LBP-12-23

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

In the Matter of	Docket No. 52-033-COL
DETROIT EDISON COMPANY	ASLBP No. 09-880-05-COL-BD01
(Fermi Nuclear Power Plant, Unit 3)	November 9, 2012

MEMORANDUM AND ORDER

(Granting Motion for Summary Disposition of Contention 6; Denying Motions for Summary Disposition of Contentions 8 and 15; Denying Motion to Admit Contention 25; and resolving remaining issues regarding Contentions 20 and 21)

Detroit Edison Company ("DTE" or "Applicant") has filed motions for summary disposition of Contentions 6, 8, and 15.[1] In addition, Intervenors have filed a Motion to Admit new Contention 25.[2] For the reasons explained below, the Board grants summary disposition of Contention 6, denies summary disposition of Contentions 8 and 15, and denies the Motion to Admit Contention 25.

In addition, the Board resolves the issues left open when we otherwise declined to admit Intervenors' proposed Contentions 20 and 21.[3] The Board concludes that, given our rulings on the motions for summary disposition of Contentions 6 and 8, the allegations of Contentions 20 and 21 that we did not previously resolve will not be admitted.

---

[1] Applicant's Motion for Summary Disposition of Contention 6 (Apr. 17, 2012) [hereinafter Second C-6 Motion]; Applicant's Motion for Summary Disposition of Contention 8 (June 11, 2012) [hereinafter Second C-8 Motion]; Applicant's Motion for Summary Disposition of Contention 15 (Apr. 17, 2012) [hereinafter C- 15 Motion].

[2] Intervenors' Motion for Admission of Contention No. 25 (Challenging § 106 NHPA Mitigation for Demolition of Fermi Unit 1) (July 2, 2012) [hereinafter Motion to Admit].

[3] LBP-12-12, 75 NRC __, __ (June 21, 2012) (slip op. at 31-32, 35-36).

I. Motion for Summary Disposition of Contention 6

A. Background

This combined license (COL) proceeding concerns the application of DTE pursuant to 10 C.F.R. Part 52, Subpart C, to construct and operate a GE-Hitachi Economic Simplified Boiling Water Reactor (ESBWR), designated Unit 3, on its existing Fermi nuclear facility site near Newport City in Monroe County, Michigan. DTE originally submitted its COL application (COLA) for Fermi Unit 3 to the NRC on September 18, 2008.[4] The Commission published a notice of hearing and opportunity to petition for leave to intervene in the Federal Register on January 8, 2009.[5] On March 9, 2009, the Intervenors[6] filed a timely Request for a Hearing and Petition to Intervene,[7] and on March 19, 2009, this Board was established to preside over the proceeding.[8] In its July 31, 2009 Order, the Board found that the Intervenors had standing, admitted four of their contentions, and granted their hearing request.[9]

Contention 6 was admitted in part and rejected in part. The Board found that Contention 6 was "admissible insofar as it challenges the adequacy of the ER's analysis of the potential contribution of chemical and thermal effluent from the proposed Fermi Unit 3 to algal production and the potential proliferation of the newly identified species of harmful algae."[10]

On September 17, 2010, DTE moved for summary disposition of Contention 6 based on

---

[4] See Detroit Edison Company; Notice of Hearing, and Opportunity to Petition for Leave to Intervene and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation on a Combined License for Fermi 3, 74 Fed Reg. 836 (Jan. 8, 2009).
[5] Id.
[6] Intervenors include Beyond Nuclear, Citizens for Alternatives to Chemical Contamination, Citizens Environmental Alliance of Southwestern Ontario, Don't Waste Michigan, the Sierra Club (Michigan Chapter), and numerous individuals.
[7] Petition of Beyond Nuclear, et al. for Leave to Intervene in Combined Operating License Proceedings and Request for Adjudication Hearing (Mar. 9, 2009); REFILED Petition of Beyond Nuclear, et al. for Leave to Intervene in Combined Operating License Proceedings and Request for Adjudication Hearing (Apr. 21, 2009) [hereinafter Petition].
[8] Establishment of Atomic Safety and Licensing Board, 74 Fed. Reg. 12,913 (Mar. 25, 2009).
[9] LBP-09-16, 70 NRC 227, 236-37 (2009), aff'd, CLI-09-22, 70 NRC 932, 933.
[10] Id. at 280.

its supplements to the ER, arguing that the issues underlying the Contention had been addressed.[11] The Board denied the Motion because various material issues remained in dispute. First, Intervenors maintained that the addition of calcium (in lieu of phosphoric acid) to the cooling water discharge may promote algal growth. Intervenors also argued that Applicant's methods of observation of algae growth had not been made a matter of record and visual observation may not be appropriate for bottom-growing algae. They also claimed that higher levels of turbidity created during plant construction and operation will cause conditions favorable to algae growth, and they disputed the estimated size of the thermal plume that enhances algae growth and questioned the assertion of a small plume residence time for bottom-growing algae.[12]

On April 17, 2012, DTE again moved for summary disposition of Contention 6.[13] On May 7, 2012, the NRC Staff (Staff) filed an answer supporting DTE's motion.[14] On May 17, 2012, the Intervenors filed a response opposing summary disposition.[15] On May 24, 2012, DTE filed a motion for leave to file a reply to the Intervenors' response.[16]

B. Legal Standard for Summary Disposition

The standard for summary disposition motions in a subpart L proceeding such as this is set forth in 10 C.F.R. § 2.1205. Under that regulation, licensing boards must apply the summary disposition standard for subpart G proceedings found in 10 C.F.R. § 2.710. Section 2.710(d)(2) provides that a moving party is entitled to summary disposition if the presiding officer finds that "the filings in the proceeding, . . . together with the statements of the parties and the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is

---

[11] Applicant's Motion for Summary Disposition of Contention 6 (Sept. 17, 2010) at 1.
[12] LBP-11-14, 73 NRC 591, 598-601 (2010).
[13] Second C-6 Motion.
[14] Staff Answer to Applicant's Motion for Summary Disposition of Contention 6 (May 7, 2012) [hereinafter Staff Answer to Second C-6 Motion].
[15] Intervenors' Response in Opposition to Applicant's Motion For Summary Disposition of Contention 6 (May 17, 2012) [hereinafter Intervenors' Response to Second C-6 Motion].
[16] See Applicant's Motion for Leave to File a Reply on Contention 6 (May 24, 2012).

entitled to a decision as a matter of law."[17]

In general, when ruling on motions for summary disposition, the Commission applies standards analogous to those used by federal courts when ruling on motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.[18] Consistent with Rule 56, the moving party bears the initial burden of demonstrating that no genuine issue as to any material fact exists and that it is entitled to judgment as a matter of law.[19] If the moving party fails to make the requisite showing to satisfy that initial burden, then "the Board must deny the motion—even if the opposing party chooses not to respond or its response is inadequate."[20] Thus, "no defense to an insufficient showing is required."[21] If the moving party meets its burden, however, the non-moving party must "counter each adequately supported material fact with its own statement of material facts in dispute and supporting documentation" and cannot rely on "mere allegations or denials," or the facts in controversy will be deemed admitted.[22] In addition, because the initial burden rests on the moving party, a Licensing Board must examine the record in the light most favorable to the non-moving party and all justifiable inferences must be drawn in favor of the non-moving party.[23]

C. The Parties' Positions

Contention 6 alleges that chemical effluent and thermal discharges from proposed Fermi 3 will contribute to algal production in Lake Erie and to proliferation of a newly-identified nuisance

---

[17] 10 C.F.R. § 2.710(d)(2).
[18] See Advanced Med. Sys., Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993).
[19] 10 C.F.R. § 2.325; see also Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 467 (1962) (summary judgment should be granted only where the truth is clear); Advanced Med. Sys., CLI-93-22, 38 NRC at 102; Private Fuel Storage, L.L.C., (Independent Spent Fuel Storage Installation), LBP-99-32, 50 NRC 155, 158 (1999).
[20] Advanced Med. Sys., CLI-93-22, 38 NRC at 102.
[21] Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 754 (1977) (internal citation omitted).
[22] 10 C.F.R. § 2.710(a); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-30, 54 NRC 231, 235 (2001).
[23] Advanced Med. Sys., CLI-93-22, 38 NRC at 102.

species of algae, *Lyngbya wollei*, and that those issues were not adequately addressed in the ER. In its Second C-6 Motion, DTE contends that all such issues have been resolved in the Draft Environmental Impact Statement (DEIS)[24] and the State of Michigan National Pollutant Discharge Elimination System (NPDES) permit.[25] The Staff agrees with DTE that summary disposition of Contention 6 is warranted.[26]

DTE states that "[b]ecause the total mass of calcium in Lake Erie will not increase, and because there will be no statistical increase in total calcium concentration in Lake Erie as a result of Fermi 3 operations, no adverse water quality impacts are anticipated from Fermi 3 operations."[27] DTE asserts that issuance of the NPDES permit by the State of Michigan confirms this finding with regard to both chemical and thermal impacts.[28] It notes that Lake Erie waters already retain relatively high concentrations of calcium. DTE also maintains that in other locations *Lyngbya wollei* responds to increased concentrations of nitrate-nitrogen, and that the Maumee River drains agro-ecosystems to the west containing nutrient-rich waters, which may account for the proliferation of *Lyngbya wollei* in the Maumee Bay area.[29]

The DEIS describes the distribution of *Lyngbya wollei* along the shoreline of Lake Erie in the vicinity of Fermi 3.[30] According to the DEIS, the closest reported observation of *Lyngbya wollei* in Lake Erie was within approximately 5 miles of the Fermi 3 site.[31] The DEIS also discusses the impacts of construction-related turbidity on potential algal growth, explaining that these impacts are short-term and easily mitigated.[32] The DEIS anticipates that other

---

[24] 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).
[25] Second C-6 Motion at 1.
[26] Staff Answer to Second C-6 Motion at 1.
[27] Second C-6 Motion at 9.
[28] Id.
[29] Id. at 10.
[30] DEIS at 2-120.
[31] Id. at 5-52.
[32] Id. at 4-46, 5-51.

construction runoff related impacts will be minor, partly because of controls required by the NPDES permit.[33]

DTE also contends that the thermal plume will be small, explaining that this conclusion is based on detailed mathematical modeling. It asserts that the Intervenors assessment of the thermal plume is "devoid of any probative or scientific validity," noting that many important processes are ignored.[34] DTE again relies on issuance of the NPDES permit as affirming that the thermal plume will not cause or contribute to algal blooms.[35]

Intervenors maintain that issues of material fact remain, and that summary disposition is therefore not warranted.[36] Intervenors assert that the likely spreading and proliferation of *Lyngbya wollei* immediately offshore of the Fermi 3 site due to the allegedly understated thermal plume and chemical effluent has not been adequately addressed.[37] They note that "water containing twice (2X) the calcium naturally-occurring in Lake Erie will be returned to the Lake in Fermi 3's effluent."[38] They maintain that calcium boosts the growth of *Lyngbya wollei*, and that construction-phase activities will also cause calcium runoff due to local geologic conditions (limestone). Intervenors assert "calcium levels remain near saturation in Lake Erie offshore of the Fermi site, hence adding concentrated calcium in the form of thermal effluent assures that maximum calcium saturation will become the norm as a direct result of Fermi construction and operation."[39] Intervenors continue to question the estimated size of the thermal plume, pointing specifically to winter periods when the lake water is cooler. They suggest that DTE's analysis is not adequate because it fails to take account of multiple plumes, increased use of agricultural

---

[33] Id. at 4-46, 5-51, 7-26.
[34] Second C-6 Motion at 12, 13.
[35] Id. at 14-15.
[36] Intervenors' Response to Second C-6 Motion at 1.
[37] Id. at 2.
[38] Id. at 4.
[39] Id.

chemicals, global warming, and mussel wastes.[40]

D. Board Ruling

1. Summary Disposition

We agree with DTE and Staff that Contention 6 is appropriate for summary disposition. The DEIS and written materials submitted by DTE and the Staff resolve the issues raised in Contention 6, and no issues of material fact remain that would benefit from the evidentiary hearing process.

