LBP-12-12

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ronald M. Spritzer, Chairman
Dr. Anthony J. Baratta
Dr. Randall J. Charbeneau

In the Matter of	Docket No. 52-033-COL
DETROIT EDISON COMPANY	ASLBP No. 09-880-05-COL-BD01
(Fermi Nuclear Power Plant, Unit 3)	June 21, 2012

MEMORANDUM AND ORDER
(Ruling on Motion for Leave to Late-file Amended and New Contentions and Motion to Admit New Contentions)

Before this Licensing Board are (1) a motion for leave to file amended and new contentions fifteen days after the deadline provided in our scheduling order ("Motion for Leave"); and (2) a motion to admit those contentions ("Motion to Admit"), both submitted by Intervenors[1] on January 11, 2012.[2] We grant Intervenors' Motion for Leave. We deny the Motion to Admit, except that we reserve ruling on two specific aspects of proposed Contentions 20 and 21 that

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

[2] Motion for Leave to Late-File Amended and New Contentions (Jan. 11, 2012); Motion for Resubmission of Contention 10, to Amend/Resubmit Contention 13, and for Submission of New Contentions 17 through 24 (Jan. 11, 2012).

are related to the pending motions for summary disposition of previously admitted Contentions 6 and 8.[3]

I. Background

This combined license (COL) contested proceeding involves the application of Detroit Edison Company (Applicant) under 10 C.F.R. Part 52, Subpart C, to construct and to operate a GE-Hitachi Economic Simplified Boiling Water Reactor (ESBWR), designated Unit 3, on its existing Fermi nuclear facility site near Newport City in Monroe County, Michigan.
On March 9, 2009, Intervenors submitted a petition to intervene that included 14 proposed contentions.[4] We ruled that Intervenors have standing and admitted four of their contentions.[5] We subsequently admitted one additional contention[6] and granted motions for summary disposition with respect to two of the original contentions.[7] Thus, three contentions remain pending in this proceeding.

On January 11, 2012, Intervenors filed the motions now before the Board, seeking to admit two re-filed contentions and eight new contentions. On February 6, the NRC Staff and

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[3] See pages 31-32 and 35-36, infra.

[4] Petition of Beyond Nuclear [et al.] for Leave to Intervene in Combined Operating License Proceedings and Request for Adjudication Hearing (Mar. 9, 2009) [hereinafter "Petition"].

[5] See LBP-09-16, 70 NRC 227, 306, aff'd, CLI-09-22, 70 NRC 932 (2009).

[6] See LBP-10-09, 71 NRC 493, 522 (2010).

[7] See Board Order (Granting Motion for Summary Disposition of Contention 3) (Jul. 9, 2010) (unpublished); Board Order (Granting Motion for Summary Disposition of Contention 5) (Mar. 1, 2011) (unpublished).

Applicant filed answers opposing admission of all ten contentions.[8] Intervenors filed their reply on February 13.[9] On February 17, Applicant filed its Motion for Leave to File Surreply and Surreply.[10]

II. Board Ruling on Intervenors' Motion for Leave

Intervenor's Motion for Leave asks that we consider the Motion to Admit even though it was filed fifteen days after the deadline specified in our scheduling order for motions to admit proposed new or amended contentions based on the Draft Environmental Impact Statement (DEIS). We grant the Motion for Leave.

Under 10 C.F.R. § 2.309(f)(2), new or amended contentions may be filed after the deadline for requests for hearing and petitions to intervene if they satisfy the following requirements:

> (i) The information upon which the amended or new contention is based was not previously available;
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> (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
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> (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

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[8] NRC Staff Answer to Intervenors' Motion for Resubmission of Contention 10, to Amend/Resubmit Contention 13, and for Submission of New Contentions 17 through 24 (Feb. 6, 2012) [hereinafter "NRC Staff Answer"]; Applicant's Answer to Proposed New Contentions (Feb. 6, 2012) [hereinafter "Applicant Answer"].

[9] Reply in Support of 'Motion for Resubmission of Contention 10, to Amend/Resubmit Contention 13, and for Submission of New Contentions 17 through 24' (Feb. 13, 2012) [hereinafter "Reply"].

[10] Applicant's Motion for Leave to File Surreply and Surreply (February 17, 2012). We find it unnecessary to consider the Surreply, and we therefore deny the Applicant's Motion for Leave to File Surreply as moot.

If a new or amended contention is deemed untimely under Section 2.309(f)(2)(iii), it will be evaluated under 10 C.F.R. § 2.309(c)(1), which provides that a Board presented with a nontimely contention shall balance eight factors to determine whether to admit the contention.[11]

The Motion for Leave concerns the third requirement for filing a new or amended contention: that the contention be "submitted in a timely fashion based on the availability of the subsequent information."[12] The regulations do not define "timely fashion." In order to provide guidance to the parties, the Board stated in its Initial Scheduling Order 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 under 10 C.F.R. § 2.309(f)(2)(iii) if it is filed within sixty (60) days of the date when the document containing the new and material

[11] The eight factors are:

(i) Good cause, if any, for failure to file on time;

(ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;

(iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;

(iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;

(v) The availability of other means whereby the requestor's/petitioner's interest will be protected;

(vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;

(vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and

(viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

[12] 10 C.F.R. § 2.309(f)(2)(iii).

information first becomes available."[13] Thus, a motion to admit new contentions based on the DEIS would be considered timely if filed within 60 days of the publication of the DEIS.

A notice of the availability of the DEIS was published in the Federal Register on October 28, 2011.[14] Therefore, any contentions based on the DEIS should have been filed by December 27, 2011 in order to be deemed timely under Section 2.309(f)(2)(iii). The Motion to Admit was filed on January 11, 2012, fifteen days after the deadline. Intervenors concede that their Motion to Admit is not timely.[15] We therefore proceed to the Section 2.309(c)(1) balancing test.

The Commission has held that good cause is the most important factor under Section 2.309(c)(1), and that absent good cause, a "compelling" showing must be made with regard to the other seven factors.[16] Intervenors attempt to demonstrate good cause for their late filing by arguing that their counsel "was preoccupied throughout the month of December with major filings in three other unrelated legal matters, two of which were due the week of December 27, 2011."[17] A delay caused by the schedule of counsel in other matters can support a finding of good cause.[18] On the other hand, our scheduling order allowed the Intervenors 60 days to

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[13] Board Order (Establishing Schedule and Procedures to Govern Further Proceedings) (Sept. 11, 2009) at 2 (unpublished) [hereinafter "ISO"].

[14] See Notice of Availability of Draft Environmental Impact Statement for a Combined License for Unit 3 at the Enrico Fermi Atomic Power Plant Site, 76 Fed. Reg. 66,998 (Oct. 28, 2011) [hereinafter "FR Notice"]; see also Office of New Reactors, Draft Environmental Impact Statement for Combined License (COL) for Enrico Fermi Unit 3, NUREG-2105 Vols. 1 & 2 (Oct. 2011) (ADAMS Accession Nos. ML11287A108 & ML11287A109) [hereinafter "DEIS"].

[15] See Motion for Leave at 1-2.

[16] See, e.g., Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-12-10, 75 NRC __, __ (slip op. at 17 n.69) (Mar. 30, 2012).

[17] Motion for Leave at 1.

[18] See Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-00-19, 52 NRC 85, 92 (2000). It is true that the Commission has held in another context that parties' other professional obligations do not relieve them of their obligations to meet mandatory deadlines.

prepare new contentions based on the DEIS, and counsel's other obligations during December only partially explain why it was not possible to meet our deadline by working on the new contentions before other deadlines became imminent. Counsel for Intervenors admits that he "did not consult the scheduling order, and (incorrectly) remembered the term for raising new contentions."[19] It thus appears that Intervenors' failure to meet the deadline was at least partly due to their counsel's misunderstanding of the deadline for filing amended or new contentions based on the availability of the DEIS. Not surprisingly, the failure to review the scheduling order does not constitute good cause for failure to meet a filing deadline.[20] We therefore conclude that Intervenors have made only a partial showing of good cause for their late filing. However, Section 2.309(c)(1) provides for a balancing test, so we must also consider the seven remaining factors.[21]

See Tenn. Valley Authority (Bellefonte Nuclear Plants, Units 1 and 2), CLI-10-26, 72 NRC 474, 476 (2010) (". . . Petitioners' argument that their counsel was busy on other legal matters disregards our longstanding policy that 'the fact that a party may have . . . other obligations . . . does not relieve that party of its hearing obligations.'" (quoting Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981))). In that case, however, the Commission was not addressing the "good cause" requirement of Section 2.309(c)(1), but rather the 10-day deadline for filing appeals, which the Commission enforces "strictly" and excuses only in "'unavoidable and extreme circumstances.'" Id. (quoting Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 21 (1998). In this case, we are not required to find "unavoidable and extreme circumstances," but only "good cause" for the 15-day delay in filing the Motion to Amend. The obligations of counsel in other cases may be part of the good cause showing, although it is preferable to request an extension of time rather than rely on an after-the-fact showing of good cause.

[19] Motion for Leave at 2.

[20] See Fla. Power & Light Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-06-21, 64 NRC 30, 33 (2006).

[21] Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), ALAB-292, 2 NRC 631 (1975) (Even if a petitioner fails to establish good cause for the untimely petition, the other factors must be examined).

Factors (ii), (iii), and (iv) restate the Commission's requirements for standing that are found at 10 C.F.R. § 2.309(d)(1).[22] We have already ruled that Intervenors have standing based upon their proximity to the proposed Fermi Unit 3, admitted four of their contentions, and granted their request for a hearing.[23] They have therefore established their right to be parties to the proceeding.[24] The nature of their interest in the proceeding is based upon the fact that members of the Intervenor organizations reside, work, or recreate within fifty miles of the proposed nuclear power plant.[25] Intervenors' proposed new contentions are based upon the National Environmental Policy Act (NEPA),[26] which is intended to require federal agencies to consider the environmental consequences of their actions and to foster informed public participation in the decision making process.[27] By seeking to enforce the NRC's NEPA obligations, Intervenors seek to require the agency to more fully consider the environmental consequences of its proposed action and to provide the public, including Intervenors' members, with accurate and complete information concerning the environmental consequences of the proposed action and alternatives to that action. Thus, any order that may be entered in this proceeding on NEPA issues may affect the Intervenors' ability to protect the interests of their members.[28] We therefore conclude that factors (ii), (iii), and (iv) weigh in Intervenors' favor.

