

July 2, 2012

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

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

***INTERVENORS’ MOTION FOR ADMISSION OF CONTENTION
NO. 25 (CHALLENGING § 106 NHPA MITIGATION FOR
DEMOLITION OF FERMI UNIT 1)***

Now come Intervenor Beyond Nuclear, *et al.*¹ (hereinafter“Intervenors”), by and through counsel, and move for the admission of Contention No. 25, by which they challenge the legal sufficiency of the historic preservation actions implemented to mitigate the demolition of the Fermi Unit 1 nuclear power reactor containment building for construction of the Fermi 3 nuclear power plant.

I. PROPOSED CONTENTION 26

Proposed Contention 25 follows:

The proposed measures taken to mitigate the demolition of the Fermi 1 containment

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

building are inadequate and violative of § 106 of the National Historic Preservation Act. The mitigation measures and concluding Memorandum of Agreement were agreed upon without public consultation or participation, and the resulting official recordation of the history of Fermi 1, is likely to be biased in favor of commercial nuclear power and to omit significant historical details.

II. BACKGROUND

Intervenors recently discovered a May 7, 2012 letter from the Michigan Historic Preservation Office (SHPO) to Bruce Olson of the NRC Staff, which letter was uploaded to ADAMS on June 1, 2012. In that letter (ADAMS ML12144A321), the SHPO announced that it had “reviewed and accept[ed] the recordation materials for Fermi Unit 1 Atomic Power Plant.” In other words, the SHPO had consented to become an official repository of historical information on Fermi 1.

Intervenors further learned that in March 2012, Detroit Edison Company, the Nuclear Regulatory Commission staff, the president of Monroe County Community College, and the SHPO had jointly executed a “Memorandum of Agreement” (ADAMS ML12089A007) whereby DTE, to mitigate the demolition of the containment building of Fermi 1, had prepared a “recordation package” which would become the permanent record of the existence of Fermi 1. One copy of the recordation was deposited with the SHPO, and one was also to be placed with the Monroe County Library and Reference Center at the Community College. At MCCC, a public exhibit about Fermi 1 would be created, based upon the recordation materials.

The Memorandum of Agreement supposedly completes DTE’s compliance with National Historic Preservation Act (“NHPA”), 16 U.S.C. § 470 et seq (“§ 106”) obligations. The Fermi 1 containment building, situated since the 1950's at the Fermi nuclear plant site, had been identified as eligible for listing on the National Register of Historic Places, but because it is located in the footprint of the proposed Fermi 3 reactor complex, DTE’s decision was to demolish it. Because of

the federal nature of a COL, DTE was required to follow the NHPA. In order for DTE to gain permission to demolish the Fermi 1 containment building to make way for construction of the Fermi 3 nuclear power plant and support structures, NHPA compliance requires mitigation efforts. The mitigation chosen was recordation, the steps toward which were set forth in the MOA.

III. PERTINENT HISTORICAL FACTS ABOUT FERMI UNIT 1 OMITTED FROM OFFICIAL RECORDATION

The Fermi Unit 1 (“Fermi 1”) nuclear power plant was an experimental effort conceived in the 1950's to be a private-sector venture into commercializing nuclear-fissioned electricity. Fermi 1 was a “fast-breeder” reactor, designed to produce more usable fuel than it consumed. An inevitable byproduct of the nuclear chain reaction was to be plutonium, a key metallic component of hydrogen bombs.

A significant report, “Information Report to the Project Companies of the Dow Chemical-Detroit Edison and Associates, Nuclear Power Development Project” (hereinafter “Information Report”), was produced on December 1, 1953² by an *ad hoc* pool of scientists and engineers tasked with developing principles and criteria “most likely to result in an economic nuclear reactor to produce electric power and byproduct materials.” “Information Report” p. 8. The industrial study group foresaw that the proposed Fermi 1 would solve “the need for plutonium technology. Since plutonium is the fuel produced by a breeder reactor using uranium-238 as fertile material and since the highest breeding gain with a fast reactor is obtained when burning plutonium as fuel, it follows that the design of a fast reactor may not be really sound until it is based on a plutonium cycle.” *Id.* at 9. The study group noted that “[i]n April 1951, the Dow Chemical Co. and The Detroit Edison

²An excerpt of the Information Report has been contemporaneously filed with this Motion as Appendix 1.