The National Environmental Policy Act (NEPA) requires agencies to consider the environmental impacts of "major Federal actions significantly affecting the quality of the human environment," as well as alternatives to the proposed action, in an environmental impact statement (EIS).[41] Contention 6 alleges that the DEIS fails to adequately evaluate one particular environmental impact, the potential of the Fermi 3 plant effluent to stimulate the growth of a nuisance algae, *Lyngbya wollei*. DTE's Second C-6 Motion maintains that the DEIS, together with the additional information DTE submitted with its Motion, resolves the issues that the Board found unresolved in its earlier ruling denying summary disposition of Contention 6. Our ruling reflects both the content of the DEIS and the additional material submitted by the parties, which forms part of the adjudicatory record.[42]

The first of the issues we previously found in dispute is the effect of calcium contained in the thermal effluent stream on the potential proliferation of *Lyngbya wollei*. The DEIS discusses nuisance algae, including *Lyngbya wollei*, concluding that "[t]he principal limiting nutrient responsible for controlling algal blooms in Lake Erie is phosphorus."[43] Phosphorus will not be

---

[40] Id. at 5.
[41] NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C).
[42] See Nuclear Innovation North America LLC (South Texas Project, Units 3 and 4) CLI-11-06, 74 NRC __, __ (slip op. at 7-8) (Sept. 9, 2011).
[43] DEIS at 5-51.

added to the discharge waters of Fermi 3.[44] DTE recognizes that calcium is present in the Fermi 3 influent and effluent streams. Intervenors note that calcium will be discharged in the Fermi 3 thermal effluent at approximately twice the influent concentration. This observation is also not disputed—it is drawn directly from DTE's Statement of Facts.[45] DTE explains, however, that calcium is already present in Lake Erie offshore of Unit 3 at near saturation levels. Intervenors agree that "[c]alcium levels remain near saturation in Lake Erie offshore of the Fermi site . . . ."[46] Also, the Fermi 3 discharge will not result in any mass addition of calcium to Lake Erie.[47] Dr. Rex Lowe, one of DTE's experts, reviews the data relevant to calcium and its role in stimulation of *Lyngbya wollei* biomass and concludes that Fermi 3 discharges are "unlikely to increase the potential for *Lyngbya wollei* proliferation or cause other algal blooms."[48] Intervenors offer neither a contrary expert opinion nor any other information that would undermine the basis of Dr. Lowe's conclusion. We accordingly find no material dispute concerning the effect of calcium contained in the thermal effluent stream on the potential proliferation of *Lyngbya wollei*.

Intervenors also allege that stormwater runoff from plant construction will add calcium to Lake Erie offshore of the Fermi 3 site.[49] But Intervenors provide no reason for the Board to conclude that calcium from plant construction is likely to increase the potential for *Lyngbya wollei* proliferation any more than calcium in the Fermi 3 effluent.

The second issue raised in admitted Contention 6 concerns the lack of discussion in the ER of the distribution and methods of observation of algae, particularly *Lyngbya wollei*. As mentioned above, the DEIS describes the distribution of *Lyngbya wollei* along the shoreline of

---

[44] Affidavit of Dr. Rex Lowe in Support of Summary Disposition of Contention 6 (April 16, 2012) at ¶ 7 [hereinafter Dr. Lowe Affidavit].
[45] Intervenors' Statement of Facts Demonstrating Issues of Material Fact (May 17, 2012) at 1 (quoting DTE, Statement of Material Facts on Which No Genuine Dispute Exists (Apr. 17, 2012) at ¶ 7).
[46] Intervenors' Response to Second C-6 Motion at 4.
[47] Dr. Lowe Affidavit at ¶ 7.
[48] Id.
[49] Intervenors' Response to Second C-6 Motion at 4.

Lake Erie in the vicinity of Fermi 3. DTE's Second C-6 Motion explains the methods of observation and data collection, including results from specific field sampling investigations.[50] The omissions have therefore been cured, and Intervenors do not dispute the methods used.

The third issue raised in Contention 6 is the lack of discussion in the ER of higher levels of turbidity that will be created during plant construction and operations, which may cause conditions favorable to the growth of *Lyngbya wollei*. Turbidity and other construction and operation impacts are discussed in the DEIS.[51] This discussion is not disputed by Intervenors. In addition, Dr. Lowe concludes that "the short-term impacts associated with construction of the Fermi 3 discharge structure are unlikely to cause or exacerbate algal blooms in Lake Erie."[52] Intervenors offer no contrary expert opinion.

The fourth issue is the size of the thermal plume and the residence time for algae in plume waters. The Staff notes that the DEIS contains extensive discussion of thermal plume modeling, and the Staff has independently confirmed the estimated plume size.[53] DTE's expert report also explains that, at the discharge location, the diffusers discharge water upward and at high velocity, making it unlikely that elevated temperatures or concentrations of chemicals will occur at the lakebed.[54] Dr. Lowe concludes, therefore, that the impact of the Fermi 3 diffusers on benthic algal communities should be minimal.[55] In addition, areas with the greatest concentration of *Lyngbya wollei* are typically more sheltered from wave action than the Fermi 3 site. "Instead of *Lyngbya wollei,* the benthic algal communities at the Fermi site were dominated by small diatoms typical of healthy sand lake bottoms that are adapted to resist turbulent flow."[56]

---

[50] Second C-6 Motion at 16-19.
[51] DEIS at 4-46, 5-51, 7-26.
[52] Dr. Lowe Affidavit at ¶ 9.
[53] Staff Answer to Second C-6 Motion at 16.
[54] Dr. Rex L. Lowe, "Assessment of Fermi 3 discharge impacts on *Lyngbya wollei* and other algal species," Second C-6 Motion, Attachment 1 at 12.
[55] Dr. Lowe Affidavit at ¶ 8.
[56] Dr. Rex L. Lowe, "Assessment of Fermi 3 discharge impacts on *Lyngbya wollei* and other algal species," Second C-6 Motion, Attachment 1 at 12.

Intervenors do not dispute any of these facts. Instead, they raise issues that are not within the scope of Contention 6, including impacts from mussel wastes and global warming. We will not consider these issues because they are outside the scope of the admitted contention and Intervenors have not sought to amend the Contention to include these issues.

In admitting Contention 6, we determined that it raised genuine disputes of material fact with regard to the DTE's assessment of potential chemical and thermal discharges impacting algal production in Lake Erie. We now find that no issues of material fact remain in dispute and that DTE is entitled to judgment as a matter of law. We therefore grant DTE's Motion for Summary Disposition of Contention 6.[57]

2. Proposed Contention 20

Given our ruling granting summary disposition, we can now resolve the issue we left open when we ruled on Intervenors' proposed Contention 20. Proposed Contention 20 alleges, among other things, that the DEIS fails to adequately consider whether thermal effluent from Fermi Unit 3 will result in drastic growth of harmful algae.[58] That issue is equivalent to the issue raised by Contention 6 concerning the ER. Because DTE had already filed its Second Motion for Summary Disposition of Contention 6, we deferred ruling on proposed Contention 20, insofar as it concerned the thermal effluent, until we ruled on DTE's Second Motion for Summary Disposition of Contention 6.[59] Because we have now granted that Motion, we also decline to admit Contention 20, insofar as it concerns the thermal effluent, because the Board has now resolved that issue in favor of DTE.

---

[57] Our ruling granting DTE's request for summary disposition renders moot Applicant's Motion for Leave to File a Reply on Contention 6. We therefore deny that Motion.

[58] LBP-12-12, 75 NRC __, __ (June 21, 2012) (slip op. at 27-28). The Board declined to admit any other aspect of Contention 20. Id. at __ (slip op. at 32).

[59] Id. at __ (slip op. at 32).

II. Motion for Summary Disposition of Contention 8

A. Background

Contention 8, as admitted by the Board, states:

> the ER fails to adequately assess [Fermi Unit 3]'s impacts on the eastern fox snake and to consider alternatives that would reduce or eliminate those impacts.[60]

The eastern fox snake is listed as a threatened species by the Michigan Department of Natural Resources (MDNR). The Board admitted Contention 8 because of the material dispute between Intervenors and DTE concerning the project's likely impacts upon the eastern fox snake and the evaluation of alternatives that would mitigate those impacts.[61] In the first version of its ER, DTE claimed that the species had not been observed on the site and that any impact of the project on the snake would be small, making mitigation measures unnecessary.[62] Intervenors challenged these claims, citing a letter from Lori Sargent, a Nongame Wildlife Biologist in MDNR's Wildlife Division.[63] She stated that MDNR's recorded sightings of the eastern fox snake at the Fermi Unit 3 site contradicted the ER's statement that the species had not been observed at the site. She further maintained that "'going forward with the construction would not only kill snakes but destroy the habitat in which they live and possibly exterminate the species from the area. We would like to see a plan for protection of this rare species with regard to this new reactor project.'"[64]

Applicant's First Motion for Summary Disposition of Contention 8 asserted that Contention 8 was moot because it had "resolved the discrepancy in the ER regarding the presence of the Eastern Fox snake at the Fermi site, developed a mitigation plan for the snake, and submitted an

---

[60] LBP-09-16, 70 NRC at 286.
[61] Id. at 286-89.
[62] Fermi 3 Combined License Application Part 3: Environmental Report, Rev. 0 (Sept. 2008) (ADAMS Accession No. ML082730641) at 4-45 [hereinafter ER Rev. 0].
[63] Petition at 89-90. (citing Email from Lori Sargent, Nongame Wildlife Biologist, Wildlife Division, Michigan Department of Natural Resources, to U.S. NRC (Feb. 9, 2009) (ADAMS Accession No. ML090401014) [hereinafter Sargent Email]).
[64] Id. at 90 (quoting Sargent Email).

addenda to the ER describing those plans."[65] The first mitigation measure put forth by DTE to address the potential impacts of construction on the eastern fox snake included a revision to "the site layout to reduce potential wetland impacts."[66] DTE noted that "the Eastern Fox snake habitat is primarily associated with wetlands."[67] Applicant stated that the new site layout reduces Fermi Unit 3's wetland impacts by approximately 120 acres, from 169 to 49 acres.[68] DTE also maintained that 39 of the 49 wetland acres impacted by construction will suffer only temporary impacts, and that those 39 acres will be restored to an equal or better ecological condition once construction of Fermi Unit 3 is complete.[69]

In addition, "to further reduce the potential impacts to Eastern Fox snakes, [Applicant] also developed a draft Habitat and Species Conservation Plan: Eastern Fox Snake (Elaphe gloydi)."[70] Specific mitigation measures called for in the draft mitigation plan include: an employee education program describing the eastern fox snake and its habitat, pre-job briefings, preconstruction surveys of developed areas, preconstruction surveys of undeveloped areas, construction mitigation, and monitoring and reporting of eastern fox snake sightings on the Fermi Unit 3 site.[71]

The Board concluded that, although DTE had made significant modifications to the project and provided relevant new information, disputes of material fact remained concerning the adequacy of the ER's evaluation of the impact of Fermi Unit 3 on the eastern fox snake and the status of mitigation measures to reduce those impacts.[72] The Board agreed with DTE that the revised ER cured the discrepancy between the original ER and the MDNR records by revising

---

[65] Applicant's Motion for Summary Disposition of Contention 8 (Nov. 16, 2010) at 4.
[66] Id. at 7.
[67] Id. (citing Letter from Peter W. Smith, Nuclear Development—Licensing and Engineering, DTE, to U.S. NRC Document Control Desk, Attachment 7 (Feb. 15, 2010) at 3 (ADAMS Accession No. ML100541329)).
[68] Id. at 8.
[69] Id.
[70] Id. (citing Letter from Peter W. Smith, Nuclear Development—Licensing and Engineering, DTE, to U.S. NRC Document Control Desk, Attachment 7, Enclosure 2 (Feb. 15, 2010) (ADAMS Accession No. ML100541329)).
[71] Id. at 8-9.
[72] LBP-11-14, 73 NRC at 604.

section 4.3.1.2.1 to acknowledge the sightings of the eastern fox snake on the Fermi Unit 3 site. The Board also acknowledged that DTE had developed a revised site layout and a draft mitigation plan for the eastern fox snake. In substance, the revised site layout and draft mitigation plan constitute alternatives to the project as originally proposed that might, if implemented, reduce impacts to the species. DTE had therefore addressed two of the issues that led the Board to admit Contention 8: it acknowledged the presence of the species at the site and developed alternatives that appear intended to reduce impacts to the species.[73]

But the Board explained that, although the specific deficiencies that DTE had resolved were among the factors that led the Board to admit Contention 8, they were not the only concerns. The Contention concerned the overall adequacy of the ER's assessments of the project's impacts on the eastern fox snake and possible alternatives that might reduce those effects, not just the specific omissions or discrepancies that were the focus of DTE's motion.[74]

The Board agreed with Intervenors that substantial conflicts relevant to compliance with NEPA and 10 C.F.R. Part 51 remain unresolved. For example, in the revised ER, DTE continued to maintain that "the impact to [the eastern fox snake] from the [Fermi Unit 3] project is considered [small], and no mitigative measures are needed."[75] The Board therefore found an unresolved conflict between the opinion of MDNR and that of DTE concerning the impact of Fermi Unit 3 construction activities on the eastern fox snake and the need for mitigation of those impacts. Moreover, the Board continued to find conflicts on the same issues within DTE's own documents.[76]

The Board agreed with DTE that "NEPA does not require a fully developed plan that will mitigate all environmental harm before an agency can act; NEPA requires only that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fully

---

[73] Id. at 606.
[74] Id. at 604-05.
[75] Id. at 606.
[76] Id. at 606-07.

