

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Beyond Nuclear, Inc.,)	Case No. 15-1173
Petitioner,)	
-vs-)	
U.S. Nuclear Regulatory Commission)	
and United States of America,)	
Respondents.)	

**UNDERLYING DECISIONS FROM WHICH
APPEAL OR PETITION ARISES**

Pursuant to the Court’s Order of June 22, 2015, Petitioner Beyond Nuclear hereby submits copies of the underlying decisions from which this Petition for Review arises:

- > Nuclear Regulatory Commission: DTE Electric Company; Fermi Unit 3 Combined License and Record of Decision; Issuance, 80 Fed. Reg. 26,302 (May 7, 2015) (Attachment 1);
- > NRC Commission Memorandum and Order CLI-15-13 (Apr. 30, 2015) (“Memorandum and Order CLI-15-13”) (Attachment 2);

26302

Federal Register / Vol. 80, No. 88 / Thursday, May 7, 2015 / Notices

**ENTERGY NUCLEAR VERMONT
YANKEE, LLC AND ENTERGY
NUCLEAR OPERATIONS, INC.
(Vermont Yankee Nuclear Power
Station)**

This proceeding involves an application by Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. for a license amendment for the Vermont Yankee Nuclear Power Station, which is located in Vernon, Vermont. In response to a notice filed in the **Federal Register**, see 80 FR 8,355, 8,359 (Feb. 17, 2015), a hearing request was filed on April 20, 2015 by the State of Vermont.

The Board is comprised of the following administrative judges:

William J. Froehlich, Chairman,
Atomic Safety and Licensing Board
Panel, U.S. Nuclear Regulatory
Commission, Washington, DC 20555–
0001.

Dr. Michael F. Kennedy, Atomic
Safety and Licensing Board Panel, U.S.
Nuclear Regulatory Commission,
Washington, DC 20555–0001.

Dr. Richard E. Wardwell, Atomic
Safety and Licensing Board Panel, U.S.
Nuclear Regulatory Commission,
Washington, DC 20555–0001.

All correspondence, documents, and
other materials shall be filed in
accordance with the NRC E-Filing rule.
See 10 CFR 2.302.

Rockville, Maryland,
Dated: May 1, 2015.

E. Roy Hawken,

*Chief Administrative Judge, Atomic Safety
and Licensing Board Panel.*

[FR Doc. 2015-11039 Filed 5-6-15; 8:45 am]

BILLING CODE 7590-01-P

**NUCLEAR REGULATORY
COMMISSION**

[Docket No. 52–033; NRC–2008–0566]

DTE Electric Company; Fermi 3

AGENCY: Nuclear Regulatory
Commission.

ACTION: Combined license and record of
decision; issuance.

SUMMARY: The U.S. Nuclear Regulatory
Commission (NRC) is providing notice

of the issuance of Combined License
(COL), NPF–95 to DTE Electric
Company (DTE, formerly Detroit Edison
Company) and Record of Decision.

ADDRESSES: Please refer to Docket ID
NRC–2008–0566 when contacting the
NRC about the availability of
information regarding this document.
You may access publicly-available
information related to this document
using any of the following methods:

- *NRC's Agencywide Documents
Access and Management System
(ADAMS):* You may obtain publicly-
available documents online in the
ADAMS Public Documents collection at
[http://www.nrc.gov/reading-rm/
adams.html](http://www.nrc.gov/reading-rm/adams.html). To begin the search, select
“ADAMS Public Documents” and then
select “Begin Web-based ADAMS
Search.” For problems with ADAMS,
please contact the NRC's Public
Document Room (PDR) reference staff at
1–800–397–4209, 301–415–4737, or by
email to pdr.resource@nrc.gov. The
ADAMS accession number for each
document referenced in this document
(if that document is available in
ADAMS) is provided at the end of this
document.

- *NRC's PDR:* You may examine and
purchase copies of public documents at
the NRC's PDR, Room O1–F21, One
White Flint North, 11555 Rockville
Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT:

Adrian Muñiz, Office of New Reactors,
U.S. Nuclear Regulatory Commission,
Washington, DC 20555–0001; telephone:
301–415–4093, email: Adrian.Muniz@nrc.gov
regarding safety matters; or
Mallecia Sutton, at 301–415–0673,
email: Mallecia.Sutton@nrc.gov
regarding environmental matters.

SUPPLEMENTARY INFORMATION:

I. Introduction

Under section 2.106 of Title 10 of the
Code of Federal Regulations (10 CFR),
the NRC is providing notice of the
issuance of COL NPF–95 to DTE and,
under 10 CFR 51.102(c), the Record of
Decision (ROD). With respect to the
application for the COL filed by DTE,
the NRC finds that the applicable
standards and requirements of the
Atomic Energy Act of 1954, as amended,

and the Commission's regulations have
been met. The NRC finds that any
required notifications to other agencies
or bodies have been duly made and that
there is reasonable assurance that the
facility will be constructed and will
operate in conformity with the license,
as amended, the provisions of the Act,
and the Commission's regulations.
Furthermore, the NRC finds that the
licensee is technically and financially
qualified to engage in the activities
authorized, and that issuance of the
license will not be inimical to the
common defense and security or to the
health and safety of the public. Finally,
the NRC finds that the findings required
by subpart A of 10 CFR part 51 have
been made.

Accordingly, the COL was issued on
May 1, 2015, and is effective
immediately.

II. Further Information

The NRC has prepared a Final Safety
Evaluation Report (FSER) and Final
Environmental Impact Statement (FEIS)
that document the information reviewed
and NRC's conclusion. The Commission
has also issued its Memorandum and
Order documenting its final decision on
the uncontested hearing held on
February 4, 2015, which serves as the
Record of Decision ROD in this
proceeding. The NRC also prepared a
document summarizing the ROD to
accompany its action on the COL
application that incorporates by
reference materials contained in the
FEIS. In accordance with 10 CFR 2.390
of the NRC's “Rules of Practice,” details
with respect to this action, including the
FSER FEIS, Summary ROD, and
accompanying documentation included
in the combined license package, as
well as the Commission's hearing
decision and ROD, are available online
in the ADAMS Public Documents
collection at [http://www.nrc.gov/
reading-rm/adams.html](http://www.nrc.gov/reading-rm/adams.html). From this site,
persons can access the NRC's ADAMS,
which provides text and image files of
NRC's public documents.

The ADAMS accession numbers for
the documents related to this notice are:

ML14296A540	“Final Safety Evaluation Report for Combined Licenses for Enrico Fermi Unit 3”.
ML12307A172, ML12307A176, ML12307A177, and ML12347A202.	NUREG–2105, “Final Environmental Impact Statement for the Combined License for Enrico Fermi Unit 3”.
ML14308A337	DTE COL Application—Revision 8 of the application.
ML15120A040	Commission's Memorandum and Order on the uncontested hearing (Record of Decision).
ML15120A221	Summary of the Record of Decision.
ML15084A160	Combined License No. NPF–95.

Dated at Rockville, Maryland, this 1st day of May 2014.

For the Nuclear Regulatory Commission.

Mark Delligatti,

Deputy Director, Division of New Reactor Licensing, Office of New Reactors.

[FR Doc. 2015-11038 Filed 5-6-15; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

[NRC-2015-0048]

Compliance With Phase 2 of Order EA-13-109

AGENCY: Nuclear Regulatory Commission.

ACTION: Interim staff guidance; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing its Japan Lessons-Learned Division Interim Staff Guidance (JLD-ISG), JLD-ISG-2015-01, "Compliance with Phase 2 of Order EA-13-109, Order Modifying Licenses with Regard to Reliable Hardened Containment Vents Capable of Operation under Severe Accident Conditions." This ISG provides guidance and clarifies the Phase 2 requirements in the order to assist the licensees that have Boiling Water Reactors (BWRs) with Mark I and Mark II containments in the design and implementation of either a vent path from the containment drywell or a strategy that makes it unlikely that venting would be needed from the drywell before alternate reliable containment heat removal and pressure control is reestablished. This ISG also endorses, with clarifications, the industry guidance contained in Nuclear Energy Institute (NEI) 13-02, "Industry Guidance for Compliance with Order EA-13-109," Revision 1.

ADDRESSES: Please refer to Docket ID NRC-2015-0048 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document by using any of the following methods:

- **Federal Rulemaking Web site:** Go to <http://www.regulations.gov> and search for Docket ID NRC-2015-0048. Address questions about NRC dockets to Carol Gallagher; telephone: 301-415-3463; email: Carol.Gallagher@nrc.gov. For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

- **NRC's Agencywide Documents Access and Management System (ADAMS):** You may obtain publicly-available documents online in the

ADAMS Public Documents collection at <http://www.nrc.gov/reading-rm/adams.html>. To begin the search, select "ADAMS Public Documents" and then select "Begin Web-based ADAMS Search." For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1-800-397-4209, 301-415-4737, or by email to pdr.resource@nrc.gov. The ADAMS accession number for each document referenced (if it available in ADAMS) is provided the first time that a document is referenced. The JLD-ISG-2015-01 is available in ADAMS under Accession No. ML15104A118. The ISG for complying with Phase 1 requirements of the order (JLD-ISG-2013-02) was issued on November 14, 2013 (ADAMS Accession No. ML13304B836). The NEI 13-02, Revision 1 is available in ADAMS under Accession No. ML15113B318.

- **NRC's PDR:** You may examine and purchase copies of public documents at the NRC's PDR, Room O1-F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

- **NRC's Interim Staff Guidance Web site:** JLD-ISG documents are also available online under the "Japan Lessons Learned" heading at <http://www.nrc.gov/reading-rm/doc-collections/isg/japan-lessons-learned.html>.

FOR FURTHER INFORMATION CONTACT:

Rajender Auluck, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; telephone: 301-415-1025; email: Rajender.Auluck@nrc.gov.

SUPPLEMENTARY INFORMATION: The NRC developed JLD-ISG-2015-01 to provide guidance and clarification to assist nuclear power reactor licensees with the identification of methods needed to comply with Phase 2 requirements in Order EA-13-109 (ADAMS Accession No. ML13130A067), "Order Modifying Licenses with Regard to Reliable Hardened Containment Vents Capable of Operation under Severe Accident Conditions." This ISG is not a substitute for the requirements in Order EA-13-109, and compliance with the ISG would not be a requirement.

The accident at the Fukushima Dai-ichi nuclear power station reinforced the importance of reliable operation of containment vents for BWR plants with Mark I and Mark II containments. As part of its response to the lessons learned from the accident, on March 12, 2012, the NRC issued Order EA-12-050 (ADAMS Accession No. ML12056A043) requiring licensees to upgrade or install a reliable hardened containment venting system (HCVS) for Mark I and Mark II

containments. While developing the requirements for Order EA-12-050, the NRC acknowledged that questions remained about maintaining containment integrity and limiting the release of radioactive materials if licensees used the venting systems during severe accident conditions.

The NRC staff on November 26, 2012, presented the Commission with options to address these issues in SECY-12-0157, "Consideration of Additional Requirements for Containment Venting Systems for Boiling Water Reactors with Mark I and Mark II Containments" (ADAMS Accession No. ML12325A704). In the staff requirements memorandum (SRM) for SECY-12-0157, dated March 19, 2013 (ADAMS Accession No. ML13078A017), the Commission directed the staff to: (1) Issue a modification to Order EA-12-050 requiring BWR licensees with Mark I and Mark II containments to upgrade or replace the reliable hardened vents required by Order EA-12-050 with a containment venting system designed and installed to remain functional during severe accident conditions, and (2) develop a technical basis and rulemaking for filtering strategies with drywell filtration and severe accident management of BWR Mark I and II containments. The NRC subsequently issued Order EA-13-109 to define requirements and schedules for licensees for BWRs with Mark I and Mark II containments to install severe accident capable containment venting systems.

In recognition of the relative importance of venting capabilities from the wetwell and drywell, a phased approach to implementation is being used to minimize delays in implementing the requirements originally imposed by Order EA-12-050. Phase 1 involves upgrading the venting capabilities from the containment wetwell to provide reliable, severe accident capable hardened vents to assist in preventing core damage and, if necessary, to provide venting capability during severe accident conditions. Phase 2 involves providing additional protection during severe accident conditions through installation of a reliable, severe accident capable drywell vent system or the development of a reliable containment venting strategy that makes it unlikely that a licensee would need to vent from the containment drywell during severe accident conditions. For implementation of Phase 1 order requirements, the NRC issued JLD-ISG-2013-02 on November 14, 2013 (78 FR 70356), which endorsed, with exceptions and clarifications, the

Attachment 2

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Stephen G. Burns, Chairman
Kristine L. Svinicki
William C. Ostendorff
Jeff Baran

In the Matter of

DTE ELECTRIC COMPANY

(Fermi Nuclear Power Plant, Unit 3)

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Docket No. 52-033-COL

CLI-15-13

MEMORANDUM AND ORDER

On February 4, 2015, we held a hearing on DTE Electric Company's combined license application to construct and operate a new nuclear reactor at the Fermi Nuclear Power Plant site in Monroe County, Michigan.¹ The purpose of the evidentiary hearing was to consider the sufficiency of the NRC Staff's review of DTE's application. As discussed below, we conclude that the Staff's review has been adequate to support the findings set forth in 10 C.F.R. §§ 52.97(a) and 51.107(a). We authorize issuance of the combined license.

¹ See In the Matter of DTE Electric Company, Combined License for Enrico Fermi Unit 3; Notice of Hearing, 79 Fed. Reg. 72,215, 72,216 (Dec. 5, 2014) (Notice of Hearing); Tr. at 1-217 (attached as Appendix B to Order of the Secretary (Adopting Proposed Transcript Corrections and Admitting Post-Hearing Exhibits) (Mar. 9, 2015) (unpublished) (Transcript Correction Order)).

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I. BACKGROUND

A. Proposed Action

DTE seeks to build a GE-Hitachi Economic Simplified Boiling Water Reactor (ESBWR) at the Fermi Nuclear Power Plant site in Monroe County, Michigan. Two units currently exist at the site: Unit 1 was permanently shut down in 1972; Unit 2 began commercial operation in 1988 and is operating today.² DTE submitted its combined license application for Unit 3 on September 18, 2008. The Staff docketed and accepted the application for review shortly thereafter.³

Over the past six years, the Staff has spent approximately 52,000 hours reviewing DTE's application to determine whether it complies with the Atomic Energy Act of 1954, as amended, and the NRC's regulations.⁴ The Staff's review included an analysis of the environmental impacts of constructing and operating Fermi Unit 3 in accordance with the National Environmental Policy Act of 1969 (NEPA), on which the Staff has spent another 17,000 hours.⁵

² DTE submitted an application to renew the operating license for Fermi Unit 2 for an additional twenty years. See DTE Electric Company; Fermi Unit 2, 79 Fed. Reg. 34,787 (June 18, 2014). The Atomic Safety and Licensing Board designated to preside over the *Fermi* license renewal proceeding granted two petitions to intervene. *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 2), LBP-15-5, 81 NRC __ (Feb. 6, 2015) (slip op.). DTE has appealed the Board's decision. *Applicant's Notice of Appeal of LBP-15-5* (Mar. 3, 2015); *Applicant's Brief in Support of Appeal of LBP-15-5* (Mar. 3, 2015) (ADAMS accession no. ML15062A634).

³ See Detroit Edison Company; Notice of Hearing, and Opportunity To Petition for Leave To Intervene and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation on a Combined License for Fermi 3, 74 Fed. Reg. 836 (Jan. 8, 2009).

⁴ Tr. at 49 (Mr. Tracy).

⁵ *Id.*

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In a separate rulemaking proceeding, the Staff reviewed GE-Hitachi's application to certify the design for the ESBWR. The Staff completed the rulemaking and issued the final ESBWR design certification rule, following our approval, in October 2014.⁶ DTE's combined license application incorporates by reference the ESBWR certified design.⁷

The Office of New Reactors led the review and provided much of the expertise, with support from the Office of Nuclear Security and Incident Response, the Office of Nuclear Material Safety and Safeguards, the Office of Nuclear Reactor Regulation, the Office of the General Counsel, and NRC Regions I and III.⁸ The Staff held approximately eighty public meetings on the Fermi Unit 3 combined license application.⁹ In its environmental review, the Staff worked closely with the U.S. Army Corps of Engineers, a cooperating agency.¹⁰ Other federal agencies, including the U.S. Department of Homeland Security and the U.S. Fish and

⁶ See 10 C.F.R. pt. 52, app. E; Final Rule, Economic Simplified Boiling-Water Reactor Design Certification, 79 Fed. Reg. 61,944 (Oct. 15, 2014) (ESBWR Final Rule). The final rule became effective on November 14, 2014. ESBWR Final Rule, 79 Fed. Reg. at 61,944.

⁷ See *generally* Ex. NRC000006A to NRC000006H and NRC000006J, DTE Energy, Fermi 3 Combined License Application (Oct. 2014) (DTE Combined License Application). Portions of DTE's combined license application contain sensitive unclassified non-safeguards information and are not publicly available.

⁸ See Tr. at 51-52 (Tracy); *Staff Witness List* (Jan. 14, 2015), Attachment A, at 1-3 (Staff Witness List).

⁹ Ex. NRC000001, "Staff Statement in Support of the Uncontested Hearing for Issuance of Combined License for the Fermi Nuclear Plant Unit 3," Commission Paper SECY-14-0132 (Nov. 20, 2014), at 4 (Staff Information Paper).

¹⁰ See Tr. at 59 (Mr. Delligatti).

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Wildlife Service, also contributed to the Staff's review of DTE's license application.¹¹ In addition, the Staff consulted with state, local, and tribal organizations—both in the United States and in Canada—concerning a variety of issues, including issues arising under the National Historic Preservation Act.¹² The Advisory Committee on Reactor Safeguards (ACRS), a committee of technical experts advising the Commission, provided an independent assessment of the safety aspects of the application, as required by our regulations.¹³

DTE did not pursue an early site permit for Fermi Unit 3.¹⁴ Therefore, all relevant site characteristics, including site geology, hydrology, seismology, and man-made hazards, as well as the potential environmental impacts of the project, were studied as part of the Staff's combined license review and are within the scope of our decision today.

¹¹ See Ex. NRC0000001, Staff Information Paper at 5; Tr. at 51 (Mr. Tracy), 60 (Mr. Delligatti) 152 (Ms. Sutton).

¹² Ex. NRC0000001, Staff Information Paper at 5.

¹³ 10 C.F.R. §§ 1.13, 52.87; see Stetkar, John W., Chairman of the ACRS, letter to Allison M. Macfarlane, Chairman of the NRC (Sept. 22, 2014) (ML14252A294) (ACRS Letter). The ACRS concluded that "[t]here is reasonable assurance that Fermi Unit 3 can be built and operated without undue risk to the health and safety of the public" and recommended that the combined license application "be approved following its final revision." ACRS Letter at 1. It also found that there is reasonable assurance that the ESBWR design and the Fermi Unit 3 site satisfy NRC requirements that were imposed as part of the agency's lessons learned from the Fukushima Dai-ichi accident on March 11, 2011. ACRS Letter at 2. The Staff responded to other, generic recommendations in the ACRS letter. See Satorius, Mark A., Executive Director for Operations, letter to John W. Stetkar, Chairman of the ACRS (Nov. 14, 2014) (ML14293A058) (Staff Response to ACRS).

¹⁴ See 10 C.F.R. pt. 52, subpt. A.

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B. Review Standards

The Atomic Energy Act, section 189a., requires that we hold a hearing on each application to construct a nuclear power plant, regardless of whether an interested member of the public requests a hearing on the application.¹⁵ Our Notice of Hearing for the “uncontested” or “mandatory” portion of this proceeding outlines the standards for our review.¹⁶ On the safety side, we must determine whether:

- (1) the applicable standards and requirements of the Atomic Energy Act and the Commission’s regulations have been met;
- (2) any required notifications to other agencies or bodies have been duly made;
- (3) there is reasonable assurance that the facility will be constructed and will operate in conformity with the license, the provisions of the Atomic Energy Act, and the Commission’s regulations;
- (4) the applicant is technically and financially qualified to engage in the activities authorized by the license; and
- (5) issuance of the license will not be inimical to the common defense and security or to the health and safety of the public.¹⁷

On the environmental side, we must consider and determine:

- (1) whether the requirements of NEPA section 102(2)(A), (C), and (E), and the applicable regulations in 10 C.F.R. Part 51 (the NRC regulations implementing NEPA), have been met;
- (2) the final balance among conflicting factors contained in the record of the proceeding with a view to determining the appropriate action to be taken;

¹⁵ AEA § 189a., 42 U.S.C. § 2239(a).

¹⁶ See Notice of Hearing, 79 Fed. Reg. at 72,216.

¹⁷ 10 C.F.R. § 52.97(a).

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- (3) after weighing the environmental, economic, technical, and other benefits against environmental and other costs, and considering reasonable alternatives, whether the combined license should be issued, denied, or appropriately conditioned to protect environmental values; and
- (4) whether the NEPA review conducted by the Staff has been adequate.¹⁸

We do not review DTE's application *de novo*; rather, we consider the sufficiency of the Staff's review of the application—that is, whether the Staff's review was sufficient to support the required findings.¹⁹

C. Contested Proceeding

When the Staff docketed DTE's combined license application, it also provided interested persons an opportunity to challenge the application in a contested proceeding, in accordance with Atomic Energy Act section 189a.²⁰ Nineteen individuals and environmental groups (collectively, Intervenorors) submitted a request for hearing and petition to intervene with fourteen proposed contentions.²¹ A Licensing Board comprised of three administrative judges, one with legal expertise and two with technical expertise, granted Intervenorors' request for hearing and

¹⁸ *Id.* § 51.107(a).

¹⁹ *South Carolina Electric & Gas Co. and South Carolina Public Service Authority (also referred to as Santee Cooper)* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-12-9, 75 NRC 421, 428 (2012); *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-12-2, 75 NRC 63, 74 (2012).

²⁰ See 74 Fed. Reg. at 836.

²¹ Intervenorors are Beyond Nuclear, Citizens for Alternatives to Chemical Contamination, Citizens Environmental Alliance of Southwestern Ontario, Don't Waste Michigan, Sierra Club, Keith Gunter, Edward McArdle, Henry Newman, Derek Coronado, Sandra Bihn, Harold L. Stokes, Michael J. Keegan, Richard Coronado, George Steinman, Marilyn R. Timmer, Leonard Mandeville, Frank Mantei, Marcee Meyers, and Shirley Steinman.

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admitted Contentions 3, 5, 6, and 8.²² Contention 3 pertained to the management of Class B and C low-level waste, Contention 5 pertained to hydrology at the Fermi site, Contention 6 concerned aquatic impacts from algae, and Contention 8 concerned potential adverse impacts on the eastern fox snake, a state-listed endangered species.²³

The Board granted summary disposition of Contentions 3, 5, and 6 in favor of DTE.²⁴ And after an evidentiary hearing, the Board resolved Contention 8 in favor of the Staff. The Board also held a hearing on a new contention that concerned DTE's compliance with the NRC's quality assurance regulations, Contention 15A/B, which was resolved in favor of DTE.²⁵ Intervenors petitioned for review of the Board's ruling on Contention 15A/B; they did not seek review of the Board's decisions resolving the other admitted contentions.²⁶ We later denied Intervenors' petition for review of the Board's dismissal of Contention 15A/B.²⁷

²² LBP-09-16, 70 NRC 227, 306 (2009). DTE challenged the Board's ruling on standing and argued that the fifty-mile "proximity presumption" should no longer apply in reactor licensing proceedings based on DTE's interpretation of contemporaneous judicial concepts of standing. It did not challenge the Board's contention admissibility ruling. We affirmed the Board's ruling on standing and upheld the validity of the proximity presumption. CLI-09-22, 70 NRC 932, 933 (2009) (citing *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911 (2009)).

²³ LBP-09-16, 70 NRC at 256, 272, 277, 285-86.

²⁴ See Order (Granting Motion for Summary Disposition of Contention 3) (July 9, 2010) (unpublished); Order (Granting Motion for Summary Disposition of Contention 5) (Mar. 1, 2011) (unpublished); LBP-12-23, 76 NRC 445, 452 (2012) (among other things, granting summary disposition of Contention 6).

²⁵ LBP-14-7, 79 NRC 451, 454 (2014). See generally LBP-10-9, 71 NRC 493, 499 (2010).

²⁶ *Intervenors' Petition for Review of LBP-14-07 (Ruling for Applicant on Quality Assurance)* (June 17, 2014).

²⁷ CLI-14-10, 80 NRC 157 (2014).