Co. signed an agreement with the Atomic Energy Commission to undertake a study of the practicability of using nuclear power for industrial purposes with the *main objective of creating a large scale reactor to produce power and fissionable materials as joint products*” (Emphasis supplied). *Id.* at 11. From the start, the explicit motivation at Detroit Edison was not merely to harness the so-called “peaceful atom” for production of electricity, but deliberately to produce large quantities of plutonium for profit to be used as weapons material in hydrogen bombs during the Cold War:

The military aspects of this reactor and its great value in the country’s defense potential have not been given appropriate emphasis. In fact, the industrial study groups were advised at one time that they should not anticipate a military market for plutonium. Apparently this situation has changed and the military aspects as we see them are:

1. High rate of production of fissionable material. . . . We are of the opinion that this source, once proven economic, could be provided, at little or no cost to the government, by breeder reactors installed by private industry for the primary purpose of generating electric power. . . .
2. ***;
3. Unique Weapons Materials. The physical characteristics of the fast reactor and the rapid processing with the contemplated metallurgical separations system will permit our reactor to provide very high purity weapons material. In addition, the rapid processing will make available a source of fresh fission products for radiological weapons.

Id. at 18.

Fermi 1 construction was completed in 1966. In 1966, according to the Union of Concerned Scientists,³ following several months during the summer in which the temperature rise of the sodium coolant flowing through two fuel assemblies in the Fermi reactor core was repeatedly above normal by a considerable percentage, the assemblies were moved to different locations within the core to determine if the problem was with them or the thermocouples monitoring the sodium temperature. On October 5, 1966, while the reactor was operating at 13.5% of power, the temperature of the

³http://www.ucsusa.org/assets/documents/nuclear_power/fermi-1.pdf

sodium flowing through the two suspect fuel assemblies was approximately 100 degrees F. higher than the normal temperature of 600 degrees F. *Id.* At 3:09 p.m., radiation alarms in the building's ventilation exhaust ducts sounded. The reactor was manually scrammed at 3:20 p.m. Subsequent examination of the fuel assemblies revealed that melting had occurred in two, while two others were damaged from overheating. *Id.* A year later, crumpled zirconium sheeting was discovered in the core inlet plenum. It was later determined that two of the six zirconium pieces added to the core inlet plenum in 1959 had broken free and blocked cooling flow through the fuel assemblies to about three per cent (3%) of normal for the two assemblies that experienced melting and limited flow through the other two damaged assemblies to about 7 and 30 per cent of normal. *Id.*

At a hearing convened in 1974 by the Congress' Joint Committee on Atomic Energy, Professor David Inglis, a University of Massachusetts professor and former senior nuclear physicist at the Argonne Laboratory, who worked at Los Alamos on weapons development during World War II, testified:

Let me explain how my confidence has since been so shaken that I now urge that no further commercial power reactors should be built at the present stage of development and need. One has always tried to imagine every possible combination of circumstances that might lead to a serious accident and to prevent it. A maximum credible accident was formulated, an accident so nearly impossible that one need not protect against it. While there had been lesser malfunctions and indications of insufficient caution, confidence was greatly shaken in 1966 by the Fermi Breeder Reactor accident, more serious than had been declared the maximum credible. For me the piercing impression of this event was second only to seeing the first atomic fireball at Alamogordo. Some people find confidence in the fact that the partial melt-down was contained and the back-up scram system worked just in time to prevent the unpredictable consequences of fast criticality. Others are concerned that the partial melt-down could occur at II in a reactor operating luckily at only one-tenth of full power. . . .

In view of the radioactive catastrophe that could ensue from failure of pressure systems, it is disquieting also that a plant could be put into operation after its welds had been competently questioned and that in it a failure of a pressure system did occur, fortunately not involving radioactivity and only killing two workers.

Joint Congressional Committee on Atomic Energy, Second Session on the Status of Nuclear Reactor Safety (Appendix 2 to this Motion).

After generating a total of a several weeks' worth of electricity in its operational life, Fermi 1 was closed for good in the early 1970's.

