

July 27, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

APPLICANT’S ANSWER TO PROPOSED CONTENTION 25

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h), the Detroit Edison Company (“Detroit Edison”) hereby answers the “Intervenors’ Motion for Admission of Contention No. 25 (Challenging § 106 NHPA Mitigation for Demolition of Fermi Unit 1)” (“Proposed Contention 25”), dated July 2, 2012.¹ For the reasons discussed below, the proposed new contention is untimely and otherwise inadmissible. Information regarding the NRC Staff’s compliance with the National Historic Preservation Act (“NHPA”), including development of the Memorandum of Agreement (“MOA”) with consulting parties and preparation of the recordation documents, has been available since at least mid-2011. Any contention regarding compliance with the NHPA is therefore untimely. And, the Intervenors’ complaints regarding the process followed by the NRC Staff and the scope of recordation documents fail to demonstrate a material dispute of law or fact regarding NHPA compliance.

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

BACKGROUND

On September 18, 2008, Detroit Edison filed an application for a combined operating license (“COL”) for Fermi 3, to be located in Monroe County, Michigan. In December 2008, the NRC initiated NHPA Section 106 consultation with the Michigan State Historic Preservation Office (“SHPO”) and the Advisory Council on Historic Preservation (“ACHP”) as part of its scoping process under the National Environmental Policy Act (“NEPA”). During the review of cultural and historic resources, Fermi 1, which is no longer operating, was identified as potentially eligible for inclusion in the National Register of Historic Places, based upon its association with the development of the nuclear power industry in the United States and for the engineering ingenuity associated with Fermi 1 operations.² The NRC concluded that the decommissioning of Fermi 1 would have no adverse effects on historic properties, but the demolition of the Fermi 1 external structure would have an adverse effect on historic properties.³

Detroit Edison has not yet decided whether to remove the external structure of Fermi 1 after the facility is decommissioned and the Unit 1 license is terminated. However, if the Fermi 1 structure remains at the time Fermi 3 construction begins, Detroit Edison would need to demolish Fermi 1.⁴ As a result, in accordance with the NRC process, the NRC, the Michigan SHPO, and Detroit Edison developed a strategy to mitigate the impacts of Fermi 3 construction

² Letter from P Smith, Detroit Edison, to NRC, “Detroit Edison Company Response to NRC Requests for Additional Information Related to the Environmental Review,” NRC3-09-0013, Attachment 6, dated August 25, 2009 (ADAMS Accession No. ML092400475).

³ NUREG-2105, Volumes 1 and 2, “Draft Environmental Impact Statement for Combined License (COL) for Enrico Fermi Unit 3,” at 4-97, 7-31. Fermi 1 is subject to NRC requirements related to radiological decommissioning. However, those NRC requirements do not necessarily mandate that external structures be dismantled (except as needed to comply with requirements related to radiological decommissioning).

⁴ *Id.* at 4-97. Portions of Fermi 3 would be located on land currently occupied by Fermi 1.

on the Fermi 1 external structure. Those mitigation measures — a recordation package placed in the Michigan State Archives and in the Monroe County Library, and a public exhibit at the Monroe County Community College — were stipulated to in the final signed MOA.⁵

DISCUSSION

In Proposed Contention 25, the Intervenors challenge the adequacy of actions taken by the NRC Staff under the NHPA to mitigate the demolition of the Fermi 1 reactor, which is located on the proposed Fermi 3 site. Specifically, Proposed Contention 25 states as follows:

The proposed measures taken to mitigate the demolition of the Fermi 1 containment building are inadequate and violative of § 106 of the [NHPA]. The mitigation measures and concluding [MOA] 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.

The Intervenors appear to be challenging both the sufficiency of the process used by the NRC Staff to satisfy its obligations under the NHPA and the substance of the official recordation of the history of Fermi 1 developed to mitigate the impacts of Fermi 1 demolition. The Intervenors argue that the NRC Staff negotiated and entered into an MOA with the Michigan SHPO, Detroit Edison, and others “effectively in secret, without the public participation which is anticipated by the NHPA § 106 regulations.”⁶ Substantively, the Intervenors vaguely allege that the “official” history of Fermi 1 will omit information regarding the possibility that Fermi 1 could produce plutonium for sale to the U.S. government and regarding the “institutional void of safety culture within the primary regulatory agency.”⁷

⁵ See Letter to R. Nelson, ACHP, from S. Flanders, NRC, dated March 7, 2012 (ADAMS Accession No. ML120450110) (transmitting signed MOA).

