at 1-9, 8-2. *See, e.g.*, *Environmental Law and Policy Center v. NRC*, 470 F.3d 676 (7th Cir. 2006) (holding that the NRC may adopt "baseload energy generation" as the purpose behind a new nuclear project); *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 353-354 (1975) (concluding that the need for a new unit can be based on a showing that the nuclear plant is need as a substitute for plants that burn fossil fuels).

for power analysis. The Intervenors provide no quantitative projection of the long-term demand for baseload power in Michigan. Instead, Intervenors question the need for Unit 3 solely because of the reduced demand for power during the last several years, primarily as the result of the economic recession. But, "[a] short-term reduction in demand is not sufficient to necessitate an accounting in the DEIS for that changed demand. The longstanding position of the Commission is that 'inherent in any forecast of future electric power demands is a substantial margin of uncertainty.'"[72] Thus, fluctuations in demand that may occur over a period of several years, such as changes brought about by an economic recession, are not a legally sufficient ground for challenging the need for power analysis under the Commission's interpretation of NEPA requirements.[73]

In *South Carolina Electric and Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3),[74] a proposed contention alleged that the applicant's need for power analysis "completely dismisses the current economic crisis and recent reductions in its sales, and has conducted no sensitivities of its load forecast to try to capture the possible effects of a recession, including the possibility of a long and deep economic downturn."[75] The Commission affirmed the Board's decision to deny the admission of the contention for several reasons, including that the Board reasonably concluded that the petitioners' load forecast claims would call for a more detailed "need for power" analysis than the NRC requires. According to the Commission, "[it] is

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72 *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant), CLI-79-5, 9 NRC 607, 609 (1979)

73 *Calvert Cliffs 3 Nuclear Project* (Calvert Cliffs 3), LBP-10-24, 72 NRC __, __ (slip op. at 32) (Dec. 28, 2010).

74 CLI-10-01, 71 NRC __, __ (slip op. at 1) (Jan. 7, 2010).

75 *Id*., slip op. at 18.

not looking for burdensome attempts by the applicant to precisely identify future market conditions and energy demand, or to develop detailed analyses of system generating assets, costs of production, capital replacement ratios, and the like in order to establish with certainty that the construction and operation of a nuclear power plant is the most economical alternative for generation of power."[76] Instead, the NRC's long-standing approach to electric power demand forecasting emphasizes historical, conservative planning to ensure electricity generating capacity will be available to meet reasonably expected needs.[77] Thus, Contention 13 could be admitted only if it actually challenged the asserted need for the additional baseload power that Fermi 3 will provide, rather than merely demanding an updated forecast based on recent fluctuations in demand. The Intervenors have not done that here.

The Intervenors also fail to provide a concise statement of the alleged facts that demonstrate genuine dispute with the DEIS on a material issue, as articulated by the Commission in *Summer* (and the Board in *Calvert Cliffs*). The Intervenors' sources and documents do not undermine the DEIS's conclusion that Michigan will need the additional baseload power from Fermi 3 in the 2025 timeframe or "as early as 2021."[78] At most, the Intervenors' arguments implicate *when*, not *whether*, the additional power to be generated by Fermi 3 will be needed. In addition, the Intervenors' assertion that declining demand eliminates the need for Fermi 3 neglects the purpose of Fermi 3. For example, the Intervenors do not address the other bases for

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76 *See id*., slip op. at 22-23 (quoting 68 Fed. Reg. 55905, 55910 (Sept. 29, 2003)).

77 *See Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 410 (1976); *Kansas Gas and Elec. Co.* (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 328 (1978) ("The most that can be required is that the forecast be a reasonable one in the light of what is ascertainable at the time made.").

78 DEIS at 8-2.

the need for power determination (*e.g.*, to replace existing fossil units or reduce load congestion and stabilize prices).[79]

Because the Intervenors are demanding a more precise forecast of the need for power than the Commission has determined is required by NEPA, and because they have failed to address other aspects of the need for power, this portion of Contention 13 does not address a material issue and, in any event, does not provide sufficient factual support for a genuine dispute with the DEIS.

b. Energy Alternatives

The Intervenors also challenge the discussion of energy alternatives in the DEIS by addressing sources and topics that they believe should be considered in the DEIS.[80] But, in this portion of Contention 13, the Intervenors do not seek any particular relief or allege that any particular aspect of the DEIS is inadequate. These paragraphs provide no information that is relevant to a determination regarding the admissibility of this contention, either in the context of the NRC's requirements for contention admissibility, or from the perspective of NEPA requirements.[81] Nevertheless, each of the topics raised by the Intervenors is addressed below.

The Intervenors begin by asserting that Michigan has "massive potential for onshore wind energy development."[82] They also allege that, at a 30% capacity factor,

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79 If anything, the Intervenors acknowledge that replacing fossil units might drive additional capacity additions such as those from Fermi 3. New Cont. at 15.

80 DEIS at 16-19.

81 The NRC's Rules of Practice do not permit the filing of vague, unparticularized contentions. *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982).

82 New Cont. at 16.

Michigan's wind resources could "theoretically" generate 58,000 MW(e).[83] But, theoretical maximums (*i.e.*, converting "potential" into reality) for individual energy technologies is not the relevant consideration under NEPA. Rather, NEPA is tempered by a "rule of reason" that requires agencies to address alternatives that are reasonably foreseeable — not those that are remote and speculative.[84] Here, the DEIS notes that Detroit Edison compared existing wind energy maps with exclusionary factors that could preempt wind farm development.[85] Detroit Edison determined that 500 MW of wind energy potential could be realized and economically delivered to its major load centers over the existing transmission network, but a theoretical maximum development capacity of 2,800 MW could be realized with appropriate upgrades and expansions to the transmission network.[86] The DEIS also discusses other estimates from MPSC Wind Energy Resource Zone Board.[87] The Intervenors do not challenge these conclusions or even attempt to articulate a dispute with the DEIS. This aspect of Contention 13 therefore is inadmissible.

The Intervenors also assert that Detroit Edison has a "needle peak" problem and therefore advocate efficiency, load management, and exploration of photovoltaics.[88] While this statement is not a direct challenge to the DEIS, it nevertheless does not take into account the

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83 *Id*.

84 *See, e.g., Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-156, 6 AEC 831, 836 (1973).

85 DEIS at 9-50.

86 *Id*.

87 *Id*.

88 New Cont. at 17.

purpose and need for Fermi 3, which is to generate baseload power. Thus, even if this could be construed as a challenge to the DEIS, it raises issues that are not material for the NRC's findings.

Proposed Contention 13 also includes a discussion of technologies that can be used to store energy, such as compressed air energy storage ("CAES") and ice storage thermal cooling.[89] However, this portion of Contention 13 does not challenge any portion of the DEIS and, if anything, appears to support the DEIS analysis. The DEIS explains that energy storage can be used, in conjunction with wind or solar power, to improve the availability and dispatchability of intermittent sources (and therefore approximate baseload power).[90] And, the DEIS evaluates alternatives that include a significant contribution of wind and solar, in conjunction with energy storage.[91] The Intervenors also mention "ice storage thermal cooling."[92] However, the Licensing Board previously addressed ice storage in this proceeding. The Board explained that "an assertion that renewables can be used during off-peak times to generate ice which can then be melted for air conditioning . . . is unsupported by facts or analysis to demonstrate the feasibility of using such a technology on a utility scale."[93] Thus, the discussion of energy storage does not demonstrate a genuine challenge to the DEIS.

The Intervenors discussion of photovoltaics also fails to present a dispute with the DEIS. The Intervenors note that photovoltaics have experienced declines in price and assert that

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89 *Id*.

90 DEIS at 9-52. The DEIS notes that there are only two large-scale CAES plants currently in operation: a 290-MW facility near Bremen, Germany, and a 110-MW plant in McIntosh, Alabama. Both facilities use salt caverns for storage. The Intervenors incorrectly state that the CAES facility in the U.S. is in Louisiana. New Cont. at 17.

91 DEIS at 9-64.

92 New Cont. at 17-18.

93 LBP-09-16 at 84.

photovoltaics may be economical when used as a peaking resource.[94] However, these statements are not material to the NEPA analysis here because the purpose of the proposed action is to generate baseload power, not peak power. Photovoltaics require energy storage or backup power supply to provide electric power at night or to generate the equivalent of baseload power.[95] The Intervenors have not acknowledged these limitations, much less demonstrated a dispute with the DEIS conclusions regarding the reasonably expected availability of photovoltaics in the region.

At the end of proposed Contention 13, the Intervenors cite a number of cases for the proposition that the NRC must consider reasonable alternatives.[96] While this is undoubtedly true, the Intervenors do not explain how the DEIS fails to satisfy this obligation. Section 9.3 of the DEIS contains a detailed discussion of a number of different energy sources and their environmental impacts. The Intervenors have not challenged any of the DEIS conclusions. In fact, this portion of Contention 13 and the accompanying statement from Mr. Ford do not even mention or cite the DEIS discussion of energy alternatives.[97]

In any event, the NRC did consider a "combination of energy alternatives" in the DEIS. The NRC found it conceivable that a combination of alternatives, including a significant combination of renewable sources in conjunction with energy storage and efficiency, might be a technically feasible alternative means of satisfying the project purpose. Specifically, the NRC considered a combination consisting of 1,218 MW natural gas facility, together with ambitious

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94 New Cont. at 18.

95 DEIS at 9-55.

96 New Cont. at 20-22.

97 A contention that does not include references to the specific portions of the DEIS that are alleged to be in dispute is inadmissible. *See Texas Utilities Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992) (citing 10 C.F.R. § 2.309(f)(1)(vi)).

conservation and demand-side management programs that would reduce demand by 218 MW and installation of 565 MW of wind and 15 MW of solar.[98] The NRC concluded that this combination of alternatives is not environmentally preferable to the proposed action.[99] None of this was specifically challenged by the Intervenors.

Because the Intervenors did not specifically challenge the DEIS conclusions regarding the reasonably foreseeable availability of wind and solar, in conjunction with energy storage, as a baseload energy source, or present any data that would undermine the DEIS conclusion that none of the energy alternatives are environmentally preferable to Fermi 3, this aspect of Contention 13 is inadmissible.