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Shortly after it ruled on Intervenor's last remaining admitted contentions, the Board requested our permission to hold an evidentiary hearing on Intervenor's proposed Contention 23, which challenged the Staff's discussion of the environmental impacts of building a new transmission-line corridor for Fermi Unit 3.²⁸ The Board did not admit the contention because the Board found that Intervenor had filed it impermissibly late.²⁹ Nonetheless, the Board determined that Contention 23 presented issues that warranted the Board's review *sua sponte* and sought our approval to undertake such a review. Intervenor also filed a petition for review of the Board's dismissal of Contention 23.³⁰ We denied Intervenor's petition for review.³¹ And we denied the Board's request for *sua sponte* review and concluded that the environmental impacts of the transmission corridor were among the issues appropriate for resolution in this uncontested proceeding.³² We discuss the Staff's review of the transmission-line corridor as part of today's decision.

Also during the pendency of the contested proceeding, the U.S. Court of Appeals for the District of Columbia Circuit vacated and remanded our 2010 Waste Confidence Decision and Temporary Storage Rule, which for various NRC licensing actions served as part of the

²⁸ LBP-14-9, 80 NRC 15, 37 (2014).

²⁹ See *id.* at 34. Intervenor filed proposed Contention 23 a second time after the Staff issued the Final Environmental Impact Statement (FEIS). The Board again dismissed the contention as impermissibly late. See *id.* at 36-37.

³⁰ *Intervenor's Petition for Review of Atomic Safety and Licensing Board's Dismissal of Contention 23 for Lack of Timeliness* (Oct. 6, 2014); see Order of the Secretary (Sept. 10, 2014) (unpublished) (amending the deadline for Intervenor's petition for review).

³¹ CLI-15-1, 81 NRC __ (Jan. 13, 2015) (slip op.).

³² *Id.* at __ (slip op. at 13-14).

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environmental analysis of the impacts of spent fuel storage after the end of a reactor's license term pending ultimate disposal in a repository.³³ In light of the D.C. Circuit's vacatur and remand of the rule, and in response to a number of suspension petitions filed on multiple dockets, we held the issuance of final licensing decisions for affected matters, including this one, while we addressed the court's remand.³⁴ To address the court's remand and provide a comprehensive analysis of the environmental impacts of continued storage, we issued a final Continued Storage Rule and supporting Generic Environmental Impact Statement.³⁵ Concurrent with this action, we lifted the licensing suspension and dismissed, or directed licensing boards to dismiss, proposed contentions that had been filed with the multi-docket suspension petitions and held in abeyance.³⁶ The Board dismissed Intervenor's continued storage contention consistent with our direction.³⁷ Separately, the Staff considered whether the

³³ See *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012). See generally Final Rule: Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 75 Fed. Reg. 81,032 (Dec. 23, 2010); Waste Confidence Decision Update, 75 Fed. Reg. 81,037 (Dec. 23, 2010).

³⁴ *Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3)*, CLI-12-16, 76 NRC 63, 67 (2012).

³⁵ *Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3)*, CLI-14-8, 80 NRC 71, 77 (2014). See generally Final Rule, Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,238 (Sept. 19, 2014); Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,263 (Sept. 19, 2014); "Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel," NUREG-2157, Vols. 1 and 2 (Sept. 2014) (ML14196A105 and ML14196A107).

³⁶ *Calvert Cliffs*, CLI-14-8, 80 NRC at 79-80.

³⁷ Order (Denying Motion to Admit Waste Confidence Contention) (Oct. 6, 2014), at 3 (unpublished).

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Continued Storage Rule and the associated Generic Environmental Impact Statement presented new and significant information such that a supplement to the Final Environmental Impact Statement for Fermi Unit 3 (FEIS) was required.³⁸ The Staff compared the fuel cycle impacts analysis in the FEIS with the analysis in the Generic Environmental Impact Statement for Continued Storage and concluded that the information in the Generic Environmental Impact Statement did not present a seriously different picture of the environmental impacts of the proposed action when compared to the impacts that were described in the FEIS.³⁹ Therefore, the Staff determined that a supplement to the FEIS was not required.⁴⁰

Thereafter, Intervenor sought leave to file a new contention that would require the NRC to make safety-related findings for the Continued Storage Rule and suspend licensing decisions until completing that action.⁴¹ We exercised our supervisory authority to consider this and other

³⁸ See Ex. NRC000004, *NRC Staff Responses to Commission Pre-Hearing Questions* (Jan. 14, 2015), at 42-43 (Staff Responses to Initial Pre-Hearing Questions) (citing Consideration of New Information Regarding the Impacts of the Continued Storage of Spent Fuel for the Fermi Nuclear Power Plant, Unit 3, Combined License Application (Nov. 20, 2014) (ML14318A477) (Staff's New and Significant Information Analysis)).

³⁹ *Id.* at 43 (citing Staff's New and Significant Information Analysis).

⁴⁰ *Id.*

⁴¹ *Intervenors' Motion for Leave to File a New Contention Concerning the Absence of Required Waste Confidence Safety Findings in the Combined Operating Licensing Proceeding for Fermi 3 Nuclear Power Plant* (Sept. 29, 2014); *Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Issuance of Waste Confidence Safety Findings* (Sept. 29, 2014) (errata Oct. 1, 2014; amended and corrected petition Oct. 6, 2014).

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substantively similar filings, dismissed the proposed “waste confidence safety contention,” and denied the suspension petitions.⁴²

Finally, Beyond Nuclear, a party to the contested proceeding, joined a group of petitioners in a multi-docket petition to supplement the environmental impact statements for a number of applications, including DTE’s combined license application for Fermi Unit 3, to incorporate by reference the analysis in the Generic Environmental Impact Statement for Continued Storage.⁴³ Beyond Nuclear also filed a new contention, accompanied by a motion to reopen the record, as a “placeholder” to permit it to challenge the Staff’s Final Environmental Impact Statement for Fermi Unit 3 (FEIS) assuming that Beyond Nuclear is successful in its pending challenge to the Continued Storage Rule in the D.C. Circuit.⁴⁴ We denied the petition

⁴² *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-4, 81 NRC __, __ (Feb. 26, 2015) (slip op. at 3, 5); *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3, CLI-14-9, 80 NRC 147, 149-50 (2014). Some of the parties challenging DTE’s application in the contested proceeding also joined other multi-docket suspension petitions that we later denied. See *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-14-7, 80 NRC 1, 5 & n.11, 10 (2014) (denying suspension request that would have halted final licensing decisions pending action on a petition for rulemaking regarding the Staff’s review of the potential expedited transfer of spent fuel from pools to dry casks); *Union Electric Co. d/b/a Ameren Missouri* (Callaway Plant, Unit 2), CLI-11-5, 74 NRC 141, 146, 177-78 (2011) (requesting suspension of proceedings and other relief after the March 11, 2011, accident at Fukushima Dai-ichi).

⁴³ See *Petition to Supplement Reactor-Specific Environmental Impact Statements to Incorporate by Reference the Generic Environmental Impact Statement for Continued Spent Fuel Storage* (Jan. 28, 2015).

⁴⁴ *Beyond Nuclear’s Motion to Reopen the Record of Combined License Proceeding for Fermi Unit 3 Nuclear Power Plant* (Feb. 12, 2015), at 1-2; *Beyond Nuclear’s Hearing Request and Petition to Intervene in Combined License Proceeding for Fermi Unit 3 Nuclear Power Plant* (Feb. 12, 2015), at 1-3. See generally *New York v. NRC*, Nos. 14-1210, 14-1212, 14-1216, and 14-1217 (Consolidated) (D.C. Cir.) (Beyond Nuclear filed its petition for review in the D.C. Circuit on October 29, 2014).

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to supplement and declined to admit Beyond Nuclear's "placeholder" contention.⁴⁵ The Board has terminated its jurisdiction.⁴⁶

D. Uncontested Proceeding

The scope of an uncontested proceeding is defined by the scope of the contested proceeding: all of the safety and environmental issues in DTE's combined license application, except for the contested matters, are subject to our review in the uncontested proceeding.⁴⁷ Before we held the first mandatory hearings for combined license applications, we directed the Staff to provide us with an information paper on its review of each application at the time the Staff issues its final safety or environmental review document.⁴⁸ The Staff issued the FEIS for Fermi Unit 3 in January 2013 and the final Safety Evaluation Report (SER) in November 2014,

⁴⁵ *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-10, 81 NRC __ (Apr. 23, 2015) (slip op.); CLI-15-12, 81 NRC __ (Apr. 23, 2015) (slip op.).

⁴⁶ LBP-15-12, 81 NRC __ (Mar. 20, 2015) (slip op.); see also *Virginia Electric and Power Co. d/b/a Dominion Virginia Power and Old Dominion Electric Cooperative* (North Anna Power Station, Unit 3), CLI-12-14, 75 NRC 692, 693, 699-701 (2012). As the Board observed, a number of matters remained pending before the Commission after the Board resolved the final contention pending before it. LBP-15-12, 81 NRC at __ (slip op. at 2-4). To clarify an understandable point of confusion, the Board's jurisdiction terminates when there are no longer any contested matters pending before it. In this instance, the Board's jurisdiction terminated when we exercised supervisory authority over the "waste confidence safety contention" in CLI-14-9.

⁴⁷ See Notice of Hearing, 79 Fed. Reg. at 72,216.

⁴⁸ See generally Staff Requirements—SECY-10-0082—Mandatory Hearing Process for Combined License Application Proceedings Under 10 C.F.R. Part 52 (Dec. 23, 2010), at 1-2 (ML103570203) (SRM-SECY-10-0082).

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which triggered the start of the uncontested portion of this proceeding.⁴⁹ We received the Staff's information paper on November 20, 2014, shortly after the Staff's issuance of the SER.⁵⁰

1. Pre-hearing Activities

We issued the Notice of Hearing on December 1, 2014, and set the schedule for the parties—the Staff and DTE—to file their lists of witnesses, as well as for DTE to provide its pre-filed testimony.⁵¹ We also issued several questions on environmental and safety-related topics to DTE and the Staff to answer in writing before the hearing.⁵² In addition, we invited interested states, local government bodies, and federally-recognized Indian tribes and Canadian Provinces, local government bodies, and First Nations to provide statements of issues for us to consider as part of the uncontested proceeding.⁵³ We received one response from the

⁴⁹ See Ex. NRC0000010A to NRC0000010D, “Environmental Impact Statement for the Combined License (COL) for Enrico Fermi Unit 3” (Final Report), NUREG-2105, Vols. 1-4 (Jan. 2013) (FEIS); Ex. NRC0000008A to NRC0000008B, “Final Safety Evaluation Report for the Fermi 3 Combined License Application” (Nov. 18, 2014) (SER). Portions of the SER contain sensitive unclassified non-safeguards information and are not publicly available.

⁵⁰ See Ex. NRC000001, Staff Information Paper at 1.

⁵¹ Notice of Hearing, 79 Fed. Reg. at 72,216. The Staff's information paper serves as its pre-filed testimony.

⁵² See Order of the Secretary (Transmitting Additional Pre-Hearing Questions) (Jan. 16, 2015) (unpublished) (Transmission-Line Corridor Questions); Order of the Secretary (Transmitting Pre-Hearing Questions) (Dec. 30, 2014) (unpublished) (Initial Pre-Hearing Questions). We also issued a question that contains sensitive unclassified non-safeguards information and was therefore filed on the non-public docket for the proceeding. The parties' responses to that question were likewise filed on the non-public docket.

⁵³ Notice of Hearing, 79 Fed. Reg. at 72,216-17.

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Delaware Nation, which stated that it declined to participate because the Fermi Unit 3 project does not lie within its area of interest.⁵⁴

2. The Hearing

The Secretary of the Commission transmitted a scheduling note to DTE and the Staff setting the topics for and the order of presentations at the hearing.⁵⁵ In the first panel, witnesses for DTE and the Staff provided an overview of DTE's combined license application and the Staff's review. The next two panels focused on safety-related issues, and the final two panels focused on environmental issues.

The Staff made available seventy-eight witnesses at the hearing.⁵⁶ Twelve of these witnesses were scheduled panelists; the remainder stood by to answer questions on topics relating to their expertise.⁵⁷ A total of twelve witnesses offered testimony on behalf of DTE on panels at the hearing and in pre-filed written testimony.⁵⁸

⁵⁴ E-mail from Corey Smith, Assistant Director, Delaware National Cultural Preservation, to Hearing Docket, NRC (Jan. 20, 2015) (ML15022A627). The Delaware Nation requested, however, that "should th[e] project inadvertently uncover an archaeological site or object(s)" that "you halt all construction and ground disturbance activities and immediately contact the appropriate state agencies, as well as our office (within 24 hours)." *Id.*

⁵⁵ See Vietti-Cook, Annette, Secretary of the Commission, memorandum to Counsel for DTE and the Staff (Jan. 30, 2015) (Scheduling Note) (revising the scheduling note issued on January 22, 2015).

⁵⁶ See Staff Witness List at 1-3; Tr. at 14-15.

⁵⁷ See Scheduling Note at 1-5; Tr. at 14-15.

⁵⁸ See Ex. DTE000004, *Applicant's Witness List for the Fermi Unit 3 Hearing on Uncontested Issues* (Jan. 14, 2015); Tr. at 12-13, 132-33; Ex. DTE000001, *Applicant's Pre-filed Written Testimony in Support of the Hearing on Uncontested Issues for Fermi Unit 3* (Jan. 14, 2015) (DTE Pre-filed Testimony).

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a. *Summary of the Overview Panels*

Peter Smith, Director of Nuclear Development for DTE, and Ron May, Sr., Executive Vice President of DTE, represented DTE on the overview panel.⁵⁹ Mr. Smith provided background on the development of DTE's license application, including DTE's decision to pursue a combined license, its selection of the ESBWR for the reactor design, and the selection of the Fermi site.⁶⁰ He also provided an overview description of the Fermi site and the features of the ESBWR.⁶¹

Glenn Tracy, Director of the Office of New Reactors, Frank Akstulewicz, Director of the Division of New Reactor Licensing in the Office of New Reactors, and Mark Delligatti, Deputy Director of the Division of New Reactor Licensing in the Office of New Reactors, provided background on the Staff's review of the Fermi Unit 3 combined license application.⁶² In particular, Mr. Akstulewicz described the "design-centered review approach," a review methodology that we have endorsed, where the Staff performs a single technical review for standard issues involving a particular design that are then applied to other combined license applications referencing the same design.⁶³ When DTE submitted its application, the combined

⁵⁹ Tr. at 18.

⁶⁰ See Ex. DTE000005, Fermi 3, Combined License Mandatory Hearing, Introduction & Overview (Jan. 28, 2015), at 1-4 (DTE Overview Presentation); see also Tr. at 19-33.

⁶¹ See Ex. DTE000005, DTE Overview Presentation at 5-9.

⁶² See Tr. at 48.

⁶³ Ex. NRC000011, Combined License Application Review, Fermi 3, Overview (Jan. 28, 2015), at 5 (Staff Overview Presentation); Tr. at 53-54; see also *Summer*, CLI-12-9, 75 NRC at 427 & n.17 (discussing the design-centered review approach with respect to the AP1000 reactor design).

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license application for a new nuclear plant at the North Anna Power Station was designated as the “reference application,” the “Reference COL” or “RCOL,” for the ESBWR design-centered review.⁶⁴ DTE was a “subsequent application,” “Subsequent COL” or “SCOL.”⁶⁵ In May 2010, the Fermi application took over as the reference application after the North Anna applicant selected a different reactor design.⁶⁶ The Staff verified that the standard content in the North Anna safety evaluation report directly applied to Fermi Unit 3, and DTE provided information to address the open items in that report.⁶⁷ Mr. Akstulewicz completed his testimony with a summary of the Staff’s findings under 10 C.F.R. § 52.97(a).⁶⁸ Mr. Delligatti provided background on the Staff’s environmental review, including a summary of the Staff’s findings in accordance with NEPA sections 102(2)(A), (C), and (E) and 10 C.F.R. § 51.107(a).⁶⁹

b. Summary of the Safety Panels

The first safety panel focused on the soil-structure interaction and seismic analyses for Fermi Unit 3.⁷⁰ Peter Smith testified for DTE.⁷¹ With him on the panel were Javad Moslemian,

⁶⁴ Ex. NRC000011, Staff Overview Presentation at 6-7.

⁶⁵ *Id.*

⁶⁶ Tr. at 54 (Mr. Akstulewicz).

⁶⁷ Ex. NRC000011, Staff Overview Presentation at 8.

⁶⁸ *Id.* at 11-13.

⁶⁹ Tr. at 58-65; Ex. NRC000011, Staff Overview Presentation at 14-20.

⁷⁰ See Ex. DTE000006, Fermi 3 COLA, Combined License Mandatory Hearing, Safety—Panel 1 (Jan. 28, 2015) (DTE Safety Panel 1 Presentation); Ex. NRC000012, Combined License Application Review, Fermi 3, Safety Panel 1 (Jan. 28, 2015) (Staff Safety Panel 1 Presentation).

⁷¹ Tr. at 83-85.

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Engineering Manager, Sargent and Lundy, and Steven Thomas, Engineering Manager, Black and Veatch.⁷² Adrian Muniz, Lead Project Manager for the Fermi Unit 3 Application Review, Licensing Branch 3, Office of New Reactors, Sara Tabatabai, Seismologist, Structural, Geotechnical and Seismic Engineering Branch, Office of Research, and Manas Chakravorty, Senior Structural Engineer, Structural Engineering Branch 2, Office of New Reactors, provided testimony for the Staff.⁷³ In addition to the soil-structure interaction and seismic analyses, the first ten chapters of the Fermi 3 SER were subject to our examination during the first safety panel.⁷⁴

The second safety panel focused on Fermi SER Chapter 20, which covered the Staff's activities relating to recommendations from the Near-Term Task Force established in response to the accident at Fukushima Dai-ichi on March 11, 2011, and the discussion of Fukushima-related regulatory actions in DTE's application and the Staff's SER.⁷⁵ Peter Smith provided testimony for DTE, with David Hinds, Technical Engineering Manager, GE-Hitachi, and Steven Thomas, Black and Veatch, on the panel.⁷⁶ Adrian Muniz, Angelo Stubbs, Senior Reactor Systems Engineer, Plant Systems Branch, Office of New Reactors, Raul Hernandez, Reactor

⁷² Tr. at 82; Scheduling Note at 2.

⁷³ Tr. at 85-92; Scheduling Note at 2. During her review of DTE's application, Ms. Tabatabai worked in the Office of New Reactors. Tr. at 87.

⁷⁴ Scheduling Note at 2-3.

⁷⁵ See Ex. DTE000007, Fermi 3, Combined License Mandatory Hearing, Safety—Panel 2 (Jan. 28, 2015) (DTE Safety Panel 2 Presentation); Ex. NRC000013, Combined License Application Review, Fermi 3, Safety Panel 2 (Jan. 28, 2015) (Staff Safety Panel 2 Presentation).

⁷⁶ Tr. at 114; Scheduling Note at 3.

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Systems Engineer, Plant Systems Branch, Office of New Reactors, and Dan Barss, Team Leader, Division of Preparedness and Response, Office of Nuclear Security and Incident Response, provided testimony for the Staff.⁷⁷ Chapters eleven through nineteen of the Fermi 3 SER were also subject to our examination during the second safety panel.⁷⁸

c. *Summary of the Environmental Panels*

The first environmental panel provided an overview of the Staff's review process for the Fermi Unit 3 FEIS, including a summary of its development, the Staff's analysis of alternatives, and a summary of the Staff's conclusions and recommendations.⁷⁹ Peter Smith testified for DTE, with Randall Westmoreland, Technical Expert and Environmental Lead, DTE, and Steven Thomas from Black and Veatch.⁸⁰ Jennifer Dixon-Herrity, Chief of the Environmental Projects Branch in the Office of New Reactors, Mallecia Sutton, Lead Environmental Project Manager, Environmental Projects Branch, Office of New Reactors, and Andrew Kugler, Senior Environmental Project Manager, Technical Support Branch, Office of New Reactors, provided testimony for the Staff.⁸¹ The second environmental panel focused on compliance with the National Historic Preservation Act with regard to the permanently shut-down Fermi Unit 1, which

⁷⁷ Tr. at 116-17; Scheduling Note at 3.

⁷⁸ Scheduling Note at 3.

⁷⁹ See Scheduling Note at 4; Ex. DTE000008, Fermi 3, Combined License Mandatory Hearing, Environmental Overview—Panel 1 (Jan. 28, 2015) (DTE Environmental Panel 1 Presentation); Ex. NRC000014, Combined License Application Review, Fermi 3, Environmental Panel 1 (Jan. 28, 2015) (Staff Environmental Panel 1 Presentation).

⁸⁰ Tr. at 139; Scheduling Note at 4.

⁸¹ Tr. at 142; Scheduling Note at 5.

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DTE plans to demolish, as well as interactions between the Staff and international organizations over the course of the Staff's environmental review.⁸² The same witnesses for the first environmental panel testified for the second environmental panel.⁸³

3. Post-hearing Questions

After the hearing, we issued additional questions for written answers from DTE and the Staff.⁸⁴ In addition to admitting DTE's and the Staff's responses as exhibits, as well as additional exhibits from DTE, we adopted corrections to the hearing transcript.⁸⁵ In its response to our post-hearing questions, the Staff provided a clarification to its hearing testimony.⁸⁶ The Staff also filed four additional exhibits—NRC000018, NRC000019, NRC000020, and NRC000021—relating to recent Staff activities under the Endangered Species Act.⁸⁷ We admit these exhibits and close the evidentiary record for the uncontested hearing.

⁸² See Ex. DTE000009, Fermi 3, Combined License Mandatory Hearing, Environmental Overview—Panel 2 (Jan. 28, 2015) (DTE Environmental Panel 2 Presentation); Ex. NRC000015, Combined License Application Review, Fermi 3, Environmental Panel 2 (Jan. 28, 2015) (Staff Environmental Panel 2 Presentation).

⁸³ Tr. at 180.

⁸⁴ Order of the Secretary (Transmitting Post-Hearing Questions) (Feb. 11, 2015) (unpublished).

⁸⁵ Transcript Correction Order at 1.

⁸⁶ Ex. NRC000017, *NRC Staff Responses to Commission Post-Hearing Questions* (Feb. 19, 2015), at 1 (Staff Responses to Post-Hearing Questions). Although we allow this clarification, which reiterated statements in the Staff's response to pre-hearing question 33, Ex. NRC000004, Staff Responses to Initial Pre-Hearing Questions at 30, we remind the Staff that when a party requests action from the presiding officer in an NRC adjudicatory proceeding, the request must come in the form of a motion. See 10 C.F.R. § 2.323.

⁸⁷ See Roach, Kevin C., Counsel for the Staff, letter to the Commissioners (Apr. 5, 2015), at 1 (April 5 Commission Notification); Ex. NRC000018, Supplemental Biological Assessment, U.S. Fish and Wildlife Service, Enrico Fermi Unit 3 Combined License Application (Feb. 2015) (continued . . .)

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II. DISCUSSION

A. Site-Specific Issues Addressed in the Proceeding

Although our review encompassed the entire application, we discuss here a brief selection of the topics discussed at the hearing and in responses to written questions before and after the hearing.

1. Safety-Related Issues

a. Soil-Structure-Interaction Analysis

The first safety issue that the Staff identified in its information paper and the first safety topic discussed at the hearing involved the soil-structure-interaction analysis for the Fermi site.⁸⁸ The design control document for the ESBWR is based on a generic set of site parameters. When evaluating an application that references the ESBWR for a specific site, the Staff focuses on whether the characteristics of the specific site fall within the parameters specified in the design control document.⁸⁹ As the Staff explained in its information paper, the partial bedrock

(. . . continued)

(Supplemental Biological Assessment); Ex. NRC000019, Hicks, Scott, U.S. Fish and Wildlife Service, letter to Jennifer L. Dixon-Herrity, NRC (Mar. 23, 2015) (March 23 Letter from the Fish and Wildlife Service); Roach, Kevin C., Counsel for the Staff, letter to the Commissioners (Apr. 29, 2015), at 1 (April 29 Commission Notification); Ex. NRC000020, Supplemental Biological Assessment to the U.S. Fish and Wildlife Service for the Enrico Fermi Unit 3 Combined License Application (Apr. 3, 2015) (Supplemental Biological Assessment (Northern Long-Eared Bat)); Ex. NRC000021, Hicks, Scott, U.S. Fish and Wildlife Service, letter to Jennifer L. Dixon-Herrity, NRC (Apr. 28, 2015) (April 28 Letter from the Fish and Wildlife Service); *see also* Smith, Tyson R., Counsel for DTE, letter to the Commissioners (Apr. 10, 2015), at 1-2. The exhibits were not accompanied by a motion. *See supra* note 86. Nevertheless, DTE has not opposed their admission and we find that they further contribute to the record.