⁶ Proposed Contention 25 at 9.

⁷ *Id.* at 4, 8.

As discussed below, Proposed Contention 25 is untimely. The Intervenors were aware (or had good reason to be aware) of the NRC Staff's efforts with respect to NHPA compliance and mitigation, including the recordation documents, but elected to not participate or file a timely contention. Their complaints about the process and the result now come too late. Proposed Contention 25 is also inadmissible because the Intervenors fail to demonstrate a genuine dispute regarding the adequacy of the NRC Staff's consultation efforts under the NHPA or the results. The NRC Staff followed appropriate processes and identified suitable historic preservation mitigation measures. No further remedy is available under NHPA or otherwise. The Board therefore should deny Proposed Contention 25.

A. Proposed Contention 25 is Untimely

The Atomic Safety and Licensing Board ("Licensing Board") has issued a Scheduling Order establishing milestones for new contentions in this proceeding.⁸ Contentions based on the Draft Environmental Impact Statement ("DEIS") were due within 60 days of the DEIS, which was issued on October 28, 2011.⁹ Otherwise, to be timely, proposed new contentions must be filed within thirty (30) days of the date when the information on which it is based first becomes available.¹⁰ Even then, a new contention may be considered only if: (1) the information upon which the new or amended contention is based was not previously available; (2) the information upon which the new or amended contention is based is materially different

⁸ See Order (Establishing schedule and procedures to govern further proceedings), dated September 11, 2009 (unpublished) ("Scheduling Order").

⁹ The Notice of Availability was published on October 28, 2011. 76 Fed. Reg. 66998.

¹⁰ Scheduling Order at 2.

from information previously available; and (3) the new or amended contention has been submitted in a timely fashion based on the availability of subsequent information.¹¹

Here, the Intervenor argues that Proposed Contention 25 is timely in light of a “recently discovered” letter, dated May 7, 2012, from the Michigan SHPO to the NRC Staff.¹² That letter states that the SHPO “reviewed and accept[ed] the recordation materials for [Fermi 1].”¹³ But, *acceptance* of the recordation is merely a ministerial act that reflects full implementation (*i.e.*, completion) of mitigation measures agreed to previously. The *process* of contacting consulting parties, drafting the MOA, identifying necessary mitigation measures, and signing the MOA all occurred prior to May 7, 2012. That process was transparent to the public based on information on the Fermi 3 docket and information available in the NRC’s document system. Any contention based on the adequacy of the process, the identity of consulting parties, the resulting MOA, or the recordation documents could have, and should have, been raised much earlier.

First, the draft MOA was available for review and comment long before June 1, 2012. On August 24, 2011, the NRC sent the draft MOA to Ms. Martha MacFarlane Faes, Michigan Deputy State Historic Preservation Officer.¹⁴ If the Intervenor had an issue with the adequacy of the MOA, or even the process to that point, they had an “ironclad” obligation to

¹¹ 10 C.F.R. § 2.309(f)(2)(i)-(iii).

¹² Proposed Contention 25 at 2.

¹³ *Id.*

¹⁴ See ADAMS Accession Nos. ML112070035 (cover letter) and ML112070039 (draft MOA). The NRC Staff also discusses development of the MOA in a letter to R. Nelson, ACHP, dated October 13, 2011 (ADAMS Accession No. ML112500143).

raise that issue at that time.¹⁵ As the Commission has explained, there would be no end to NRC licensing proceedings if intervenors could disregard the NRC's timeliness requirements every time they "realize[d] . . . that maybe there was something after all to a challenge [they] either originally opted not to make or which simply did not occur to [them] at the outset."¹⁶