C. *Contention 17: The descriptions of terrestrial and wetland mitigation plans are insufficient and inadequate, legally and practically, in violation of NEPA requirements for a Draft Environmental Impact Statement.*

1. Timeliness

Contention 17 is untimely because it is not based upon any new data or conclusions in the DEIS.[100] Moreover, under 10 C.F.R. 2.309(f)(2)(i)-(iii), it is untimely with respect to the availability of other information on wetlands mitigation plans for Fermi 3.[101]

In the ER, Detroit Edison stated that it would "prepare a mitigation plan for Fermi construction activities that will be submitted to the [Michigan Department of Environmental Quality ("MDEQ")] and [U.S. Army Corps of Engineers ("USACE")]."[102] In the DEIS, the

98 *Id*. at 9-64.

99 *Id*. at 9-67.

100 10 C.F.R. § 2.309(f)(2).

101 *See Private Fuel Storage*, 52 NRC at 223 (holding that the time to submit contentions tolls when the information on which the contention is based first becomes available).

102 ER at Section 4.3.1.2.2.

NRC Staff states that it anticipates the MDEQ and USACE permitting process to be completed prior to issuance of the FEIS.[103] This procedural overview, which forms the basis for proposed Contention 17, does not "differ significantly" from the information provided in the ER, and is therefore not new data or a new conclusion.[104] The Intervenors have not pointed to any wetland impacts that are new or different in the DEIS as compared to the ER. And, the Intervenors have not argued that any particular mitigation measures should have been, but were not, addressed in the DEIS.

Beyond the information submitted in the ER, Detroit Edison has previously made public details of its wetland mitigation plans. These plans became available in August 2011 when Detroit Edison submitted its MDEQ/USACE Joint Permit Application.[105] If the Intervenors wished to challenge a specific aspect of these plans, a timely contention should have

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103 DEIS at 4-44. Detroit Edison received its final MDEQ wetland permit on January 24, 2012. *See* Attachment 1 – MDEQ Wetland Permit No. 10-58-011-P, dated January 24, 2012.

104 *Clinton ESP*, LBP-05-19, 62 NRC at 163.

105 *See* Conservation Connects and Tetra Tech. 2011. Fermi 3 Conceptual Aquatic Resource Mitigation Strategy, MDEQ/USACE Joint Permit Application, File Number 10-58-0011-P, 2011-MEP-F3COLA-0063, dated August 25, 2011 (ADAMS Accession No. ML112700404); *see also* Letter from Peter W. Smith (Detroit Edison) to Collette M. Luff (USACE), "Proposed Fermi 3 Mitigation Site Information for Review and Comment (File Number 10-58-011-P)," 2011-MEP-F3COLA-0072, dated September 20, 2011 (ADAMS Accession No. ML112650427).

been filed at that time.[106] Therefore, the Intervenors' proposed contention is untimely and cannot be admitted.[107]

2. Admissibility

In Contention 17, the Intervenors assert that "[t]he descriptions of terrestrial and wetland mitigation plans are insufficient and inadequate, legally and practically, in violation of NEPA requirements for a [DEIS]."[108] Although the Intervenors acknowledge that "proposed mitigation measures need not be laid out to the finest detail," they nevertheless argue that they and the public "are being deprived of a comment right accorded them under NEPA by not having access to mitigation plans contemporaneously and as a part of the DEIS stage."[109] However, the proposed contention ignores the detailed information on mitigation available to the public in the DEIS and, in any event, fails to demonstrate a genuine dispute with the DEIS on a material issue.

First, the DEIS itself includes considerable detailed information regarding mitigation. For example, the DEIS contains a discussion of mitigation for terrestrial species and aquatic species during construction (DEIS at 4-43 to 4-44, 4-58) and during operation (*id*. at 5-25, 5-35, 5-38, 5-39, 5-43, 5-53). The DEIS also discusses Detroit Edison's Habitat and Species Conservation Plan that was specifically prepared to reduce fox snake impacts during the

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106 *See Entergy Nuclear Vt. Yankee, LLC* (Vt. Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 573, 579-80 (2006) (rejecting petitioner's attempt to "stretch the timeliness clock" because its new contentions were based on information that was previously available and petitioners failed to identify precisely what information was "new" and "different").

107 10 C.F.R. § 2.309(f)(2)(i)-(iii). In the absence of good cause for late-filing, the Intervenors have not made the necessary showing on the other factors of 10 C.F.R. § 2.309(c)(1), as discussed in Section III above.

108 New Cont. at 22.

109 *Id*. at 22-23.

construction phase of the project (*see* DEIS Section 4.3.1.3). Indeed, mitigation measures are discussed for nearly every type of impact included in the DEIS, including land use, ecology, socioeconomics, air quality, nonradiological health, and historic/cultural resources.[110] Table 10-1 and Table 10-2 also present the unavoidable adverse impacts associated with construction and preconstruction activities and operations for each of the resource areas evaluated in the DEIS, as well as the mitigation measures that would reduce the impacts.[111] The Intervenors have not challenged the adequacy of the mitigation measures proposed or discussed. Nor have they indicated which measures supposedly require more detail.

The DEIS also contains detailed information regarding the wetland mitigation strategy. Appendix K to the DEIS describes the steps that Detroit Edison took to reduce wetland impacts and presents a conceptual mitigation strategy to mitigate the impacts that are expected to occur. For example, impacts to wetlands were avoided to the maximum extent practicable.[112] Where impacts could not be avoided, impacts were minimized to the maximum extent possible in terms of both quality and quantity.[113] Design iterations reduced potential wetland impacts from over 150 acres to approximately 30.37 acres of regulated wetlands requiring mitigation (21 acres of which will be restored post-construction).[114] For unavoidable impacts, a mitigation strategy was developed to compensate for those impacts.

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110 *See* DEIS Table 5-35, "Summary of Measures and Controls Proposed by Detroit Edison to Limit Adverse Impacts When Operating Fermi 3," at 5-137 to 5-141.

111 *Id*. at 10-5 to 10-8, 10-10 to 10-13.

112 *Id*. at K-6.

113 *Id*.

114 *Id*.

As discussed in the DEIS, to compensate for the loss of wetlands at Fermi 3, Detroit Edison will restore and enhance wetlands of similar ecological type within the same coastal zone. According to the DEIS, Detroit Edison will restore approximately 82 acres of wetlands and enhance existing wetlands off site in the coastal zone of Western Lake Erie.[115] Detroit Edison will also restore approximately 21 acres of impacted wetlands onsite after construction.[116] The mitigation plan describes, in detail, the functions and values of the wetlands impacted and the restored and enhanced wetlands, as well as the ratios for wetland replacement.[117] The mitigation plan also contains performance standards and monitoring requirements for the restored and enhanced wetlands.[118] The proposed contention suggests on its face that the Intervenors have not even reviewed the available information, much less identified any genuine dispute on these matters. By failing to engage the specific information provided, the Intervenors have failed to demonstrate a genuine dispute with the DEIS.

To the extent that the contention is predicated on the lack of a final approved mitigation plan, numerous cases have held that it is not necessary to have a final mitigation plan prior to issuance of the FEIS or approval of a Clean Water Act Section 404 wetlands permit.[119]

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115 The final permit issued by MDEQ obligates Detroit Edison to construct 107.31 acres of wetland mitigation. *See* Attachment 1 – MDEQ Wetland Permit at 1, 7.

116 DEIS at K-6. Restoration implies returning an area to wetland that once was wetland but currently is not due to past and ongoing modifications. Enhancement implies improving wetland functions in an existing wetland.

117 *Id*. at K-7 to K-16.

118 *Id*. at K-19 to K-22.

119 *Robertson v. Methow Valley Citizens Council*, 490 US 332, 352-353 (1989) (holding that an agency is not precluded from taking action before another agency, which has authority over the area in which the adverse effects are being addressed, has reached a final conclusion as to which mitigation measures are necessary).

Instead, a permit conditioned on future development of a mitigation plan complies with the dictates of NEPA and the Clean Water Act.[120] The Intervenors are simply incorrect when they imply that the DEIS was predicated merely on vague mitigation goals rather than on a sufficiently detailed plan. The mitigation plans discussed in the DEIS are quite detailed and, in fact, were recently accepted by MDEQ in issuing the wetland permit to Detroit Edison.[121]

Given the discussions of mitigation throughout the DEIS, as well as the specific mitigation measures discussed in the DEIS, proposed Contention 17 fails to satisfy the NRC's strict standards for admissibility. The Intervenors have not pointed to any particular impact that they allege to be inadequately mitigated and they have not pointed to any discussion of mitigation measures that allegedly lacks sufficient detail to permit them to comment. The Intervenors have offered no tangible information, no experts, and no substantive affidavits regarding mitigation measures. Proposed Contention 17 is little more than a generic "complaint" that fails to identify any specific dispute with the DEIS discussion of mitigation. The contention lacks both specificity and factual support and therefore cannot be admitted.

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120 *See Preserve Endangered Areas of Cobb's History, Inc. v. United States Army Corps of Eng'rs,* 87 F.3d 1242, 1248 (11th Cir. 1996); *National Wildlife Fed'n v. Whistler,* 27 F.3d 1341, 1343, 1346 (8th Cir. 1994); *Holy Cross Wilderness Fund v. Madigan,* 960 F.2d 1515, 1528-29 (10th Cir. 1992); *Friends of the Earth v. Hintz,* 800 F.2d 822, 825-26, 836-37 (9th Cir. 1986).

121 As noted *supra*, note 103, the MDEQ issued the wetland permit for Fermi 3, which includes an obligation to mitigate wetland impacts, on January 26, 2012. *See also* Conservation Connects and Tetra Tech. 2011. Fermi 3 Conceptual Aquatic Resource Mitigation Strategy, MDEQ/USACE Joint Permit Application, File Number 10-58-0011-P, 2011-MEP-F3COLA-0063, dated August 25, 2011 (ADAMS Accession No. ML112700404); *see also* Letter from Peter W. Smith (Detroit Edison) to Collette M. Luff (USACE), "Proposed Fermi 3 Mitigation Site Information for Review and Comment (File Number 10-58-011-P)," 2011-MEP-F3COLA-0072, dated September 20, 2011 (ADAMS Accession No. ML112650427).