⁸⁸ See Ex. NRC000001, Staff Information Paper at 14; Tr. at 83 (Mr. Smith).

⁸⁹ See Ex. NRC000001, Staff Information Paper at 14; *see also* 10 C.F.R. § 52.79(d)(1) (requiring applicants referencing a certified design to provide sufficient information for the Staff to determine whether the site's characteristics fall within the design's parameters).

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embedment of the Reactor Building/Fuel Building and Control Building structures at the Fermi 3 site “deviates from the foundation configurations considered in the ESBWR [design control document]. In addition, the Fermi 3 site does not meet the minimum backfill shear wave velocity requirement of the ESBWR [design control document].”⁹⁰ Consequently, “site-specific soil structure interaction . . . analyses need[ed] to be performed to confirm that the certified design is adequate for the site.”⁹¹ DTE thus provided analyses to address these issues.⁹²

At the hearing, Peter Smith, testifying for DTE, explained that because the timing of its analyses coincided with the Staff’s post-Fukushima activities, DTE voluntarily updated its soil-structure-interaction analyses using inputs from the Central and Eastern U.S. Seismic Source Characterization for Nuclear Facilities (CEUS-SSC).⁹³ DTE also added margin to these inputs. DTE provided the results of its analyses, showing that the Fermi Unit 3 foundation response spectra using the updated inputs as well as updated inputs with added margin fell within the

⁹⁰ Ex. NRC000001, Staff Information Paper at 14; *see also* Ex. DTE000006, DTE Safety Panel 1 Presentation at 3 (depicting partial embedment and backfill).

⁹¹ Ex. NRC000001, Staff Information Paper at 14.

⁹² *Id.*; Tr. at 83 (Mr. Smith).

⁹³ Tr. at 83; Ex. DTE000006, DTE Safety Panel 1 Presentation at 2; *see also* Tr. at 87 (Ms. Tabatabai) (explaining that applicants like DTE were requested, not required, to consider using the updated model). The CEUS-SSC constitutes a key input to a probabilistic seismic hazard analysis. The probabilistic seismic hazard analysis is used as a method for accounting for uncertainty in seismic design and in calculating seismic risk. The seismic source characterization model describes where earthquakes will occur, how big they will be, and how often they will happen. The CEUS-SSC model includes consideration of an up-to-date database, full assessment and incorporation of uncertainties, and the range of diverse technical interpretations from the larger technical community. “Central and Eastern United States Seismic Source Characterization for Nuclear Facilities,” NUREG-2115, Vol. 1 (Jan. 2012), at ix-x (ML12048A804).

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seismic design response spectra for the ESBWR.⁹⁴ DTE also provided comparisons of the in-structure response spectra and concluded that the ESBWR certified design envelopes the Fermi 3 site with “considerable margin.”⁹⁵ The Staff reviewed DTE’s analyses, performed additional analyses, and “confirmed that at the Fermi 3 site, the site-specific seismic demand is bounded by the [ESBWR design control document] analyses.”⁹⁶ The Staff concluded that DTE provided sufficient information to demonstrate the suitability of the ESBWR for the Fermi site.⁹⁷

b. Regulatory Treatment of Non-Safety Systems Equipment

In another area that focused on features of the ESBWR design and their applicability to the Fermi site, we asked pre-hearing questions on the protection of Regulatory Treatment of Non-Safety Systems (RTNSS) equipment from external hazards at the site.⁹⁸ This equipment is used to maintain core, containment, and spent fuel pool cooling after the reactor has been shut down for seventy-two hours following an accident.⁹⁹ RTNSS equipment is not relied on in the

⁹⁴ Ex. DTE000006, DTE Safety Panel 1 Presentation at 4; Tr. at 84 (Mr. Smith).

⁹⁵ Tr. at 85 (Mr. Smith); *see also* Ex. DTE000006, DTE Safety Panel 1 Presentation at 5.

⁹⁶ Ex. NRC000001, Staff Information Paper at 14; *see also* Ex. NRC000012, Staff Safety Panel 1 Presentation at 5-6 (showing similar results between the Staff’s confirmatory probabilistic seismic hazard analysis and DTE’s analyses and that they are enveloped by the ESBWR certified seismic design response spectrum).

⁹⁷ Ex. NRC000001, Staff Information Paper at 14; Ex. NRC000012, Staff Safety Panel 1 Presentation at 10; *see also* Tr. at 89 (Ms. Tabatabai).

⁹⁸ Initial Pre-Hearing Questions at 6-7, 12-13.

⁹⁹ Ex. NRC000008B, SER at 20-11. “RTNSS” refers to the regulatory oversight given to items that are not safety-related but perform risk-significant functions in passive reactor designs. *See, e.g.,* Ex. NRC000008A, SER at 3-1. As the Staff explained, “[b]y definition, RTNSS [structures, systems, and components] are non[-]safety equipment and should not be treated as safety-related.” Ex. NRC000004, Staff Responses to Initial Pre-Hearing Questions at 14. The RTNSS (continued . . .)

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first instance in an accident or event; rather, the ESBWR's passive safety system performs that function.¹⁰⁰ DTE's application for Fermi Unit 3 incorporates by reference the RTNSS equipment from the ESBWR design control document; there are no departures from the ESBWR design with respect to the RTNSS equipment.¹⁰¹ Nevertheless, we considered certain aspects of RTNSS equipment in the uncontested hearing because it may be relied on to address certain post-Fukushima mitigation strategies for beyond-design-basis external events requirements after seventy-two hours.¹⁰² These post-Fukushima requirements are discussed further in Section C below.

(. . . continued)

concept was developed in the 1990s, in the context of the Staff's review of reactor designs with passive safety systems that also use active systems (as a backup to the passive system) to replenish coolant after a seventy-two hour period following an accident. The Staff sought to ensure that proper regulatory oversight was given to these systems, even though they were not safety-related, given uncertainties associated with passive safety system performance identified by the Staff. The Staff therefore determined that it "will not require that these active systems meet all the safety-related criteria, but will expect a high level of confidence that active systems which have a significant safety role are available when challenged." See "Policy and Technical Issues Associated with the Regulatory Treatment of Non-Safety Systems (RTNSS) in Passive Plant Designs (SECY-94-084)," Commission Paper SECY-95-132 (May 22, 1995), Attachment 2, at 2-3 (ML003708005); Staff Requirements—SECY-95-132—Policy and Technical Issues Associated with the Regulatory Treatment of Non-Safety Systems (RTNSS) in Passive Plant Designs (SECY-94-084) (June 28, 1995) (ML003708019); see also Callan, L. Joseph, Executive Director for Operations, to Commissioners, "Implementation of Staff Position in SECY-96-128, 'Policy and Key Technical Issues Pertaining to the Westinghouse AP600 Standardized Passive Reactor Design,' Related to Post-72 Hour Actions" (June 23, 1997), at 2-3 (ML003708229); "Policy and Key Technical Issues Pertaining to the Westinghouse AP600 Standardized Passive Reactor Design," Commission Paper SECY-96-128 (June 12, 1996) (ML003708224); Ex. NRC000004, Staff Responses to Initial Pre-Hearing Questions at 14.

¹⁰⁰ See Tr. at 96 (Mr. Nolan); Ex. NRC000004, Staff Responses to Initial Pre-Hearing Questions at 14.

¹⁰¹ Tr. at 97 (Mr. Smith).

¹⁰² Ex. NRC000008B, SER at 20-11.

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In its letter summarizing its independent review of the safety aspects of DTE's application, the ACRS noted that seismic Category NS (non-seismic) and Category II structures that house RTNSS equipment must be evaluated for hurricane-generated missiles, but it also noted that there is no corresponding requirement for tornado-generated missiles.¹⁰³ The ACRS expressed some concern that the ability of these structures to withstand tornado-driven missiles had not been evaluated either with regard to the ESBWR design or for the Fermi Unit 3 site, making it "unclear that structures . . . hous[ing] RTNSS equipment that is credited for mitigation of beyond-design-basis external events will survive" the impact of a tornado-driven missile.¹⁰⁴ Nonetheless, the ACRS acknowledged the ESBWR's passive design and the ESBWR's ability to maintain passive core cooling, containment functions, and spent fuel cooling for at least

¹⁰³ ACRS Letter at 4; see also ESBWR Design Control Document, Tier 2, Chapter 3, Design of Structures, Components, Equipment, and Systems, Rev. 10 (Apr. 2010), at 3.3-1 (ML14104A929 (package)) (ESBWR DCD) ("Seismic Category I structures are designed for tornado and extreme wind phenomena. Seismic Category II structures are designed for extreme and tornado wind (excluding tornado missiles)," and "Seismic Category NS buildings that house RTNSS equipment are designed to withstand hurricane Category 5 wind velocity at 87.2 m/s (195 mph), 3-second gust."). Section 3.2.1 of the ESBWR design control document defines the seismic categories: Seismic Category I structures "must remain integral with systems and components (including their foundations and supports) that must remain functional or retain their pressure integrity in the event of a safe-shutdown earthquake." Seismic Category II structures, systems, and components "perform no safety-related function, but . . . [their] structural failure or interaction could degrade the functioning of a Seismic Category I item to an unacceptable level of safety or could result in incapacitating injury to occupants of the main control room." They "are designed to structurally withstand the effects of a [safe-shutdown earthquake]." "Seismic Category II structures, systems and components that are also classified as . . . [RTNSS] Criterion B in [design control document] Tables 19A-2 and 19A-3 are required to remain functional following a seismic event." All other structures, systems, and components are designated Seismic Category NS, and "are designed for seismic requirements in accordance with the International Building Code." ESBWR DCD at 3.2-1 to 3.2-2.

¹⁰⁴ ACRS Letter at 4.

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seventy-two hours after the plant is shut down.¹⁰⁵ It noted that RTNSS equipment would not be required for the first seventy-two hours after loss of AC power, and that equipment from national response centers could provide defense-in-depth mitigating strategies if RTNSS equipment is not available thereafter.¹⁰⁶

In its response to our pre-hearing questions, the Staff explained that when it developed the policy for the protection of RTNSS equipment from certain external events in the 1990s, it required some RTNSS equipment to withstand hurricane loads and missiles, but not tornado loads or tornado missiles.¹⁰⁷ The Staff focused on the external events that could potentially result in widespread damage—hurricanes, floods, and seismic events—over the more localized damage from a tornado.¹⁰⁸ The Staff represented that it has applied this approach consistently since that time to all passive reactor designs, including the ESBWR.¹⁰⁹

Specifically with regard to the application for Fermi Unit 3, the RTNSS B long-term cooling equipment is located in a seismic Category I structure that is “designed to provide

¹⁰⁵ *See id.*

¹⁰⁶ *Id.*

¹⁰⁷ Ex. NRC000004, Staff Responses to Initial Pre-Hearing Questions at 14.

¹⁰⁸ *Id.* at 14-15.

¹⁰⁹ *Id.* at 15. In its response to the ACRS on this issue, the Staff stated that it has since updated its RTNSS guidance to include tornado-missiles. *See* Staff Response to ACRS at 6. The Staff was asked at the hearing whether it was concerned that the updated guidance was not used in the review of DTE’s application. Tr. at 108-09 (Commissioner Baran). Ryan Nolan, Reactor Systems Engineer, Balance of Plant Branch, Office of New Reactors, stated that the Staff had no concern and reiterated that the RTNSS equipment is not safety-related and therefore not held to the standard of safety-related equipment and that the conservatism of the new guidance may vary depending on the site. *Id.* (Mr. Nolan).

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protection from design-basis storms, tornados, and floods” so that the effects of natural phenomena do not adversely affect long-term core and spent fuel pool cooling.¹¹⁰ The Staff stated that the diesel-driven or motor-driven fire pumps housed within that enclosure can be used to provide makeup water to the passive safety system after the first seventy-two hours following an external event.¹¹¹ For the ancillary diesel generator, an item that is housed within a Category II structure and used to power the motor-driven fire pump, the Staff explained that the diesel-driven pumps or power sources brought from offsite could support mitigation if the structure housing the ancillary diesel generator does not survive an external event.¹¹²

c. Staff Activities Relating to Fukushima Lessons-Learned

The Staff, in its pre-hearing information paper, described its review of DTE’s combined license application relative to regulatory actions that the NRC has taken in response to lessons learned from the Fukushima Dai-ichi accident.¹¹³ The Staff requested DTE to “provide an evaluation of the Fermi 3 site for updated seismic hazards”; “develop mitigating strategies for beyond-design-basis external events”; “provide reliable spent fuel pool instrumentation”; and “evaluate emergency preparedness staffing and communications.”¹¹⁴ The Staff stated that DTE

¹¹⁰ Ex. NRC000004, Staff Responses to Initial Pre-Hearing Questions at 28; *see also* Ex. DTE000002, DTE Response to Initial Pre-Hearing Questions at 11.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Ex. NRC000001, Staff Information Paper at 14-15.

¹¹⁴ *Id.*

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provided the requested information and updated its application accordingly.¹¹⁵ We asked the Staff a pre-hearing question regarding the Staff's verification of the adequacy of DTE's use of the Electric Power Research Institute's (EPRI) 2004/2006 ground motion model rather than EPRI's 2013 ground motion model to update its seismic hazard analysis.¹¹⁶

In Safety Panel 2, DTE and the Staff addressed the Fukushima-related requests for additional information.¹¹⁷ Mr. Smith for DTE stated that its responses to the Staff's information requests were primarily administrative in nature and none of them required changes to the design.¹¹⁸ He explained that the Staff will impose license conditions for: (1) implementing mitigation strategies under the NRC-endorsed "FLEX" approach proposed by the Nuclear Energy Institute (NEI);¹¹⁹ (2) operator training on external power for the ESBWR's spent fuel pool instrumentation; and (3) reevaluating staffing and communications for emergency preparedness.¹²⁰

¹¹⁵ *Id.* at 15.

¹¹⁶ Initial Pre-Hearing Questions at 11-12.

¹¹⁷ See Ex. DTE000007, DTE Safety Panel 2 Presentation at 2; Ex. NRC000013, Staff Safety Panel 2 Presentation at 3-16.

¹¹⁸ Tr. at 115.

¹¹⁹ See NEI 06-12, *Diverse and Flexible Coping Strategies (FLEX) Implementation Guide*, Rev. 0 (Aug. 2012) (ML12242A378) (proposing the flexible use of onsite and offsite equipment to cope with beyond-design-basis external events). The Staff endorsed the FLEX approach in JLD-ISG-2012-01, *Interim Staff Guidance, "Compliance with Order EA-12-049, Order Modifying Licenses with Regard to Requirements for Mitigation Strategies for Beyond-Design-Basis External Events,"* Rev. 0 (Aug. 29, 2012) (ML12229A174).

¹²⁰ *Id.* at 115-16; see also Ex. DTE000007, DTE Safety Panel 2 Presentation at 2.

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The Staff described three of its Fukushima-related requests for additional information and provided its findings at the hearing.¹²¹ First, the Staff discussed its assessment of the agency's 2012 order imposing requirements for mitigation strategies for beyond-design-basis external events.¹²² The Staff explained that the ESBWR passive design provides mitigation for seventy-two hours following a beyond-design-basis external event, or "initial phase mitigation."¹²³ Because the passive design provides mitigation for up to seventy-two hours without AC power, and installed RTNSS equipment could enhance the time period for transition to seven days, the Staff found that it provides sufficient time to transition to the final stage "without necessarily relying upon a transition phase."¹²⁴ After that time frame, DTE will rely on the ESBWR's passive design and offsite resources to maintain cooling for the core, containment, and spent fuel pool for "final phase mitigation."¹²⁵ The Staff concluded that the Fermi 3 mitigating strategies provide the core cooling, containment, and spent fuel pool cooling

¹²¹ With respect to the Staff's request for additional information concerning DTE's seismic hazard analysis, DTE updated the information in its application using inputs from the Central and Eastern U.S. Seismic Source Characterization Model. Ex. NRC000001, Staff Information Paper at 15. The Staff then performed its own calculations and confirmed that DTE's updated calculations "accurately characterize the ground motion at the Fermi 3 site." *Id.*; see also *supra* notes 88-97 and accompanying text.

¹²² Ex. NRC000013, Staff Safety Panel 2 Presentation at 3 (citing Order EA-12-049, "Order Modifying Licenses with Regard to Requirements for Mitigation Strategies for Beyond-Design-Basis External Events" (ML12054A736 (package))).

¹²³ Tr. at 120 (Mr. Stubbs).

¹²⁴ Ex. NRC000008B, SER at 20-10.

¹²⁵ Ex. NRC000013, Staff Safety Panel 2 Presentation at 4-7; Tr. at 121 (Mr. Stubbs).

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capabilities required in the mitigation strategies order.¹²⁶ The Staff also discussed the proposed license condition that would require DTE to implement the guidance and strategies in the NEI “FLEX” plan prior to fuel load.¹²⁷

Second, with regard to spent fuel pool instrumentation, the Staff explained that the ESBWR design provides instruments that measure the level of water in the spent fuel pool which are full-range, safety-related, Seismic Category I, and permanently installed. The instruments are also protected from internally and externally generated missiles, physically separated from each other, and powered from separate power sources.¹²⁸ The ESBWR level instrument description will include “independent power source connectivity and instrument design accuracy.”¹²⁹ The Staff proposed a license condition that would require DTE to implement a training program on establishing the alternate power connections to the level instruments.¹³⁰

Finally, the Staff discussed the license condition that it would impose to ensure that DTE performs an assessment of communications systems and equipment needed during a prolonged station blackout and the staffing capability needed to respond to a multi-unit event.¹³¹ DTE would need to complete this assessment eighteen months before the last date scheduled

¹²⁶ Tr. at 121 (Mr. Stubbs).

¹²⁷ *Id.* (Mr. Stubbs); Ex. NRC000013, Staff Safety Panel 2 Presentation at 9.

¹²⁸ Ex. NRC000013, Staff Safety Panel 2 Presentation at 11; Tr. at 122 (Mr. Hernandez).

¹²⁹ Ex. NRC000013, Staff Safety Panel 2 Presentation at 11.

¹³⁰ *Id.* at 12; Tr. at 123 (Mr. Hernandez).

¹³¹ Ex. NRC000013, Staff Safety Panel 2 Presentation at 13.

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for completing the inspections, tests, analyses, and acceptance criteria (ITAAC) in the combined license.¹³² The Staff found this approach acceptable because it would be imposed as a condition in the license and because DTE committed to using NRC-endorsed guidance when conducting its assessment.¹³³

d. Emergency Planning

In its pre-hearing information paper, the Staff identified the proximity of the Fermi site to the Canadian border as a novel issue in its environmental review.¹³⁴ We considered this issue in the context of the safety review as well and asked the Staff pre-hearing questions in recognition of the fact that the Canadian border lies within the ten-mile emergency planning zone for Fermi Unit 3.¹³⁵ In particular, we asked whether NRC regulations require an applicant to make protective action recommendations to Canadian officials in the event of an emergency at the Fermi site.¹³⁶ In addition, we asked how protective action recommendations to state, local, or provincial officials would be made regarding members of the public (for example, boaters) within the United States and Canadian portions of the plume exposure pathway

¹³² *Id.* at 15. The Staff modified the license condition proposed by DTE from a completion date of two years before initial fuel load. *Id.*

¹³³ *Id.* at 15-16; Tr. at 124 (Mr. Barss).

¹³⁴ Ex. NRC000001, Staff Information Paper at 17-19.

¹³⁵ Initial Pre-Hearing Questions at 3-4.

¹³⁶ *Id.* at 3.

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emergency planning zone.¹³⁷ We also asked how the proximity of proposed Fermi Unit 3 to Canada affected the Staff's emergency planning review overall.¹³⁸

In response, the Staff noted that the NRC's emergency planning regulations do not address areas outside of the United States and therefore there is no requirement for DTE to make protective action recommendations to Canada.¹³⁹ The Staff explained, however, that DTE's emergency plan takes the Canadian border into account. It provides for an initial notification to the Province of Ontario, Canada in several circumstances: in the event of an initial emergency classification; a classification escalation; the issuance of, or change to, a protective action recommendation for the general public; the state of a radiological release status; and event de-escalation, termination, or entry into recovery phase.¹⁴⁰ The Staff also stated that state and local officials are responsible for implementing protective action recommendations and that if informed of a general emergency, the State of Michigan would request assistance from the U.S. Coast Guard (through the National Response Framework) for protective actions affecting activities on Lake Erie, including Canadian waters.¹⁴¹ The Province of Ontario and the appropriate local officials would be responsible for implementing protective actions in the Province and would respond in accordance with the Provincial Nuclear Emergency Response

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Ex. NRC000004, Staff Responses to Initial Pre-Hearing Questions at 4-5.

¹⁴⁰ *Id.* at 5.

¹⁴¹ *Id.* at 6.

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Plan.¹⁴² In addition, the Staff noted that our agency and the Canadian Nuclear Safety Commission have formally agreed to notify each other “promptly of any significant radiological event, accident, or emergency that occurs in activities under . . . [our] respective jurisdictions.”¹⁴³ The Staff stated that its review “was not materially affected by the proximity to Canada.”¹⁴⁴

e. Squib Valves

We also asked the Staff to discuss its review of squib valves, which were the topic of considerable discussion during the mandatory hearings for the Vogtle and Summer combined license applications, which referenced the AP1000 certified design.¹⁴⁵ This topic was of particular focus for the *Vogtle* and *Summer* hearings because the inservice testing and inspection program for squib valves in those applications would have relied on an American Society of Mechanical Engineers (ASME) code provision that was still under development at the time.¹⁴⁶

In the event of a severe accident in an AP1000, squib valves, which are explosively activated, reduce pressure and inject water as needed into the reactor vessel.¹⁴⁷ The squib valves are subject to ITAAC specified in the AP1000 DCD. The purpose of the testing program

¹⁴² *Id.* at 5-6.

¹⁴³ *Id.* at 5 (citing “Arrangement Between USNRC and CNSC for the Exchange of Technical Information and Cooperation in Nuclear Safety Matters” (ML12152A096)).

¹⁴⁴ *Id.*

¹⁴⁵ See *Vogtle*, CLI-12-2, 75 NRC at 90-96; *Summer*, CLI-12-9, 75 NRC at 460-64.

¹⁴⁶ *Vogtle*, CLI-12-2, 75 NRC at 91; *Summer*, CLI-12-9, 75 NRC at 461.

¹⁴⁷ See *Vogtle*, CLI-12-2, 75 NRC at 90; *Summer*, CLI-12-9, 75 NRC at 461.

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required by ITAAC is to ensure that the valves operate as intended under design conditions.¹⁴⁸ Although we found the Staff's review of the Vogtle and Summer applications rigorous, we shared a concern initially raised by ACRS regarding the status of the inservice inspection/inservice testing program for this component and imposed a condition in the Vogtle and Summer licenses that requires the implementation of a squib-valve surveillance program prior to fuel load.¹⁴⁹

The Vogtle and Summer applications and the Fermi Unit 3 application reference entirely different reactor designs: the Vogtle and Summer applications referenced the AP1000 certified design, and the Fermi Unit 3 application, as discussed above, references the ESBWR certified design. Nevertheless, the ESBWR also uses squib valves as part of its passive safety system, and the Staff has proposed a license condition, based on the experience licensing Vogtle and Summer, that would require a surveillance program for squib valves prior to fuel load to supplement the inservice testing requirements.¹⁵⁰ We asked the Staff a pre-hearing question on this issue; the Staff also provided testimony at the hearing.¹⁵¹

The Staff explained that the 2012 edition of the ASME code, which the Staff is in the process of incorporating by reference into 10 C.F.R. § 50.55a, includes pre-service and

¹⁴⁸ See *Vogtle*, CLI-12-2, 75 NRC at 90; *Summer*, CLI-12-9, 75 NRC at 461.

¹⁴⁹ *Vogtle*, CLI-12-2, 75 NRC at 93-95; *Summer*, CLI-12-9, 75 NRC at 461-63.

¹⁵⁰ Tr. at 98-99 (Mr. Scarbrough) (explaining that there is a wider size range of squib valves in the ESBWR than in the AP1000); Ex. NRC000008A, SER at 3-88 to 3-90; Ex. NRC000002, Draft Combined License, Enrico Fermi Nuclear Plant Unit 3, DTE Electric Company, Docket No. 52-033 (Dec. 4, 2014), at 12-14 (Draft Combined License).