There also is nothing to the Intervenor's assertion that the NRC Staff somehow concealed the NHPA consultation from the public, thereby excusing the Intervenor's untimely filing. In addition to the August 24, 2011 letter transmitting the draft MOA to the SHPO, the Intervenor's assertion that the MOA was developed "in secret" is belied by numerous other documents available on the Fermi 3 docket.¹⁷ For example, the NRC Staff specifically gave notice of its intent to coordinate its compliance with the NHPA in a *Federal Register* notice on December 10, 2008.¹⁸

Subsequently, during a public teleconference held on August 29, 2011, the NRC discussed the draft MOA and letter that had recently been sent to the SHPO.¹⁹ One of the intervenors in this proceeding, Michael J. Keegan, was present during the call.²⁰ On December 15, 2011, Mr. Keegan provided comments regarding the historical accuracy of the proposed

¹⁵ *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-687, 16 NRC 460, 468 (1982), *vacated in part on other grounds*, CLI-83-19, 17 NRC 1041 (1983).

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

¹⁷ Proposed Contention 25 at 9.

¹⁸ *See* 73 Fed. Reg. 75142 (December 10, 2008) (explicitly stating the NRC Staff's intent to coordinate NHPA compliance with steps taken to satisfy NEPA).

¹⁹ *See* ADAMS Accession No. ML112440055 (teleconference discussing NHPA activities).

²⁰ *Id.*

archives for Fermi 1 at a public meeting on the DEIS.²¹ Mr. Keegan was also present during earlier and later teleconferences discussing the same topic — held on May 23, 2011 (ADAMS Accession No. ML11179A177), June 6, 2011 (ADAMS Accession No. ML11179A179), June 27, 2011 (ADAMS Accession No. ML112231667), and September 29, 2011 (ADAMS Accession No. ML112720110).

The DEIS, which was published in October 2011, also contains a discussion of the impacts of construction on Fermi 1 and mitigation measures — consisting of “recordation documents and a public exhibit” — to provide an *increased* opportunity for the public to learn about the significance of Fermi 1.²² The final signed MOA was transmitted to the ACHP on March 7, 2012,²³ and notice of delivery of the recordation package to the Michigan SHPO was made on April 5, 2012.²⁴ The Intervenors could have, but failed to, raise any issues with the adequacy of the mitigation measures, the identity of the consulting parties, or the scope of the recordation documents based on the information previously and readily available to an interested party. Having made the decision not to participate in 2011, or earlier in 2012, the effort by the Intervenors to raise this issue now is untimely.

²¹ Mr. Keegan referenced *We Almost Lost Detroit* (cited in Proposed New Contention at 6-7), and his comments concerned the same issues as those raised in Proposed Contention 25. See Transcript of Afternoon Session of Public Meeting on DEIS for Fermi 3 Project, Jan. 13, 2012 (ADAMS Accession No. ML12009A120) and Transcript of Evening Session of Public Meeting on DEIS for Fermi 3 Project, at 89, Jan. 13, 2012 (ADAMS Accession No. ML12009A121).

²² DEIS at 4-97.

²³ See Letter to R. Nelson, ACHP, from S. Flanders, NRC (ADAMS Accession No. ML120450110) (transmitting signed MOA).

²⁴ Letter to B. Grennell, Michigan State Historic Preservation Office, from P. Smith, Detroit Edison (ADAMS Accession No. ML121220411). The letter was made publicly available on May 9, 2012.

The Intervenors further argue that, even if the Board finds Proposed Contention 25 to be untimely, the proposed contention should be considered after weighing the factors for late-filing in 10 C.F.R. § 2.309(c)(1).²⁵ As the Intervenors correctly note, “good cause” is the first, and most important, factor. Here, there is no good cause for the late filing. Information and documents relating to the MOA, consulting parties, and the recordation materials were available as early as mid-2011. As discussed above, at least one of the Intervenors also participated in public meetings where the NHPA and mitigation steps were discussed. There is no good cause for late filing where a party fails to raise any concerns when information first becomes available.