IV. FACTUAL AND LEGAL BASES FOR THE CONTENTION

Intervenors believe that the "official" history of Fermi 1 which is to be memorialized in State of Michigan archives and at Monroe County Community College will omit uncomfortable facts about war profiteering during the Cold War and a studied indifference by Detroit Edison and the then-Atomic Energy Commission toward public health and safety in locating, building and operating Fermi 1. These subjects are matters of considerable controversy in the history of Fermi 1. *See, e.g.,* Fuller, John G., We Almost Lost Detroit, ISBN 0-88349-070-6 (Reader's Digest Press, Thomas Y. Crowell Company, New York, 1975); and ; Scott-Heron, Gil, "We Almost Lost Detroit," a song (1977), http://search.yahoo.com/search;_ylt=AILQmMR1fosQDw57yW1nt2ievZx4?p=gil+scott+heron+we+almost+lost+detroit&toggle=1&cop=mss&ei=UTF-8&fr=yfp-t-701.

In We Almost Lost Detroit, Fuller documented how Fermi 1 construction was undertaken with a plethora of unanswered scientific and technical questions, and against the wishes of the then AEC's Advisory Committee on Reactor Safeguards. The impetus was provided by Walker Cisler, then-president of Detroit Edison, beginning in 1951. Cisler's push for speedy development of commercial reactors was aided by the AEC, first with basic research, then with development of prototypes. The AEC, under Chairman Lewis Strauss, an investment banker appointed by Eisenhower in 1954, was extremely desirous of developing a commercial nuclear power industry. Cisler and DTE paid for some of the Fermi 1 equipment. The AEC concealed from the public an

from Congress the content of studies that would have prevented passage of the Price-Anderson Act, the quintessential corporate subsidy which allowed the widespread construction of commercial nuclear power plants instead of small-scale experimental prototypes over the ensuing decades.

Similarly, The Careless Atom, by Sheldon Novick, (Houghton Mifflin Company, Boston, MA 1968) is another documented retelling of the Fermi 1 story:

A meeting was held Large amounts of radioactive fission products in these samples made it clear that a portion of the reactor fuel had melted. Once this had been established, there was great concern, for the possibility of further, and more serious, accidents existed. Walter J. McCarthy, Jr., Assistant General Manager of the Power Reactor Development Corporation, who was present at this meeting, later stated that the possibility of such a secondary accident was a "terrifying thought."

The long, thin fuel rods of the Fermi core contained about half a ton of uranium 235 -- enough to make forty Hiroshima-sized atom bombs. . . .

. . . .On October 5, 1966, this object probably blocked one or two of the openings which admit cooling sodium to the reactor core. Within minutes, a large portion of the fuel in two subassemblies melted, and the assemblies themselves buckled, forcing nearby elements out of line. The reactor was apparently shut down in time to prevent severe damage to other portions of the fuel.

Congressman Craig Hosmer interrupted: "Now, there is more to the story, is there not? . . . Let me put it this way, then. I understand that late in the construction of the reactor, around 1959, the designers decided to cover the bottom of the vessel with a zirconium sheet as an added safeguard to prevent fuel melt from going through the bottom of the vessel, anticipating this Chinese syndrome. . . ."

As we have seen, in case of an accident, the molten fuel might dissolve its way right through the reactor vessel, and anything beneath it, presumably "right down to China." The bottom of the Fermi reactor vessel was therefore coated with zirconium which, it was hoped, would hold the molten fuel. Projecting upward from the center of the zirconium sheet laid at the vessel's bottom was a cone about a foot high. . . .

. . . Representative Hosmer: Based on that, I understand that they hurriedly rounded up some zirconium sheet and fabricated these six triangular pieces, and they were bolted on the cone, maybe tack welded, I don't know, at least three bolts were used in each, and that the total cost of these sheets was about a hundred bucks.

Mr. Shaw: We understand that this was a last minute decision, hurriedly made, to put the zirconium pieces in. We also understand that these additions were not shown on the final construction "as built" drawings. This became one of the problems related to identifying whether the object was part of the reactor or an object foreign to the reactor.

This again gets to the point that when you take shortcuts like this you must be prepared for the consequences. In this case, the consequences were the accident of October 5, 1966. . . .

