July 27, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF ANSWER TO THE INTERVENORS' MOTION
FOR ADMISSION OF CONTENTION 25

Pursuant to 10 C.F.R. § 2.309(h)(1), the staff (Staff) of the Nuclear Regulatory Commission (NRC) hereby answers the "Intervenors' Motion for Admission of Contention No. 25 (Challenging § 106 NHPA Mitigation for Demolition of FERMI Unit 1)" dated July 2, 2012 (Motion), [1] filed in this proceeding regarding the Fermi Nuclear Power Plant, Unit 3 (Fermi 3) combined license (COL) application, by the organizations Beyond Nuclear, Citizens for Alternatives to Chemical Contamination, Citizens Environmental Alliance of Southwestern Ontario, Don't Waste Michigan, the Sierra Club, and various individuals (collectively, Intervenors).[2]

For the reasons set forth herein, the Motion, together with proposed Contention No. 25, should be rejected. The proposed contention does not satisfy the contention admissibility

[1] The Motion was filed on July 2, 2012; however, certain accompanying documents were not filed until July 3, 2012.

[2] The Motion states the proposed Contention 25 as follows: "The proposed measures taken to mitigate the demolition of the Fermi 1 containment 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." Motion at 1-2.

requirements of 10 C.F.R. § 2.309(f)(1) in that the Intervenors have not demonstrated that the issues raised are material to the findings the NRC must make nor have they shown that a genuine dispute exists on a material issue of fact or law. Furthermore, to the extent the proposed contention is based on information that was previously available in the Staff's Draft Environmental Impact Statement (DEIS), it fails to meet the timeliness requirements of 10 C.F.R. § 2.309(f)(2).

BACKGROUND

By letter dated September 18, 2008, Detroit Edison Co. (DTE or Applicant) submitted a COL application (Application or COLA) for one ESBWR advanced boiling water reactor to be located at the site of the operating Fermi Nuclear Power Plant, Unit 2, in Monroe County, Michigan. *See* Letter from Jack M. Davis, DTE, to NRC Document Control Desk (Sept. 18, 2008) (ADAMS Accession No. ML082730763). Upon acceptance of the Application, the NRC began the environmental review by publishing a Federal Register notice of intent to publish an environmental impact statement . *See* Detroit Edison Company Fermi Nuclear Power Plant, Unit 3 Combined License Application Notice of Intent To Prepare an Environmental Impact Statement and Conduct Scoping Process*,* 73 Fed. Reg. 75,142 (Dec. 10, 2008) (Notice of Intent). The notice included the statement that:

> ... the NRC staff plans to coordinate compliance with Section 106 of the National Historic Preservation Act (NHPA) with steps taken to meet the requirements of the National Environmental Policy Act of 1969, as amended (NEPA). Pursuant to 36 C.F.R. § 800.8(c), the NRC staff intends to use the process and documentation for the preparation of the EIS on the proposed action to comply with Section 106 of the NHPA in lieu of the procedures set forth on 36 C.F.R. § 800.3 through 800.6.

Id.

On January 14, 2009, the NRC held two scoping meetings in Monroe, Michigan, to obtain public input on the scope of the environmental review *See* Corrected Transcript of Fermi 3 Afternoon Scoping Meeting (Jan. 14, 2009) (ADAMS Accession No. ML090440586) (Scoping

Meeting (Afternoon) Tr.); Corrected Transcript of Fermi 3 Evening Scoping Meeting (Jan. 14, 2009) (ADAMS Accession No. ML090440588) (Scoping Meeting (Evening) Tr.).

On October 28, 2011, a notice of availability for the DEIS was published in the Federal Register. *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 (October 28, 2011); *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). A 75-day public comment period on the DEIS commenced on October 28, 2011, when the United States Environmental Protection Agency (EPA) issued a notice of availability to allow members of the public to comment on the DEIS. Environmental Impact Statements; Notice of Availability, 76 Fed. Reg. 66,925 (October 28, 2011). Public meetings were held in the afternoon and evening of December 15, 2011, at the Monroe County Community College, in Monroe, Michigan. During these public meetings, the review team described the results of the NRC environmental review, answered questions related to the review, and provided members of the public with information to assist them in formulating their comments. On January 11, 2012, the comment period on the DEIS ended.[3]

On July 2, 2012, the Intervenors filed the Motion and proposed Contention No. 25. Motion at 1.

[3] An analysis of the comments received and the Staff's responses thereto will be provided in the Final Environmental Impact Statement (FEIS) in this proceeding, which is currently scheduled for release in November, 2012.

DISCUSSION

I. LEGAL STANDARDS

A. Requirements for New or Untimely Contentions

NRC regulations require that petitioners base contentions on documents available at the time the initial petition is filed. *See* 10 C.F.R. § 2.309(f)(2). However, petitioners may amend contentions or submit new contentions after the deadline for submitting an initial petition when the petitioners can show that they meet the standards in 10 C.F.R. § 2.309(f)(2)(i)-(iii), which require that:

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

10 C.F.R. § 2.309(f)(2)(i)-(iii). S*ee also Pa'ina Hawaii LLC*, (Materials License Application), CLI-10-18, 72 NRC 56, 86 n.171 (2010) (for parties already admitted to a proceeding, the timeliness of new or amended contentions is governed by the requirements of Section 2.309(f)(2)). The Commission has emphasized that standards for filing new or amended contentions under 10 C.F.R. § 2.309(f)(2) are "stringent," and that even contentions that satisfy these requirements must still meet the strict standards for contention admissibility under Section 2.309(f)(1). *AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), CLI-09-07, 69 NRC 235, 260-61 (2009) (internal citations omitted).