The Intervenors also fail to make a “compelling case” relative to the remaining factors.²⁶ The Intervenors did not seek to participate as a consulting party, did not comment on the DEIS discussion of impacts to Fermi 1, and now fail to provide any expert support relating to the historical significance of Fermi 1. Their participation on this issue would therefore unnecessarily broaden the proceeding, would lead to delay, and would not assist in development of a sound record. Even though the Intervenors have specifically declined to act on prior opportunities to participate, their interests are represented by the SHPO, who’s mandate requires it to identify, evaluate, register, interpret and protect the state’s historic properties.

²⁵ Proposed Contention 25 at 14. The factors are (1) good cause, if any, for the failure to file on time; (2) the availability of other means whereby the requestor’s interest will be protected; (3) the extent to which the requestor’s interests will be represented by existing parties; (4) the extent to which the requestor’s participation will broaden the issues or delay the proceeding; and (5) the extent to which the requestor’s participation may reasonably be expected to assist in developing a sound record.

²⁶ *See State of New Jersey* (Department of Law and Public Safety’s Requests Dated October 8, 1993), CLI-93-25, 38 NRC 289, 296 (1993) (citations omitted).

In sum, there is no good cause for late-filing and there has been no compelling showing with respect to the other criteria for late-filed contentions. Proposed Contention 25 should be rejected as untimely.

B. Proposed Contention 25 is Inadmissible

Proposed Contention 25 also fails to demonstrate a genuine dispute regarding the NRC Staff's compliance with the NHPA. The Intervenors improperly characterize the requirements of the NHPA and, in any event, fail to raise a genuine dispute regarding the adequacy of the recordation materials and fail to demonstrate any relief that must be granted.

The Intervenors argue broadly that the NRC Staff has somehow failed to satisfy the agency's obligations under the NHPA to provide a public *process*.²⁷ Citing ACHP regulations, the Intervenors argue that the NRC Staff failed to develop a plan for public participation in the Fermi 1 demolition decision.²⁸ The Intervenors also complain that there were "no formal notices to the public, including that there was no disclosure before the MOA was formally signed."²⁹ But, the Intervenors are ignoring the ACHP regulations that specifically authorize agencies to comply with the NHPA in conjunction with the NEPA process. According to 36 C.F.R. § 800.8, an agency can use the NEPA process to comply with the NHPA and should involve the public through the agency's NEPA procedures. This is precisely what the NRC has

²⁷ The Intervenors also challenge *Detroit Edison's* compliance with the NHPA. The Intervenors argue, for example, that "DTE was required to follow the NHPA" and that the MOA "supposedly completes DTE's compliance with [NHPA]." Proposed Contention 25 at 2, 3. However, the NHPA applies exclusively to Federal agencies, not private applicants. See *Crow Butte Resources, Inc.* (North Trend Expansion Area), CLI-09-12, 69 NRC 535, ___ (June 25, 2009) (slip op. at 40) (explaining that the regulations implementing the NHPA "explicitly apply to federal agencies, not to a private license applicant").

²⁸ Proposed Contention 25 at 10.

²⁹ *Id.*

done here — identifying demolition of Fermi 1 as a potential impact and discussing mitigation measures in the DEIS. The Intervenor also claim that there was “no Federal Register announcement” or any other “formal notices to the public” before the MOA was signed. But, the Intervenor do not point to any requirement to publish such notices. And, in fact, there was a *Federal Register* notice associated with the start of the NEPA scoping and NHPA consultation processes, as discussed above.³⁰ The Intervenor therefore fail to demonstrate any issue regarding the adequacy of the process used by the NRC Staff to comply with the NHPA.

The Intervenor also claim that the *substance* of the *DEIS* is inadequate — arguing that the “total discussion of historic preservation impacts expected from Fermi 1 in the DEIS for Fermi 3” consists of a single passage in Section 7.5.³¹ Setting aside the fact that the NHPA is a procedural statute that does not dictate particular outcomes,³² there is in fact a detailed discussion of Fermi 1 elsewhere in the DEIS. Section 4.6.1, Onsite Historic and Cultural Resources Impacts, provides a discussion of the impacts of Fermi 3 construction on on-site historic resources, including Fermi 1. The DEIS notes that Fermi 1 appears to be eligible for listing on the National Register of Historic Places based on its role in development of the nuclear power industry and the significance of the engineering design of the reactor and associated components.³³ The DEIS states that, because access to Fermi 1 is restricted, mitigation measures

³⁰ See 73 Fed. Reg. 75142, 75143.