D. *Contention 18: The Endangered Species Act consultation and biological assessment ("BA") are incomplete, and there is no adequate substitute for the BA which appears within the DEIS. This makes the DEIS dependent upon completion of the BA and as a practical matter, precludes the public a participation/comment opportunity on the Endangered Species Act at the DEIS stage. This disclosure violates NEPA requirements for a Draft Environmental Impact Statement.*

1. Timeliness

Contention 18 is untimely because it is not based on information that differs "significantly from the data or conclusions in the applicant's documents."[122] The Intervenors find the DEIS insufficient because it does not contain "an adequate substitute" for a biological assessment ("BA").[123] The DEIS states that, in accordance with the requirements of the Endangered Species Act ("ESA"), "the review team will prepare a BA prior to issuance of the [FEIS]."[124] According to Intervenors, this is a violation of NEPA because it "precludes the public a participation/comment opportunity on the [ESA] at the DEIS stage."[125] But a BA was not prepared prior to the ER, and this process issue could have been raised equally at that time.

Intervenors also identify no differences between the analysis of endangered species in the ER and the DEIS. And, the Intervenors have not identified any particular mitigation measures that should have been, but were not, addressed in the DEIS. Likewise, Intervenors have not identified any additional material information outside of the DEIS to

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122 10 C.F.R. § 2.309(f)(2).

123 New Cont. at 23.

124 DEIS at 5-21 to 5-22.

125 *Id*.

support their late-filed contention.[126] Therefore, the Intervenors' contention is untimely and must be rejected.[127]

2. Admissibility

As part of its compliance with NEPA and Part 51, the NRC Staff engages in consultation with other Federal agencies, as appropriate, under Section 7 of the ESA. As the Intervenors note, the NRC must undertake a Section 7 consultation for any federal action that may affect a threatened or endangered species to ensure that the federal action is not likely to "jeopardize the continued existence of" a Federally-listed endangered or threatened species and will not result in the "destruction or adverse modification" of the designated critical habitat of the listed species.[128] If the consulting agency — in this case, the U.S. Fish and Wildlife Service ("USFWS") — advises that an endangered or threatened species may be present, the NRC must prepare a BA. This assessment "may be" undertaken as part of the agency's compliance with the requirements of NEPA.[129] If the BA indicates effects to a listed or proposed species or habitat, the agency must engage in formal consultation.[130]

Neither the ESA nor NEPA requires that consultation be complete prior to issuance of a DEIS. The ESA requires only that consultation be completed before the NRC

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

127 In the absence of good cause for late-filing, the Intervenors have not made the necessary showing on the other factors of 10 C.F.R. § 2.309(c)(1), as discussed in Section III above.

128 New Cont. at 23, *citing* 16 U.S.C. § 1536(a)(2).

129 50 C.F.R. § 402.06; *see Int'l Union, UAW v. Dole,* 919 F.2d 753, 756 (D.C. Cir. 1990) (noting the "the usual presumption that 'may' confers discretion, while 'shall' imposes an obligation to act").

130 50 C.F.R. § 402.14. If the NRC engages in formal consultation with USFWS, the end result is a Biological Opinion issued by the USFWS.

makes any "irreversible or irretrievable commitment of resources" that would foreclose implementation of any mitigation measures suggested in a Biological Opinion ("BO"). Here, the NRC's NEPA requirements are being satisfied concurrently with the consultation requirement in Section 7 of the ESA. The Intervenors point to no authority to suggest that issuance of a DEIS (or an FEIS, for that matter) must await completion of the ESA consultation process.[131] Thus, to the extent that Contention 18 relates to the absence of a completed BA prior to issuance of the DEIS or FEIS, the Intervenors fail to identify a procedural basis under NEPA for the contention or demonstrate a genuine dispute with respect to the consultation requirements of Section 7 of the ESA.

The proposed contention also fails to substantively challenge the DEIS conclusions regarding impacts to Federally-listed species. Although the Intervenors argue that a completed BA is needed to permit comments on impacts to Federally-threatened and endangered species, the Intervenors have not pointed to any alleged impacts that were overlooked or that might necessitate preparation of a BO (or lead to a jeopardy conclusion). The Federally-listed species that could occur on the Fermi site and nearby in Monroe County were identified by the USFWS and are listed in Table 2-8 of the DEIS.[132] The DEIS identifies three species at the site

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131 Completion of Section 7 is not a necessary prerequisite to issuance of a FEIS or a DEIS. *See, e.g.*, *Westlands Water District v. U.* S. *Dept. of Interior*, 376 F.3d 853, 874 (9th Cir. 2004) (concluding that a federal agency was not required to supplement its DEIS to address the findings of a BO that post-dated the DEIS in the absence of significant new circumstances or information that was not considered in the FEIS); *Roosevelt Campobello International Park Commission v. EPA*, 684 F.2d 1041, 1044-45 (1st Cir. 1982), *rehearing en banc denied* (1982) (upholding EPA issuance of FEIS where consultation did not begin until several months *after* issuance of the FEIS); *Natural Resources Defense Council, Inc. v. FAA*, 564 F.3d 549, 561 (2nd Cir. 2009) (upholding the FAA's decision not to supplement its FEIS — even though the BA was prepared after issuance of the FEIS — in light of the FAA's determination in its BA that the project was unlikely to adversely affect the species).

132 DEIS at 2-48.

as protected under the ESA: the Eastern prairie fringed orchid, the Indiana bat, and the Karner blue butterfly. The Eastern prairie fringed orchid has not been observed on or near the Fermi site since 1973. The plant is known mostly from lakeplain prairies, which do not exist on the project site or in the immediate vicinity.[133] The Indiana bat has not been observed in Monroe County or at the Fermi site.[134] And, the Karner blue butterfly has not been seen in Monroe County since 1986 and suitable habitat does not exist at the site or immediate vicinity.[135] The NRC concludes that none of the Federally-listed species identified are likely to be affected by operation of the Fermi 3 facility.[136] The Intervenors have presented no evidence or expert testimony to contradict this conclusion. In addition, the Intervenors have not asserted that there are any unexamined impacts to critical habitat for these or other species. Proposed Contention 18 therefore fails to demonstrate the existence of a genuine dispute with the DEIS on a material issue.

*E.* *Contention 19: Consumptive water uses from the Great Lakes Basin have not been properly addressed in accordance with the Great Lakes Compact, and the required approval process and approvals, if any, are not delineated in the DEIS, in violation of NEPA.*

1. Timeliness

Contention 19 is untimely because it could have been raised based on the ER and is not based on new data or conclusions in the DEIS.[137] The ER contained a detailed analysis of

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133 *Id*. at 2-50.

134 *Id*. at 2-50 to 2-51.

135 *Id*. at 2-50.

136 *Id*. at 5-22. In addition to the species listed above, the DEIS also notes that Mitchell's satyr butterfly may occur in the transmission corridor. *Id*. at 2-61 (Table 2-9). The DEIS concludes that "the impacts of transmission line operation on Federally listed species are likely to be minimal." *Id*. at 5-24.

137 10 C.F.R. § 2.309(f)(2).

anticipated consumptive water use related to operation of Fermi 3.[138] The Great Lakes Compact was ratified in 2008, and the fact that, as a result, "any new water withdrawals from within the Great Lakes Basin that would result in a consumptive use of 5 MGD or more were made subject to review by all the States and provinces in the region," is not new information.[139] The requirement to obtain a water withdrawal permit from MDEQ in accordance with the Great Lakes Compact was listed in Revision 0 of the ER.[140] Intervenors allege that the DEIS "cites" but does not "properly address" this requirement.[141] Yet the NRC Staff provides in the DEIS a detailed review of consumptive water use and acknowledges the regional review requirement.[142] The Intervenors have pointed to nothing new or different that would support a timely contention.

That the Intervenors rely on the comments of the Great Lakes Environmental Law Center ("GLELC"), submitted on January 11, 2012, does not alleviate the timeliness problem. Because the challenges regarding consumptive water use and uncertainties associated with the regional review process could have been brought forward in a contention based on the ER, the issue cannot now be raised based on the DEIS or the GLELC's January letter. In citing the GLELC letter, the Intervenors do not point to any discrepancy between the DEIS and ER, or point to any new information in the GLELC letter that was not available in the ER (*i.e.*, prior to publication of the DEIS).[143] The DEIS does not "reset the clock" for timeliness in the absence of

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138 ER Section 2.3.2, Tables 2.3-32 through 2.3-39.

139 New Cont. at 27.

140 ER, Rev. 0, at 1-11 (September 2008).

141 *Id.*

142 *See* DEIS at 2-25, Section 5.2.2.1.

143 *See* 10 C.F.R. § 2.309(f)(2)(i)-(iii); *see Bellefonte COL*, slip op. at 8.

new or materially different information.[144] Where, as here, the data concerning consumptive water use related to operation of Fermi 3 were identified and relied upon in both the ER and the DEIS, the Intervenors' challenge is untimely.[145]

2. Admissibility

In proposed Contention 19, the Intervenors acknowledge that the DEIS accurately describes the requirements of the Great Lakes Compact.[146] However, they go on to argue that, because of the uncertainty inherent in gaining approval under the Great Lakes Compact, the NRC and Detroit Edison must take steps "to initiate an approval process under the terms of the Great Lakes Compact."[147] This argument does not present a genuine dispute with the DEIS on a material issue. Of course Detroit Edison cannot undertake activities that are authorized by the Compact or State agencies, such as the MDEQ, without appropriate approvals. But, the mere fact that the water withdrawal permitting process has not yet been initiated is not a basis for an admissible contention. The NRC requirement that applicants report the status of environmental permitting does not extend the NRC's scope to cover the granting of such permits.[148] It is "not

144 *Private Fuel Storage, LLC*, 52 NRC at 223.

145 In the absence of good cause for late-filing, the Intervenors have not made the necessary showing on the other factors of 10 C.F.R. § 2.309(c)(1), as discussed in Section III above.

146 New Cont. at 27, *citing* DEIS at 2-25.

147 *Id*.

148 *Nuclear Management Company, LLC*, (Palisades Nuclear Plant), LPB-06-10, 63 NRC 314, 362 (2006) (concluding that, although an applicant is required by 10 C.F.R. 51.45(d) to 'list all federal permits, licenses, approvals and other entitlements which must be obtained in connection with the proposed action,' … the adequacy of any such permit is not within the Commission's jurisdiction.").

the province of the NRC (and thus [a] Board) to enforce another agency's regulations."[149] Simply noting that a regulatory process unrelated to NRC licensing must occur in the future cannot support an admissible contention.