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[22] Compare 10 C.F.R. § 2.309(c)(1)(ii)-(iv) with 10 C.F.R. § 2.309(d)(1)(ii)-(iv).

[23] LBP-09-16, 70 NRC at 227.

[24] 10 C.F.R. § 2.309(c)(1)(ii).

[25] LBP-09-16, 70 NRC at 242.

[26] 42 U.S.C. §§ 4321 et seq.

[27] See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349–350 (1989).

[28] 10 C.F.R. § 2.309(c)(1)(iv).

Factor (v) is "the availability of other means whereby the requestor's/petitioner's interest will be protected."[29] As with any other member of the public, Intervenors were free to provide comments on the DEIS.[30] While we fully recognize that the commenting process is vital to NRC proceedings and the administrative process more broadly, a public adjudicatory hearing provides more complete protection of an intervenor's interests. This factor weighs in favor of the Intervenors because they have no other means of obtaining the same level of protection of their interests that a public hearing provides.

Factor (vi) is "the extent to which the requestor's/petitioner's interests will be represented by existing parties."[31] As Intervenors are the only parties who have intervened in this proceeding, no other party will represent their interests. Thus, this factor weighs in favor of the Intervenors.

Factor (vii) is "the extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding."[32] Because three contentions are already set for hearing in this proceeding, the admission of further contentions would not substantially delay the proceeding. And, because two of the previously admitted contentions allege NEPA violations, the new NEPA contentions put forward by the Intervenors would not unreasonably broaden the issues. Therefore, this factor weighs in favor of the Intervenors.

Factor (viii) is "the extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record."[33] Intervenors have submitted

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[29] 10 C.F.R. § 2.309(c)(1)(v).

[30] See FR Notice at 66,999.

[31] 10 C.F.R. § 2.309(c)(1)(vi).

[32] Id. § 2.309(c)(1)(vii).

[33] Id. § 2.309(c)(1)(viii).

affidavits and other information in support of their proposed new contentions, which suggests that, if the new contentions were admitted, Intervenors would be capable of assisting in the development of a sound record concerning those issues. Therefore, this final factor weighs in favor of the Intervenors as well.

While the Intervenors have made only a partial showing of good cause for their late filing, the remaining seven factors strongly weigh in their favor. Because Section 2.309(c)(1) provides for a balancing test, and because Intervenors' delay was only 15 days and will not cause any significant delay in concluding this adjudication, we will consider Intervenors' Motion to Amend, despite its lateness.

We note, however, that this ruling resolves only one aspect of the timeliness dispute. In addition to opposing the Motion for Leave, Applicant and the NRC Staff also argue that, although the proposed new contentions are purportedly based on new information in the DEIS, the same or substantially similar information was presented in other previously available documents, including the Applicant's Environmental Report (ER).

As a general rule, Intervenors must file their NEPA contentions based on the ER.[34] Thus, a contention submitted for the first time after the DEIS is issued will be deemed untimely. But there are exceptions to this rule. A petitioner "may amend [NEPA] contentions or file new [NEPA] contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's documents."[35] Alternatively, the Intervenors may file new or amended contentions in response to the DEIS if they can satisfy the

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[34] 10 C.F.R. § 2.309(f)(2).

[35] Id.

test of Section 2.309(f)(2)(i)-(iii).[36] Thus, a new or amended contention may be filed based upon the DEIS if it is based upon new and materially different information, whether contained in the DEIS itself or some other source, and if it is filed in a timely manner once the new information becomes available (or any delay is excused pursuant to Section 2.309(c)(1)).

By granting the Motion for Leave, we have resolved only the question whether the 15-day delay in filing the proposed new and amended contentions should be excused. Given the other timeliness objections of the Applicant and the NRC Staff, we must also determine whether the new contentions are based upon either (1) data or conclusions in the DEIS that differ significantly from data or conclusions in the ER; or (2) information that is new and materially different from that previously available. We consider these separate timeliness issues below in our rulings on the specific contentions.

III. Board Ruling on the Motion to Admit

A. Contention 10

Proposed Contention 10 reads as follows:

> The Walpole Island First Nation [WIFN] 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.[37]

On first examination, Contention 10 fails to present an issue for litigation. It merely predicts that at some future date the WIFN might petition to intervene in this adjudication. Such a contention fails to identify any dispute with the license application or the DEIS, and thus fails to satisfy the requirement of 10 C.F.R. § 2.309(f)(1)(vi). Licensing boards do not conduct evidentiary hearings to decide whether a future petition to intervene will be filed as predicted.

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[36] Id.; see page 3, supra.

[37] Motion to Admit at 5.

In their argument in support of the contention, however, Intervenors allege that "[t]here has been no formal notification given the [WIFN] by the NRC Staff of the pendency of these proceedings, nor the right to comment or otherwise participate as an intervenor."[38] The Intervenors further allege that the "NRC has legal obligations under the National Environmental Policy Act (NEPA) to notify affected Native American tribes of pending significant proposals and actions, such as the Fermi 3 new reactor environmental and licensing proceedings. NRC is required under NEPA to interact with Native American tribes in a sovereign-government-to-sovereign-government manner." Intervenors claim that this lack of notification violates 10 C.F.R. § 51.28(a)(5).[39] This argument alleges, in substance, that the DEIS was issued in violation of NEPA requirements intended to ensure tribal participation in the NEPA process.[40]

We will evaluate the timeliness and admissibility of the contention on that basis.

1. Timeliness

Intervenors submitted an earlier version of this contention in their initial petition to intervene.[41] This Board did not rule on the admissibility of that contention because the Intervenors withdrew it during the oral argument held on May 5, 2009.[42] Intervenors note that

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[38] Id.

[39] Id. at 7-8.

[40] Although it might be fatal for standing purposes if the WIFN were seeking to have Intervenors represent their interests in this proceeding, see Fla. Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989), Intervenors' lack of authority to represent the WIFN is not a bar to Intervenors raising this contention. By reason of their own standing in this proceeding, Intervenors may assert any violation of law that would lead to a redress of their injuries, including their interests in seeing that the NEPA process is properly carried out or in preventing or delaying issuance of the requested COL. See LBP-09-16, 70 NRC at 242 (citing Crow Butte Resources, Inc. (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 339 (2009)).

[41] See Petition at 96.

[42] Tr. at 142.

they "withdrew that contention voluntarily because of an inability to secure the Walpoles' commitment to join these proceedings."[43] In order for Contention 10 to be timely now, Intervenors must show that new and materially different information justifies resubmitting the contention. But, as the NRC Staff argues, Intervenors have not shown that the DEIS contains or omits any information "that would justify amending and/or resubmitting a contention challenging notifications related to a scoping process that occurred several years previously and that the Intervenors have already challenged in this proceeding."[44]

The NRC Staff's alleged failure to notify the WIFN of this proceeding occurred in 2009. And, as noted, Intervenors raised a challenge to this alleged failure in 2009. In their current Motion, Intervenors attempt to demonstrate that there is new information on which to base the resubmission of this contention by pointing out that Joseph B. Gilbert, Chief of the WIFN, has written a letter to the Canadian Minister of the Environment requesting that the government of Canada consult with and accommodate WIFN during their administrative processes relevant to Fermi 3.[45] Intervenors suggest that the Canadian government will consult with the tribe, and that "the end result will be that the [WIFN] will petition this Board to intervene."[46]

The claim that the WIFN has petitioned the Canadian government is of no help to Intervenors in establishing the timeliness of Contention 10. The alleged failure by the NRC to notify the tribe occurred in 2009, and Chief Gilbert's letter does not somehow renew or add to the alleged injury. Thus, Intervenors have not demonstrated that Contention 10 is based on

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[43] Motion to Admit at 6.

[44] NRC Staff Answer at 12.

[45] Motion for Leave at 6-7.

[46] Id. at 7.

information that "was not previously available"[47] and that "is materially different than information previously available."[48] Contention 10 is therefore untimely under Section 2.309(f)(2).

Although Intervenors argued in their Motion for Leave that their fifteen day delay in filing the Motion to Admit should be excused under Section 2.309(c)(1), they have made no equivalent argument under that provision with respect to the more lengthy delay in re-filing Contention 10. We therefore have no basis upon which to excuse the untimely re-filing of Contention 10.

2. Admissibility

Even if timely, Contention 10 would not be admissible because Intervenors have alleged no factual or legal basis for applying the requirements of 10 C.F.R. § 51.28(a)(5) to the WIFN, a Canadian Tribe. The Intervenors rely on Section § 51.28(a)(5) for the proposition that First Nations in Canada must receive invitations to participate in the EIS scoping process when there are transboundary environmental impacts from a project.[49] As the NRC Staff points out, however, Section 51.28(a)(5) is subject to the general limitation that the NRC's NEPA regulations "do not apply to . . . any environmental effects which NRC's domestic licensing and related regulatory functions may have upon the environment of foreign nations."[50] Thus, any impact that the licensing of Fermi Unit 3 would have upon the Canadian environment fails to provide a basis for alleging that the DEIS violates the NRC's NEPA regulations.

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[47] 10 C.F.R. § 2.309(f)(2)(i).

[48] Id. § 2.309(f)(2)(ii).

[49] Motion to Admit at 7.

[50] 10 C.F.R. § 51.1.

Intervenors suggest that the NRC's regulatory limitation on the scope of its NEPA obligations is inconsistent with the statute as construed by several federal courts.[51] Whether or not this argument has merit, we may not entertain it because 10 C.F.R. § 2.335(a) precludes us from hearing challenges to NRC regulations absent a request for a waiver under Section 2.335(b), which Intervenors have not made.

