

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))	

APPLICANT’S MOTION FOR LEAVE TO FILE A REPLY ON CONTENTION 6

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(a), The Detroit Edison Company (“Detroit Edison”) files this motion for leave to file a reply to “Intervenors’ Response in Opposition to Applicant’s Motion for Summary Disposition of Contention 6,” dated May 17, 2012 (“Response in Opposition”).¹ In their response, the Intervenors introduce new bases and supporting material that were not included in Contention 6 as originally filed. Because Detroit Edison has not yet had an opportunity to respond to this new material, Detroit Edison requests leave to file a reply for the narrow purpose of responding to the new issues raised by the Intervenors for the first time in their Response in Opposition.² For the sake of efficiency and the convenience of the

¹ Detroit Edison has consulted with the Intervenors and the NRC Staff prior to filing this motion, as required by 10 C.F.R. § 2.323(b). The NRC Staff and the Intervenors have no objection.

² As the Board noted previously, a motion for leave to reply is an appropriate procedural vehicle for addressing new information and arguments raised for the first time in a response to a summary disposition motion. *See* LBP-11-14, “Memorandum and Order Denying Summary Disposition of Contentions 6 and 8; Denying in Part and Granting in Part Motion to Strike,” 22 at n. 108 (May 20, 2010), *citing Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-08-3, 67 NRC 85, 97-103 (2008); *see also Duke Cogema Stone & Webster* (Savannah River Mixed Oxide fuel Fabrication Facility), LBP-05-4, 61 NRC 71, 78 (2005) (request to file reply to summary disposition

Licensing Board and parties, the reply identifying the new bases and responding to those new bases is attached to this motion.

DISCUSSION

While there is normally no right to a reply to a response to a motion for summary disposition, permission to reply may be granted where “the moving party demonstrates that it could not have reasonably anticipated the arguments to which it seeks leave to reply.”³ Here, Detroit Edison requests leave to file a reply because it could not have anticipated that Intervenor’s Response in Opposition would raise issues and rely on materials not previously identified in this proceeding and that are otherwise outside the scope of the contention.

As summarized and admitted by the Board, Contention 6 alleges that the chemical impacts from Fermi 3 effluent discharges would contribute to increasing algal blooms in Lake Erie.⁴ Specifically, Contention 6 focused on a new nuisance algae in Lake Erie, *Lyngbya wollei*.⁵ Contention 6 seeks assessment of the algal bloom potential as a result of the proposed chemical discharge (e.g., phosphorus and calcium) combined with thermal pollution expected during operation of Fermi 3.⁶

answer was granted where Applicant alleged that the Intervenor’s answer made statements that mischaracterized the MOX facility’s seismic design).

³ 10 C.F.R. § 2.323(c); see *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-89, 16 NRC 1355, 1357 (1982) (“If an intervenor must make new factual or legal arguments in a reply, it should clearly identify the new material and explain why it did not anticipate the need for the material in the initial filing. If the explanation is satisfactory, the new material may be considered, but the other parties should be permitted to respond.”).

⁴ LBP-09-16 at 51.

⁵ *Id.*

⁶ *Id.*

However, in their Response in Opposition, the Intervenors introduce a number of new issues that were not included in Contention 6, as admitted, or addressed in Detroit Edison's Motion for Summary Disposition. For example, the Intervenors raise, for the first time, an issue related to the relative distribution of zebra and quagga mussels in Lake Erie and their influence on algae.⁷ And, while Contention 6 was focused exclusively on Fermi 3 effluent discharges (via the discharge point in Lake Erie), the Intervenors are now making, for the first time, arguments regarding the potential impacts of runoff from construction.⁸ Because Intervenors have now introduced new arguments — on topics that are far afield from the bases for the Intervenors' original contention — and because Detroit Edison could not have reasonably anticipated these arguments, there is good cause for granting leave for Detroit Edison to file a reply.

CONCLUSION

For the above reasons, Detroit Edison respectfully requests that the Board grant this motion and allow a reply.

⁷ Response in Opposition at 5-7; Statement of Facts at ¶¶6-7.

⁸ Response in Opposition at 4; Statement of Facts at ¶3.

