



## **1. No Fundamental Agreement As to What Constitutes ‘History’**

A prudent reading of the answers of DTE and the NRC Staff to Intervenors’ motion reveals that the very meaning of the word “history” is not agreed. There is no agreement on the breadth nor extent of the detailed history of Fermi 1, nor what public officials charged with portraying the history of the plant should present. Part of the reason for this disagreement lies in the complete ignorance of the true facts of Fermi 1 as espoused by none other than the Michigan Historic Preservation Officer:

Based on the information provided for our review, the State Historic Preservation Officer (SHPO) concurs with the determination of the U.S. Nuclear Regulatory Commission that the proposed undertaking will have an adverse effect on the Enrico Fermi (Fermi 1) Nuclear Power Plant, which *appears to meet the criteria for listing in the National Register of Historic Places as one of the first power reactors of its type that operated safely and proved the feasibility of the fast breeder design on a commercial scale.*

(Emphasis added). Letter, SHPO to NRC, May 9, 2011, ADAMS ML111590571 (copy attached).

But the “feasible” Fermi 1 generated fewer than three weeks of commercially- marketable electricity before the decision was made to junk it.. The “safe” Fermi 1 came to within moments of completely melting down and exploding; the design has never since been replicated anywhere on the planet, and will never be constructed again. General Pyrrhus might have been referring to Fermi 1 when he commented, “One more such victory and we are defeated.”<sup>3</sup> Michigan’s professional historian possesses such a grossly inaccurate grasp of Fermi 1’s unique place in nuclear power history that the story told may bear more resemblance to conscious propagandizing than historical truth.

## **2. The NRC Moves to Control Permissible ‘History’**

The NRC Staff describes, falsely, how information about Fermi 1 for the proposed

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<sup>3</sup>[http://dante.udallas.edu/hutchison/Republic\\_Expansion/Names/pyrrhus\\_of\\_epirus.htm](http://dante.udallas.edu/hutchison/Republic_Expansion/Names/pyrrhus_of_epirus.htm)

permanent exhibit at Monroe County Community College is “required” by the Memorandum of Agreement to be narrow and circumscribed:

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.***

(Emphasis added). “NRC Staff Answer to the Intervenors’ Motion for Admission of Contention 25” at 15.

However, the Federal guidelines for archival materials submitted to the Michigan SHPO call for a much broader notion of the required historical record. Perhaps the NRC believes that Fermi 1 is memorable only as an engineering achievement or a grand experiment in private-sector nuclear experimentation, the SHPO guidelines contemplate far more detail, where it exists. SHPO guidance states: “The historical narrative should provide an account of the resource’s history and explain its significance in terms of the national register criteria . . . .”

According to the National Park Service’s National Register criteria, mentioned by the SHPO, “history” has a very wide span. The following criteria appear in guidance about preparing “statements of significance” on National Register-eligible properties (all from “National Register Bulletin 16A: How to Complete the National Register Registration Form,” Part III<sup>4</sup>):

**WRITING A STATEMENT OF SIGNIFICANCE**

Some general principles for stating significance:

In the summary paragraph, simply and clearly state the reasons why the property

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<sup>4</sup>Found at [http://www.nps.gov/nr/publications/bulletins/nrb16a/nrb16a\\_III.htm#statement](http://www.nps.gov/nr/publications/bulletins/nrb16a/nrb16a_III.htm#statement)

meets the National Register criteria. Add to the information marked on the form for section 8, by providing brief facts that explain how the property meets the criteria, how it contributed to the areas of significance listed, and the ways it was important to the history of its locality, State, or the nation during the period of significance. Mention the important themes or historic contexts to which the property relates.

Using the summary paragraph as an outline, make the case for significance in subsequent paragraphs. Begin by providing a brief chronological history of the property. Then for each area of significance, beginning with the ones of primary importance, discuss the facts and circumstances in the property's history that led to its importance. Make clear the connection between each area of significance, its corresponding criterion, and period of significance. Be selective about the facts you present. Consider whether they directly support the significance of the property. Avoid narrating the entire history of the property. Focus on the events, activities, or characteristics that make the property significant. For example, identify significant architectural details if a building is significant for its design, or explain the role the property played in local commerce or industry.

Be specific in all references to history or geography. Give dates and proper names of owners, architects or builders, other people, and places. Keep in mind the reader who will have little or no knowledge of the property or the area where it is located.

Include descriptive and historical information about the area where the property is located to orient the reader to the property's surroundings and the kind of community or place where it functioned in the past. Again, focus on facts that help explain the property's role and illustrate its importance.

## **SUMMARY PARAGRAPH**

### **Identify the following items:**

Specific **associations or characteristics** through which the property has acquired significance, including historic events, activities, persons, physical features, artistic qualities, architectural styles, and archeological evidence that represent the historic contexts within which the property is important to the history of the local community, the State, or the nation.

