UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF ANSWER TO INTERVENORS' MOTION FOR RESUBMISSION OF CONTENTION 10, TO AMEND/RESUBMIT CONTENTION 13, AND FOR SUBMISSION OF NEW CONTENTIONS 17 THROUGH 24

INTRODUCTION

On October 28, 2011, the draft environmental impact statement for the Fermi 3 combined license application was published and made available to the public. On January 11, 2012, the Intervenors who were previously admitted in this proceeding resubmitted two contentions that they filed previously, and submitted eight new contentions. Except for issues previously admitted as environmental contentions earlier in this proceeding, none of these contentions meet the requirements of 10 C.F.R. § 2.309. Accordingly, they should be rejected.

PROCEDURAL BACKGROUND

On September 18, 2008, the Detroit Edison Company (Applicant) submitted an application (Application) for a combined license (COL) for one ESBWR advanced boiling water reactor, designated as Unit 3, to be located at the site of the operating Fermi Nuclear Power Plant, Unit 2, in Monroe County, Michigan. Letter from Jack M. Davis, DTE, to NRC, Detroit Edison Company Submittal of a Combined License Application for Fermi 3 (NRC Project No. 757) (Sept. 18, 2008), ADAMS Accession No. ML082730763. The *Federal Register* notice of docketing was published on December 2, 2008 (73 Fed. Reg. 73,350), and the *Federal Register*

notice of hearing was published on January 8, 2009 (74 Fed. Reg. 836). The ESBWR design is the subject of an NRC rulemaking under Docket No. 52-010. The Fermi 3 COL application includes an Environmental Report (ER), as required by 10 C.F.R. § 51.50(c).

On March 9, 2009, Beyond Nuclear, Citizens for Alternatives to Chemical Contamination, Citizens Environmental Alliance of Southwestern Ontario, Don't Waste Michigan, Sierra Club, Keith Gunter, Edward McArdle, Henry Newman, Derek Coronado, Sandra Bihn, Harold L. Stokes, Michael J. Keegan, Richard Coronado, George Steinman, Marilyn R. Timmer, Leonard Mandeville, Frank Mantei, Marcee Meyers, and Shirley Steinman (collectively, Intervenors) filed a Petition for Leave to Intervene in the COL proceeding, along with 14 contentions (Intervention Petition). On April 3, 2009, the NRC Staff filed its answer to the Intervention Petition (Staff Answer to Intervention Petition). Following oral argument, the Licensing Board ruled to admit the Intervenors as parties to this proceeding. *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-09-16, 70 NRC 227 (2009).

Three contentions filed under the National Environmental Policy Act (NEPA) were admitted at that time. Two of these, Contentions 6 and 8, are still pending before the Licensing Board. Contention 6, as admitted by the Board, concerns "the Applicant's water quality analysis in the ER regarding the potential for increasing algal blooms and the proliferation of a newly identified species of harmful algae in the western Lake Erie basin" as a result of chemical and thermal discharges related to the plant cooling system. *Id*. at 277. Contention 8, as admitted by the Board, is "a NEPA contention alleging that the ER fails to adequately assess the project's impacts on the eastern fox snake and to consider alternatives that would reduce or eliminate those impacts." *Id*. at 286. Contention 8 specifically excludes any argument requiring the NRC to "order the Applicant to adopt additional mitigation measures for the protection of the eastern fox snake." *Id.* The Board subsequently admitted a safety contention concerning quality assurance, Contention 15, which also remains pending. *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-10-09, 71 NRC 493, 522 (2010).

On September 17, 2010, the Applicant filed for summary disposition of Contention 6. On November 16, 2010, the Applicant filed for summary disposition of Contention 8. The Licensing Board denied summary disposition of both contentions. *Detroit Edison Co*. (Fermi Nuclear Power Plant, Unit 3), LBP-11-14, 73 NRC ___ (May 20, 2011).

In parallel with the litigation before the Licensing Board, the NRC Staff began the process of producing an environmental impact statement (EIS) for the Fermi 3 COL application. A notice of intent to prepare an EIS and conduct scoping was published in the *Federal Register* on December 10, 2008. 73 Fed. Reg. 75,142. Scoping meetings were held in Monroe, Michigan, on January 14, 2009. Letters inviting participation in the scoping process were also sent on December 24, 2008, to a variety of organizations, including Native American tribes, as required by 10 C.F.R. § 51.28.

The NRC Staff and the U.S. Army Corps of Engineers (USACE) published the draft environmental impact statement (DEIS) on October 28, 2010. Draft Environmental Impact Statement for Combined License (COL) for Enrico Fermi Unit 3, NUREG-2105 (October 2010). The USACE is participating with the NRC as a cooperating agency in the preparation of the DEIS. DEIS at 1-1. The *Federal Register* notice of availability for the DEIS provided a 75-day period for public comments, 76 Fed. Reg. 66,998. and approximately 60 comments on the document were received by the NRC prior to the due date of January 11, 2012. The NRC Staff is currently developing responses to these comments for inclusion in the final environmental impact statement, which is scheduled for publication in November 2012.[1]

On January 11, 2012, the Intervenors filed the current motion (Fermi DEIS Contention Filing) to resubmit Contention 10, originally submitted as part of the original 14 contentions in this proceeding and subsequently withdrawn; to amend and resubmit Contention 13, submitted as part of the original 14 contentions and rejected by the Licensing Board in *Fermi*, LBP-09-16,

[1] *See* http://www.nrc.gov/reactors/new-reactors/col/fermi/review-schedule.html.

70 NRC at 299-304; and to submit new contentions numbered 17 through 24.[2] The Intervenors also filed a Motion for Leave to Late-File Amended and New Contentions (Late Filing Motion) along with the contentions.

LEGAL STANDARDS

The admissibility of new, amended and/or nontimely contentions after the initial filing in an NRC proceeding is governed by 10 C.F.R. §§ 2.309(f)(2), 2.309(c)(1), and 2.309(f)(1). Contentions filed after the initial filing period may be admitted as timely in some circumstances under 10 C.F.R. § 2.309(f)(2), or as nontimely filings under 10 C.F.R. § 2.309(c)(1). In addition, all contentions must meet the general contention pleading standards in 10 C.F.R. § 2.309(f)(1).

10 C.F.R. § 2.309(f)(2) states that, for issues arising under NEPA, a "petitioner shall file contentions based on the applicant's environmental report," and "may amend those contentions or file new contention if there are data or conclusions in the NRC draft or final environmental impact statement . . . that differ significantly from the data or conclusions in the applicant's documents." 10 C.F.R. § 2.309(f)(2). Otherwise, new or amended contentions may be filed only with leave of the presiding officer if they meet the following requirements:

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

10 C.F.R. § 2.309(f)(2)(i)-(iii).

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[2] The NRC Staff notes that there has already been a Contention 17 in this proceeding, which concerned the nuclear accident at the Fukushima facility in Japan and which the Licensing Board dismissed as moot in an unpublished order dated November 23, 2011. *See* Licensing Board Memorandum and Order (Denying as Moot Intervenors' Motion to Admit Contention 17) (Nov. 23, 2011) (unpublished). The subject matter of the new Contention 17 proposed in the Fermi DEIS Contention Filing is completely different, but the NRC Staff will nonetheless follow the Intervenors' contention numbering scheme throughout this pleading.

In this proceeding, the Licensing Board has established time schedules for filing new contentions based on publication of the DEIS and based on any other new information that meets the standards set forth in 10 C.F.R. § 2.309(f)(2)(i)-(iii). *See* Licensing Board Order (Establishing schedule and procedures to govern further proceedings) (Sept. 11, 2009) (unpublished) (Scheduling Order). For contentions based on the DEIS, the Board established a deadline of 60 days after the DEIS first becomes available. *Id*. at 2. For most other types of new information, the Board established a deadline of 30 days for a contention based on that information to be deemed timely. *Id*. As noted in the Scheduling Order, contentions filed outside those periods are to be considered nontimely filings and evaluated under the provisions of 10 C.F.R. § 2.309(c)(1). *Id*.

Under the provisions of 10 C.F.R. § 2.309(c)(1), the admissibility of nontimely contentions is subject to an eight-factor balancing test that includes:

(i) Good cause, if any, for the failure to file on time;

(ii) The nature of the requestor's/petitioner's right . . . to be made a party to the proceeding;

(iii) The nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding;

(iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interests;

(v) The availability of other means whereby the requestor's/petitioner's interest will be protected;

(vi) The extent to which the requestor's/petitioner's interests will be represented by the existing parties;

(vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and

(viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

10 C.F.R. § 2.309(c)(1)(i)-(viii). Pursuant to 10 C.F.R. § 2.309(c)(2), each of the factors is required to be addressed in the requestor's nontimely filing. The first factor, whether good

cause exists for the failure to file on time, is the "most important" and entitled to the most weight. *Amergen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), CLI-09-07, 69 NRC 235, 261 (2009); *Private Fuel Storage, L.L.C*. (Independent Spent Fuel Storage Installation), CLI-04-4, 59 NRC 31, 44 (2004). Good cause may be found to exist when a given contention

> (1) is wholly dependent upon the content of a particular document; (2) could not therefore be advanced with any degree of specificity (if at all) in advance of the public availability of the document; and (3) is tendered with the requisite degree of promptness once the document comes into existence and is available for public examination.

Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 469 (1982), *cited with approval in* CLI-83-19, 17 NRC 1041, 1045-47 (1983). If no showing of good cause for the lateness is tendered, "petitioner's demonstration on the other factors must be particularly strong." *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 73 (1992) (quoting *Duke Power Co*. (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-431, 6 NRC 460, 462 (1977)).

Additionally, a new or amended contention must also meet the general contention admissibility requirements of 10 C.F.R. § 2.309(f)(1). *Id*. In accordance with 10 C.F.R. § 2.309(f)(1), an admissible contention must:

> (i) Provide a specific statement of the issue of law or fact to be raised or controverted . . . ;
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> (ii) Provide a brief explanation of the basis for the contention;
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> (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
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> (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
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> (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;

> (vi) . . . provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief. . . .

10 C.F.R. § 2.309(f)(1)(i)-(vi). The Commission has emphasized that the rules on contention admissibility are "strict by design." *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *petition for reconsideration denied*, CLI-02-01, 55 NRC 1 (2002). Failure to comply with any of these requirements is grounds for the dismissal of a contention. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

DISCUSSION

I. THE CONTENTIONS FILED IN RESPONSE TO THE DEIS ARE UNTIMELY UNDER 10 C.F.R. § 2.309(c), AND IN SOME CASES UNDER 10 C.F.R. § 2.309(f)(2).

In their Late Filing Motion, the Intervenors acknowledge that the Fermi DEIS Contention Filing was filed after the 60-day deadline the Licensing Board established in its Scheduling Order for new contentions based on the DEIS. Late Filing Motion at 1. The Intervenors attribute this fact to attorney error, and make no attempt to argue that the contentions are timely. *Id*. at 2. The Intervenors therefore acknowledge that the admissibility of the new contentions is governed by the nontimely filing rule in 10 C.F.R. § 2.309(c)(1) rather than the standard for timely new contentions in 10 C.F.R. § 2.309(f)(2) and the Board's Scheduling Order. *Id*. at 2-3. The Intervenors assert that the late filing will not result in substantial delay of the proceeding, as it involves having missed the deadline by only 15 days. *Id*. at 4.

Despite the Intervenors' assertion, many of the submitted contentions are not based on new data and conclusions the DEIS, as required by 10 C.F.R. § 2.309(f)(2), and are therefore

considerably more than 15 days late. In addition, the Intervenors have failed to demonstrate good cause for late filing, or to otherwise meet the balancing test in 10 C.F.R. § 2.309(c)(1). For these reasons, the contentions should be rejected on timeliness grounds.

A. Many of the submitted contentions are not based on new data and conclusions the DEIS, and are therefore much more than 15 days late.

Before considering the admissibility under 10 C.F.R. § 2.309(c) of contentions based on the DEIS but filed 15 days later than the deadline for such contentions, it is important to note that not all of the Intervenors' new and amended contentions are, in fact, based on the publication of the DEIS. 10 C.F.R. § 2.309(f)(2) states that "[o]n issues arising under [NEPA], the petitioner shall file contentions based on the applicant's environmental report" and may file timely new or amended contentions "if there are data or conclusions in the NRC draft or final environmental impact statement . . . that differ significantly from the data or conclusions in the applicant's documents." Therefore, if there are no data or conclusions on a given issue in the Fermi 3 DEIS that differ significantly from the data and conclusions in the Applicant's ER, the deadline established by the Board for new contentions based solely on the DEIS is not the relevant deadline for determining their timeliness. Any such contention may be substantially more that 15 days late at this stage of the proceeding, rather than the mere 15 days that the Intervenors allege. In addition, if a contention challenges information found in a document other than the DEIS, for example in the design certification document (DCD) for the ESBWR design, an entirely different set of deadlines and timeliness considerations may apply. This issue will be discussed in Sections II and III below to the extent that it applies to specific contentions.

B. The Intervenors have failed to demonstrate good cause for late filing, or to otherwise meet the balancing test in 10 C.F.R. § 2.309(c)(1).

As noted above, nontimely filings must address each of the eight factors found in 10 C.F.R. § 2.309(c)(2). The first factor, whether good cause exists for the failure to file on time, is to be granted the most weight. *Oyster Creek*, CLI-09-07, 69 NRC at 261; *Private Fuel Storage,*

CLI-04-4, 59 NRC at 44. When a petitioner does not show good cause for failure to file on time, the burden of justifying a late contention on the basis of the other seven factors is considerably higher. *See, e.g., Nuclear Fuel Services, Inc. and New York State Atomic and Space Development Authority*, (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975).

The Intervenors state that their filing was late due to attorney error, and acknowledge that this may not constitute good cause. Late Filing Motion at 3. They also mention their attorney's recent workload and the complexity of the issues involved. *Id*. at 3-4. Workload considerations certainly may be reasons for requesting an extension of a deadline before it passes; however, it is clear from the Intervenors' motion that missing the deadline outright was an error in this case. An error of this type is not the "good cause" contemplated by NRC regulations. For this reason, a particularly strong showing on the other seven factors is required in this situation. *See West Valley*, CLI-75-4, 1 NRC at 275.

The Intervenors argue that the other seven factors favor permitting their late filing. Late Filing Motion at 4-5. However, their argument is not the strong showing needed when the "good cause" requirement is not met. The NRC Staff agrees that that the Intervenors have a right to be made a party to this proceeding and have sufficient interests to demonstrate standing, and that they therefore satisfy 10 C.F.R. § 2.309(c)(1)(ii)-(iii). Nevertheless, their showing on the other factors is not compelling, particularly considering the types of contentions submitted.

10 C.F.R. § 2.309(c)(1)(iv)-(vi) and (viii), taken together, require petitioners to show that to show that their interests cannot be addressed by other means or represented by other parties, and to demonstrate that their participation in the adjudicatory proceeding will assist in developing a sound record. This showing is then balanced against the general public's interest, captured in 10 C.F.R. § 2.309(c)(1)(viii), in an efficient adjudicatory proceeding. The Intervenors are correct that a 15-day delay by itself is not enormous. However, the contentions do have significant potential to broaden the issues and cause delays in the adjudicatory process. Furthermore, as explained below, the majority either have been submitted in other portions of

the Fermi 3 licensing process, by the Intervenors or by other organizations, or should have been submitted at other times and/or in other manners. Consequently, admitting contentions which the Intervenors had ample opportunity to raise much earlier in the proceeding does not comport with the adjudicatory efficiency that the Commission's contention standards were designed to promote.

The Fermi DEIS Contention Filing includes issues that have already been filed in this proceeding and not admitted (Contentions 10, 13, portions of 19, 20, 21, and 23) issues that have been admitted as contentions and remain pending (portions of Contentions 19, 20, and 23), issues related to the design certification rulemaking for the ESBWR that Commission regulation and policy require to be addressed within that framework (portions of Contention 22), and challenges to NRC regulations that should be submitted as Petitions for Rulemaking under 10 C.F.R. § 2.802 (portions of Contentions 10 and 23). Finally, some of these contentions are nearly verbatim quotations from public comments on the DEIS that have been submitted by other organizations as public comments on the DEIS[3] and that the Intervenors have simply copied and submitted as contentions for litigation here (Contentions 19, 20, and 21). It is therefore unclear that the Intervenors' interests cannot be addressed by other means or represented by other parties, or that their participation in the adjudicatory proceeding will assist in developing a sound record. *See* 10 C.F.R. § 2.309(c)(1)(iv)-(vi) and (viii). For these reasons, the balancing test in 10 C.F.R. § 2.309(c)(1) does not favor permitting this nontimely filing in the absence of good cause.[4]

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[3] The NRC Staff will resolve public comments on the DEIS prior to publishing the FEIS, independent of whether the issues they raise meet the standards for admissible contentions under 10 C.F.R. § 2.309.