. . . The possibility that Walter McCarthy called a "terrifying thought" and that preoccupied the meeting after the accident was that a large quantity of fuel had melted and then recongealed when the reactor was shut down. Those at the meeting feared that enough uranium had recongealed so that a disturbance of the core -- by an attempt to remove the damaged fuel, for example -- would jar it into a critical mass too great to be controlled by the control rods, which were already at their maximum.

The result could have been an explosion -- nowhere near as great as that of nuclear weapon, but perhaps great enough to rupture the steel and concrete containment structure of the reactor. A large portion of the radioactive gases held within the core would then have been released to the atmosphere, and would have drifted uncontrolled with the wind. The huge quantities of radioactivity involved, and the proximity of Detroit, made such prospect terrifying indeed.

The Careless Atom, pp. 158-163.

The story of Fermi 1, in short, offers a large window into the history of commercial nuclear power, an institutional void of safety culture within the primary regulatory agency, and nuclear power's inherent weapons connection.

The NRC Staff considered the principal resources for recordation to be a March 2009 National Register of Historic Places Evaluation for the Enrico Fermi Atomic Power Plant, prepared by Commonwealth Cultural Resources Group, provided to the State Historic Preservation Office by DTE, and a 454-page book published by the American Nuclear Society (ANS) on the Fermi 1 plant in 1979 titled Fermi-1: New Age for Nuclear Power, ISBN:0-89448-017-0 . The NRC calls this book a “detailed account of the history of the Fermi-1 site, including initial considerations, organizational structures, conceptual design, financing, legal matters, construction permitting, design and construction, testing and preparing for operations, operations, the fuel melting accident, renewed operation, safety, nuclear research and development and other related information.” Fermi 3 Section 106 Supplemental Info. Form, ADAMS ML101820313. DTE provided this book to the SHPO in 2009. In its § 106 review, the NRC Staff determined that no further action, beyond provision of the evaluation and the book, were necessary to mitigate the potential demolition of Fermi 1. *Id.*

The total discussion of historic preservation impacts expected from Fermi 1 in the Draft Environmental Impact Statement (DEIS) for Fermi 3 consists of this passage (p. 7-31):

As part of its independent evaluation, the review team reviewed the cultural and historic information available at the SHPO. The activities at Fermi 1 are the only ones in the geographic area of interest to have undergone National Historic Preservation Act Section 106 review. The review team concludes that the decommissioning of Fermi 1 has no adverse effects on historic properties (Conway 2011b). Demolition of Fermi 1 will have an adverse effect on historic properties (Conway 2011a). The NRC is consulting with the Michigan SHPO and Detroit Edison to develop measures to mitigate adverse effects, which would be included in a Memorandum of Agreement.

Since the Fermi 3 DEIS issuance in October 2011, all ensuing progress toward a Memorandum of Agreement has been accomplished effectively in secret, without the public participation which is anticipated by the NHPA § 106 regulations. The only participation has been via interested parties, by invitation, in the form of requests for comment to consulting parties such as Monroe County

Community College, and a few others with identified interests in the history of Fermi 1. Although the executed Memorandum of Agreement apparently was transmitted to the federal Advisory Council on Historic Preservation on March 7, 2012,⁴ there has been no Federal Register announcement or other notice to the public. There is only the obscure, fragmented mosaic of documents in ADAMS which passively reveal the conclusion of the arrangements which greenlight the demolition of Fermi 1. Intervenors' research has turned over no formal notices to the public, including that there was no disclosure before the MOA was formally signed.

According to Advisory Council on Historic Preservation (“ACHP”) guidelines, “The agency official must, except where appropriate to protect confidentiality concerns of affected parties, provide the public with information about an undertaking and its effects on historic properties and seek public comment and input.” 36 C.F.R. § 800.2(d)(2). Also, “[i]n consultation with the SHPO/THPO, the agency official *shall plan for involving the public in the section 106 process. The agency official shall identify the appropriate points for seeking public input and for notifying the public of proposed actions, consistent with § 800.2(d).*” (Emphasis supplied). 36 C.F.R. § 800.3(e). Intervenors could find no NRC plan for public participation in the Fermi 1 demolition decision anywhere.

While the federal agency is encouraged to use the NEPA track to solicit public participation in deciding on mitigation for National Register-eligible properties,⁵ the information provided in the

⁴ADAMS ML120450110.