evaluated."[77] But the Board did not agree with DTE that the revised ER necessarily satisfies the latter requirement. The only statement in section 4.3.1.2.1 of the ER regarding mitigation of impacts to the eastern fox snake was that no mitigation is necessary.[78] Although the draft mitigation plan was referred to as an addendum to the revised ER, neither the plan nor its likely effect was discussed in the ER.[79] This left the Board uncertain which mitigation measures, if any, DTE will actually take for the protection of the eastern fox snake during the construction of Fermi Unit 3, whether those measures had been reviewed or approved by MDNR, and whether they will actually help prevent harm to the species during construction. The Board stated that the ER should explain, at a minimum, the mitigation measures DTE intends to take to benefit the eastern fox snake, the effect DTE believes those measures will have if implemented, and the basis of that belief.[80] The Board therefore concluded that a dispute of material fact remained concerning whether ER Revision 1 included the requisite hard look at potential construction impacts to the eastern fox snake and mitigation that might reduce those impacts.[81]

In October 2011, after the Board's ruling denying DTE's first motion for summary disposition of Contention 8, the Staff issued its Draft Environmental Impact Statement (DEIS). In the discussion of construction impacts, the DEIS reports that

> more than 15 documented sightings of the eastern fox snake have been made on the Fermi site since 1990, including two sightings in 2008 during the wetlands delineation survey. . . . Eastern fox snakes have been observed in a variety of habitats, even near Fermi 2 buildings. The snake's most likely preferred habitat occurs along the cattail marshes or wetland shorelines around woody debris, but many of the habitats present on the Fermi site are usable as habitat by the snake . . . . Of the 1260 [acres] of the Fermi site, 656 [acres] are undeveloped, and much of it is potentially suitable habitat for the eastern fox snake.[82]

The DEIS states that Fermi 3 building activities would affect approximately 197 acres of

---

[77] Id. at 607 (quoting Laguna Greenbelt, Inc. v. U.S. Dep't of Transp., 42 F.3d 517, 528 (9th Cir. 1994) (internal citation omitted)).
[78] Id. at 608.
[79] Id.
[80] Id.
[81] Id.
[82] DEIS at 4-34.

the potential snake habitat. Of that total, approximately 51 acres would be converted permanently to developed uses. "The remaining 146 [acres] of disturbed habitat would be restored to the pre-project vegetative cover type."[83] In addition, the DEIS acknowledges that "[t]raffic into the site and vicinity would increase greatly during construction," and that the "[i]ncreased traffic associated with operation of Fermi 3 has the potential to increase wildlife mortality, including mortality of eastern fox snakes."[84]

The DEIS noted that DTE had prepared a Habitat and Species Conservation Plan (Conservation Plan or the Plan) to mitigate direct impacts on the snake.[85] The MDNR's Endangered Species Coordinator, however, had not reviewed the Plan when the DEIS was issued, and therefore he had not "commented on whether the [P]lan's mitigation measures would be adequate to protect the eastern fox snake."[86] The coordinator did inform the Staff that "monitoring of the eastern fox snake population during and after building of Fermi 3 could help determine whether the direct impacts from site activities and increased traffic warranted additional measures."[87] The Staff acknowledged that, "[g]iven the extent of potential eastern fox snake habitat that would be disturbed, albeit temporarily, and the increased traffic during construction and preconstruction, . . . the Fermi 3 project could result in mortality of some individuals and reduce the local population unless appropriate avoidance and mitigation measures are taken."[88] The Staff also concluded that, in addition to the measures identified in DTE's Conservation Plan, "monitoring of the snake would be necessary during and after building Fermi 3 to support development and implementation of effective mitigation measures."[89] The Staff "expects that

---

[83] Id. at 4-35.
[84] Id.
[85] Id.
[86] Id. at 4-35 to 4-36.
[87] Id. at 4-36.
[88] Id.
[89] Id.

this monitoring would be required by and done under the direction of the MDNR."[90]

In summarizing the project's impacts on important species at the Fermi 3 site, the Staff acknowledged that impacts on the eastern fox snake could be "noticeable" unless adequate mitigation measures are developed and implemented.[91] The Staff predicted, however, that "State permitting would probably result in requirements to protect the eastern fox snake to the extent practicable and to mitigate impacts that cannot be avoided."[92] The Staff, again referring to the requirements it believes MDNR will impose and enforce, concluded that

> the impacts from construction and preconstruction activities for Fermi 3 on terrestrial resources on the Fermi site and transmission line corridor would be [small] because mitigation would be required prior to conducting site preparation, preconstruction, and construction activities. This conclusion is based in part on . . . mitigation for eastern fox snake and American lotus impacts that would be required by MDNR. Based on the above analysis, and because NRC-authorized construction activities represent only a portion of the analyzed activities, the NRC staff concludes that the impacts of NRC-authorized activities on terrestrial resources would be [small].[93]

On April 6, 2012, MDNR issued a two-page checklist to DTE, indicating that MDNR had reviewed "information received regarding the proposed Fermi 3 nuclear plant construction" and that the information "was found . . . to adequately address the concerns for potential threatened and endangered species at the site in question."[94] The MDNR checklist further states, based on the information DTE provided, that "[t]he proposed project should have minimal direct impacts on known special natural features at the location(s) specified if it proceeds <u>according to the plans provided</u>."[95] The checklist also indicates that the eastern fox snake "may occur on the site(s) and should be avoided and protected from harm from all activities associated with the project and in

---

[90] <u>Id.</u>
[91] <u>Id.</u>
[92] <u>Id.</u>
[93] <u>Id.</u> at 4-44.
[94] Letter from Lori G. Sargent, Endangered Species Specialist, Wildlife Division, MDNR, to Mr. Randall Westmoreland, DTE Energy (April 6, 2012), Second C-8 Motion, Attachment 2 at 1 [hereinafter MDNR checklist].
[95] <u>Id.</u> (emphasis in original).

perpetuity from any future activities on the property."[96] Finally, the MDNR checklist states that "[a]n endangered species permit is required if activities will harm the species that are present, including transplanting them to another location."[97] The checklist does not indicate whether DTE has applied for such a permit.

B. Parties' Positions

According to DTE, the DEIS "acknowledges the potential adverse impacts to fox snakes from Fermi 3 construction activities and describes the role of MDNR with respect to mitigation of potential impacts to fox snakes."[98] DTE further maintains that MDNR has reviewed its Mitigation Plan and "concluded that the plan is acceptable and provides adequate protection for the fox snakes at the Fermi site."[99] Applicant has also submitted the declaration of "Detroit Edison's expert herpetologist," who "concluded that the Mitigation Plan is comprehensive and will effectively minimize impacts to fox snakes during construction."[100] DTE argues that these facts are sufficient to remove any dispute of material fact and to establish its right to summary disposition of Contention 8.[101]

Intervenors challenge the claim that the entire dispute concerning the impact of Fermi 3 upon the eastern fox snake has been resolved. They note that the Board admitted Contention 8 based on "the conflict between the ER's claim that the project would have only a small impact on the snake and that no mitigation measures were necessary, and the opinion of [MDNR] that 'going forward with the construction would not only kill the snakes but destroy the habitat in which they live and possibly exterminate the species from the area,' and that mitigation should be

---

[96] Id.
[97] Id. at 2 (emphasis in original).
[98] Second C-8 Motion at 9.
[99] Id.
[100] Id.
[101] Id. at 9-10.

considered."[102] Intervenors acknowledge that DTE has now proposed mitigation measures, but, they maintain, those measures "have not been adequately vetted by the state regulatory authority and there are not satisfactory enforcement mechanisms in place."[103] Intervenors then allege various deficiencies in DTE's Conservation Plan. For example, they criticize the Plan for failing to characterize the 107.31 acre farm field intended to serve as mitigation habitat, as well as the "absence of a binding commitment to having the mitigation habitat available contemporaneously to the removal of the [eastern fox snake] from the construction site."[104] Intervenors also state, referring to the MDNR checklist, that the "approval does not explain with any particularity what, exactly, was reviewed by MDNR, nor what the basis of the approval is."[105] Intervenors complain that the checklist does not reflect sufficiently thorough analysis to "merit deference."[106]

Intervenors further argue that "[a]bsent a viable enforcement mechanism, there is no guarantee whatsoever that mitigation will take place."[107] In support of this argument, Intervenors rely on guidance issued by the Council on Environmental Quality (CEQ) that addresses the appropriate use of mitigation and monitoring to support a conclusion in an EIS or a finding of no significant impact.[108] The CEQ acknowledges that NEPA itself does not create a general substantive duty on Federal agencies to mitigate adverse environmental effects,[109] but recommends that, if an agency relies upon mitigation measures in its Final Environmental Impact Statement (FEIS), then it should take steps to ensure that mitigation commitments are

---

[102] Intervenors' Response in Opposition to Applicant's Motion for Summary Disposition of Contention 8 (Eastern Fox Snake) (July 2, 2012) at 2-3 (quoting LBP-11-14, 73 NRC at 605) [hereinafter Intervenors' Response to Second C-8 Motion].
[103] Id. at 3.
[104] Id. at 4-6.
[105] Id. at 6.
[106] Id. at 11.
[107] Id. at 8.
[108] Id. at 11 (citing and quoting U.S. Council on Environmental Quality, "Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact," 76 Fed. Reg. 3843 (Jan. 21, 2011) [hereinafter CEQ Guidance]).
[109] CEQ Guidance, 76 Fed. Reg. at 3846.

implemented, monitor the effectiveness of such mitigation commitments, and be able to remedy failed mitigation.[110] Intervenors imply that the Staff has failed to address these issues.[111] Intervenors also emphasize that, for agency decisions such as a COL that are based on an EIS, the CEQ Regulations require that "a monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation."[112] The CEQ Guidance makes clear that this applies to permitting actions: "[w]hen an agency . . . permits or otherwise approves actions, it should also exercise its available authorities to ensure implementation of any mitigation commitments by including appropriate conditions on the relevant grants, permits or approvals."[113]

Intervenors conclude that "[a]n evidentiary hearing is warranted here, because DTE has provided neither sufficient proofs of genuine regulatory scrutiny of its plan, nor procedures to assure its implementation if it were approved."[114] Because genuine issues of material fact are in dispute, they argue, DTE's motion should be denied.[115]

The Staff filed a response to DTE's Second Motion for Summary Disposition of Contention 8, arguing that the Motion should be granted. Echoing DTE's position, the Staff argues that the DEIS adequately addresses the impacts of construction of Fermi Unit 3 on the eastern fox snake and the need for mitigation.[116]

Although replies in support of summary disposition motions are not authorized by the NRC's hearing regulations, DTE filed a Motion for Leave to File a Reply on Contention 8, together with the proposed Reply. The Motion for Leave is unopposed, and we will therefore permit the filing of the Reply. The Reply alleges that Intervenors, in their Opposition to the Summary Disposition Motion, "impermissibly attempt to expand the scope of Contention 8 by providing new

---

[110] Id. at 3847.
[111] Intervenors' Response to Second C-8 Motion at 11-13.
[112] Id. at 12 (quoting 40 C.F.R. § 1505.2(c)).
[113] CEQ Guidance, 76 Fed. Reg. at 3847.
[114] Intervenors' Response to Second C-8 Motion at 14-15.
[115] Id. at 15.
[116] NRC Staff Answer to Applicant's Motion for Summary Disposition of Contention 8 (July 2, 2012) [hereinafter Staff Answer to Second C-8 Motion].

bases—without addressing the criteria for late-filed or amended contentions and without demonstrating that the new issues are within the scope of the proceeding as currently defined by the admitted Contention 8."[117] We resolve DTE's objections in our ruling below on the scope of Contention 8.

C. Board Ruling

1. Scope of Contention 8

In its Reply, DTE maintains that several of Intervenors' arguments in response to the summary disposition motion are outside the scope of Contention 8 as admitted by the Board. "'Where an issue arises over the scope of an admitted contention, NRC opinions have long referred back to the bases set forth in support of the contention.'"[118] Thus, the scope of an admitted contention depends in large part on the bases set forth in the "brief explanation of the basis for the contention" required by 10 C.F.R. § 2.309(f)(1)(ii). As long as the facts now relied on by Intervenors in opposition to the summary disposition motion fall within the scope of that explanation, they are properly before the Board. In addition, while a party may not raise new arguments that are outside the scope of its contention, it may "legitimately amplify" arguments presented in support of the contention in order to fairly respond to arguments raised by the opposing party.[119]

We explained the basis of Contention 8 in our ruling on DTE's Motion to Strike, which alleged that various arguments of Intervenors in response to DTE's First Motion for Summary Disposition of Contention 8 were outside the scope of the Contention. As we stated, the Contention concerns the adequacy under NEPA of the assessment of the project's impacts on the eastern fox snake and possible alternatives that might reduce those effects. Contention 8 is

---

[117] Reply to Response in Opposition to Summary Disposition of Contention 8 (July 9, 2012) at 1 [hereinafter DTE C-8 Reply].
[118] Duke Energy Corp., (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002).
[119] See, e.g., Nuclear Management Co., LLC (Palisades Nuclear Plant), LBP-06-10, 63 NRC 314, 329 (2006).

based on the risk that the construction of Fermi Unit 3 will kill snakes, destroy their habitat, and exterminate the species from the area.[120] To the extent Intervenors' arguments went beyond the impacts of construction of Unit 3 upon the snake, we ruled that they were outside the scope of Contention 8. On the other hand, arguments concerning the adequacy of the NEPA analysis of the impact of Construction of Unit 3 upon the snake and of measures to mitigate those impacts fall within the scope of the Contention.[121]

DTE argues that Intervenors' criticism of MDNR's review of the Conservation Plan, describing it as a "shallow, checklist review," is outside the scope of Contention 8. According to DTE, the Board "should not entertain what is, in effect, a collateral attack on the MDNR process—a matter over which the NRC is devoid of jurisdiction."[122] We agree, and for that reason the Board has not considered that argument in our ruling below. DTE also argues that Intervenors' criticisms of the Plan are outside the scope of Contention 8. These include Intervenors' arguments that various toxic contaminants may be present in the soil of the wetland mitigation site, and that "[r]epurposing agricultural land as reptile habitat is rather experimental."[123] We found it unnecessary to consider these arguments in our ruling, so this aspect of DTE's Reply is moot.