[4] Arguments related to 10 C.F.R. § 2.309(c) also appear in the discussions of several contentions that follow. In sections other than Section I of this pleading, 10 C.F.R. § 2.309(c) arguments refer not to the 15-day delay in filing discussed here, but to the question of whether the publication date of the DEIS is, in fact, the correct date to use in calculating the timeliness of specific claims. *See supra*, Section I.A.

II. AMENDED AND RESUBMITTED CONTENTIONS

A. Proposed Contention 10 (Resubmitted)

> The Walpole Island First Nation has learned of these proceedings and has petitioned the government of Canada for consultation and accommodation prefatory to joining these proceedings on the ground that tribal hunting and fishing rights, property rights and other concerns on the Great Lakes may be impaired by the construction and operation of Fermi 3.

Fermi DEIS Contention Filing at 5. Proposed Contention 10 is an amended version of a contention the Intervenors submitted with their Intervention Petition in 2009. Intervention Petition at 96-102. In the original version of Contention 10, the Intervenors asserted that the NRC Staff failed to make certain notifications to various Native American or First Nations tribes concerning the "environmental scoping public comment opportunity" for Fermi 3 or "their right to intervene against Fermi 3." *Id*. at 96. In the original version of Contention 10, the Intervenors made special mention of the Walpole Island First Nation (WIFN), located 50 miles from the Fermi 3 site, along with several other First Nations in Canada. *Id*. at 97. The Intervenors withdrew Contention 10 at oral argument, and the Licensing Board therefore did not rule on its admissibility. *See* Tr. at 142 (May 5, 2009); *Fermi*, LBP-09-16, 70 NRC at 293 n. 196.

The amended version of Contention 10 raises procedural claims similar to those raised in the original version of the contention and asserts that "these proceedings must be waylaid to allow the Walpoles an opportunity to intervene and participate." Fermi DEIS Contention Filing at 10. As support for reviving the contention at this time, the Intervenors submit a block quotation of a letter to the Minister of Environment Canada from the Chief of the WIFN, requesting information on consultation regarding "whatever position Canada takes concerning this project." *Id*. at 7. According to the Intervenors "[i]t is anticipated that such consultation will occur between the tribe and the federal government of Canada . . . and that the end result will be that the [WIFN] will petition this Board to intervene." *Id*. at 7.

Staff Response: Proposed Contention 10 (Resubmitted) is inadmissible for several reasons. First, it is untimely, because the same contention was submitted with the Intervention Petition

and because the Intervenors do not show that there is new information to support resubmitting the contention. Second, the contention is a challenge to NRC regulations and therefore barred from consideration in this proceeding by 10 C.F.R. § 2.335. Third, the Intervenors have failed to demonstrate that the NRC's notices were legally deficient, and their procedural claim therefore fails to meet the pleading standards of 10 C.F.R. § 2.309(f)(1) or to support any claim related to the extraordinary remedy of staying this proceeding. Finally, the contention is based on the Intervenors' claim to represent organizations that have neither submitted contentions in this proceeding nor indicated that the Intervenors represent their interests.

1. *Proposed Contention 10 is not timely.*

In addition to its untimeliness due to the Intervenors having filed it 15 days later than the deadline set by the Licensing Board, Proposed Contention 10 is also untimely because it raises issues that the Intervenors could have raised, and did raise, at the time of their initial Intervention Petition. *See* Intervention at 96-102. The notifications the Intervenors consider insufficient were letters inviting specific U.S. organizations to participate in the EIS scoping process that was noticed in the *Federal Register* on December 10, 2008. 73 Fed. Reg. 75,142. The scoping letters were sent on December 24, 2008, to a variety of organizations, including Native American tribes, as required by 10 C.F.R. § 51.28. Following the scoping process, the NRC Staff and the USACE prepared and published the DEIS. The Intervenors have not explained how the DEIS itself contains (or omits) any information that would justify amending and/or resubmitting a contention challenging notifications related to a scoping process that occurred several years previously and that the Intervenors have already challenged in this proceeding. For this reason, Proposed Contention 10 is untimely under 10 C.F.R. § 2.309(f)(2).

2. *Proposed Contention 10 impermissibly challenges NRC regulations*.

Rather than raising any specific challenge to the Applicant's ER or the Staff's DEIS, Proposed Contention 10 asserts that the NRC's formal notice process related to the Fermi 3 COL Application was legally deficient. The Intervenors assert that "the Commission is obligated

to notify the Walpoles and other First Nations in Canada just as it must notify tribes located partly or wholly within the United States when there are transboundary environmental impacts from a project." Fermi DEIS Contention Filing at 9. In making this assertion, the Intervenors ignore express language in 10 C.F.R. Part 51, which begins with the statement that NRC's NEPA regulations "do not apply to . . . any environmental effects which NRC's domestic licensing and related regulatory functions may have upon the environment of foreign nations." 10 C.F.R. § 51.1.

NRC procedural rules specifically bar consideration of any contention that challenges NRC regulations. *See* 10 C.F.R. § 2.335(a). A party may petition for waiver of a regulation in a specific proceeding, *see* 10 C.F.R. § 2.335(b), but the Intervenors have not attempted to do so here. To the extent Proposed Contention 10 asserts that the possibility of "transboundary environmental impacts" requires the Commission to provide formal notice to Canadian tribes, it raises an impermissible challenge to 10 C.F.R. § 51.1, and should therefore be dismissed under 10 C.F.R. § 2.335(a).

3. *The Intervenors' procedural claim fails to meet the pleading requirements of 10 C.F.R. § 2.309(f)(1) or to provide any legal justification for staying this proceeding.*

Given the Intervenors' misunderstanding of the scope of Part 51, a related defect in Proposed Contention 10 is that the Intervenors have failed to demonstrate that the NRC's notices related to this proceeding and the NEPA process were legally deficient, and have therefore failed to support any claim related to the extraordinary remedy of staying this proceeding. The Intervenors assert that the NRC must notify First Nations in Canada when there are transboundary environmental impacts from a project. Fermi DEIS Contention Filing at 9. However, the Intervenors cite no authority for this assertion, and cite only 10 C.F.R. § 51.28(a)(5) for the proposition that First Nations in Canada must receive invitations to participate in the EIS scoping process. *Id*. at 7. That regulation does direct the NRC Staff to invite affected Indian tribes to participate in the scoping process; however, like the rest of 10

C.F.R. Part 51, it is subject to the limitation of 10 C.F.R. § 51.1 discussed above with respect to environmental impacts on the environment of foreign nations. As the NRC Staff noted in its response to the original version of Proposed Contention 10, while 10 C.F.R. § 51.28(a) therefore does not require the NRC to issue specific invitations to participate in scoping to any person or entity in Canada, the Staff would accept NEPA comments from a First Nations tribe or any other organization or individual in Canada. Staff Answer to Intervention Petition at 82, n.69. To date, no comments related to scoping or the DEIS have been received from the WIFN. Because the Intervenors have failed to identify any legal deficiency in the NRC's notices related to the NEPA process, they have failed to identify a genuine dispute that is material to and within the scope of this proceeding, and have therefore failed to meet the requirements of 10 C.F.R. § 2.309(f)(1)(iii), (iv), and (vi).[5]

The Intervenors have also failed to meet the far more stringent standards for staying a proceeding. The Commission considers suspension of proceedings a "drastic action" that is not warranted in the absence of "immediate threats to public health and safety." *AmerGen Energy Company, LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 484 (2008) (*quoting Vermont Yankee Nuclear Power Corp. & AmerGen Vermont, LLC* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 173-174 (2000)). Absent some immediate threat to public health and safety, the Commission is reluctant to suspend proceedings in light of the "substantial public interest in efficient and expeditious administrative proceedings." *Duke Energy Corp.* (Oconee Nuclear Station Units 1, 2 & 3), CLI-99-11, 49 NRC 328, 339 (1999). Petitioners have not shown that moving forward with this adjudicatory proceeding will jeopardize public health and safety. Rather, they are arguing for allowing another organization an

[5] This contention raises only a procedural claim; nothing in either the original version of Contention 10, *see* Staff Answer to Intervention Petition at 82, or the amended version currently under consideration relates to any data or conclusions in either the Fermi 3 Application or the DEIS. Because the procedural claim in Proposed Contention 10 is inadmissible for the reasons stated above, and because there is no other substantive claim, the contention should be dismissed.

opportunity to file an intervention petition. *See* Fermi DEIS Contention Filing at 7. Suspending this proceeding is not necessary for the WIFN to file any such petition, should they choose to do so. NRC regulations already provide this opportunity, and the extraordinary action of staying the proceeding is therefore unwarranted.

4. *The WIFN has not petitioned to intervene on its own behalf or authorized the Intervenors to represent their interests.*

In submitting Proposed Contention 10, the Intervenors assert that their interest is "to ensure the participation of first nations people." Fermi DEIS Contention Filing at 5. The Intervenors state that "it is to be anticipated" that the WIFN "will petition this Board to intervene." *Id*. at 7. As of this writing, however, no intervention petition from the WIFN has been received. Furthermore, the letter submitted by the Intervenors in support of this contention mentions only WIFN's interest in consultation with the Canadian government and is silent regarding involvement in this NRC proceeding. *See id*. at 6-7. The Intervenors' speculation about the possibility that the WIFN will file an intervention petition and contentions on its own behalf in the future does not constitute a dispute with the COL application or the DEIS. This aspect of the contention thus fails to meet the requirements of 10 C.F.R. § 2.309(f)(1)(vi).

In any event, the Intervenors have failed to show that they are authorized to make such claim on behalf of the WIFN. As the Intervenors note, Canadian petitioners have already been granted standing in this proceeding. Fermi DEIS Contention Filing at 10; *see also Fermi*, LBP-09-16, 70 NRC at 241. The NRC Staff has not previously objected to the standing of Canadian petitioners, and would not anticipate doing so with respect to new Canadian intervenors who otherwise meet the legal requirements for standing in NRC proceedings. *See* Staff Answer to Intervention Petition at 15. At this time, however, there is nothing in the record of this proceeding to indicate that the admitted Canadian Intervenors, or any other organizations already found to have standing, are authorized to represent the WIFN. As the NRC Staff noted in its answer to the original Contention 10, organizations may not represent persons other than

their members in NRC proceedings without express authorization to do so. *See id*. at 81 n. 68, citing *Florida Power and Light Co*. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989); *Long Island Lighting Co*. (Shoreham Nuclear Power Plant, Unit 1), LBP-77-11, 5 NRC 481, 483-84 (1977). Without such express authorization, the Intervenors may not submit contentions on behalf of the WIFN or any other First Nations people who are not members of their organizations. For this reason, the amended version of Proposed Contention 10 should be denied.

B. Proposed Contention 13 (Amended and Resubmitted)

> The [DEIS] is inadequate to meet the requirement of NEPA or the Atomic Energy Act because it does not provide a reasonable cost/benefit basis for the NRC to decide to issue a combined operating license for the proposed Fermi 3 nuclear reactor. The DEIS analysis of Need for Power, Energy Alternatives, and Cost/Benefit analysis are flawed and based on inaccurate, irrelevant and/or outdated information.

Fermi DEIS Contention Filing at 10. Proposed Contention 13 is an amended version of an earlier Contention 13 that was submitted with the Intervention Petition and deemed inadmissible by the Licensing Board. *See* Intervention Petition at 109-22; *Fermi*, LBP-09-16, 70 NRC at 297-304. In the original version of Contention 13, the Intervenors raised four distinct issues: (1) the cost of a new nuclear facility, (2) the need for power analysis in the Applicant's ER, (3) the consideration of energy efficiency in the Applicant's ER, and (4) the consideration of renewable energy sources in the Applicant's ER. Intervention Petition at 111-22. In the amended version of Proposed Contention 13, the Intervenors revive the second, third, and fourth of these issues with respect to the NRC Staff's DEIS, and provide an affidavit and report (Ford Report) by Ned Ford, consultant to the Sierra Club, in support of their claims. Fermi DEIS Contention Filing at 10-22. The Intervenors also reference a comment submitted by the Environmental Law and Policy Center (ELPC) during the DEIS public comment period and incorporate it by reference

into their contention.[6]

In the amended version of Proposed Contention 13, the Intervenors make the following claims. First, they assert that the need for power analysis in the DEIS fails to meet NEPA requirements "because it relies entirely on the Michigan Public Service Commission (MPSC) 21st Century Plan (21st Century Plan), a 2006 energy planning report that was prepared before the recession" and therefore "fails to account for the dramatic reduction in electricity demand that followed." Fermi DEIS Contention Filing at 11. Second, the Intervenors claim that energy efficiency programs are capable of meeting new demand at a lower cost than construction of new generating capacity. *Id*. at 15-16. Finally, the Intervenors assert that a combination of wind energy, solar energy, compressed air storage, and ice storage thermal cooling provide a viable energy alternative that is "likely to cost less than the current cost of electric generation from existing fossil fuel plants or a new nuclear unit through the next fifteen years and beyond." *Id*. at 19.

Staff Response: Proposed Contention 13 (Amended) is inadmissible for the following reasons. First, the amended contention is untimely under 10 C.F.R. § 2.309(f)(2). Second, the Intervenors' critique of the DEIS need for power analysis merely repeats claims already made and rejected in this proceeding. Finally, the Intervenors' claims regarding energy efficiency and energy alternative fail to show the existence of a genuine dispute, as required by 10 C.F.R. § 2.309(f)(1)(vi), or to provide the support required by 10 C.F.R. § 2.309(f)(1)(v). Proposed Contention 13 should therefore be rejected.

[6] The Staff notes that the comment was not attached to the Intervenors' filing; however, it is listed in the Staff's hearing file submission dated February 1, 2012. *See* Comment of Allen Gleckner, David Gard and Allie Muchmore on Behalf of the Environmental Law and Policy Center and the Michigan Environmental Council on Draft Environmental Impact Statement for Combined License for Enrico Fermi Unit 3 (Jan. 11, 2012), ADAMS Accession No. ML12018A113 (ELPC Comment). As a public comment filed in the NRC's NEPA process rather than an adjudicatory filing, it is not accompanied by the affidavits of the authors.

1. *The amended version of the contention does not meet the requirements of 10 C.F.R. § 2.309(f)(2)and is therefore untimely.*

As noted above, the Intervenors submitted a version of Contention 13 challenging the Applicant's ER at the outset of this proceeding, and the Licensing Board deemed it inadmissible at that time. *See Fermi*, LBP-09-16, 70 NRC at 297-304. NRC regulations permit intervenors to file new or amended contentions on NEPA issues "if there are data or conclusions in the NRC draft or final [EIS] . . . that differ significantly from the data or conclusions in the applicant's documents." 10 C.F.R. § 2.309(f)(2). Otherwise, contentions may be amended after the initial filing only with leave of the presiding officer upon a showing that the three conditions set forth in 10 C.F.R. § 2.309(f)(2)(i)-(iii) have been met. In submitting their amended version of Proposed Contention 13, the Intervenors have not even attempted to demonstrate that these standards have been met. They have not pointed to any portion of the DEIS that they allege to contain data or conclusions that differ from those in the ER. Nor have they asserted that the amended contention meets the conditions set forth in 10 C.F.R. § 2.309(f)(2)(i)-(iii). Rather, they have merely used the occasion of the DEIS's publication to renew claims that the Licensing Board has already rejected. For this reason alone, Proposed Contention 13 should be rejected.

2. *The Intervenors' critique of the DEIS need for power analysis merely repeats claims already made and rejected in this proceeding.*

A considerable portion of Proposed Contention 13 contains the Intervenors' critique of the need for power analysis presented in Chapter 8 of the DEIS. According to the Intervenors, this analysis is flawed because it relies on the MPSC 21st Century Plan, published in 2006 before the recent recession, and therefore fails to account for the effects of recent economic conditions on the demand for electricity. Fermi DEIS Contention Filing at 11. They assert that by overestimating the future demand for electricity, the DEIS overstates the benefits of constructing a new nuclear facility. *Id*.