Specific ways the property meets the qualifying criterion and has contributed to each **area of significance** entered on the form.

Role of any **important persons or cultural affiliations** entered on the form.

Ways the property meets the special standards for any **criteria considerations** marked on the form.

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## **SUPPORTING PARAGRAPHS - HISTORY OF PROPERTY**

**Discuss the chronology and historic development of the property.** Highlight and focus on the events, activities, associations, characteristics, and other facts that relate the property to its historic contexts and are the basis for its meeting the National Register criteria. Follow the Guidelines for Evaluating and Stating Significance listed below. The guidelines, in the form of questions, address the key points that should be covered. Consult with SHPO and FPO staff to determine what and how much information is needed to support

the property's **significance** and **integrity**.

### **GUIDELINES FOR EVALUATING AND STATING SIGNIFICANCE**

The following questions should be considered when evaluating the significance of a property and developing the statement of significance. Incorporate in the narrative the answers to the questions directly pertaining to the property's historic significance and integrity.

#### **ALL PROPERTIES**

A. What events took place on the significant dates indicated on the form, and in what ways are they important to the property?

B. \*\*\*\*\*

C. What is the period of significance based on? Be specific and refer to existing resources or features within the property or important events in the property's history.

#### **BUILDINGS, STRUCTURES AND OBJECTS**

A. If the property is significant for its association with historic events, what are the historically significant events or patterns of activity associated with the property? Does the existing building, object, or structure reflect in a tangible way the important historical associations? How have alterations or additions contributed to or detracted from the resource's ability to convey the feeling and association of the significant historic period?

B. If the property is significant because of its association with an individual, how long and when was the individual associated with the property and during what period in his or her life? What were the individual's significant contributions during the period of association? Are there other resources in the vicinity also having strong associations with the individual? If so, compare their significance and associations to that of the property being documented.

C. \*\*\*\*\*;

D. \*\*\*\*\*;

E. \*\*\*\*\*;

F. \*\*\*\*\*;

#### **HISTORIC SITES**

A. How does the property relate to the significant event, occupation, or activity that took place there?

B. \*\*\*\*\*;

C. In what ways does the event that occurred here reflect the broad patterns of American history and why is it significant?

#### **SUPPORTING PARAGRAPHS - HISTORIC CONTEXT**

**Relate the property to important themes in the prehistory or history** of its community, State, or the nation. Include information about the history of the community or larger geographical area that explains the ways the property is unique or representative of its theme, place, and time.

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Incorporate the following information to the extent that it relates to the significance of the property:

- specific events
- activities and uses
- influence of technology
- aspects of development
- common architectural styles or types
- construction materials and methods
- role of important persons or organizations
- cultural affiliations
- political organization
- social or cultural traditions
- trends in local or regional development
- patterns of physical development
- economic forces
- presence and condition of similar properties

The discussion of historic context should do several things:

- Explain the role of the property in relationship to broad historic trends, drawing on specific facts about the property and its community.
- Briefly describe the prehistory or history of the community where the property is located as it directly relates to the property. Highlight any notable events and patterns of development that affected the property's history, significance, and integrity.
- Explain the importance of the property in each area of significance by showing how the property is unique, outstanding, or strongly representative of an important historic context when compared with other properties of the same or similar period, characteristics, or associations.

- \*\*\*\*\*.

- Incorporate the facts needed to make the case for significance and integrity. Consult with the SHPO or FPO staff for help in determining how much and what kinds of information are needed. The site of a pivotal battle or a textbook example of a prominent architectural style usually requires less documentation than a property associated with a commonplace local event or exhibiting a vernacular building form about which little is written.

## **GUIDELINES FOR DEVELOPING HISTORIC CONTEXT**

Identify and provide facts about one or more themes of history to which the property relates through its historic uses, activities, associations, and physical characteristics. These facts should be organized by theme, geographical place, and period of time. Facts may relate to other properties having similar associations or characteristics and existing in the same place and time. . . .

## **PROPERTIES SIGNIFICANT FOR CRITERION A**

Explain how the **event or pattern of events** made an important contribution to the history of the community, State, or nation, and how related types of properties reflect these events, for example, how the advent of the railroad affected the growth and character of a town in the late 19th century and is represented today by the 1870 depot.

#### **PROPERTIES SIGNIFICANT FOR CRITERION B**

Explain why the **person with whom the property is associated** is important to the history of the community, State, or nation. Identify also other properties associated with the person and explain their role in the career of the person, for example, how an author who depicted the people, events, and places of her region achieved statewide recognition and how a rustic mountain retreat and boarding house where she wrote and found inspiration are the surviving properties best associated with her life and career.