The Intervenors also argue that the NRC should include in the FEIS "the steps that will be taken by the relevant parties to seek and gain approval by the parties of the Compact."[150] However, the requirements of the Compact are for the various parties to the Compact to determine, and also are beyond the jurisdiction of NRC adjudicatory bodies.[151] The Licensing Board should not entertain what is, in effect, a collateral attack on the Compact process, which is a matter over which the NRC is devoid of jurisdiction.[152] Although the NRC has appropriately recognized the need for Compact approval, it should not delay its NEPA process or withhold a license merely because another agency might conceivably take future action that may have an impact upon the operation of Fermi 3.[153]

At bottom, the DEIS acknowledges that approval under the Great Lakes Compact is necessary. Contention 19, which focuses on Great Lakes Compact requirements and approvals that are unrelated to the NRC review of the Fermi 3 COL, does not raise a genuine dispute with the DEIS on an issue material to NRC licensing.

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149 *Florida Power and Light* (Turkey Point Nuclear Generating Station), LBP-11-06, 73 NRC __, __ (slip op. at 97) (Feb. 28, 2011), *citing Hydro Res., Inc.* (292 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-16, 48 NRC 119, 120-22 & n.3 (1998).

150 New Cont. at 29.

151 *See Northern States Power Company* (Tyrone Energy Park, Unit 1), ALAB-464, 7 NRC 372, 375 (1978).

152 *See Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-82-117A, 16 NRC 1964, 1991 (1982).

153 *Id*., *citing Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-78-14, 7 NRC 952, 958 n.5 (1978).

*F.* *Contention 20: The DEIS does not adequately evaluate thermal pollution issues associated with the discharge of cooling water into Lake Erie, in violation of NEPA.*

1. Timeliness

The issues raised by Contention 20 were in large part raised previously by Contention 6 (partially admitted in this proceeding) and Contention 14 (rejected by the Licensing Board). The information relied upon by the Intervenors either was previously available or is not materially different from information previously available. For example, the specific CORMIX model sets used to evaluate thermal discharges in the ER were also used in the DEIS.[154] The Intervenors have not identified any specific data or conclusions in the DEIS that they allege to be different from those in the ER. The arguments and information in proposed Contention 20 could have been raised — and in large part were raised — based on the ER and therefore are untimely.

Contention 14, in part, alleged that the ER failed to identify and consider "chemical and thermal effluent discharge impacts of the proposed cooling system intake and discharge structures on aquatic resources."[155] As filed, Contention 6 stated that the COL application "omits critical information disclosing the environmental impacts to Lake Erie's Western Basin and Maumee River/Maumee Bay."[156] The Licensing Board found the claims in Contentions 6 and 14 to be duplicative and admitted a narrowed Contention 6 "insofar as it related to the adequacy of the Applicant's water quality analysis in the ER regarding the potential for increasing algal blooms and the proliferation of a newly identified species of

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154 *Compare* ER at 5-30 to 5-33 (Model Sets 1, 2, and 3) *to* DEIS at 5-12 and Table 5-4 (cross-referencing ER Model Sets 1, 2, and 3); *see also* ER at 3-28; DEIS at 5-27 (discussing cooling water alternatives).

155 Pet. at 123.

156 *Id*. at 67.

harmful algae in the western Lake Erie basin."[157] The Board rejected the other aspects of Contentions 6 and 14, including those raised again here.

At bottom, the Intervenors cite no information that was not previously available. The DEIS is not a vehicle to reintroduce contentions that were previously rejected in this proceeding. Because the Intervenors rehash the arguments previously rejected by the Licensing Board and fail to identify any new "data or conclusions," Contention 20 is untimely.[158]

2. Admissibility

In proposed Contention 20, the Intervenors argue that "the DEIS does not adequately evaluate thermal pollution issues associated with the discharge of cooling water into Lake Erie" and "fails to provide potential mitigation options for the Fermi 3 facility."[159] However, in addition to being untimely, this contention fails to demonstrate a genuine dispute with the DEIS on a material issue.

First, the Intervenors assert that "the reviewing agencies . . . did not recommend any mitigation strategies for [Detroit] Edison."[160] This statement is contradicted later in the contention, where the Intervenors acknowledge that "[t]he review team did suggest two mitigation procedures within the DEIS" — "the installation of a diffuser that would mix the discharge before being released into the lake and a procedure to gradually reduce the discharge of cooling water during plant shutdowns to avoid any sort of heat or cold shock to aquatic

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157 LBP-09-16 at 51.

158 10 C.F.R. § 2.309(f)(2). In the absence of good cause for late-filing, the Intervenors have not made the necessary showing on the other factors of 10 C.F.R. § 2.309(c)(1), as discussed in Section III above.

159 New Cont. at 30.

160 *Id*.

species."[161] The Intervenors also ignore other mitigation measures that Detroit Edison will take, as referenced in the DEIS — using "Best Available Technology to reduce evaporative losses from cooling towers," "[l]ocat[ing] and orient[ing] the discharge structure to minimize siltation resulting from turbidity at the diffuser ports," and designing the diffuser to "minimize the size of the thermal mixing zone, in both lateral and vertical extent" and "minimize bottom scour and associated turbidity."[162] The Intervenors also do not propose any additional alternatives that they assert should be, but were not, considered in the DEIS. Having failed to challenge the adequacy (or even recognize the existence) of the measures included in the Fermi 3 design to reduce thermal discharge impacts, the Intervenors fail to demonstrate a genuine dispute with the DEIS on discharge mitigation measures.

Regardless, Section 511(c)(2) of the Clean Water Act specifically precludes the NRC from determining whether nuclear facilities are in compliance with Clean Water Act limitations, assessing discharge limitations, or imposing additional alternatives to further minimize impacts on aquatic ecology that are subject to the Clean Water Act.[163] The NRC Staff must consider the cooling system, as designed for Clean Water Act permitting purposes and as

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161 *Id*. at 32, *citing* DEIS at 5-7, 5-35.

162 DEIS at 5-137, 5-138.

163 33 U.S.C. § 1371(c)(2); *Entergy Nuclear Operations, Inc.* (Indian Point Units 2 and 3), LBP-08-13, 68 NRC 43, 155 (2008). Indeed, the Clean Water Act's legislative history indicates that Congress, when enacting Section 511(c)(2), specifically intended to deprive the NRC's predecessor agency (the Atomic Energy Commission) of such authority. *Tennessee Valley Authority* (Yellow Creak Nuclear Plant, Units 1 and 2), ALAB-515, 8 NRC 702, 712 (1978) (quoting Sen. Edmund Muskie as stating that "the effect of . . . [Section 511(c)(2)] would be to require Federal licensing agencies to 'accept as dispositive' EPA's determinations respecting the discharge of pollutants").

accepted by the MDEQ,[164] and factor the impacts that result from that system into its NEPA analysis.[165] But, to the extent the contention is alleging that the NRC must consider or propose additional mitigation measures, it raises an issue beyond the scope of this proceeding.[166]

The Intervenors also incorrectly argue that NRC did not "suggest … alternatives to the current discharge plan."[167] The Intervenors ignore the extensive discussion of cooling water alternatives in Section 9.4 of the DEIS. Section 9.4 evaluates a number of different heat dissipation systems and circulating water system alternatives.[168] The ER and the DEIS both considered a range of heat dissipation systems, including a once through cooling system, several alternative closed cycle cooling system configurations, dry cooling systems, and wet/dry hybrid systems. The use of cooling towers for Fermi 3 represents the best technology available under Phase I of Section 316(a) of the Clean Water Act and also acts to greatly reduce the thermal loading to Lake Erie (relative to, for example, once-through cooling).[169] The closed-cycle cooling system intakes water through three dual flow intake traveling screens at no more than 0.5 feet per second. The flow is designed to be sufficiently low that fish are not trapped against the

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164 MDEQ issued the NPDES permit for Fermi 3 on February, 2, 2012. *See* Attachment 2 – NPDES Permit No. MI0058892.

165 *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-78-1, 7 NRC 1, 28 (1978).

166 *See Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-07-16, 65 NRC 371, 387 (2007) (rejecting, as barred by the Clean Water Act, a contention based on alleged effects of thermal discharges on fish and shellfish).

167 New Cont. at 31.

168 DEIS at 9-298.

169 ER at 3-28.

traveling screens.[170] Also, the offshore rapid mix diffuser minimizes the size and potential shoreline effects of the thermal mixing zone in Lake Erie and adjacent wetlands.[171] The combination of these two technologies provides advanced treatment of the cooling water (relative to once-through cooling and a shoreline discharge). The Intervenors have not identified any alternatives that were not considered, nor challenged the effectiveness of those measures that were included. There is simply no issue to litigate.

The Intervenors also broadly take exception with the DEIS analysis of thermal discharges. After referencing the DEIS discussion, the Intervenors "recommend that the reviewing agencies reevaluate the potential problems caused by thermal pollution … at a more localized level."[172] The Intervenors provide no basis for this recommendation. The DEIS describes the Detroit Edison analysis of thermal effluents, which investigated three different scenarios:

- *Compliance with MDEQ Water Quality Standards for Lake Temperature*: This scenario, which corresponds to Model Set 1 in the ER, evaluated (1) monthly variations in the size of the plume that was 3°F or more than ambient lake water temperature and (2) monthly variations in the size of the thermal plume that exceeded the maximum allowable temperature (presented in Table 5-3).

- *Sensitivity of Maximum Plume to Changes in Water Depth*: This simulation, which corresponds to Model Set 2 in the ER, evaluated the sensitivity of the size of the thermal plume caused by a rise in ambient lake temperatures higher than 3°F to lake depth and the effects of extremely low water conditions caused by a wind-driven seiche. To be conservative, this analysis used the largest plume determined in the first set of simulations.

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170 DEIS at 5-27.

171 *Id*. at 5-7.