Respectfully submitted,

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May 24, 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))

REPLY TO RESPONSE IN OPPOSITION
TO SUMMARY DISPOSITION OF CONTENTION 6

INTRODUCTION

The Detroit Edison Company (“Detroit Edison”) hereby submits this reply to “Intervenors’ Response in Opposition to Applicant’s Motion for Summary Disposition of Contention 6,” dated May 17, 2012 (“Response in Opposition”). As described below, the Intervenors’ response includes new arguments and supporting materials that were not part of Contention 6 as originally filed. These arguments are outside the scope of Contention 6 and, in any event, fail to demonstrate a genuine dispute with the Fermi 3 Draft Environmental Impact Statement (“DEIS”). The Board should grant summary disposition on Contention 6.

DISCUSSION

A. Intervenors’ Response in Opposition Raises Issues Outside the Scope of Contention 6

In their Response in Opposition, Intervenors impermissibly attempt to expand the scope of Contention 6 by providing new bases and new supporting material — without addressing the criteria for late-filed or amended contentions and without demonstrating that the new issues are within the scope of the proceeding as currently defined by the admitted Contention 6. Intervenors may not now introduce new bases that were not raised in their original

contention in response to a motion for summary disposition. Longstanding NRC practice requires adjudicatory boards to adhere to the terms of admitted contentions.⁹ In particular, “[w]here an issue arises over the scope of an admitted contention, NRC opinions have long referred back to the bases set forth in support of the contention.”¹⁰ Contention 6, as admitted, challenges the analysis of the potential contribution of chemical and thermal effluent from the proposed Fermi Unit 3 discharge point to algal production in Lake Erie.¹¹ Contention 6 raises two discrete issues: (1) the adequacy of analysis in the DEIS regarding the potential for Fermi Unit 3 effluent to increase the risk of algal blooms, particularly *Lyngbya wollei*, in the western Lake Erie basin; and (2) the failure to discuss the proliferation of *Lyngbya wollei* in Lake Erie.¹²

But, in the Response in Opposition, the Intervenors raise issues previously rejected by the Board as well as a number of new issues. For example, the Intervenors attempt to link the effects of global warming to algae impacts.¹³ But global warming was never part of Contention 6, as admitted. In fact, the Intervenors’ arguments regarding the effects of global warming on Lake Erie was specifically rejected by the Board.¹⁴ The Board also rejected the

⁹ *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 105 (1998) (citation omitted).

¹⁰ *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002) (citation omitted).

¹¹ LBP-09-16, 70 NRC at 280.

¹² The Intervenors appear to no longer dispute the adequacy of the description of the distribution of *Lyngbya wollei* in Lake Erie. This issue is not discussed further.

¹³ *See* Response in Opposition at 5-7; Statement of Material Facts at ¶¶6, 9.

¹⁴ *See* LBP-09-16, 70 NRC at 54-55 (finding that Intervenors failed “to acknowledge that the ER included [analyses for a range in water levels extending beyond that possible due to climate variability] in its ER and to challenge those analyses through alleged facts or expert opinion.”).

Intervenors' argument on cumulative impacts from Fermi 3 discharges, which is the same as Intervenors' argument related to "multi-variate" analyses.¹⁵ Likewise, the Intervenors never before raised an issue regarding the potential effects of runoff from excavation at the Fermi site or the effects of agricultural runoff within the Lake Erie watershed. Contention 6 was focused exclusively on discharges from the Fermi 3 discharge point in Lake Erie. The effects (and distribution) of zebra and quagga mussels on algal blooms is also an entirely new issue. Contention 6 only involved the impacts of Fermi 3 discharges on algae — not the potential impacts of invasive mussels on algae. And, the relative distribution of mussels in Lake Erie has nothing to do with the effects of Fermi 3 discharges on nuisance algae.

An answer to a motion for summary disposition is not an opportunity for the Intervenors to raise new issues that they failed to voice at the outset of the proceeding. As the Commission has explained, a party is not allowed to amend or supplement its contention in an answer to a motion for summary disposition. Otherwise, there would be no end to NRC licensing proceedings if petitioners could disregard the NRC's timeliness requirements every time they "realize[d] . . . that maybe there was something after all to a challenge it either originally opted not to make or which simply did not occur to it at the outset."¹⁶ If the Intervenors wish to litigate new issues not encompassed by Contention 6, they should either

¹⁵ See *id.* at 55-56 (rejecting portion of Contention that dealt with potential cumulative impacts); Response in Opposition at 5, 7 (referring to Fermi 3 as a "cumulative" contributor).