(All emphasis in original). As can be seen, National Register guidance encourages provision of global historical detail in the nomination of a property. The guidance mandates a narrative which fits Fermi 1 into historical context. The significance of Fermi 1 as a physical, political, economic, social and historical development is supposed to be articulated in a detailed, documented way. “Counseled by the congressional inclusion of Section 106 in the NHPA, we acknowledge historic preservation as a highly important societal interest. As a civilization, we suffer a terrible loss if we do not make every reasonable effort to preserve our heritage, which may be enshrined in bricks and mortar as well as in books and documents.” *Concerned Citizens Alliance, Inc. v. Slater*, 176 F.3d 686, 696 (3rd Cir. 1999).

The National Register’s theme of including more, not less, historical detail sharply contradicts the NRC Staff’s claim that recorded documents deposited with the State Historic Preservation Officer are “limited to materials related to the structures under consideration and do not extend to the other types of materials that the Intervenors mention.” The NRC, DTE, the SHPO and Monroe County Community College appear to have decided privately just what history future generations will be allowed to know and that it will be limited to shallow narratives about who built the structure and when, and that the reactor was an early private-sector initiative before commercial

nuclear power was widespread. The rich contextual history of Fermi will likely be left out. Such matters as Fermi 1's place in nuclear weapons manufacturing, its use as a stalking horse for development of the pioneering corporate welfare of the Price-Anderson Act, and its influence upon the old AEC in developing a regulatory culture which stresses nuclear promotion over enforcement, will all be deemed "too broad."

Intervenors believe that the NRC Staff's description of what was deposited with the SHPO for recordation purposes expresses a violation of National Register requirements. The shallow, unreflective official history that was provided derogates the broadly-inclusive National Register expectations.

Often, the retrospectives of historical truth take years and much factual debate to identify. To allow contortion of the concept of "mitigation" of the demolition of Fermi 1 into a bureaucratically-circumscribed recordation of information which touts the "safety" and "feasibility" of Fermi 1 is Orwellian ham-handedness.

### **3. Avoidance of Public Consultations**

The NRC Staff makes much of the public comments in December 2011 on the Fermi 3 DEIS by the Intervenors. At the NRC's public comment session on the Draft EIS, one of the Intervenors in this COL case stated:

Fermi 1 is being declared a historical site and there will be a museum set up. But I would like to know that the public will have access as to what goes in that museum. A little known fact that the Fermi 1, the primary objective of Fermi 1 was to produce weapons grade plutonium, suitable for rockets.\*

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Now what is this nuclear scheme all about? It's about, as I heard Dr. Nixon from the community college state that he was proud that the community college would be housing a museum, archives for the Fermi 1 documents. I have some documents on the Fermi 1.

They were top secret when they were first established. And it talks about the prime objective of the Fermi 1 as high rate of production of fissionable material, where weapons material production is the prime objective, as appears to be the case in much of the commission's program. Our present studies indicate the cheapest source would be very large size breeder reactors, operated for the maximum production of fissionable material. It goes on to say unique weapons material. The physical characteristics of the fast reactor and the rapid processing with the contemplated metallurgical separation system will permit our reactor to provide very high purity weapons materials. It was a bomb factory, okay? I'm not real proud of that.\*\*

\*Transcript of 12/13/2011 DEIS public comment afternoon session, statement of Michael Keegan, ML12009A120; \*\*Trancript of 12/13/2011 DEIS public comment evening session, Statement of Michael Keegan, ML12009A121.

The NRC knew specifically how to get in touch with Intervenors, who believed they were doing all they could by way of involvement in the mitigation arrangements for Fermi 1 by commenting at the public meeting on their perspectives on the controversy. Nothing from the COL record suggests that members of the public were sought out for special consultation by the SHPO, DTE, Monroe County Community College or the NRC Staff - yet it was they and not the public which understood the consultation requirements. It was the agencies' jobs and legal obligations to involve the public, but they did not. It was their legal responsibility to act, and they did not.

Advisory Council on Historic Preservation ("ACHP") guidelines state that "In 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)." 36 C.F.R. § 800.3(e). Intervenors could find no NRC plan for public participation in the Fermi 1 demolition decision anywhere; but instead of placing the burden of global knowledge of obscure public participation guidelines on the public, the better question is, why didn't agency officials approach Intervenor

Keegan after he articulated his comments on the Fermi 1 mitigation? Intervenor's have specified an issue of fact which differs from the COL application.

#### **4. Legal Standards Governing Disclosure of Mitigation Measures**

Intervenor's do not contest the NRC's right to use the NEPA process as the vehicle for disclosing and resolving the Fermi 1 mitigation process. They contend, instead, that the disclosures respecting Fermi 1 mitigation occurring at the DEIS stage are wholly inadequate under applicable law.

The question is, is the following quotation, which represents the total discussion of historic preservation impacts from Fermi 1 appearing in the Draft Environmental Impact Statement (DEIS) for Fermi 3, an adequate disclosure of mitigation plans for Fermi 1?:

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.