B. Contention 13

Proposed Contention 13 reads as follows:

> The [DEIS] is inadequate to meet the requirements of NEPA or the Atomic Energy Act because it does not provide a reasonable cost/[b]enefit 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.[52]

Like Contention 10, Contention 13 was also submitted as part of the Intervenors' Petition to Intervene.[53] This Board found that the original Contention 13 was inadmissible because it did not provide factual or expert support sufficient to demonstrate a genuine material dispute with the application.[54]

1. Timeliness

The NRC Staff argues that Contention 13 is untimely because Intervenors "have not pointed to any portion of the DEIS that they allege to contain data or conclusions that differ from those in the ER."[55] We agree that the contention is untimely.

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[51] Reply at 4-5.

[52] Motion for Leave at 10.

[53] See Petition at 109.

[54] LBP-09-16, 70 NRC at 299-304.

[55] NRC Staff Answer at 18.

Although NRC regulations provide that petitioners may file amended contentions "if there are data or conclusions in the [DEIS] . . . that differ significantly from the data or conclusions in the applicant's documents,"[56] this does not mean that the publication of the DEIS simply provides an opportunity to renew previously-filed (and rejected) contentions. Rather, the petitioner must demonstrate that the DEIS actually contains new data or conclusions. Intervenors have made no such demonstration in their Motion to Admit. Similarly, they have not shown that the information contained in the DEIS was "not previously available," as required by 10 C.F.R. § 2.309(f)(2)(i). For this reason, Intervenors could have submitted (and indeed did submit) this contention upon publication of Applicant's ER. Therefore, Contention 13 is untimely.

In their Reply, Intervenors make a brief effort to justify the untimely filing of Contention 13 under Section 2.309(c)(1).[57] Given that Intervenors submitted an earlier version of Contention 13 several years ago in their petition to intervene, it is difficult to see how Intervenors can now make the required showing of good cause for their failure to file in a timely manner.[58] In any event, Intervenors do little more than assert, without explanation, that "good cause - or certainly, not very bad cause - exists for their failure to file on time."[59] An unsupported assertion of "not very bad cause" plainly fails to justify resubmitting Contention 13 at this late date.

2. Admissibility Requirements Under 10 C.F.R. § 2.309(f)(1)

As noted above, we rejected Intervenors' original Contention 13 for failure to satisfy

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[56] 10 C.F.R. § 2.309(f)(2).

[57] Reply at 9-10.

[58] See Pacific Gas & Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-8, 67 NRC 193, 201 (2008).

[59] Reply at 9.

Section 2.309(f)(1)(vi). In an effort to correct this deficiency, failure to provide sufficient information to show that there is a genuine dispute over a material issue, Intervenors have submitted the declaration of Ned Ford and have attached comments on the DEIS that were submitted by the Environmental Law Policy Center.[60]

Intervenors contend that "[t]he Draft EIS's Need for Power analysis fails to meet [NRC regulations] because it relies entirely on the Michigan Public Service Commission ("MPSC") 21st Century Plan ("21st Century Plan"), a 2006 energy planning report that was prepared before the recession."[61] Essentially, Intervenors argue that the DEIS overestimates energy demand and thus overstates the need for Fermi Unit 3. As the NRC Staff points out, this is essentially the same argument that Intervenors used to attack the Need for Power analysis in the ER.[62] We rejected this argument in our initial ruling on Intervenors' petition to intervene because "contrary to the Petitioners' claim, the Applicant's analysis of the need for power accounts for economic conditions in Michigan that might reduce the growth in demand, acknowledges sources of uncertainty, and recognizes that energy efficiency and conservation may also reduce the need for power."[63] Intervenors now argue that the NRC Staff may not rely on the 21st Century Plan in its DEIS as the basis of a Need for Power analysis.[64] As Applicant did in its ER, the NRC Staff has addressed the issue of uncertainty with regard to the 21st Century Plan in the DEIS.[65] Because Intervenors have not pointed out how this treatment of the

[60] See Motion to Admit at 10.

[61] Id. at 11.

[62] NRC Staff Answer at 19; Petition at 113.

[63] LBP-09-16, 70 NRC at 302.

[64] Motion to Admit at 11; see also DEIS at 8-14 to -15.

[65] See DEIS at 8-13 to -15.

21st Century Plan is inadequate, this portion of Contention 13 is inadmissible.

Next, Intervenors state that energy efficiency programs cost much less per kilowatt-hour than construction of a new nuclear power plant.[66] Intervenors raised this same concern in their petition to intervene.[67] We rejected this portion of the original Contention 13 because Intervenors did "not take issue with any claim made in the ER," and their arguments were "too general to create a genuine dispute with the Applicant on a material issue."[68] The re-filed Contention 13 suffers from the same flaws. Neither Intervenors' Motion nor the attached statement of Ned Ford provides a specific statement of the portions of the DEIS with which intervenors disagree. As before, Intervenors do "not take issue with any claim made in the" DEIS. Because of this failure, this portion of Contention 13 does not raise a genuine dispute with the DEIS and is thus inadmissible.[69]

Last, Intervenors point out a number of alternative sources of energy that they would prefer to see built rather than Fermi Unit 3.[70] As with the other portions of Contention 13, this portion was previously raised by Intervenors and rejected by this Board.[71] We found that Intervenors did not provide adequate support for their assertion that any alternative source of energy could be implemented at "utility scale."[72] Thus, we found that the Intervenors had not

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[66] Motion to Admit at 16.

[67] See Petition at 116-17.

[68] LBP-09-16, 70 NRC at 303.

[69] 10 C.F.R. § 2.309(f)(1)(vi).

[70] See Motion to Admit at 15-21.

[71] LBP-09-16, 70 NRC at 304.

[72] Id.

demonstrated that the ER omitted an analysis of a feasible alternative.[73] Intervenors have not addressed these issues in their re-filed Contention 13. Intervenors still do not offer any information to demonstrate that their preferred alternatives can be implemented at a utility scale, and they do not address the portion of the DEIS that discusses alternative energy sources.[74] Thus, this portion of Contention 13 is inadmissible for failure to raise a genuine dispute with the DEIS[75] and for failure to provide factual or expert support for the notion that these alternative energy sources can be implemented at a utility scale.[76]

C. Contention 17

Proposed Contention 17 reads as follows:

> 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.[77]

Intervenors claim that they have the right to comment on mitigation measures at the DEIS stage, and that the NRC Staff's alleged failure to include an adequate explanation of mitigation measures in the DEIS prevents them from exercising that right. Intervenors allege that "the NRC Staff expects Intervenors and the public to forego public comment opportunity on terrestrial and/or wetland mitigation plans at the DEIS stage for want of information disclosure in a timely fashion."[78]

1. Timeliness

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[73] Id.

[74] See DEIS at 9-3 to -68.

[75] 10 C.F.R. § 2.309(f)(1)(vi).

[76] Id. § 2.309(f)(1)(v).

[77] Motion to Admit at 22.

[78] Id. at 23.

The NRC Staff argues that Contention 17 is untimely because Revision 2 of Applicant's ER contained lengthy discussions of potential mitigation measures and, therefore, Intervenors could have filed Contention 17 based on the ER.[79] We agree.

Revision 2 states that the Applicant will prepare a mitigation plan for Fermi 3 construction activities in consultation with the Army Corps of Engineers and the Michigan Department of Environmental Quality (MDEQ).[80] As the NRC Staff argues, the ER also describes potential impacts to the environment from the proposed action, identifies where the Applicant believes mitigation measures may be warranted or are not warranted, and describes proposed mitigation measures.[81] Based on the information the Applicant provided in the ER, the DEIS also discusses potential impacts of the proposed action and proposed mitigation measures.[82]

Intervenors fail to show that, with respect to terrestrial and wetland mitigation plans, "there are data or conclusions in the [DEIS] . . . that differ significantly from the data or conclusions in the applicant's documents."[83] Similarly, they have not demonstrated that the information contained in the DEIS on mitigation was "not previously available."[84] Thus, we agree with the Staff that Intervenors could have submitted Contention 17 upon publication of Applicant's Revision 2 to the ER. Accordingly, Contention 13 is untimely. And Intervenors do

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[79] NRC Staff Answer at 23.

[80] Fermi: Combined License Application; Part 3, Environmental Report (Rev. 0) (Sept. 2008) at 4-49, 6-45 [hereinafter "ER"].

[81] NRC Staff Answer at 23 (citations omitted).

[82] Id. (citations omitted).

[83] 10 C.F.R. § 2.309(f)(2)

[84] 10 C.F.R. § 2.309(f)(2)(i).

not attempt to justify their nontimely filing under Section 2.309(c)(1).

2. Admissibility Requirements Under 10 C.F.R. § 2.309(f)(1)

Even if it were timely, Contention 17 is inadmissible because it lacks legal and factual support and fails to identify a genuine dispute with the DEIS on a material issue of law or fact.[85]

Intervenors complain about the lack of opportunity to comment on the terrestrial and wetland mitigation plans, but the DEIS in fact describes Applicant's plans for mitigating impacts to both terrestrial and aquatic resources.[86] In addition, DEIS Appendix K includes Applicant's "Proposed Fermi 3 Aquatic Resource Conceptual Mitigation Strategy," a plan to mitigate the project's impacts to wetlands and other aquatic resources submitted to the Army Corps of Engineers in connection with Applicant's application for a Clean Water Act permit. Intervenors do not identify any deficiency in the descriptions of the plans, nor do they acknowledge that the DEIS includes Applicant's "Proposed Fermi 3 Aquatic Resource Conceptual Mitigation Strategy." The only specific deficiency Intervenors allege is based on the statement in the DEIS that the U.S. Army Corps of Engineers and the Michigan Department of Environmental Quality will evaluate, as part of their respective permitting processes, the potential impacts on terrestrial or wetland resources and the compensatory mitigation proposed by the Applicant.[87] Intervenors' claim seems to be that, because the permitting process will be completed after the DEIS was issued for public comment, they have been deprived of their right to comment publicly on mitigation plans at the DEIS stage.[88]

Intervenors fail to cite any legal authority, however, supporting their theory that the

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[85] 10 C.F.R. § 2.309(f)(1)(v) and (vi).