The claims in this portion of the contention repeat claims already raised by the Intervenors in the original version of Contention 13. In the original version of the contention, the

Intervenors also argued that the MPSC 21st Century Plan was outdated because it failed to account for the recession that began in 2008. Intervention Petition at 113. At that time, the NRC Staff responded that the Applicant's need for power analysis in the ER did, contrary to the Intervenors' assertions, take a variety of economic uncertainties into account and present several different projections of electricity demand based on different economic assumptions. Staff Answer to Intervention Petition at 98. The Licensing Board agreed, noting that both the ER and the 21st Century Plan took a number of uncertainties into account, "including business cycles and economic conditions." *Fermi*, LBP-09-16, 70 NRC at 302. In rejecting the contention, the Board observed that the Intervenors "provided some alleged facts suggesting the future need for power might be closer to the low-growth case identified in the ER," but have not "provided facts or expert opinion to indicate that the future need for power will likely fall below the low-growth case" or "identified an issue affecting the need for power or a source of uncertainty that was not considered in the ER." *Id*. For this reason, the Board determined that this portion of Contention 13 failed to demonstrate the existence of a genuine dispute with the Application, as required by 10 C.F.R. § 2.309(f)(1)(vi). *Id*.

The amended version of Proposed Contention 13 suffers from the same flaws. The Intervenors continue to assert that the 21st Century Plan is an inappropriate basis for a need for power analysis, and they continue to ignore both the range of projections that document contains and the types of uncertainties it considers. *See* Fermi DEIS Contention Filing at 14. The ELPC comment that the Intervenors reference as support for their contention is similarly flawed in failing to acknowledge how the document addresses projections and uncertainties. *See* ELPC Comment at 6. Information submitted by Ned Ford in support of the contention is silent on this issue, focusing instead on peak demand issues, energy efficiency, and energy alternatives. *See generally* Ned Ford, A Critique of the Resource Options Comparing Fermi 3 to Efficiency and Renewable Generation, attachment to Fermi DEIS Contention Filing (Ford

Report). These arguments simply repeat arguments that have already been submitted and rejected in this proceeding as failing to meet the contention pleading standards of 10 C.F.R. § 2.309(f)(1). The Intervenors have failed to show that this portion of Proposed Contention 13 is based on new data or conclusions in the DEIS, as discussed above, and have failed to demonstrate that the contention raises issues not previously considered and rejected by the Board. For these reasons, this portion of Proposed Contention 13 is inadmissible.

3. *The Intervenors' claims regarding energy efficiency fail to show the existence of a genuine dispute and are therefore inadmissible*.

Like their claims regarding the need for power analysis, the Intervenors' claims regarding energy efficiency have also been submitted and rejected previously in this proceeding. *Fermi*, LBP-09-16, 70 NRC at 302-03. When the original version of Contention 13 was presented to the Licensing Board, the Intervenors supported it with citations to testimony in a rate increase case before the Michigan Public Services Commission, and with citations to a book by D. Arjun Makhijani. Intervention Petition at 116-118. In the amended version of Proposed Contention 13, the Intervenors reference a report submitted by Ned Ford, who asserts that the potential for energy efficiency is not limited and that, under current law, "the Southeast Michigan region will [see] 15% of its total electricity sales met with efficiency by 2025." Ford Report, under "Detroit Edison and Efficiency" (unpaginated). According to Mr. Ford, energy efficiency programs have much lower costs per kilowatt-hour than construction of new nuclear generating capacity. *Id.*

In rejecting the energy efficiency claims presented in the original version of Contention 13, the Board noted that all the assertions made by the Intervenors were too general to constitute an admissible contention, in that they did not demonstrate the existence of a material dispute with the Applicant's ER or provide sufficient supporting facts or expert opinion. *Fermi*, LBP-09-16, 70 NRC at 302-03. The same problems appear in the revised version of Proposed Contention 13. The Intervenors do not address any portion of the DEIS that discusses energy efficiency, and do not assert that any portion of this discussion is deficient, as required by 10

C.F.R. § 2.309(f)(1)(vi). Furthermore, although the Ford Report discusses efficiency, the discussion is general and not linked to any specific claims related to either the ER or DEIS and therefore does not meet the requirement of 10 C.F.R. § 2.309(f)(v) regarding support for contentions. As noted above, the Intervenors again fail to show why these energy efficiency concerns are based on new information in the DEIS or on any sources that were not available prior to issuance of the DEIS. For these reasons, this portion of the amended Contention 13 is inadmissible for the same reasons the Board cited in its decision to reject the original version.

4. *The Intervenors' claims regarding energy alternatives fail to show the existence of a genuine dispute and are therefore inadmissible.*

Like the other claims in Proposed Contention 13, the Intervenors' claims regarding energy alternatives have been submitted and rejected previously in this proceeding. *Fermi*, LBP-09-16, 70 NRC at 303-04. In the original version of Contention 13, the Intervenors argued that the Applicant's ER was too dismissive of solar and wind energy generation options and of combinations of renewable generation with storage technologies. Intervention Petition at 119-22. The revised version of Proposed Contention 13 includes similar claims, backed by the statement of Ned Ford that Michigan has a high potential for wind energy development and a high potential for solar energy development as a "peaking" resource. Fermi DEIS Contention Filing at 16-19; Ford Report under "Detroit Edison and Wind" and "Photovoltaics" (unpaginated).

In rejecting this portion of the original Contention 13, the Board noted the contention contained no information to show that the ER omitted any energy generation alternative that was feasible for baseload power generation on a utility scale. *Fermi*, LBP-09-16, 70 NRC at 304. According to the Board, the Intervenors "failed to provide facts or expert opinion sufficient to show that the ER disregarded a feasible alternative based on either wind power, solar power, or some combination of the two." *Id*. The amended version of Proposed Contention 13 suffers from the same flaws, in that it fails to demonstrate a dispute with the DEIS or to provide any evidence to support the Intervenors' preferred energy alternatives in light of the Applicant's

stated goal of baseload power generation. The Intervenors do not address those sections of the DEIS that discuss alternative sources of energy, and do not assert that any specific portion of this discussion is deficient, as required by 10 C.F.R. § 2.309(f)(1)(vi). Furthermore, although the Ford Report discusses alternative energy sources, the discussion is general and not linked to any specific claims related to either the ER or DEIS and therefore does not meet the requirement of 10 C.F.R. § 2.309(f)(v) regarding support for contentions. As noted above, the Intervenors again fail to show why these energy alternatives concerns are based on new information in the DEIS or on any sources that were not available prior to issuance of the DEIS.For this reason, the amended version of Proposed Contention 13 should be rejected for failure to meet the pleading requirements of 10 C.F.R. § 2.309(f)(1).

III. NEW CONTENTIONS

A. Proposed Contention 17

> The descriptions of terrestrial and wetland mitigation plans are insufficient and inadequate, legally and practically, in violation of NEPA requirements for a Draft Environmental Impact Statement.

Fermi DEIS Contention Filing at 22. In this contention, the Intervenors argue that the DEIS does not discuss proposed terrestrial and wetland mitigation plans in sufficient detail to ensure that they have been fairly evaluated. *Id*. at 22. The Intervenors further argue that because mitigation measures proposed by the Applicant are not available to the Intervenors and the public for comment in the DEIS, the Intervenors and other members of the public are prohibited from meaningfully participating in the NEPA process. *Id*. at 22-23.

Staff Response: As discussed more fully below, Proposed Contention 17 is inadmissible because the Intervenors have not demonstrated that the information in the DEIS upon which this contention is based contains data or conclusions that "differ significantly from the data or conclusions in the applicant's documents" or.that the contention is otherwise based on information that is new, materially different, and not previously available, as required by 10 C.F.R. § 2.309(f)(2). Nor have they demonstrated good cause for submitting this contention

almost a year after the latest revision of the ER was available, or addressed the other seven nontimely filing factors in 10 C.F.R. § 2.309(c). Additionally, the Intervenors have not provided a legal basis to support their argument that other permitting authorities' processes for developing mitigation plans are subject to challenge in NRC proceedings, and have not demonstrated that challenges to the plans themselves meet the pleading requirements in 10 C.F.R. § 2.309(f)(1)(iii)-(vi). Finally, the Intervenors do not challenge the adequacy of the mitigation measures described in the ER or the DEIS, or provide factual or expert support to indicate that additional mitigation measures are necessary, and therefore fail to meet the pleading requirements of 10 C.F.R. § 2.309(f)(1)(i), (v), and (vi).

1. *Intervenors fail to demonstrate that Contention 17 is timely under 10 C.F.R. § 2.309(f)(2) or is a permissible nontimely filing under 10 C.F.R. § 2.309(c).*

Revision 2 of the Applicant's ER, first available in March 2011, states that in order to mitigate unavoidable impacts to wetlands, the Applicant will prepare a mitigation plan for Fermi 3 construction activities in consultation with USACE and Michigan Department of Environmental Quality (MDEQ). ER at 4-49, 6-45. The ER also describes potential impacts to the environment from the proposed action, identifies where the Applicant believes mitigation measures may be warranted or are not warranted, and describes proposed mitigation measures.[7] Based on the information the Applicant provided in the ER, and the NRC Staff's and USACE's independent evaluation, the DEIS also discusses potential impacts of the proposed action and proposed mitigation measures where they may be warranted.[8] The Intervenors have not demonstrated

[7] *See* ER at 4-5 to 4-11; 4-21; 4-24; 4-27 to 4-28; 4-42; 4-44 to 4-45; 4-48 to 4-49; 4-52; 4-72; 4-75; 4-94; 4-95; 5-2 to 5-3; 5-10; 5-15; 5-25; 5-39; 5-40; 5-42 to 5-58; 5-113 to 5-115; 5-128 to 5-130; 5-134; 5-136 to 5-138; 5-146; 5-148; 5-150 to 5-151; 5-159 to 5-165; 5-169; 5-190; 5-193 to 5-206; 5-211 to 5-212; 5-216; 5-219 to 5-224; 10-1 to 10-11; 10-13; 10-21; 10-29.

[8] *See* DEIS at iii; xxxvi to xxxvii; 1-4 to 1-5; 1-8; 4-43; 4-58; 5-1 to 5-6; 5-9; 5-16; 5-18 to 5-19; 5-22 to 5-23; 5-25 to 5-26; 5-35 to 5-39; 5-42 to 5-43; 5-45; 5-48 to 5-49; 5-53; 5-56 to 5-57; 5-73; 5-83; 5-91 to 5-93; 5-96 to 5-99; 5-101; 5-104; 5-113 to 5-114; 5-116; 5-118 to 5-120; 5-122; 5-137 to 5-138; 7-3; 7-8 to 7-9; 7-11 to 7-12; 7-15 to 7-16; 7-18; 7-20 to 7-23; 7-27; 7-30 to 7-33; 7-36; 7-38 to 7-45; 9-21; 9-23; 9-26 to 9-27; 9-29; 9-41; 9-87; 9-100 to 9-101; 9-112; 9-114; 9-117; 9-126; 9-130 to 9-132; 9-142; 9-156; 9-161; 9-166; 9-171; 9-179; 9-181; 9-183; 9-192; 9-

that the DEIS or their challenge thereto is based on any data or conclusions related to mitigation measures that "differ significantly from the data or conclusions in the applicant's documents" or that are new, materially different, and not previously available in the ER; therefore, this contention is untimely under 10 C.F.R. § 2.309(f)(2).

Having failed to explain why the contention would be timely pursuant to 10 C.F.R. § 2.309(f)(2), the Intervenors also fail to explain why it would be permitted under the 10 C.F.R. § 2.309(c) standards for nontimely filings. The first and most important element of Section 2.309(c) is whether the Intervenor has demonstrated "good cause" for filing late. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77, 79 (2000). Here, where the Intervenors have failed to explain how the contention is based on differences between the ER and DEIS, the Intervenors provide no cause for filing this contention almost a year after the most recent revision of the the ER, and have not attempted to address the other factors in Section 2.309(c). As a result, this contention is also inadmissible under 10 C.F.R. § 2.309(c).

2. *The Intervenors provide no legal support for their argument that mitigation plans determined by other permitting authorities are subject to challenge in NRC proceedings*.

As support for this contention, the Intervenors cite the statement in the DEIS at page 4-44 that the USACE and MDEQ will evaluate, as part of their respective permitting processes, the potential impacts on terrestrial or wetland resources and the compensatory mitigation proposed by the Applicant. Fermi DEIS Contention Filing at 22. Because the DEIS notes that this process is anticipated to be completed subsequent to the DEIS and prior to the issuance of the FEIS, the Intervenors argue that their right to publicly comment on mitigation plans at the DEIS stage is forfeited. *Id*. at 22-23. As support for their contention, the Intervenors cite several cases, but none of these cases support the Intervenors' argument that they are entitled,

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205; 9-209; 9-218; 9-222; 9-232; 9-234; 9-236; 9-245; 9-259; 9-264; 9-275; 9-285; 9-287 to 9-289; 9-305; 10-2 to 10-4; 10-8 to 10-9; 10-27; 10-29 to 10-31.

at the time the DEIS is issued, to comment on completed mitigation plans to be determined by other permitting authorities.[9] As indicated above, both the ER and the DEIS identify and discuss potential mitigation measures and how those measures affect the conclusions regarding potential impacts of the proposed action. The Staff's analysis and the basis for its conclusions have been provided in the DEIS and made subject to public comment. The Intervenors have failed to explain any inadequacy in their opportunity to comment on these aspects of the DEIS. This contention is therefore inadmissible under 10 C.F.R. § 2.309(f)(1)(vi).

3. *The Intervenors do not challenge specific portions of the DEIS, provide facts or expert opinions to support their contention, or demonstrate a genuine issue of law or fact concerning compensatory mitigation measures*.

The Intervenors argue in general terms that the DEIS's descriptions of terrestrial and wetland mitigation plans are insufficient and inadequate, but they do not identify with any specificity which mitigation measures discussed in the DEIS are insufficient or inadequate, and therefore have not met the requirements of 10 C.F.R. § 2.309(f)(1)(vi). As noted above, *see supra* n. 8, several sections of the DEIS describe potential mitigation measures and their relevance for the impact conclusions in the DEIS, but the Intervenors do not cite any of these sections or explain why they are deficient. A contention that does not contain sufficient information to show that a genuine dispute exists with the Applicant on a material issue of law or fact and does not include references to the specific portions of the Application or DEIS that the Intervenors dispute is inadmissible. *See Texas Utilities Co.* (Comanche Peak Steam Electric

[9] Compensatory mitigation measures are part of the USACE's permitting process, not the NRC's licensing process. As the DEIS explains, if USACE issues a permit, compensatory mitigation measures determined by USACE will be included in that permit. DEIS at 1-7 to 1-8. USACE cooperates in the preparation of the DEIS to make sure that the DEIS includes the information needed to support its permitting process, which involves receiving public feedback in the form of comments on the DEIS and its own public notice. *Id*. If a permit is issued, the Applicant must confirm that the proposed mitigation meets all applicable federal wetland criteria, and if USACE finds that mitigation is not satisfied, it can order modifications to the project or the mitigation plan. *Id*. Because the NRC does not have the regulatory authority to implement, enforce, monitor, or modify these completed mitigation plans, challenges to the content of the USACE permit or the process by which the USACE will complete its permitting review are beyond the scope of this proceeding.

Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992), *vacated in part on other grounds*, CLI-93-11, 37 NRC 192 (1993). Additionally, the Intervenors provide no factual basis or expert opinion to support their argument that the DEIS is inadequate and deficient. The Intervenors are obligated to examine the publicly available material relating to Fermi 3 with sufficient care to enable them to uncover specific information that can support their contention, for neither Section 189a of the Atomic Energy Act nor 10 C.F.R. § 2.309 permit the Intervenors to file a vague, nonspecific contention and flesh it out later during discovery. *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982), *vacated in part on other grounds*, CLI-83-19, 17 NRC 1041 (1983). Because the Intervenors ignore the discussions of mitigation measures in the DEIS and offer "no tangible information, no experts, no substantive affidavits,' but instead only 'bare assertions and speculation'" concerning their adequacy, this contention is inadmissible. 10 C.F.R. § 2.309(f)(1)(v), (vi); *see Duke Energy Carolinas, LLC* (Combined License Application for William States Lee III Nuclear Station, Units 1 and 2), LBP-08-17, 68 NRC 431, 441 (2008) (quoting *Fansteel, Inc*. (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003)).