¹⁵¹ Initial Pre-Hearing Questions at 9-10; Tr. at 98-100.

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inservice surveillance provisions for squib valves.¹⁵² After the rulemaking is completed, licensees for new reactors will be required to comply with the ASME code surveillance provisions under 10 C.F.R. § 50.55a(f)(4)(i).¹⁵³ Until that time, however, the surveillance provisions will be imposed by a condition in the license.¹⁵⁴ At the hearing, Thomas Scarbrough, Senior Mechanical Engineer, Mechanical Engineering Branch, Office of New Reactors, explained that the proposed license condition for Fermi Unit 3 has more specific requirements than the ASME code provision.¹⁵⁵ He stated that the license condition specifically requires surveillance of squib valves in the gravity-driven cooling system and the automatic depressurization system but that it is consistent with the ASME code provision.¹⁵⁶

f. Knowledge Management

DTE has not set a date to begin construction of Fermi Unit 3 and has acknowledged that construction may not begin immediately after the issuance of a license for Fermi Unit 3.¹⁵⁷ At the hearing, we explored DTE's and the Staff's plans to maintain the knowledge gained during the combined license review, should DTE receive our approval for a license and wait for some period of months or years to begin construction.¹⁵⁸ DTE and the Staff were asked to address

¹⁵² Ex. NRC000004, Staff Responses to Initial Pre-Hearing Questions at 19.

¹⁵³ *Id.*; Tr. at 100 (Mr. Scarbrough).

¹⁵⁴ Ex. NRC000004, Staff Responses to Initial Pre-Hearing Questions at 19.

¹⁵⁵ Tr. at 99.

¹⁵⁶ *Id.*; *see also* Ex. NRC000004, Staff Responses to Initial Pre-Hearing Questions at 20.

¹⁵⁷ *See* Tr. at 209 (Mr. Smith).

¹⁵⁸ *See id.* at 209-12.

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the challenges they see, if any, in preserving knowledge between receipt of a combined license and future construction.¹⁵⁹

Mr. Smith for DTE explained that over the past two years DTE has been in the process of establishing a “holder project” that will provide the “infrastructure” to comply with NRC requirements as a licensee “for an indefinite period of time,” including funds in its “long-term planning budget.”¹⁶⁰ Mr. Smith also explained that the continued operation of Fermi Unit 2 provides a “ready pool of resource[s].”¹⁶¹

Mr. Tracy, responding for the Staff, explained that the question goes to the heart of the Staff’s plans for the future of the new reactor program.¹⁶² He acknowledged the need to retain knowledge and experience between NRC Headquarters and NRC Region II for license issuance and proper oversight.¹⁶³ Mr. Akstulewicz expanded on this response, breaking down the knowledge-management issue into two time periods—the near term (five years) and the long term (beyond five years).¹⁶⁴ Over the next five years, Mr. Akstulewicz stated that the Staff will remain busy working through the detailed design of the ESBWR as the licensing review continues for the North Anna combined license application, whose applicant is again referencing

¹⁵⁹ Tr. at 209 (Chairman Burns).

¹⁶⁰ *Id.* at 209-10.

¹⁶¹ *Id.* at 210.

¹⁶² *See id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 211.

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the ESBWR design.¹⁶⁵ Beyond that time frame, as DTE provides its regular updates to the Final Safety Analysis Report (FSAR), Mr. Akstulewicz stated that the Staff will need to ensure that knowledge and staffing resources are maintained to address potentially evolving technical issues.¹⁶⁶

2. Environmental Issues

a. Historic Preservation of Fermi Unit 1

The Staff identified two novel environmental issues in its information paper that it discussed at the hearing—the historic preservation of Fermi Unit 1, and the Staff’s interaction with international organizations due to the Fermi site’s proximity to the Canadian border.¹⁶⁷ DTE’s plans for constructing Fermi Unit 3 require the demolition of Fermi Unit 1, a prototype ninety-four megawatt electric fast breeder reactor that began commercial operation in 1957 and was permanently shut down in 1972.¹⁶⁸ The American Nuclear Society designated Fermi Unit 1

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 212.

¹⁶⁷ Ex. NRC000001, Staff Information Paper at 16-19. The Staff also discussed its implementation of the Continued Storage Rule, but this became a potentially contested issue after the Staff submitted its paper and responded to pre-hearing questions on the topic. See Ex. NRC000001, Staff Information Paper at 19-20; Ex. NRC000004, Staff Responses to Initial Pre-Hearing Questions at 42-44. The parties were asked not to discuss the issue at the uncontested hearing. Tr. at 176-77 (Chairman Burns).

¹⁶⁸ Tr. at 180-81 (Ms. Sutton).

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as a Nuclear Historic Landmark in 1986.¹⁶⁹ In addition, Fermi Unit 1 is eligible for listing in the National Register of Historic Places.¹⁷⁰

As part of its compliance with section 106 of the National Historic Preservation Act, the Staff determined that “if demolition of Fermi Unit 1 is required to build Fermi 3, this will result in a finding of adverse effect under [the] applicable . . . criteria in 36 CFR [§] 800.5.”¹⁷¹ The Staff, the Michigan State Historic Preservation Officer, and DTE entered into a memorandum of agreement to mitigate the adverse effect finding.¹⁷² DTE agreed to preserve artifacts from Fermi Unit 1 in a permanent exhibit at the Monroe County Community College; the exhibit opened in August 2013.¹⁷³ It also sent a documentation package on Fermi Unit 1 to the Michigan State Archives.¹⁷⁴ On January 31, 2014, DTE notified the Staff that it had completed work on the exhibit.¹⁷⁵ The Staff concluded that DTE had met the terms of the memorandum of agreement.¹⁷⁶

¹⁶⁹ Tr. at 181 (Ms. Sutton); Ex. NRC000015, Staff Environmental Panel 2 Presentation at 2.

¹⁷⁰ Ex. NRC000015, Staff Environmental Panel 2 Presentation at 2.

¹⁷¹ Tr. at 181 (Ms. Sutton). See *generally* National Historic Preservation Act of 1966, as amended, § 106, 16 U.S.C. § 470f.

¹⁷² Tr. at 181 (Ms. Sutton).

¹⁷³ *Id.* at 182 (Ms. Sutton); Ex. DTE000009, DTE Environmental Panel 2 Presentation at 3.

¹⁷⁴ Ex. NRC000015, Staff Environmental Panel 2 Presentation at 3.

¹⁷⁵ Tr. at 182 (Ms. Sutton).

¹⁷⁶ *Id.* (Ms. Sutton).

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b. International Cooperation

The Staff found its interactions with international organizations to be an important part of its environmental review for Fermi Unit 3, given that the international boundary between the United States and Canada is just over seven miles (eleven kilometers) from the Fermi site.¹⁷⁷ Even though NRC regulations do not require the Staff to analyze the environmental impacts of NRC licensing actions “upon the environment of foreign nations,” the Staff explained that it extended its outreach to international organizations “to inform its analysis of the potential environmental impacts of the Fermi project.”¹⁷⁸ DTE, for its part, explained that cross-border interaction with Canada, although not usually pertaining to environmental concerns, is not new; it meets regularly with Canadian officials primarily with regard to emergency planning for Fermi Unit 2.¹⁷⁹ Mr. Smith testified for DTE; he explained that DTE addressed the potential trans-boundary impacts in its Environmental Report and that none of them were unique or unusual.¹⁸⁰

The Staff stated that it contacted two environmental organizations—the International Joint Commission’s Great Lakes Water Quality Board and the Great Lakes Fisheries Commission.¹⁸¹ The International Joint Commission’s Great Lakes Water Quality Board is made up of federal, state, provincial, local, and tribal government officials in the United States

¹⁷⁷ Ex. NRC000001, Staff Information Paper at 17-18.

¹⁷⁸ *Id.* (quoting 10 C.F.R. § 51.10(a)).

¹⁷⁹ Ex. DTE000009, DTE Environmental Panel 2 Presentation at 4; Tr. at 179 (Mr. Smith).

¹⁸⁰ Ex. DTE000009, DTE Environmental Panel 2 Presentation at 4; Tr. at 180.

¹⁸¹ Ex. NRC000001, Staff Information Paper at 18; Tr. at 183 (Ms. Sutton); see *also* Ex. NRC000010B, FEIS at D-7, D-77 to D-78.

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and Canada, as well as representatives from business and environmental organizations.¹⁸² The Great Lakes Fisheries Commission is made up of federal, state, and provincial government officials from the United States and Canada, as well as academic experts.¹⁸³ The information that the Staff gathered from these organizations informed the Staff's analysis in the FEIS.¹⁸⁴ For example, in a letter responding to the Staff's request for comments, the Great Lakes Water Quality Board cited a number of its reports on water quality in the Great Lakes Basin, and the Staff considered this information when evaluating the impacts from operation of Fermi Unit 3.¹⁸⁵

The Staff also contacted the U.S. Fish and Wildlife Service for information relating to trans-boundary impacts to the Detroit River International Wildlife Refuge, which Fish and Wildlife manages jointly with the Canadian government.¹⁸⁶ In 2003, DTE placed portions of the Fermi site under management of the Detroit River International Wildlife Refuge.¹⁸⁷ Fish and Wildlife commented during the scoping process for the Fermi Unit 3 application that it would "continue to work with DTE on wildlife management during the Fermi 3 planning process."¹⁸⁸ The Staff used the information obtained from Fish and Wildlife regarding the refuge to inform its

¹⁸² Ex. NRC000001, Staff Information Paper at 18.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ See Ex. NRC000010B, FEIS at D-78.

¹⁸⁶ Ex. NRC000001, Staff Information Paper at 18.

¹⁸⁷ *Id.*; see also Ex. NRC000010B, FEIS at D-54.

¹⁸⁸ Ex. NRC000001, Staff Information Paper at 18.

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land use and terrestrial ecology impact determinations.¹⁸⁹ Overall, the Staff found that the information it obtained through its international outreach “supported the thoroughness of . . . [its] review.”¹⁹⁰

c. *Proposed Transmission-Line Corridor*

In its Environmental Report, DTE described a proposed transmission corridor to deliver electricity from the new plant to the grid.¹⁹¹ DTE explained that the International Transmission Company (ITC*Transmission*) plans to install three new 345 kV transmission lines from Unit 3 to a substation northwest of the plant.¹⁹² The proposal would place the lines in existing corridors of Fermi and non-Fermi lines for 18.6 miles (29.9 kilometers).¹⁹³ The lines would then continue to the Milan substation in a mostly undeveloped corridor for 10.8 miles (17.4 kilometers).¹⁹⁴ DTE stated that ITC*Transmission* would own and operate the lines in the proposed corridor.¹⁹⁵

DTE’s Environmental Report discussed potential environmental impacts along the potential transmission corridor.¹⁹⁶ DTE concluded that the environmental impacts of transmission-line development likely would be small because most of the development would

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 19.

¹⁹¹ Ex. NRC000006F, DTE Combined License Application at 1-4 to 1-5, 2-22 to 2-26.

¹⁹² *Id.* at 1-4 to 1-5.

¹⁹³ *Id.* at 2-23.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 1-5.

¹⁹⁶ See, e.g., Ex. NRC000006F, NRC000006G, NRC000006H, DTE Combined License Application at 2-22 to 2-26, 2-469 to 2-473, 4-12 to 4-22, 5-5 to 5-10

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likely take place along an existing corridor.¹⁹⁷ Further, DTE reasoned that the proposed shorter, 10.8-mile (17.4-kilometer) undeveloped corridor would be expected to experience minimal impacts because best management practices likely would be used and only a limited area around the bases of the towers would be disturbed.¹⁹⁸ The NRC Staff incorporated this information into the FEIS along with its own review. Appendix M of the FEIS provides a roadmap of the Staff's discussion of transmission-line impacts.¹⁹⁹

As discussed above, Intervenor in the contested proceeding twice proposed a contention challenging DTE's and the Staff's discussion of transmission-corridor impacts. The Board dismissed those challenges as impermissibly late, but requested our permission to review the adequacy of the Staff's consideration of transmission-corridor impacts *sua sponte*. We denied the Board's request, which left the issue uncontested and therefore suitable for our review in the mandatory hearing. Thereafter, we explored with DTE and the Staff the environmental impacts of the proposed transmission-line corridor before and during the hearing.²⁰⁰

¹⁹⁷ See Ex. NRC000006G, DTE Combined License Application at 4-12 to 4-22.

¹⁹⁸ See *id.* at 4-15 to 4-16.

¹⁹⁹ Ex. NRC000010D, FEIS at M-1 to M-2.

²⁰⁰ See Transmission-Line Corridor Questions; Tr. at 154-58 (Commissioner Baran); Ex. NRC000016, NRC Staff Responses to Commission Additional Pre-Hearing Questions, Proposed Corrections to Draft COL, and Updated Exhibit Table (Jan. 30, 2015).

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Building transmission lines is not considered “construction” within the scope of the NRC’s regulatory authority.²⁰¹ As such, the Staff ordinarily evaluates the environmental impacts of building transmission lines as part of its cumulative impacts analysis.²⁰² However, the U.S. Army Corps of Engineers—a cooperating agency in the environmental review of DTE’s combined license application—considered preconstruction activities like the proposed transmission-line corridor to be within the direct impacts of the Fermi Unit 3 project.²⁰³ Therefore, the Staff considered the impacts of the proposed transmission-line corridor for Fermi Unit 3, normally a “preconstruction activity,” together with the impacts of “construction” activities within the NRC’s regulatory purview.²⁰⁴ The Staff also discussed measures to mitigate any adverse impacts from the transmission lines, as well as considered transmission-line impacts in its alternatives analysis.²⁰⁵

²⁰¹ See *id.* §§ 50.10(a)(2)(vii), 51.4 (defining “construction”); see also See Final Rule, Limited Work Authorizations for Nuclear Power Plants, 72 Fed. Reg. 57,416, 57,417 (Oct. 9, 2007) (Limited Work Authorization Rule) (requiring NRC authorization “only before undertaking activities that have a reasonable nexus to radiological health and safety and/or common defense and security”).

²⁰² Limited Work Authorization Rule, 72 Fed. Reg. at 57,421.

²⁰³ See Ex. NRC000010A, FEIS at 1-7 to 1-8, 4-1 to 4-4.

²⁰⁴ See *id.* at 4-3; Ex. NRC000010D, FEIS at M-1 to M-2.

²⁰⁵ See, e.g., *id.* at 4-25 (citing the Environmental Protection Agency’s recommendation that when clearing forested land for transmission lines that DTE “consider establishing low-growing native plants conducive to periodic mowing”); *id.* at 4-9 (noting ITC *Transmission*’s statement that it would use best practices for minimizing environmental impacts); Ex. NRC000010B, FEIS at 9-4 (discussing transmission-corridor impacts relative to alternative sources of energy); *id.* at 9-81, 9-95 to 9-96, 9-263 (considering transmission-corridor impacts in the comparison of alternative sites).

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The Staff explained at the hearing that there would have been no difference in its FEIS analysis of transmission-corridor impacts had the Staff considered their development a “direct impact” of licensing Fermi Unit 3.²⁰⁶ Given that there has been no formal proposal by ITC*Transmission* announcing the route of the proposed transmission line for Fermi Unit 3, the Staff performed its analysis using the best information available.²⁰⁷ The Staff expected that the U.S. Army Corps of Engineers and state agencies, including the Michigan Department of Environmental Quality, would perform additional environmental analyses when ITC*Transmission* applies for the permits it will need to build any new transmission lines.²⁰⁸

d. Consultation under the Endangered Species Act

Section 7 of the Endangered Species Act requires an agency, in consultation with and with the assistance of the Secretary of the Interior or the Secretary of Commerce (as appropriate), to ensure that “any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of critical habitat of such species.”²⁰⁹ As part of its environmental review, the Staff prepared a biological assessment discussing the potential impacts of constructing and operating Fermi Unit 3 on federally listed threatened or endangered species and species that are candidates for federal listing.²¹⁰ The Staff found that

²⁰⁶ See Tr. at 155-58.

²⁰⁷ See *id.* at 155; Ex. NRC000010A, FEIS at 2-10.

²⁰⁸ See, e.g., Ex. NRC000010A, FEIS at 2-61, 4-8, 4-11.

²⁰⁹ Endangered Species Act § 7(a)(2), 16 U.S.C. § 1536(a)(2).

²¹⁰ See Ex. NRC000010D, app. F.

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no listed species were likely to be adversely affected by the project, and the respective federal resource agencies agreed.²¹¹ After the Staff finalized the FEIS, and shortly before the hearing, however, the U.S. Fish and Wildlife Service listed a new threatened species, the rufa red knot bird.²¹²

At the hearing, the Staff provided the status of ongoing interactions with Fish and Wildlife concerning the rufa red knot bird.²¹³ Mallecia Sutton testified that the Staff contacted Fish and Wildlife and planned to issue a supplemental biological assessment for the rufa red knot.²¹⁴ The Staff has since notified us that it submitted its biological assessment to Fish and Wildlife on February 20, 2015.²¹⁵ The Staff determined that the proposed action may affect but is not likely to adversely affect the rufa red knot.²¹⁶ The Fish and Wildlife Service concurred with the Staff's conclusion.²¹⁷

The Staff also provided a status update on Fish and Wildlife's then-proposed listing of the northern long-eared bat as a threatened or endangered species.²¹⁸ We note that the Fish and Wildlife Service listed the northern long-eared bat as a threatened species on April 2,

²¹¹ Tr. at 152 (Ms. Sutton).

²¹² See Ex. NRC000014, Staff Environmental Panel 1 Presentation at 12.

²¹³ See *id.*

²¹⁴ Tr. at 152, 158-59.

²¹⁵ See April 5 Commission Notification at 1.

²¹⁶ *Id.*; see also Ex. NRC000018, Supplemental Biological Assessment at 25.

²¹⁷ April 5 Commission Notification; see also Ex. NRC000019, March 23 Letter from the Fish and Wildlife Service at 1-2.

²¹⁸ Ex. NRC000014, Staff Environmental Panel 1 Presentation at 12.

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2015.²¹⁹ Subsequently, the Staff submitted a biological assessment to the Fish and Wildlife Service that concluded that construction and operation of Fermi Unit 3 may affect but is not likely to adversely affect the northern long-eared bat.²²⁰ The listing of the northern long-eared bat will not be effective until May 4, 2015.²²¹ In the meantime, however, the Fish and Wildlife Service has concurred with the Staff's conclusion.²²²

B. Findings

We have conducted an independent review of the sufficiency of the Staff's safety findings, with particular attention to the topics discussed above. Our findings, however, are based on the entire record. Based on the evidence presented in the uncontested hearing, including the Staff's review documents and the testimony provided, we find that the applicable standards and requirements of the Atomic Energy Act and the NRC regulations have been met. The required notifications to other agencies or bodies have been duly made. DTE is technically and financially qualified to engage in the activities authorized.²²³ We find that there is

²¹⁹ See Endangered and Threatened Wildlife and Plants; Threatened Species Status for the Northern Long-Eared Bat with 4(d) Rule, 80 Fed. Reg. 17,974 (Apr. 2, 2015) (Northern Long-Eared Bat Listing); April 5 Commission Notification at 1.

²²⁰ Ex. NRC000020, Supplemental Biological Assessment (Northern Long-Eared Bat).

²²¹ Northern Long-Eared Bat Listing, 80 Fed. Reg. at 17,974.

²²² April 29 Commission Notification; Ex. NRC000021, April 28 Letter from the Fish and Wildlife Service.

²²³ As part of its financial qualification review, the Staff found that DTE had met the requirements for financial protection and onsite property insurance for Fermi Unit 3. Ex. NRC000008A, SER at 1-37 to 1-38. The Staff stated that it would issue DTE an amended indemnity agreement to include Fermi Unit 3 upon issuance of the combined license. *Id.* at 1-38. The Staff has since provided an update on the status of its amendment to the indemnity agreement. Particularly, the Staff represented that American Nuclear Insurers has committed to "endorse a site (continued . . .)

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reasonable assurance that the facility will be constructed and operated in conformity with the license, the provisions of the Atomic Energy Act, and the NRC's regulations and that issuance of the license will not be inimical to the common defense and security or to the health and safety of the public. Additionally, we find that the Staff's proposed license conditions are appropriately drawn²²⁴ and sufficient to provide reasonable assurance of adequate protection of public health and safety.

We also conducted an independent review of the Staff's environmental analysis in the FEIS taking into account the particular requirements of NEPA. NEPA section 102(2)(A) requires agencies to use "a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts" in decision-making that may impact the environment.²²⁵ We find that the environmental review team used the systematic,

(. . . continued)

insurance policy that includes the Fermi 3 site concurrent with the NRC's issuance of a . . . [combined license] to DTE" and concurrent with the amendment of the indemnity agreement. Roach, Kevin C., Counsel for the Staff, letter to the Commissioners (Mar. 24, 2015), at 1. The Staff further represented that it will coordinate with DTE and American Nuclear Insurers so that the amended policy is effective as of the date of the combined license and the amended indemnity agreement. *Id.* The Staff thus confirmed its financial protection finding. *Id.* at 1-2 (citing Ex. NRC000002, Draft Combined License at 1 ("The Fermi owner has satisfied the applicable provisions of 10 [C.F.R.] Part 140, "Financial Protection Requirements and Indemnity Agreements[.]")).

²²⁴ However, we direct the Staff to make the changes to the draft combined license that it identified during this proceeding. See Ex. NRC000004, NRC Staff Responses to Commission Initial Pre-Hearing Questions at 28-30; Ex. NRC000016, Staff Responses to Additional Pre-Hearing Questions, Attachment B; April 5 Commission Notification; see *also* Ex. NRC000002, Draft Combined License.

²²⁵ NEPA § 102(2)(A), 42 U.S.C. § 4332(2)(A).

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interdisciplinary approach that NEPA requires.²²⁶ The environmental review team consisted of more than forty individuals with expertise in disciplines including ecology, geology, hydrology, radiological health, socioeconomics, and cultural resources.²²⁷

NEPA section 102(2)(E) calls for agencies to study, develop, and describe appropriate alternatives.²²⁸ The alternatives analysis is the “heart of the environmental impact statement.”²²⁹ Based on the Staff’s testimony at the hearing, as well as the discussion in the FEIS, we find that the environmental review identified an appropriate range of alternatives with respect to alternative power sources, alternative sites, and alternative system designs and adequately described the environmental impacts of each alternative.²³⁰ We find reasonable the Staff’s conclusion that none of the alternatives considered is environmentally preferable to the proposed action.²³¹

NEPA section 102(2)(C) requires us to assess the relationship between local short-term uses and long-term productivity of the environment, to consider alternatives, and to describe the unavoidable adverse environmental impacts and the irreversible and irretrievable commitments

²²⁶ See, e.g., Tr. at 144-48 (Ms. Dixon-Herrity) (providing an overview of the Staff’s environmental review methodology); Ex. NRC000014, Staff Environmental Panel 1 Presentation at 3-8.

²²⁷ See Ex. NRC000010B, FEIS at A-1 to A-2.

²²⁸ NEPA § 102(2)(E), 42 U.S.C. § 4332(2)(E).

²²⁹ 10 C.F.R. pt. 51, subpt. A, app. A, § 5.

²³⁰ See, e.g., Tr. at 148-50 (Mr. Kugler); Ex. NRC000010B, FEIS Ch. 9.

²³¹ See, e.g., Tr. at 149-50 (Mr. Kugler); Ex. NRC000010B, FEIS at 10-25 to 10-26.

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of resources associated with the proposed action.²³² The discussion of alternatives is in Chapter 9 of the FEIS; the other items are discussed in Chapter 10.²³³ The environmental review team found extensive short-term benefits of the project from the production of electrical energy and the economic productivity of a site that “is not currently available for agricultural or industrial uses.”²³⁴ In terms of long-term productivity, the review team found that “the enhancement of regional productivity that would result from the electrical energy produced by Fermi 3 would lead to a correspondingly large increase in regional long-term productivity that would not be equaled by any other long-term use of the site.”²³⁵

Chapter 10 of the FEIS includes a chart of the unavoidable adverse environmental impacts during preconstruction, construction, and operation, along with actions to mitigate those impacts.²³⁶ The environmental review team found that the unavoidable adverse impacts during preconstruction and construction would be small for all resource areas except for terrestrial and wetland resources, socioeconomics, and historical and cultural resources, which could be small to moderate based on potential impacts to the eastern fox snake, increased traffic during construction, and demolition of Fermi Unit 1, respectively.²³⁷ For operation, the review team found that the unavoidable adverse impacts during operation would be small for all resource

²³² NEPA § 102(2)(C)(ii)-(v), 42 U.S.C. § 4332(2)(C)(ii)-(v).