Where the new or amended contention does not meet the standards of 10 C.F.R. § 2.309(f)(2), nontimely filings must meet the requirements of 10 C.F.R. § 2.309(c), which establishes an eight-part balancing test for admissibility. 10 C.F.R. § 2.309(c)(1)(i)-(viii).[4] The

---

[4] The factors to be balanced under 10 C.F.R. § 2.309(c)(1)(i)-(viii) are (i) Good cause, if any, for the failure to file on time; (ii) nature of the petitioner's right to be made a party to the

petitioner bears the burden of showing that a balancing of these eight factors weighs in favor of admittance of the late petition. *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 347 (1998). Of the eight factors set forth in 10 C.F.R. § 2.309(c), the first – good cause, if any, for the failure to file on time – is normally considered to be the most important. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-4, 58 NRC 31, 44 (2004); *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986). Failure to meet the good cause factor requires a compelling showing regarding the other factors. *See, e.g., Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 2), CLI-10-12, 71 NRC 319, 323 (2010); *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 165 (1993).

B. General Requirements for Contention Admissibility

In addition to satisfying the requirements described above, proposed Contention 25 must also satisfy the general admissibility requirements governing all contentions submitted in NRC proceedings. The legal requirements governing the admissibility of contentions are well established and currently are set forth in 10 C.F.R. § 2.309(f)(1) of the Commission's Rules of Practice.

These requirements may be summarized as follows. An admissible contention must: (1) provide a specific statement of the legal or factual issue sought to be raised; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised is within the scope of the proceeding; (4) demonstrate that the issue raised is material to the findings the

---

proceeding; (iii)nature and extent of the petitioner's interest in the proceeding; (iv) possible effect of any order that may be entered in the proceeding on the petitioner's interest; (v) availability of other means whereby the petitioner's interest will be protected; (vi) extent to which the petitioner's interests will be represented by existing parties; (vii) extent to which the petitioner's participation will broaden the issues or delay the proceeding; and (viii) extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

NRC must make to support the action that is involved in the proceeding; (5) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at the hearing; and (6) provide sufficient information to show that a genuine dispute with the applicant exists with regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief. 10 C.F.R. § 2.309(f)(1)(i)-(vi).

The purpose of these requirements is to "focus litigation on concrete issues and result in a clearer and more focused record for decision." Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004); *see also Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 553-54 (1978); *BPI v. AEC*, 502 F.2d 424, 428 (D.C. Cir. 1974); *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974). The Commission has stated that it "should not have to expend resources to support the hearing process unless there is an issue that is appropriate for and susceptible to, resolution in an NRC hearing." 69 Fed. Reg. at 2202. The Commission has emphasized that the rules on contention admissibility are "strict by design." *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *pet. for reconsideration denied*, CLI-02-01, 55 NRC 1 (2002). Failure to comply with any of these requirements is grounds for the dismissal of a contention. 69 Fed. Reg. at 2221; *see also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); *Arizona Public Service Co. et al.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991). "Mere 'notice pleading' does not suffice." *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 119 (2006).

C. Legal Requirements For Consultations Under NHPA Section 106

The National Historic Preservation Act of 1966 (NHPA) was enacted in 1966 with the stated purpose of "establish[ing] a program for the preservation of additional historic properties throughout the nation." Pub. L. No. 89-665, 80 Stat. 915 (1966). Additionally, the NHPA creates a partnership between Federal, State, local, and private entities to further the goal of historic preservation. *See* 16 U.S.C. § 470-1.

NHPA requires that federal agencies take into account the effects of their proposed actions on historic properties. *Id.* If the Federal action is determined to be an undertaking, the agency must determine whether it is the type of activity that "has the potential to cause effects on historic properties." 36 C.F.R. § 800.3(a). An "effect" is defined as "alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register." 36 C.F.R. § 800.16(i). Section 106 of NHPA requires consultation with interested parties, including the State Historic Preservation Officer (SHPO), and if tribal historic properties may be affected, the requisite Tribal Historic Preservation Officer (THPO) and/or other tribal representative. In consultation with the SHPO and THPO, the agency must also identify any other parties entitled to be consulting parties and invite them to participate as such (e.g., local governments and applicants). 36 C.F.R. § 800.3(f). Moreover, the agency, in consultation with the SHPO and THPO, must consider all requests to participate as a consulting party and determine which should be included as such. 36 C.F.R. § 800.3(f)(3). While NHPA requires consultation with various parties, no substantive outcome is required as a result of those consultations. *Business and Residents Alliance of East Harlem v. Jackson*, 430 F.3d 584, 591 (2d Cir. 2005).

If an agency determines that the undertaking is not the type which would cause effects on historic properties, the agency has no further obligations under section 106. 36 C.F.R. §800.3(a)(1). If the agency determines that there is a potential to cause effects on historic properties, the agency must continue the section 106 process. Once an undertaking which has

potential to effect historic properties has been identified, the agency must:

(1) identify properties listed on the National Register, or properties eligible for listing, which may be affected by the undertaking;

(2) assess the impacts on any such historic properties; and

(3) consider methods of minimizing or mitigating the impacts on historic properties.