DTE also challenges as outside the scope of the Contention 8 Intervenors' argument that there is no viable enforcement mechanism to ensure implementation of the Conservation Plan.[124] Although we agree with DTE that an NRC adjudication is not the appropriate forum for a challenge to a decision by a state regulatory agency, we do not construe the argument regarding the lack of an enforcement mechanism as such a challenge. Instead, Intervenors question the adequacy of the DEIS's analysis of the impact of construction on the snake, given the lack of any means to

---

[120] LBP-11-14, 73 NRC at 609.
[121] Id. at 608-09.
[122] DTE C-8 Reply at 2 (citing Arizona Public Service Co. (Palo Verde Generating Station, Units 1, 2, and 3), LBP-82-117A, 16 NRC 1964, 1991 (1982)).
[123] Id. at 2-3.
[124] Id. at 2.

enforce the Conservation Plan. As previously explained,[125] the Staff expressly relied on future MDNR actions, including enforcement of the Plan, to justify its finding that the impact of construction and pre-construction activities on the eastern fox snake will be small. Applicable NEPA law requires an agency to justify its reliance on anticipated future mitigation of adverse impacts.[126] Intervenors may therefore question whether the DEIS includes a sufficient justification for its reliance upon future actions of MDNR.

A board faced a related issue in litigation challenging amendments to the operating license for Unit 1 at the River Bend Station.[127] The contention at issue alleged that the licensee's financial exposure in ongoing litigation and regulatory proceedings might adversely affect safety at the facility.[128] In arguing for summary disposition, the licensee and the Staff contended that, if the licensee was forced to declare bankruptcy, the bankruptcy court would ensure that the River Bend would receive sufficient funding to ensure safe operation.[129] The Intervenor responded that the licensee had not supplied enough information to establish that a bankruptcy court would supply sufficient funding to River Bend. The Board concluded that "the question of whether bankruptcy courts will adequately fund nuclear facilities to ensure safety is a disputed factual question for which summary disposition is inappropriate."[130] Similarly, the question here is whether the Staff, in the DEIS, has reasonably relied on assumptions about the future actions of MDNR. By raising that issue, Intervenors are not making a collateral attack on the MDNR process any more than the Intervenor in River Bend was making a collateral attack upon the bankruptcy court process. Rather, Intervenors are disputing the sufficiency of the DEIS under NEPA. Intervenors' argument, as so construed, does not impermissibly expand the scope of Contention 8 into an attack upon the State agency's process.

---

[125] See supra pp. 15-16.
[126] See infra p. 25.
[127] Gulf States Utilities Co. (River Bend Station, Unit 1), LBP-95-10, 41 NRC 460 (1995).
[128] Id. at 466.
[129] Id. at 471.
[130] Id.

2. Summary Disposition

The Board denied DTE's First Motion for Summary Disposition of Contention 8 because genuine issues of material fact remained unresolved. Although DTE's present motion identifies additional developments since our earlier ruling that resolve some of the problems that led us to deny DTE's earlier motion, the new information is not sufficient to resolve all disputed questions of material fact or law relevant to resolution of Contention 8. The Board accordingly denies DTE's Second C-8 Motion.

We agree with DTE that the DEIS, like the revised ER, resolves the question whether the eastern fox snake is present at the Fermi 3 site. The DEIS acknowledges the presence of the snake, as well as the availability of snake habitat at the site. Intervenors have not alleged that the DEIS understates the presence of the snake at the site or the available habitat, so those issues are no longer in dispute. Similarly, the DEIS does not repeat the statement in the ER that the snake would be expected to avoid construction activities and that therefore mitigation is unnecessary. Instead, the DEIS acknowledges the potential adverse impacts to eastern fox snakes from Fermi 3 construction activities and notes that DTE has modified the site layout and developed the Conservation Plan.[131] On these issues as well, Intervenors fail to identify any factual dispute.

But Intervenors do dispute whether the Staff's reliance on the Conservation Plan is consistent with the CEQ Guidance. The Staff expressly premised its conclusion that the impact of construction and pre-construction activities on the snake will be small on its assumption that MDNR will require mitigation that will be sufficient to protect the snake from the impacts of such activities.[132] As the CEQ Guidance explains, although NEPA does not require mitigation of environmental impacts, it does require that, if a federal agency relies on mitigation to support a finding in an environmental impact statement (EIS) or a finding of no significant impact (FONSI),

[131] DEIS at 4-34 to 4-35.
[132] See DEIS at 4-44.

the agency should ensure that mitigation commitments are implemented, monitor the effectiveness of such commitments, be able to remedy failed mitigation, and involve the public in mitigation planning.[133] The DEIS, however, fails to address those issues. Instead, the DEIS's conclusion that the impact on the eastern fox snake will be small appears to be based on the assumption that MDNR will require implementation of DTE's Conservation Plan, and that MDNR will also require the monitoring that the Staff concluded would also be necessary. In other words, the DEIS assumes that MDNR will take the actions that the CEQ Guidance states are the responsibility of the federal agency that relies on mitigation to support a finding in its EIS. In substance, Intervenors question whether this reliance is consistent with the CEQ Guidance.

Intervenors have raised a substantial question whether the DEIS adequately addresses the issues raised in the CEQ Guidance. Because DTE, the moving party in this instance, bears the burden of demonstrating that it is entitled to judgment as a matter of law,[134] a substantial question whether the DEIS complies with applicable NEPA requirements is sufficient to defeat summary disposition. But the CEQ Guidance consists primarily of recommendations to federal agencies, not legally binding obligations. The Guidance "is not a rule or regulation, and the recommendations it contains may not apply to a particular situation based upon the individual facts and circumstances."[135] It also "does not change or substitute for any law, regulation, or other legally binding requirement and is not legally enforceable."[136] Some courts have declined to defer to similar interpretative guidance issued by CEQ.[137]

Fortunately, we need not resolve the question of the level of deference we should afford

---

[133] CEQ Guidance, 76 Fed. Reg. at 3847.
[134] 10 C.F.R. § 2.710(d)(2). See also Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 467 (1962) (summary judgment should be granted only where the truth is clear); Advanced Med. Sys., CLI-93-22, 38 NRC at 102; Private Fuel Storage, L.L.C., (Independent Spent Fuel Storage Installation), LBP-99-32, 50 NRC 155, 158 (1999).
[135] CEQ Guidance, 76 Fed. Reg. at 3846 n.5.
[136] Id.
[137] See Ass'ns Working for Aurora's Residential Env't v. Colorado Dep't of Transp., 153 F.3d 1122, 1127 n.4 (10th Cir. 1998); Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson, 685 F.2d 678, 682-83 (D.C. Cir. 1982).

the CEQ Guidance, because the federal courts have developed similar rules for deciding when federal agencies may rely on mitigation to support a FONSI. To be sure, in the present case the NRC did not issue a FONSI, but it did rely on mitigation to support its finding that the impact of construction and pre-construction activities on the eastern fox snake will be small. Such a finding is sufficiently similar to a FONSI that the cases addressing that issue are also relevant to assessing the determination the Staff made in the DEIS concerning impacts to the snake. The CEQ Guidance recognizes the overlap between those two issues.[138] We will therefore look to the federal case law for the governing legal requirements.

Federal courts have agreed that, "[w]hen conducting a NEPA-required environmental review, an agency may consider the ameliorative effects of mitigation in determining the environmental impacts of an activity."[139] But "[a]n agency's reliance on mitigation in making a FONSI . . . must be justified."[140] Such reliance is justified if the proposed mitigation satisfies two criteria. "First, the proposed mitigation underlying the FONSI 'must be more than a possibility' in that it is 'imposed by statute or regulation or have been so integrated into the initial proposal that it is impossible to define the proposal without mitigation.'"[141] "Second, there must be some assurance that the mitigation measures 'constitute an adequate buffer against the negative impacts that result from the authorized activity to render such impacts so minor as to not warrant an EIS.'"[142] Proposed mitigation measures are sufficient "if they are supported by sufficient

---

[138] See CEQ Guidance, 76 Fed. Reg. at 3846-49.

[139] Ohio Valley Envtl. Coalition v. Hurst, 604 F. Supp. 2d 860, 888 (S.D. W. Va. 2009) (citing O'Reilly v. U.S. Army Corps of Eng'rs, 477 F.3d 225, 231 (5th Cir. 2007); Sierra Club v. U.S. Army Corps of Eng'rs, 464 F. Supp. 2d 1171, 1224 (M.D. Fla. 2006), aff'd, 508 F.3d 1332 (11th Cir. 2007)).

[140] Id. (citing Sierra Club, 464 F. Supp. 2d at 1224).

[141] Id. (quoting Sierra Club, 464 F. Supp. 2d at 1225 (quoting Wyo. Outdoor Council v. U.S. Army Corps of Eng'rs, 351 F. Supp. 2d 1232, 1250 (D. Wyo. 2005))). Accord Davis v. Mineta, 302 F.3d 1104, 1125 (10th Cir. 2002).

[142] Id. (quoting Wetlands Action Network v. U.S. Army Corps of Eng'rs, 222 F.3d 1105, 1121 (9th Cir. 2000) (citing Greenpeace Action v. Franklin, 14 F.3d 1324, 1332 (9th Cir.1992))).

evidence, such as studies conducted by the agency, or are 'adequately policed.'" [143]

Concerning the first requirement, the record before us fails to show that DTE's conservation plan is "'imposed by statute or regulation or [has] been so integrated into the initial proposal that it is impossible to define the proposal without [the] mitigation.'"[144] The DEIS informs us only that "State permitting" would "probably" result in requirements to protect the snake to the extent practicable and to mitigate any unavoidable impacts.[145] The DEIS also states that, "[i]n addition to the measures identified in [DTE's Conservation Plan], the review team believes that monitoring of the snake would be necessary during and after building Fermi 3 to support development of effective mitigation measures."[146] The Staff stated that it "expects" that the additional monitoring it found to be necessary would be "required and done under the direction of the MDNR."[147] Thus, the DEIS fails to identify any statutory or regulatory requirements that will mandate implementation of the Conservation Plan and the additional monitoring the DEIS states will be necessary. Instead, the DEIS appears to simply assume that MDNR will take whatever actions are necessary to ensure that impacts to the snake are small and that necessary additional monitoring will occur.

This is similar to the argument the D.C. Circuit recently rejected in New York v. NRC.[148] The NRC argued that its environmental assessment did not need to deal with the potential impacts of leaks from spent fuel pools because its monitoring and regulatory compliance program would prevent such leaks. The court stated:

> That argument . . . amounts to a conclusion that leaks will not occur because the NRC is "on duty." With full credit to the Commission's considerable enforcement and inspection efforts, merely pointing to the compliance program is in no way

---

[143] Id. (quoting Wetlands Action Network, 222 F.3d at 1121 (quoting Wyo. Outdoor Council, 351 F. Supp. 2d at 1250)).
[144] 604 F. Supp. 2d at 888 (quoting Sierra Club, 464 F. Supp. 2d at 1225 (quoting Wyo. Outdoor Council v. U.S. Army Corps of Eng'rs, 351 F. Supp. 2d 1232, 1250 (D. Wyo. 2005))).
[145] DEIS at 4-36.
[146] Id.
[147] Id.
[148] 681 F.3d 471, 481 (D.C. Cir. 2012).