²³³ Ex. NRC000010B, FEIS ch. 9-10.

²³⁴ *Id.* at 10-21.

²³⁵ *Id.* at 10-22.

²³⁶ *Id.* at 10-4 to 10-21.

²³⁷ *See id.* at 10-5 to 10-9.

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areas with the exception of terrestrial and wetland resources and socioeconomics, which could be small to moderate based on potential impacts to the eastern fox snake and increased traffic during outages, respectively.²³⁸

Finally, with regard to irreversible and irretrievable commitments of resources, the environmental review team concluded that preconstruction and construction activities on the Fermi site, including the proposed transmission corridor, “would permanently convert some portions of terrestrial and aquatic habitats.”²³⁹ The Staff also concluded that during the construction of Fermi Unit 3, the materials used and energy consumed, “while irretrievable, would be of small consequence with respect to the quantities of such resources that are available.”²⁴⁰ With regard to operation of Fermi Unit 3, the review team determined that uranium would be irretrievably committed, “but that this irreversible and irretrievable commitment . . . [would] be negligible.”²⁴¹

We must weigh these unavoidable adverse environmental impacts and resource commitments—the environmental “costs” of the project—against the project’s benefits.²⁴² Considering the need for power in the region and the expected increase in productivity, jobs, and tax revenue as described during the hearing and in the FEIS, we find that the benefits of the project outweigh the costs described above. Moreover, we have considered each of the

²³⁸ See *id.* at 10-12 to 10-19.

²³⁹ *Id.* at 10-23.

²⁴⁰ *Id.* at 10-25.

²⁴¹ *Id.*

²⁴² 10 C.F.R. § 51.107(a).

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requirements of NEPA section 102(2)(C) and find nothing in the record that would lead us to disturb the Staff's conclusions on those requirements.

In sum, for each of the topics discussed at the hearing and in today's decision, we find that the Staff's review was reasonably supported in logic and fact and sufficient to support the Staff's conclusions.²⁴³ Based on our review of the FEIS, we also find that the remainder of the FEIS was reasonably supported and sufficient to support the Staff's conclusions.

Therefore, as a result of our review of the FEIS environmental analysis, and in accordance with the Notice of Hearing for this uncontested proceeding, we find that the requirements of NEPA section 102(2)(A), (C), and (E), and the applicable regulations in 10 C.F.R. Part 51, have been satisfied with respect to the combined license application. We independently considered the final balance among conflicting factors contained in the record of this proceeding. We find, after weighing the environmental, economic, technical, and other benefits against environmental and other costs, and considering reasonable alternatives, that the combined license should be issued.

III. CONCLUSION

We find that, with respect to the safety and environmental issues before us today, the Staff's review of DTE's combined license application was sufficient to support the findings in

²⁴³ Our finding includes the Staff's consideration of the proposed transmission-line corridor for Fermi Unit 3. We are satisfied that the Staff took a hard look at the environmental impacts of the transmission-line corridor, regardless of whether the Staff's analysis is characterized as a cumulative impacts analysis or a direct impacts analysis. In substance, the Staff reviewed and discussed potential transmission-corridor impacts together with other preconstruction and construction impacts on the environment from construction and operation of Fermi Unit 3. We find that the Staff's approach was reasonable and that its consideration of this issue satisfied NEPA.

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10 C.F.R. §§ 52.97(a) and 51.107(a). We *authorize* the Director of the Office of New Reactors to issue the combined license for the construction and operation of Fermi Nuclear Power Plant Unit 3 subject to the directions and modifications contained herein.²⁴⁴ We *authorize* the Staff to issue the record of decision, subject to its revision as necessary to reflect the findings in this decision and the results of the Staff's analysis of environmental impacts on recently listed species.²⁴⁵

IT IS SO ORDERED.

For the Commission

NRC Seal

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 30th day of April, 2015.

²⁴⁴ See *supra* note 224.

²⁴⁵ See Ex. NRC000003, Draft Record of Decision, U.S. Nuclear Regulatory Commission Docket No. 52-033, Combined License Application for Enrico Fermi Nuclear Plant Unit 3 (Dec. 5, 2014). The Staff may issue the license notwithstanding the pendency of a petition for reconsideration under 10 C.F.R. § 2.345, a petition for review under 10 C.F.R. § 2.341, a motion for stay under 10 C.F.R. § 2.342, or a petition for action under 10 C.F.R. § 2.206. 10 C.F.R. § 2.340(i).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)

DTE ELECTRIC COMPANY)

(Fermi Nuclear Power Plant, Unit 3)
Mandatory Hearing)

Docket No. 52-033-COL

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER (CLI-15-13)** have been served upon the following persons by Electronic Information Exchange.

U.S. Nuclear Regulatory Commission
Office of Commission Appellate Adjudication
Mail Stop: O-7H4
Washington, DC 20555-0001
ocaamail@nrc.gov

Detroit Edison Company
One Energy Plaza, 688 WCB
Detroit, Michigan 48226
Jon P. Christinidis, Esq.
christinidisj@dteenergy.com

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

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop: O-15D21
Washington, DC 20555-0001
Marcia Carpentier, Esq.
marcia.carpentier@nrc.gov
Kevin Roach, Esq.
kevin.roach@nrc.gov
Anthony Wilson, Esq.
anthony.wilson@nrc.gov
Megan Wright, Esq.
megan.wright@nrc.gov
Patrick Moulding, Esq.
patrick.moulding@nrc.gov

OGC Mail Center: Members of this office have received a copy of this filing by EIE service.

Fermi Nuclear Power Plant, Unit 3, Docket No. 52-033-COL (Mandatory Hearing)
COMMISSION MEMORANDUM AND ORDER (CLI-15-13)

Winston & Strawn, LLP
1700 K Street, NW
Washington, DC 20006-3817
Counsel for the Applicant
Noelle Formosa, Esq.
nformosa@winston.com
David Repka, Esq.
drepka@winston.com
Tyson R. Smith, Esq.
trsmith@winston.com
Carlos L. Sisco, Senior Paralegal
CSisco@winston.com

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

Dated at Rockville, Maryland
this 30th day of April, 2015

Attachment 3

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Stephen G. Burns, Chairman
Kristine L. Svinicki
William C. Ostendorff
Jeff Baran

In the Matter of:

DTE ELECTRIC COMPANY

(Fermi Nuclear Power Plant, Unit 3)

Docket No. 52-033-COL

CLI-15-12

MEMORANDUM AND ORDER

Beyond Nuclear moves to reopen the record of this proceeding and seeks a hearing on its claim that the final environmental impact statement prepared in connection with this combined license application violates the National Environmental Policy Act by failing to consider the environmental impacts associated with the continued storage of spent nuclear fuel.¹ For the reasons discussed below and explained in the related decision also issued today in the *Callaway* license renewal matter, Beyond Nuclear's request is denied.²

¹ See *Beyond Nuclear's Hearing Request and Petition to Intervene in Combined License Proceeding for Fermi Unit 3 Nuclear Power Plant* (Feb. 12, 2015) (Petition); *Beyond Nuclear's Motion to Reopen the Record of Combined License Proceeding for Fermi Unit 3 Nuclear Power Plant* (Feb. 12, 2015) (Motion).

² See *Union Electric Co. (Callaway Nuclear Power Plant, Unit 1)*, CLI-15-11 (Apr. 23, 2015) (slip op.).

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During this combined license proceeding, the U.S. Court of Appeals for the District of Columbia Circuit vacated and remanded our 2010 Waste Confidence Decision and Temporary Storage Rule.³ For various licensing actions, including this one, the Decision and Rule served as part of the environmental analysis of the impacts of spent fuel storage after the end of a reactor's license term, pending ultimate disposal of spent fuel in a repository. In response to the court's decision, Beyond Nuclear, together with other petitioners, sought to suspend final licensing decisions in this and other proceedings pending completion of our action on the remanded Waste Confidence proceeding.⁴ We suspended final licensing decisions until we addressed the court's remand and instructed the boards in the affected proceedings to hold the contentions in abeyance pending our further order.⁵

Last year, concurrent with our approval of the final Continued Storage Rule and companion Generic Environmental Impact Statement (GEIS), we lifted the suspension on final licensing decisions and directed that the proposed contention in this matter (among others) be dismissed.⁶ We observed that, "[a]s part of the analysis underpinning the GEIS . . . we

³ *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012).

⁴ *Petition to Suspend Final Licensing Decisions in All Pending Reactor Licensing Proceedings Pending Completion of Remanded Waste Confidence Proceedings* (June 18, 2012). Beyond Nuclear (together with several other intervenors) filed a new contention asserting that the draft environmental impact statement failed to address the environmental impacts associated with spent fuel pool leaks and fires, and the lack of a permanent spent fuel storage facility. *Intervenors' Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Proposed Fermi 3 Nuclear Power Plant* (July 9, 2012).

⁵ *Calvert Cliffs 3 Nuclear Project, LLC and UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 NRC 63 (2012). At that time, we observed, "[t]o the extent the NRC takes action with respect to waste confidence on a case-by-case basis, litigants can challenge such site-specific agency actions in our adjudicatory process." *Id.* at 67 (but citing *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 ("[L]icensing boards should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission.")).

⁶ *Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-14-8, 80 NRC 71, 77-79 (2014). The Board dismissed (continued . . .)

- 3 -

concluded that the impacts of continued storage will not vary significantly across sites; the impacts of continued storage at reactor sites, or at away-from-reactor sites, can be analyzed generically.”⁷ These generic determinations, therefore, were appropriately excluded from litigation in individual proceedings.⁸

Beyond Nuclear has now filed a fresh intervention petition in which it argues that the environmental analysis for the Fermi combined license is inherently flawed because it relies on the NRC’s generic analysis in the Continued Storage GEIS of the environmental impacts of the continued storage of spent fuel, yet did not supplement the final environmental impact statement to reflect these impacts.⁹ Beyond Nuclear seeks to reopen the record in this proceeding to file a “placeholder” contention in anticipation that the court of appeals will overturn our recently promulgated Continued Storage Rule.¹⁰ The NRC Staff and the applicant, DTE Electric Company, oppose the petition to intervene and motion to reopen.¹¹

the continued storage contention consistent with our direction. Order (Denying Motion to Admit Waste Confidence Contention) (Oct. 6, 2014), at 3 (unpublished).

⁷ *Calvert Cliffs*, CLI-14-8, 80 NRC at 78-79. We stated additionally that “the assumptions used in the analysis are sufficiently conservative to bound the impacts such that variances that may occur between sites are unlikely to result in environmental impact determinations greater than those presented in the GEIS.” *Id.* at 79 (citation omitted).

⁸ *Id.* at 79.

⁹ See “NUREG-2105, Final Environmental Impact Statement for Combined License (COL) for Enrico Fermi Unit 3, Vols. 1-4 (Jan. 2013) (ADAMS accession nos. ML12307A172, ML12307A176, ML12307A177, ML12347A202). Petition at 1, 7, 9 n.5; NUREG-2157, Vols. 1 & 2, *Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel* (Sept. 2014) (ADAMS accession nos. ML14196A105 and ML14196A107).

¹⁰ *Beyond Nuclear v. NRC*, Docket No. 14-1216 (D.C. Cir. filed Oct. 29, 2014); see Final Rule, Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,238 (Sept. 19, 2014).

¹¹ *NRC Staff Answer to Beyond Nuclear’s Motion to Reopen the Record and Petition to Intervene* (Feb. 27, 2015); *Applicant’s Response Opposing Beyond Nuclear’s Motion to Reopen and Request for Hearing* (Feb. 27, 2015)

- 4 -

Beyond Nuclear seeks to lodge with us a “placeholder” contention; it does not seek to litigate the substance of the contention now and candidly acknowledges that our rules of practice do not allow litigants to challenge our regulations within the context of individual license proceedings, absent a request for a waiver.¹² Rather, Beyond Nuclear states that it filed the petition to ensure that the decision resulting from its federal court challenge to the Continued Storage Rule and GEIS will be applied to this combined license proceeding.¹³ With respect to the bases of its contention and its rationale for moving to reopen this proceeding, Beyond Nuclear’s pleadings are substantively identical to those filed in the *Callaway* license renewal proceeding, which we also rule on today.¹⁴ Particularly, the contention challenges the generic findings in the GEIS; Beyond Nuclear does not, in its new contention, specifically challenge the *Fermi* combined license application or the final environmental impact statement.¹⁵

As we explained in the *Callaway* decision, a contention that challenges an agency regulation does not raise an issue appropriately within the scope of this individual licensing proceeding and is not admissible absent a waiver.¹⁶ Further, because the contention does not engage the *Fermi* combined license application, Beyond Nuclear has not demonstrated a genuine dispute with the applicant on a material issue.¹⁷

¹² Petition at 1-2. Beyond Nuclear does not seek a rule waiver. *Id.* at 2 n.2.

¹³ *Id.* at 2.

¹⁴ Compare *Missouri [Coalition] for the Environment’s Hearing Request and Petition to Intervene in License Renewal Proceeding for Callaway Nuclear Power Plant* (Dec. 8, 2014) (ML14342B010), and *Missouri [Coalition] for the Environment’s Motion to Reopen the Record of License Renewal Proceeding for Callaway Unit 1 Nuclear Power Plant* (Dec. 8, 2014) (ML14342B011), with Petition, and Motion.

¹⁵ Petition at 8-9.

¹⁶ *Callaway*, CLI-15-11, 81 NRC at __ (slip op. at 3-5).

¹⁷ *Id.* at __ (slip op. at 4). Moreover, the lack of an admissible contention necessarily precludes reopening the proceeding. *Id.* at __ (slip op. at 4 n.17).

- 5 -

For the reasons explained in *Callaway* and as discussed above, we *deny* Beyond Nuclear's motion to reopen the record of this proceeding and admit a new contention.

IT IS SO ORDERED.

For the Commission

NRC Seal

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 23rd day of April, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

DTE ELECTRIC COMPANY

(Fermi Nuclear Power Plant, Unit 3)

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Docket No. 52-033-COL

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER (CLI-15-12)** have been served upon the following persons by Electronic Information Exchange.

U.S. Nuclear Regulatory Commission
Office of Commission Appellate Adjudication
Mail Stop: O-7H4
Washington, DC 20555-0001
ocaamail@nrc.gov

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

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

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop: O-15D21
Washington, DC 20555-0001
Marcia Carpentier, Esq.

Ronald M. Spritzer, Chair
Administrative Judge
ronald.spritzer@nrc.gov

marcia.carpentier@nrc.gov

Anthony Baratta
Administrative Judge
anthony.baratta@nrc.gov

Sara Kirkwood, Esq.
sara.kirkwood@nrc.gov

Lisa London, Esq.
lisa.london@nrc.gov

Randall J. Charbeneau
Administrative Judge
randall.charbeneau@nrc.gov

Patrick Moulding, Esq.
patrick.moulding@nrc.gov

Kevin Roach, Esq.
kevin.roach@nrc.gov

Michael Spencer, Esq.
michael.spencer@nrc.gov

Matthew Zogby, Law Clerk
matthew.zogby@nrc.gov

Robert M. Weisman, Esq.
robert.weisman@nrc.gov

Anthony Wilson, Esq.
anthony.wilson@nrc.gov

Megan Wright, Esq.
megan.wright@nrc.gov

OGC Mail Center: Members of this office have received a copy of this filing by EIE service.

Fermi Nuclear Power Plant, Unit 3, Docket No. 52-033-COL
COMMISSION MEMORANDUM AND ORDER (CLI-15-12)

Detroit Edison Company
One Energy Plaza, 688 WCB
Detroit, Michigan 48226
Jon P. Christinidis, Esq.
christinidisj@dteenergy.com

Winston & Strawn, LLP
1700 K Street, NW
Washington, DC 20006-3817
Counsel for the Applicant
Noelle Formosa, Esq.
nformosa@winston.com
David Repka, Esq.
drepka@winston.com
Tyson R. Smith, Esq.
trsmith@winston.com
Carlos L. Sisco, Senior Paralegal
CSisco@winston.com

Nuclear Energy Institute
1201 F Street NW
Suite 1100
Washington, DC 20004
Jonathan Rund, Esq.
jmr@nei.org

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

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

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

Dated at Rockville, Maryland,
this 23rd day of April, 2015

Attachment 4

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Stephen G. Burns, Chairman
Kristine L. Svinicki
William C. Ostendorff
Jeff Baran

In the Matter of

DTE ELECTRIC CO.
(Fermi Nuclear Power Plant, Unit 3)

Docket No. 52-033-COL

DTE ELECTRIC CO.
(Fermi Nuclear Power Plant, Unit 2)

Docket No. 50-341-LR

DUKE ENERGY CAROLINAS, L.L.C.
(William States Lee III Nuclear Station, Units 1 and 2)

Docket Nos. 52-018-COL &
52-019-COL

ENTERGY NUCLEAR OPERATIONS, INC.
(Indian Point Nuclear Generating Units 2 and 3)

Docket Nos. 50-247-LR &
50-286-LR

FIRSTENERGY NUCLEAR OPERATING CO.
(Davis-Besse Nuclear Power Station, Unit 1)

Docket No. 50-346-LR

FLORIDA POWER & LIGHT CO.
(Turkey Point, Units 6 and 7)

Docket Nos. 52-040-COL &
52-041-COL

LUMINANT GENERATION CO. L.L.C.
(Comanche Peak Nuclear Power Plant, Units 3 and 4)

Docket Nos. 52-034-COL &
52-035-COL

NEXTERA ENERGY SEABROOK, L.L.C.
(Seabrook Station, Unit 1)

Docket No. 50-443-LR

NUCLEAR INNOVATION NORTH AMERICA, L.L.C.
(South Texas Project, Units 3 and 4)

Docket Nos. 52-012-COL &
52-013-COL

PACIFIC GAS AND ELECTRIC CO.
(Diablo Canyon Power Plant, Units 1 and 2)

Docket Nos. 50-275-LR &
50-323-LR

- 2 -

PROGRESS ENERGY FLORIDA, INC. (Levy County Nuclear Power Plant, Units 1 and 2)	Docket Nos. 52-029-COL & 52-030-COL
STP NUCLEAR OPERATING CO. (South Texas Project, Units 1 and 2)	Docket Nos. 50-498-LR & 50-499-LR
TENNESSEE VALLEY AUTHORITY (Bellefonte Nuclear Power Plant, Units 3 and 4)	Docket Nos. 52-014-COL & 52-015-COL
TENNESSEE VALLEY AUTHORITY (Sequoyah Nuclear Plant, Units 1 and 2)	Docket Nos. 50-327-LR & 50-328-LR
TENNESSEE VALLEY AUTHORITY (Watts Bar Nuclear Plant, Unit 2)	Docket No. 50-391-OL
UNION ELECTRIC CO. (Callaway Plant, Unit 1)	Docket No. 50-483-LR
VIRGINIA ELECTRIC AND POWER CO. d/b/a DOMINION VIRGINIA POWER and OLD DOMINION ELECTRIC COOPERATIVE (North Anna Power Station, Unit 3)	Docket No. 52-017-COL

CLI-15-4

MEMORANDUM AND ORDER

Several environmental organizations in the captioned matters (collectively, Petitioners) have requested that we suspend final reactor licensing decisions pending our issuance of a “waste confidence safety decision.”¹ Petitioners also have submitted companion filings proposing a new or amended waste confidence safety contention, together with related

¹ See, e.g., *Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Issuance of Waste Confidence Safety Findings* (Sept. 29, 2014) (errata Oct. 1, 2014; amended and corrected petition Oct. 6, 2014) (Petition). Citations to the Petition in today’s decision will reference the corrected Petition filed in the *Callaway* license renewal matter. A full list of the filings associated with this decision is set forth in the Appendix.

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procedural motions to reopen the record in several of the captioned proceedings.² For the reasons set forth below, we deny the suspension petitions, decline to admit the related contention, and deny the motions to reopen.

Petitioners primarily assert that the Atomic Energy Act of 1954, as amended (the Act), requires the NRC, as a precondition to issuing or renewing operating licenses for nuclear power plants, to make definitive findings concerning the technical feasibility of a repository for the disposal of spent nuclear fuel. We rejected a nearly identical argument in 1977 and, though much of the regulatory framework has changed in the intervening years, our reading of the Act has not.³

Our conclusion that a suspension is not warranted finds support not only in our interpretation of the Act itself, but also in the regulatory authority that Congress has provided to the agency to protect public health and safety. Indeed, our confidence in the safety and

² See, e.g., *Missouri Coalition for the Environment's Motion for Leave to File a New Contention Concerning the Absence of Required Waste Confidence Safety Findings in the Relicensing Proceeding at Callaway 1 Nuclear Power Plant* (Sept. 29, 2014) (Motion; filed in the Callaway license renewal docket). In some proceedings, petitioners also filed motions to reopen the record. See, e.g., *Motion to Reopen the Record for Callaway Nuclear Power Plant* (Sept. 29, 2014) (Motion to Reopen; filed in the Callaway license renewal docket). Intervenor in the *Levy County* combined license proceeding filed a motion to reopen, but subsequently withdrew their motion. See *Intervenors' Unopposed Motion to Withdraw Their Motion to Reopen the Record* (Oct. 2, 2014); Order (Dismissing Environmental Waste Confidence Contention) (Oct. 1, 2014) (unpublished). With the withdrawal of this motion, nine motions to reopen remain pending before us. In the *Indian Point* license renewal proceeding, Riverkeeper filed a substantively identical suspension petition together with a motion transmitting a new contention a few days after the initial suspension petitions were filed. *Petition to Suspend Final Decision in Indian Point Relicensing Proceeding Pending Issuance of Waste Confidence Safety Findings* (Oct. 3, 2014); *Riverkeeper Consolidated Motion for Leave to File a New Contention and New Contention RK-10 Concerning the Absence of Required Waste Confidence Safety Findings* (Oct. 3, 2014).

³ See *Natural Resources Defense Council, Denial of Petition for Rulemaking*, 42 Fed. Reg. 34,391, 34,393 (July 5, 1977), *aff'd*, *Natural Res. Def. Council v. NRC*, 582 F.2d 166 (2d Cir. 1978) (NRDC PRM Denial).

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technical feasibility of systems for the storage and disposal of spent fuel has only increased since the late 1970s, as demonstrated by our expanded regulatory scheme and the ongoing licensing of such systems, as well as the efforts that are under way—both in the United States and abroad—to develop repositories for the disposal of spent fuel. Thus, today we not only address Petitioners' concerns, but we also take the opportunity to confirm the continued validity of our determinations regarding the technical feasibility of safe spent fuel storage and ultimate disposal in a repository.

I. **BACKGROUND**

Recently, we approved a final rule and generic environmental impact statement, issued in accordance with the National Environmental Policy Act (NEPA) and the Administrative Procedure Act, to address the environmental impacts associated with the storage of spent nuclear fuel after the end of a reactor's license term (the Continued Storage Rule).⁴ Following the publication of the Continued Storage Rule and supporting generic environmental impact statement (Continued Storage GEIS), Petitioners filed substantively identical petitions to suspend final licensing decisions, related motions requesting the admission of new—or, in one instance, amended—contentions in the captioned matters, and, in several proceedings, motions to reopen the proceedings to consider the proposed contentions.⁵

⁴ Final Rule, Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,238 (Sept. 19, 2014) (Continued Storage Rule); NUREG-2157, Vols. 1 & 2, *Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel* (Sept. 2014) (ADAMS accession nos. ML14196A105 and ML14196A107) (Continued Storage GEIS).

⁵ See, e.g., Petition, Motion, and Motion to Reopen.

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Exercising our inherent supervisory authority over agency proceedings, we took review of the petitions and motions ourselves and set a briefing schedule.⁶ All answers oppose the suspension petitions and admission of the accompanying contention.⁷ Petitioners filed a consolidated reply.⁸

Petitioners claim that we cannot satisfy our statutory responsibilities under the Atomic Energy Act and that we no longer have a lawful basis for issuing initial and renewed licenses for nuclear power reactors.⁹ They assert that we must, therefore, suspend final licensing decisions

⁶ CLI-14-9, 80 NRC __ (Oct. 7, 2014) (slip op.).