DEIS p. 7-31. This passage seems to describe the NRC's plan to have a mitigation plan. It does not depict what the mitigation measures are, only that there will be some. And following the Draft EIS issuance in October 2011, all ensuing progress toward a Memorandum of Agreement was accomplished invisibly until the Memorandum of Agreement surfaced in recent weeks.

Under NEPA, an EIS must discuss "any adverse environmental effects which cannot be avoided should the proposal be implemented." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351-52, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989). Thus, an EIS needs to include "a reasonably complete discussion of possible mitigation measures." *Id.* at 352, 109 S.Ct. 1835.

Admittedly, NEPA does not contain “a substantive requirement that a complete mitigation plan be actually formulated and adopted.” *Id.* Such a requirement “would be inconsistent with NEPA's reliance on procedural mechanisms.” *Id.* at 353, 109 S.Ct. 1835.

A mitigation plan “need not be legally enforceable, funded or even in final form to comply with NEPA's procedural requirements.” *National Parks & Conservation Ass'n v. United States Dep't of Transp.*, 222 F.3d 677, 681 n. 4 (9th Cir. 2000). But the court nonetheless must “be satisfied that the agency took the requisite ‘hard look’ at the possible mitigating measures.” *Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir.1998). To this end, a “perfunctory description” is not adequate to satisfy NEPA's requirements, *id.*, and a “mere listing” of mitigating measures, without supporting analytical data, is likewise inadequate. *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1151 (9th Cir.1998).

“When the compensatory action is to be undertaken by third parties, their commitments, while they need not be contractual, must be more than mere vague statements of good intentions.” *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 860 (9th Cir. 1982), citing *City and County of San Francisco v. United States*, 615 F.2d 498, 501 (9th Cir. 1980). An EIS without a “reasonably complete discussion of possible mitigation measures would undermine the ‘action-forcing’ function of NEPA,” and requires that “mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated. . . .” *Methow Valley, supra* at 352, 109 S.Ct. 1835.

The court in *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 473 (9th Cir. 2000) noted that the difference between adequate and inadequate mitigation discussions “appears to be one of degree.” The Ninth Circuit explained that in *Cuddy Mountain*, the court of appeals rejected an EIS

because it appeared that “the Forest Service did not even consider mitigating measures for the creeks actually affected by the [timber] sale.” *Supra*, 137 F.3d at 1381. By contrast, a review of the EIS at issue in *Okanogan* “suggest[ed] that the Forest Service did consider and take a ‘hard look’ at the environmental effects and mitigating measures,” notwithstanding the fact “that the mitigating measures are described in general terms and rely on general processes, not on specific substantive requirements.” 236 F.3d at 473. The court concluded that, “Because the actual adverse effects are uncertain, and the EIS considered extensively the potential effects and mitigation processes. . . the discussion of mitigating measures in the EIS is adequate.” *Id.* The *Okanogan* court explained that a “mitigation plan ‘need not be legally enforceable, funded or even in final form to comply with NEPA’s procedural requirements.’” *Id.* (quoting *National Parks & Conservation Ass’n v. United States Dep’t of Transp.*, 222 F.3d 677, 681 n. 4 (9th Cir. 2000)).

In *South Fork Band Council of Western Shoshone of Nevada v. U.S. Dept. of Interior*, 588 F.3d 718, 727 (9th Cir.2009), the court cautioned that “[a]n essential component of a reasonably complete mitigation discussion is an assessment of whether the proposed mitigation measures can be effective. A mitigation discussion without at least some evaluation of effectiveness is useless in making that determination.” *Id.*

Intervenors urge that the tenuous pledge in the DEIS to develop mitigation measures does not comport with the Methow Valley requirement that “mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated. . . .” 490 U.S. at 352, 109 S.Ct. 1835. The NRC in the Draft EIS for Fermi 3 cannot be said to have taken the requisite “hard look” at environmental effects and mitigating measures. *Okanogan Highlands Alliance v. Williams*, 236 F.3d at 473.

## 5. Conclusion

This matter can be easily mitigated at no significant cost to DTE or taxpayers, but it requires acceptance of the principle that history is not something which is merely “allowed” to be recounted in a prescribed form. It is also obligatory for there to be an understanding that historical preservation is not a mere bureaucratic detail where a box must be checked so it is superficially addressed, but instead is a process of factfinding and a search for truth extending over many years. The ASLB must insert itself into the process of defining history here, by disavowing and disapproving the so-called mitigation measures for the demolition of Fermi 1.

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

In the Matter of )  
The Detroit Edison Company ) Docket No. 52-033  
(Fermi Nuclear Power Plant, Unit 3) )  
 ) August 3, 2012  
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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing “REPLY IN SUPPORT OF 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 3rd day of August, 2012:

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