> sufficient to support a scientific finding that spent-fuel pools will not cause a significant environmental impact during the extended storage period.[149]

Similarly, in the DEIS the Staff appears to assume that because the MDNR is "on duty" the snake will not be significantly impacted by the construction of Fermi Unit 3. That assumption, like the similar assumption rejected in New York v. NRC, is insufficient to demonstrate compliance with NEPA's requirement that agencies take a hard look at the environmental consequences of their proposed actions.[150]

The CEQ Guidance states that, as an alternative to reliance upon the agency's own authority to impose mitigation, "the authority for the mitigation may derive from legal requirements that are enforced by other Federal, state, or local government entities (e.g., air or water permits administered by local or state agencies)."[151] This suggests that federal agencies may rely on mitigation that will be imposed by other agencies. But this does not relieve the federal agency conducting the NEPA review of the burden to explain the statutory or regulatory requirements it is relying on and its reasons for concluding that the application of those requirements will actually result in the mitigation and monitoring it assumes will occur. The DEIS fails to provide that information, which raises a significant question whether the DEIS complies with NEPA.[152]

Nor was DTE's Plan part of the initial proposal (the license application). Instead, it was

---

[149] Id.

[150] See also Center for Biological Diversity v. Bureau of Land Management, ___ F.3d ___, 2012 WL 5193100 (9th Cir. Oct. 22, 2012) (Biological Opinion and its accompanying Incidental Take Statement issued by the United States Fish and Wildlife Service were arbitrary and capricious because they were based in part on a conservation plan that was not enforceable under the Endangered Species Act).

[151] CEQ Guidance, 76 Fed. Reg. at 3847.

[152] See Davis v. Mineta, 302 F.3d at 1125 (Court of Appeals disagreed with the district court's conclusion that the increase in noise levels would not be a significant impact because the agency's environmental assessment made "no firm commitment to any noise mitigation measures."); National Audubon Soc. v. Hoffman, 132 F.3d 7, 17 (2d Cir. 1997) ("In this case, we have no assurance of Measure K's efficacy. The Forest Service conducted no study of its likely effects, proposed no monitoring to determine how effective the proposed mitigation would be, and did not consider alternatives in the event Measure K fails."). Cf. Wyo. Outdoor Council v. U.S. Army Corps of Eng'rs, 351 F. Supp. 2d at 1250 (district court found that "the mitigation measures are a mandatory condition to the use of GP 98-08," and that they therefore "qualify as the type of mitigation measures that can be relied upon for a finding of no significant impact.")

developed after the Board admitted Contention 8. And the Plan has not been so integrated into DTE's proposed action that it would be "impossible" to define the action without the Plan.[153] In Ohio Valley Environmental Coalition, the court found that the Army Corps of Engineers satisfied that requirement because "the case-by-case evaluation that the Corps relies upon to mitigate the cumulative impacts to insignificance, as well as the factors to be considered in that process, are mandatory conditions that are integrated into the proposed permit . . . ."[154] Here, by contrast, the DEIS does not suggest that the Conservation Plan will be required by or otherwise integrated into the proposed COL. And MDNR has not yet issued a permit providing for protection of the eastern fox snake.

The MDNR checklist, relied on by DTE in its Motion, also fails to identify any present obligation to implement the Conservation Plan. On the contrary, the checklist informs us only that "[t]he proposed project should have minimal direct impacts on known special natural features at the location(s) specified if it proceeds according to the plans provided."[155] Thus, while the checklist supports DTE's position that construction will not have a significant impact upon the eastern fox snake if the Conservation Plan is implemented, it provides no support for the supposition that the proposed action will in fact proceed according to the Plan. On the contrary, the checklist simply reinforces the uncertainty about what measures, if any, will be imposed to ensure implementation of the Plan and the additional monitoring that the DEIS states will be necessary.

In short, neither DTE nor the Staff has identified any existing requirement that DTE implement its Conservation Plan or the additional monitoring. DTE has provided the affidavit of a company official stating that DTE will implement the Plan,[156] but this does nothing to make the

---

[153] Ohio Valley Environmental Coalition, 604 F. Supp. 2d at 888.
[154] 604 F. Supp. 2d at 890.
[155] MDNR checklist at 1 (emphasis in original).
[156] Affidavit of Peter W. Smith in Support of Summary Disposition of Contention 8 (June 11, 2012) at 4.

Plan enforceable. As things stand, DTE may halt or modify implementation of the Conservation Plan as it chooses. Thus, an issue material to determining whether the DEIS complies with NEPA has not been resolved. This is sufficient to require denial of summary disposition, so the Board need not address the second part of the federal court test.

3. Proposed Contention 21

Given our ruling on summary disposition, we can now resolve the issue we left open when we ruled on Intervenors' proposed Contention 21. We construed proposed Contention 21 to allege, among other things, that the DEIS fails to adequately discuss mitigation alternatives for the eastern fox snake.[157] That issue is equivalent to the issue raised by Contention 8 concerning the ER. Because DTE had already filed its Second Motion for Summary Disposition of Contention 8, we deferred ruling on proposed Contention 21, insofar as it concerned the eastern fox snake, until we ruled on DTE's Second Motion for Summary Disposition of Contention 8.[158] Because we have now denied the summary disposition motion, Contention 8 remains pending.

Contention 8 was filed based on the ER, but the issuance of an EIS by the Staff does not necessarily render moot a contention that was filed based on the ER. The Board may construe an admitted contention contesting the ER as a challenge to a subsequently issued DEIS or FEIS without the necessity for Intervenors to file a new or amended contention.[159] This concept has

---

[157] LBP-12-12, 75 NRC at __ (slip op. at 33). The Board declined to admit any other aspect of Contention 21. Id. at __ (slip op. at 36).

[158] Id. at __ (slip op. at 35-36).

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

been referred to as the "migration tenet."[160] It helps to expedite hearings by obviating the need to file and litigate the same contention up to three times—once against the ER, once against the DEIS, and one final time against the FEIS.[161] The tenet applies when the information contained in a subsequently released document is sufficiently similar to the information contained in the original document upon which the original contention was filed.[162]

The relevant parts of the ER and the DEIS both concern the impact of construction activities upon the eastern fox snake and conclude that the impact will be small. There is one difference relevant to Contention 8: the ER assumed that no mitigation would be necessary, while the DEIS acknowledges the need for mitigation and assumes that adequate mitigation will be required by MDNR. However, the issue raised by Intervenors remains the same—whether the discussion of mitigation is sufficient to satisfy the requirements of NEPA. We therefore deem the ER and the DEIS to be sufficiently similar that the migration tenet should apply. Contention 8 accordingly applies to the DEIS and is not moot.

We therefore deny the Motion to Admit Contention 21, as it relates to the snake, because the amendment is unnecessary.

III. Motion for Summary Disposition of Contention 15

A. Background

On November 6, 2009, the Intervenors filed a Supplemental Petition for Admission of a Newly Discovered Contention (Supplemental Petition), which included a quality assurance (QA) contention numbered as Contention 15.[163] In June 2010, the Board admitted a reformulated version of the Contention:

Contention 15 (including subparts A and B)

---

[160] Progress Energy Florida, Inc. (Combined License Application for Levy County Nuclear Power Plant, Units 1 and 2), LBP-11-01, 73 NRC 19, 26 (2011).
[161] Id.
[162] See id.
[163] Supplemental Petition for Admission of a Newly Discovered Contention (Nov. 6, 2009) at 2-3.

> Detroit Edison (DTE) failed to comply with Appendix B to 10 C.F.R. Part 50 to establish and implement its own quality assurance (QA) program when it entered into a contract with Black and Veatch (B&V) for the conduct of safety-related combined license (COL) application activities and to retain overall control of safety-related activities performed by B&V. This violation began in March 2007 and continued through at least February 2008. Further, DTE failed to complete internal audits of QA programmatic areas implemented for the Fermi 3 COL Application, and DTE also has failed to document trending of corrective actions to identify recurring conditions adverse to quality since the beginning of the Fermi Unit 3 project in March 2007.

Contention 15A:

> These deficiencies adversely impact the quality of the safety related design information in the FSAR that is based on B&V's tests, investigations, or other safety-related activities. Because the NRC may base its licensing decision on safety-related design information in the FSAR only if it has reasonable assurance of the quality of that information, it may not lawfully issue the COL until the deficiencies have been adequately corrected by the Applicant, or until the Applicant demonstrates that the deficiencies do not affect the quality of safety-related design information in the FSAR.

Contention 15B:

> Although DTE claims that in February 2008 it adopted a QA program that conforms to Appendix B, DTE has failed to implement that program in the manner required to properly oversee the safety-related design activities of B&V. This demonstrates an ongoing lack of commitment on the part of DTE's management to compliance with NRC QA regulations. The NRC cannot support a finding of reasonable assurance that the plant, as built, can and will be operated without endangering the public health and safety until DTE provides satisfactory proof of a fully-implemented QA program that will govern the design, construction, and operation of Fermi Unit 3 in conformity with all relevant NRC regulations.[164]

The Contention was based upon a Staff inspection in August 2009 that resulted in a Notice of Violation (NOV) issued in October 2009 (the October 2009 NOV). The October 2009 NOV found that DTE had failed, in certain respects, to comply with the QA requirements of Appendix B.[165] The violations included: (A) failing to establish and implement a Fermi Unit 3 QA program between March 2007 (when DTE initially contracted with B&V for the conduct of COLA activities for Fermi Unit 3) and February 2008 and failing to retain overall control of contracted COLA activities as required under Criterion II, "Quality Assurance Program" of Appendix B, resulting in inadequate control of procurement documents and ineffective control of contract services

[164] LBP-10-9, 71 NRC 493, 510-11 (2010).
[165] Id. at 500.

performed by B&V for COLA activities; (B) failing to perform internal audits of QA programmatic areas implemented for Fermi Unit 3 COLA activities; and (C) failing to document trending of DTE's corrective action reports.[166]

In its reply to the October 2009 NOV, DTE denied that any violation occurred before September 18, 2008**,** because it was not then a COL applicant and thus was not subject to Appendix B requirements.[167] The Staff responded to DTE on April 27, 2010.[168] The Staff agreed with DTE that it could not issue a NOV for actions or omissions before the date on which DTE submitted the Fermi 3 COLA to the NRC. Therefore, the Staff withdrew the original Violation A and substituted a revised Violation A in its revised NOV (the April 2010 NOV). But the Staff also stated that DTE "must demonstrate compliance with Appendix B in order to receive a COL" from the NRC.[169] Thus, the Staff made clear that DTE's compliance with Appendix B requirements between March 2007 and February 2008, as well as later, remained relevant to the question whether the NRC may issue the COL.

DTE's reply also disputed Violations B and C in the October 2009 NOV. The Staff determined, however, that those violations remained valid. [170] In its April 2010 NOV, the Staff reformulated those two violations into one new violation (revised Violation B). The Staff's reply also stated that DTE's response to Violations B and C was responsive to the October 2009 NOV, and DTE was not required to respond further concerning those violations or revised Violation B.[171]

---

[166] Id.
[167] Id.
[168] Id. at 500-01 (citing Letter from Richard Rasmussen, Chief Quality and Vendor Branch B, Division of Construction Inspection & Operational Programs, Office of New Reactors, to Jack Davis, Chief Nuclear Officer, Detroit Edison Company and Revised Notice of Violation to Detroit Edison Company (Apr. 27, 2010) (ADAMS Accession No. ML100330687) [hereinafter NRC Response to DTE NOV Reply]).
[169] NRC Response to DTE NOV Reply at 1.
[170] Id. at 2.
[171] Id.

In May 2010, DTE responded to the revised Violation A, admitting the violation and outlining the corrective steps that DTE had taken to address it.[172] The Staff now considers resolved all the violations identified in the October 2009 and April 2010 NOVs.[173]

In March 2010, the Staff issued a Request for Additional Information No. 26 (RAI 26) concerning DTE's QA activities prior to submittal of the application in September 2008. It stated in part, "[s]ufficient detail has not been provided in the Fermi 3 FSAR to enable the Staff to reach a final conclusion on whether all Fermi 3 project safety-related activities completed prior to the COL application date were consistent with the requirements of Appendix B to 10 CFR Part 50."[174] DTE responded in May 2010 to RAI 26, describing how, in its view, all Fermi 3 safety-related activities completed or in process prior to September 18, 2008, were consistent with the requirements of Appendix B, and identifying all safety related activities performed prior to that date that were related to the Application.[175]

On April 17, 2012, DTE moved for summary disposition of Contention 15 and subparts 15A and 15B.[176] On May 7, 2012, the Staff filed an answer supporting DTE's motion.[177] On May 17, the Intervenors filed a response opposing summary disposition.[178] On May 24, DTE filed a

---

[172] NRC Staff Answer to Applicant's Motion for Summary Disposition of Contention 15 (May 7, 2012) at 8 [hereinafter Staff Answer to C-15 Motion].
[173] Id. at 8-9.
[174] Letter from Jerry Hale, U.S. NRC, to Jack M. Davis, Chief Nuclear Officer. DTE (Mar. 18, 2010) (ADAMS Accession No. ML100770169).
[175] C-15 Motion at 11.
[176] See C-15 Motion.
[177] See Staff Answer to C-15 Motion.
[178] See Intervenors' Response in Opposition to Applicant's Motion for Summary Disposition of Contention 15 (May 17, 2012) [hereinafter Intervenors' Answer to C-15 Motion]. Concurrently, the Intervenors filed a motion to allow them to supplement their response in opposition to DTE's summary disposition motion by July 31, 2012. See Intervenors' Motion to Supplement Response in Opposition to Applicant's Motion for Summary Disposition of Contention 15 (May 17, 2012). Both DTE and the Staff opposed the Intervenors' motion to supplement. See Applicant's Response to Motion to Supplement Response in Opposition to Summary Disposition on Contention 15 (May 29, 2012); Staff Answer to Intervenors' Motion to Supplement Response in Opposition to Applicant's Motion for Summary Disposition of Contention 15 (May 24, 2012). On June 21, 2012, we denied the motion. See Licensing Board Order (Denying Intervenors' Motion to Supplement) (June 21, 2012) (unpublished).

motion for leave to file a reply to the Intervenors response.[179]

B. The Parties' Positions

DTE characterizes Contention 15 as raising two issues: "(1) The first issue concerns the reliability of safety-related information in the FSAR"; and (2) "the second issue relates to the Intervenors' assertion that there is a history of QA violations associated with the Fermi 3 project, and therefore a lack of commitment to compliance with Appendix B requirements."[180] The first issue is the subject of Contention 15A, the second the subject of Contention 15B.