⁷ See, e.g., *NRC Staff Consolidated Answer to Petitions to Suspend Final Reactor Licensing Decisions, Motions to Admit a New Contention, and Motions to Reopen the Record* (Oct. 31, 2014); *Entergy's Combined Answer to Riverkeeper's Proposed New Contention RK-10 and Petition to Suspend Final License Renewal Decision Pending Issuance of Waste Confidence "Safety" Findings* (Oct. 31, 2014); *Tennessee Valley Authority's Answer Opposing Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Issuance of Waste Confidence Safety Findings and Motions for Leave to File New Contention* (Oct. 31, 2014); *Tennessee Valley Authority's Answer to Motion to Reopen the Record for Sequoyah Nuclear Power Plant and Motion to Reopen the Record for Bellefonte Nuclear Power Plant* (Oct. 31, 2014) (TVA Answer to Motions to Reopen).

⁸ *Petitioners' and Intervenors' Consolidated Reply to Answers to Petitions to Suspend Final Reactor Licensing Decisions, Motions to Admit a New Contention, and Motions to Reopen the Record* (Nov. 7, 2014) (Reply). In addition, the Nuclear Energy Institute filed an unopposed motion for leave to file a brief *amicus curiae* opposing the Petition. *Nuclear Energy Institute, Inc.'s Motion for Leave to File Amicus Curiae Brief* (Oct. 31, 2014); *Amicus Curiae Brief of the Nuclear Energy Institute, Inc. in Response to Suspension Petitions and Waste Confidence Safety Contentions* (Oct. 31, 2014). Our rule governing *amicus curiae* participation does not contemplate a brief under the current circumstances. See 10 C.F.R. § 2.315(d) (providing for *amicus* filings at our discretion under 10 C.F.R. § 2.341 or *sua sponte*). We, nonetheless, have considered the Nuclear Energy Institute's views as a matter of discretion. See, e.g., *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-13-9, 78 NRC 551, 556 n.17 (2013).

⁹ See, e.g., Motion at 3.

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unless and until we make a “safety finding” associated with disposal.¹⁰ Petitioners ask us to admit the following contention:

The NRC lacks a lawful basis under the Atomic Energy Act ... for issuing or renewing an operating license in this proceeding because it has not made currently valid findings of confidence or reasonable assurance that the hundreds of tons of highly radioactive spent fuel that will be generated during any reactor’s 40-year license term or 20-year license renewal term can be safely disposed of in a repository. The NRC must make these predictive safety findings in every reactor licensing decision in order to fulfill its statutory obligation under the [Act] to protect public health and safety from the risks posed by irradiated reactor fuel generated during the reactor’s license term.¹¹

Petitioners’ contention, which comes on the heels of our issuance of the Continued Storage Rule, relies in large part on the fact that, unlike prior versions of the Rule, the Continued Storage Rule is no longer supported by specific “findings” concerning, among other things, reasonable assurance of the feasibility of a repository. To provide a more complete understanding of the context of Petitioners’ argument, we provide a brief history of our “waste confidence” proceedings.¹²

In 1976, the Natural Resources Defense Council (NRDC) filed a petition requesting that we conduct rulemaking to determine whether spent fuel “can be generated in nuclear power reactors and subsequently disposed of without undue risk to the public health and safety.”¹³ NRDC argued that, without this determination, we should refrain from making final decisions on

¹⁰ See, e.g., Petition at 8 (unnumbered).

¹¹ Motion at 3-4 (citations omitted).

¹² A complete history of the prior waste confidence proceedings can be found in Chapter 1 of the Continued Storage GEIS.

¹³ NRDC PRM Denial, 42 Fed. Reg. at 34,391.

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“pending or future requests for operating licenses.”¹⁴ We denied NRDC’s petition and found that, as a matter of statutory interpretation, the Atomic Energy Act did not require us to make the requested finding.¹⁵ In the denial, we noted the NRC’s obligations with respect to spent fuel storage and disposal at the time of a reactor licensing decision. Specifically, we explained that, at the time a license is issued, we must “be assured that the wastes generated by licensed power reactors can be safely handled and stored as they are generated.”¹⁶ As part of the reactor licensing process, we noted, an applicant must submit information to allow the NRC to “assure that the design provides for safe methods for interim storage of spent nuclear fuel.”¹⁷ Given the focus during the licensing process on the safety of licensed operations, we determined that the text of the Atomic Energy Act (combined with Congress’s understanding of the state of the development of a repository) did not require us to make, as a precondition to licensing, an express determination that spent fuel generated during operation could be disposed of safely.¹⁸

The denial also included a separate statement of policy.¹⁹ In that discussion, which Petitioners reference throughout their filings, we stated that we would not continue to license

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* Today, this assurance is demonstrated by compliance with our regulations that govern the safe storage of spent fuel. See, e.g., Domestic Licensing of Production and Utilization Facilities, 10 C.F.R. pt. 50 (2014) and General License for Storage of Spent Fuel at Power Reactor Sites, 10 C.F.R. pt. 72, subpt. K (2014), which grants a general license to all Part 50 and Part 52 reactor licensees to store spent fuel in an independent spent fuel storage installation.

¹⁷ NRDC PRM Denial, 42 Fed. Reg. at 34,391.

¹⁸ *Id.* at 34,391-93.

¹⁹ *Id.* at 34,393-94.

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reactors if we “did not have reasonable confidence that ... [spent fuel] can and will in due course be disposed of safely.”²⁰ We explained that our “implicit” finding that methods of safe permanent storage were available could be “readily distinguished” from the type of safety findings that the agency is called upon to make during the course of reactor licensing under the Atomic Energy Act and that any finding in this regard “would not have to be a definitive conclusion that permanent disposal of high-level wastes can be accomplished safely at the present time.”²¹

NRDC sought judicial review of the petition denial. The Court of Appeals for the Second Circuit affirmed the denial and endorsed our conclusion that the Atomic Energy Act does not, as a prerequisite to licensing, require a finding of reasonable assurance that “highly hazardous and long-lived radioactive materials can be disposed of safely.”²² The court concluded that, by seeking to require an express finding concerning safe disposal prior to licensing, “NRDC simply reads too much into the [Atomic Energy Act] We are satisfied that Congress did not intend such a condition.”²³

In addition to recognizing that the text of the Atomic Energy Act does not mandate such a specific finding, the court relied on Congress’s decades-long tacit approval of nuclear power plant licensing even in the absence of a disposal site.²⁴ Further, the court explained, if NRDC’s

²⁰ *Id.* at 34,393.

²¹ *Id.*

²² *Natural Res. Def. Council v. NRC*, 582 F.2d 166, 168, 171 (2d Cir. 1978).

²³ *Id.* at 171.

²⁴ *Id.* at 173-74. The court found Congress’s silence in the face of ongoing reactor licensing “deafening.” *Id.* at 171.

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view of the Atomic Energy Act were correct, it would be “incredible that AEC and its successor NRC would have been violating the [Act] for almost twenty years with no criticism or statutory amendment by Congress, which has been kept well informed of [disposal] developments.”²⁵ Accordingly, the court quoted favorably that it was “fair to read this history as a *[d]e facto* acquiescence in and ratification of the Commission's licensing procedure by Congress.”²⁶

The court did not rest its decision solely on the legislative history of the Act or on tacit congressional approval of reactor licensing absent safety findings for a repository. “[I]f there were any doubt over the intent of Congress” not to require a safety finding on spent fuel disposal, explained the court, it was “persuaded that the matter was laid to rest by enactment of the Energy Reorganization Act of 1974.”²⁷ The court noted that, in that act, “Congress expressly recognized and impliedly approved NRC’s regulatory scheme and practice under which the safety of interim storage of [spent fuel] at commercial nuclear power reactor sites has been determined separately from the safety of ... permanent storage facilities which have not, as yet, been established.”²⁸ Since the passage of the Energy Reorganization Act of 1974 as well as the Second Circuit’s decision in *NRDC v. NRC*, Congress has had numerous opportunities to consider our interpretation of the Atomic Energy Act with respect to a disposal safety finding at

²⁵ *Id.*

²⁶ *Id.* at 172 (quoting *Power Reactor Dev. Co. v. Int’l Union of Elec., Radio & Mach. Workers*, 367 U.S. 396, 409 (1961)).

²⁷ *Id.* at 174 (citations omitted).

²⁸ *Id.* The court observed that, in considering passage of the 1974 legislation, Congress heard testimony from scientists and other representatives of groups “urg[ing] Congress, unsuccessfully, to halt further commercial power plant licensing pending resolution of the waste disposal issue.” *Id.* at 171 n.9, 174-75 (citations omitted).

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the time of reactor licensing. But in each case, Congress has left intact both this agency's and the court's interpretation.²⁹

Since 1984, we have completed four rulemaking proceedings that analyzed the environmental impacts of the continued storage of spent fuel after the end of a reactor's license term (the "waste confidence" and "continued storage" proceedings).³⁰ The first rulemaking, the 1984 waste confidence proceeding, was prompted by a remand from the Court of Appeals for the District of Columbia Circuit in *Minnesota v. NRC*.³¹ In that case, the petitioners challenged the NRC's approval of amendments to the Prairie Island and Vermont Yankee nuclear power plant operating licenses to allow for the use of higher-density spent-fuel-storage racks in the reactors' spent fuel pools.³² The court observed that the Second Circuit had recently ruled in *NRDC v. NRC* that "Congress did not intend in enacting the Atomic Energy Act to require a demonstration that nuclear wastes could safely be disposed of before licensing of nuclear plants

²⁹ See, e.g., Nuclear Waste Policy Act of 1982, Pub. L. No. 97-425, 96 Stat. 2201 (1982); Energy Policy Act of 2005, Pub. L. 109-58, 119 Stat. 594 (2005).

³⁰ Final Waste Confidence Decision, 49 Fed. Reg. 34,658 (Aug. 31, 1984) (1984 Waste Confidence Decision); Requirements for Licensee Actions Regarding the Disposition of Spent Fuel Upon Expiration of Reactor Operating Licenses, 49 Fed. Reg. 34,688 (Aug. 31, 1984) (1984 Temporary Storage Rule); Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 55 Fed. Reg. 38,472 (Sept. 18, 1990) (1990 Temporary Storage Rule); Waste Confidence Decision Review, 55 Fed. Reg. 38,474 (Sept. 18, 1990) (1990 Waste Confidence Decision); Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 75 Fed. Reg. 81,032 (Dec. 23, 2010) (2010 Temporary Storage Rule); Waste Confidence Decision Update, 75 Fed. Reg. 81,037 (Dec. 23, 2010) (2010 Waste Confidence Decision); Continued Storage GEIS; and Continued Storage Rule.

³¹ *Minnesota v. NRC*, 602 F.2d 412 (D.C. Cir. 1979).

³² *Id.* at 412.

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was permitted,” and it did not disagree with that result.³³ Referring to the language in the policy statement accompanying the denial of the petition for rulemaking, the court directed the NRC to determine “whether there is reasonable assurance that an off-site storage solution will be available by [the end of a reactor’s license term], and if not, whether there is reasonable assurance that the fuel can be stored safely at the sites beyond those dates.”³⁴

In 1984, we published our first Waste Confidence Decision and Temporary Storage Rule. The Waste Confidence Decision included “findings,” expressed in terms of “reasonable assurance,” that, among other things, a repository was technically feasible, one could be open by 2007-2009, and the spent fuel could be safely stored for 30 years after the end of a reactor’s license term.³⁵ In 1990, we revisited the Decision and Temporary Storage Rule and updated the findings to reflect a new expected date for a repository to become available (“the first quarter of the twenty-first century”) and to include a 30-year license renewal term in our safe-storage analysis.³⁶ In 2010, we issued another update that removed the anticipated date for repository availability (explaining instead that a repository would be available “when necessary”) and

³³ *Id.* at 417 (citing *NRDC*, 582 F.2d at 166).

³⁴ *Id.* at 418. In reaching this decision, the court recognized the long-term nature of the concerns associated with spent fuel storage and disposal when it declined to vacate the license amendments that were the subject of the case, noting that doing so “would effectively shut down the plants.” *Id.* Moreover, its decision was predicated on the context of the particular license amendments at issue—to allow high-density spent fuel storage; in fact, the court acknowledged the Second Circuit’s ruling in *NRDC v. NRC* and did not disagree with that result. See *id.* at 417.

³⁵ 1984 Waste Confidence Decision, 49 Fed. Reg. at 34,659-60; 1984 Temporary Storage Rule, 49 Fed. Reg. at 34,688.

³⁶ See, e.g., 1990 Temporary Storage Rule, 55 Fed. Reg. at 38,473; 1990 Waste Confidence Decision, 55 Fed. Reg. at 38,503-04.

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expanded the safe-storage analysis time frame from 30 years after the end of the reactor's license term to 60 years after the end of the reactor's license term.³⁷

Several states, an Indian Tribe, and environmental organizations (some of whom are Petitioners here) filed suit before the Court of Appeals for the District of Columbia Circuit challenging the 2010 update to the Decision and Temporary Storage Rule. In 2012, in *New York v. NRC*, the court vacated and remanded the decision and rule, and found that we had not satisfied our obligations under NEPA with respect to three issues: (1) we did not consider the environmental impacts of a repository never becoming available; (2) our analysis of spent fuel pool leaks was not forward-looking; and (3) we had not sufficiently considered the consequences of spent fuel pool fires.³⁸ The court did not specifically address any issues arising under the Atomic Energy Act.

Following the court's decision in *New York*, we suspended all final decisions for licenses that relied on the Waste Confidence Decision and Temporary Storage Rule.³⁹ Shortly thereafter we directed the NRC staff to prepare a generic environmental impact statement to support an updated rule and address the deficiencies that the court identified.⁴⁰ We approved the final Continued Storage GEIS and Rule, now known as the Continued Storage Rule, in September

³⁷ See, e.g., 2010 Temporary Storage Rule, 75 Fed. Reg. at 81,037; 2010 Waste Confidence Decision, 75 Fed. Reg. at 81,038.

³⁸ *New York v. NRC*, 681 F.3d 471, 473, 481-82 (D.C. Cir. 2012).

³⁹ *Calvert Cliffs Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 NRC 63, 66-67 (2011).

⁴⁰ Staff Requirements—COMSECY-12-0016—Approach for Addressing Policy Issues Resulting from Court Decision to Vacate Waste Confidence Decision and Rule (Sept. 6, 2012) (ML12250A032).

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2014.⁴¹ Although it did not include the discrete findings made in the waste confidence proceedings, and although it did not express our conclusions in terms of “reasonable assurance,” the Continued Storage GEIS contains a comprehensive discussion supporting our unqualified conclusion that both safe storage and disposal in a repository are technically feasible.⁴²

Thus, while much has changed since we last addressed the specific issue raised in Petitioners’ contention, much has stayed the same. In each of our waste confidence proceedings, as well as in the recently concluded continued storage proceeding, we determined that deep geologic disposal of spent nuclear fuel is technically feasible.⁴³ Similarly, throughout our rulemakings conducted over the past thirty years, neither we nor the courts have questioned our initial conclusion that the Atomic Energy Act does not require the explicit “reasonable assurance” finding requested by Petitioners. And of course, our licensing has proceeded on the basis of these well-settled premises.

II. DISCUSSION

With this background in mind, we turn to the petitions at hand. Petitioners claim a deficiency in our ability to satisfy our basic licensing responsibilities under the Atomic Energy Act, which Petitioners believe results in the loss of our “lawful basis for licensing or relicensing

⁴¹ Staff Requirements—Affirmation Session 10:00 a.m., Tuesday, August 26, 2014, Commissioners’ Conference Room, One White Flint North, Rockville, Maryland (Open to Public Attendance) (Aug. 26, 2014) (ML14237A092).

⁴² *See generally* Continued Storage GEIS, app. B.

⁴³ *Compare* 1984 Waste Confidence Decision, 49 Fed. Reg. at 34,659, *with* 1990 Temporary Storage Rule, 55 Fed. Reg. at 38,472, *and with* Continued Storage GEIS § B.2.1.

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nuclear reactors.”⁴⁴ This claim is distinguishable from those raised in the suspension petitions that we have considered in recent years. Following the events of September 11, 2001, and again following the accident at Fukushima Dai-ichi, petitioners asserted that our actions were insufficient to satisfy our general obligation under the Atomic Energy Act to protect public health and safety.⁴⁵ Here, on the other hand, Petitioners claim that we have an obligation under the Atomic Energy Act to make explicit findings regarding the safety of spent fuel disposal as a prerequisite to our reactor licensing decisions.⁴⁶ As such, our usual framework for considering suspension requests is not applicable to the case at hand. Instead, exercising our inherent supervisory authority over agency proceedings, we consider Petitioners’ claims regarding the scope of our obligations under the Atomic Energy Act. As discussed below, we find Petitioners’ Atomic Energy Act claims to be without merit, and we therefore deny the petitions and the companion proposed contention and motions to reopen.⁴⁷

⁴⁴ Reply at 11.

⁴⁵ See, e.g., *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 380 (2001); *Union Electric Co. d/b/a Ameren Missouri* (Callaway Plant, Unit 2), CLI-11-5, 74 NRC 141, 151 (2011).

⁴⁶ Reply at 11. As Petitioners acknowledge, “the Petition is *not* a motion for a stay of the effectiveness of a decision pursuant to 10 C.F.R. § 2.342 or any other kind of request for equitable relief.” *Id.* (emphasis in original). See *generally* 10 C.F.R. § 2.342 (governing stays of the actions or decisions of a presiding officer pending filing of a petition for review).

⁴⁷ Because Petitioners’ Atomic Energy Act claim fails, they have not raised an issue material to findings that the NRC must make to support final decisions in the captioned matters and they are unable to satisfy our contention admissibility standards or meet the criteria to reopen a closed record. See 10 C.F.R. §§ 2.309(f)(1) and 2.326. We therefore decline to admit Petitioners’ proposed contention and deny their motions to reopen. Moreover, we deny as moot Blue Ridge Environmental Defense League’s motions to reopen in the *Sequoyah* and *Bellefonte* proceedings because those proceedings remain open. See TVA Answer to Motion to Reopen at 1.

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Together with the Energy Reorganization Act of 1974, the Atomic Energy Act provides the basis for our authority to regulate the use of special nuclear material in facilities like nuclear power reactors.⁴⁸ We can issue nuclear power reactor licenses to applicants only upon a finding that “the utilization ... of special nuclear material will be in accord with the common defense and security and will provide adequate protection to the health and safety of the public.”⁴⁹ An applicant demonstrates its ability to meet these standards, and thus its entitlement to a license, by submitting a license application that satisfies our licensing criteria.⁵⁰ If a power reactor license applicant is unable to meet our regulatory requirements or if we find that the proposed use of special nuclear material will not be in accord with the common defense and security or will not provide adequate protection of public health and safety, then we will not issue a license.⁵¹

⁴⁸ Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2297h-13 (2012) and Energy Reorganization Act of 1974, 42 U.S.C. §§ 5801-5891 (2012).

⁴⁹ Atomic Energy Act § 182a, 42 U.S.C. § 2232 (2012).

As we noted in the Continued Storage GEIS, Congress “authorized and directed the NRC to issue regulations establishing requirements for providing adequate protection to public health and safety and common defense and security (see Atomic Energy Act [§] 161b) [U]nder current law, the NRC will issue a nuclear power plant or materials license (including a license authorizing storage of spent fuel) when the NRC determines that a license applicant has met the NRC’s regulatory standards for issuance of a license, addressing adequate protection of public health and safety and common defense and security, and the NRC has no reason to doubt that issuance of the license would provide adequate protection.” Continued Storage GEIS § 1.6.2.1.

⁵⁰ See, e.g., 10 C.F.R. pts. 50, 52, and 54.

⁵¹ See, e.g., *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station) 6 AEC 1003, 1007 (1973) (“Unless the safety findings prescribed by the Atomic Energy Act and the (continued . . .)

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Petitioners argue that part of this analysis must include a “safety” or “waste confidence” finding regarding the technical feasibility of a deep geologic repository for the disposal of spent fuel generated at nuclear power plants.⁵² Petitioners contend that without such a finding we are unable to make the required finding of adequate protection under the Atomic Energy Act and must, therefore, refrain from issuing licenses until this finding is made.⁵³ Further, Petitioners argue, this safety finding must be supported by a separate NEPA analysis of the environmental impacts of spent fuel disposal—either in the form of an environmental impact statement or an environmental assessment.⁵⁴

A. Petitioners’ Atomic Energy Act Claims

Petitioners argue that the NRC’s historic practice, the plain language of the Atomic Energy Act, and relevant case law support their claims. We disagree. At no time have we, Congress, or the courts articulated the view that the Atomic Energy Act requires a “finding” or “predictive safety findings” regarding the disposal of spent fuel in a repository as a prerequisite to issuing a nuclear reactor license. We see no reason to alter our long-standing interpretation of the Atomic Energy Act.

(. . . continued)

regulations can be made, the reactor does not obtain a license—no matter how badly it is needed.”).

⁵² Motion at 3-4.

⁵³ Petition at 2-3 (unnumbered).

⁵⁴ Motion to Reopen at 4. Among other things, Petitioners argue that this NEPA analysis must consider the costs of spent fuel storage and disposal. *Id.*

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Our interpretation of the agency's obligations under the Atomic Energy Act with respect to spent fuel disposal began with our 1977 denial of NRDC's petition for rulemaking.⁵⁵ We found then that the Atomic Energy Act does not require us to make a finding regarding spent fuel disposal as part of our reactor licensing decisions.⁵⁶ And the Second Circuit endorsed our construction of the Act:

[W]e hold that NRC is not required to conduct the rulemaking proceeding requested by NRDC or to withhold action on pending or future applications for nuclear power reactor operating licenses until it makes a determination that high-level radioactive wastes can be permanently disposed of safely.⁵⁷

Both our denial of the petition for rulemaking and the court's affirmance of this decision were grounded in the language of Atomic Energy Act sections 103, 161, and 182—the very sections relied upon here by Petitioners. As the court expressly concluded in *NRDC*, we find that Petitioners read “too much into the [Act].”⁵⁸

Section 103d. prohibits the agency from issuing a license if doing so “would be inimical to the common defense and security or the health and safety of the public.”⁵⁹ Petitioners claim that the “plain language” of this section conflicts with the interpretation of the Atomic Energy Act that we adopted in the denial of NRDC's petition for rulemaking. Specifically, they take issue with our conclusion that “the statutory findings required by section 103 apply specifically to the ‘proposed activities’ and ‘activities under such licenses’” but do not apply to disposal activities

⁵⁵ NRDC PRM Denial, 42 Fed. Reg. at 34,391-92.

⁵⁶ *Id.*

⁵⁷ *NRDC*, 582 F.2d at 175.

⁵⁸ *Id.* at 171.

⁵⁹ Atomic Energy Act, Commercial Licenses § 103, 42 U.S.C. § 2133 (2012).

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that might result from the operation of a licensed facility.⁶⁰ Section 103 does not contemplate consideration of spent fuel disposal in the NRC's licensing decisions, and we decline to infer from Congress's silence an affirmative obligation to the contrary.⁶¹

The same is true of the other Atomic Energy Act provisions upon which Petitioners rely. Section 161 establishes the general scope of the NRC's authority, yet nowhere does it discuss spent fuel disposal.⁶² Similarly, section 182 specifies the information that must be provided by an applicant for a license with no reference to spent fuel disposal.⁶³ Thus, the text of the Atomic Energy Act does not compel the conclusion that we are required to include "findings" regarding spent fuel disposal in our reactor licensing decisions, and we decline to interpret it otherwise. And, in light of our interpretation, the related NRC regulations do not require information about the eventual disposal of the spent fuel that would be generated by the reactor.⁶⁴

Moreover, as the Second Circuit explained in *NRDC*, the conclusion that the Atomic Energy Act does not require "safety findings" is further supported by the legislative history of the Act and subsequent Congressional action. For example, in 1959, Congress held hearings

⁶⁰ Motion at 6-7; *NRDC PRM Denial*, 42 Fed. Reg. at 34,391.

⁶¹ See *NRDC*, 582 F.2d at 170-71. Petitioners also rely on the concurring opinion of Judge Tamm from *Minnesota v. NRC*. In his concurrence, Judge Tamm noted his "belief that section 102(2)(C) of [NEPA] and section 103(d) [of the Act] ... mandate the determination that the Commission identified in" the *NRDC PRM Denial*. *Minnesota*, 602 F.2d at 419 (Tamm, J., concurring). But the majority did not express this view, and a concurring opinion, by its nature, does not carry the force of law, except in very narrow circumstances not applicable here. See generally *United States v. Duvall*, 740 F.3d 604, 605 (D.C. Cir. 2013). Had a majority of the Court in *Minnesota* agreed with Judge Tamm's expansive view of our Atomic Energy Act obligations, these views would have been reflected in the majority opinion.

⁶² Atomic Energy Act, General Provisions § 161, 42 U.S.C. § 2201 (2012).