[86] DEIS at 4-43, 4-44.

[87] Motion to Admit at 22 (citing DEIS at 4-44).

[88] Id. at 22-23.

permitting processes of other agencies must be completed before the DEIS may be issued for public comment. Although the NRC must respond to the significant views of other agencies, particularly if they are critical of the NRC's analysis, that duty applies at the FEIS stage,[89] after the DEIS has been circulated to interested federal and State agencies for their review and comment in accordance with the NRC's regulations.[90] Here, the DEIS identifies and discusses potential mitigation measures and how those measures affect the conclusions in the DEIS regarding potential impacts of the proposed action. The Staff's analysis and the basis for its conclusions have been provided in the DEIS and opened to public comment. Intervenors fail to provide any factual or legal support for the theory that the Staff is prohibited from issuing the DEIS for public comment until the Corps and the Michigan Department of Environmental Quality have completed their reviews.

This contention is therefore inadmissible under Section 2.309(f)(1)(v) and (vi).

D. Contention 18

Proposed Contention 18 reads as follows:

> The Endangered Species Act [ESA] 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 [ESA] at the DEIS stage. This disclosure violates NEPA requirements for a [DEIS].[91]

1. Timeliness

Because this contention concerns duties of the NRC Staff, not an applicant (i.e., consultation and performance of a BA under the ESA), this contention could not have been

[89] See Western Watersheds Project v. Kraayenbrink, 632 F.3d 472, 491-93 (9th Cir. 2011).

[90] 10 C.F.R. §§ 51.73, 51.74; see also 40 C.F.R. § 1503.1.

[91] Motion to Admit at 23.

raised at the ER stage. We therefore reject the argument that it is untimely.

The situation here is analogous to that in Crow Butte Resources,[92] in which a petitioner, the Oglala Sioux Tribe, alleged that it had not been consulted concerning tribal cultural resources at the ER stage, in violation of the National Historic Preservation Act. The Commission held that the contention was premature because the NRC Staff, not the applicant, has the duty to consult with the Tribe under the Act, and the Staff had not completed its review process.[93] Similarly, in this case the NRC Staff, not the Applicant, has the legal duty to engage in consultation under the ESA.[94] Assuming that the DEIS must include the agency's BA and the views of consulting agencies under the ESA, as Intervenors allege, it is the Staff that must provide that information. Thus, as in Crow Butte Resources, the NRC Staff, not the Applicant, has the legal duty alleged by Intervenors. It would therefore have been premature for Intervenors to have filed a contention alleging a violation of that duty based on the Applicant's ER.

We therefore will not reject Contention 18 as untimely.

2. Admissibility Requirements Under 10 C.F.R. § 2.309(f)(1)

The NRC Staff argues that Contention 18 is inadmissible because Intervenors have not provided any support for their claim that the DEIS may not be issued for public comment until the BA and the ESA consultation process are complete.[95] We agree.

The ESA provides:

Each Federal agency shall, in consultation with and with the assistance of the

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[92] CLI-09-9, 69 NRC at 348.

[93] Id. at 348-51.

[94] Endangered Species Act, 16 U.S.C. § 1536.

[95] NRC Staff Answer at 30.

> Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.[96]

The ESA also states:

> To facilitate compliance with the requirements of subsection (a)(2) of this section [i.e., the section just quoted], each Federal agency shall . . . request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises . . . that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed . . . before any contract for construction is entered into and before construction is begun with respect to such action.[97]

The ESA thus explains NRC's duty to consult and to perform a BA if endangered species may be present at the site. As the NRC Staff notes, the DEIS contains information regarding impacts to endangered species.[98] In addition, the Staff has been in consultation with the Fish and Wildlife Service since December, 2008,[99] and is currently finalizing a BA.[100] Intervenors contend that these actions needed to be completed before publication of the DEIS. We find no such requirement in either the ESA,[101] or the NRC regulations enumerating the required contents of a DEIS.[102] Intervenors do not provide any factual or legal support for this claim, as required by Section 2.309(f)(1)(v). Therefore, Contention 18 is inadmissible.

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[96] 16 U.S.C. § 1536(a)(2).

[97] Id. § 1536(c)(1).

[98] NRC Staff Answer at 32; see, e.g., DEIS at 5-20 to -25, 5-43 to -50.

[99] NRC Staff Answer at 29.

[100] Id. at 30.

[101] See generally 16 U.S.C. § 1536.

[102] See generally 10 C.F.R. § 51.71.

E. Contention 19

Proposed Contention 19 reads as follows:

> 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.[103]

The Great Lakes Compact ("Compact") is an agreement among the states of Illinois, Indiana, Michigan, Minnesota, New York, Ohio and Wisconsin and the Commonwealth of Pennsylvania regarding management and use of the waters within the Great Lakes and St. Lawrence River basin.[104] Under the Compact, certain proposed water uses are subject to "Regional Review," or review by members of the Compact.[105] The Compact provides that no member state shall approve a proposal that is subject to Regional Review unless it has obtained regional approval.[106] In other words, a member state's issuance of a state permit allowing the proposal to go forward is conditioned on regional approval. Thus, the entity required to seek Regional Review is the State, not an applicant or any other agency.

Any proposal that would bring about new or increased consumptive use of more than 5 million gallons of water from the basin per day must undergo Regional Review.[107] Intervenors note that, "[w]ith an estimated consumptive footprint of 20-25 million gallons per day, the Fermi 3 facility will most certainly be subject to a 'regional review' from the various states and

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[103] Motion to Admit at 26.

[104] See generally Agreement of the Great Lakes—St. Lawrence River Basin Water Resources Compact, available at <http://www.glslregionalbody.org/Docs/Agreements/Great_Lakes-St_Lawrence_River_Basin_Water_Resources_Compact.pdf> [hereinafter "Compact Agreement"].

[105] Id. § 4.5.

[106] Id. § 4.3.

[107] Id. § 4.9.

provinces within the Compact."[108] Intervenors contend that this regional review process "is not properly addressed by the DEIS," and that the parties to the Compact may not approve the proposal to construct Fermi 3.[109]

1. Timeliness

The NRC Staff argues that this contention is untimely to the extent it challenges "the way Fermi 3's consumptive water use is presented in the DEIS, and the environmental conclusions the NRC Staff has drawn from that information."[110] We agree. As NRC Staff notes, "the same information [that Intervenors challenge in the DEIS] is presented in the Applicant's ER, in more detail."[111] Because this portion of Contention 13 is not based on any new data or conclusions within the DEIS, it is untimely under Section 2.309(f)(2).

Intervenors' challenge to the discussion of the Great Lakes Compact is also untimely. Both the applicant's ER and the NRC Staff's DEIS are required to list required Federal permits and approvals and the current status of compliance with those requirements.[112] In addition, the applicant must discuss in an ER the status of its compliance with "environmental quality standards and requirements . . . which have been imposed by Federal, State, regional, and local agencies having responsibility for environmental protection."[113] Both Applicant, in its ER, and NRC Staff, in its DEIS, provided these required lists.[114] In each list, it is noted that the Applicant

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[108] Motion to Admit at 27.

[109] Id. at 27, 29.

[110] NRC Staff Answer at 35.

[111] Id.; compare DEIS at 2-23, 5-8 with ER at 2-175 to 2-185, 5-13 to 5-14.

[112] See 10 C.F.R. §§ 51.45(d) and 51.71(c)

[113] Id. § 51.45(d).

[114] See ER at 1-8; DEIS at H-1.

must obtain a water withdrawal permit from the Michigan Department of Environmental Quality because Fermi 3 would withdraw more than 5 million gallons per day from Lake Erie.[115] Both the ER and the DEIS note that this permit has not yet been obtained.[116]

Intervenors make no effort to explain any difference between the ER and the DEIS regarding this required water withdrawal permit. Moreover, they make no effort to demonstrate that the NRC Staff has a duty not imposed on the applicant (as it does to consult with the FWS under the ESA) such that this contention could not have been raised at the ER stage. Given these failures, this aspect of Contention 19 is untimely under Section 2.309(f)(2).

Finally, Intervenors have made no attempt to justify the late filing under Section 2.309(c)(1).

2. Admissibility Requirements Under 10 C.F.R. § 2.309(f)(1)

Intervenors seem to challenge the NRC Staff's assertion that the consumptive water use impact of operating Fermi Unit 3 would be "small."[117] To the extent that Intervenors are asserting that the Staff's position is invalid, Contention 19 is inadmissible, because Intervenors have provided no factual or expert support to challenge that assertion.[118]

Intervenors' challenge concerning the DEIS's alleged failure to discuss the Compact's regional review process is inadmissible because it does not raise a genuine dispute with the DEIS.[119] As noted above, the Compact Agreement binds and imposes certain obligations on the member states, not on other governmental agencies or on utility companies. Where Fermi 3

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[115] Compare ER at 1-11 with DEIS at H-4.

[116] Id.

[117] Motion to Admit at 28.

[118] 10 C.F.R. § 2.309(f)(1)(v).

[119] Id. § 2.309(f)(1)(vi).

is concerned, if the Michigan Department of Environmental Quality decides to grant Applicant a water withdrawal permit, it is Michigan that must seek approval from the Compact, not Applicant or the NRC.

Both Applicant and the NRC Staff, in the ER and DEIS, respectively, note that Applicant must obtain a water withdrawal permit under the Michigan Natural Resources and Environmental Protection Act.[120] This statute refers to Michigan's obligations under the Compact. Indeed, the Compact's review process is simply a part of each member state's licensing and permitting processes, each of which is governed by that member state's laws. Therefore, while the NRC Staff, in its DEIS, did not explain the Compact's review process, it satisfied its duty under 10 C.F.R. § 51.71(c) by stating that Applicant must obtain a water withdrawal permit from the state of Michigan and citing to the governing Michigan statute, which in turn explains Michigan's obligations under the Compact. Because the DEIS actually does contain the information that Intervenors allege it is lacking, this portion of Contention 19 fails to raise a genuine dispute and is therefore inadmissible.[121]

F. Contention 20

Proposed Contention 20 reads as follows:

> The DEIS does not adequately evaluate thermal pollution issues associated with the discharge of cooling water into Lake Erie, in violation of NEPA.[122]

Intervenors contend that the DEIS "does not properly evaluate [thermal pollution] issues as serious and fails to provide potential mitigation options."[123] Intervenors also contend that the

[120] ER at 1-11; DEIS at H-4; see also Mich. Comp. Laws. § 324.32723.