172 New Cont. at 32.

- *Potential Impact of Plume Cooling Water Intake Temperatures*: A third simulation investigated the potential for a thermal plume to reach the shore and affect the temperature of water withdrawn from Lake Erie for cooling Fermi 3.[173]

Based on these analyses, the DEIS concludes that the simulated size of the maximum thermal plume was very small when compared to the area of the entire western basin of Lake Erie and that impacts from the thermal plume are expected to be minor.[174] The Intervenors have not challenged any specific aspect of the conservative thermal analysis in the DEIS (which was also included in the ER). The Intervenors have therefore failed to demonstrate a specific factual dispute with the DEIS assessment of thermal impacts.[175]

To the extent that Contention 20 is based on the implications of future climate change for thermal discharges to Lake Erie (New Cont. at 32), the Intervenors have not challenged, in any way, the conclusions of the NRC Staff in the DEIS. The NRC Staff recognizes that climate change could lower lake levels, causing thermal plumes and mixing zones to increase in size.[176] Because the Intervenors have not presented any expert analysis of factual information to call into question the DEIS discussion regarding the effects of climate change on thermal discharges, this aspect of Contention 20 also is inadmissible.

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173 DEIS at 5-12. These scenarios are summarized in Table 5-4.

174 *Id*. at 5-11.

175 The Intervenors mention the DEIS discussion that notes increased phosphorus loading of Lake Erie from regional agricultural activities, which cause "toxic algal blooms." New Cont. at 30, *citing* DEIS at 2-26. They also assert that thermal discharges could lead to "drastic growth of toxic algae." *Id*. at 32. But, they provide no basis for this claim and do not discuss potential impacts on algal growth in detail. The contention therefore cannot be admitted on this basis. In any event, the effect of thermal discharges on algal growth is within the scope of Contention 6.

176 *See id*., *citing* DEIS at 7-14.

Finally, citing Great Lakes Compact requirements, the Intervenors argue that "it would be prudent for both [Detroit] Edison and the regulatory agencies tasked with approving Fermi 3 to ensure that the thermal plumes being discharged into Lake Erie 'result in no significant individual or cumulative adverse impacts to the quantity or quality of the Waters and Water Dependent Natural Resources and the applicable Source Watershed.'"[177] Like Contention 19, this aspect of Contention 20 is outside the scope of the NRC's review under NEPA. Compliance with the Great Lakes Compact requirements is for the MDEQ and other relevant agencies to determine, not the NRC.

*G. Contention 21: Evaluation of the wetland areas that would be impacted by the construction and operation of the reactor, and the potential status of selected wildlife within those areas, is not fully and properly addressed in the DEIS, in violation of NEPA.*

1. Timeliness

In proposed Contention 21, Intervenors raise concerns that are untimely because they could have been made based upon the ER. In particular, the Intervenors allege that the DEIS wetland mitigation plan is "bereft of details" and that impacts to wetlands could impact threatened species that rely upon the wetlands.[178] Yet the Intervenors have not pointed to any wetland impacts or mitigation measures that are new or different in the DEIS as compared to the ER.[179] And, the Intervenors have not argued that any particular mitigation measures should have

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177 *Id*. at 33.

178 *Id*. at 34.

179 The information in the DEIS cited to by Intervenors is substantially similar to that in the ER. *Compare* DEIS at 2-13, 2-14 and ER 2-342 (656 acres of undeveloped land on the Fermi site are managed as part of the Detroit River International Wildlife Refuge.); DEIS 2-53 and ER 2-335 (Wetlands are protected by state and federal laws and require state and federal permits); DEIS 2-57, 2-58 and ER 2-336, 2-337 (Fermi 3 wetlands reduce flooding and support wildlife habitat); DEIS 5-23 and ER 4-5 (19 acres of coastal wetlands will be permanently converted due to Fermi 3 construction); DEIS at 7-21 and

been, but were not, addressed in the DEIS. Further, the Intervenors note that the DEIS's determination that the wetland impacts described in the ER would be mitigated by "82 acres of coastal wetland restoration at an offsite location on Lake Erie and 21 acres of on-site mitigation" was in accord with Detroit Edison's Section 404 permit application, released in August 2011.[180] Any challenge to the mitigation measure proposed in the Section 404 application should have been raised at that time.[181]

To the extent that the proposed contention relates to the effects of construction of Fermi 3 on the fox snake, the issues are already being addressed as part of Contention 8. To the extent that the contention relates to impacts to the American lotus, the contention is untimely as any concerns could have been raised based on the ER. The American lotus is listed as a State-identified threatened species in both the DEIS and ER.[182] The ER concluded that impacts to the lotus will be SMALL and stated that:

> Because state populations of American lotus are healthy, MDNR endangered species specialists have indicated that plants expected to be impacted by Fermi 3 construction activities should be transplanted to other areas of the lagoons on the Fermi site or possibly offsite to minimize adverse impact.[183]

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ER at Table 2-6 (93.4 acres of inland wetlands would be cleared of trees and converted to an herbaceous or shrub condition).

180 Conservation Connects and Tetra Tech. 2011. Fermi 3 Conceptual Aquatic Resource Mitigation Strategy, MDEQ/USACE Joint Permit Application, File Number 10-58-0011-P, 2011-MEP-F3COLA-0063, dated August 25, 2011 (ADAMS Accession No. ML112700404). The final permit issued by MDEQ obligates Detroit Edison to construct 107.31 acres of wetland mitigation. *See* Attachment 1 – MDEQ Wetland Permit at 1, 7.

181 10 C.F.R. § 2.309(f)(2)(i)-(iii).

182 *See* DEIS at 4-34, 7-20; ER at 2-326.

183 ER at 4-45.

The DEIS reaches nearly identical conclusions, noting that the American lotus is "common" in parts of the Fermi site and explaining that some impacts may be expected in the south canal. The DEIS notes that Detroit Edison identified mitigation measures in the ER (*e.g.*, transplanting) and concludes that "[i]mpacts from building Fermi 3 would be minimal and no mitigation measures are needed beyond those already identified by Detroit Edison in the ER."[184] The data and conclusions in the ER are the same.

Overall, with respect to the issues raised in Contention 21, there are no data or conclusions in the DEIS that differ from those in the ER.[185] Therefore, the Intervenors' contention is untimely and cannot be admitted.[186]

2. Admissibility

In proposed Contention 21, the Intervenors cite the DEIS discussion of wetland impacts and recognize Detroit Edison's plans to mitigate onsite wetland impacts. The Intervenors argue, however, that the DEIS fails to provide details on the mitigation plans.[187] This aspect of Contention 21 is substantively similar to Contention 17. As discussed above, the DEIS describes the proposed wetland mitigation plan in Appendix K. The Intervenors have not argued that any particular details are missing or pointed to any aspect of the mitigation plan that they allege to be insufficiently detailed so as to preclude development of comments. This aspect

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184 DEIS at 4-34.

185 *Clinton ESP*, LBP-05-19, 62 NRC at 163; *Cf. Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 579 (2006).

186 In the absence of good cause for late-filing, the Intervenors have not made the necessary showing on the other factors of 10 C.F.R. § 2.309(c)(1), as discussed in Section III above.

187 New Cont. at 34.

of Contention 21 therefore lacks specificity and basis, and cannot support an admissible contention.

In the proposed contention, the Intervenors argue that the USACE has not "verified the adequacy of the applicant's avoidance and minimization statement, and therefore its compensatory mitigation plan."[188] The Intervenors assert that the USACE needs to confirm both the necessary conversion of the wetlands on site as well as the proposed mitigation from the Section 404 application if the project is to move forward properly.[189] This statement, while true, does not establish a genuine dispute with the DEIS on a material issue. Of course Detroit Edison cannot undertake activities authorized by the USACE without appropriate permits.[190] But, the mere fact that the permits have not yet been issued is not a basis for an admissible contention.

To the extent that this contention is a challenge to the USACE or MDEQ wetland permitting review process or substantive decisions, it is outside the scope of this COL proceeding. As discussed above under Contention 19, the NRC requirement that applicants report the status of environmental permitting does not extend the NRC's scope to cover the granting of such permits.[191] The NRC and the USACE have different licensing and permitting

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188 *Id*.

189 *Id*.

190 Appendix J of the DEIS discusses Detroit Edison's application to the USACE and, in particular, its demonstration that the proposed project-related dredged or fill activities satisfy USACE guidelines and constitute the least environmentally damaging practicable alternative ("LEDPA"). Appendix J also explains that the USACE could identify further practicable avoidance or minimization measures during its analysis resulting in the USACE-identified LEDPA having fewer impacts (but not more) than Detroit Edison's proposed LEDPA. DEIS at J-2.

191 *Nuclear Management Company, LLC* (Palisades Nuclear Plant), LPB-06-10, 63 NRC 314, 362 (2006) (concluding that, although an applicant is required by 10 C.F.R. 51.45(d) to 'list all federal permits, licenses, approvals and other entitlements which must be

responsibilities.[192] It is "not the province of the NRC (and thus [a] Board) to enforce another agency's regulations."[193] Simply noting that a parallel regulatory process is ongoing cannot support an admissible contention.

According to the Intervenors, the DEIS must also include proposed mitigation measures that take "the potential effects of climate change on the wetland areas into account" — citing the DEIS discussion of climate change, which states that "[p]rolonged higher temperatures could cause increased evaporation rates, which, along with the greater likelihood of drought, could reduce the extent of wetlands in the area."[194] The Intervenors cite the DEIS discussion of climate change as the only basis in support of this contention. But, NEPA focuses on impacts from the proposed action. Here, the Intervenors have provided no basis for presuming that construction and operation of Fermi 3 would cause or exacerbate climate change and therefore impact wetlands. In fact, the DEIS concludes that "[t]he impacts of building or operating Fermi 3 are not expected to affect climate change on either an individual or cumulative basis with past, present, and reasonably foreseeable future projects in the geographic area of interest."[195] Because there are no expected impacts to wetlands from climate change due to Fermi 3, there is no obligation to consider mitigation. The Intervenors have not challenged this conclusion in the

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obtained in connection with the proposed action,' … the adequacy of any such permit is not within the Commission's jurisdiction").

192 *See, e.g.*, "Memorandum of Understanding Between U.S. Army Corps of Engineers and U.S. Nuclear Regulatory Commission on Environmental Reviews Related to the Issuance of Authorizations To Construct and Operate Nuclear Power Plants," 73 Fed. Reg. 55546, 55547 (Sept. 25, 2008).