¹⁶ *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 428-29 (2003).

move to amend the existing contention or file a new one.¹⁷ Accordingly, the Board should disregard the portions of the Response in Opposition identified below:

Response in Opposition at 4 Disregard: “The construction phase of Fermi 3 will also cause calcium runoff from the excavations for structural foundations, because the shallow bedrock in the vicinity is limestone, which contains calcium.”

Response in Opposition at 5 Disregard: “DTE’s analysis is not authoritative, because it is not multi-variate, *i.e.*, DTE fails to account for Fermi 3’s anticipated thermal pollution to Lake Erie plus the effects of possibly increased use of agricultural chemicals in the Lake Erie basin plus global warming plus the boost to *lyngba wollei* and *cladophora* that has been identified from zebra and quagga mussel wastes.”

Response in Opposition at 5 Disregard: “Recent scientific observation of two common mussels in Lake Erie reveals that they enrich the water habitat for benthic algae and promote algae’s growth and productivity, aiding in blooms and creating a greater food quality for grazers. Statement of Facts ¶ 6. DTE’s own expert admits the significant presence of *Lyngbya* and other algae in the vicinity of concentrations of freshwater mussels.”

Response in Opposition at 5-6 Disregard: “DTE’s conclusory assertion (DEIS Vol. I, p. 563) that ‘None of these [quagga and zebra mussels] species are considered abundant in the vicinity of the Fermi site’ is belied by other statements appearing in the DEIS. At Vol. II, p. 204, zebra mussels are noted to have ‘substantially changed the ecosystem characteristics of Lake Huron by increasing benthic productivity, reducing plankton and planktivorous fish abundance, and altering the substrate available to demersal organisms.’ Lake Huron is north, and upstream, of the Fermi site. And, ‘[t]he ecology of Lake Erie has been dramatically altered by the introduction of *dreissenid* mussels, with quagga mussels dominating the eastern basin and zebra mussels dominating the western basin of Lake Erie (Benson *et al.* 2011).’ DEIS Vol. II, p. 252. Statement of Facts ¶ 7. Perhaps by miracle, the Fermi site has been spared the scourge of invasive mussel species in all of the Great Lakes. One would have expected that more scientific research might have been directed at understanding such providence.”

Response in Opposition at 6 Disregard: “Most global circulation models predict that reductions in precipitation from global warming, an increase in evaporation, and less ice cover will lead to lower Lake Erie water levels.”

¹⁷ LBP-11-14 at 24. Any new or amended contention must meet the Commission’s requirements for both timeliness and admissibility. *Id.*

Response in Opposition at 7 Disregard: “DTE has employed a simplistic approach to analysis of the probable effects of thermal pollution on algal growth (not to mention mussel habitat) in Lake Erie which tends to view Fermi 3’s discharge as a sole source instead of as a cumulative contributor. Without producing data, Applicant assumes less-nutrient-laden water flowing past the plant site from the north despite the reality that nonnative mussel populations enhance the water richness north of the plant to sustain or expand algal development.”

Response in Opposition at 7 Disregard: “Too, DTE fails to provide evidence (as opposed to conclusory statements) that other water uses, such as agricultural drainage from points north and west in the Great Lakes Basin, are inconsiderable factors in its conclusion of no effects from a new Fermi 3.”

Response in Opposition at 7-8 Disregard: “Nor does Applicant seriously consider the effects of global warming and its potential for evaporation in the Lake Erie Western Basin, which will leave the Lake even shallower than its present average 24 foot depth in the Basin. DTE predicates the supposedly *de minimis* effects of thermal pollution on the perspective that the entire year in southeastern Michigan is a hot summer day. As all large-scale thermal emitters into shallow waters, Fermi 3 will create microclimate change. Given the lack of consideration of - or admission of the existence of - macroclimatic change in a multi-variate analysis, DTE’s conclusions do not easily follow.”

In addition and for the same reasons, the Board should disregard in their entirety paragraphs 3, 6, 7, 8, and 9 of the Intervenors’ “Statement of Facts Demonstrating Issues of Material Fact in Support of Intervenors’ Opposition to DTE’s ‘Motion for Summary Disposition of Contention 6.’”