⁶³ Atomic Energy Act, License Applications § 182, 42 U.S.C. § 2232 (2012).

⁶⁴ See, e.g., *id.*; 10 C.F.R. pts. 50, 52, and 54 (2014).

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regarding the disposal of spent nuclear fuel and, at that time, Congress “was made aware of the fact that the problem of permanent disposal of high-level waste had not been solved.”⁶⁵ But Congress did not restrict or modify the NRC’s licensing authority. Further, Congress later approved a continuation of the licensing approach in the Atomic Energy Act when it transferred the licensing functions of the Atomic Energy Commission to us via the Energy Reorganization Act of 1974.⁶⁶ Had Congress believed that our licensing activities required the finding sought by Petitioners, it could have enacted legislation consistent with this understanding at any time between 1954 and today.⁶⁷ That Congress has maintained this course despite our rejection of NRDC’s interpretation of the Atomic Energy Act in the denial of the petition for rulemaking, the Second Circuit’s endorsement of our construction of the Act in *NRDC*, and the numerous opportunities for legislative clarification provides further confirmation of the propriety of our interpretation of the Act.⁶⁸

Petitioners rely heavily upon our statement, expressed as part of the policy discussion included in the denial of NRDC’s petition for rulemaking, that we would not continue to license reactors if we “did not have reasonable confidence that ... [spent fuel] can and will in due course

⁶⁵ NRDC PRM Denial, 42 Fed. Reg. at 34,392 (citing “Industrial Radioactive Waste Disposal,” Hearings Before the JCAE Special Subcommittee on Radiation, Jan. 29-30, Feb. 2-3, and July 29, 1959, 86th Cong., 1st Sess. (1959)).

⁶⁶ Energy Reorganization Act of 1974, Pub. L. 93-438, 88 Stat. 1233 (1974).

⁶⁷ See, e.g., Nuclear Waste Policy Act of 1982, Pub. L. No. 97-425, 96 Stat. 2201 (1982); Energy Policy Act of 2005, Pub. L. 109-58, 119 Stat. 594 (2005).

⁶⁸ Indeed, in recent years, numerous congressional hearings over the funding of the Yucca Mountain repository have highlighted the absence of a national consensus on siting a repository.

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be disposed of safely.”⁶⁹ They assert that this statement should guide our interpretation of the Act and that any acquiescence by Congress in our interpretation was conditioned on its existence.⁷⁰ But in the NRDC PRM Denial we expressly distinguished findings of the kind contemplated by the Atomic Energy Act and the NRC’s licensing regulations from the more generalized conclusion in the policy statement.⁷¹ As we explained at the time:

Even if, contrary to the Commission's view, some kind of prior finding on waste disposal safety were required under the statutory scheme, such a finding would not have to be a definitive conclusion that permanent disposal of high-level wastes can be accomplished safely at the present time. There is no question that prior to authorizing operation of a reactor the Commission must find pursuant to section 182 that hazards which become fully mature with start-up will be dealt with safely from the beginning. *But the quality of this reactor safety finding can be readily distinguished from the quality of findings regarding impacts on public health and safety which will not mature until much later, if ever.* The hazards associated with permanent disposal will become acute only at some relatively distant time when it might be no longer feasible to store radioactive wastes in facilities subject to surveillance.⁷²

It was only after this discussion that we added: “The Commission would not continue to license reactors if it did not have reasonable confidence that the wastes can and will in due course be disposed of safely.”⁷³ Moreover, we pointed out that the program for siting and developing a

⁶⁹ NRDC PRM Denial, 42 Fed. Reg. at 34,393.

⁷⁰ See, e.g., Reply at 7.

⁷¹ NRDC PRM Denial, 42 Fed. Reg. at 34,393.

⁷² *Id.* (emphasis added).

⁷³ *Id.*

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geologic repository was not within the NRC's statutory responsibilities under the Atomic Energy Act, another reason rendering an explicit safety finding on spent fuel disposal inappropriate.⁷⁴

When considered within the context of our denial of the petition for rulemaking, it is clear that the statement at issue was nothing more than what it purported to be: a statement of our policy regarding the licensing of nuclear power plants and our confidence in the availability of a disposal solution.⁷⁵ This policy has always existed independent of our legal conclusion that no obligation exists under the Atomic Energy Act to make predictive findings regarding spent fuel disposal as part of our reactor licensing decisions.

Petitioners also misapprehend the relevant case law. Specifically, Petitioners misread the Second Circuit's opinion in *NRDC v. NRC*, the only court decision to have directly addressed the issue. Overlooking the express holding that endorsed our interpretation of the Act,⁷⁶ Petitioners instead quote the court's characterization of our policy and practice: "[The] NRC maintains that ... its long-continued regulatory practice of issuing operating licenses, with an implied finding of reasonable assurance that safe permanent disposal of [spent nuclear fuel] can be available when needed, is in accord with the intent of Congress underlying the [Atomic

⁷⁴ In this regard, we observed that the Energy Research and Development Administration (the Department of Energy's predecessor agency) was responsible for the development of a high-level waste repository; the NRC's statutory responsibilities "to insure that permanent disposal of high-level radioactive wastes will be accomplished safely" were, and still are, limited to licensing the repository. *Id.*

⁷⁵ *Id.*

⁷⁶ *NRDC*, 582 F.2d at 175 ("[W]e hold that NRC is not required to conduct the rulemaking proceeding requested by NRDC or to withhold action on pending or future applications for nuclear power reactor operating licenses until it makes a determination that high-level radioactive wastes can be permanently disposed of safely.").

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Energy Act] and [Energy Reorganization Act].”⁷⁷ But that description neither constitutes the court’s holding nor reflects an admission concerning our interpretation of our statutory obligations. Rather, it reflects our view that our practice was consistent with the conclusion that a specific finding of repository feasibility was not a prerequisite under the Atomic Energy Act to reactor licensing. And the court agreed: “Congress expressly recognized and impliedly approved NRC’s regulatory scheme and practice under which the safety of interim storage of high-level wastes at commercial nuclear power reactor sites has been determined separately from the safety of Government-owned permanent storage [disposal] facilities which have not, as yet, been established.”⁷⁸

Petitioners also rely on two subsequent decisions by the D.C. Circuit, *New York v. NRC* and *Minnesota v. NRC*. But in neither of these cases did the court find a statutory obligation on the part of the NRC to prepare “waste confidence” safety findings prior to or as part of our reactor licensing decisions. In *New York*, the court did not consider Atomic Energy Act issues. Instead, the remand was based solely on the court’s finding that we did not satisfy our obligations under NEPA.⁷⁹

In *Minnesota*, the court remanded for our consideration the question “whether there is reasonable assurance that an off-site storage solution will be available by ... the expiration of the plants’ operating licenses, and if not, whether there is reasonable assurance that the [spent] fuel can be stored safely at the sites beyond those dates.”⁸⁰ Further, as distinct from the

⁷⁷ *Id.* at 170.

⁷⁸ *Id.* at 174.

⁷⁹ *New York*, 681 F.3d at 471, 483.

⁸⁰ *Minnesota*, 602 F.2d at 418.

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concurrence, the court majority refrained from identifying an obligation to make findings under the Atomic Energy Act. In that regard, the court expressly declined to “set aside or stay the challenged license amendments,”⁸¹ thus confirming that the court did not view the amendments to be contingent upon any additional safety determination under the Atomic Energy Act.

To be sure, our “findings” in the initial waste confidence proceeding likely caused some confusion. We understand that because of how they were framed, they could have been, and likely were, interpreted by some as safety findings made under and compelled by the Atomic Energy Act. That we responded to the *Minnesota* remand as we did, however, does not mean that the particular form of our response was compelled by the Atomic Energy Act. Rather, the formal “findings” in the initial waste confidence proceeding resulted from our use of a hybrid rulemaking proceeding, which combined elements of a formal “on the record” proceeding with the more common “notice and comment” rulemaking widely used today.⁸² Formal rulemakings often result in “findings,” such as the ones we made in our first waste confidence proceeding.⁸³ Moreover, that approach made sense at the time, which was long before our framework for regulating the safe storage and disposal of spent fuel had matured into its current state, and long before we had comprehensively evaluated the environmental impacts of the storage of spent nuclear fuel for an extended time frame—a task we now have completed in the Continued Storage GEIS.

Throughout their motions, Petitioners ascribe significance to our failure to use the term “reasonable assurance” to describe the extent of our consideration of the technical feasibility of

⁸¹ *Id.* at 413.

⁸² See 1984 Waste Confidence Decision, 49 Fed. Reg. at 34,658-60.

⁸³ See *id.*

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disposal.⁸⁴ But as the technical agency entrusted by Congress to make determinations of this sort, we have concluded—without qualification—that a geologic repository is technically feasible.⁸⁵ As we acknowledged in the Continued Storage GEIS, the uncertainty in spent fuel disposal lies not with the technical feasibility of long-term storage and disposal, but with the political and societal factors that continue to delay the construction of a repository.⁸⁶ We recognized this uncertainty in the Continued Storage GEIS by analyzing the possibility that a repository will never become available.⁸⁷ Our decision today is consistent with our longstanding conclusion.

Finally, it bears repeating that our recently completed Continued Storage GEIS considers the issues raised by Petitioners. Many of the groups petitioning us now provided essentially identical comments as part of our recently completed Continued Storage proceeding.⁸⁸ We responded to Petitioners' comments in the final GEIS and nothing has changed since then that would cause us to question the technical feasibility of disposal in a repository—safe geologic disposal is achievable with currently available technology.⁸⁹ Our analysis in the Continued Storage GEIS builds on decades of experience and multiple

⁸⁴ See, e.g., Reply at 9-10.

⁸⁵ Continued Storage GEIS § B.2.1.

⁸⁶ *Id.*

⁸⁷ See, e.g., *id.* § 1.8.2.

⁸⁸ See, e.g., Corrected comments of “Environmental Organizations on Draft Waste Confidence Generic Environmental Impact Statement and Proposed Waste Confidence Rule and Petition to Revise and Integrate All Safety and Environmental Regulations Related to Spent Fuel Storage and Disposal,” at 14, 16 (Jan. 7, 2014) (ML14024A297).

⁸⁹ We responded to the concerns raised by Petitioners in Appendix D of the Continued Storage GEIS. See, e.g., Continued Storage GEIS §§ D.2.1.2, D.2.4.1, and B.2 (discussing the technical feasibility of disposal in a repository).

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rulemaking proceedings.⁹⁰ Specifically, our conclusion finds support in ongoing research in the United States and abroad, along with the ability to characterize and quantitatively assess the capabilities of geologic and engineered barriers, experience gained from the Staff's review of the Department of Energy's construction authorization application for a repository at Yucca Mountain, disposal activities at the Waste Isolation Pilot Plant, and continued progress toward a repository in other countries.⁹¹ Indeed, contrary to the situation that accompanied the issuance of the initial Waste Confidence Decision, our regulatory framework now includes specific standards and requirements for licensing the storage of spent fuel and, in the case of Yucca Mountain, standards for licensing a repository.⁹²

Since we deny Petitioners' petition to suspend and related motions, we need not address the related NEPA issue raised in the motions.⁹³ Nevertheless, we do so to provide additional clarity regarding the scope of our NEPA responsibilities. NEPA requires us to consider the environmental impacts of major agency actions, such as the issuance of an initial or renewed nuclear power reactor license. In some cases, we have addressed environmental impacts generically.⁹⁴ The courts have consistently found generic analyses of the

⁹⁰ *Id.* § B.2.

⁹¹ *See generally id.* at B-2 to B-5.

⁹² *See, e.g.,* 10 C.F.R. pts. 60, 63, and 72.

⁹³ Motion at 12-14.

⁹⁴ *See, e.g.,* NUREG-1437, Revision 1, Generic Environmental Impact Statement for License Renewal of Nuclear Power Plants—Final Report (June 2013) (ML13107A023).

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environmental impacts of continued storage and disposal in the context of our reactor licensing proceedings to be acceptable.⁹⁵

Petitioners contend that their requested “safety decision” regarding the feasibility of a repository would constitute a federal action that would require us to prepare a separate NEPA analysis to support our conclusion that spent fuel disposal is technically feasible.⁹⁶ Petitioners further assert that this separate analysis was “required by the Court of Appeals in *New York*.”⁹⁷ We disagree. We find nothing in the court’s decision to support Petitioners’ assertion.

Nonetheless, any finding we have made, whether express or implied, does not require its own environmental analysis; it is simply a confirmation of what Congress and the courts have previously understood—that we believe it is safe to proceed with reactor licensing because it is ultimately possible to dispose of spent nuclear fuel safely.⁹⁸ And of course, each reactor

⁹⁵ See, e.g., *New York*, 681 F.3d at 480 (citing *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 100, 103 (1983)) and *Minnesota*, 602 F.2d at 416-17.

⁹⁶ Motion at 13.

⁹⁷ *Id.* at 14.

⁹⁸ In this vein, Petitioners misapprehend our statement in the Continued Storage GEIS that “in this GEIS and Rule, the NRC is not making a safety determination under the Atomic Energy Act ... to allow for the continued storage of spent fuel. [The Atomic Energy Act] safety determinations would be made as part of individual licensing actions.” See Motion at 14 n.54 (citing Continued Storage GEIS at D-9). This commitment does not deviate from our long-held view that the [Act] does not require findings regarding spent fuel disposal at the time of reactor or storage facility licensing. We intended only to correct the misimpression that safety findings for the purposes of making final licensing decisions were to be found in our NEPA rulemaking. We therefore noted that these safety findings would be made in future licensing actions as necessary—for example, in the licensing of spent fuel storage facilities after the end of a reactor’s license term. The Atomic Energy Act “safety determinations” to which we referred in the Continued Storage GEIS and Rule were not those that Petitioners claim to be required here for spent fuel disposal—they were our well-known determinations that are made as part of final licensing decisions. Continued Storage GEIS at D-9.

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licensing decision will have to be made in light of the full panoply of reasonably foreseeable environmental impacts that can fairly be attributed to the proposed action.⁹⁹

In light of the foregoing, we find that Petitioners have not demonstrated a legal basis for their contention. It follows that Petitioners have not stated a valid contention that satisfies our contention admissibility criteria in 10 C.F.R. § 2.309, nor have they satisfied the criteria to reopen a closed record in 10 C.F.R. § 2.326.¹⁰⁰

B. Additional Considerations Concerning the Issuance of Licenses

For the reasons discussed above, we do not interpret the Atomic Energy Act to require us to make safety findings regarding the technical feasibility of a repository as a prerequisite to our reactor licensing decisions. We are nonetheless aware of the public's concerns about the safety issues associated with the waste generated by the facilities that we license. For this reason, we stress that our ongoing efforts to ensure adequate protection of the public health and safety are not circumscribed by a narrow conception of what the law requires or a stagnant approach to regulation. Accordingly, we set forth below the considerations that guide our

⁹⁹ Petitioners additionally argue that we must prepare a cost-benefit analysis that considers the "costs of spent fuel storage and disposal" as part of their requested NEPA analysis. Motion to Reopen at 4. In response to comments on the draft Continued Storage GEIS and Rule regarding the cost of continued storage, the Staff added additional information to the Continued Storage GEIS to ensure that NRC decision-makers, applicants, licensees, and the public would have sufficient information to appropriately consider the costs of continued storage in NEPA analyses for future licensing actions. See *generally* Continued Storage GEIS, ch. 2. Here, we need not expand upon the disclosure of cost information found in the GEIS. To the extent required by NEPA, the Staff will, as appropriate, consider the cost information contained in Chapter 2 of the GEIS as part of the cost-benefit analyses prepared in conjunction with NEPA reviews for individual licensing proceedings.

¹⁰⁰ Petitioners, Applicants, and the Staff present numerous arguments regarding the procedural propriety of the petition and motions now before us. Because we find that the suspension petition and new contention fail on the merits, and we consider—and take action on—the petition and motions in our supervisory capacity, we need not address these procedural issues. See, e.g., *Callaway*, CLI-11-5, 74 NRC at 158 n.65.

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analysis of these issues and our conclusion that licensing nuclear plants will not endanger the public health and safety.

As an initial matter, the disposal question is inextricably linked to the question of the technical feasibility of safe storage pending disposal. As we acknowledged in the Continued Storage GEIS, the time frames we considered, including one that contemplates indefinite storage, depend on the continued technical feasibility of safely storing spent fuel as it ages.¹⁰¹ Our regulations, including those in 10 C.F.R. Parts 50, 52, and 72, establish stringent safety requirements that apply to the construction and operation of reactor spent fuel pools and independent spent fuel storage installations.¹⁰² Even after the end of a reactor's license term, these storage facilities will continue to be subject to our regulations governing spent fuel storage, which ensure that these safety requirements remain in place for as long as the fuel is stored.¹⁰³ For example, 10 C.F.R. § 50.54(bb), which requires licensees to submit for NRC approval their plans to manage spent fuel after the permanent cessation of reactor operation; and 10 C.F.R. Part 50, Appendix A, Criterion 61, which requires that spent fuel storage systems be designed to assure adequate safety under normal and postulated accident conditions, directly relate to the safe storage of spent fuel after a reactor has stopped operating.

Spent fuel can be stored safely in spent fuel pools or independent spent fuel storage installations licensed under the Atomic Energy Act. Indeed, we recently concluded in our Continued Storage rulemaking that the indefinite storage of spent fuel in dry casks, if it becomes

¹⁰¹ Continued Storage GEIS §§ B.2 and B.3.

¹⁰² *See, e.g., id.* § D.2.4.1, at D-28 to D-32.

¹⁰³ *Id.*

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necessary, is technically feasible.¹⁰⁴ As reflected in the Continued Storage GEIS, several characteristics of dry cask storage systems ensure that these systems can safely store spent fuel; among others, these systems are massive, passive, and inherently robust.¹⁰⁵

Further, our regulatory process is dynamic: we continue to revise and refine our regulatory regime as our technical knowledge and experience grows.¹⁰⁶ Thus, we rely both upon our ability to ensure that licensees conform to existing regulations and upon our comprehensive regulatory scheme that takes into account the length of time during which, and the conditions under which, the storage of spent fuel will occur. For example, in our waste confidence proceedings, we assessed the technical feasibility of geologic disposal, along with the continued storage of spent fuel pending the availability of a repository. As early as 1990, however, we recognized that the length of the continued storage period could be significantly longer than the specific time periods originally reflected in the Temporary Storage Rule.¹⁰⁷ But we did not examine the safety or environmental consequences of storing fuel for longer time frames because we assumed that the Department of Energy would have a deep geologic

¹⁰⁴ In accordance with the direction of the court of appeals, we analyzed a scenario where a repository never becomes available. *New York*, 681 F.3d at 479. As part of this analysis, we determined that it is technically feasible to store spent fuel indefinitely, should it become necessary to do so. Continued Storage GEIS § B.3.

¹⁰⁵ *Id.*

¹⁰⁶ *See, e.g.*, Final Rule, License and Certificate of Compliance Terms, 76 Fed. Reg. 8873 (Feb. 16, 2011) (extending the maximum possible length of licenses issued under 10 C.F.R. pt. 72 from 20 years to 40 years).

¹⁰⁷ In our 1990 Waste Confidence Decision, we noted that “[a]lthough the Commission does not dispute the statement that dry spent fuel storage is safe and environmentally acceptable for a period of 100 years, the Commission does not find it necessary to make that specific finding in this proceeding.” 1990 Waste Confidence Decision, 55 Fed. Reg. at 38,473.

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repository available within those time frames.¹⁰⁸ We revisited this assumption as a consequence of the remand in *New York v. NRC*, and we now have analyzed the impacts of spent fuel storage over much longer time frames.¹⁰⁹ We expect that our regulatory process will not be static and will continue to evolve in the future.

Disposal in a deep geologic repository remains the option that Congress has selected for addressing the problem of spent nuclear fuel, and we have neither a mandate nor a reason to question this determination. For the reasons stated in the Continued Storage GEIS, we believe that a geologic repository is technically feasible and that, with sufficient political and societal commitment, a repository can become available within 25–35 years.¹¹⁰ But we have no crystal ball. We recognize, as we did in 1977, that the hazards associated with spent fuel could become acute at some distant time. We also recognize, as we must, that our statutory mission only confers upon us the authority to license, and not to construct, a permanent repository.¹¹¹ Thus, our statutory obligation to ensure the adequate protection of public health and safety encompasses an ongoing responsibility to regulate the continued storage of spent fuel, with or without a repository. Our long history with these issues (including our ability to adapt our regulatory processes based upon changing circumstances) continues to support our conclusion that safe, permanent disposal of spent nuclear fuel is technically feasible and that spent fuel can

¹⁰⁸ See *id.* at 38,482.

¹⁰⁹ See, e.g., Continued Storage GEIS, chs. 4 and 5.

¹¹⁰ *Id.* § B.2.

¹¹¹ The Nuclear Waste Policy Act assigned the responsibility for constructing and operating a repository to the Department of Energy, not the NRC. See, e.g., Nuclear Waste Policy Act of 1982 § 114, 42 U.S.C. § 10134 (2012).

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be safely stored until a repository is available, or indefinitely should such storage become necessary.

Congress has entrusted this agency to ensure adequate protection of public health and safety by granting us the authority to condition licenses and to enforce our regulations. In our view, licensing production and utilization facilities now and relying upon our overall regulatory regime to address both ongoing safe storage and the construction of a repository in the future does not constitute an abdication of our statutory obligations. Rather, we understand these actions to be precisely what Congress intended when it both authorized the NRC to issue licenses for nuclear power plants and granted the agency broad regulatory and enforcement authority to protect the public health and safety and common defense and security.

III. CONCLUSION

In light of these considerations, and in light of our determination that the Atomic Energy Act does not require us to make the “waste confidence safety finding” that Petitioners propose, we decline to suspend final licensing decisions in the captioned proceedings. We therefore *deny* Petitioners’ suspension requests and *deny* Petitioners’ associated motions for leave to file new contentions and to reopen the record.

IT IS SO ORDERED.

For the Commission

NRC SEAL

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 26th day of February, 2015.

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**APPENDIX
PETITIONS AND MOTIONS**

1. Served in all captioned proceedings except *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating, Units 2 and 3): *Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Issuance of Waste Confidence Safety Findings* (Sept. 29, 2014); *Errata to Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Issuance of Waste Confidence Safety Findings* (Oct. 1, 2014); and *Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Issuance of Waste Confidence Safety Findings—Amended and Corrected* (Oct. 6, 2014).
2. *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3): *Intervenors' Motion for Leave to File a New Contention Concerning the Absence of Required Waste Confidence Safety Findings in the Combined Operating Licensing Proceeding for Fermi 3 Nuclear Power Plant* (Sept. 29, 2014).
3. *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 2): *Petitioners' Motion for Leave to Amend and Supplement Contention 3 Concerning the Absence of Required Waste Confidence Safety Findings in the Relicensing Proceeding for Fermi 2 Nuclear Power Plant* (Sept. 29, 2014).
4. *Duke Energy Carolinas, L.L.C.* (William States Lee III Nuclear Station, Units 1 and 2): *Petitioner's Motion for Leave to File a New Contention Concerning the Absence of Required Waste Confidence Safety Findings in the Licensing Proceeding at William States Lee III Nuclear Power Plant* (Sept. 29, 2014).
5. *Duke Energy Carolinas, L.L.C.* (William States Lee III Nuclear Station, Units 1 and 2): *Motion to Reopen the Record for William States Lee III Nuclear Power Plant* (Sept. 29, 2014).
6. *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating, Units 2 and 3): *Petition to Suspend Final Decision in Indian Point Relicensing Proceeding Pending Issuance of Waste Confidence Safety Findings* (Oct. 3, 2014).
7. *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating, Units 2 and 3): *Riverkeeper Consolidated Motion for Leave to File a New Contention and New Contention RK-10 Concerning the Absence of Required Waste Confidence Safety Findings* (Oct. 3, 2014).
8. *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1): *Intervenors' Motion for Leave to File a New Contention Concerning the Absence of Required Waste Confidence Safety Findings in the Relicensing Proceeding for Davis-Besse Nuclear Power Station* (Sept. 29, 2014).
9. *Florida Power & Light Co.* (Turkey Point, Units 6 and 7): *Intervenors' Motion for Leave to File a New Contention Concerning the Absence of Required Waste Confidence Safety Findings in the Licensing Proceeding at Turkey Point Nuclear Power Plant* (Sept. 29, 2014).