⁵36 C.F.R. § 800.8(a)(1): “Federal agencies are encouraged to coordinate compliance with section 106 and the procedures in this part with any steps taken to meet the requirements of the National Environmental Policy Act (NEPA). Agencies should consider their section 106 responsibilities as early as possible in the NEPA process, and plan their public participation, analysis, and review in such a way that they can meet the purposes and requirements of both statutes in a timely and efficient manner. The determination of whether an undertaking is a “major Federal action significantly affecting the quality of

Fermi 3 DEIS - which was only a vague mention that there would be a Memorandum of Agreement - followed by the completely-unheralded entry by the respective parties into the MOA, could not have been what the ACHP conceives of as effective public participation in the decision.

One of the parties invited to comment on the MOA was the curator of the Monroe County Historical Museum, which maintains an archive known as the “Jens Collection,” an array of Fermi 1 documents donated in the 1980's by Dr. Wayne Jens, former engineer at Fermi 1 and later upper-level manager at Fermi 2 who retired shortly after it became public that Fermi 2 had experienced an unanticipated premature criticality before receiving its full-power operating license. The Museum curator told the NRC staff in November 2011 that she had told Randy Westmoreland of DTE and Dr. David Nixon, president of Monroe County Community College, about the Jens Collection and suggested that they might wish to review it as part of the investigation for historic preservation mitigation. Kull email, ADAMS ML12129A359 (uploaded to ADAMS on May 22, 2012). There appears to have been no investigation of that lead by the College or DTE.

Appendices 1 and 2 accompanying this Motion are taken from to files donated to the Museum by Dr. Jens. Those donated files likely dwarf the information submitted for recordation. The NRC staff estimated the shelf space required by the DTE recordation for the “official” history at MCCC as minimal: “the subject Documentation Package for Fermi 1 would consist of two or three documents, and thus would occupy much less than a linear foot of shelf space in the Monroe Library and Reference Center.” Email, ADAMS ML12129A569 (uploaded to ADAMS on May 22, 2012).

According to 36 C.F.R. § 800.11(f), “When a memorandum of agreement is filed with the

the human environment,” and therefore requires preparation of an environmental impact statement (EIS) under NEPA, should include consideration of the undertaking's likely effects on historic properties.”

Council, the documentation shall include any substantive revisions or additions to the documentation provided the Council pursuant to § 800.6(a)(1), an evaluation of any measures considered to avoid or minimize the undertaking's adverse effects *and a summary of the views of consulting parties and the public.*” There is no reference in the March 7, 2012 letter from the NRC, by which it transmitted the MOA to the ACHP (ADAMS ML120450110, uploaded March 15, 2012), to any public participation, nor any recitation of the NRC’s attempts to communicate the existence of, or the signing of, the MOA to the general public before the signing actually took place.

Public participation is essential in the mitigation decision for Fermi 1 in order to ensure truth-telling of the Fermi 1 story, along with a realistic explanation of the context in which the grand experiment was launched, and failed. The “official” narrative of this 20th century failure must not be hijacked for use as pro-industry promotion by the 21st century nuclear industry.

V. STANDARDS FOR CONTENTION ADMISSIBILITY

To be admitted for hearing, a new contention must satisfy the six general requirements set forth in 10 C.F.R. § 2.309(f)(1), and the timeliness requirements set forth in either 10 C.F.R. § 2.309(f)(2) (governing timely contentions) or 10 C.F.R. § 2.309(c) (governing non-timely contentions). Intervenors state that each of the requirements set forth in 10 C.F.R. § 2.309(f)(1) is satisfied. Moreover, they maintain that this Motion and accompanying contention are timely, and the requirements of 10 C.F.R. § 2.309(f)(2) are also satisfied. In the event this Board determines that this Motion and the accompanying contention are not timely, Intervenors submit that the requirements of 10 C.F.R. § 2.309(c) are satisfied.

A. This Motion and Accompanying Contention Satisfy The Requirements for Admission of a Timely Contention Set Forth in 10 C.F.R. § 2.309(f)(2)

The NRC has adopted a three-part standard for assessing timeliness. See 10 C.F.R. § 2.309(f)(2).