For the reasons set forth above, the Intervenors have not demonstrated that the information in the DEIS upon which this contention is based includes data or conclusions that "differ significantly from the data or conclusions in the applicant's documents" or is new, materially different, and not previously available in the ER, nor have they demonstrated good cause for submitting this contention almost a year after the latest revision of the ER was issued. *See* 10 C.F.R. §§ 2.309(c), 2.309(f)(2). Additionally, the Intervenors have not demonstrated that challenges to other permitting authorities' processes for developing mitigation plans are within the scope of this proceeding or constitute a genuine, material dispute with the application. *See* 10 C.F.R. § 2.309(f)(1)(iii)-(iv), (vi). Finally, the Intervenors do not challenge the adequacy of the mitigation measures described in the ER or the DEIS, or provide factual or expert support to

indicate that additional mitigation measures must be discussed in the DEIS, as required by 10 C.F.R. § 2.309(f)(1)(i), (v), and (vi). The Staff therefore opposes the admission of Contention 17.

B. Proposed Contention 18

> The Endangered Species Act consultation and biological assessment ("BA") are incomplete, and there is no adequate substitute for the BA which appears within the DEIS. This makes the DEIS dependent upon completion of the BA and as a practical matter, precludes the public a participation/comment opportunity on the Endangered Species Act at the DEIS stage. This disclosure violates NEPA requirements for a Draft Environmental Impact Statement.

Fermi DEIS Contention Filing at 23. In this contention, the Intervenors argue that the DEIS does not include the NRC Staff's Biological Assessment (BA) in the DEIS. Fermi DEIS Contention Filing at 25. The Intervenors further argue that because mitigation measures proposed by the Applicant will be evaluated by other agencies as part of their permitting actions and finalized after the issuance of the DEIS, the Intervenors and other members of the public are prohibited from meaningfully participating in the NEPA process. *Id*. at 24-26. In support of this contention, the Intervenors cite to several cases, none of which provide support their arguments that NEPA requires that other federal and state agencies' determinations as to the adequacy of proposed mitigation measures must be complete and included in the DEIS.

Staff Response: As described more fully below, Contention 18 is inadmissible because it does not raise a genuine dispute with the DEIS in that it does not establish any factual or legal basis for its claim that the NRC has failed to meet its obligations under Section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536, and NEPA. *See* 10 C.F.R. § 2.309(f)(1)(v), (vi).

1. *Contention 18 fails to raise a genuine dispute on a material issue of law or fact.*

The NRC is required under NEPA and the agency's NEPA-implementing regulations in 10 C.F.R. Part 51 to consider the environmental impacts of licensing, including impacts to threatened or endangered species. *See* 42 U.S.C. § 4332; *see also* 10 C.F.R. §§ 51.20(a)(1), (b)(2) and 51.71(a). As part of its compliance with NEPA and 10 C.F.R. Part 51, the NRC Staff

engages in consultation with other Federal agencies, as appropriate, under Section 7 of the ESA. The ESA requires federal agencies "to insure that actions authorized, funded or carried out by them do not jeopardize the continued existence" of an endangered species or "result in the destruction or modification of habitat of such species." *See Tennessee Valley Authority v. Hill*, 437 U.S. 153, 160 (1978); 16 U.S.C § 1536(a)(2).

Under the Section 7 consultation requirement, the first task of an agency is to request information from FWS on whether a listed or proposed species or a designated or proposed critical habitat is present in the area. 50 C.F.R. § 402.12(c). If FWS advises that an endangered or proposed species may be present, the agency must conduct a biological assessment (BA). 50 C.F.R. § 402.12(b)(1). This assessment "may be" undertaken as part of the agency's compliance with the requirements of Section 102 of NEPA.[10] If the BA indicates effects to a listed or proposed species or habitat, the agency must engage in formal consultation with FWS. 50 C.F.R. § 402.14.

In accordance with FWS procedures, during formal consultation, FWS determines "whether a proposed agency action(s) is likely to jeopardize the continued existence of a listed species . . . or destroy or adversely modify critical habitat."[11] At the close of formal consultation, FWS will issue a biological opinion (BO), with a finding of either jeopardy or no jeopardy. 50 C.F.R. § 402.14(h). If a "no jeopardy" opinion is issued, then no further action is required by the action agency. If a "jeopardy" opinion is issued, FWS will indicate reasonable

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[10] 50 C.F.R. § 402.06. Section 102(2)(C) of NEPA states that, "Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved." 42 U.S.C. § 4332(2)(C).

[11] "Endangered Species Consultation Handbook, Procedures for Conducting Consultation and Conference Activities under Section 7 of the Endangered Species Act," U.S. Fish and Wildlife Service, National Marine Fisheries Service (Mar. 1998) at 4-1, accessible at: http://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf.

and prudent alternatives, if any exist. FWS may also issue an incidental take statement[12] in conjunction with either a "jeopardy" or "no jeopardy" finding in its BO. Once consultation is initiated with FWS, an agency cannot make any "*irreversible or irretrievable* commitment of resources with respect to the agency action which has the effect of *foreclosing* the formulation or implementation of any reasonable and prudent alternatives" that the BO may raise. 50 C.F.R. § 402.09 (emphasis added). Only after consultation is complete can an agency "determine whether and in what manner to proceed with the action in light of its section 7 obligations and [FWS's] biological opinion." 50 C.F.R. § 402.15.

FWS regulations anticipate an intersection between Section 7 consultation and an agency's NEPA review process. Specifically, 50 C.F.R. § 402.06 states that "[c]onsultation, conference, and biological assessment procedures under section 7 *may be* consolidated with interagency cooperation procedures required by other statutes, such as the National Environmental Policy Act"; the regulations further state that the results of consultation under Section 7 "*should be* included in the documents required by [NEPA]," namely, the EIS. 50 C.F.R. § 402.06(a) (emphasis added). However, as explained below, the NRC Staff's BA is not required to be included in the DEIS.

a. The NRC Staff has not violated Section 7 of ESA by issuing the DEIS before consultation is complete.

Pursuant to Section 7 of the ESA, the NRC Staff initiated consultation with FWS on December 23, 2008, by a letter requesting participation by the FWS in the EIS scoping meeting held by NRC in Monroe, Michigan on January 14, 2009. Letter from G. Hatchett, NRC, to C. Czarnecki, Field Supervisor, FWS, East Lansing Michigan Field Office (Dec. 23, 2008), ADAMS Accession No. ML083151398, listed in DEIS at 2-265 and Appendix F at F-1. In response, FWS provided data on Federally-listed species known to occur in Monroe, County, Michigan

[12] Section 7(b)(4) allows the Service to issue an "incidental take statement" for agency actions where the taking of an endangered species is incidental to the agency action. This written statement can set forth terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant.

(which includes the Fermi site) and several adjacent counties where transmission lines might be built. Letter from C. Czarnecki, Field Supervisor, FWS, East Lansing Michigan Field Office, to G. Hatchett, NRC (Jan. 28, 2009) ADAMS Accession No. ML090750973, listed in DEIS Appendix F at F-1. FWS also provided some general recommendations, such as minimizing wetland impacts and minimizing fragmentation of forest cover when routing the transmission lines, offered further technical guidance, and suggested that the NRC Staff contact the Michigan Department of Natural Resources regarding possible impacts to state-listed species. *Id*.

The NRC Staff has initiated consultation with FWS as required by the ESA, and is presently finalizing the BA in consideration of information provided by FWS in July and August 2011. This consultation, which is currently in progress, will include consideration of all the information requested by FWS, and is expected to conclude within the next several months and prior to the issuance of the FEIS.

The Intervenors take issue with the fact that the NRC Staff's consultation with FWS is ongoing, and was not complete before the Staff issued the DEIS. However, the Intervenors have not provided any support for their argument that including a complete BA in the DEIS is required by law. The ESA requires only that the NRC's BA be completed before any contract for construction is entered into and before construction is begun, and that consultation be completed before the NRC makes any "irreversible or irretrievable commitment of resources" that may foreclose implementation of any mitigation measures the FWS's BO may suggest. *See* 50 C.F.R. §§ 402.01(a), 402.12(b)(2). The NRC Staff's issuance of the DEIS does not cause or amount to an "irreversible or irretrievable commitment of resources." Moreover, even if the COL is ultimately granted, FWS regulations do not require a Section 7 consultation to be complete at the time an agency's final environmental review is issued. *See* 50 C.F.R. § 402.06. Although the NRC Staff has completed its DEIS, the FEIS has not been completed, and the BA will be completed before the FEIS is issued. Additionally, as the NRC has not yet decided whether to issue the Fermi 3 COL to permit construction and operation of the proposed new

unit, the Intervenors have not demonstrated that the NRC has, by issuing the DEIS prior to the completion of the BA, made any "irreversible or irretrievable commitment of resources" that may foreclose implementation of any mitigation measures the FWS's BO may ultimately suggest. *See* 50 C.F.R. §§ 402.01(a), 402.12(b)(2).

The Intervenors provide no support for their argument that the NRC must wait to complete the ESA consultation process and include a completed BA in its DEIS, and thus have not demonstrated that a genuine, material dispute exists with respect to the consultation requirements of Section 7 of the ESA. Contention 18 should be rejected for failing to meet the requirements of 10 C.F.R. § 2.309(f)(1)(iv)- (vi).

b. The NRC Staff has not violated NEPA by issuing the DEIS before its endangered species consultation is complete.

Section 102(2)(C) of NEPA requires an agency to consult with other federal agencies that may have "special expertise with respect to any environmental impact involved" in the proposed federal action. The purpose of § 102(2)(C) consultation is to encourage "widespread discussion and consideration of the environmental risks and remedies associated with the pending project." *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1021 (9th Cir. 1980).

Here, the agency's NEPA consultation requirement is being satisfied concurrently with the consultation requirement in Section 7 of the ESA. The NRC Staff initiated consultation with FWS, received FWS's comments, and will address them in the BA, and in the FEIS, as necessary. DEIS Appendix F and 5-21 to 5-22. Further, formal consultation is expected to be completed within the next several months, and the BA will be will be included with the FEIS. The Intervenors have identified no statute, regulation or case law that would require the agency to complete consultation with ESA before issuance of the FEIS, in order to comply with NEPA. In accordance with Section 102(2)(C) of NEPA, the Staff solicited and received FWS's input on the presence of endangered or threatened species in the vicinity of Fermi 3 and provided its

DEIS to FWS. The Staff will also provide its initial BA to FWS, obtain FWS's comments on the BA and DEIS, and obtain additional information, if necessary to address FWS's comments in the FEIS and BA. These actions will satisfy NEPA's requirement that, "[p]rior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved." 42 U.S.C. § 4332(2)(C); Thus, the Intervenors have not explained how issuing the DEIS before ESA consultation with FWS is complete constitutes a violation of NEPA. Accordingly, Contention 18 does not raise a genuine dispute of material fact or law in this proceeding, contrary to the requirements of 10 C.F.R. § 2.309(f)(1)(vi).

The Intervenors have also provided no basis for their concern that issuance of the DEIS prior to completion of consultations shows that FWS's or the public's input is inconsequential to the NRC's decision-making process.[13] In the DEIS the NRC Staff extensively discussed potential impacts to Federal and State-protected and listed species, but the Intervenors have not addressed, let alone disputed, any of that information, analysis, or conclusions. DEIS at 2-49 to 2-53; 2-60 to 2-64; 2-98 to 2-119; 4-29 to 4-36; 4-39 to 4-41; 4-52 to 4-57; 5-22 to 5-25; 5-43 to 5-50; 7-18 to 7-21; 7-47. As set forth in 10 C.F.R. § 2.309(f)(2), petitioners must base their contentions on existing documents and information:

> Contentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. . . .

10 C.F.R. § 2.309(f)(2). This requirement places an "ironclad obligation" on petitioners to examine available information with sufficient care to enable them to uncover any information that could serve as the foundation of a contention. *See* Rules of Practice for Domestic

[13] Complying with consultation responsibilities does not relieve an agency of its obligation to assess and consider the impacts to threatened and endangered species under NEPA; that must be done in the context of the EIS. 50 C.F.R. § 402.06(a).

Licensing Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989). In this contention, the Intervenors do not identify any specific information in the DEIS concerning listed or potentially listed endangered and threatened species, or provide facts or an expert opinion to challenge any of the DEIS information on potential impacts to threatened or endangered species. As a result, this contention does not meet the contention admissibility requirements in 10 C.F.R. § 2.309(f)(1)(i) and (v) and therefore should be dismissed. Additionally, the Intervenors have not provided "sufficient information to show that *a genuine dispute exists with the applicant* on a material issue of law or fact." 10 C.F.R. § 2.309(f)(1)(vi) (emphasis added).

The Intervenors also argue that because the NRC's consultation with FWS has yet to culminate in a final BA, the public is deprived of an opportunity to provide information required under NEPA before the NRC makes a final decision and precludes meaningful consideration of such information. However, as explained above, there is no requirement that the BA be completed prior to the issuance of the DEIS. 50 C.F.R. § 402.12(b)(2). Furthermore, if the BA or FWS's BO brings to light any significant new information that was not considered in the DEIS with respect to impacts to listed species, the Staff, in compliance with its continuing duty under NEPA, will address this information in the FEIS as appropriate.[14]

For the reasons set forth above, the Intervenors have not provided a sufficient legal basis to support their assertion that the NRC Staff has failed to meet its obligations under Section 7 of the ESA and NEPA, and therefore have failed to raise a genuine dispute with the DEIS, as required by 10 C.F.R. § 2.309(f)(1)(vi). Further, the Intervenors do not challenge any of the information provided in the DEIS concerning Federal or State listed or protected species, and have not provided a factual basis or expert opinion to support their argument that the DEIS

[14] The NRC staff notes that, consistent with the Commission's contention admissibility requirements, the public has the ability to raise new contentions based on new information in the FEIS. 10 C.F.R. §§ 2.309(c), 2.309(f)(1), and 2.309(f)(2).

is inadequate. 10 C.F.R. § 2.309(f)(1)(v) and (vi). The Staff therefore opposes the admission of Contention 18.

C. Proposed Contention 19

> Consumptive water uses from the Great Lakes Basin have not been properly addressed in accordance with the Great Lakes Compact, and the required approval processes and approvals, if any, are not delineated in the DEIS, in violation of NEPA.

Fermi DEIS Contention Filing at 26. Proposed Contention 19 is a nearly verbatim rendering of a comment submitted by the Great Lakes Environmental Law Center (GLELC) during the public comment period on the Fermi 3 DEIS.[15] The Intervenors adopt the GLELC comment as the body of their contention. In the comment, GLELC cites a sentence in the DEIS which notes that "with the passing of the Great Lakes Compact in 2008, any new water withdrawals within the Great Lakes Basin that would result in a consumptive use of 5 MGD [million gallons per day] or more were made subject to review by all of the States and provinces in the region." *Id*. at 27, citing DEIS at 2-25. According to the GLELC and the Intervenors, this requirement is not properly addressed in the DEIS. Proposed Contention 19 asserts that the consumptive water use is sufficiently high to be subject to regional review, and that the states and provinces in the region may find it to be "per se unreasonable." *Id*. at 27-28. Accordingly, GLELC and the Intervenors assert that the DEIS must be revised to include both a description of the steps to be taken to gain approval from the parties to the Great Lakes Compact and a justification for Fermi 3's consumptive water use. *Id*. at 29-30.

Staff Response: Contention 19 is inadmissible under the provisions of both 10 C.F.R. § 2.309(f)(2) and 10 C.F.R. § 2.309(f)(1). To the extent that it challenges the DEIS's presentation of consumptive water use by Fermi 3 and other facilities, and the environmental conclusions related to this presentation, the Intervenors fail to explain how the contention is based on "data

[15] The Intervenors provided a copy of the comment as an attachment to their filing. Because it is a public comment submitted as part of the NEPA process rather than a statement prepared by an expert witness in the course of litigation, it is not accompanied by an affidavit signed by the authors.

or conclusions" in the DEIS "that differ significantly from the data or conclusions in the applicant's documents," as required by 10 C.F.R. § 2.309(f)(2), and is therefore untimely. In addition, it is inadmissible under 10 C.F.R. § 2.309(f)(1). To the extent the contention asserts that NEPA requires the NRC to describe the approval process under the Great Lakes Compact, the contention is inadmissible under 10 C.F.R. § 2.309(f)(1)(ii)-(v) in that it fails to supply a basis for the assertion, to demonstrate that the issue is within the scope of the proceeding, to demonstrate that the issue is material to the findings the NRC must make with respect to the Fermi 3 COL Application, or to provide any statement of alleged facts or expert opinion in support of the Intervenor's position.