36 C.F.R §§ 800.3-800.6; *Pye v. United States*, 269 F.3d 459, 471 (4th Cir. 2001) (explaining the three steps). An agency may use services and input from applicants, but the agency remains legally responsible for all findings and determinations required under section 106. 36 C.F.R. § 800.2(a)(3).

If the agency finds that there are no historic properties affected by the undertaking, then the agency must notify the consulting parties who would have an opportunity to dispute the agency's findings. 36 C.F.R. § 800.4(d)(1). If historic properties are found which may be affected by the undertaking, the agency must notify the consulting parties and assess any adverse effects. 36 C.F.R. § 800.4(d)(2).

Under NHPA, the federal agency must "afford the Advisory Council on Historic Preservation (ACHP) ... a reasonable opportunity to comment with regard to such undertaking." 14 U.S.C. § 470f. The ACHP is the independent federal agency that oversees implementation of NHPA throughout the federal government. Pursuant to NHPA regulations, once the adverse effects have been assessed, the agency must consult with the other parties to "develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize or mitigate adverse effects on historic properties." 36 C.F.R § 800.6. The agency's responsibilities under section 106 will be satisfied when the appropriate scoping, identification of historic properties, assessment of effects upon them, and consultation leading to resolution of any adverse effects are resolved[5] through either the appropriate NEPA documents pursuant to 36 C.F.R. §

[5] The Advisory Council on Historic Preservation (ACHP) has indicated that an agency's section 106 procedural responsibilities are met once the agency has: (1) identified the appropriate consulting

800.8(c)(4); a memorandum of agreement (MOA) executed and implemented pursuant to 36 C.F.R. § 800.6(c); a programmatic agreement under 36 C.F.R. § 800.14(b); or, official termination of consultation with comments from the ACHP as provided in 36 C.F.R. § 800.7.

As discussed further below, an agency may integrate its compliance with Section 106 with its process for conducting its review pursuant to the National Environmental Policy Act of 1969, as amended (NEPA). NEPA requires the preparation of an environmental impact statement for major Federal actions that have the potential to significantly affect the quality of the human environment. 42 U.S.C. § 4321 *et seq*. The NRC has implemented section 102 of NEPA in 10 C.F.R. Part 51. Further, in 10 C.F.R. § 51.20, the NRC determined that the issuance of a COL under 10 C.F.R. Part 52 is an action that requires an EIS. *See* 10 C.F.R. § 51.20.

NHPA, like NEPA, is a procedural statute that requires federal agencies to follow and complete a process before taking an action that may, in the case of the NHPA, affect a historic property. 14 U.S.C. § 470f. Similar to NEPA reliance on procedural mechanisms, NHPA preserves historic and cultural resources "neither by forbidding the destruction of historic sites nor by commanding their preservation, but instead by ordering the government to take into account the effect any federal undertaking might have on them." *United States v. 162.20 Acres of Land*, 639 F.2d 299, 302 (5th Cir. 1981).

Agencies are encouraged to coordinate their NHPA review with reviews required by other Federal, State, and local laws, such as NEPA. 36 C.F.R. § 800.3(b). Under NHPA an agency may use the process and documentation required in connection with those other reviews required under Federal, State, or local laws as long as they are consistent with Section

---

parties; (2) provided them with adequate documentation so they were able to participate in consultation effectively; and (3) provided a reasonable opportunity for consulting parties to exchange views about the identification of historic properties, the assessment of effects to them, and the resolution of adverse effects. *Section 106 Archaeology Guidance* at 30 (Jan. 1, 2009), *available at* http://www.achp.gov/docs/ACHP%20ARCHAEOLOGY%20 GUIDANCE.pdf (Archaeology Guidance).

106 procedures. In order to use this coordinated approach, an agency must notify other consulting parties of their intention, and meet certain standards specified in 36 C.F.R. § 800.8. *See* 36 C.F.R. § 800.8(c). Further, coordination of NEPA and NHPA review should be considered as early as possible. 36 C.F.R. § 800.8(a)(1).

The NRC generally follows this approach, permitted by 36 C.F.R. § 800.8, of using the NEPA process to substitute for the NHPA procedures. *See, e.g., USEC Inc.* (American Centrifuge Plant), CLI-06-09, 63 NRC 433, 438 (2006) ("The NRC Staff's practice is to make this 'process' substitution, using the NEPA process to identify, analyze, and document any cultural impacts of a project as part of its environmental review."). This approach was used for the review of the Fermi COL application, as specified in the Notice of Intent. *See* Notice of Intent at 75,142.

IV. PROPOSED CONTENTION 25

Proposed Contention 25 states the following:

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

Motion at 1-2.

The Intervenors claim that proposed Contention 25 is based on information not previously available and meets the requirements of 10 C.F.R. § 2.309(f)(2) for contentions filed after the initial filing deadline. Specifically, the Intervenors claim the information upon which proposed Contention No. 25 is based was not available until the NRC Staff filed its June 2012 hearing file update. Motion at 13-14. Further, the Intervenors contend that the "total discussion of historic preservation impacts expected from Fermi 1 in the [DEIS] for Fermi 3 consists of" the following passage:

> 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 § 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.

Motion at 9. They assert that "[s]ince 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 Section 106 regulations." *Id.* The Intervenors claim the only public 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 ..." Motion at 10. The Intervenors raise a host of issues summarized as challenges to the "'official history'" of Fermi 1 and claim that pertinent historical facts have, or will be, omitted from official recordation. Motion at 11-12.

Finally, the Intervenors complain that no formal notice of the completion of the MOA has been issued 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." Motion at 12.