[121] 10 C.F.R. § 2.309(f)(1)(vi).

[122] Motion to Admit at 30.

[123] Id.

DEIS's analysis leading to its conclusion that "thermal pollution would have minimal environmental impact on Lake Erie" is "poorly framed," and the NRC should reevaluate "the potential problems caused by thermal pollution . . . at a more localized level."[124] As in Contention 19, Intervenors note that the Fermi 3 project will be subject to review by the Great Lakes Compact, and state that "it would be prudent" for the NRC to ensure that Fermi 3 would "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."[125]

1. Timeliness

Thermal pollution issues were initially raised by Intervenors in Contention 6 and Contention 14.[126] The Board admitted such issues as part of Contention 6 insofar as they relate 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 harmful algae. In all other respects, they were dismissed for failing to demonstrate a genuine dispute with the ER or to provide alleged facts or expert opinions to support the Petitioners' assertions.[127] The DEIS extensively cites to the ER for analysis of potential impacts from thermal emissions.[128] In Contention 20, Intervenors cite no new data, analyses, or conclusions that differ significantly from the ER, and therefore Contention 20 is not timely except as it relates to the issue that we previously admitted as Contention 6.[129] As explained below, we will defer all issues concerning

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[124] Id. at 31-32.

[125] Id. at 33.

[126] See Petition at 67-76, 123-39.

[127] LBP-09-16, 70 NRC at 277.

[128] See DEIS at 5-9 to -16, 5-33 to -35.

[129] 10 C.F.R. § 2.309(f)(2).

Contention 6 until our ruling on the Applicant's motion for summary disposition of that contention.

2. Admissibility Requirements Under 10 C.F.R. § 2.309(f)(1)

Intervenors' request that the thermal analysis be reevaluated on "a more localized level" is not admissible. The Applicant's hydrodynamic analysis is based on site-specific data and characteristics, and thermal impacts are evaluated on a localized as well as a basin-wide scale both in the ER and DEIS.[130] Intervenors do not identify specific issues in the ER and DEIS thermal analyses that are in dispute. Thus, with respect to this portion of Contention 20, Intervenors have not raised a genuine dispute with the DEIS, as required by Section 2.309(f)(1)(vi).

We also will not admit Intervenors' assertion that the DEIS "fails to provide potential mitigation options." In Contention 20, Intervenors acknowledge that the DEIS does discuss two potential mitigation options. They contend that these are "positive mitigation procedures but not adequate to properly address the extent of harm."[131] However, Intervenors make no attempt to explain how or why these measures are inadequate. In addition, as Applicant notes,[132] Intervenors have ignored other mitigation measures concerning reduction of evaporative losses from cooling towers, minimization of turbidity at diffuser ports, and design of the diffuser to limit thermal plume impacts.[133] For these reasons, we conclude, with regard to this portion of Contention 20, that Intervenors have failed to present adequate facts or expert opinion

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[130] See ER at § 5.3.2.1.1, DEIS at § 5.2.3.1.

[131] Motion to Admit at 32-33.

[132] Applicant Answer at 41.

[133] DEIS at 5-137, 5-138.

supporting the contention and to raise a genuine dispute with the DEIS.[134]

Intervenors also claim that, because the project will be subject to review under the Great Lakes Compact, the NRC Staff "would be prudent" to ensure that Fermi Unit 3 would "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."[135] This argument also fails to justify admitting the contention. By using the phrasing "it would be prudent," Intervenors appear to be giving the NRC advice, not raising a genuine dispute with the DEIS.

Alternatively, this aspect of Contention 20 could be construed as asking the Board to determine whether the project will be consistent with the requirements of the Great Lakes Compact. Such an issue, however, is outside the scope of this proceeding.[136] In Hydro Resources the Commission made clear that licensing boards should not admit contentions alleging that the applicant must obtain permits from other agencies:

> Whether non-NRC permits are required is the responsibility of bodies that issue such permits, such as the Federal Environmental Protection Agency, . . . or state and local authorities. To find otherwise would result in duplicate regulation as both the NRC and the permitting authority would be resolving the same question, i.e., whether a permit is required. Such a regulatory scheme runs the risk of Commission interference or oversight in areas outside of its domain. Nothing in our statute or rules contemplates such a role for the Commission.[137]

The same reasoning also precludes a licensing board from admitting a contention alleging that the project may not be consistent with the requirements of another federal, state, or local agency. That issue must be resolved by the other agency, not the NRC.

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[134] 10 C.F.R. § 2.309(f)(1)(v)-(vi).

[135] Motion to Admit at 33.

[136] 10 C.F.R. § 2.309(f)(1)(iii).

[137] Hydro Resources, Inc. (292 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-16, 48 NRC 119, 120 (1998).

Finally, Intervenors argue that thermal emissions from Fermi Unit 3 may result in drastic growth of harmful algae, and that the DEIS fails to adequately evaluate that adverse impact.[138] As noted above, this challenge to the DEIS is substantially equivalent to the issue raised by previously admitted Contention 6 concerning the ER.[139] Thus, if we admitted this aspect of Contention 20, we would in effect be admitting a contention challenging the DEIS on a basis substantially equivalent to that alleged in Contention 6 with respect to the ER.

The Board may construe an admitted contention contesting the ER as a challenge to the subsequently issued DEIS or FEIS without the necessity for Intervenors to file a new or amended contention.[140] This concept has been referred to as the "migration tenet."[141] The migration tenet helps to expedite hearings by obviating the need to file and litigate the same contention up to three times—once against the ER, once against the DEIS, and one final time against the FEIS.[142] This tenet, however, applies "only so long as the DEIS analysis or discussion at issue is essentially *in para materia* with the ER analysis or discussion that is the

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[138] Motion to Admit at 30-32.

[139] LBP-09-16 at 277.

[140] Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 84 (1998) ("In this proceeding, CANT filed most of its environmental contentions on the basis of LES's ER. But by the time the various NEPA issues came before the Board on the merits, the NRC Staff had issued its FEIS. In LBP-96-25 and LBP-97-8, therefore, the Board appropriately deemed all of CANT's environmental contentions to be challenges to the FEIS."); Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 383 n.44 (2002) ("[A] contention 'initially framed as a challenge to the substance of an applicant's ER analysis of particular matters would not necessarily require a late-filed revision or substitution to constitute a litigable issue statement relative to the substance of the Staff's DEIS (or final environmental impact statement) analysis of the same matter.'"); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-23, 54 NRC 163, 172 n.3 (2001).

[141] Progress Energy Florida, Inc. (Combined License Application for Levy County Nuclear Power Plant, Units 1 and 2), LBP-11-01, 73 NRC __, __ (slip op. at 7) (Feb. 2, 2011).

[142] Id.

focus of the contention."[143] If it is not, an intervenor may need to amend the admitted contention, or file a new contention altogether.[144]

Ordinarily, therefore, we would first determine whether the migration tenet applies, and only if it does not would we decide whether to admit the part of Contention 20 that concerns the DEIS's analysis of the algae proliferation issue. But there is a complicating factor here. While the Motion to Admit was pending, the Applicant filed a summary disposition motion alleging that, far from being *in para materia* with the ER, the DEIS completely resolves the issue raised by Contention 6.[145] If the Applicant's motion is correct, then the migration tenet would not apply. Given the overlap in the issues raised by the pending motions, we will defer ruling on this one aspect of proposed Contention 20 until we rule on the summary disposition motion. In all other respects, we will not admit proposed Contention 20.

G. Contention 21

Proposed Contention 21 reads as follows:

> 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.[146]

Intervenors argue that the wetlands "mitigation plan is bereft of details within the pages of the DEIS" and that "[t]he EIS should also include proposed mitigation measures that take the potential effects of climate change on the wetland areas into account."[147] Additionally,

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[143] So. Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-08-2, 67 NRC 54, 63–64 (2008).

[144] Id. at 64 (citing 10 C.F.R. § 2.309(f)(2); Duke Energy Corp., CLI-02-28, 56 NRC at 383).

[145] Applicant's Motion for Summary Disposition of Contention 6 (April 17, 2012).

[146] Id.at 33.

[147] Id. at 34.

Intervenors state that the DEIS fails to include protection plans for the eastern fox snake and the American lotus, two species that are listed as threatened by the state of Michigan, and which the DEIS acknowledged would be potentially impacted by construction activities.[148]

1. Timeliness

To the extent Contention 21 challenges the DEIS wetlands mitigation plan as inadequate, it is untimely. As the Staff and the Applicant correctly observe, the information presented in the DEIS on mitigation is based on the content of the ER.[149] Consequently, this portion of the contention is not based on new information that is significantly different from the data or conclusions in the application. And the Intervenors have not attempted to justify their nontimely filing under Section 2.309(c)(1).

As to the American lotus, Intervenors claim that "the regulatory agencies made note that [Applicant] would work together with the Michigan Department of Natural Resources to create protections for those Threatened species."[150] They maintain, however, that "[n]o specific protection plans are in place at this time . . ., and these protections must be published and available for public comments prior to inclusion in the Final EIS."[151] This is an argument, unlike the ESA issue in Contention 18, that could have been raised in a challenge to the ER because, as Intervenors state, it is the Applicant's duty to consult with the Michigan Department of Natural

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[148] Id. at 35. Intervenors also assert that the U.S. Army Corps of Engineers has not yet evaluated the applicant's mitigation plan for the purposes of granting a section 404 permit to fill wetlands. Id. at 34. The adequacy of another agency's licensing process is outside the scope of our review. See Florida Power and Light (Turkey Point Nuclear Generating Station), LBP-11-06, 73 NRC __, __ (slip op. at 97 n.102) (Feb. 28, 2011) ("it is not the province of the NRC (and thus this Board) to enforce another agency's regulations").