1. The Information Upon Which the Motion and Accompanying
Contention are Based Was Not Previously Available

The availability of material information “is a significant factor in a Board’s determination of whether a motion based on such information is timely filed.” *Houston Lighting & Power Co.* (South Texas Project, Units 1 & 2), LBP-85-19, 21 NRC 1707, 1723 (1985) (internal citations omitted). This Motion and the accompanying contention are based upon information which became of record only on June 1, 2012, specifically, notification by the SHPO to Bruce Olson of the NRC Staff dated April 7, 2012, which appeared in ADAMS on June 1, 2012. Prior to this acceptance, the MOA action was nonfinal and nonimplemented.

Indeed, on July 2, 2012 while Intervenors prepared this Motion, the NRC Staff in its periodic disclosures revealed the existence of three (3) new items concerning historic preservation of Fermi 1 which as of this writing are not posted at ADAMS:

> 32-3 ML12177A162 08/30/2011 2011/08/30 Fermi COL - Re: List of Fermi 1 Potentially Interested Parties;

> 32-7 ML12177A168 01/26/2012 2012/01/26 Fermi COL - Re: FW: Fermi 1 MOA; and

> 32-8 ML12177A179 02/03/2012 2012/02/03 Fermi COL - RE: Fermi 1 MOA.

Finally, it appears that the NRC Staff may have acted to thwart public disclosure of the fact of the MOA’s having been signed. In a May 1, 2012 email to DTE, John Fringer of the Staff advised DTE that “We don't need to reference it [Detroit Edison’s April 5, 2012 letter to the SHPO requesting review of the Fermi 1 Recordation Package] in the EIS at this time, though.” ADAMS ML12129A552. The NRC Staff’s vaguely-worded and tentative description of mitigation for Fermi

1 in the DEIS left open the prospect of latter events to mitigate destruction of the historic containment building. But since the DEIS publication, the NRC Staff has made no attempts to explain the nature of the mitigation to the public, nor has it solicited public participation beyond the 7 interested parties with whom it corresponded about the Memorandum of Agreement.

2. The Information Upon Which the Motion and
Accompanying Contention are Based is Materially
Different than Information Previously Available

As previously noted, the SHPO letter uploaded to ADAMS on June 1, 2012 contains an administrative determination rendered for the first time in the § 106 process, namely, the SHPO's review and acceptance of the DTE recordation items.

3. The Motion and Accompanying Contention are
Timely Based on the Availability of the New Information

The ASLB's order recognizes as timely contentions that are submitted within thirty (30) days of the occurrence of the triggering event. *Shaw Areva MOX Services, Inc.* (Mixed Oxide Fuel Fabrication Facility), LBP-08-10, 67 NRC 460, 493 (2008). Treating the SHPA recordation review letter as the triggering event, its deposit in ADAMS on June 1 means that this Motion is timely. This Motion has been submitted on the first business day after the July 1, 2012 (that is, July 2, 2012, a Monday) and complies with the ASLB timeliness parameter.

***B. The New Contention Also Satisfies the Standards
For Non-Timely Contentions In 10 C.F.R. § 2.309(c)***

Pursuant to § 2.309(c), determination on any "nontimely" filing of a contention must be based on a balancing of eight factors, the most important of which is "good cause, if any, for the failure to file on time." *Crow Butte Res., Inc.* (North Trend Expansion Project), LBP-08-6, 67 NRC 241 (2008). As set forth below, each of the factors favors admission of the accompanying conten-

tion.

1. Good Cause

Good cause for the late filing is the first, and most important, element of 10 C.F.R. § 2.309(c)(1). *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-02, 51 NRC 77, 79 (2000). Newly arising information has long been recognized as providing the requisite “good cause.” See *Consumers Power Co.* (Midland Plant, Units 1 & 2), LBP-82-63, 16 NRC 571, 577 (1982), citing *Indiana & Michigan Elec. Co.* (Donald C. Cook Nuclear Plant, Units 1 & 2), CLI-72-75, 5 AEC 13, 14 (1972). Thus, the NRC has previously found good cause where (1) a contention is based on new information and, therefore, could not have been presented earlier, and (2) the intervenor acted promptly after learning of the new information. *Texas Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 69-73 (1992).