V. STAFF RESPONSE TO PROPOSED CONTENTION 25

A. Proposed Contention No. 25 Fails to Meet the Contention Admissibility Requirements of Section 2.309(f)(1)

As discussed further below, the Intervenors fail to show that their contention meets the requirements of 10 C.F.R. § 2.309(f)(1). In particular, to the extent the contention is based on asserted deficiencies in the Staff's process for soliciting public participation pursuant to NHPA, it fails to demonstrate that the issues raised are material to the findings the NRC must make and that a genuine dispute exists on a material issue of fact or law, because Staff, through the combined issuance of Federal Register notices, public meeting, comment solicitations, and the

DEIS, has continued to comply with Section 106 of NHPA.

To fulfill its NHPA responsibilities, the Staff followed the process as outlined in 36 C.F.R. § 800.8(c), "Coordination with the National Environmental Policy Act of 1969" for public notification. That provision, under the heading "*Use of the NEPA process for Section 106 purposes",* provides that:

> ... An agency official may use the process and documentation required for the preparation of an EA/FONSI or an EIS/ROD to comply with § 106 in lieu of the procedures set forth in §§ 800.3 through 800.6 if the agency official has notified in advance the SHPO/THPO and the Council that it intends to do so and the following standards are met.

36 C.F.R. § 800.8(c).

The Staff in this COL proceeding, as in previous proceedings, announced its intention to prepare an EIS in a duly published Federal Register notice.[6] *See* Notice of Intent at 75,143. Staff gave notice of its intent and called for public participation and comment in the December 10, 2008, Federal Register notice for this proceeding, which stated that:

> ... as outlined in 36 C.F.R. § 800.8(c), ''Coordination with the National Environmental Policy Act,'' the NRC staff plans to coordinate compliance with Section 106 of the National Historic Preservation Act (NHPA) with steps taken to meet the requirements of the National Environmental Policy Act of 1969, as amended (NEPA). Pursuant to 36 C.F.R. § 800.8(c), the NRC staff intends to use the process and documentation for the preparation of the EIS on the proposed action to comply with Section 106 of the NHPA in lieu of the procedures set forth 1n 36 C.F.R. § 800.3 through 800.6.

73 Fed. Reg. 75142, 75143.

As described above, the Staff's DEIS was published in October 2011. Publication of the DEIS followed a public scoping process that included two public scoping meeting and submittal of written scoping comments, as summarized in Appendix D of the DEIS. The Staff also held various public meetings with the Applicant associated with requests for additional

---

[6] This is the same notification process used by Staff in other COL proceedings. *See, e.g.*, Florida Power & Light Company; Turkey Point, Units 6 and 7; Combined License Application, Notice of Intent To Prepare an Environmental Impact Statement and Conduct Scoping Process, 75 Fed. Reg. 33,851 (June 15, 2010).

information (RAIs) the Staff had issued during the preparation of the DEIS.

The DEIS described the Staff's section 106 consultation process and analyzed impacts from construction and operation of Fermi 3 the proposed site, including with respect to historic and cultural resources. *See* DEIS at 2-193 to 2-205 (describing historic and cultural resources at the site); 2-207 to 2-208 (describing section 106 consultation); 4-96 to 4-100 (describing impacts of construction on historic and cultural resources): 5-88 to 5-90 (describing impacts of operations on historic and cultural resources; and 7-31 to 7-32 (describing cumulative impacts on historic and cultural resources). As part of that analysis, the Staff identified Fermi Unit 1 as an historic property eligible for listing on the National Register of Historic Places. *Id*. at 2-203 to 2-204; 4-97. Furthermore, the DEIS acknowledged the potential impacts to historic and cultural resources associated with the demolition of Fermi Unit 1 prior to the construction of Unit 3. *Id*. at 4-97. This analysis was supported by public input received during the scoping process, input from the Michigan SHPO, and information obtained from the Applicant in writing and in public meetings.

The Staff accordingly concluded that there would be adverse impacts to historic properties as a result of the proposed action, based on the demolition of Fermi 1, and determined that impacts would be MODERATE if the Fermi 1 structure remains on the site when construction of Fermi 3 begins. DEIS at 4-97 to 4-98. It further noted that "[t]he NRC staff is consulting with the Michigan SHPO and Detroit Edison in developing an MOA to resolve the adverse effects on Fermi 1 pursuant to 36 C.F.R. § 800.6(c)." *Id*. at 4-97. The DEIS also lists recordation and a public exhibit as measures to mitigate adverse impacts to Fermi 1. *Id*. at 4-98.

Consistent with its use of NEPA to fulfill its NHPA responsibilities and with the approach to consultation and mitigation described in the DEIS, the Staff worked with designated consulting parties, including the Applicant and the Michigan SHPO, to prepare an MOA regarding activities to mitigate impacts associated with the demolition of Fermi Unit 1. The MOA

was signed by the NRC staff, the Applicant, the Michigan SHPO, and a representative of Monroe County Community College, respectively, on various dates between March 7, 2012, and March 22, 2012. *See* Memorandum of Agreement for Fermi 1 Demolition at 3 (ADAMS Accession No. ML12089A007) (Mar. 20, 2012) (Fermi MOA). The Fermi MOA describes two specific activities to be carried out by the Applicant and other signatories:

> I. RECORDATION
>
> A. DTE will document Fermi 1 so there is a permanent record of its existence. The recordation packages shall follow the SHPO *Documentation Guidelines* (Appendix A) and shall be submitted to the SHPO for review and approval.
>
> B. The completed Fermi 1 documentation package shall be submitted to the SHPO no later than one (1) year from the date of this agreement. The approved original documentation package shall be submitted to the SHPO for deposit in the State Archives of Michigan and another original copy of the documentation shall be submitted to the Monroe County Library and Reference Center.
>
> II. EXHIBIT
>
> DTE, in consultation with Monroe County Community College and other interested parties and the SHPO, shall develop and establish a permanent public exhibit regarding the history of the Fermi 1 plant within two years of the execution of this agreement. DTE will coordinate with the parties to develop a mutually acceptable plan for the scope, location, and design of this exhibit. At the completion (i.e., conclusion) of the exhibit, DTE shall offer any remaining archival items pertaining to the history of Fermi 1 to local, State, and Federal agencies and non-profit organizations potentially interested in permanent retention or display of these items.

Fermi MOA at 1-2. The Michigan SHPO's guidelines, attached to the Fermi MOA as Appendix A, contain information on how to submit archival-quality photographs of the resource and instruct submitters to describe the resource in terms of criteria for listing on the National Register of Historic Places. *See* Fermi MOA, Appendix A at 1, 3-6.

As noted by the Intervenors, the "recordation" activities listed in the Fermi MOA have been completed. Motion at 2. The Applicant has submitted the required photographs and descriptive information to the SHPO, and the SHPO has issued a letter approving that submittal.

Id., citing Letter from Martha MacFarlane Faes, Cultural Resource Protection Manager, Michigan State Historic Preservation Office, to Bruce Olson, U.S. NRC (May 7, 2012), ADAMS Accession No. ML12144A321 (accepting DTE's recordation package for Fermi 1). However, it is important to note that development of the exhibit described in the Fermi MOA has not yet occurred.

The Intervenors state that the NRC interprets the recordation portion of the Fermi MOA so that it is limited to only a few documents. *Id.* at 9. This is correct, because the guidelines for submitting archival materials to the Michigan SHPO are limited to materials related to the structures under consideration and do not extend to the other types of materials that the Intervenors mention. *See generally* Fermi MOA, Appendix A. The goal of this recordation is simply to create a "visual public record" that "will be maintained and made available to the public for research purposes." *Id*. at 1. Incorporation of this archival information into broader historical narratives, the focus of the Intervenors' concern, is a separate activity.

The faculty of MCCC, in cooperation with the Michigan SHPO, has begun discussions related to developing an exhibit that goes considerably beyond the recordation package submitted by DTE to the SHPO. However, the content and scope of the exhibit have not yet been established.

In light of the Staff's review process as summarized above, the Intervenors have erred in characterizing the section 106 process as it is reflected in the DEIS for Fermi 3. *See* Motion at 9. To the extent they assert that there has been insufficient opportunity for public participation in the identification of historic properties, analysis of potential impacts to Fermi Unit 1, and identification of potential mitigation measures, they have overlooked or simply failed to acknowledge and account for the extensive DEIS discussions of the historic and cultural resources at the site, the section 106 consultation process, or the analysis of construction, and operations impacts of the Fermi 3 project on historic and cultural resources. DEIS at 2-193 to 2-205, 2-207 to 2-208, 4-96 to 4-100, 5-88 to 5-90, and 7-31 to 7-32. Thus, there is no genuine

dispute on a material issue of law or fact, in contravention of 10 CFR § 2.309 (f)(1)(vi).

The DEIS states that "[t]he NRC staff is consulting with the Michigan SHPO and Detroit Edison in developing a MOA to resolve the adverse effects on Fermi 1 pursuant to 36 C.F.R. § 800.6(c)," and notes that the mitigation measures will include recordation and a public exhibit. DEIS at 4-97 to 4-98. When the DEIS was published, the public was given 75 days to comment (*see* 76 Fed. Reg. 66,998 (October 28, 2011); consistent with Commission's regulations and the Board's instructions in this proceeding,[7] the Petitioners also had the opportunity to file contentions based on the DEIS's contents. In sum, the Intervenors, like any interested party, had an opportunity at that time to raise issues related to the Staff's analysis and conclusions concerning impacts to historic resources and the steps to be taken to mitigate those impacts.

Indeed, at the public meetings on the DEIS held on December 15, 2011, Michael Keegan, of the Intervenors' member group Don't Waste Michigan, provided comments regarding the historical accuracy of the proposed archives for Fermi 1, offered additional documents to be included in the archives, cited to the book "We Almost Lost Detroit," and read a statement into the record. *See* Transcript of Afternoon Session of Public Meeting on Draft EIS for Fermi 3 Project (Jan. 13, 2012) (ADAMS Accession No. ML12009A120) (DEIS Meeting (Afternoon) Tr.) and Transcript of Evening Session of Public Meeting on Draft EIS for Fermi 3 Project, at 89 (Jan. 13, 2012) (ADAMS Accession No. ML12009A121) (DEIS Meeting (Evening) Tr.). Mr. Keegan's comments, made in December 2011, mirror those made in the July 2012 Motion and proposed Contention 25. *See* Motion at 7-9.[8]

The Intervenors have also had various opportunities to weigh in on historic preservation

---

[7] *See* Order (Establishing Schedule and Procedures to Govern Further Proceedings) at 2 (Sept. 11, 2009) (unpublished) (ADAMS Accession No. ML092540392).