1. *Proposed Contention 19 is not based on new data or conclusions in the DEIS and is therefore nontimely under 10 C.F.R. § 2.309(f)(2).*

To the extent that Proposed Contention 19 is intended to challenge the way Fermi 3's consumptive water use is presented in the DEIS, and the environmental conclusions the NRC Staff has drawn from that information, it is not based on new data or conclusions in the DEIS and therefore cannot be considered a timely filing under 10 C.F.R. § 2.309(f)(2). The GLELC and the Intervenors draw their information from Chapter 2 of the DEIS, which describes the affected environment at the proposed Fermi 3 site, and Chapter 5 of the DEIS, which describes the environmental impacts of plant operations. *See* Fermi DEIS Contention Filing at 28, citing DEIS at 2-23 and 5-8. However, the same information is presented in the Applicant's ER, in more detail. *See* ER at 2-175 to 185, 5-13 to 5-14. Information in both the ER and the DEIS is ultimately derived from information collected by the MDEQ and the Great Lakes Commission. See *id*.; *id*. at 2-116- to 2-117. The Applicant and the NRC Staff reach the same conclusion, that consumptive water uses by the Fermi 3 facility with have a SMALL impact as defined in 10 C.F.R. Part 51, Appendix A.[16] For these reasons alone, this portion of Proposed Contention 19

[16] As defined in 10 C.F.R. Part 51, Appendix A, the definition of SMALL specifies that, "[f]or the issue, environmental effects are not detectable or are so minor that they will neither destabilize nor noticeably alter any important attribute of the resource."

should be dismissed.

2. *Claims challenging the impact of consumptive water use are unsupported and therefore inadmissible under 10 C.F.R. § 2.309(f)(1*).

The Intervenors have already challenged the Applicant's information related to consumptive water use related to the Fermi 3 facility in Proposed Contention 6, which was submitted as part of the Intervention Petition. Intervention Petition at 71-72. The Licensing Board dismissed this portion of Contention 6. *Fermi*, LBP-09-16, 70 NRC at 277. Proposed Contention 19 discusses the issue in somewhat more detail. According to the Intervenors and GLELC, Fermi 3 would account for 4% of total consumptive water use of Lake Erie and that it is "estimated to take up . . . a large amount of consumptive use in comparison to its peer facilities and industrial use as a whole." Fermi New Contention Filing at 28-29. For this reason, the Intervenors and GLELC assert that the DEIS errs in concluding that this is a small impact. *Id*. at 28.

This assertion, which was not drafted in the form of a contention by GLELC, fails to meet the contention pleading requirements of 10 C.F.R. § 2.309(f)(1)(v)-(vi) in that it does not include sufficient factual or expert support to demonstrate the existence of a genuine dispute. The Intervenors and GLELC provide no information to support the assertion that the impact of Fermi 3's consumptive water use on Lake Erie would be anything other than SMALL, as defined in 10 C.F.R. Part 51, Appendix A. As discussed above, an issue is not admissible in NRC proceedings based merely on "bare assertions and speculation" concerning the adequacy of Applicant or NRC Staff documents. *Fansteel*, CLI-03-13, 58 NRC at 203. For this reason, this portion of the contention fails to meet NRC's contention pleading rules and should be rejected.

3. *The Intervenors and GLELC provide no legal support for their assertion that the process for regional review under the Great Lakes Compact must be included in the DEIS.*

The Intervenors and GLELC also assert that NEPA requires the NRC to describe the approval process under the Great Lakes Compact for consumptive water uses over five million

gallons a day (MGD), and consider the possibility that this approval may be denied. Fermi DEIS Contention Filing at 27-28. This portion of Proposed Contention 18 is inadmissible under 10 C.F.R. § 2.309(f)(1)(ii)-(v) because it does not include a basis for the assertion, does not demonstrate that the issue is within the scope of the proceeding, does not demonstrate that the issue is material to the findings the NRC must make with respect to the Fermi 3 COL Application, and does not provide any statement of alleged facts or expert opinion in support of the Intervenors' position.

The DEIS does mention the mention the Great Lakes Compact, as the Intervenors and GLELC correctly note. *Id*. at 27, citing DEIS at 2-25; *see also* DEIS at 5-9. However, the DEIS does not include an extensive description of the approval process because obtaining that approval is not part of the NRC's licensing process.

The Great Lakes Compact, more formally the Great Lakes – St. Lawrence River Water Resources Compact, is a binding legal agreement entered into by states in the Great Lakes region under the auspices of the Council of Great Lakes Governors. The Great Lakes Compact provides a variety of mechanisms for U.S. states and Canadian provinces to cooperate in protecting the water resources of the Great Lakes basin, including a "regional review" process that is described in detail in Section 4.5 of the compact's text.[17] It is important to note that the "regional review" process is part of the state permitting processes for the water uses specified in the compact's text. It is not part of the U.S. Federal government's NEPA review, and the Intervenors have not provided any legal argument in support of their claim that a description of the "regional review" process (or speculation as to its outcome) must be included in the DEIS.

The DEIS does include a list of water use permits the Applicant must obtain prior to operation of a new nuclear facility. DEIS at 5-5 to 5-6. The list includes Michigan Department

[17] The text of the Great Lakes Compact can be found at http://www.cglg.org/projects/water/docs/12-13-05/ Great_Lakes-St_Lawrence_River_Basin_ Water_Resources_Compact.pdf.

of Environmental Quality (MDEQ) Large Quantity Water Withdrawal Permit, which is required for water withdrawals of more than 5 MGD from the Great Lakes per MCL 324.32723(1)(a)-(b). *Id*. at 5-5. The Great Lakes Compact requires the state of Michigan to submit this proposed water to use for "regional review" prior to issuing the permit. However, this process is outside of the NRC's review of the Fermi 3 COL Application.

The Intervenors and GLELC have failed to provide any argument that actions under the Great Lake Compact are part of the NRC's review process and must be included in the DEIS. They have not demonstrated that the "regional review" process is within the scope of this proceeding or material to any decision the NRC must make, and they have not provided any facts or expert opinion in support of such a claim. For these reasons, this portion of Proposed Contention 19 fails to meet the pleading standards in 10 C.F.R. § 2.309(f)(1) and must be rejected.

D. Proposed Contention 20

> The DEIS does not adequately evaluate thermal pollution issues associated with the discharge of cooling water into Lake Erie, in violation of NEPA.

Fermi DEIS Contention Filing at 30. Like Proposed Contention 19, Proposed Contention 20 is a nearly verbatim rendering of a comment submitted by GLELC during the public comment period on the Fermi 3 DEIS.[18] The Intervenors adopt the GLELC comment as the body of their contention. According to GLELC and the Intervenors, "[t]he DEIS notes the issues with thermal pollution on its discharge of cooling water into Lake Erie but does not properly evaluate these issues as serious and fails to provide potential mitigation options for the Fermi 3 facility." *Id*. Thermal emissions from the Fermi 3 facility could be "enormously damaging" at the localized level, and "could result in the drastic growth of toxic algae, heat stress for aquatic life, and . . . the creation of favorable conditions for invasive species." *Id*. at 32, citing DEIS at 5-33. GLELC

[18] The Intervenors provided a copy of the comment as an attachment to their filing. Because it is a public comment submitted as part of the NEPA process rather than a statement prepared by an expert witness in the course of litigation, it is not accompanied by an affidavit signed by the authors.

and the Intervenors claim that these effects could be exacerbated by climate change, and that the reviewing agencies should therefore "reevaluate the potential problems caused by thermal pollution from coolant water discharge at a more localized level before producing the Final EIS." *Id*.

Staff Response: To the extent that Proposed Contention 20 deals with thermal emissions as they relate to algae production in the western basin of Lake Erie, the new contention corresponds to that portion of Contention 6 that the Licensing Board has already admitted in this proceeding. The remaining portions of the contention are untimely under 10 C.F.R. § 2.309(f)(2) because they are not based on "data and conclusions in the NRC draft or final [EIS] . . . that differ substantially from the data or conclusions in the applicant's documents," but rather on information that is essentially the same in the ER and the DEIS. Finally, the contention fails to meet the pleading standards of 10 C.F.R. § 2.309(f)(1)(v)-(vi) because it does not include sufficient facts or expert opinion to demonstrate that a genuine dispute exists. For these reasons, it should be rejected.

1. *Insofar as it relates to algae production, Proposed Contention 20 is subsumed under admitted Contention 6*.

The Board admitted Contention 6 "insofar as it challenges the adequacy of the ER's analysis of the potential contribution of chemical and thermal effluent . . . to algal production and the potential proliferation of newly identified species of harmful algae." *Fermi*, LBP-09-16, 70 NRC at 280.

As this Board has previously noted, the "migration tenet" in NRC proceedings provides that "an admitted contention contesting the adequacy of the ER can be construed as a challenge to the subsequently issued DEIS or FEIS, without modification of the admitted contention" provided that the information in the Staff's NEPA document "is sufficiently similar to the relevant information contained in the earlier document upon which the original contention was filed." Licensing Board Memorandum and Order (Denying as Moot Intervenors' Motion to

Admit Contention 17) (Nov. 23, 2011) (unpublished) at 5-6 & n.19, citing *Louisiana Energy Servs., L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 84 (1998).

The thermal plume analysis in the DEIS relies on the analysis presented in the ER and is substantially the same as that analysis. *See* DEIS at 5-10 to 5-16. The DEIS notes that the review team verified the Applicant's model inputs and model results and found the Applicant's analysis conservative and acceptable. *Id*. at 5-15. Contention 6 already challenges the ER's conclusions related to the effects of thermal emissions on algae growth, and Proposed Contention 20 challenges similar conclusions in the DEIS. Therefore, although the Intervenors do not present Proposed Contention 20 as an amendment to Contention 6, and do not allege that the DEIS contains new information related to thermal emissions or their effects that would require an amendment to their earlier contention, the condition necessary for the "migration tenet" to apply is met. Accordingly, the portions of Proposed Contention 20 that relate to algae production are subsumed under admitted Contention 6 and therefore redundant.

2. *Other portions of Proposed Contention 20 are not based on new information in the DEIS and are therefore untimely*.

To the extent that Proposed Contention 20 relates to issues other than algae production related to thermal emissions at the Fermi 3 site, the Intervenors have failed to demonstrate that the contention is based on "data and conclusions in the NRC draft or final [EIS] . . . that differ substantially from the data or conclusions in the applicant's documents." 10 C.F.R. § 2.309(f)(2). As noted above, Proposed Contention 20 was drafted by GLELC as a public comment on the DEIS, and therefore does not refer to regulations related to NRC adjudicatory proceedings. GLELC and the Intervenors cite to portions of the DEIS that mention Lake Erie conditions, the size of the thermal plume, and possible heat stress to aquatic life. Fermi DEIS Contention Filing at 30-32. However, they do not allege that this information differs substantially from information in the Applicant's documents.

In fact, the information in the DEIS is based on information presented in the ER and

represents the NRC Staff's verification and confirmation of the Applicant's analysis. As noted above, the review team prepared the thermal plume analysis in the DEIS by verifying the Applicant's model inputs and model results, and the Staff found the Applicant's analysis conservative and acceptable. DEIS at 5-15. The Intervenors and GLELC themselves attribute the analysis they discuss to the Applicant, and cite to parts of the DEIS in which the Staff cites information provided by the Applicant in the ER. Fermi DEIS Contention Filing at 31, citing DEIS at 5-12. Portions of the contention that refer to the effect of the thermal plume on aquatic organisms also refer to portions of the DEIS that are based on the ER; to the extent that the Intervenors' cite the Staff's own analysis, the Intervenors appear to agree with the Staff's statements rather than alleging that the DEIS is inadequate. Fermi DEIS Contention Filing at 32, citing DEIS at 5-33. Because the information in the DEIS that the Intervenors object to is based on the Applicant's documents, this portion of Proposed Contention 20 is untimely under 10 C.F.R. § 2.309(f)(2) because it is not based on "data and conclusions in the NRC draft or final [EIS] . . . that differ substantially from the data or conclusions in the applicant's documents," but rather on information that is essentially the same in the ER and the DEIS.

The Intervenors and GLELC also argue that the relationship between climate change, water levels in Lake Erie, and thermal emissions from Fermi 3 needs to be addressed in the DEIS. Fermi DEIS Contention Filing at 32. This issue in not merely untimely under 10 C.F.R. § 2.309(f)(2), but has already been raised in a contention based on the ER and rejected by the Licensing Board. *See* Intervention Petition at 69, 71 (Contention 6). The Licensing Board rejected this portion of Contention 6 on the ground that it failed to challenge analyses that were present in the Applicant's ER, but instead alleged that the Applicant omitted the information. *Fermi*, LBP-09-16, 70 NRC at 280. Proposed Contention 20 suffers from the same flaw – it cites to portions of the Cumulative Impacts analysis in the ER, but not challenge any aspect of the analysis or provide support for such a challenge. Fermi DEIS Contention Filing at 32. For this reason, this portion of Proposed Contention 20 is inadmissible under 10 C.F.R.

§ 2.309(f)(1)(v)-(vi).

3. *Proposed Contention 20 does not provide sufficient factual or expert support to demonstrate that a genuine dispute exists*.

Finally, the contention fails to meet the pleading standards of 10 C.F.R. § 2.309(f)(1)(v)-(vi) because it does not include sufficient facts or expert opinion to demonstrate that a genuine dispute exists. The Intervenors and GLELC state that the analysis in the DEIS is "poorly framed," but their pleading describes no specific shortcomings aside from the climate change issue discussed above, which was already rejected by the Licensing Board. *See* Fermi DEIS Contention Filing at 32. The Intervenors urge the NRC Staff to "properly address the extent of harm that the volume of warm effluent being released by the facility" might cause, but they do not point to any particular in which the NRC has not done so nor point to any legal requirement that the DEIS does not satisfy. For this reason, Proposed Contention fails both to identify a genuine dispute and to provide the supporting evidence that NRC rules require. For these reasons, and those described above, Contention 20 should be rejected.

E. Proposed Contention 21

> Evaluation of the wetland areas that would be impacted by the construction and operation of the reactor, and the potential status of selected wildlife within those areas, is not fully and properly addressed in the DEIS, in violation of NEPA.

Fermi DEIS Contention Filing at 33. Like Proposed Contentions 19 and 20, Proposed Contention 21 is a nearly verbatim rendering of a comment submitted by GLELC during the public comment period on the Fermi 3 DEIS.[19] The Intervenors adopt the GLELC comment as the body of their contention. In Proposed Contention 21, the Intervenors and GLELC note that construction and operation of the Fermi 3 facility would result in the permanent conversion of 19 acres of coastal wetlands on the site. *Id*. at 33-34, citing DEIS at 5-23. In addition, offsite activities not regulated by NRC such as auxiliary structures, transmission lines, and access

[19] The Intervenors provided a copy of the comment as an attachment to their filing. Because it is a public comment submitted as part of the NEPA process rather than a statement prepared by an expert witness in the course of litigation, it is not accompanied by an affidavit signed by the authors.

roads would disturb an additional 93.4 acres of inland wetlands. *Id*. at 34, citing DEIS at 5-39 and 7-21. As the Intervenors note, the DEIS mentions proposals by the Applicant to restore 82 acres of coastal wetlands and 21 acres of onsite wetlands as mitigation under its permits with the MDEQ and the USACE. *Id*., citing DEIS at 7-20. The Intervenors also mention plans by the Applicant to work with the Michigan Department of Natural Resources (MDNR) to create protection plans for the eastern fox snake and the American lotus. *Id*. at 35. According to the Intervenors, this information must be made available for public comment prior to inclusion in the FEIS, and failure to include this information in the DEIS deprives the Intervenors of participation rights under NEPA. *Id*. at 35-36

Staff Response: Proposed Contention 21 makes claims that are nearly identical to those raised in Proposed Contention 17, which is discussed in Section III.A above. For this reason, the Staff's response is similar. To the extent that Proposed Contention 21 relates to the impacts of the Fermi 3 facility on the eastern fox snake, it has already been admitted for litigation in this proceeding and remains pending. To the extent that the contention raises other arguments, it is untimely under 10 C.F.R. § 2.309(f)(2). Portions of the contention alleging that the Intervenors have a right under NEPA to challenge specific wetlands mitigation plans prepared by other regulatory agencies are outside the scope of this proceeding and immaterial to any decision the NRC must make on the Fermi 3 COL Application. Finally, the remainder of the contention fails to raise or support a genuine dispute with either the Applicant's or NRC's Staff's documents. Proposed Contention 21 thus fails to meet the pleading requirements of 10 C.F.R. § 2.309(f)(1)(iii)-(vi) and should be dismissed.

1. *To the extent Proposed Contention 21 relates to the impacts of construction and operation of the Fermi 3 facility on the eastern fox snakes, the issue is already admitted in this proceeding, and the contention is duplicative*.