³¹ See Proposed Contention 25 at 9 (citing the DEIS discussion of cumulative impacts).

³² See *Nat'l Mining Ass'n v. Fowler*, 324 F.3d 752, 755 (D.C. Cir. 2003) (requirements imposed by § 106 are procedural, not substantive); *Narragansett Indian Tribe v. Warwick Sewer Auth.*, 334 F.3d 161, 166 (1st Cir. 2003) (characterizing NHPA Section 106 as a requirement that agency decisionmakers “‘stop, look, and listen,’ but not that they reach particular outcomes”).

³³ DEIS at 4-97. Several of the public comments in Appendix D of the DEIS also relate to the historic significance of Fermi 1 (e.g., D-83, D-88, D-92, and D-99).

— consisting of “recordation documents and a public exhibit” — will provide an *increased* opportunity for the public to learn about the significance of Fermi 1.³⁴ The Intervenors’ claims about the inadequacies of the DEIS ignore the record and fail to establish a basis for relief.

The Intervenors’ assertion that the *recordation documents* are inadequate also fails. As noted above, NHPA is a procedural statute that does not dictate particular outcomes. And, Intervenors do not cite any requirement under NHPA for their implicit claim that every conceivable viewpoint or record be captured in a mitigation recordation.³⁵ While the Fermi 1 structure may be physically demolished in order to make way for Fermi 3, the public record will not be destroyed. The materials referenced by Intervenors, particularly including the books on the Fermi 1 fuel melting event and *Fermi-1: New Age for Nuclear Power*, will continue to exist notwithstanding the demolition of Fermi 1 and the creation of the recordation (and exhibit).³⁶ Intervenors and others will be free to trace the historical context and draw their own conclusions. The Intervenors argument therefore fails to state a claim on which relief could be granted.

The Intervenors are apparently particularly concerned that the recordation materials omit information regarding the possibility that Fermi 1 could produce plutonium for

³⁴ *Id.* The DEIS also addresses impacts on Fermi 1 in the discussion of energy alternatives in Section 9.2. And, Table 10.1 notes that adverse effects from demolition of Fermi 1 will be mitigated according to measures and plans developed in consultation with the NRC, the SHPO, and Detroit Edison.

³⁵ At most, 36 C.F.R. § 800.6 requires that an agency consider methods to “minimize or mitigate” the adverse effects on historic properties. *See also Pye v. United States*, 269 F.3d 459, 471 (4th Cir. 2001).

³⁶ The document highlighted by the Intervenors, *Fermi-1: New Age for Nuclear Power*, was published by the American Nuclear Society in 1979 and was provided to the SHPO in 2009. *Id.* at 9. *Fermi 1: New Age for Nuclear Power* acknowledges (on page 11) that Fermi 1 could provide high-grade plutonium that could be used for military weapons or as fuel for other reactors. The possibility of plutonium sales was also discussed on pages 87-88. And, an entire chapter, Chapter 11 (pages 225-254), is devoted to the 1966 fuel melting incident. *Fermi-1: New Age for Nuclear Power* is publicly-available.

sale to the U.S. government and the “institutional void of safety culture within the primary regulatory agency.”³⁷ But, the Intervenor never cite to the recordation materials themselves or provide any specific indication of how the recordation materials are inadequate for their intended purpose. The Intervenor only state that the recordation materials are “likely to be biased.”³⁸ Again, the recordation is not required by the NHPA and Intervenor provide no authority for the premise that the recordation must somehow compile or reflect the entire public record on Fermi 1. In that regard, the proposed contention again fails to demonstrate a genuine dispute that could lead to a remedy in this proceeding.

CONCLUSION

For all of the above reasons, Proposed Contention 25 is inadmissible.

Respectfully submitted,

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Dated at Washington, District of Columbia
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³⁷ Proposed Contention 25 at 4, 8.

³⁸ *Id.* at 2.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "APPLICANT'S ANSWER TO PROPOSED CONTENTION 25" in the above captioned proceeding have been served upon the following persons by Electronic Information Exchange:

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