[8] Although the Intervenors' counsel attended both the afternoon and evening meetings and made public comments in the evening meeting, he did not offer comments or concerns regarding Fermi 1.

issues earlier in the proceeding. The Staff conducted environmental scoping meetings related to the review of the DTE Fermi Application on Wednesday, January 14, 2009, at the Monroe County Community College. Each meeting included a formal presentation that was given by the NRC staff. After the presentation there was a question and answer period, after which members of the public were invited to provide comments. Approximately 100 people attended the afternoon meeting, and approximately 60 attended the evening meeting. Memorandum to Ryan Whited from Stephen Lemont, Summary of Public Scoping Meetings Conducted Related to the Combined License Application Review of the Fermi Nuclear Power Plant, Unit 3, at 1 (Mar. 3, 2009)(ADAMS Accession No. ML090291080). The participants included members of the NRC staff, NRC contractors from Argonne National Laboratory, members of the public, and the Intervenors including members of the Sierra Club, Don't Waste Michigan, and Beyond Nuclear, together with the Intervenors' counsel, Terry Lodge. *Id.* at 22-25. Kevin Kamps, of the Intervenors' member groups Beyond Nuclear and Don't Waste Michigan, discussed Fermi 1 in the afternoon scoping meeting, as did Ed McArdle of the Sierra Club. Scoping Meeting (Afternoon) Tr. at 33, 79-85 and 109-112. In the evening scoping meeting, Mr. Keegan, of the Intervenors' member group Don't Waste Michigan, discussed Fermi 1. Scoping Meeting (Evening) Tr. at 30, 94-100.

Furthermore, Mr. Keegan was also an active participant in at least six public meeting Conference Calls for the Fermi 3 COL Environmental Review in which Fermi 1 was discussed in relation to NHPA Section 106.[9] The last two of these conference calls included discussion

---

[9] *See* Conference Call Notes from the Fermi 3 COLA Environmental Review Teleconference Meeting—Monday, November 22, 2010 (Nov. 24, 2010) (ADAMS Accession No. ML103470088); Conference Call Notes from the Fermi 3 COLA Environmental Review Teleconference Meeting—Monday, November 29, 2010 (Dec. 2, 2010) (ADAMS Accession No. ML103470085); Conference Call Notes for the Fermi 3 COL Environmental Review Progress and Status—2-28-2011 (Mar. 1, 2011) (ADAMS Accession No. ML110770534); Detroit Edison-NRC Conference Call for the Fermi 3 COL Environmental Review and Status—3-28-2011 (Mar. 29, 2011) (ADAMS Accession No. ML11112A050); Meeting Minutes—Conference Call for the Fermi 3 COL Environmental Review—Monday, May 23, 2011, 2:00PM Eastern Time (May 25, 2011) (ADAMS Accession No. ML11179A177); Fermi 3 Conference Calls—Environmental Review—DEIS

concerning the proposed mitigation stipulations in the Fermi MOA. Although in attendance, Mr. Keegan made no comments concerning the NHPA Section 106 process or Fermi 1 during any of these calls.

In addition to references to the proposed MOA in the DEIS and on the teleconferences described above, the Staff had prepared various earlier drafts of the document, which were made public in ADAMS. These documents were included in the Staff's hearing file updates of November 1, 2011, and October 3, 2011. *See* Fermi COL Hearing File and Mandatory Disclosures, Update 24 – Nov. 1, 2011 (disclosing MOA for Fermi 1 Demolition – Final Draft, ADAMS Accession No. ML112780234) and Update 23 – Oct. 3, 2011 (disclosing Draft MOA Between the U.S. NRC and the Michigan SHPO Regarding the Demolition of Fermi 1, ADAMS Accession No. ML112070039).[10]

As described above, the Intervenors have participated in the Staff's process for complying with both NHPA and NEPA beginning several years ago, and have had both notice and the opportunity to provide input concerning potential effects on historic properties including with respect to Fermi Unit 1. The Intervenors' participation thus contradicts their claims that they lacked notice of the process or that consultation – whether on overall impacts to historic properties or with respect to impacts and mitigation concerning Fermi Unit 1 in particular – was "accomplished effectively in secret." Motion at 9. The fact that the Intervenors chose not to further pursue their concerns regarding Fermi Unit 1 (including those that were the subject of

---

(July 19, 2011) (ADAMS Accession No. ML11209D619).

[10] As noted above, the Fermi MOA was signed by the NRC staff, the Applicant, the Michigan SHPO, and a representative of Monroe County Community College (MCCC) on various dates between March 7, 2012, and March 22, 2012. MOA at 3. The signed document was entered into ADAMS on March 29, 2012, and released in ADAMS as a public document on April 4, 2012. (ADAMS Accession No. ML12089A007) However, the Staff has recently discovered that when the final MOA was entered into ADAMS, it was inadvertently profiled with the docket number for the existing Fermi Unit 2 (05000341) rather than the docket number for the COL proceeding, Fermi Unit 3 (05200030). For this reason, the final document was not captured by the Staff's May 2012 hearing file update nor subsequent updates. The Staff has since corrected the docket designation for this document in ADAMS and will include the document in its next update.

their earlier comments) or seek to more closely participate in the MOA process does not demonstrate a material dispute with the Staff's NHPA compliance. Thus, the Intervenors have failed to show that a genuine dispute exists on a material issue of law or fact, or to show that this issue is material to the findings the Staff must make, in contravention of 10 C.F.R. §2.309(f)(1)(iv) and (vi).