The impacts on the eastern fox snake of constructing and operating the Fermi 3 facility are already the subject of Contention 8, which the Board admitted in its order on the Intervention Petition. *Fermi*, LBP-09-16, 70 NRC at 286. As admitted by the Board, the contention alleged

that the ER failed to "adequately assess the project's impacts on the eastern fox snake and to consider alternatives that would reduce or eliminate those impacts." *Id*. The Board rejected those portions of the contention that would require the NRC to order the Applicant to propose additional mitigation measures for the eastern fox snake. In admitting the contention, the Board noted that the Applicant was working with the MDNR to obtain the necessary permits and to mitigate effects of the project on the eastern fox snake. *Id*. at 289.

Because Contention 8 remains pending, portions of Proposed Contention 21 that deal with construction and operation impacts on the eastern fox snake are subsumed under that contention and are therefore redundant.

2. *Proposed Contention 21 is not timely under 10 C.F.R. § 2.309(f)(2).*

Proposed Contention 21 is not timely for the same reasons as Proposed Contention 17, in that it fails to demonstrate that any portion of the DEIS the Intervenors wish to challenge contains data or conclusions that "differ significantly from the applicant's documents, as required by 10 C.F.R. § 2.309(f)(2). Furthermore, it fails to show good cause for nontimely filing, or to address the other nontimely filing factors in 10 C.F.R. § 2.309(c)(1). For this reason, all the same timeliness arguments that apply to Proposed Contention 17 also apply to Proposed Contention 21. *See supra*, Section III.A.1.

3. *Challenges to the development of mitigation plans to be imposed by the USACE or state agencies are outside the scope of this proceeding*.

As discussed in Section III.A.2 above, the Intervenors and GLELC have not demonstrated that mitigation plans to be determined and imposed by other permitting agencies, such as USACE, are subject to challenge in NRC proceedings, contrary to the requirements of 10 C.F.R. § 2.309(f)(1)(iii)-(iv). The Intervenors claim that failure to include the completed plans in the DEIS deprives the Intervenor of the right to comment on those plans[20] and challenge them

[20] The substance of Proposed Contention 21 has, in fact, been submitted by GLELC as a public comment on the DEIS, and the NRC and USACE will address it along with all other public comments prior to publication of the FEIS.

in this proceeding. Fermi DEIS Contention Filing at 34-35. However, the Intervenors provide no legal basis or argument for their claim that the substance of another agency's regulatory process may be attacked in an NRC adjudicatory proceeding. As the Board noted in its decision on Contention 8,

> neither NEPA nor Part 51 requires applicants to eliminate adverse environmental impacts. Courts have consistently interpreted NEPA as a procedural statute that requires disclosure and analysis of environmental impacts, not one that imposes substantive obligations for the protection of natural resources.

Fermi, LBP-09-16, 70 NRC at 287. The Intervenors appear to be arguing that NEPA gives them the right to challenge regulatory decisions by other agencies in an adjudication limited to an NRC licensing action. They do not argue that the consideration of any environmental impact in the DEIS is inadequate, but rather assert the right to challenge specific mitigation plans. Because the contents of such plans are determined by the review processes of other agencies, challenges to those agencies' procedures and determinations are outside the scope of and immaterial to this proceeding, and these portions of Proposed Contention 21 fail to meet the pleading requirement of 10 C.F.R. § 2.309(f)(1)(iii)-(iv).

4. *Proposed Contention 21 fails to raise a specific challenge to mitigation measures discussed in the DEIS, and therefore fails to meet the pleading requirements of 10 C.F.R. § 2.309(f)(1)(v)-(vi).*

The Intervenors argue in general terms that the DEIS's descriptions of wetland mitigation measures are insufficient and inadequate, but they do not identify with any specificity which mitigation measures discussed in the DEIS are insufficient or inadequate. For this reason, they have not demonstrated the existence of a genuine dispute and have not met the requirements of 10 C.F.R. § 2.309(f)(1)(vi). As noted above, *see supra* Section III.A.1, several sections of the DEIS describe potential mitigation measures and their relevance for the impact conclusions in the DEIS, but the Intervenors do not cite any of these sections or explain why they are deficient. The Intervenors cite only one portion of the Cumulative Impacts section of the DEIS that addresses climate change and wetlands, Fermi DEIS Contention Filing at 34-35, but do not

describe what they dispute in relation to that part of the document, let alone why it would be significant to the NRC's analysis and conclusion. Additionally, the Intervenors provide no factual basis or expert opinion to support their argument that the DEIS is inadequate and deficient, as required by 10 C.F.R. § 2.309(f)(1)(v). For these reasons, which are set forth in more detail in response to Proposed Contention 17, *see supra* Section III.A.3, this portion of Proposed Contention 21 is also inadmissible.

F. Proposed Contention 22

> The DEIS calls for scrutiny only [sic] transportation aspects of the use of unusually enriched fuel in the Fermi 3 reactor, which is not adequately disclosed, nor is there analysis of the potential reactor operations accident implications from the use of higher-enriched fuel for fissioning, nor evaluation of the increased potential for higher levels of emissions of radioactivity in air and water from normal operations.

Fermi DEIS Contention Filing at 36. In this contention, the Intervenors argue that the DEIS does not adequately discuss the fuel to be used in the Fermi 3 reactor, and that it omits accident analyses as well as an evaluation of the increased potential for higher levels of radioactivity in the environment during normal operations. Fermi DEIS Contention Filing at 36, citing DEIS at 6-19. The Intervenors state that they are concerned about potential impacts of transporting both unirradiated and spent fuel, and argue both that the transportation consequences are inadequately addressed in the ER and the DEIS, and that "[t]his is an omission." *Id*. The Intervenors further state that the fuel to be used in the ESBWR at Fermi 3 will exceed enrichment and temperatures specified in 10 CFR § 51.52, and that neither the ER nor the DEIS address these issues. *Id*.

Staff Response: As described more fully below, Contention 22 is inadmissible because it challenges the design and operation of the plant and its fuel and is based primarily on previously available information. Some of this information has been available since October 1, 2005, when the NRC accepted the ESBWR Design Certification Application for review, and in any event since Rev. 9 of the design certification document (DCD) was submitted in December

2010. ESBWR DCD Rev. 9 (Dec. 2, 2010), ADAMS Accession No. ML103440266 (DCD Rev. 9). The Intervenors also challenge information in the ER, which has been available since at least March 2011, and the Intervenors have not demonstrated that the DEIS differs significantly from the DCD or ER or otherwise shown good cause for not raising these issues earlier as required by 10 C.F.R. §§ 2.309(c) and 2.309(f)(2). Furthermore, in their arguments concerning fuel enrichment and accidents, the Intervenors appear to misunderstand the requirements of 10 C.F.R. § 51.52; while they quote the DEIS, they do not challenge the Staff's analysis under Section 51.52 that is provided within the very part of the DEIS they quote, and therefore do not demonstrate a material dispute as required by 10 C.F.R. § 2.309(f)(1)(vi). *See* DEIS at 6-20 to 6-29. This contention is also inadmissible because the Intervenors do not provide facts or an expert opinion to support their arguments and therefore do not meet the requirements in 10 C.F.R. § 2.309(f)(1)(v). Finally, the Intervenors also appear to impermissibly challenge 10 C.F.R. § 52.55(c), which allows an applicant to reference a design certification that the Commission has docketed but not granted, by resubmitting arguments concerning the ESBWR which the Board has previously rejected. *Fermi*, LBP-09-16, 70 NRC at 268-69.

1. *Intervenors fail to demonstrate that Contention 22 is based on new, materially different or previously unavailable information and do not provide good cause for its late filing.*

Citing information in the DEIS on the thermal power and electrical ratings of the ESBWR and the enrichment of its fuel, the Intervenors argue that the impacts of transporting fuel have not been adequately addressed in either the ER or the DEIS, and that "[t]his is an omission." Fermi DEIS Contention Filing at 36, citing DEIS at 6-19. As a threshold matter, the Intervenors have not demonstrated that any of the information they challenge in the contention involves "data and conclusions in the NRC draft or final environmental impact statement . . . that differ significantly from the data or conclusions in the applicant's documents," as required by 10 C.F.R. § 2.309(f)(2). All of the information the Intervenors challenge in Proposed Contention 22 has been available in the DCD at least since December 2, 2010, or in the ER since March 2011,

when Revision 2 was submitted. *See* DCD at 1.3-2 to1.3-7; ER at 3-60 to 3-70. For example, the Intervenors list ESBWR design characteristics provided in Table 1.3-1 of the DCD, Tier 2, Chapter 1.[21] The Intervenors also quote the DEIS's description of information, previously available in the ER, regarding the methodology the Applicant used to analyze transportation impacts. *Id*. at 37-38, citing DEIS at 6-19. Because the Intervenors have not shown that data and conclusions in the DEIS "differ significantly from the data or conclusions in the applicant's documents," Proposed Contention 22 is untimely under 10 C.F.R. § 2.309(f)(2) and the Scheduling Order in this case. Because the Intervenors have not demonstrated good cause for not addressing this information sooner, or addressed the other late-filing factors governing nontimely filing under 10 C.F.R. § 2.309(c), this contention should be dismissed on timeliness grounds.

2. *Both the ER and the DEIS contain the transportation impacts and accident analyses the Intervenors claim have been omitted, and the Intervenors do not dispute them. Additionally, the Intervenors' references to 10 C.F.R. § 51.52 and Table S-4 do not support their contention.*

The Intervenors argue that the impacts of transporting fuel have not been adequately addressed in either the ER or the DEIS, and also that "[t]his is an omission." Fermi DEIS Contention Filing at 36, citing DEIS at 6-19. However, both the ER and the DEIS contain the information allegedly missing – detailed, complete evaluations of both the radiological and nonradiological environmental impacts during normal and accident conditions resulting from the shipment of radioactive materials, including both unirradiated and spent fuel, to the Fermi 3 site. *See* ER at 3-60 to 3-70; DEIS at 6-17 to 6-39. The Intervenors have not disputed any of it.

For instance, the Intervenors assert that fuel enrichment is not adequately disclosed, and that there is no analysis of the potential impacts from both normal operating conditions and accidents, but fuel enrichment was addressed in the ER and in the DEIS. *See* Fermi DEIS

[21] Fermi DEIS Contention Filing at 37-40, quoting DCD Rev. 9 at 1.3-2 to 1.3-7. As discussed below, even if this represented new information in the DCD, the Intervenors do not explain how these design characteristics support their contention, contrary to 10 C.F.R. 2.309(f)(1)(v)-(vi).

Contention Filing at 36, 40; ER Rev. 2 at 3-60 to 3-70; DEIS at 6-19 to 6-24. The ER cites the ESBWR DCD and discusses fuel enrichment for the ESBWR reactor design in the context of its discussion of 10 C.F.R. § 51.52(a) and the applicability of Table S-4, which contains the Commission's generic determination of the environmental effects of transportation of fuel and waste. ER at 3-60 to 3-61, citing DCD Revision 6 (Aug. 2009). Similarly, the DEIS references the ER and discusses the ESBWR fuel enrichment in the context of 10 C.F.R. § 51.52(a). DEIS at 6-19.

The Intervenors also argue that neither the ER nor the DEIS adequately analyze potential transportation accidents stemming from the use of more highly enriched fuel. Fermi DEIS Contention Filing at 36. However, this too was addressed in the ER and DEIS. The ER contains an analysis of potential transportation accidents which includes the effects of fuel enrichment, the number of shipments, and the amount of radioactivity associated with each shipment. ER at 3-67 to 3-69. Similarly, the DEIS references the ER and evaluates both the radiological and nonradiological impacts of transportation accidents for unirradiated and spent fuel. DEIS at 6-26 to 6-27, 6-35 to 6-41. Accordingly, the Intervenors have failed to demonstrate a genuine dispute with the application, as required by 10 C.F.R. 2.309(f)(1)(vi). The Intervenors must read the pertinent portions of the COL application, including the ER, as well as the DEIS, identify specific issues, and present their opposing views. *See Millstone*,CLI-01-24, 54 NRC at 358 (citing 54 Fed. Reg. at 33,170-71). Because this contention both fails to directly controvert the application and mistakenly asserts that the application does not address a relevant issue, it may be dismissed on both grounds. 10 C.F.R. § 2.309(f)(1)(vi); *Southern Nuclear Operating Company* (Vogtle Electric Generating Plant, Units 3 and 4), LBP-09-03, 69 NRC 139, 154 (2009); *PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2*),* LBP-07-10, 66 NRC 1, 24 (2007) (internal citations omitted).

To the extent the Intervenors raise concerns that the fuel enrichment level and reactor power level of the ESBWR exceed the specifications in 10 C.F.R. § 51.52(a), and assert that

neither the ER nor the DEIS address these factors, the Intervenors have misunderstood both the requirements in 10 C.F.R. § 51.52 and Table S-4 and the analysis in both the ER and the DEIS. *See* Fermi DEIS Contention Filing at 36-37. As relevant here, Section 51.52 requires that a COL applicant include a statement in its ER that addresses the transportation of fuel and radioactive wastes to and from the reactor. 10 C.F.R. § 51.52. Applicants have the option to meet this requirement by indicating that the reactor and transportation of fuel and radioactive wastes to and from the reactor meet either all of the conditions in Section 51.52(a), or all of the conditions in Section 51.52(b). *Id*. If the reactor has a core thermal power level that does not exceed 3,800 megawatts, and the enrichment of its fuel does not exceed 4% by weight, and the reactor meets all other requirements in Section 51.52(a)(1)-(6), the Applicant may use the generic evaluation and impact determination in Table S-4, which provides a summary of the environmental impacts of the transportation of fuel and waste to and from one light-water-cooled nuclear power reactor. 10 C.F.R. § 51.52(a); Summary Table S-4 – Environmental Impacts of Transportation of Fuel and Wastes from One Light-Water-Cooled Nuclear Power Reactor. If a reactor does not meet all of the requirements in 10 C.F.R. § 51.52(a)(1)-(6), the ER must contain a full description and a detailed analysis of the environmental effects of transporting fuel and wastes to and from the reactor, including values for the environmental impact under normal conditions of transport, and the environmental risk from accidents during transport. 10 C.F.R. § 51.52(b). Thus, the Intervenors' apparent claim that Section 51.52 and Table S-4 set limits for the fuel that must be used in a reactor is not supported by the regulation.

Both the ER and the DEIS address each of the factors in 10 C.F.R. § 51.52(a)(1)-(6), and contain an analysis of the ESBWR and transportation of fuel and waste as prescribed by 10 C.F.R. § 51.52(b). However, the Intervenors neither cite to those analyses, nor raise any specific areas in which the Intervenors allege they are deficient. *See* ER at 3-60 to 3-70; DEIS at 6-17 to 6-41. As a result, the Intervenors have not demonstrated a material dispute with the DEIS. 10 C.F.R. § 2.309(f)(1)(vi). The Intervenors' imprecise reading of the Application, the

DEIS, or any other document does not generate an issue suitable for litigation in this licensing proceeding. *See Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 300 (1995). This contention both fails to directly controvert the application and mistakenly asserts that the application does not address a relevant issue, and therefore may be dismissed on both grounds.

3. *Safety issues related to radioactive emissions from normal reactor operations were addressed in the ESBWR DCD and the associated Staff safety evaluation, and related environmental impacts were addressed in the ER and DEIS. To the extent the Intervenors challenge the Applicant's referencing of the ESBWR, their arguments present an impermissible challenge to Commission regulations and have already been rejected by the Board*.

The Intervenors also argue that both the ER and DEIS lack an evaluation of the increased potential for higher levels of emissions of radioactivity in air and water from normal reactor operations. Fermi DEIS Contention Filing at 36. However, information concerning the emission of radioactive gaseous and liquid wastes during normal reactor operations is provided in the DCD, which the Staff evaluated in its ESBWR SER. The DCD contains an analysis of potential reactor accidents, and the effects thereon of fuel enrichment, which the NRC Staff reviewed and approved.[22] This information is referenced in the Fermi FSAR, which is Part 2 of the Fermi 3 COL Application. All of these documents were issued prior to the DEIS, and the Intervenors have not shown that that the DEIS contains data or conclusions "that differ significantly from the data or conclusions in the applicant's documents," as required by 10 C.F.R. § 2.309(f)(2).