DTE maintains that, both before and after the COLA was submitted to the NRC, "work related to the Fermi 3 application has been subject to 10 C.F.R. Part 50, Appendix B, QA programs."[181] DTE states that it "delegated to its COL Application contractor [B&V] the responsibility for establishment and execution of a QA program related to the project." [182] DTE explains that such delegation is allowed by 10 CFR Part 50, Appendix B, Criterion I, which provides that

> [t]he applicant shall be responsible for the establishment and execution of the quality assurance program. The applicant may delegate to others, such as contractors, agents, or consultants, the work of establishing and executing the quality assurance program, or any part thereof, but shall retain responsibility for the quality assurance program .

DTE argues that it complied with its obligation to retain responsibility for the QA program. DTE further argues that the information developed during this time period is of "high quality," that it may be and has been relied on by the NRC during its review of the FSAR, and that therefore DTE is entitled to summary disposition of Contention 15A.[183]

---

[179] See Applicant's Motion for Leave to File a Reply on Contention 15 (May 24, 2012). The Motion for Leave is unopposed, and we therefore allow the filing of the Reply. The Reply argues that an issue raised by Intervenors in their Answer to the C-15 Motion is outside the scope of the admitted contention. We find, however, that Intervenors' argument is within the scope of Contention 15. See infra note 198.

[180] C-15 Motion at 12-13.

[181] Id. at 14.

[182] Id. at 15.

[183] Id. at 42.

DTE also argues that it is entitled to summary disposition of Contention 15B. DTE states that it had in place as of February 2008 its own QA program.[184] It further argues that it has demonstrated its commitment to QA since the start of the project in various ways, and that "there is ample basis for the Licensing Board to make its predictive finding that there is reasonable assurance that the Fermi 3 QA program has been, can be, and will be implemented."[185]

The Staff argues that, because it now considers resolved all the violations identified in the October 2009 and April 2010 NOVs, all issues related to Contentions 15A and 15B have been resolved and DTE is entitled to summary disposition.[186]

Intervenors disagree. They acknowledge that a license applicant "may delegate to others, such as contractors, agents, or consultants, the work of establishing and executing the quality assurance program, or any part thereof," but they stress that DTE must "retain responsibility for the quality assurance program." 10 C.F.R. Part 50, App. B.[187] According to Intervenors, the evidence shows that DTE failed to comply with this requirement by effectively relying on B&V, the QA contractor, to oversee its own work.[188] Intervenors contend that the lack of independent oversight of B&V, as well as the defects in the QA program identified by their expert, Arnold Gunderson, are material factual issues that remain in dispute, and the existence of these disputed issues renders summary disposition unwarranted. [189]

2. Board Ruling

We agree with Intervenors that Contention 15 is not appropriate for summary disposition because issues of material fact remain in dispute. In our view, the adequacy of the QA program both before and after submission by DTE of the COLA is a disputed issue of material fact that must be resolved through the evidentiary hearing process.

---

[184] Id. at 26.
[185] Id. at 46.
[186] See Staff Answer to C-15 Motion.
[187] Intervenors' Answer to C-15 Motion at 3.
[188] Id. at 5-8.
[189] Id. at 14-16.

An adequate QA program is basic to ensuring that a nuclear power plant is designed and built to the exacting standards needed to provide adequate assurance of safety. The QA program used to develop design and site characteristics must therefore be robust enough to ensure all data and design information is reliable and accurate. The Commission has explained that an adequate QA "program must provide for control over activities affecting quality of 'structures, systems, and components, to an extent consistent with their importance to safety.' The program must also include provisions requiring that the applicant regularly review its status and adequacy. The regulations further mandate that the program establish measures to assure that conditions 'adverse to quality' are promptly identified and corrected."[190] Contention 15 maintains, in substance, that the QA program was insufficient to enable the Applicant to perform those functions.

Intervenors point out that there appear to be conflicting interests between B&V acting as the QA contractor, design contractor, pre-application activity contractor, and Owner's Engineer.[191] DTE states that, in addition to contracting with B&V to develop the Fermi 3 application, it "secured the services of an Owner's Engineer . . . to support owner-related activities such as . . . COL Application contractor oversight."[192] According to DTE, the evidence "demonstrates that, during site investigation and COL Application development activities, there was a substantial degree of oversight—under the B&V QA program and by the Detroit Edison [Owner's Engineer]."[193] Intervenors note that, in at least four other places in its C-15 Motion, DTE refers to its Owner's Engineer providing oversight of B&V QA activities.[194] But Intervenors, relying on various passages in the Final Safety Analysis Report, note that the Owner's Engineer providing oversight

---

[190] Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant), 21 NRC 490, 492-3 (1985) (internal citation omitted).
[191] Intervenors' Answer to C-15 Motion at 8.
[192] C-15 Motion at 17.
[193] Id. at 25.
[194] Intervenors' Answer to C-15 Motion at 6 n.3.

of B&V QA activities was in fact B&V itself.[195] Intervenors argue that their "evidence suggests that some of the 2007-2010 quality assurance activities involving the proposed Fermi 3 were compromised by conflicts of interest wherein Black & Veatch personnel, acting as the 'Owner's Engineer,' were overseeing fellow Black & Veatch personnel who were serving as general contractor and quality assurance guarantors for DTE."[196] Intervenors contend that such an arrangement fails to satisfy the requirement that DTE "retain responsibility for the quality assurance program."[197] As admitted by the Board, the contention includes a dispute over proper oversight of the contractor by DTE,[198] something that Intervenors still dispute in their response to the C-15 Motion. Based on the record before us, that dispute has not yet been resolved. Therefore, Intervenors have identified a material issue relevant to Contention 15 that remains in dispute.

Also, Intervenors' expert, Mr. Gunderson, disputes the adequacy of DTE's QA program. In June of 2010, Mr. Gunderson reviewed information submitted by DTE in response to RAI 26 and identified various issues that, in his view, constitute significant problems with the QA program.[199] Although originally submitted at an earlier stage of this adjudication, Mr. Gunderson's Second Declaration was discussed at length in DTE's C-15 Motion,[200] as well as by Intervenors in their Response.[201] It is therefore properly before the Board. Mr. Gunderson contends that "[i]t is critical in nuclear QA that there be complete separation and independence between QA and other line functions," and that for a 13-month period this was lacking in DTE's QA

---

[195] Id. at 6-7.
[196] Id. at 15-16.
[197] Id. at 8.
[198] LBP-10-9, 71 NRC at 514-518. We therefore reject DTE's argument, in its Reply on Contention 15, that the alleged conflict of interest resulting from B&V's role as Owner's Engineer is outside the scope of the admitted contention.
[199] Second Declaration of Arnold Gunderson Supporting Supplemental Petition of Intervenors Contention 15: DTE COLA Lacks Statutorily Required Cohesive QA Program (June 8, 2010) [hereinafter Second Gunderson Declaration].
[200] C-15 Motion at 47-53.
[201] Intervenors' Answer to C-15 Motion at 8-13.

program because the QA department reported directly to the Director of Nuclear Development.[202] For these and other reasons, Mr. Gunderson concludes that "[t]he RAI response, when compared to DTE Fermi Unit 3's COLA, shows that the QA function on the Fermi 3 project was and continues to be wholly inadequate."[203]

DTE spends 6 pages of its 54 page C-15 Motion disputing Mr. Gunderson's analysis.[204] Intevenors respond to DTE's attacks, maintaining that Mr. Gunderson's criticisms of DTE's QA program remain valid.[205] This is not the appropriate place for the Board to resolve these disagreements. "[W]hen presented with conflicting expert opinions, licensing boards should be mindful that summary disposition is rarely proper."[206] "[A] licensing board (or presiding officer) should not . . . conduct a 'trial on affidavits.'"[207] "Regardless of the level of the dispute, at the summary disposition stage, it is not proper for a Board" to choose which expert has the better of the argument.[208] "If 'reasonable minds could differ as to the import of the evidence,' summary disposition is not appropriate."[209] Here we have a conflict of expert opinion on a material issue, the adequancy of DTE's QA program, which is sufficient to defeat summary disposition.

Our conclusion that summary judgment must be denied is not altered by the Staff's view that the issues identified in the October 2009 and April 2010 NOVs have been resolved. The Staff has concluded that QA deficiencies cited the NOVs do not affect the quality of safety-related design information in the FSAR and the confidence the NRC can reasonably have in DTE's

---

[202] Id. at 8.
[203] Id. at 12.
[204] C-15 Motion at 47-53.
[205] Intervenors' Answer to C-15 Motion at 8-13.
[206] Nuclear Innovation North America LLC (South Texas Project, Units 3 and 4), 73 NRC 254, 263 (2011) (citing Phillips v. Cohen, 400 F.3d 388, 399 (6th Cir. 2005)). See also Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-06-5, 63 NRC 116, 122 (2006).
[207] Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 297 (2010) (citing Anderson v. Liberty Lobby, 477 U.S. 242, 255 (1986)).
[208] Vermont Yankee, LBP-06-5, 63 NRC at 122 (citing Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-39, 54 NRC 497, 510 (2001)).
[209] Pilgrim, CLI-10-11, 71 NRC at 297-98 (citing Anderson, 477 U.S. at 250-51).

commitment to implementing QA requirements.[210] But the Staff's views do not preclude Intervenors from attempting to persuade the Board that it should reach different conclusions concerning those issues. We addressed a similar question in our ruling admitting Contention 15, explaining that the Staff's April 2010 decision to grant DTE's appeal of the original Violation A did not alter our decision that the Contention should be admitted.[211] We noted that the Staff's decision appeared to be based on its interpretation of its legal authority, but that in any event the Board is not bound by NRC Staff's position or by changes in that position.[212] In the present context as well, we are not required to accept the Staff's views of disputed issues. For example, although the Staff reviewed DTE's response to RAI 26 and concluded that the deficiencies cited in the October 2009 NOV do not affect the quality of safety-related information in the FSAR,[213] Mr. Gunderson reached quite different conclusions upon his review of the same RAI response. "[T]he Staff is but one of the parties to this licensing proceeding, and . . . the positions which it may take are in no way binding upon us."[214]

DTE complains that Intervenors have not identified any specific information in the COLA that is allegedly flawed due to deficient QA.[215] Again, we responded to a similar argument in our ruling admitting Contention 15. We acknowledged that Intervenors, in petitioning for admission of Contention 15, alleged only that the FSAR's accuracy is "brought into question" by the alleged QA violations, not that it actually provides false information.[216] But we explained that to argue that Intervenors must show specific information in the FSAR to be false misapprehends the effect of QA violations. "The effect of a pattern of QA violations is not necessarily to show that particular safety-related information is false, but, as the Appeal Board stated in the Diablo Canyon licensing

---

[210] Staff Answer to C-15 Motion at 9, 14.
[211] LBP-10-9, 71 NRC at 522 n.133.
[212] Id.
[213] Staff Answer to C-15 Motion at 9.
[214] Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-268, 1 NRC 383, 399 (1975).
[215] C-15 Motion at 41.
[216] LBP-10-9, 71 NRC at 519.

proceeding, to erode the confidence the NRC can reasonably have in, and create substantial uncertainty about the quality of, the work that is tainted by the alleged QA violations."[217] Once the petitioners in the Diablo Canyon proceeding established that the plant's design was infected by a pattern of QA violations, the burden shifted to the applicant to reestablish confidence in the adequacy of the design.[218] Similarly, in this case, Intervenors need show only that safety-related design information in the FSAR is infected by a pattern of QA violations. The burden then shifts to DTE to reestablish confidence in the safety-related aspects of the design.