B. Notice of Completion of the Fermi MOA is Not Required

The Intervenors also assert that no formal notice of the completion of the Fermi MOA has been issued. However, the Intervenors cite no legal authority requiring the Staff to provide formal notice of the completion of the Fermi MOA to the Intervenors. The Staff, as set forth in the preceding sections, provided notice that the NRC planned to use the process and documentation for the preparation of the EIS on the proposed action to comply with Section 106 of the NHPA in lieu of the procedures set forth in 36 C.F.R. § 800.3 through 800.6. *See* Notice of Intent. Although the Staff will reference the final MOA in its FEIS when it is published, the Intervenors identify no legal obligation under either NHPA or NEPA requiring specific notice to the public that the Fermi MOA has been completed. As explained in guidance provided by the ACHP, an agency's section 106 procedural responsibilities are met once the agency has: (1) identified the appropriate consulting parties; (2) provided them with adequate documentation so they were able to participate in consultation effectively; and (3) provided a reasonable opportunity for consulting parties to exchange views about the identification of historic properties, the assessment of effects to them, and the resolution of adverse affects. *See Section 106 Archaeology Guidance* at 30 (Jan. 1, 2009), *available at* http://www.achp.gov/docs/ACHP%20ARCHAEOLOGY%20 GUIDANCE.pdf (Archaeology Guidance). Through its scoping process, public meetings, preparation of the DEIS, and development of the Fermi MOA, Staff has continued to comply throughout its NEPA review with these NHPA responsibilities.

Furthermore, while the Motion purports to challenge the Staff's consultation process, much of its attention appears directed at expressing dissatisfaction with the potential contents of an exhibit that will be prepared to describe the history of Fermi Unit 1. Motion at 3-6. In effect, the Motion asserts that the Staff's NHPA consultation is inadequate unless the Intervenors are allowed to determine the content and scope of the Fermi MOA as well as subsequent implementation. However, NHPA merely requires consultation and to afford consulting parties a reasonable opportunity to comment on such undertakings, *see* 36 C.F.R. § 800.1; it does not dictate a substantive outcome. *See Business and Residents Alliance of East Harlem v. Jackson*, 430 F.3d 584, 591 (2d Cir. 2005). Other than a general reference to the need for public participation under NHPA, the Intervenors cite no authority to support their implication that, in addition to public participation throughout the scoping process and the opportunity to comment on the DEIS, NHPA also requires direct public participation in (or approval of) the finalization of the Fermi MOA . Accordingly, the Intervenors' claim is without a legal basis and should be rejected for failing to show that their contention is material to the findings the Staff must make and failing to show a genuine dispute with the application on a material issue of law or fact.[11] 10 C.F.R. § 2.309(f)(1)(iv), (vi).

For the reasons set forth herein, proposed Contention No. 25 fails to meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1) and should be rejected.

C. For Claims That Could Have Been Raised Based on the DEIS (or Documents Supporting It), Intervenors Fail To Demonstrate That Proposed Contention 25 Meets The Timeliness Requirements of 10 C.F.R. § 2.309(f)(2).

---

[11] Intervenors also claim that Staff sought to "thwart public disclosure" of the completion of the MOA. Motion at 13. In addition to being unfounded, this claim is puzzling, as the documents Intervenors rely on for this claim (*see id.* at 13-14) were included in the Staff's routine Hearing File updates, hardly an indication of an attempt to suppress information. Also, as previously noted, the FEIS, when issued, will update the DEIS with information pertaining to the finalized MOA.

To the extent proposed Contention 25 is based on information that was available in the DEIS with respect to the NHPA Section 106 process, or on already-available documents supporting the DEIS review, the Intervenors fail to show that Proposed Contention 25 is timely under 10 C.F.R. § 2.309(f)(2). In particular, they fail to show that the information in documents on which they rely are materially different than information previously available or that they were timely submitted based on the information's availability. 10 C.F.R. § 2.309(f)(2)(ii), (iii).

The Intervenors argue that "[t]his 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." Motion at 13 (emphasis added).[12]

With respect to potential impacts associated with the demolition of Fermi 1, the DEIS stated that, among other steps, "[t]he 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." DEIS at 7-31; DEIS at 4-97. The DEIS also stated that the mitigation measures "will consist of recordation documents and a public exhibit." DEIS at 4-98. The Staff concluded that "the incremental impacts associated with the onsite NRC-authorized activities would be MODERATE, because of the demolition of Fermi 1, and no mitigation measures would be warranted beyond those discussed in Sections 4.6 and 5.6 [of the DEIS]." DEIS at 4-97, 4-98.

---

[12] To the extent the Intervenors are noting that a final version of the MOA had not yet been signed or that the precise text of the final MOA was not available at the time the DEIS was published, the Staff does not disagree. However, the fact that an MOA was being developed to mitigate the demolition of Fermi 1 and the general nature of its provisions regarding recordation and exhibit development, were disclosed to the Intervenors on a number of occasions in 2011, including in the DEIS, on publicly noticed teleconferences in which the Intervenors representatives participated, and in documents disclosed in the hearing file. To the extent proposed Contention 25 is based on that information, it is therefore untimely.

Furthermore, as discussed above, prior to publication of the DEIS the Staff held a number of public conference calls that addressed the Staff's NHPA review, impacts to Fermi Unit 1 in particular, and even the proposed stipulations in the Fermi 1 MOA regarding mitigation.[13] On each of these conference calls, a member of one of the groups comprising the Intervenors was present.