Moreover, both the ER and the DEIS evaluate the environmental impacts of emissions of radioactivity in the air and in water from both normal operations and postulated accidents in their

[22] DCD at 4.2-1, 4.2-5, 4.2-9, 4.3-2, 4.4-7, 4.6-1, 4.6-4, 4.6-26, 4B-5, 4C-1, 4C-2, 5.1-1, 5.2-3, 5.2-31, 5.3-9, 5.3-13, 5.4-2, 5.4-3, 5.4-5, 5.4-6, 5.4-8, 5.4-17, 5.4-28, 5.4-30, 5.4-33, 5.4-35, 5.4-38; ESBWR Final Safety Evaluation Report (ESBWR SER) (March 10, 2011), ADAMS Accession No. ML103470210. *See also* Fermi 3 COL Application, Part 2: Final Safety Analysis Report, Rev. 3 (March 21, 2011) (Fermi FSAR).

respective chapters covering the environmental impacts of operations.[23] The Intervenors have neither referenced nor specifically challenged any of this information, but instead confine their citations to portions of the DEIS that address fuel cycle impacts. See Fermi DEIS Contention Filing at 36, citing DEIS at 6-19. Intervenors must read the pertinent portions of the COL application and the DEIS, identify specific issues, and present their opposing views. *See Millstone*, CLI-01-24, 54 NRC at 358 (citing 54 Fed. Reg. at 33,170-71). Because this contention both fails to directly controvert the application and mistakenly asserts that the application does not address a relevant issue, it may be dismissed on both grounds. *See* 10 C.F.R. § 2.309(f)(1)(vi).

The Intervenors also argue that the ER and DEIS are deficient because the ESBWR is not yet certified and has not been tested. Fermi DEIS Contention Filing at 37, 38, 41. By listing comparisons between the ESBWR and other reactor designs, and asserting that there is no discussion in the DEIS or ER of the increased risk of running the ESBWR, which Intervenors characterize as "untested," and "skeletally designed," and having "so many firsts," the Intervenors appear to be resubmitting arguments they raised in Contention 4, which asserted that the content of the ESBWR standard design "has yet to be established." *Compare* Fermi DEIS Contention Filing at 38, 41 *with* Intervention Petition at 47. NRC procedural rules specifically bar consideration of any contention that challenges NRC regulations, absent a petition for waiver in a specific proceeding. *See* 10 C.F.R. § 2.335(b). By raising such arguments, the Intervenors appear to impermissibly challenge 10 C.F.R. § 52.55(c), which allows a COL applicant to reference a design for which a design certification application has been docketed but for which the final design certification rulemaking has not been completed.[24]

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[23] *See* ER at 5-1, 5-16, 5-110, 5-111, 5-113, 5-115, 5-132, 5-134, 5-145, 5-148, 5-151, 5-154, 5-155, 5-188-89, 5-198, 5-212, 5-221-24; DEIS at 5-104 to 5-136.

[24] The Commission's policy regarding contentions in such cases states that any otherwise admissible contention challenging a DCD is to be held in abeyance until either the design certification rulemaking is complete or the applicant chooses to proceed in the absence of a final

In dismissing Contention 4 the Board has already rejected such arguments and to the extent the Intervenors resubmit those arguments in support of Contention 22, they should be similarly rejected. *See Fermi*, LBP-09-16, 70 NRC at 268-69.

4. *Proposed Contention 22 fails to provide the necessary factual or expert support with respect to its claims regarding design characteristics of the ESBWR, and does not provide a legal basis to support the argument that more analysis is required*.

This contention is also deficient because it is not supported by a factual basis or an expert opinion. The Intervenors quote from tables in the DCD that compare the ESBWR's design characteristics to those of other reactors, and state that the tables "suggest" why the ER and DEIS are deficient, but they do not explain why these facts support their assertions or provide a reasoned expert opinion to demonstrate that the DEIS is not sufficient and that additional details and analyses must be considered. Fermi DEIS Contention Filing at 37-40. The Intervenors' "'suggestions' or ideas of additional details or description that conceivably could be included" are not sufficient to support the admission of a contention; rather an admissible contention "must be based on alleged facts or expert opinion pointing to an actual error or deficiency . . . ." *USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 477 (2006). Bare assertions alleging that "matter[s] ought to be considered or that a factual dispute exists . . . [are] not sufficient"; rather, the Intervenors "must provide documents or other factual information or expert opinion that set forth the necessary technical analysis to show why the proffered bases support [their] contention." *Private Fuel Storage, L.L.C.,* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 180 (1998) (internal citation omitted). . Additionally, the Intervenors do not provide facts or an expert opinion to support their arguments and therefore do not meet the requirements in 10 C.F.R. § 2.309(f)(1)(v). Because the Intervenors have not identified specific portions of the DEIS in dispute, or provided support for

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rule on the issue. *See* Conduct of New Reactor Licensing Proceedings; Final Policy Statement, 73 Fed. Reg. 20,963, 20,972 (Apr. 17, 2008). However, the approach applies only to contentions that otherwise meet the requirements of 10 C.F.R. § 2.309.

their argument that omitted matters are required by law to be included by the DEIS, this contention should be dismissed pursuant to 10 C.F.R. § 2.309(f)(1)(v)-(vi).

5. *Portions of Proposed Contention 22 that deal with "positive void coefficient" lack a legal basis and fail to meet the pleading requirements of 10 C.F.R. § 2.309(f)(1)*.

The Intervenors further argue that because the ER and the DEIS both omit any discussion of the potential of an accident scenario resulting from a "positive void coefficient,"[25] critical information has been omitted from the NEPA process. Fermi DEIS Contention Filing at 40-41. However, the Intervenors do not provide a regulatory basis for this alleged requirement. In raising this argument, the Intervenors note that issues concerning void coefficients are described and discussed in the DCD, but they do not provide any regulatory authority to support their position that a discussion of "positive void coefficient" must be included in the DEIS. *Id*. For this reason, this argument does not support construing Contention 22 as a contention of omission. *See* 10 C.F.R. § 2.309(f)(1)(vi); *Pa'ina,* LBP-06-12, 63 NRC 403, 414 (2006). As explained more fully below, the contention also fails to demonstrate any inadequacy in the DEIS. [26]

[25] A "positive void coefficient" may occur during the operation of certain types of reactors when nuclear feedback characteristics do not compensate for rapid increases in reactivity. However, light-water-cooled reactors like the ESBWR have negative void coefficients under all but a few unique situations, none of which is relevant to the transportation of fuel. In any event, a discussion of "positive void coefficient" is irrelevant here because NRC's regulations prohibit certification of reactor designs with "positive void coefficient" characteristics, and the ESBWR provides for a net negative effect from reactivity coefficients and incorporates a negative void coefficient. 10 C.F.R. Part 50, Appendix B, General Design Criteria (GDC) 11; DCD Section 4.3.1.1 at 4B-5 to 4B-6.

[26] The Intervenors cite *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1216 (9th Cir. 1998), as support for their claims related to "positive void coefficient." Fermi DEIS Contention Filing at 41. However, this case does not support their arguments. In that case, the U.S. Forest Service, which regulates timber salvage sales of timber in national forests, awarded contracts for such sales based on an environmental assessment (EA), rather than an EIS, and did not identify the area of impact or reasonably foreseeable impacts. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d at 1210. In the present case, the Intervenors have not explained how the "positive void coefficient" issue they raise is relevant to the ESBWR design, let alone how it represents a deficiency in the DEIS analysis.

First, although the Intervenors claim that the DEIS is deficient because it does not contain an evaluation of "positive void coefficient," they have not provided a specific statement of the issue they raise or explained the basis for their argument as required by 10 C.F.R. § 2.309(f)(1)(i), (ii). Contention 22 also lacks a factual basis or expert opinion to show that "positive void coefficient" is relevant to the DEIS's evaluation of transportation impacts or accidents, as required by 10 C.F.R. § 2.309(f)(1)(v). The Intervenors argue that the DEIS's omission of this information deprives them of the opportunity to conduct their own investigation with engineering experts, or comment meaningfully under NEPA, but do not explain why this information is pertinent to the environmental review. Fermi DEIS Contention Filing at 40-41. Because the Intervenors have not provided a factual basis or expert opinion to support their contention, it should be dismissed. 10 C.F.R. § 2.309(f)(1)(v).

In sum, Proposed Contention 22 is based on information that was previously available, and the Intervenors have not demonstrated good cause for not raising these issues earlier. 10 C.F.R. §§ 2.309(c), 2.309(f)(2). Additionally, the Intervenors have not identified specific portions of the DEIS in dispute, provided a basis for their arguments additional analysis is required in the DEIS, demonstrated a material dispute with the DEIS, or provided a legal basis, facts or an expert opinion to support their arguments. 10 C.F.R. § 2.309(f)(1)(i), (ii), (v), (vi). The Intervenors also appear to impermissibly challenge a Commission regulation, in violation of 10 C.F.R. § 2.335(a). Contention 22 should therefore be dismissed.

G. Proposed Contention 23

> The high-voltage transmission line portion of the project involves a lengthy corridor which is inadequately assessed and analyzed in the Draft Environmental Impact Statement.

In this contention, the Intervenors argue that because the proposed transmission line corridor may be up to 300 feet wide and will cross 80 wetlands and other bodies of water, NRC's evaluation of environmental impact is deficient, and its determination that the impacts will be minimal or small is not credible. Fermi DEIS Contention Filing at 41-42. The Intervenors

also criticize the fact that the NRC's analysis of the environmental impacts of the proposed transmission line is discussed in several different sections of the DEIS. *Id*.

Staff Response: As described more fully below, this contention is inadmissible for several reasons. First, impacts associated with transmission lines were discussed in the ER and the Intervenors have not shown that the data and conclusions in the DEIS "differ significantly from the data and conclusions in the Applicant's documents," as required for new and amended contentions under 10 C.F.R. § 2.309(f)(2). Nor have the Intervenors shown good cause for nontimely filing under 10 C.F.R. §§ 2.309(c) or addressed any of the other factors that would justify their waiting until now, almost a year after the most recent revision of the ER was issued, to raise these issues. Furthermore, to the extent the Intervenors challenge either the Commission's definition of construction or the substantive decisions of other regulatory agencies as to which mitigation measures to implement, enforce, monitor or modify, this contention is an impermissible challenge to NRC regulations and outside the scope of this proceeding. 10 C.F.R. §§ 2.335(a), 2.309(f)(1)(iii). The Intervenors also fail to raise specific challenges to mitigation measures and impacts described in both the ER and the DEIS, or provide a factual basis or expert opinion to support their position that more is required. 10 C.F.R. § 2.309(f)(1)(v),(vi). For these reasons, Contention 23 should be dismissed.

1. *Intervenors fail to demonstrate that Contention 23 is based on new, materially different or previously unavailable information and do not provide good cause for its late filing*.

The ER describes onsite and offsite transmission corridors and identifies potential environmental impacts related to onsite and offsite transmission lines.[27] All of this information

[27] ER at 1-4 to 1-6; 1-10; 2-2, 2-10, 2-20 to 2-26, 2-30, 2-41 to 2-43, 2-53; 3-1, 3-3, 3-57 to 3-58; 4-2, 4-4, 4-12 -4-21, 4-23, 4-30 to 4-31, 4-41 to 4-43, 4-46, 4-49 to 4-52, 4-56 to 4-58, 4-64, 4-127 to 4-128, 4-136, 4-139 to 4-143, 4-146 to 4-152, 4-155; 5-1, 5-2, 5-5 to 5-9, 5-18, 5-48, 5-135, 5-142, 5-161, 5-191, 5-202 to 5-206, 5-210 to 5-211, 5-215 to 5-218; 6-44 to 6-45; 9-1, 9-3, 9-5, 9-10, 9-16, 9-25, 9-30, 9-51, 9-54, 9-58, 9-60 to 9-62, 9-67, 9-71 to 9-72, 9-81, 9-83, 9-85, 9-87, 9-93, 9-94, 9-100 to 9-101; 10-1 to 10-4, 10-7 to 10-8, 10-11, 10-13, 10-17, 10-18, 10-23 to 10-25, 10-28.

has been available at least since March 2011, when the Applicant submitted Revision 2 of the ER. *Id*. The DEIS includes descriptions of transmission line corridors and potential environmental impacts from building transmission lines that do not differ materially from any information on these subjects in the ER.[28] Because the Intervenors have not demonstrated that data or conclusions in the DEIS regarding transmission line corridors or potential environmental impacts related to building transmission lines "differ significantly from the data and conclusions in the Applicant's documents," this contention fails to meet the standards of 10 C.F.R. § 2.309(f)(2) and is therefore untimely. The contention is also inadmissible under the standards for nontimely contentions under 10 C.F.R. § 2.309(c). The first and most important element of Section 2.309(c) is whether the Intervenor has demonstrated "good cause" for filing late. *Private Fuel Storage,* CLI-00-2, 51 NRC at 79 . Here, the Intervenors provide no cause for filing late, and have not attempted to address the other factors in § 2.309(c). For these reasons, this contention is also inadmissible under 10 C.F.R. § 2.309(c).

2. *Challenges to the NRC's definition of construction or to the review processes of other permitting authorities are outside the scope of this proceeding*.

The Intervenors have not demonstrated that their criticisms regarding the designation of transmission lines as preconstruction activities are within the scope of this action, as required by 10 C.F.R. § 2.309(f)(1)(iii). *See* Fermi DEIS Contention Filing at 47. Under the Commission's rules, construction of a nuclear power plant does not include building transmission lines or environmental mitigation measures associated with site preparation, which are outside the Commission's regulatory authority. *See* 10 C.F.R. §§ 50.10(a)(2)(iii) and(vii), 51.4; Limited

[28] DEIS at 1-6; 2-10, 2-45, 2-47, 2-58, 2-60, 2-64, 2-80, 2-123, 2-205 to 2-209, 2-232 to 2-234; 3-1, 3-2, 3-17 to 3-19, 3-26 to 3-31, 3-38; 4-8, 4-27 to 4-29, 4-39 to 4-42, 4-49, 4-52 to 4-54, 4-57, 4-100, 4-120, 4-122; 5-1, 5-4, 5-16 to 5-17, 5-20 to 5-24, 5-38 to 5-50, 5-53, 5-55, 5-85 to 5-86, 5-89 to 5-90, 5-98, 5-100 to 5-104, 5-137 to 5-142; 7-3, 7-7 to 7-8, 7-18 to 7-19, 7-21 to 7-22, 7-31 to 7-32, 7-36, 7-37, 7-46; 8-1 to 8-11; 9-4, 9-7, 9-16, 9-22, 9-24, 9-27, 9-31, 9-32, 9-40 to 9-44, 9-47 to 9-51, 9-61 to 9-62, 9-65 to 9-66, 9-100, 9-103 to 9-105, 9-113, 9-124, 9-126, 9-128 to 9-131, 9-135, 9-137, 9-141 to 9-142, 9-148 to 9-156.

Work Authorizations for Nuclear Power Plants, Final Rule, 72 Fed. Reg. 57,416, 57,417, 57,429, 57,432 to 57,433 (Oct. 9, 2007).

The ER describes onsite and offsite transmission corridors, identifies potential environmental impacts related to onsite and offsite transmission lines, estimates which impacts are related to NRC-regulated construction and which impacts are preconstruction, and correctly states that building service facilities such as transmission lines constitute pre-construction activities over which NRC has no regulatory authority. ER at 4-2; *see also* n.27 *supra*. The COL Application states that the International Transmission Company (ITC Transmission) owns and operates the transmission system. Application, Part 1 at 1-4 to 1-6. The ER also explains that ITC Transmission owns transmission lines exiting the Fermi switchyard and proposes to service the Fermi 3 station through the installation of three new transmission lines, and notes that the Applicant has no control over the construction or operation of the transmission system.[29] Additionally, the ER describes potential environmental impacts and a reasonable expectation that ITC Transmission would follow standard industry practices. ER at 4-12. The approach the Applicant followed in the ER is consistent with the Environmental Standard Review Plan, NUREG-1555 (ESRP), which provides:

> In some cases transmission lines may be constructed and operated by an entity other than the applicant. In such cases, impact information may be limited and the reviewer should proceed with the assessment using the information that can be obtained.

ESRP § 4.1.2 (citied in ER at 4-12).

[29] ER at 1-4 to1-5; 2-2; 10-1. The ER states that: "The Fermi site, including the 120 kV and 345 kV transmission switchyard sites, are owned and operated by Detroit Edison, while the transmission system (including switchyard equipment) from the switchyard outward from the Fermi site is owned and maintained by the International Transmission Company (ITCTransmission). There are easements on Fermi property granted to ITCTransmission for the 345 kV and 120 kV transmission lines as they leave their respective switchyards. Transmission lines over the Fermi site and along the entire transmission corridor routes run within ITC*Transmission* easements." ER at 2-2.