Our task at this point is not to conduct a comprehensive review of the evidence to decide which side is likely to prevail on that or any other issue. Rather, at this point we need only determine whether a genuine factual dispute remains concerning a material issue. As the Commission has explained, when considering a motion for summary disposition, the function of the Board is not "'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for [hearing].'"[219] Summary disposition "is not a tool for trying to convince a Licensing Board to decide, on written submissions, genuine issues of material fact that warrant resolution at a hearing."[220] Intervenors have identified specific material issues that remain in dispute. We therefore deny DTE's Motion for Summary Disposition of Contention 15.

IV. Motion to Admit Contention 25

A. Background

On July 2, 2012, Intervenors filed the motion now before the Board to admit proposed Contention 25. It states:

> 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

---

[217] Id. (citing Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-763, 19 NRC 571, 576 (1984)).
[218] Id. at 521.
[219] Pilgrim Nuclear Power Station, CLI-10-11, 71 NRC at 297 (internal citation omitted).
[220] Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-39, 54 NRC 497, 509 (2001) (emphasis omitted).

> 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.[221]

1. Historic Preservation and NEPA

Section 106 of the National Historic Preservation Act of 1966 (NHPA) requires that federal agencies, before licensing any federally-assisted undertaking, "take into account the effect of the undertaking" on any site that is included or eligible for inclusion in the National Register of Historic Places.[222] The agency must also allow the federal Advisory Council on Historic Preservation (ACHP) "a reasonable opportunity to comment with regard to such undertaking."[223]

The ACHP has promulgated regulations delineating the procedures for an agency to follow in complying with section 106, which generally involve (1) identifying the impacts of the project, or lack thereof, on historic properties; (2) communicating these to the "consulting parties," including the ACHP and the relevant State historic preservation officer (SHPO); and (3) considering measures to mitigate any impacts.[224] The regulations also encourage that the NHPA section 106 process be coordinated with the agency's process for complying with NEPA.[225] The agency "shall plan for involving the public in the section 106 process,"[226] but "may use the agency's procedures for public involvement under [NEPA] . . . if they provide adequate opportunities for public involvement."[227]

2. Fermi Unit 1

Fermi Unit 1, completed in 1963, was the first (and to date the only) commercial fast breeder reactor constructed and operated in the United States. It is also notable for an accident

---

[221] Motion to Admit at 1-2.
[222] NHPA § 106, 16 U.S.C. § 470f (2006). There is no dispute that a combined license for a nuclear reactor is an "undertaking" under the NHPA.
[223] Id.
[224] See 36 C.F.R. §§ 800.3-800.6.
[225] See id. § 800.8.
[226] Id. § 800.3(e).
[227] Id. § 800.2(d)(3).

in 1966 that shut down the reactor for three years.[228] Unit 1 was taken off line permanently in 1972. The Staff and the Michigan SHPO have deemed Unit I eligible for inclusion in the National Registry of Historic Places.[229]

Unit 1 sits on the proposed site of Unit 3. As a result, if Applicant's COL is approved and construction goes forward, Unit 1 must be demolished. In light of this fact, the Staff reached the obvious conclusion in the DEIS that demolition would "adversely affect" Unit 1 as an historic or cultural resource.[230] In the DEIS, the Staff stated that it was "consulting with the Michigan SHPO and [Applicant] in developing a MOA [Memorandum of Agreement] to resolve the adverse effects" on Unit 1.[231] Among the steps in that consultation were: a notice in the Federal Register that the Staff would coordinate its NHPA compliance with its NEPA review;[232] a draft MOA;[233] conference calls with participants; the final MOA sent for signatures to the SHPO,[234] and acceptance by the SHPO.

The MOA specifies that the Applicant will prepare documentation as a permanent record of the existence of Fermi I, in accordance with documentation guidelines of the Michigan SHPO.[235] Two copies of this "recordation" package will be sent to the Michigan SHPO and the

---

[228] See Fermi, Unit 1, U.S. NRC, http://www.nrc.gov/info-finder/decommissioning/power-reactor/enrico-fermi-atomic-power-plant-unit-1.html (last visited October 17, 2012).
[229] See DEIS at 2-204, 7-32; Letter from Brian D. Conway, Michigan SHPO, to Bruce Olson, U.S. NRC (May 9, 2011) (ADAMS Accession No. ML11159071).
[230] DEIS at 4-97.
[231] Id.
[232] 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, 75,143 (Dec. 10, 2008).
[233] Draft Memorandum of Agreement Between the U.S. [NRC] and the Michigan [SHPO] Regarding the Demolition of the Enrico Fermi Atomic Power Plant, Unit 1 Facility Located in Monroe County, Michigan (Aug. 22, 2011) (ADAMS Accession No. ML112070039) [hereinafter Draft MOA].
[234] Memorandum of Agreement Between the U.S. [NRC] and the Michigan [SHPO] Regarding the Demolition of the Enrico Fermi Atomic Power Plant, Unit 1 Facility Located in Monroe County, Michigan (Mar. 8, 2012) (ADAMS Accession No. ML12089A007) [hereinafter MOA].
[235] See MOA at 1 & Appendix A.

Monroe County Library and Reference Center.[236] In addition, the Applicant is to "develop and establish a permanent public exhibit regarding the history of the Fermi 1 plant," with the location and design to be determined.[237]

B. Parties' Positions

Intervenors assert that the recordation materials settled on by the Staff are insufficient to memorialize the true significance of Unit 1, including its alleged legacy as a potential source of fuel for nuclear weapons.[238] Intervenors also suggest that the recordation materials minimize the importance of the 1966 accident. In the Motion to Admit, Intervenors point to additional materials, including books, reports, and congressional testimony, that they believe should be included in the recordation package.[239]

Intervenors also argue that the NRC failed to comply with the procedural requirements of the NHPA regulations that the agency seek input from the public.[240] Intervenors claim that no formal notice for public participation was issued during the completion of the MOA, nor was there 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."[241] Intervenors contend 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

---

[236] Id. Although the final MOA does not specify the contents of the recordation package, the draft MOA referenced two documents that Applicant had provided the SHPO: a 2009 evaluation of Unit 1's suitability for listing in the National Register and the book Fermi-1: New Age for Nuclear Power. See Draft MOA at 1.

[237] Id. at 2.

[238] See Motion to Admit at 3-4, 6.

[239] See id. at 3-8, 11. In particular, Intervenors reference the books We Almost Lost Detroit and The Careless Atom. Id.

[240] See 36 C.F.R. § 800.2(d)(2) ("The agency official must, except where appropriate to protect confidentiality concerns of affected parties, provide the public with information about an undertaking and its effects on historic properties and seek public comment and input."); 36 C.F.R. § 800.3(e) ("[i]n consultation with the SHPO/THPO, the agency official shall plan for involving the public in the section 106 process. The agency official shall identify the appropriate points for seeking public input and for notifying the public of proposed actions, consistent with § 800.2(d)").

[241] Motion to Admit at 12.

anticipated by the NHPA § 106 regulations."[242]

On July 27, the Staff and Applicant filed answers opposing admission of the contention.[243] They argue that the contention is untimely and that it fails to satisfy the admissibility criteria. Intervenors filed their reply on August 3.[244]

C. Board Ruling

On September 4, 2012, amendments to the NRC's rules of practice for adjudications took effect.[245] Because Intervenors' submitted the contention before the new regulations took effect, we analyze the admissibility of the contention under the rules that were in place at the time of filing.[246]

1. Timeliness

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

> (i) The information upon which the amended or new contention is based was not previously available;
>
> (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.

The regulations do not define "timely fashion." In our scheduling order, we established that "a proposed new or amended contention shall be deemed timely under 10 C.F.R. § 2.309(f)(2)(iii) if

---

[242] Id. at 9.
[243] Staff Answer to the Intervenors' Motion for Admission of Contention 25 (July 27, 2012) [hereinafter Staff C-25 Answer]; Applicant's Answer to Proposed Contention 25 (July 27, 2012) [hereinafter Applicant C-25 Answer].
[244] See Intervenors' Reply in Support of Motion for Admission of Contention No. 25 (Challenging § 106 NHPA Mitigation for Demolition of Fermi Unit 1) (Aug. 3, 2012) [hereinafter C-25 Reply].
[245] See Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46,562, 46,562 (Aug. 3, 2012).
[246] See id. ("[I]n ongoing adjudicatory proceedings, if there is a dispute over an adjudicatory obligation or situation arising prior to the effective date of the new rule, the former rule provisions would be used.")

it is filed within thirty (30) days of the date when the new and material information on which it is based first becomes available."[247] If a new contention is deemed untimely under Section 2.309(f)(2)(iii), it will be evaluated under the former 10 C.F.R. § 2.309(c)(1), which provides that a Board presented with a nontimely contention shall balance eight factors to determine whether to admit the contention.

Intervenors assert that Contention 25 is based on new information that did not become available through the NRC's public document system (ADAMS) until June 1, 2012 or later. This information consists of (1) the March 2012 MOA describing the mitigation plan and recordation package, and (2) a letter dated May 7, 2012 from the Michigan SHPO to the NRC confirming acceptance of the recordation materials.[248] Intervenors contend that the May 7 letter constituted an "administrative determination" that concluded the NHPA consultation.[249]

In response, the Applicant and the Staff argue that the May 7 letter is not different from information previously available.[250] Although this letter from the SHPO confirmed acceptance of the final MOA, information about the recordation materials was publicly available earlier. The Applicant characterizes the letter as "a ministerial act that reflects full implementation (i.e., completion) of mitigation measures agreed to previously."[251] Additionally, the March MOA was available in draft form months earlier, in August 2011. The Applicant and the Staff point out that the Intervenors had prior opportunities to participate in the consultation or bring their contention. For this reason, they argue, Intervenors also lack good cause for filing their contention late.[252]

The Commission considered the timing of an historical preservation contention in the

---

[247] Licensing Board Order (Establishing Schedule and Procedures to Govern Further Proceedings) (Sept. 11, 2009) at 2 (unpublished).
[248] Letter from Martha MacFarlane Faes, Cultural Resource Protection Manager, Michigan SHPO, to Bruce Olson, U.S. NRC (May 7, 2012) (ADAMS Accession No. ML12144A321).
[249] Motion to Admit at 14.
[250] See Applicant C-25 Answer at 5-7; Staff C-25 Answer at 21.
[251] Applicant C-25 Answer at 5.
[252] Id. at 8; Staff C-25 Answer at 23 n.17.

Crow Butte license renewal proceeding.[253] There, the petitioning Indian tribe raised a contention against the Applicant's environmental report, alleging that the Staff had not fulfilled its NHPA consultation duty regarding cultural resources and tribal artifacts that may be found at the site. In response, the Staff argued not that the contention was untimely, but that it was not yet ripe, and "will not ripen until the Staff completes its NEPA review."[254] The Commission agreed. The Commission stated that "the Tribe must defer its contention until the NEPA review is complete."[255]

Thus, the question in this case is not simply when sufficient information was available to enable Intervenors to formulate Contention 25. The Board must consider not only that issue, but also when the Staff's NEPA review of the Fermi Unit 1 preservation issue was (or will be) complete.[256] Until then, Contention 25 is premature, and therefore it could not plausibly be deemed late.

In Crow Butte, the Commission suggested that the publication of the DEIS could be the trigger for a timely NHPA contention.[257] But, in this case, the Staff's NEPA review of the Fermi Unit 1 historic preservation issue was not complete when the DEIS was issued, because the Staff was then still consulting with the Michigan SHPO and DTE to develop a MOA to resolve the adverse effects on Unit 1.[258] Thus, a plan for mitigating the adverse effect on Unit 1 was still being developed. The MOA was signed several months later, in March of 2012, but for two reasons it is not clear that such action constituted the completion of the Staff's NEPA review. First, the MOA requires further action, including DTE's submission of the recordation package to the SHPO; and development of a Fermi Unit 1 exhibit in consultation with the Michigan SHPO,

---

[253] See Crow Butte Res., Inc. (In-Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 348-51 (2009).
[254] Id. at 349.
[255] Id. at 351.
[256] Although the Staff and Applicant argue that the information necessary to support Contention 25 was available more than thirty days before it was filed, neither addresses the question of when the Staff's review terminated or will terminate. Intervenors also fail to address the question.
[257] See CLI-09-9, 69 NRC at 351 n.105.
[258] DEIS at 4-97.

Monroe County Community College, and other interested persons. In addition, the Staff has not yet issued the FEIS, which would logically be understood as the completion of the NEPA review process that was still ongoing when the DEIS was issued. In the FEIS, the Staff must explain the impact of the proposed action on Fermi Unit 1 and the steps the agency has taken to mitigate the impact, which will presumably include an explanation of the MOA and the steps that have been and will be taken pursuant to that agreement.[259] Under this analysis, Contention 25 is premature, not late, because the Staff's review of the historic preservation issue will not be complete until the FEIS is issued.

Nevertheless, given that in Crow Butte the Commission did not attempt to precisely define the point at which the Staff's review terminates, we are reluctant to base our ruling on a finding that Contention 25 is premature. We are equally reluctant to find the contention late, given the uncertainty about the prematurity issue. We will therefore base our decision on the admissibility criteria, an issue that we find easier to resolve.