Thus, through the DEIS, in combination with the Staff's previous actions (described above) to notify the public of its process for meeting its obligations under Section 106 of NHPA,[14] the Intervenors have long had notice of the process being undertaken by the NRC, Michigan SHPO, DTE, and the Monroe Community College to create a Memorandum of Agreement. To the extent proposed Contention 25 is based on the Intervenors' disagreement with the DEIS's identification of potentially affected historic properties, the conclusion with respect to likely impacts to those properties, the Staff's description of the intended approach to mitigation of the impacts, the process for the creation of the MOA, or even the extent to which the Intervenors felt the selection of consulting parties was flawed, the Intervenors could have raised such concerns well before July 2, 2012.[15]

However, instead of filing this Contention shortly after the DEIS was published in October 2011 (or on the various calls or meeting summaries available to them prior to issuance of the DEIS), the Intervenors have waited approximately ten months. As the Board noted in its

---

[13] *See supra* note 9.

[14] *See supra* at 11-19.

[15] The Staff notes that the letter to which Intervenors refer confirmed an action that had already been agreed to in the Memorandum of Agreement. MOA for Fermi 1 Demolition-Signed 3/20/12 (ADAMS Accession No. ML12089A007) (Mar. 20, 2012). That MOA stated, in the "Stipulations" Section, under Part I. RECORDATION, "A. DTE will document Fermi I so that there is a permanent record of its existence. The recordation packages shall follow the SHPO *Documentation Guidelines* (Appendix A) and shall be submitted to the SHPO for review and approval." Fermi 1 MOA at 1 (underlining added). The May 7 letter simply states that the review and approval of the recordation packages that had been agreed to in the MOA had in fact occurred.

most recent ruling on the admission of new contentions based on asserted 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 information becomes available.' Thus, a motion to admit new contentions based on the DEIS would be considered timely if filed within 60 days of publication of the DEIS. A notice of the availability of the DEIS was published in the Federal Register on October 28, 2011. 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).[16]

Following the standard emphasized by the Board in LBP-12-12, to the extent the proposed contention is based on complaints about aspects of the consultation process that have been apparent since before the DEIS was issued, or on disagreement with the analysis and conclusions in the DEIS, the Intervenors' failure to file by December 27, 2011 – and instead waiting until July 2, 2012 – renders the contention nontimely under 10 C.F.R. § 2.309(f)(2)(iii).[17]

---

[16] *Detroit Edison Company* (Fermi Nuclear Power Plant, Unit 3), LBP-12-12, 75 NRC __, __ (June 21, 2012) (slip op. at 4-5).

[17] The Staff notes that where a new or amended contention does not meet the standards of 10 C.F.R. § 2.309(f)(2), it must meet the requirements of 10 C.F.R. § 2.309(c). Although the Motion asserts that the balancing of factors under § 2.309(c) supports admission of the contention, see Motion at 14-18 this discussion fails to demonstrate that these standards are met with respect to information that was apparent in the DEIS or in previous documents supporting it. In particular, with respect to demonstrating "good cause", they simply assert that the contention is based on new information. However, the Staff has explained that the Intervenors' claims in this respect fail to meet the timeliness standards of Section 2.309(f)(2). For the same reasons, the Intervenors do not show why they could not have raised these aspects of their concerns well before the instant Motion was filed, and thus do not show good cause. 10 C.F.R. § 2.309(c)(1)(i). Absent good cause, they must make a "compelling" showing on the other factors. *See Watts Bar*, CLI-10-12, 71 NRC at 323.

The Intervenors' standing in this proceeding, as well as their status as the only party with admitted contentions weighs somewhat in their favor on factors (ii)-(iv) and (v)-(vi), respectively. By contrast, the broadening of issues and potential for delay mean that factor (vii) weighs against them. With respect to their ability to contribute to a sound record, as the Staff has explained in describing why the contention does not meet the requirements of Section 2.309(f)(1), the Intervenors' interest seems largely directed at determining the content of an as-yet-undeveloped exhibit whose final content is not dictated or determined by the MOA, which merely sets forth the process for its future preparation. Because the "record" to which the Intervenors seek to contribute thus is not part of what is to be resolved in the MOA or in this proceeding, factor (viii) likewise does not weigh in the Intervenors' favor. Because consideration of these remaining factors cannot be said to be compelling, it would not overcome the absence of good cause for its late-filing, and the Intervenors thus do not meet the requirements of 10 C.F.R. § 2.309(c).

CONCLUSION

For the reasons set forth above, the Motion, together with proposed Contention No. 25, should be rejected. The proposed contention does not satisfy the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1) in that the Intervenors have not demonstrated that the issues raised are material to the findings the NRC must make nor have they shown that a genuine dispute exists on a material issue of fact or law. Furthermore, to the extent the proposed contention is based on information that was previously available in the Staff's Draft Environmental Impact Statement (DEIS) or documents supporting the DEIS, it fails to meet the timeliness requirements of 10 C.F.R. § 2.309(f)(2).

Respectfully Submitted,

/Signed (electronically) by/
Anthony C. Wilson
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
(301) 415-3699
Anthony.Wilson@nrc.gov

/Executed in accord with 10 C.F.R. 2.304(d)/
Myrisha S. Lewis
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
(301) 415-4067
Myrisha.Lewis@nrc.gov

Dated at Rockville, Maryland
this 27th day of July, 2012