B. The New Issues Fail to Demonstrate a Genuine Dispute with the DEIS

In addition to being outside the scope of Contention 6, the new issues raised by the Intervenors in their response fail to create a genuine dispute with the DEIS. The Intervenors baldly assert that construction of Fermi 3 will cause calcium runoff from the excavations for structural foundations because the shallow bedrock in the vicinity is limestone (which contains calcium).¹⁸ But, the Intervenors do not include a statement from any technical expert or point to other information showing that there will actually be any runoff from the excavation, increased

¹⁸ Response in Opposition at 4.

calcium loading to Lake Erie from such runoff, or any impact on algae in Lake Erie from that runoff. To avoid summary disposition, the Intervenor must “counter each adequately supported material fact with its own statement of material facts in dispute and supporting documentation” and cannot rely on “mere allegations or denials.”¹⁹ A conclusory statement by counsel in a legal pleading is inadequate to establish a genuine dispute at the summary disposition stage.

A similar deficiency exists with respect to the Intervenor arguments regarding the impacts of zebra and quagga mussels on Lake Erie. The Intervenor argue that these two types of mussels “enrich the water habitat for benthic algae and promote algae’s growth and productivity, aiding in blooms and creating a greater food quality for grazers.”²⁰ But, the Intervenor provide no link between the mussels and Fermi 3 discharges. There is no expert or factual support to demonstrate that Fermi 3 has any impact on mussel growth or that the effects of Fermi 3 discharges are influenced by these mussels.

Intervenor also challenge the DEIS on the basis that it fails to “seriously consider the effects of global warming.”²¹ But Intervenor do not point to any information in the DEIS that is incorrect or inaccurate. And, the Intervenor do not demonstrate that any conclusions would be affected by consideration of global warming. The point is merely speculation. Unsupported and inadequately probative evidence is insufficient to defeat a motion for summary disposition.²²

¹⁹ *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 754 (1977).

²⁰ Response in Opposition at 5.

²¹ *Id.* at 7.

²² *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 297 (2010).

Intervenors also aver that “DTE fails to provide evidence (as opposed to conclusory statements) that other water use, such as agricultural drainage from points north and west in the Great Lakes Basin, are inconsiderable factors in its conclusion of no effects from Fermi 3.”²³ Setting aside that the NRC Staff (not Detroit Edison) authored the DEIS, the DEIS conclusions were specifically based on reviews of historic water quality data for Maumee Bay and in Lake Erie near the Fermi site.²⁴ The DEIS acknowledges that algal blooms in the Maumee Bay area are “primarily attributed to increased nutrient loading due to agricultural runoff and urbanization” and that the “principal limiting nutrient responsible for controlling algal blooms in Lake Erie is phosphorus.”²⁵ And, as the Intervenors note, Detroit Edison will not use phosphorus-containing corrosion and scale inhibitors for Fermi 3.²⁶ Contrary to Intervenors’ assertion, the DEIS acknowledges the impacts of agricultural drainage on Lake Erie and recognizes that Detroit Edison has taken concrete steps to ensure that operation of Fermi 3 will not further contribute to those impacts.

At bottom, the new issues raised by the Response in Opposition fail to establish a material dispute with the information presented in the DEIS. Intervenors have presented no expert or factual information to call into question the reasonableness of the NRC Staff’s conclusions in the DEIS.

²³ Response in Opposition at 7. The Intervenors reference to “conclusory statements” is unclear. The information in the DEIS is based on information, including water quality data from locations in Lake Erie, collected by the NRC during its review.

²⁴ DEIS at 5-52.

²⁵ *Id.* at 5-51.

²⁶ *Id.* at 5-52; Response in Opposition at 3.

CONCLUSION

For the foregoing reasons, the Licensing Board should grant the motion for summary disposition and resolve summary disposition in favor of Detroit Edison and the NRC Staff.

Respectfully submitted,

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Dated at Washington, District of Columbia
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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 MOTION FOR LEAVE TO FILE A REPLY ON CONTENTION 6” and “REPLY TO RESPONSE IN OPPOSITION TO SUMMARY DISPOSITION OF CONTENTION 6” in the captioned proceeding have been served via the Electronic Information Exchange (“EIE”) this 24th day of May 2012, which to the best of my knowledge resulted in transmittal of the foregoing to the following persons.

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