[149] See NRC Staff Answer at 44; Applicant Answer at 45-46.

[150] Motion to Admit at 35.

[151] Id.

Resources to create protections for species listed as threatened under State law. Intervenors maintain that the regulatory review process must be complete by the time the DEIS is published, and the approved mitigation plan must be published in the DEIS for public review and comment. It is the Applicant's responsibility to include in the ER the information that the NRC Staff needs to prepare the DEIS, including, among other things, information on "alternatives available for reducing or avoiding adverse environmental effects."[152] If the Applicant failed to include information in the ER concerning protection plans for the American lotus that was necessary to prepare the DEIS, that deficiency could have been raised as a challenge to the ER. Indeed, the Intervenors did challenge the ER for failure to consider alternatives to mitigate harm to the eastern fox snake. We admitted that issue as a part of Contention 8, which remains pending.[153] Given that Intervenors included in their initial petition a contention challenging the lack of mitigation for the snake, they should have filed a similar contention concerning the American lotus based on the alleged deficiency in the ER.

Contention 21 is therefore untimely except as to the issue concerning the eastern fox snake that we previously admitted as Contention 8. As explained below, we will defer all issues concerning Contention 8 until our ruling on the Applicant's motion for summary disposition of that contention.

2. Admissibility Requirements Under 10 C.F.R. § 2.309(f)(1)

Intervenors contend that the DEIS must include specific protection plans for the eastern fox snake and the American lotus. Although NEPA requires that the environmental impact statement discuss the impacts of the proposed action and any alternatives to that action (including options for mitigating impacts), the statute does not require that any specific

[152] 10 C.F.R. § 51.45(c).

[153] LBP-09-16 at 286-87.

mitigation strategies must be adopted.[154] We therefore construe Intervenors' contention to allege that the DEIS fails to adequately discuss mitigation alternatives for the two species at issue.

Intervenors essentially allege that the NRC failed to take the requisite "hard look" at alternatives that would lessen the impact on the American lotus. They claim that the Staff instead deferred its consideration of mitigation to future discussions with the Michigan Department of Natural Resources (MDNR).[155] Intervenors insist that discussion of mitigation in the DEIS take the form of a specific "protection plan" for the lotus.

Intervenors, however, ignore the conclusion in the DEIS that "[i]mpacts from building Fermi 3 [on the American lotus] would be minimal and no mitigation measures are needed beyond those already mentioned by Detroit Edison in the ER," measures which include transplanting plants in areas to be disturbed to other areas on the Fermi site or possibly offsite.[156] Intervenors do not explain in their contention what is inadequate about this discussion of mitigation measures in the DEIS, nor do they explain how their ability to comment on the information present in the DEIS is not an adequate substitute for their claimed right to comment on "specific protection plans." Accordingly, Intervenors have not raised a genuine dispute and the contention concerning the American lotus is inadmissible.

As noted above, we have already admitted a contention (Contention 8) alleging that the ER fails to adequately evaluate impacts on the eastern fox snake and alternatives to mitigate

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[154] See Robertson v. Methow Valley Citizens Council, 490 U.S. at 350 ("it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.") (citations omitted).

[155] See Motion to Admit at 35.

[156] DEIS at 4-34.

those impacts.[157] With respect to the snake, Contention 21 challenges the DEIS on grounds much like those alleged in Contention 8 concerning the ER. The Applicant has recently filed a motion for summary disposition of Contention 8. As with the potential algae proliferation issue raised in Contention 20, because of the overlap in the issues raised by the pending motions we will defer ruling on this one aspect of proposed Contention 21 until we rule on motion for summary disposition of Contention 8.

In all other respects, we will not admit proposed Contention 21.

H. Contention 22

Proposed Contention 22 reads as follows:

> The DEIS calls for scrutiny only [of] 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.[158]

Intervenors are "concerned about the transportation consequences of transporting fuel which is beyond the 4% U-235 limit established by 10 CFR 51.52(a)(2) as it is shipped to the Fermi 3 as unirradiated fuel."[159] They allege that "[t]his has not been adequately addressed in the Environmental Report or in the DEIS."[160] Additionally, "[w]hat is of particular concern to Intervenors is the use of such enriched fuel at 4.6% U-235 (by weight) running above 4500 MW

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[157] See LBP-09-16, 70 NRC at 286-92.

[158] Motion to Admit at 36.

[159] Id.

[160] Id.

thermal, both enrichment and temperature well above the 10 CFR 51.52 specifications. This is not addressed in the Environmental Report or in the DEIS."[161]

They also allege that "nowhere in the Environmental Report or the DEIS is there any discussion of the potential of an accident scenario resulting from a 'Positive Void Coefficient.'"[162]

1. Timeliness

The NRC Staff argues that Contention 22 is not timely because it is based primarily on information that was previously available. The Staff notes, for example, that "[s]ome of this information has been available since October 1, 2005, when the NRC accepted the ESBWR Design Certification Application for review, and in any event since Rev. 9 of the design certification document (DCD) was submitted in December 2010."[163] According to the Staff, "[a]ll of the information the Intervenors challenge in Contention 22 has been available in the DCD at least since December 2, 2010, or in the ER since March 2011 when Revision 2 was submitted."[164] Because, in the Staff's view, Intervenors do not show "that data and conclusions in the DEIS 'differ significantly from the data or conclusions in the applicant's documents,' Contention 22 is untimely under 10 C.F.R. § 2.309(f)(2) and the Scheduling Order in this case."[165] The Staff concludes that the Intervenors have not shown why this information was not addressed sooner despite having been available, and that Contention 22 should therefore be dismissed as untimely.

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[161] Id. at 36-37.

[162] Id. at 41.

[163] NRC Staff Answer at 46-47 (citing ESBWR Design Control Document, 26A6642AD Rev. 9 (Dec. 2, 2010), ADAMS Accession No. ML103440266 [hereinafter "ESBWR DCD"]).

[164] Id. at 47-48.

[165] Id. at 48.

We agree that this contention is not based on any information that is new, materially different, or previously unavailable, as required by 10 C.F.R. § 2.309(f)(2)(i)-(iii). As the basis for the contention, Intervenors point to technical specifications in the DCD as well as to a passage of the DEIS that specifically summarizes the content of the ER, but provide no explanation as to why they did not raise their contention earlier based on this information.[166] Intervenors also reference a January 2012 response to a question posed by one of Intervenors' representatives in December 2011 as seemingly new information to support the contention.[167] But that response simply referred Intervenors to relevant portions of the previously-available DCD.[168]

Contention 22 is therefore untimely, and the late filing has not been justified under Section 2.309(c)(1).

2. Admissibility Requirements Under 10 C.F.R. § 2.309(f)(1)

Even had it been timely filed, Contention 22 would be inadmissible. We agree with the Staff that while the intervenors "quote the DEIS, they do not challenge the Staff's analysis under [10 C.F.R. § 51.52] that is provided within the very part of the DEIS they quote, and therefore do not demonstrate a material dispute as required by 10 C.F.R. § 2.309(f)(1)(vi)."[169] Intervenors also fail to support their allegation that the DEIS must consider the potential of an accident scenario resulting from a positive void coefficient.

Under Section 51.52, every environmental report prepared for the construction permit stage, the early site permit stage, or the combined license stage of a light-water-cooled nuclear

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[166] Motion to Admit at 37-40.

[167] Id. at 40-41.

[168] Id.

[169] NRC Staff Answer at 47.

power reactor must contain a statement concerning transportation of fuel and radioactive wastes to and from the reactor.[170] For reactors not meeting the conditions of Section 51.52(a), the statement shall contain a full description and detailed analysis of the environmental effects of transportation of fuel and wastes to and from the reactor, including assessments of the environmental impact under normal conditions of transport and for the environmental risk from accidents in transport.[171] Thus, as the Staff points out, Section 51.52 does not establish limits on power or on fuel enrichment. Instead, Section 51.52(b) requires an applicant to perform an analysis if the conditions of Section 51.52(a) are not met. As the Staff also notes, both the ER and the DEIS do in fact contain an analysis of the transportation of fuel and waste as required by Section 51.52(b). Because the Intervenors do not controvert the analysis, they have failed to provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact as required by Section 2.309(f)(1)(vi), and therefore this aspect of the contention is not admissible.[172]

The Intervenors' reply states, however, that "closer scrutiny of the ESBWR Design Control Document, Rev. 9, dated December 2010 reveals that the DEIS is inaccurate in its disclosure of the enrichment levels of the fuel slated for use in Fermi 3."[173] According to Intervenors, "Table 1.3-1 [of the ESBWR DCD] … indicates that the 'first core' at Fermi 3 (which is the only planned ESBWR) would be enriched at a level of 2.08%, not 4.6%."[174]

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[170] 10 C.F.R. § 51.52.

[171] Id. § 51.52(b).

[172] NRC Staff Answer at 49-51.

[173] Reply at 18-19.

[174] Id.

Although we do not decide the merits at the contention admissibility stage, materials cited as the basis for a contention are subject to scrutiny to determine whether, on their face, they actually support the facts alleged.[175] In this instance, they fail to provide the necessary support. Table 1.3-1 actually states that the "Initial average U235 enrichment" is "2.08%" (emphasis added).[176] Chapter 4 of the DCD states that the "U-235 enrichments may vary axially within a fuel rod and from fuel rod to fuel rod within a bundle to reduce local peak-to-average fuel rod power ratios."[177] For the average enrichment to be 2.08%, the enrichment in some fuel would have to be greater than the average and less elsewhere. Thus, it is apparent that the references to an enrichment of 4.6% and an average enrichment of 2.08% refer to two separate characteristics of the fuel, and thus Intervenors fail to show any inaccuracy or inconsistency. Accordingly, Intervenors have failed to show a dispute of material fact with the DEIS, as required by Section 2.309(f)(1)(vi), and therefore this portion of the contention is also inadmissible.