193 *Turkey Point*, LBP-11-06, slip op. at 97.

194 New Cont. at 34-35, *citing* DEIS at 7-18.

195 DEIS at 7-19.

DEIS. Similarly, the Intervenors provide no basis for concluding that the wetland impacts from construction of Fermi 3 would be different as a result of possible future climate change. This aspect of proposed Contention 21 lacks both specificity and expert or evidentiary support.

Lastly, the Intervenors note that impacts to wetlands could affect threatened species that rely upon the wetlands. The Intervenors point, for example, to the DEIS conclusion that vehicle mortality and construction activities could result in impacts to the State-threatened fox snake and the DEIS discussion of potential impacts to the American lotus from construction activities.[196] To the extent that the contention relates to the effects of construction of Fermi 3 on the fox snake, the issues are already part of Contention 8.[197] To the extent that the contention relates to impacts to the American lotus, it is inadmissible for failure to demonstrate a genuine dispute with the DEIS. The proposed contention does not identify any impacts to the American lotus that were not discussed or addressed in the DEIS. As noted above, both the ER and the DEIS discuss the potential for impacts to the American lotus and conclude that the identified mitigation measures (transplantation) would minimize those impacts.[198] The proposed contention does not challenge these conclusions. The aspect of the contention addressing the

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196 New Cont. at 35, *citing* DEIS at 7-20.

197 Impacts to the fox snake from operations were previously rejected by the Licensing Board as outside the scope of Contention 8. *See* LBP-11-14 at 23 ("To the extent Intervenors' arguments extend beyond the impacts of construction of Fermi Unit 3, they are outside the scope of Contention 8."). Regardless, Detroit Edison has prepared a Habitat and Species Conservation Plan for the fox snake. The Michigan Department of Natural Resources ("MDNR") has reviewed Detroit Edison's plan and concluded that it addresses their concerns with impacts to threatened and endangered species. *See* Attachment 3 – Letter to R. Westmoreland, Detroit Edison, from L. Sargent, MDNR, dated October 27, 2011.

198 DEIS at 4-34.

American lotus therefore lacks adequate expert or factual support to demonstrate a genuine dispute with the ER.

*H.* *Contention 22: The DEIS calls for scrutiny only [sic] transportation aspects of the use of unusually enriched fuel in the Fermi 3 reactor, which is not adequately disclosed, nor is there analysis of the potential reactor operations accident implications from use of higher-enriched fuel for fissioning, nor evaluation of the increased potential for higher levels of emissions of radioactivity in air and water from normal operations.*

1. Timeliness

In proposed Contention 22, the Intervenors challenge the ER and the DEIS evaluations of the consequences of transporting fuel that is beyond the 4% U-235 limit addressed in 10 C.F.R. § 51.21.[199] Intervenors allege that this possibility is not properly addressed in the ER and the DEIS.[200] But the Intervenors do not point to any material differences in the logic or structure of the DEIS analysis that would justify filing a new contention now, rather than based on the ER.[201] In fact, Intervenors do the opposite, citing portions of the DEIS that reference Detroit Edison's application documents.[202] The arguments and information in proposed Contention 22 regarding transportation impacts could have been developed and proposed as a contention at the outset of this proceeding. The issuance of the DEIS does not give Intervenors a new opportunity to challenge the ER. Accordingly, Contention 22 is untimely.

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199 New Cont. at 36.

200 *See id*. at 36 ("not adequately addressed in the [ER] or in the DEIS"); 37 ("not addressed in the [ER] or the DEIS"); 38 ("no discussion the DEIS or in the ER . . . The DEIS and [ER] do not address . . ."); 41 ("nowhere in the [ER] or the DEIS").

201 *Cf. Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 579 (2006).

202 *See* New Cont. at 36, *citing* DEIS at 6-19 ("In its application . . ."); *id*. at 37, *citing* DEIS at 6-19 ("In its ER. . . "); *compare* DEIS 6-19 *to* ER 3-60 (noting in both instances the proposed fuel enrichment level and discussing the need for a full description and detailed analysis of transportation impacts under 10 C.F.R. § 51.52(a)).

Intervenors also describe interactions between Mr. Michael J. Keegan, Intervenor, and Mr. Jerry Hale, Project Manager at Fermi 3.[203] Mr. Keegan apparently requested data on the levels of fuel enrichment to be utilized at Fermi 3 and Mr. Hale referred him to the ESBWR Design Certification Document ("DCD").[204] Intervenors assert that a discussion of accidents related to positive void coefficients should have been included in the ER or DEIS. However, void coefficients were discussed in the ESBWR DCD, which was available at the time initial contentions were filed.[205] Commission regulations require contentions to be raised in a timely fashion.[206] The Intervenors do not show any "data or conclusions" in the DEIS that differ from those in the ER (or ESBWR DCD) regarding accidents, nor do they provide any independent data or expert analysis.[207] This aspect of Contention 22 is therefore also untimely.[208]

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203 New Cont. at 40-41.

204 *Id*. at 41.

205 *See, e.g.*, ESBWR DCD, Tier 2, at 3.1-7 (noting that the ESBWR maintains a negative core moderator void reactivity coefficient for all operating conditions, which provides an inherent negative feedback during power transients); *id*., at 4.3-1 (confirming that the moderator relativity coefficient is "negative" and meets General Design Criteria 11).

206 10 C.F.R. § 2.309(f)(2)(i)-(iii).

207 *Compare* DEIS at Section 5.11, *Environmental Impacts of Postulated Accidents*, *to* ER at Chapter 7, *Environmental Impacts of Postulated Accidents Involving Radioactive Materials*.

208 In the absence of good cause for late-filing, the Intervenors have not made the necessary showing on the other factors of 10 C.F.R. § 2.309(c)(1), as discussed in Section III above.

2. Admissibility

In proposed Contention 22, Intervenors express concern that the fuel shipped to and from the Fermi 3 plant will exceed the enrichment criteria used in 10 C.F.R. § 51.52.[209] The proposed contention is characterized as a contention of omission because, according to the Intervenors, the ER and the DEIS do not adequately address the transportation or potential accident impacts of these shipments.[210] Intervenors also argue that the ER and DEIS are incomplete because they do not discuss the potential of an accident scenario resulting from a positive void coefficient.[211] However, the proposed contention ignores the detailed information on fuel transportation and accident scenarios contained in the ER and the DEIS and, in any event, fails to demonstrate a genuine dispute with the DEIS on a material issue.

a. Transportation Impacts

First, the DEIS includes detailed information regarding transportation impacts, as required by 10 C.F.R. § 51.52(b).[212] Section 6.2.1 states:

> The NRC staff performed an independent analysis of the environmental impacts of transporting unirradiated (i.e., fresh) fuel to the Fermi site and alternative sites. Radiological impacts of normal operating conditions and transportation accidents as well as nonradiological impacts are discussed

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209 New Cont. at 36. Section 51.52 resolves, by rule, the impacts associated with transport of fuel enriched to less than 4%. For fuel enriched beyond 4%, the applicant must provide a separate analysis.

210 *Id.*

211 *Id*. at 41.

212 10 C.F.R. § 51.52(b) requires that, for reactor fuel with a uranium-235 enrichment exceeding 4%, an applicant must include in its ER a full description and detailed analysis of the environmental effects of transportation of fuel and wastes to and from the reactor, including values for the environmental impact under normal conditions of transport and for the environmental risks from accidents in transport. The statement shall indicate that the values determined by the analysis represent the contribution of such effects to the environmental costs of licensing the reactor.

> in this section. Radiological impacts on populations and [maximally exposed individuals] are presented.[213]

Although Intervenors allege that the use of fuel triggering the detailed analysis requirement of § 51.52 is "not addressed in the [ER] or the DEIS,"[214] they inexplicably cite to the very portion of the DEIS that recognizes the requirement and confirms that "a full description and detailed analysis of transportation impacts is required."[215] Detroit Edison met the requirements of § 51.52 in the ER by providing an analysis of these impacts.[216] And, the DEIS specifically addresses transport of ESBWR fuel both under normal conditions[217] and during an accident.[218]

The Intervenors have not specifically challenged the analysis provided in the DEIS; they merely allege an "escalated risk."[219] In support, Intervenors provide data on the ESBWR reactor's design.[220] But this data, which was taken directly from the ESBWR DCD, by itself does not demonstrate a dispute with the DEIS. And, the NRC Staff, having evaluated the information provided by Detroit Edison in the ER, determined that the "radiation doses from

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213 DEIS at 6-20.

214 New Cont. at 37.

215 *Id*. at 36, *citing* DEIS at 6-19.

216 *See* ER Section 3.8.1, *Transportation of Unirradiated Fuel*

217 DEIS at 6-20 to 6-26. Normal conditions include truck shipments, shipping mode and weight limits, and radiological doses to transport workers, the public, and maximally exposed individuals — that is, truck crew members, inspectors, residents, individuals stuck in traffic, and people at a truck service station. *Id*.

218 *Id*. at 6-26, 6-27. The evaluation includes both the radiological and non-radiological impacts of transportation accidents.

219 New Cont. at 38.

220 *Id*. at 37-40.

transporting unirradiated fuel to the Fermi site [] would still be small."[221] Intervenors point to no specific analysis that the DEIS lacks and identify no errors in the data or analysis performed in the DEIS. By failing to engage with the specific information available in the DEIS, the Intervenors have failed to demonstrate a genuine dispute on a material issue.

Considering the discussions of transportation impacts in the DEIS, proposed Contention 22 fails to satisfy the NRC's strict standards for admissibility. The Intervenors have not pointed to any particular impact that they allege to be inadequately analyzed in the DEIS nor have they pointed to any portion of the DEIS that allegedly lacks sufficient detail to permit them to comment. The Intervenors have proffered no tangible information, no experts, and no affidavits regarding transportation measures. Proposed Contention 22 lacks specificity and therefore cannot be admitted.

b. Accident Scenarios

The Intervenors also take issue with the DEIS's lack of discussion of "the potential of an accident scenario resulting from a 'Positive Void Coefficient.'"[222] According to Intervenors, the possibility of such an accident has been omitted from the NEPA process.[223]

As an initial matter, this part of the proposed Contention is a challenge to the ESBWR design, which is the subject of on ongoing Commission rulemaking. Challenges to current rulemakings are not permitted.[224] If Intervenors wish to challenge the design of the

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221 DEIS at 6-20.