2. Admissibility

A contention must meet the six admissibility requirements of 10 C.F.R. § 2.309(f)(1). Intervenors challenge both the Staff's procedural compliance with section 106 of the NHPA, and the substance of the mitigation plan developed by the NRC, the Michigan SHPO, and the Applicant.

To the extent that the Intervenors' proposed contention is based on asserted deficiencies in the Staff's process for soliciting public participation pursuant to the NHPA, we conclude that the Intervenors' proposed contention fails to demonstrate a genuine dispute on a material issue of

[259] 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 (1989), and must provide "a reasonably complete discussion of possible mitigation measures." Id. at 352.

fact or law.[260] Applicant argues that Intervenors are disregarding the ACHP regulations that authorize agencies to comply with the NHPA through the NEPA process.[261] Similarly, the Staff maintains that it fulfilled its NHPA responsibilities by following the process outlined in 36 C.F.R. § 800.8(c).[262] The Staff asserts that "through the combined issuance of Federal Register notices, public meeting, comment solicitations, and the DEIS, [the Staff] has continued to comply with Section 106 of NHPA."[263]

The Staff stated in a December 10, 2008 Federal Register notice that it would address its NHPA responsibilities through its NEPA process.[264] The DEIS, published in October 2011, described the Staff's section 106 consultation process and analyzed impacts from construction and operation of the proposed site for Fermi Unit 3, including the historic and cultural resources of the site.[265] In addition, as part of the Staff's historical and cultural analysis in the DEIS, the Staff

---

[260] 10 C.F.R. § 2.309(f)(1)(vi). Intervenors also appear to challenge Detroit Edison's compliance with the NHPA. They contend, for instance, that "[b]ecause of the federal nature of a COL, DTE was required to follow the NHPA." Motion at 2-3. This argument also fails to demonstrate a genuine dispute of material fact because the burden of fulfilling NHPA's consultation requirements rests exclusively with the NRC, not with the Applicant. See Crow Butte Res., Inc. (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 566 (2009) ("Regardless of the applicant's efforts, the burden rests on the NRC to fulfill the consultation requirements.").

[261] Applicant C-25 Answer at 9.

[262] 36 C.F.R. § 800.8, "Coordination With the National Environmental Policy Act," contains a subsection entitled, "Use of the NEPA process for section 106 process." This subsection 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 section 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).

[263] Staff C-25 Answer at 11-12.

[264] 73 Fed. Reg. 75,142, 75,143 (Dec. 10, 2008) ("Pursuant to 36 CFR 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 CFR 800.3 through 800.6.").

[265] 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.

identified Fermi Unit 1 as a historic property.[266] The DEIS also acknowledged the potential impacts to historic and cultural resources associated with the demolition of Fermi Unit 1 prior to the construction of Unit 3.[267] The Staff 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)."[268]

The Staff conducted environmental scoping meetings related to the Detroit Edison Application on January 14, 2009 at the Monroe County Community College.[269] The participants in the afternoon and evening meetings included several of the Intervenors—members of the Sierra Club, Don't Waste Michigan, Beyond Nuclear, and the Intervenors' counsel, Terry Lodge.[270] In addition, Kevin Kamps, of Beyond Nuclear and Don't Waste Michigan, and Ed McArdle, of the Sierra Club, discussed Fermi 1 in the afternoon scoping meeting.[271] In the evening scoping meeting, Mr. Keegan, of Don't Waste Michigan, discussed Fermi 1.[272]

Moreover, as pointed out by the Applicant in its Answer, Mr. Keegan was present for one of the public hearings concerning the cultural and historical aspects of Fermi 1.[273] During a public teleconference held on August 29, 2011, the NRC discussed the draft MOA and a letter sent to the SHPO by the NRC about the section 106 review.[274] Mr. Keegan was present during

---

[266] DEIS at 2-203 to 2-204; 4-97.
[267] Id. at 4-97.
[268] Id.
[269] 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 (Mar. 3, 2009) at 1 (ADAMS Accession No. ML090291080).
[270] Id. at 22-25.
[271] See Corrected Transcript of Fermi 3 Afternoon Scoping Meeting (Jan. 14, 2009) at 33, 79-85, 109-112 (ADAMS Accession No. ML090440586).
[272] See Corrected Transcript of Fermi 3 Evening Scoping Meeting (Jan. 14, 2009) at 30, 94-100 (ADAMS Accession No. ML090440588).
[273] See Applicant C-25 Answer at 6.
[274] See Memorandum from Ryan Whited, Chief, Environmental Projects Branch 2, to Bruce A. Olson, Project Manager, Environmental Projects Branch 2 (Sept. 7, 2011) at 1 (ADAMS Accession No. ML112440055).

the call.[275] In addition, on December 15, 2011, Mr. Keegan provided comments regarding the historical accuracy of the proposed archives for Fermi 1 at a public meeting on the DEIS.[276] Mr. Keegan specifically referred to We Almost Lost Detroit during his comments in the evening session of the public meeting on the DEIS.[277] Mr. Keegan was also present during other teleconference calls discussing the historical preservation of Fermi 1; these conference calls were held on May 23, 2011,[278] June 6, 2011,[279] June 27, 2011,[280] and September 28, 2011.[281]

Because the Staff used the process and documentation required for the preparation of an EIS/ROD to comply with NHPA Section 106, as it is permitted to do, Intervenors must identify some requirement applicable to that process and documentation with which the Staff arguably failed to comply. They have failed to do so. A mere desire for even more public participation than required by the applicable requirements is not sufficient to demonstrate a genuine dispute of material fact. Intervenors have accordingly failed to demonstrate a genuine dispute regarding the adequacy of the process used by the Staff to comply with the NHPA.

Intervenors also assert 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 [one passage]."[282] Applicant responds that Fermi 1 is discussed in several sections

---

[275] See id. at 4.
[276] See Transcript of Afternoon Session of Public Meeting on DEIS for Fermi 3 Project (Jan. 13, 2012), at 50-55 (ADAMS Accession No. ML12009A120); see also Transcript of Evening Session of Public Meeting on DEIS for Fermi 3 Project, (Jan. 13, 2012), at 42-43, 88-93 (ADAMS Accession No. ML12009A121) [hereinafter Jan. 13, 2012 Evening Session Tr.].
[277] Jan. 13, 2012 Evening Session Tr. at 90.
[278] See Meeting Minutes of Conference Call for the Fermi 3 COL Environmental Review (May 23, 2011), at 1 (ADAMS Accession No. ML11179A177).
[279] See Meeting Minutes of Conference Call (June 6, 2011), at 1 (ADAMS Accession No. ML11179A179).
[280] See Meeting Minutes of Conference Call (June 27, 2011), at 1 (ADAMS Accession No. ML112231667).
[281] See Meeting Minutes of Conference Call, List of Attendees (Sept. 26, 2011) (ADAMS Accession No. ML112720110).
[282] See Motion to Admit at 9 (quoting DEIS at 7-31).

of the DEIS.[283] Applicant points to Sections 7.5 and 4.6.1 of the DEIS to support this argument.[284] We accordingly find no genuine dispute on this issue.

In addition, Intervenors argue that the recordation documents are inadequate because the recordation package "is likely to be biased in favor of commercial nuclear power and to omit significant historical details."[285] Applicant responds that recordation is not required by the NHPA and that Intervenors provide no authority for the premise that the recordation must reflect the entire public record of Fermi 1.[286] The Staff argues that Intervenors' Motion to Admit "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."[287] The Staff also contends that the NHPA merely requires consultation and to afford consulting parties a reasonable opportunity to comment; the NHPA does not dictate a substantive outcome nor does it require direct public participation in the approval of or finalization of the Fermi MOA.[288]

Intervenors' argument concerning the substance of the recordation package fails to present a genuine dispute. The NHPA and its implementing regulations require only that agencies consider the impacts of an undertaking on historic preservation and measures to mitigate those impacts in their decision-making. It does not require that the agency implement any mitigation measures, let alone that those measures meet a certain standard of protection for historic properties.[289] Intervenors are thus demanding that the Staff do something it has no legal obligation to do.

---

[283] See Applicant C-25 Answer at 10-11.
[284] See id. (citing DEIS at 4-97).
[285] Motion to Admit at 2.
[286] See Applicant C-25 Answer at 12.
[287] Staff C-25 Answer at 20.
[288] Id.
[289] See, e.g., Valley Comty. Pres. Comm'n v. Mineta, 373 F.3d 1078, 1085 (10th Cir. 2004) ("Section 106 is essentially a procedural statute and does not impose a substantive mandate"); Waterford Citizens' Ass'n v. Reilly, 970 F.2d 1287, 1290-91(4th Cir. 1992); Slockish v. U.S. Fed. Highway Admin., 682 F. Supp. 2d 1178, 1193 (D. Or. 2010) ("the NHPA and NEPA impose only procedural requirements on federal projects").

Because Intervenors have failed to proffer an admissible contention, the Motion to Admit is DENIED.

V. Conclusion

For the foregoing reasons, the Board grants summary disposition of Contention 6, denies summary disposition of Contentions 8 and 15, and denies the Motion to Admit proposed Contention 25. The Board also declines to admit those parts of previously submitted Contentions 20 and 21 that the Board did not previously reject.

IT IS SO ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD
/RA/

Ronald M. Spritzer, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Anthony J. Baratta
ADMINISTRATIVE JUDGE

/RA/

Dr. Randall Charbeneau
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 9, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Granting Motion for Summary Disposition of Contention 6; Denying Motions for Summary Disposition of Contentions 8 and 15; Denying Motion to Admit Contention 25; and Resolving Remaining Issues Regarding Contentions 20 and 21) (LBP-12-23)** have been served upon the following persons by Electronic Information Exchange.

Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Ronald M. Spritzer, Chair
Administrative Judge
E-mail: Ronald.Spritzer@nrc.gov

Anthony J. Baratta
Administrative Judge
E-mail: Anthony.Baratta@nrc.gov

Randall J. Charbeneau
Administrative Judge
E-mail: Randall.Charbeneau@nrc.gov

Kirsten Stoddard, Law Clerk
E-mail: kirsten.stoddard@nrc.gov

James Maltese, Law Clerk
E-mail: james.maltese@nrc.gov

Onika Williams, Law Clerk
Email: onika.williams@nrc.gov

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop O-16C1
Washington, DC 20555-0001
Hearing Docket
E-mail: hearingdocket@nrc.gov

Detroit Edison Company
One Energy Plaza, 688 WCB
Detroit, Michigan 48226
Bruce R. Matters, Assistant General Counsel
E-mail:
matersb@dteenergy.com

Docket No. 52-033-COL

MEMORANDUM AND ORDER (Granting Motion for Summary Disposition of Contention 6; Denying Motions for Summary Disposition of Contentions 8 and 15; Denying Motion to Admit Contention 25; and Resolving Remaining Issues Regarding Contentions 20 and 21) (LBP-12-23)

Winston & Strawn, LLP
1700 K Street, NW
Washington, DC 20006-3817
Counsel for the Applicant
David Repka, Esq.
Rachel Miras-Wilson, Esq
Tyson R. Smith, Esq.
Carlos L. Sisco, Senior Paralegal

E-mail:
drepka@winston.com
trsmith@winston.com
rwilson@winston.com
CSisco@winston.com

Pillsbury Winthrop Shaw Pittman, LLP
2300 N Street, NW
Washington, DC 20037-1122
Counsel for Progress Energy
Robert Haemer, Esq.
E-mail: robert.haemer@pillsburylaw.com

Beyond Nuclear, Citizens for Alternatives to Chemical Contamination, Citizens Environmental, Alliance of Southwestern Ontario, Don't Waste Michigan, Sierra Club et al.
316 N. Michigan Street, Suite 520
Toledo, OH 43604-5627
Terry J. Lodge, Esq.
Michael J. Keegan, Esq.
E-mail: tjlodge50@yahoo.com
E-mail: mkeeganj@comcast.net

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-15D21
Washington, DC 20555-0001
Marcia Carpentier, Esq.
Sara Kirkwood, Esq.
Robert M. Weisman, Esq.
Anthony Wilson, Esq.
Andrea Silvia, Esq.
Patrick Moulding, Esq.
Michael Spencer, Esq.
Myrisha Lewis, Esq.
Catherine Scott, Esq.
marcia.carpentier@nrc.gov
sara.kirkwood@nrc.gov
robert.weisman@nrc.gov
anthony.wilson@nrc.gov
andrea.silvia@nrc.gov
Patrick.Moulding@nrc.gov
michael.spencer@nrc.gov
myrisha.lewis@nrc.gov
catherine.scott@nrc.gov
OGC Mail Center : OGCMailCenter@nrc.gov

Beyond Nuclear
Reactor Oversight Project
6930 Carroll Avenue Suite 400
Takoma Park, MD 20912
Paul Gunter, Director
E-mail: paul@beyondnuclear.org

[Original signed by Clara Sola]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 9th day of November 2012