Similar to the ER, the DEIS explains that preconstruction activities such as building transmission lines are outside the NRC's regulatory authority. DEIS at 1-6; 4-8. The DEIS also explains that ITC Transmission would seek a USACE permit for the construction of the portion of the transmission lines that may cross navigable waters or wetlands and would be expected to observe all industry standards for best environmental practices. *Id*.

In challenging the adequacy of the ER and DEIS's discussion of the impacts of building transmission lines, the Intervenors assert that "DTE should be made to disclose precisely where the transmission line corridor will be, before this proceeding continues any further" because the development of transmission line corridors is "part and parcel" of the Fermi 3 proposal. Fermi DEIS Contention Filing at 44. The Intervenors also suggest their disagreement with the DEIS's characterization of transmission line activities as preconstruction. *Id.* at 47.

To the extent Contention 23 amounts to a challenge to the Commission's definition of construction and the scope of its regulatory authority, this contention must be dismissed. [30] Contentions challenging the validity of NRC regulations are inadmissible under 10 C.F.R. §2.335(a). *Commonwealth Edison Co.* (Byron Nuclear Power Station, Units 1 and 2), LBP-80-30, 12 NRC 683, 692-93 (1980). A contention presents an impermissible challenge to the Commission's regulations by seeking to impose requirements in addition to those set forth in the regulations, and should in such cases be dismissed. *See Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-87-12, 26 NRC 383, 395 (1987) (contentions reinterpreting the EPZ rule amounted to an impermissible challenge to the rule).

The Intervenors also have not demonstrated that contentions challenging the regulatory decisions of other agencies, such as USACE and the State of Michigan, to implement, enforce,

[30] The Intervenors previously challenged the Commission's limited work authorization (LWA) rule by arguing that the Commission should not permit any construction prior to the completion of the EIS, and the Board rejected that contention as an impermissible challenge to a regulation. *See Fermi*, LBP-09-16, 70 NRC at 268. To the extent the Intervenors now challenge the Commission's definition of construction, which is included in the LWA rule, this contention should also be dismissed. 10 C.F.R. §§ 2.335(a), 50.10(a), 51.4.

monitor, or modify mitigation plans, are within the scope of this proceeding. 10 C.F.R. § 2.309(f)(1)(iii); see *PPL Susquehanna LLC*, LBP-07-10, 66 NRC at 23; *see also* Sections III.A.2 and III.E.3 *supra.* For example, the Intervenors assert that the DEIS must contain more detailed discussion of other permits and state laws. Fermi DEIS Contention Filing at 50-51. Because the Intervenors have not identified a legal basis for this assertion, nor explained why any particular analysis or conclusion in the DEIS is deficient without more discussion of any particular permit or law, this contention should be dismissed. 10 C.F.R. § 2.309(f)(1)(iii)-(iv) and (vi).

3. *The Intervenors do not challenge specific portions of the ER or DEIS, provide facts or expert opinions to support their contention, or demonstrate a genuine issue of law or fact concerning compensatory mitigation measures*.

As in Contention 17, above, the Intervenors argue that the DEIS's descriptions of terrestrial and wetland mitigation plans are insufficient and inadequate. However, as explained further below, they do not identify with any specificity which mitigation measures discussed in the DEIS are insufficient or inadequate, and therefore have not met the requirements of 10 C.F.R. § 2.309(f)(1)(vi). A contention that does not contain sufficient information to show that a genuine dispute exists with the Applicant on a material issue of law or fact and does not include references to the specific portions of the Application or DEIS that the Intervenors dispute is inadmissible. *See Comanche Peak,* LBP-92-37, 36 NRC at 384.. Additionally, the Intervenors provide no factual basis or expert opinion to support their argument that the DEIS is inadequate and deficient. The Intervenors are obligated to examine the publicly available material relating to Fermi 3 with sufficient care to enable them to uncover specific information that can support their contention, for neither Section 189a of the Atomic Energy Act nor 10 C.F.R. § 2.309 permit the Intervenors to file a vague, nonspecific contention and flesh it out later during discovery. *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982), *vacated in part on other grounds*, CLI-83-19, 17 NRC 1041 (1983). Because the Intervenors offer "no tangible information, no experts, no substantive affidavits,' but instead only

'bare assertions and speculation[,]'" this contention is inadmissible under 10 C.F.R. § 2.309(f)(1)(v)-(vi). *See William States Lee*, LBP-08-17, 67 NRC at 441 (quoting *Fansteel*, CLI-03-13, 58 NRC at 203).

While the Intervenors cite to portions of the DEIS that describe the site layout and the area surrounding the site, and suggest general dissatisfaction with the DEIS's description of the transmission line corridor and the associated cumulative impacts analysis, the Intervenors fail to explain any specific challenge to either the DEIS's description of potential environmental impacts or its conclusions regarding construction and operation of the proposed plant, which form the basis for the cumulative impacts analysis. Fermi DEIS Contention Filing at 42-51. The DEIS's cumulative impacts analysis combines the environmental impacts from construction and operation of the proposed plant with impacts of other past, present, and reasonably foreseeable future actions in the general area surrounding the Fermi site. DEIS at 7-2. While the Intervenors repeatedly criticize the adequacy of the cumulative impacts analysis in Chapter 7, they do not specifically identify flaws in any of the descriptions, analyses, or conclusions in Chapters 4 and 5 of the DEIS, which Chapter 7 summarizes. Fermi DEIS Contention Filing at 42. For instance, both the ER and the DEIS indicate that mitigation for the unavoidable impacts to wetlands on the Fermi site will be conducted as prescribed by the USACE and MDEQ in the context of the USACE and Michigan Wetlands Protection Permit processes, and that no impacts to wetlands from offsite transmission activities are expected. ER at 6-45; DEIS at 4-8 to 4-9. The Intervenors cite selectively to the DEIS to support assertions that the DEIS is inadequate, deficient, or "not credible," for example by citing to the site description in Chapter 2 of the DEIS and ignoring discussions of impacts in other chapters. *See, e.g.*, Fermi DEIS Contention Filing at 42. While the Intervenors repeatedly suggest that the DEIS is premature and that more information should be provided, they fail to directly contradict the basis for any particular analysis or conclusion in the DEIS and ignore several portions of the DEIS that analyze impacts in the T-line corridors and explain the Staff's conclusion. DEIS at 4-8 to 4-9; 4-27 to 4-36; 4-39

to 4-44; 4-49 to 4-57; 4-99 to 4-100; 4-120 to 4-126; 5-3 to 5-45-20 to 5-25; 5-38 to 5-39.The contention does not, therefore, demonstrate a genuine dispute with the DEIS on a material issue of fact or law, as required by 10 C.F.R. § 2.309(f)(1)(vi). The Intervenors also do not provide any facts or expert opinions to support their position that the DEIS is inadequate and that more analysis of pre-construction impacts from building transmission lines is needed. The contention should therefore also be dismissed for failing to meet the requirements in 10 C.F.R. § 2.309(f)(1)(v).

The Intervenors also allude in Contention 23 to "social and environmental justice, as well as human rights and religious freedom issues" and "treaty rights." Fermi DEIS Contention Filing at 51. As a threshold matter, the Intervenors fail to cite any particular statute or regulation that the NRC has not met, and thus do not identify the legal basis for their claim. Moreover, the Intervenors fail to acknowledge, let alone specify a dispute with, the analysis in the DEIS of impacts to historic and cultural resources, or the analysis of environmental justice impacts. DEIS at 2-179 to 2-208; 4-92 to 4-100; 5-84 to 5-90; 7-30 to 7-32; 9-118 to 9-130; 9-172 to 9-181; 9-224 to 9-234; 9-976 to 9-287; 10-17. They therefore fail to meet the requirements of 2.309(f)(1)(vi).

4. *Admitted Contention 8 already encompasses onsite environmental impacts to the eastern fox snake and the Intervenors' attempt to expand the contention to include offsite transmission corridor impacts is both untimely and unsupported.*.

The Intervenors assert that Table 2-9 of the DEIS, p. 2-61, shows the state-listed and federally-listed species, including the eastern fox snake, that are present in counties that may be crossed by potential transmission line corridors. Fermi DEIS Contention Filing at 46-47. The Board has already admitted Contention 8, which addresses onsite environmental impacts from construction to the eastern fox snake, for hearing in this proceeding. *Fermi*, LBP-09-16, 70 NRC at 286. In Contention 23, the Intervenors appear to seek to expand the bases of Contention 8 to include potential environmental impacts to the eastern fox snake from building new offsite transmission lines, which the Intervenors note cross habitats regulated by the

USACE and/or MDEQ that the transmission lines would cross. Fermi DEIS Contention Filing at 45-46. However, the Intervenors fail to explain why this challenge is based on data or conclusions in the DEIS that differ from those in the ER or why it is otherwise based on materially different information that was not previously available, as required by 10 C.F.R. § 2.309(f)(2). Moreover, the Intervenors fail to provide facts or other expert opinion to support a claim that impacts to the eastern fox snake associated with the building of transmission line corridors have been inadequately analyzed. Therefore, the Intervenors have not met the necessary requirements to support expanding Contention 8 to address potential environmental impacts to the eastern fox snake from building new offsite transmission lines. 10 C.F.R. § 2.309(f)(1).

For the reasons set forth above, the Intervenors have not demonstrated that the information in the DEIS upon which this contention is based contains data or conclusions that "differ significantly from the data or conclusions in the applicant's documents" or.that the contention is otherwise based on information that is new, materially different, and not previously available, as required by 10 C.F.R. § 2.309(f)(2). Nor have they demonstrated good cause or addressed other late-filing factors to support submitting this contention almost a year after the ER was issued, as required for nontimely filings under 10 C.F.R. §§ 2.309(c). Additionally, the Intervenors have not demonstrated that other state and federal agencies' determinations as to specific mitigation plans in offsite transmission corridors are within the scope of this proceeding, and they appear to impermissibly challenge the Commission's definition of construction. C.F.R. §§ 2.309(f)(1)(iii), (vi); 2.335(a); 50.10(a)(1)-(2); 51.4. Further, the Intervenors do not challenge the adequacy of the mitigation measures described in the ER or the DEIS, or provide factual or expert support to indicate that additional mitigation measures must be discussed in the DEIS. 10 C.F.R. § 2.309(f)(1)(v), (vi). The Staff therefore opposes the admission of Contention 23 and recommends that it be rejected.

H. Proposed Contention 24

> The public health effects and impacts from routine, licensed radiological emissions in air and water from the proposed Fermi 3 have been inadequately assessed, analyzed and disclosed in the Draft Environmental Impact Statement, in violation of NEPA.

Fermi DEIS Contention Filing at 52. Although the statement of Proposed Contention 24 focuses on radiological emissions, the contention text itself raises two issues. First, the Intervenors allege that "the chemical contents of the water vapor emitted from the cooling towers is unknown," and that the environmental impact of water vapor emitted from the cooling towers therefore cannot be assessed. *Id*. at 52-53. Second, the Intervenors supply a quotation from the DEIS that includes a paragraph related to the linear, no threshold dose response model of radiation doses, *id*. at 53, citing DEIS § 5.9.3.2 Population Dose, and appends a report by Joseph Mangano related to cancer epidemiology. Potential Health Risks Posed by Adding a New Reactor at Fermi Plant (Jan. 6, 2012) (Mangano Report). The Intervenors say that the Mangano report is "incorporated by reference" into Proposed Contention 24, but do not reference specific portions in their text. Fermi DEIS Contention Filing at 54.

Staff Response: Neither argument raised in Proposed Contention 24 constitutes an admissible contention. Both are nontimely, and the contention challenges neither the air quality analysis nor the radiological health analysis in the DEIS. For these reasons, Proposed Contention 24 should be rejected.

1. *Proposed Contention 24 is nontimely and does not challenge any portion of the air quality analysis in the DEIS, and therefore fails to raise an admissible issue*.

According to the Intervenors, the total dissolved solids in cooling tower drift water "were assumed to be salt." Fermi DEIS Contention Filing at 53. The Intervenors assert that the cooling tower drift may include other chemicals, "many of which could be far more environmentally destructive than salt and could appreciably contribute to the $PM_{2.5}$ emissions from the cooling towers." *Id*. This portion of the contention does not allege that any of the "data and conclusions" in the DEIS "differ significantly from the data and conclusions in the applicant's

documents," and therefore fails to meet the timeliness requirements of 10 C.F.R. § 2.309(f)(2) and the Board's Scheduling Order. The Applicant's ER includes an analysis of cooling water drift deposition, *see* ER at 5-43 to 5-48, and the Intervenors have not pointed to any portion of the DEIS that is alleged to be different. Accordingly, this portion of Proposed Contention 24 could have been filed at any time following publication of the ER, and is not timely at this stage of the proceeding.

Furthermore, this portion of the contention does not cite to or challenge any portion of the air quality impact analysis in the DEIS. *See* DEIS at 5-93 to 5-97. This analysis includes both cooling tower drift and $PM_{2.5}$. The Intervenors do not raise any specific claim related to this analysis, and do not provide any form of factual or expert support in support of any such claim. Accordingly, this portion of Proposed Contention 24 fails to demonstrate the existence of a genuine dispute, or to provide a basis or the required degree of support for an admissible contention. This portion of the contention should therefore be dismissed pursuant to 10 C.F.R. § 2.309(f)(1)(ii), (v), and (vi).

2. *Proposed Contention 24 is nontimely and fails to challenge any portion of the radiological health effects analysis in the DEIS, and therefore fails to raise an admissible issue*.

The Intervenors' statements regarding the radiological health portion of Proposed Contention 24 are very brief, given that this portion of the contention consists primarily of a block quotation from the DEIS that includes a paragraph related to the linear, no-threshold dose-response model for radiation doses. Fermi DEIS Contention Filing at 53, citing DEIS § 5.9.3.2. The remaining text of the contention describes the Mangano Report, and the contention concludes with a statement from that report that more research and a more comprehensive public education effort is needed prior to reactor licensing. *Id*. at 54. The Mangano Report is "incorporated by reference," although no specific citations to any part of it are included in the contention. *Id*.

This portion of the contention does not allege that any of the "data and conclusions" in the DEIS "differ significantly from the data and conclusions in the applicant's documents," and therefore fails to meet the timeliness requirements of 10 C.F.R. § 2.309(f)(2) and the Board's Scheduling Order. The Applicant's ER includes an analysis of radiological health effects of reactor operation, *see* ER at 5-110 to 5-115, and the Intervenors have not pointed to any portion of the DEIS that is alleged to be different. Accordingly, this portion of Proposed Contention 24 could have been filed at any time following publication of the ER, and is not timely at this stage of the proceeding.

Furthermore, this portion of the contention does not challenge any portion of the radiological health effects analysis in the DEIS. *See* DEIS at 5-104 to 5-107. The Intervenors do not assert that any portion of the analysis is inadequate or incorrect, and do not allege that any legal dose limit is likely to be exceeded. The Mangano Report, attached as support for the contention, relates to actual and potential emissions from Fermi Unit 2 and argues that a decline in various measures of health status in Monroe County, Michigan, is due to operation of that facility. *See* Mangano Report at 12-20. Neither the report nor the contention explains how these assertions about Unit 2 are relevant to the assessment of potential impacts from Unit 3. The Mangano Report, like the contention text itself, does not raise any specific claim related to the DEIS (let alone challenge any particular analysis or conclusion in it) or provide factual or expert support in support of any such claim. Accordingly, this portion of Proposed Contention 24 fails to demonstrate the existence of a genuine dispute, or to provide a basis or the required degree of support for an admissible contention. This portion of the contention should therefore be rejected pursuant to 10 C.F.R. § 2.309(f)(1)(ii), (v), and (vi).

CONCLUSION

Aside from issues already admitted as contentions in this proceeding and resubmitted in response to the publication of the DEIS, none of the contentions in the Fermi DEIS Contention

Filing meets the admissibility requirements of 10 C.F.R. § 2.309(f)(1). In addition, most do not meet the timeliness requirement of 10 C.F.R. § 2.309(f)(2) because they are not based on data and conclusions in the DEIS that "differ significantly from the data and conclusions" in the Applicant's ER. Accordingly, they should be rejected.

Respectfully Submitted,

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Dated at Rockville, Maryland
this 6th day of February, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the NRC STAFF ANSWER TO INTERVENORS' MOTION TO ADMIT NEW CONTENTION REGARDING THE SAFETY AND ENVIRONMENTAL IMPLICATIONS OF THE NRC TASK FORCE REPORT ON THE FUKUSHIMA DAI-ICHI ACCIDENT have been served upon the following persons by Electronic Information Exchange and electronic mail this 6th day of September, 2011:

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