Intervenors cite tables in the DCD that compare the ESBWR's design characteristics, such as its power, physical dimensions, and number of bundles, to those of other reactors. They then state that the tables somehow "suggest" that the ER and DEIS are deficient.[178] Intervenors fail to provide, however, any explanation of how the tables they cite support their

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[175] See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), vacated in part on other grounds and remanded, CLI-90-4, 31 NRC 333 (1990); Dominion Nuclear North Anna, LLC, (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 NRC 253, 265 (2005); Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90 n.30, rev'd in part on other grounds, CLI-96-7, 43 NRC 235 (1996).

[176] ESBWR DCD at 1.3-3.

[177] Id. at 4.2-5.

[178] Motion to Admit at 38-39.

claims, as required by Section 2.309(f)(1)(ii). "[P]roviding any material or document as the basis of a contention, without setting forth an explanation of its significance, is inadequate to support the admission of the contention."[179]

Lastly, the Intervenors complain that "an accident scenario encompassing the potential of 'Positive Void Coefficient' has been omitted from the NEPA process."[180] Intervenors fail to provide any factual support, however, for their belief that the ESBWR exhibits a positive void coefficient.[181] The General Design Criteria require the "[t]he reactor core and associated coolant systems shall be designed so that in the power operating range the net effect of the prompt inherent nuclear feedback characteristics tends to compensate for a rapid increase in reactivity."[182] In other words, the General Design Criteria require that the reactor exhibit a negative void coefficient in the power operating range. Consistent with this requirement, the DCD for the ESBWR shows that throughout core life the ESBWR exhibits a negative void coefficient.[183] Thus, there was no need for the DEIS to discuss accidents "encompassing the potential of 'Positive Void Coefficient'" because the design does not exhibit such a characteristic. Here also, Intervenors fail to demonstrate a genuine dispute of material fact with the DEIS, as required by Section 2.309(f)(1)(vi).

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[179] North Anna ESP Site, LBP-04-18, 60 NRC at 265 (citing Fansteel, Inc. (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 205 (2003)).

[180] Id. at 41.

[181] Void coefficient of reactivity is the rate of change in light water reactor power with the formation of steam bubbles or voids. A positive void coefficient of reactivity indicates a move toward a power increase with an increasing number of steam voids. A negative void coefficient of reactivity indicates a move towards a power decrease.

[182] 10 C.F.R. Part 50, Appendix A, GDC 11.

[183] ESBWR DCD, Section 4.3.1.1, at 4B-5 to 4B-6.

H. Contention 23

Proposed Contention 23 reads as follows:

> 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.

Intervenors allege that the discussion in the DEIS of "the environmental impacts to the approximately 1,000 acres of transmission corridor is deficient in a host of ways."[184] They characterize the DEIS' treatment of the topic as scattered, incoherent, shallow, and lacking a meaningful discussion of cumulative impacts or mitigation alternatives.[185]

1. Timeliness

Both the NRC Staff and the Applicant argue that Contention 23 is not based on new or materially different information.[186] Rather, as the Applicant states, "the Intervenors' challenges could have and should have been made in response to the ER."[187] The Staff provides an exhaustive list of citations to portions of the ER that address the impacts of the proposed transmission corridor.[188]

Intervenors do not establish that the contention is based on any data or conclusions in the DEIS that are significantly different from those in the ER. We are satisfied that each of the issues that comprise the subject matter of the contention was discussed in the ER, including the route of the transmission corridor[189] and impacts from the corridor on historic and cultural

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[184] Motion to Admit at 41.

[185] Id. at 42-43.

[186] NRC Staff Answer at 56-57; Applicant Answer at 56-58.

[187] Applicant Answer at 58.

[188] NRC Staff Answer at 56 n.27.

[189] ER at 3-57.

resources,[190] on endangered or threatened species,[191] and on wetlands and vegetation.[192] Rather than put forward any information to show how the DEIS differs from the ER, Intervenors at several points acknowledge that the DEIS' treatment of the transmission corridor echoes the ER.[193] Because Contention 23 is not based on new or materially different information, it is not timely under Section 2.309(f)(2). Nor have the Intervenors justified their nontimely filing under Section 2.309(c).

2. Admissibility Requirements Under 10 C.F.R. § 2.309(f)(1)

Although Contention 23 is untimely, it raises substantial questions concerning the adequacy of the DEIS that the NRC Staff should carefully consider in preparing the FEIS.

Intervenors present a number of criticisms of the DEIS's limited evaluation of the environmental impacts of the transmission line corridor. For example, Intervenors emphasize that substantial construction will take place in undeveloped wetlands, forests, and grasslands:

> NRC reports that "the final western 10.8 miles of transmission lines would be built in an undeveloped segment of an existing transmission ROW . . . Some transmission tower footings were installed there as part of earlier plans but were never used." NRC reports that the proposed new Fermi 3 transmission line corridor would cross open water, deciduous forest, evergreen forest, mixed forest, grassland, 93.4 acres of woody wetlands, and 13 acres of emergent herbaceous wetland. (Table 2-7,Vegetative Cover Types in the Proposed 29.4-mi Transmission Corridor, page 2-46). This shows what is at stake – major impacts, or perhaps even complete destruction, to irreplaceable habitat, vital for the viability of endangered and threatened species, as well as overall ecosystem health. At 4-2, "Vegetative Cover Types Occurring in the Undeveloped 10.8-mi Segment of the Transmission Line Corridor" (page 4-28), DEIS Table 4-2 repeats the sensitive vegetative cover forms at risk from the proposed Fermi 3 transmission corridor: 170

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[190] Id. at 4-19 to -22.

[191] Id. at 4-51 to -52.

[192] Id. at 4-12 to -16.

[193] See Motion to Admit at 44 ("NRC cannot attempt to duck its responsibilities under NEPA by echoing DTE"); Reply at 23 ("The DEIS (and before it, the ER) segmented the transmission line part of Fermi from the rest of the project.").

acres of deciduous forest, 74 acres of woody wetlands, and 9 acres of herbaceous emergent wetlands.[194]

Intervenors also stress potential impacts to threatened and endangered species:

NRC's DEIS section 2.4.1.4 Important Terrestrial Species and Habitats – Transmission Lines (page 2-60) also reports the high biological stakes. Important species may occur along transmission lines, "but because the exact route of the corridor has not been finally determined, no surveys have yet been conducted to confirm the presence of any species." . . . [T]able 2-9 (page 2-61) shows state-listed and federally-listed species which inhabit the counties (Monroe, Washtenaw, Wayne) that would be crossed, including over 80 plant species, 8 insect species, 2 amphibian species, 4 reptile species (including the Eastern Fox Snake), a dozen bird species, and 2 mammal species. The Michigan Dept. of Natural Resources (MDNR/now DNRE) has not provided concurrence for the project to proceed, because DTE has provided no details about the transmission line corridor route for determining the damage that would be done to threatened and endangered species and their habitats. MDNR has identified five State-listed species likely present on the Fermi site, which could also be present along the proposed Fermi 3 transmission corridor. In addition to all of the above, the U.S. Fish and Wildlife Service has identified the eastern massasauga snake as a candidate species potentially inhabiting Washtenaw and Wayne Counties, and thus, at risk along the proposed new transmission corridor.[195]

Intervenors further argue that maintenance of the transmission corridor will continue to impact wetlands and other environmental resources after construction is completed. They note that, according to the DEIS, "'[d]uring operation of Fermi 3, the power transmission line system would need to be maintained free of vegetation by ITC Transmission. Vegetation removal activities would include trimming and application of herbicides periodically and on an as-needed basis along the transmission line corridor."[196] Intervenors complain of the failure to analyze the environmental consequences of these actions:

It is clear that the deforestation will be an indefinitely long, or even permanent, condition. Although herbicides designed for use in wetlands are mentioned, no specifics are given. The impact of these biocides on species inhabiting the corridor is thus impossible to

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[194] Motion to Admit at 44-45.

[195] Id. at 45-46.

[196] Id. at 49 (quoting DEIS at 3-31).

> analyze, given the lack of specificity. The downgrade in the ecological quality and quantity (or even permanent loss and complete destruction) of forested wetlands in an extended area along the Fermi 3 transmission line corridor is a major ecosystem impact, which currently goes unreflected.[197]

Although the DEIS acknowledges in general terms the types of environmental resources that the transmission corridor will affect, it provides little analysis of the actual environmental consequences. Intervenors criticize the DEIS for, among other things, an inadequately defined route for the corridor,[198] a failure to identify endangered or threatened species along the corridor,[199] an inadequate discussion of impacts on wetlands and vegetation,[200] and a failure to adequately investigate historic or cultural resources that may be affected.[201] Given the very limited analysis in the DEIS of these and other environmental impacts arising from the transmission line corridor, these claims may have been admissible had they been filed in a timely manner.

The NRC Staff responds that the construction of a transmission line is defined as a "preconstruction activity."[202] The Staff also maintains that the NRC lacks regulatory authority over construction of the transmission corridor, which will be built by an entity other than the Applicant.[203] To the extent these arguments imply that the DEIS need not evaluate in detail the environmental impacts of the transmission corridor, we are not persuaded. In order to avoid an

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[197] Id. at 48.

[198] Id. at 43-44.

[199] Id. at 45-47.

[200] Id. at 47-50.

[201] Id. at 51-52.

[202] NRC Staff Answer at 57 (citing 10 C.F.R. §§ 50.10(a)(2)(iii), (vii), 51.4).

[203] Id.

unlawful segmentation of the project, the FEIS must evaluate the environmental impact not only of the construction and operation of Unit 3 itself but of all connected actions.[204] Even if the transmission corridor is a preconstruction activity and outside the NRC's regulatory jurisdiction, the construction and maintenance of the transmission corridor likely qualifies as a connected action under governing NRC and Council on Environmental Quality (CEQ) regulations, and therefore must be analyzed in the FEIS.