222 New Cont. at 41.

223 *Id*.

224 *See e.g.*, *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345 (1999).

ESBWR they must do so in the context of the ESBWR rulemaking.[225] As such, the discussion of accidents in the ESBWR DCD is not within the scope of these proceedings.

Insofar as Contention 22 alleges a deficiency in the DEIS related to analysis of potential accidents, it lacks specificity and cannot be admitted. The Intervenors do not identify any analysis in the DEIS that is incorrect or any impacts that have not been considered. The Intervenors simply have not challenged the conclusions in the DEIS regarding design basis or severe accidents.[226] Because the Intervenors have not offered any expert analysis or factual information to call into question the DEIS analysis regarding potential accidents, this aspect of Contention 22 is inadmissible.

*I.* *Contention 23: The high-voltage transmission line portion of the project involves a lengthy corridor which is inadequately assessed and analyzed in the Draft Environmental Impact Statement.*

1. Timeliness

Contention 23 is untimely because it is based upon information previously available in the ER and is not based on new data or conclusions in the DEIS. Intervenors provide an extensive recitation of multiple aspects of the DEIS evaluation of transmission lines, including impacts to wetlands, vegetative cover, aquatic habitats, endangered species, historic districts, preconstruction activities, and cumulative impacts.[227] Despite the Intervenors' laundry list of concerns, proposed Contention 23 is untimely. The statements challenged by the

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225 The NRC is analyzing the environmental implications of the ESBWR design, including various design alternatives to prevent and mitigate severe accidents, in conjunction with the ESBWR design certification rulemaking. 76 Fed. Reg. at 16566.

226 *See* DEIS at Section 5.11, *Environmental Impacts of Postulated Accidents*.

227 *See* New Cont. at 43-52.

Intervenors do not involve data or conclusions that are new or materially different from those in the ER discussion of transmission-related impacts.

The ER addressed the same topics in the same manner as the DEIS. For example, Intervenors take issue with the fact that ITC*Transmission* has not yet chosen the exact route for the offsite transmission corridor.[228] But this information was clear in the ER, which explicitly notes that Detroit Edison "cannot reasonably provide transmission system detailed design information" because the evaluation and design of the transmission line is within the purview of ITC*Transmission*.[229] Because the proposed transmission line corridor will cross water, forests, grasslands and wetlands, Intervenors allege major impacts vegetative cover.[230] However the data on vegetative cover in the DEIS table cited by Intervenors is identical to the data presented in Table 4.3-4 in the ER.[231] Similarly, Intervenors take issue with the planned construction of the Fermi 3 switchyard in an existing prairie restoration area at the Fermi site.[232] Yet this exact location was identified for the switchyard in the ER.[233]

The overall conclusion of the DEIS that Intervenors are concerned with — that the impacts of the transmission line are small — also was reached previously in the ER.[234] Intervenors have provided no new data or analysis to dispute this conclusion or call into question

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228 *Id*. at 43.

229 *Compare* ER 3-57 *to* DEIS 2-10.

230 New Cont. at 44.

231 *Compare* DEIS Table 4-2 *to* ER Table 4.3-4.

232 New Cont. at 50, *citing* DEIS at 3-26.

233 *See* ER at 4-13 ("The Fermi 3 switchyard will be constructed in the prairie restoration area.").

234 *Compare* DEIS at 5-4 *to* ER Sections 5.6.1, 5.6.2, and 5.6.3.

the conclusion that was reached in both the ER and the DEIS. At bottom, the Intervenors' challenges could have and should have been made in response to the ER.[235] Because the focus of, and bases for, the proposed contention were identified in both the ER and the DEIS, the Intervenors' challenge is untimely.[236]

2. Admissibility

In Contention 23, the Intervenors argue that the "the discussion of the environmental impacts to the approximately 1,000 acres of transmission corridor is deficient in a host of ways."[237] They complain that the DEIS analysis is "not coherent" and is "vague and shallow."[238] The Intervenors assert that the DEIS conclusion that transmission related impacts "will be minimal or small is not credible."[239] As discussed below, this contention lacks adequate factual or expert support, and fails to demonstrate a genuine dispute with the DEIS on a material issue. The DEIS discusses transmission related impacts in detail and the Intervenors have pointed to no impacts that were overlooked or not considered in the DEIS.

First, some understanding of the role of Detroit Edison in transmission planning is necessary. Detroit Edison is not responsible for transmission of electricity generated at Fermi 3. Instead, ITC*Transmission* owns and operates the transmission system in southeastern Michigan.

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235 *See* 10 C.F.R. § 2.309(f)(2)(i)-(iii); *See Tennessee Valley Authority*, slip op. at 8; *Vt. Yankee*, LBP-06-14, 63 at 579-80 (rejecting attempt to "stretch the timeliness clock" because new contentions were based on information that was previously available and petitioners failed to identify precisely what information was "new" and "different").

236 In the absence of good cause for late-filing, the Intervenors have not made the necessary showing on the other factors of 10 C.F.R. § 2.309(c)(1), as discussed in Section III above.

237 New Cont. at 41.

238 *Id*. at 42.

239 *Id*.

The offsite portions of the proposed Fermi 3 transmission system and associated corridors would be owned and operated by ITC*Transmission*.[240] Detroit Edison has no control over the construction or operation of the transmission system and is not involved in the evaluation or decision making for proposed changes to or design of the transmission system.[241] But, regardless of which entity is ultimately responsible, the DEIS discusses all impacts from transmission-related activities, as required by NEPA.

The Intervenors argue that the DEIS contains an inadequate discussion of the interconnectedness of the corridor land uses with adjacent land uses and fails to discuss mitigation of transmission system impacts.[242] They posit a scenario whereby cutting down trees leads to increased evaporation which transforms a wetland into "at best intermittently mucky soil."[243] And, they argue that the DEIS must address whether wetland mitigation will be considered, "perhaps by creating wooded wetlands elsewhere."[244] But, contrary to the Intervenors' assertions, the DEIS discusses mitigation and other measures to reduce transmission-related impacts. Such measures include the following:

- Transmission operations would use best management practices ("BMPs") outlined in a soil erosion and sedimentation control ("SESC") plan or right-of-way ("ROW") maintenance manual used by Detroit Edison and/or the ITC*Transmission*.[245]

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240 DEIS at 3-19.

241 *Id*.

242 New Cont. at 42.

243 *Id*.

244 *Id*.

245 DEIS at 5-3.

- ITC*Transmission* would implement BMPs involving minimal use of maintenance vehicles and access roads to the extent possible and limit transmission line maintenance work during wet weather conditions.[246]

- Vegetation clearing would be limited to the minimum needed to allow access for maintenance vehicles and to prevent the growth of trees that could interfere with the operation of the lines.[247]

- Maintenance of the corridor would be conducted in accordance with ITC*Transmission*'s Transmission Vegetation Management Plan, which was developed in compliance with the North American Electric Reliability Council Reliability Standard FAC-003-1 – Transmission Vegetation Management Program.[248]

- Herbicides would be applied by licensed personnel in accordance with their labels, and only herbicides labeled for aquatic environments would be used in wetlands.[249]

- Where access is needed to sensitive areas along the corridor, such as wetlands, matting would be used to avoid soil disturbance and minimize damage to plants.[250]

- ITC*Transmission* is expected to conform to industry-standard BMPs that are protective of terrestrial resources and aquatic systems for transmission ROW maintenance.[251]

- ITC*Transmission* will design transmission lines to avoid wetlands or other water bodies to the maximum extent possible. Any unavoidable impacts would be subject to regulatory permit conditions.[252]

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246 *Id*. at 5-4.

247 *Id*.

248 *Id*. at 5-20.

249 *Id*. at 5-4.

250 *Id*. at 5-20.

251 *Id*. at 5-138, 5-139.

252 *Id*. at 5-139.

- ITC*Transmission* is expected to conform to regulatory requirements pertaining to historic and cultural resources that could be affected by transmission line operations.[253]

Moreover, because ITC*Transmission* is responsible for construction and operation of the transmission lines and because the final detailed design of the new transmission lines is not complete, development of specific mitigation measures is premature.[254] Nevertheless, because any mitigation measures will further reduce transmission impacts, the DEIS discussion of transmission impacts is bounding and provides sufficient information to aid the NRC and the public in evaluating transmission impacts.

To the extent that the Intervenors argue that the DEIS fails to cumulatively consider impacts along the transmission corridor,[255] the Intervenors fail to raise a dispute with the DEIS. The NRC specifically addressed transmission-related impacts in Chapter 7, *Cumulative Impacts*. For example, the DEIS considered cumulative impacts of transmission lines on land use,[256] wildlife and habitat,[257] climate change,[258] important species and habitats, including wetlands,[259] aquatic resources,[260] historic and cultural resources,[261] and non-

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253 *Id*. at 5-140.

254 As noted *supra* note 119, final detailed mitigation plans need not be in place prior to completion of the NEPA process. *Methow Valley*, 490 US at 352-353.

255 New Cont. at 42-43.

256 DEIS at 7-7.

257 *Id*. at 7-17.

258 *Id*. at 7-19.

259 *Id*. at 7-21.

260 *Id*. at 7-22.

261 *Id*. at 7-31.

radiological health impacts.[262] The Intervenors have not pointed to any cumulative impacts that were allegedly overlooked. Nor have they argued that the cumulative impacts in any resource area were understated. As a result, the Intervenors have failed to raise a genuine dispute with the DEIS and this aspect of Contention 21 should be denied.

The Intervenors also argue that "DTE should be made to disclose precisely where the transmission corridor will be" and assert that "the NRC cannot attempt to duck its responsibilities under NEPA" because the transmission corridor is "part and parcel of the Fermi 3 proposal under NEPA."[263] While the Intervenors are correct that the DEIS must (as it did) address transmission impacts in the DEIS, there is no requirement that the NRC specifically identify the transmission corridor used by an entity — in this case, ITC*Transmission* — that does not have an application pending before the NRC.[264] As noted above, ITC*Transmission*, not Detroit Edison, owns and operates the transmission system. The NRC Staff in the DEIS therefore relied upon the best available information, including information from ITC*Transmission*, in evaluating transmission impacts.[265] The Intervenors have not presented any legal basis for this aspect of the contention and it should be rejected.