Section 2.309(f)(v) requires "a concise statement of the alleged facts or expert opinion which support the “petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the petitioner intends to rely to support its position on the issue." An intervenor is not required to prove its case at the contention filing stage: "the factual support necessary to show that a genuine dispute exists need not be in affidavit or formal evidentiary form and need not be of the quality as that is necessary to withstand a summary disposition motion." Statement of Policy on Conduct of Adjudicatory Proceedings, 48 N.R.C. 18, 22 n.1 (1998), citing, Rules of Practice for Domestic Licensing Proceedings — Procedural Changes in the Hearing Process, Final Rule, 54 F.R. 33168, 33171 (Aug. 11, 1989). The intervenor need only make "a minimal showing that the material facts are in dispute, thereby demonstrating that an inquiry in depth is appropriate." *Gulf States Utilities Co.*, 40 NRC 43, 51

(1994), citing, Rules of Practice for Domestic Licensing Proceedings - Procedural Changes in the Hearing Process, Final Rule, 54 F.R. 33168, 33171 (Aug. 11, 1989).

2. Nature of the Intervenors' Right to be A Party to the Proceeding

Intervenors have a right to participate in this proceeding because they have previously established standing and have submitted admissible contentions. See 10 C.F.R. § 2.309, 42 U.S.C. § 2339(a)(1).

3. Nature of Intervenors' Interest in the Proceeding

Intervenors seek to protect their, or their members', health, safety and environment. All of the individually-named Intervenors reside within 10 to 20 miles of Fermi 3. Intervenors seek to protect the health and safety of the general public and to protect the environment by ensuring that the NRC fulfills its non-discretionary duty under NEPA and the NHPA to consider the new and significant information Intervenors have brought to light, before approving historic preservation mitigation measures for Fermi 1. "To establish standing by alleging procedural harm, the [plaintiffs] must show only that they have a procedural right that, if exercised, could protect their concrete interests and that those interests fall within the zone of interests protected by the statute at issue." *Defenders of Wildlife v. EPA*, 420 F.3d 946, 957 (9th Cir. 2005). If the causation of harm "is dependent upon the agency's policy," then there is procedural injury and Article III standing. *Id. See West v. Sec'y of Dep't of Transp.*, 206 F.3d 920, 930 n. 14 (9th Cir. 2000) (environmental plaintiff was "surely . . . harmed [when agency action] precluded the kind of public comment and participation NEPA requires in the EIS process").

4. Possible Effect of an Order on Intervenors' Interest in the Proceeding

As noted above, Intervenors' interests in a safe, clean, and healthful environment would be

served by the issuance of an order requiring the NRC to fulfill its non-discretionary duty under NEPA and NHPA to consider new and significant information before making an historic preservation mitigation decision. *See Silva v. Romney*, 473 F.2d 287, 292 1st Cir. 1973). Compliance with NEPA ensures that environmental issues are given full consideration in “the ongoing programs and actions of the Federal Government.” *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 371 n.14 (1989).

5. Availability of Other Means to Protect the Intervenors’ Interests

The question here is not whether other parties may protect Intervenors’ interests, but rather whether there are other means by which Intervenors may protect their own interests. *Long Island Lighting Co.* (Jamesport Nuclear Power Station, Units 1 & 2), ALAB-292, 2 NRC 631 (1975). Quite simply, no other means exist. Only through this hearing do Intervenors have a right that is judicially enforceable to seek compliance by NRC with NEPA and NHPA

6. Extent Intervenors’ Interests are Represented by Other Parties

There are no other parties to this COL proceeding besides Intervenors, the NRC Staff and DTE. No other party can represent Intervenors’ interests in protecting the health, safety, and environmental interests which they have manifested throughout this litigation. A licensing board may not delegate its obligation to decide controverted issues away from an intervenor to the Staff. *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 & 2), ALAB-298, 2 NRC 730, 737 (1975); *Commonwealth Edison Co.* (Byron Nuclear Power Station, Units 1 and 2), LBP-84-2, 19 NRC 36, 210 (1984), (*rev'd on other grounds*, ALAB-793, 20 NRC 1591, 1627 [1984]), citing *Perry, supra*, 2 NRC at 737.