The issue concerns the scope of the FEIS. The "scope" of an EIS is defined as "the range of action, alternatives, and impacts to be considered in an environmental impact statement."[205] An NRC NEPA regulation directs the agency to use the CEQ regulations in defining the scope of its impact statements.[206] Under the CEQ regulations, the scope of the EIS must include all "connected actions."[207] Another NRC NEPA regulation specifically adopts the

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[204] "'Segmentation' or 'piecemealing' occurs when an action is divided into component parts, each involving action with less significant environmental effects." Town of Huntington v. Marsh, 859 F.2d 1134, 1142 (2d Cir. 1988) (citing City of West Chicago v. NRC, 701 F.2d 632, 650 (7th Cir.1983)). "Segmentation is to be avoided in order to 'insure that interrelated projects[,] the overall effect of which is environmentally significant, not be fractionalized into smaller, less significant actions.'" Id. (quoting Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 298 (D.C. Cir.1987)).

[205] 40 C.F.R. § 1508.25.

[206] The NRC regulation governing the scope of the EIS states that the agency should use the provisions of 40 C.F.R. § 1502.4 for that purpose. 10 C.F.R. § 51.29(a)(1). Section 1502.4 in turn directs that

> Agencies shall use the criteria for scope (§ 1508.25) to determine which proposal(s) shall be the subject of a particular statement. Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.

40 C.F.R. § 1502.4(a).

[207] 40 C.F.R. § 1508.25(a)(1).

CEQ regulation (40 C.F.R. § 1508.25) that defines "connected actions."[208] Thus, the NRC's regulations effectively direct the agency to use CEQ regulations in defining the scope of its impact statements. Under Section 1508.25 of the CEQ regulations, separate actions are "connected" if, among other things, they "[c]annot or will not proceed unless other actions are taken previously or simultaneously," or they "[a]re interdependent parts of a larger action and depend on the larger action for their justification."[209] In general, "connected actions" are those that lack "independent utility."[210]

It appears that the sole purpose of the new transmission corridor is to transmit electrical energy generated by Fermi Unit 3, and that it would serve no useful purpose absent the new nuclear power plant. If that is true, the transmission corridor lacks independent utility (i.e., it is a connected action) and must be fully evaluated in the FEIS. [211] This remains true even though the NRC may define construction of the transmission corridor as a preconstruction activity, it is owned by a company other than the Applicant, and it is outside the NRC's regulatory jurisdiction. The NRC's obligations under NEPA include evaluating all environmental effects of

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[208] 10 C.F.R. § 51.14(b).

[209] 40 C.F.R. § 1508.25(a)(1)(ii) and (iii). NRC's NEPA regulations specifically adopt this definition. See 10 C.F.R. § 51.14(b).

[210] See Society Hill Towers Owners' Ass'n v. Rendell, 210 F.3d 168, 181 (3d Cir. 2000) (collecting cases); Northwest Resource Info. Ctr. v. National Marine Fisheries Service, 56 F.3d 1060, 1067-69 (9th Cir. 1995) (same).

[211] Id. Also, in order to require detailed analysis in the FEIS, the transmission corridor must be a proposed action rather than one that is merely contemplated. See Kleppe v. Sierra Club, 427 U.S. 390, 410 & n.20 (1976). But the DEIS and ER suggest that the action has advanced to the stage of a proposed action. The DEIS reports that "[t]hree new 345-kV transmission lines have been proposed to serve Fermi 3." DEIS at 4-8 (emphasis added). The ER refers to "[t]he proposed route for the three new 345 kV transmission lines from Fermi to the Milan Substation . . . ." ER at 2-23 (emphasis added).

the proposed action (including connected actions) that it has the authority to prevent.[212] Even though the NRC does not license construction or operation of the transmission corridor, it has the authority to deny the license for Fermi Unit 3 if, for example, the total environmental costs of the new reactor and connected actions exceed the benefits.[213] Denial of the license would effectively prevent harmful environmental impacts resulting from construction and operation of the transmission corridor, given that its sole purpose appears to be transmitting electrical energy generated by Fermi Unit 3.

Although NEPA does not direct any particular substantive result,[214] all the environmental consequences of the proposed action, including connected actions, must be fully evaluated in the FEIS.[215] Moreover, only by evaluating all the environmental costs of the proposed action can the NRC adequately fulfill its obligation to "[d]etermine, after weighing the environmental, economic, technical, and other benefits against environmental and other costs . . . whether the combined license should be issued, denied, or appropriately conditioned to protect environmental values."[216] Because Contention 23 was not timely filed and no sufficient showing has been made under Section 2.309(c)(1) to justify the late filing, we are precluded from admitting it in this proceeding. But the "primary responsibility for compliance with NEPA lies

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[212] Department of Transportation v. Public Citizen, 541 U.S. 752, 770 (2004) ("[W]here an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant "cause' of the effect.")

[213] See 10 C.F.R. § 51.107(a)(3); Louisiana Energy Services, L.P. (Clairborne Enrichment Center), CLI 98-3, 47 NRC 77, 88 (1998); Calvert Cliffs Coordinating Committee, 449 F.2d 1109, 1123 (D.C. Cir. 1971).

[214] Robertson v. Methow Valley Citizens Council, 490 U.S. at 350.

[215] 40 C.F.R. § 1508.25(a)(1).

[216] 10 C.F.R. § 51.107(a)(3).

with the Commission."[217] We recommend, therefore, that the NRC Staff consider the issues raised by Intervenors when it prepares the FEIS.

I. Contention 24

Proposed Contention 24 reads as follows:

> 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.

Intervenors allege that the DEIS omits an analysis of impacts from the chemical contents of water vapor emitted from the Fermi cooling towers, and relies on a flawed assumption that all of the dissolved solids in the water vapor would be salt .[218] They charge that the DEIS "fails to consider the impact of other chemicals in the drift, many of which could be far more environmentally destructive than salt and could appreciably contribute to the PM2.5 emissions from the cooling towers."[219] Additionally, Intervenors claim, based on the declaration of their expert Joseph Mangano, that "statistically noteworthy increases" in cancer rates occurred following Fermi 2 entering operation, and therefore Fermi 3 must not be licensed without further research into epidemiological risks of the radiological releases from plant operation.[220]

1. Timeliness

Intervenors' contention is untimely because, as the Applicant observes, all of the information cited in support was available at the time of Intervenors' original intervention

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[217] New York v. NRC, __ F.3d ___, 2012 WL 2053581 at *10 (D.C. Cir. June 8, 2012). Accord Pa'ina Hawaii, LLC (Materials License Application), CLI-10-18, 72 NRC 56, 82 (2010).

[218] Motion to Admit at 52-53.

[219] Id. at 53.

[220] Id. at 54.

petition.[221] The assumption in the DEIS of which the Intervenors complain regarding the composition of cooling tower exhaust vapor was present in the ER.[222] The ER also addressed the impacts of radiological releases from plant operation.[223] Intervenors do not explain how the data and conclusions in the DEIS differ from the ER in this regard. Further, the attached declaration of Mr. Mangano relies on an assemblage of data, the vast majority of which was available when the ER was submitted. Although the declaration references certain demographic data that runs through 2009 or 2010,[224] the declaration does not suggest that these years of data are crucial to the conclusions therein, and therefore the information is not materially different from information that was previously available. Nor have the Intervenors justified their nontimely filing under Section 2.309(c)(1).

2. Admissibility Requirements Under 10 C.F.R. § 2.309(f)(1)

The NRC Staff argues that the contention fails to challenge any portion of the air quality impact analysis in the DEIS, which included both cooling tower drift and $PM_{2.5}$.[225] The Applicant observes that "the DEIS specifically addresses drift deposition 'from dissolved salts and chemicals found in the cooling water.'"[226] The Intervenors' concerns about the cooling tower drift are too speculative and insubstantial to form the basis of an admissible contention. Intervenors offer no facts to support their assertion that the cooling tower vapor could be harmful in ways not considered by the DEIS. As a result, this portion of the contention is

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[221] See Applicant Answer at 64-65.

[222] ER at 5-47.

[223] See id. at 5-110 to -116

[224] See Declaration of Joseph Mangano, Intervenors' Expert Witness at 10, 14 (Jan. 11, 2011)

[225] See NRC Staff Answer at 65.

[226] Applicant Answer at 66 (citing DEIS at 5-90).

inadmissible for failure to allege facts or provide expert support under Section 2.309(f)(1)(v) and failure to provide sufficient information establishing a genuine dispute under Section 2.309(f)(1)(vi).

By raising the public health consequences of all radiological releases from Fermi 3, Intervenors seem to suggest that any release, even those within limits set by NRC regulations, must be prohibited. As the Staff notes, "[t]he Intervenors do not assert that any portion of the [DEIS' radiological health effects] analysis is inadequate or incorrect, and do not allege that any legal dose limit is likely to be exceeded."[227] Because this portion of the contention does not challenge the contents of the DEIS, it fails to present a genuine dispute, and is inadmissible under Section 2.309(f)(1)(vi). Additionally, to the extent that Intervenors challenge all radiological releases from nuclear power plants, the contention presents an impermissible challenge to the NRC's regulations.[228]

V. Conclusion

The Motion for Leave is GRANTED. Because Intervenors have failed to proffer an admissible contention, the Motion to Admit is DENIED, except that we defer ruling on the two specific aspects of proposed Contentions 20 and 21, identified in our rulings on those contentions, that are related to the pending motions for summary disposition of previously admitted Contentions 6 and 8. Applicant's Motion for Leave to File Surreply is DENIED.

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[227] NRC Staff Answer at 66.

[228] See 10 C.F.R. § 2.335(a).

Any party aggrieved by this Order may file a petition for interlocutory review by the Commission in accordance with the provisions of 10 C.F.R. § 2.341(f)(2). Any such petition for review must be filed within fifteen (15) days of service of this Memorandum and Order.

IT IS SO ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Ronald M. Spritzer, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Anthony J. Baratta
ADMINISTRATIVE JUDGE

/RA/

Dr. Randall Charbeneau
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 21, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MEMORANDUM AND ORDER (Ruling on Motion for Leave to Late-file Amended and New Contentions and Motion to Admit New Contentions) have been served upon the following persons by Electronic Information Exchange.

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Beyond Nuclear
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[Original signed by Nancy Greathead]_
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 21st day of June 2012