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262 *Id*. at 7-37.

263 New Cont. at 44.

264 While the Intervenors argue that the DEIS "flirts with illegal segmentation" (New Cont. at 42), in fact the DEIS considers transmission-related impacts and the impacts of construction and operation of Fermi 3 in a single NEPA document. Segmentation embraces the situation where a Federal agency divides what would otherwise be regarded as a single, integrated Federal action into separate, smaller Federal actions, for the purpose of avoiding compliance with NEPA, or otherwise minimizing the apparent impact of the single, integrated Federal action. Because the NRC considered the activities at the Fermi site and those in the transmission corridor together, the DEIS eliminates any segmentation concerns.

265 The DEIS approach is consistent with NRC guidance on treatment of transmission impacts that are not within the control of the applicant. *See, e.g.*, NUREG-1555,

The Intervenors allege that "detail is missing from the DEIS" on permits required for transmission-related activities and note that "cultural significant sites could be bulldozed by DTE and ITC Transmission [sic] … without public or affected Native nations even knowing that culturally significant sites were at risk."[266] But, the NRC specifically notes that transmission activities are "outside the NRC's regulatory authority," and explains that "many [transmission activities] are within the regulatory authority of local, State, or other Federal agencies" and may require permits from USACE.[267] The DEIS also notes that "impacts on important species from development of the proposed transmission lines are expected to minimal, conditional upon ITC*Transmission* coordinating with the FWS, MDEQ, and MDNR and implementing any avoidance, minimization, or mitigation measures those agencies require to minimize impacts on Federal and State-listed species."[268] Thus, contrary to the Intervenors' assertions, the DEIS does discuss the need for additional permits and consultations as part of ITC*Transmission*'s transmission-related activities.

Finally, the Intervenors refer to Detroit Edison's past efforts to restore prairie on the Fermi site as "mere PR greenwashing" as reflected by Detroit Edison's "readiness to destroy restored prairie to build a switchyard for Fermi 3."[269] However, the plan to convert the prairie

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*Environmental Standard Review Plan for New Nuclear Plants*, at § 4.12, 5.12 ("In some cases transmission lines may be constructed and operated by an entity other than the applicant. In such cases, impact information may be limited and the reviewer should proceed with the assessment using the information that can be obtained.").

266 New Cont. at 51. As noted above, ITC*Transmission* has responsibility for offsite transmission system development. Any assertion that Detroit Edison could "bulldoze" culturally significant sites in the transmission corridor is misplaced.

267 DEIS at 1-6.

268 *Id*. at 4-42.

269 New Cont. at 50.

restoration area resulted from the need to minimize impacts on high-quality forested wetlands.[270] The Intervenors also assert that Detroit Edison must disclose why the prairie was preserved and restored.[271] According to the ER at 2-322, the prairie was planted in 2003 by Detroit Edison with the assistance of a North American Wetland Conservation Act grant managed by Ducks Unlimited and the Natural Resources Conservation Service. The USFWS, ITC*Transmission*, and Detroit Edison cooperatively funded the restoration of the prairie area from 2005 to 2006.[272] The information alleged by the Intervenors to be missing therefore was in fact available.

For all of the reasons discussed above, Contention 23 is inadmissible.

*J.* *Contention 24: The public health effects and impacts from routine, licensed radiological emissions in air and water from the proposed Fermi 3 have been inadequately assessed, analyzed and disclosed in the Draft Environmental Impact Statement, in violation of NEPA.*

1. Timeliness

Proposed Contention 24 is inadmissible because the information upon which it is based was available at the time of the initial Petition to Intervene. Contention 24 is not based on any new data or conclusions in the DEIS; the contention could have been filed in essentially the same form based on the ER. The contention therefore is untimely.

First, Intervenors assert that the DEIS assumes that the dissolved solids in the drift from the cooling towers is salt.[273] Intervenors challenge this assumption as not "a science-based analysis of the actual conditions."[274] However, the ER contained the same assumption.[275] Any

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270 DEIS at 5-23.

271 New Cont. at 50.

272 ER at 2-337.

273 New Cont. at 53, *citing* DEIS 5-18, 5-91 and 5-138.

274 *Id*.

challenge to assumptions regarding the content of dissolved solid drift from the Fermi 3 cooling towers should have been made based upon the ER.[276]

Contention 24 also relies on the Declaration of Joseph Mangano, Executive Director of the Radiation and Public Health Project ("Mangano Declaration"). The Mangano Declaration "provides a basic 'report card' of operations at Fermi 2 as a means to help evaluate safety and health issues posed by Fermi 3."[277] The Mangano Declaration relies upon data gathered from several sources, all of which were publicly available prior to issuance of the DEIS. The Mangano Declaration does not rely upon the DEIS in any way. Consolidating pre-existing data in a new declaration does not transform old information into new information.[278] In so far as Contention 24 is based upon previously available information regarding Fermi 2, it is untimely.

Finally, Contention 24 generally challenges the DEIS with respect to the environmental impacts of routine radiological releases from operation of a nuclear plant. Putting aside that releases during routine operations will be subject to regulatory limits, this broad challenge could have been made at the time of the Petition to Intervene. Accordingly, the contention is now untimely without good cause.[279]

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275 ER at 5-47 ("the solids deposition analysis conservatively assumed that all [total dissolved solids] was salt.").

276 In fact, one portion of proposed Contention 14, which was rejected by the Licensing Board, revolved around the chemical and biological content of the cooling tower drift. Pet. at 138-139.

277 Mangano Declaration at 3.

278 *See Tennessee Valley Authority*, slip op. at 8.

279 In the absence of good cause for late-filing, the Intervenors have not made the necessary showing on the other factors of 10 C.F.R. § 2.309(c)(1), as discussed in Section III above.

2. Admissibility

Proposed Contention 24 asserts that the DEIS fails to adequately address the public health effects and impacts from routine, licensed radiological emissions resulting from proposed Fermi 3.[280] The Intervenors cite the DEIS discussion of the chemical content of the drift from the Fermi 3 cooling towers and express general concerns regarding exposure to radiological emissions. As discussed below, the proposed contention is outside the scope of this proceeding and fails to raise a genuine dispute on a material issue of fact or law. Notwithstanding the NEPA context, the contention represents a generic challenge to NRC's regulations.

The Intervenors first assert that the DEIS fails to consider the impact of chemicals other than salt in the drift.[281] This aspect of proposed Contention 24 lacks both specificity and expert or evidentiary support. First, the DEIS includes considerable detailed information regarding cooling tower emissions.[282] On pages 5-90 the DEIS specifically addresses drift deposition "from dissolved salts and chemicals found in the cooling water."[283] The DEIS describes the process used by the applicant to estimate cooling system impacts.[284] This analysis relied upon five years (2003-2007) of onsite meteorological data, meteorological data from the Detroit Metropolitan Airport, and mixing height data from White Lake, Michigan.[285] The DEIS

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280 New Cont. at 52.

281 *Id*. at 53.

282 *See*, *e.g*., DEIS Sections 5.3.1.3, 5.5.2.3, and 5.7.1.

283 *Id*. at Section 5.7.1.

284 *Id*.

285 *Id*.

further reflects that site-specific, tower-specific, and circulating water-specific engineering data were used as inputs to the evaluation model.[286] As discussed in the DEIS, the analysis demonstrates that the "maximum impact levels are well below the levels considered acceptable in NUREG-1555."[287] And, as acknowledged by Intervenors, the DEIS discusses the current water quality in the Western Basin of Lake Erie.[288] The ER contains essentially the same analysis.[289] The basis for the proposed contention does not establish a genuine dispute with these conclusions.

The proposed contention also does not allege or provide a basis to establish any non-compliance with NRC requirements for radiological releases.[290] Intervenors instead provide their "own calculations and assessment of epidemiological consequences from the 25-year operation history of Fermi 2."[291] This information does not establish a dispute with respect to the environmental consequences of routine operations. Operations consistent with regulatory requirements must, presumptively, result in minimal environmental consequences — including radiological injuries. It is simply insufficient for a contention to be admitted based merely upon an assertion that the plant will harm the public due to "routine, licensed radiological emissions."[292] As the Commission has noted in other proceedings, "routine permissible releases

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286 *Id*.

287 *Id.* at 5-91.

288 New Cont. at 53, *citing* DEIS at 7-13.

289 *See* ER Section 5.3.3.1.

290 *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982).

291 New Cont. at 54.

292 *Id*. at 52.

occur virtually daily … and must remain within NRC-prescribed limits."[293] Regulatory limits on effluent concentrations "take into account the licensee's need to make frequent adjustments in releases, while still imposing absolute limits on both the rate of release and the dose to the nearest member of the public."[294] To the extent that the Intervenors are objecting to all permitted releases, then their claim amounts to an impermissible general attack on Commission regulations governing public doses at operating nuclear plants.[295] The contention must be viewed and rejected as an attack on the adequacy of the regulations themselves.[296] Accordingly, Contention 24 is beyond the scope of the proceeding and the Contention should be rejected.

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293 *Dominion Nuclear Connecticut* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 364 (2001).

294 *Id*.

295 *Id*. Petitioners "may not demand an adjudicatory hearing to attack generic NRC requirements or regulations, or to express generalized grievances about NRC policies." *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 334 (1999).

296 *See* 10 C.F.R. § 2.335(a); *Indian Point*, LBP-08-13, 68 NRC at 215-217 (denying a similar contention in a license renewal proceeding on the basis that it constituted an impermissible challenge to NRC regulations).

## VI. CONCLUSIONS

For all of the above reasons, the Intervenors' proposed new contentions are inadmissible and should be rejected.

Respectfully submitted,

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Dated at Washington, District of Columbia
this 6th day of February 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

| | | |
|---|---|---|
| In the Matter of: | ) | |
| | ) | |
| The Detroit Edison Company | ) | Docket No. 52-033-COL |
| | ) | |
| (Fermi Nuclear Power Plant, Unit 3) | ) | |

CERTIFICATE OF SERVICE

I hereby certify that copies of "APPLICANT'S ANSWER TO PROPOSED NEW CONTENTIONS" in the above captioned proceeding have been served upon the following persons by Electronic Information Exchange.

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Dated at Washington, District of Columbia
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