7. Extent That Participation Will Broaden the Issues

While Intervenors' participation may broaden or delay the proceeding, this factor may not be relied upon to deny this Motion or exclude the contention, because the NRC has a nondiscretionary duty under NEPA to consider new and significant information that arises before it makes its licensing decision. *Marsh*, 490 U.S. at 373-4. Inasmuch as a hearing date for Intervenors' admitted contentions has not yet been scheduled, admission of the new contention will not delay the hearing.

8. Extent to Which Intervenors Will Assist in the Development of a Sound Record

Intervenors will assist in the development of a sound record, as their contention is supported by serious evidence which questions the official history of Fermi 1. As a longtime coalition of intervening parties, including decades-old environmental groups (Don't Waste Michigan, Michigan Sierra Club, Citizens Against Chemical Contamination), Citizens Environment Awareness of SW Ontario), Intervenors can be expected to address the merits with evidence. *See also Pacific Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-01, 67 NRC 1, 6 (2008) (finding that, when assisted by experienced counsel and experts, participation of a petitioner may be reasonably expected to contribute to the development of a sound record).

Furthermore, as a matter of law, NEPA requires consideration of the new and significant information which Intervenors have added to the record via this Motion. *See* 10 C.F.R. § 51.72(a)(2) ("There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts"). A sound record cannot be developed without such consideration.

C. The New Contention Satisfies the Standards For Admission of Contentions

Intervenors respectfully submit that the proposed new contention satisfies the standards set

Forth in 10 C.F.R. § 2.309(f)(1). They have provided “a specific statement of the issue of law or fact to be raised or controverted” (subsection i). They have provided a “brief explanation of the basis for the contention,” (subsection ii). The issue raised is indisputably “within the scope of the proceeding” because DTE must mitigate the loss of historic properties under the NHPA (subsection iii). Compliance with the NHPA is material to the findings the NRC must make to support the decision to grant a new Combined Operating License (subsection iv). action that is involved in the proceeding. Intervenors have provided concise evidence supporting their position that the “official” history of Fermi 1 is likely biased and inaccurate (subsection v). By demonstrating the lack of public participation in the Section 106 NHPA process, Intervenors have provided sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact” (subsection vi). Intervenors’ showing exceeds the obligatory "minimal showing that the material facts are in dispute, thereby demonstrating that an inquiry in depth is appropriate." *Gulf States Utilities Co.*, 40 NRC 43, 51 (1994), *citing*, Rules of Practice for Domestic Licensing Proceedings — Procedural Changes in the Hearing Process, Final Rule, 54 F.R. 33168, 33171 (Aug. 11, 1989). This is not the juncture at which the Licensing Board may not address the merits or weigh the contention evidence when addressing admissibility. *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1654 (1982).

VI. CONCLUSION

Control over the storytelling of history can have enormous consequences. It has been observed that “half of writing history is hiding the truth.”⁶ History, sometimes referred to as the story written by the victors, has also been cynically described as the art of having the dead dance for

⁶Joss Whedon, <http://www.goodreads.com/quotes/show/8839>

us.

The controversy over the “official”, public history of Fermi 1 embodies themes of war and energy policy that resonate, still, in 2012. The notion of placing an historical exhibit about this very controversial early nuclear reactor, along with carefully-selected documentation, at a community college with a nuclear operations program in a town dominated by a nuclear utility company at the end of a nonpublic process to determine how and what history would be preserved is very troubling. The mitigation for the demolition of Fermi 1 may have been transformed into a parochial arrangement aimed at excluding important details from historical scrutiny. And if so, this “mitigation” very much mimics the energy policy decisions of our time. It is incumbent upon the ASLB, not to rewrite, or edit history, however, but to see that the legal requirements for public participation are followed. In that way, perhaps instead of dancing for us, the dead might become our instructors.

For the foregoing reasons, this Motion should be granted and the accompanying contention admitted.

WHEREFORE, Intervenors respectfully pray the ASLB admit Contention 25 for adjudication.

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July 2, 2012

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
Before the Atomic Safety and Licensing Board**

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

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "INTERVENORS' MOTION FOR ADMISSION OF CONTENTION NO. 25 (CHALLENGING § 106 NHPA MITIGATION FOR DEMOLITION OF FERMI UNIT 1)" have been served on the following persons via Electronic Information Exchange this 2nd day of July, 2012:

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