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10. *Luminant Generation Co. L.L.C. (Comanche Peak Nuclear Power Plant, Units 3 and 4): Motion to Reopen the Record for Comanche Peak Units 3 & 4 Nuclear Power Plant* (Sept. 29, 2014).
11. *Luminant Generation Co. L.L.C. (Comanche Peak Nuclear Power Plant, Units 3 and 4): Petitioners' Motion for Leave to File a New Contention Concerning the Absence of Required Waste Confidence Safety Findings in the Licensing Proceeding at Comanche Peak Units 3 & 4* (Sept. 29, 2014).
12. *Nextera Energy Seabrook, L.L.C. (Seabrook Station, Unit 1): Shadis, Raymond, Friends of the Coast and New England Coalition, letter to Administrative Judges* (Sept. 29, 2014).
13. *Nuclear Innovation North America, L.L.C. (South Teas Project, Units 3 and 4): Motion to Reopen the Record for South Texas Project 3 & 4 Nuclear Power Plant* (Sept. 29, 2014).
14. *Nuclear Innovation North America, L.L.C. (South Teas Project, Units 3 and 4): Petitioners' Motion for Leave to File a New Contention Concerning the Absence of Required Waste Confidence Safety Findings in the Licensing Proceeding at South Texas Project Units 3 & 4 Nuclear Power Plant* (Sept. 29, 2014).
15. *Pacific Gas and Electric Co. (Diablo Canyon Power Plant, Units 1 and 2): San Luis Obispo Mothers for Peace Motion for Leave to File a New Contention Concerning the Absence of Required Waste Confidence Safety Findings* (Sept. 29, 2014).
16. *Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2): Ecology Party of Florida and Nuclear Information and Resource Services' Motion to Reopen the Record* (Sept. 29, 2014).
17. *Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2): Ecology Party of Florida and Nuclear Information and Resource Services' Motion for Leave to File a New Contention Concerning the Absence of Required Waste Confidence Safety Findings* (Sept. 29, 2014).
18. *Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2): Intervenor's Unopposed Motion to Withdraw Their Motion to Reopen the Record* (Oct. 2, 2014).
19. *STP Nuclear Operating Co. (South Texas Project, Units 1 and 2): Motion to Reopen the Record for South Texas Project Units 1 & 2 Nuclear Power Plant* (Sept. 29, 2014).
20. *STP Nuclear Operating Co. (South Texas Project, Units 1 and 2): Petitioners' Motion for Leave to File a New Contention Concerning the Absence of Required Waste Confidence Safety Findings in the Relicensing Proceeding at South Texas Project Electric Generating Statio[sic] Units 1 and 2* (Sept. 29, 2014).
21. *Tennessee Valley Authority (Bellefonte Nuclear Power Plant, Units 3 and 4): Motion to Reopen the Record for Bellefonte Nuclear Power Plant* (Sept. 29, 2014).

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22. *Tennessee Valley Authority (Bellefonte Nuclear Power Plant, Units 3 and 4): Intervenor's Motion for Leave to File a New Contention Concerning the Absence of Required Waste Confidence Safety Findings in the Licensing Proceeding at Bellefonte Nuclear Power Plant* (Sept. 29, 2014).
23. *Tennessee Valley Authority (Sequoyah Nuclear Plant, Units 1 and 2): Motion to Reopen the Record for Sequoyah Nuclear Power Plant* (Sept. 29, 2014).
24. *Tennessee Valley Authority (Sequoyah Nuclear Plant, Units 1 and 2): Intervenor's Motion for Leave to File a New Contention Concerning the Absence of Required Waste Confidence Safety Findings in the Re-Licensing Proceeding at Sequoyah Nuclear Power Plant* (Sept. 29, 2014).
25. *Tennessee Valley Authority (Watts Bar Nuclear Plant, Unit 2): Southern Alliance for Clean Energy's Motion to Reopen the Record* (Sept. 29, 2014).
26. *Tennessee Valley Authority (Watts Bar Nuclear Plant, Unit 2): Southern Alliance for Clean Energy's Motion for Leave to File a New Contention Concerning the Absence of Required Waste Confidence Safety Findings* (Sept. 29, 2014).
27. *Union Electric Co. (Callaway Plant, Unit 1): Motion to Reopen the Record for Callaway Nuclear Power Plant* (Sept. 29, 2014).
28. *Union Electric Co. (Callaway Plant, Unit 1): Missouri Coalition for the Environment's Motion for Leave to File a New Contention Concerning the Absence of Required Waste Confidence Safety Findings in the Relicensing Proceeding at Callaway 1 Nuclear Power Plant* (Sept. 29, 2014).
29. *Virginia Electric and Power Co. d/b/a Dominion Virginia Power and Old Dominion Electric Cooperative (North Anna Power Station, Unit 3): Motion to Reopen the Record for North Anna Nuclear Power Plant* (Sept. 29, 2014).
30. *Virginia Electric and Power Co. d/b/a Dominion Virginia Power and Old Dominion Electric Cooperative (North Anna Power Station, Unit 3): Petitioner's Motion for Leave to File a New Contention Concerning the Absence of Required Waste Confidence Safety Findings in the Licensing Proceeding at North Anna Nuclear Power Plant* (Sept. 29, 2014).

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RESPONSIVE PLEADINGS

1. Served in all captioned proceedings: *NRC Staff Consolidated Answer to Petitions to Suspend Final Reactor Licensing Decisions, Motions to Admit a New Contention, and Motions to Reopen the Record* (Oct. 31, 2014).
2. Served in all captioned proceedings: *Nuclear Energy Institute, Inc.'s Motion for Leave to File Amicus Curiae Brief; Amicus Curiae Brief of the Nuclear Energy Institute, Inc. in Response to Suspension Petitions and Waste Confidence Safety Contentions* (Oct. 31, 2014).
3. Served in all captioned proceedings: *Petitioners' and Intervenor's Consolidated Reply to Answers to Petitions to Suspend Final Reactor Licensing Decisions, Motions to Admit a New Contention, and Motions to Reopen the Record* (Nov. 7, 2014).
4. *DTE Electric Co. (Fermi Nuclear Power Plant, Unit 3): Applicant's Opposition to Petition to Suspend Final Decisions and Proposed New Continued Storage Contention* (Oct. 31, 2014).
5. *DTE Electric Co. (Fermi Nuclear Power Plant, Unit 2): Applicant's Opposition to Petition to Suspend Final Decisions and Proposed New Continued Storage Contention* (Oct. 31, 2014).
6. *Duke Energy Carolinas, L.L.C. (William States Lee III Nuclear Station, Units 1 and 2): Duke Energy's Answer Opposing Petition to Suspend Licensing Proceedings, Related Contention and Motion to Reopen* (Oct. 31, 2014).
7. *Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating, Units 2 and 3): Entergy's Combined Answer to Riverkeeper's Proposed New Contention RK-10 and Petition to Suspend Final License Renewal Decision Pending Issuance of Waste Confidence "Safety" Findings* (Oct. 31, 2014).
8. *FirstEnergy Nuclear Operating Co. (Davis-Besse Nuclear Power Station, Unit 1): FirstEnergy Nuclear Operating Company Combined Response to Proposed Contention and Petition to Suspend Related to Alleged Need for Issuance of Waste Confidence Safety Findings* (Oct. 31, 2014).
9. *Florida Power & Light Co. (Turkey Point, Units 6 and 7): FPL's Answer Opposing Petition to Suspend Licensing Proceedings and Related Contention* (Oct. 31, 2014).
10. *Luminant Generation Co. L.L.C. (Comanche Peak Nuclear Power Plant, Units 3 and 4): Luminant Combined Response to Proposed Contention and Petition to Suspend Related to Alleged Need for Issuance of Waste Confidence Safety Findings* (Oct. 31, 2014).
11. *Nextera Energy Seabrook, L.L.C. (Seabrook Station, Unit 1): Nextera's Answer Opposing Petition to Suspend Licensing Proceedings* (Oct. 31, 2014).
12. *Nuclear Innovation North America, L.L.C. (South Teas Project, Units 3 and 4): Nuclear Innovation North America LLC Combined Response to Proposed Contention and*

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Petition to Suspend Related to Alleged Need for Issuance of Waste Confidence Safety Findings (Oct. 31, 2014).

13. *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant, Units 1 and 2): *Applicant's Opposition to Petition to Suspend Final Decisions and Proposed New Continued Storage Contention* (Oct. 31, 2014).
14. *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2): *Answer of Progress Energy Florida, Inc. Opposing Petition to Suspend Licensing Proceedings and Related Contention* (Oct. 31, 2014).
15. *STP Nuclear Operating Co.* (South Texas Project, Units 1 and 2): *STP Nuclear Operating Company Combined Response to Proposed Contention and Petition to Suspend Related to Alleged Need for Issuance of Waste Confidence Safety Findings* (Oct. 31, 2014).
16. *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4 and Sequoyah Nuclear Power Plant, Units 1 and 2): *Tennessee Valley Authority's Answer to Motion to Reopen the Record for Sequoyah Nuclear Power Plant and Motion to Reopen the Record for Bellefonte Nuclear Power Plant* (Oct. 31, 2014).
17. *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 2): *Tennessee Valley Authority's Answer Opposing Southern Alliance for Clean Energy's Motion to Reopen the Record* (Oct. 31, 2014).
18. *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4; Sequoyah Nuclear Power Plant, Units 1 and 2; and Watts Bar Nuclear Plant, Unit 2): *Tennessee Valley Authority's Answer Opposing Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Issuance of Waste Confidence Safety Findings and Motions for Leave to File New Contention* (Oct. 31, 2014).
19. *Union Electric Co.* (Callaway Plant, Unit 1): *Ameren's Answer Opposing Petition to Suspend Licensing Proceedings, Related Contention and Motion to Reopen* (Oct. 31, 2014).
20. *Virginia Electric and Power Co. d/b/a Dominion Virginia Power and Old Dominion Electric Cooperative* (North Anna Power Station, Unit 3): *Dominion's Answer Opposing Petition to Suspend Licensing Proceedings, Related Contention and Motion to Reopen* (Oct. 31, 2014).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

DTE ELECTRIC COMPANY

(Fermi Nuclear Power Plant, Unit 3)

Docket No. 52-033-COL

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER (CLI-15-4)** have been served upon the following persons by Electronic Information Exchange.

U.S. Nuclear Regulatory Commission
Office of Commission Appellate Adjudication
Mail Stop: O-7H4
Washington, DC 20555-0001
ocaamail@nrc.gov

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

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

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop: O-15D21
Washington, DC 20555-0001
Marcia Carpentier, Esq.
marcia.carpentier@nrc.gov

Ronald M. Spritzer, Chair
Administrative Judge
ronald.spritzer@nrc.gov

Sara Kirkwood, Esq.
sara.kirkwood@nrc.gov

Anthony Baratta
Administrative Judge
anthony.baratta@nrc.gov

Lisa London, Esq.
lisa.london@nrc.gov
Patrick Moulding, Esq.
patrick.moulding@nrc.gov

Randall J. Charbeneau
Administrative Judge
randall.charbeneau@nrc.gov

Kevin Roach, Esq.
kevin.roach@nrc.gov
Michael Spencer, Esq.
michael.spencer@nrc.gov

Matthew Zogby, Law Clerk
matthew.zogby@nrc.gov

Robert M. Weisman, Esq.
robert.weisman@nrc.gov
Anthony Wilson, Esq.
anthony.wilson@nrc.gov
Megan Wright, Esq.
megan.wright@nrc.gov
Nicholas Koontz, Paralegal
nicholas.koontz@nrc.gov

OGC Mail Center: Members of this office have received a copy of this filing by EIE service.

Fermi Nuclear Power Plant, Unit 3, Docket No. 52-033-COL
COMMISSION MEMORANDUM AND ORDER (CLI-15-04)

Detroit Edison Company
One Energy Plaza, 688 WCB
Detroit, Michigan 48226
Bruce R. Maters, Esq.
matersb@dteenergy.com

Winston & Strawn, LLP
1700 K Street, NW
Washington, DC 20006-3817
Counsel for the Applicant
Noelle Formosa, Esq.
nformosa@winston.com
David Repka, Esq.
drepka@winston.com
Tyson R. Smith, Esq.
trsmith@winston.com
Carlos L. Sisco, Senior Paralegal
CSisco@winston.com

Nuclear Energy Institute
1201 F Street NW
Suite 1100
Washington, DC 20004
Jonathan Rund, Esq.
jmr@nei.org

Beyond Nuclear, Citizens for Alternatives
To Chemical Contamination, Citizens
Environmental, Alliance of Southwestern
Ontario, Don't Waste Michigan, Sierra Club,
et al.

316 N. Michigan Street, Suite 520
Toledo, OH 43604-5627
Terry J. Lodge, Esq.
tjlodge50@yahoo.com
Michael J. Keegan, Esq.
mkeeganj@comcast.net

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

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

Dated at Rockville, Maryland,
this 26th day of February, 2015

Attachment 5

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Stephen G. Burns, Chairman
Kristine L. Svinicki
William C. Ostendorff
Jeff Baran

In the Matter of

DTE ELECTRIC COMPANY

(Fermi Nuclear Power Plant, Unit 3)

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Docket No. 52-033-COL

CLI-15-01

MEMORANDUM AND ORDER

Today we rule on the Atomic Safety and Licensing Board's request to review, *sua sponte*, issues relating to the environmental impacts of the proposed transmission-line corridor for Fermi Unit 3.¹ For the reasons set forth below, we deny the Board's request for *sua sponte* review. In addition, we deny Intervenor's petition for review of the Board's dismissal of Contention 23, also relating to transmission-corridor environmental impacts.²

¹ LBP-14-9, 80 NRC __ (July 7, 2014) (slip op.).

² *Intervenor's Petition for Review of Atomic Safety and Licensing Board's Dismissal of Contention 23 for Lack of Timeliness* (Oct. 6, 2014) (Petition). Intervenor's are Beyond Nuclear, Citizens for Alternatives to Chemical Contamination, Citizens Environmental Alliance of Southwestern Ontario, Don't Waste Michigan, Sierra Club, Keith Gunter, Edward McArdle, Henry Newman, Derek Coronado, Sandra Bihn, Harold L. Stokes, Michael J. Keegan, Richard Coronado, George Steinman, Marilyn R. Timmer, Leonard Mandeville, Frank Mantei, Marcee Meyers, and Shirley Steinman.

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I. BACKGROUND

This proceeding concerns DTE's combined license application to construct and operate a GE-Hitachi Economic Simplified Boiling Water Reactor (ESBWR) on the Fermi site in Monroe County, Michigan.³ Intervenors sought a hearing and originally proposed fourteen contentions; the Board granted a hearing and admitted four of those contentions.⁴ Since their entry into the proceeding in July 2009, Intervenors have proposed several additional contentions, including Contention 23, their challenge to the NRC Staff's compliance with the National Environmental Policy Act of 1969 (NEPA) as it pertains to the anticipated environmental impacts of the proposed transmission line corridor for Fermi Unit 3, the subject of our decision today.

Intervenors first proposed Contention 23 after the Staff issued the draft Environmental Impact Statement (EIS) for DTE's application.⁵ Later, after the Board dismissed the contention

³ See Detroit Edison Company; Notice of Hearing, and Opportunity To Petition for Leave To Intervene and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation on a Combined License for Fermi 3, 74 Fed. Reg. 836 (Jan. 8, 2009).

⁴ The Board admitted Contentions 3, 5, 6, and 8. LBP-09-16, 70 NRC 227, 306 (2009). In three separate opinions, the Board granted summary disposition of Contentions 3, 5, and 6 in favor of DTE. See Order (Granting Motion for Summary Disposition of Contention 3) (July 9, 2010) (unpublished); Order (Granting Motion for Summary Disposition of Contention 5) (Mar. 1, 2011) (unpublished); LBP-12-23, 76 NRC 445, 452 (2012) (among other things, granting summary disposition of Contention 6). After an evidentiary hearing, the Board ruled on the merits of Contention 8 in favor of the NRC Staff and ruled on the merits of a new admitted contention pertaining to quality assurance, Contention 15, in favor of DTE. LBP-14-7, 79 NRC 451 (2014). In a separate decision, we denied Intervenors' petition for review of the Board's ruling on the merits of Contention 15. See CLI-14-10, 80 NRC __ (Dec. 16, 2014) (slip op.).

⁵ See *Motion for Resubmission of Contention 10, to Amend/Resubmit Contention 13, and for Submission of New Contentions 17 through 24* (Jan. 11, 2012), at 1-2, 41-52 (Original Contention 23).

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as late, Intervenor resubmitted Contention 23 in response to the Staff's final EIS.⁶ The Board again dismissed the contention as late.⁷ In Contention 23, both as originally proposed and resubmitted, Intervenor challenged the adequacy of the Staff's consideration of the environmental impacts of building new transmission lines for Fermi Unit 3.⁸

Although the Board did not admit Contention 23, it found some merit to Intervenor's arguments.⁹ In its first ruling dismissing the contention, the Board suggested that the contention might have been admissible if not for its tardiness and recommended that the Staff consider Intervenor's concerns when preparing the final EIS.¹⁰ In its second ruling, the Board again found the contention to be unjustifiably late, but it reiterated its view that Intervenor had raised "a substantial . . . issue that might have been admissible had it been timely filed."¹¹ The Board further observed that the adequacy of the Staff's review of transmission-corridor impacts might be appropriate for the Board's consideration *sua sponte*, pursuant to 10 C.F.R. § 2.340(b).¹² The Board thus sought briefing from the parties on the appropriateness of the Board's taking

⁶ See LBP-12-12, 75 NRC 742, 776-80 (2012); *Motion for Resubmission of Contentions 3 and 13, for Resubmission of Contention 23 or its Admission as a New Contention, and for Admission of New Contentions 26 and 27* (Feb. 19, 2013), at 2, 21-53 (Resubmitted Contention 23).

⁷ Licensing Board Memorandum and Order (Denying Intervenor's Motion for Resubmission of Contentions 3 and 13, for Resubmission of Contention 23 or its Admission as a New Contention, and for Admission of New Contentions 26 and 27) (Apr. 30, 2013), at 21 (unpublished) (Second Board Ruling).

⁸ Compare Original Contention 23 at 41-52, with Resubmitted Contention 23 at 21-53.

⁹ See LBP-12-12, 75 NRC at 776-80; Second Board Ruling at 22-23.

¹⁰ LBP-12-12, 75 NRC at 776, 780.

¹¹ Second Board Ruling at 23.

¹² See *id.*

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review of the issues raised in Contention 23 on its own motion.¹³ Intervenor supported *sua sponte* review; DTE and the Staff opposed it.¹⁴

As it considered the parties' views on *sua sponte* review, the Board proceeded to hearing on Intervenor's then-pending admitted contentions and issued an initial decision ruling on those contentions in favor of the Staff and DTE.¹⁵ The Board returned to the *sua sponte* issue shortly thereafter. In LBP-14-9, the Board determined that the issues raised in Contention 23 merited *sua sponte* review.¹⁶ In accordance with section 2.340(b), the Board requested our approval to undertake that review.¹⁷

We now have before us the briefs that we invited from the parties in response to the Board's *sua sponte* request,¹⁸ as well as a motion from the Nuclear Energy Institute (NEI) to file

¹³ *Id.* at 23-24.

¹⁴ *Intervenor's Memorandum in Support of Sua Sponte ASLB Referral of Transmission Line Corridor NEPA Compliance Issue* (May 30, 2013); *Applicant's Brief Opposing Sua Sponte Review of Environmental Impacts in the Offsite Transmission Corridor* (May 30, 2013); *NRC Staff Response to Board Order Concerning Proposed Sua Sponte Review of Contention 23* (May 30, 2013).

¹⁵ See *supra* note 4.

¹⁶ LBP-14-9, 80 NRC at __ (slip op. at 4).

¹⁷ *Id.* at __ (slip op. at 16-17, 58).

¹⁸ *Applicant's Opposition to Sua Sponte Consideration of Transmission Corridor Issues* (July 28, 2014) (DTE Brief); *NRC Staff Response to Commission's Order Inviting Comments on the Board's Request for Approval to Conduct Sua Sponte Review of Contention 23 (Transmission Lines)* (July 28, 2014) (NRC Staff Brief); *Intervenor's Motion for Commission Approval of LBP-14-09 (Memorandum Determining that Issues Related to Intervenor's Proposed Contention 23 Merit Sua Sponte Review Pursuant to 10 C.F.R. § 2.340(b) and Requesting Commission Approval)* (e-mailed July 28, 2014 and re-filed on July 30, 2014); *Applicant's Reply Brief Opposing Sua Sponte Consideration of Transmission Issues* (Aug. 7, 2014); *NRC Staff Reply to Other Parties' Pleadings Related to the Board's Request for Approval to Conduct Sua Sponte Review of Contention 23 (Transmission Lines)* (Aug. 7, 2014); *Intervenor's Corrected Reply Memorandum in Support of Motion for Commission Approval of LBP-14-09* (Aug. 8, 2014) (Intervenor's Reply Brief). Intervenor apparently experienced technical difficulties that (continued . . .)

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a brief as *amicus curiae* in this matter.¹⁹ Also pending before us is Intervenor's petition for review of the Board's dismissal of Contention 23.²⁰ It makes sense for us to review first whether the Board properly dismissed the contention to determine whether the transmission-corridor impacts issue is litigable in the traditional sense—as a contested matter between the parties—

(. . . continued)

prevented their use of the agency's e-filing system on July 28, 2014. They e-mailed their reply on July 28, 2014, and then properly re-filed the document on July 30, 2014. Although they did not request leave to file their reply out of time, we note that counsel for Intervenor also filed the same day a declaration that detailed these technical difficulties in the context of a separate filing in this proceeding. See *Intervenor's Motion for Enlargement of Time to Reply in Support of Petition for Review* (July 30, 2014); see also *Intervenor's Reply to DTE Answer Opposing Petition for Review of LBP-14-07 (Ruling for Applicant on Quality Assurance)* (July 30, 2014), at n.1; *Intervenor's Reply to NRC Staff Answer to Petition for Review of LBP-14-07 (Ruling for Applicant on Quality Assurance)* (July 30, 2014), at n.1. We therefore will consider Intervenor's reply for good cause shown. The same is true for Intervenor's re-filed reply dated August 8, 2014 (in which only the caption appears to have been corrected from what was filed on August 7, 2014). But see CLI-14-10, 80 NRC at ___ (slip op. at 10 n.41) (observing that failure to comply with agency procedural rules could result in disciplinary action).

¹⁹ *Motion of the Nuclear Energy Institute, Inc. for Leave to File Amicus Curiae Brief in Response to the Commission's July 11, 2014 Briefing Order* (July 28, 2014); *Amicus Curiae Brief of the Nuclear Energy Institute, Inc. in Response to the Commission's July 11, 2014 Briefing Order* (July 28, 2014). Our rules of practice permit persons who are not parties to file a brief *amicus curiae* "if a matter is taken up by the Commission under [10 C.F.R.] § 2.341 or *sua sponte*." 10 C.F.R. § 2.315(d). Although this rule does not squarely apply here, it is within our discretion to grant leave for participation as *amicus curiae*. See *Calvert Cliffs 3 Nuclear Project, LLC and UniStar Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-13-4, 77 NRC 101, 104 n.9 (2013). NEI's motion is unopposed, and we find that its brief would further contribute to the record. We exercise our discretion and consider NEI's brief.

²⁰ See generally *Petition*; *Order of the Secretary* (Sept. 10, 2014) (unpublished) (amending the deadline to file a petition for review of the Board's ruling on Contention 23 "[b]ecause the issues raised . . . in [that contention] are intertwined with the Board's [*sua sponte*] request"). DTE and the Staff oppose Intervenor's petition for review. *Applicant's Opposition to Petition for Review on Contention 23* (Oct. 31, 2014) (DTE Response to Petition); *NRC Staff Response to Intervenor's Petition for Review of Atomic Safety and Licensing Board's Dismissal of Contention 23 for Lack of Timeliness* (Oct. 30, 2014) (NRC Staff Response to Petition). Intervenor filed a reply. *Intervenor's Reply in Support of Petition for Review of Atomic Safety and Licensing Board's Dismissal of Contention 23 for Lack of Timeliness* (Nov. 10, 2014) (Reply).

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before turning to the Board's *sua sponte* request. Therefore, we rule on both Intervenor's petition for review and the Board's *sua sponte* request in today's decision.²¹

II. DISCUSSION

A. Intervenor's Petition for Review

We will grant a petition for review at our discretion, upon a showing that the petitioner has raised a substantial question as to whether

- (i) a finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) a necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (iii) a substantial and important question of law, policy, or discretion has been raised;
- (iv) the conduct of the proceeding involved a prejudicial procedural error; or
- (v) any other consideration that we may deem to be in the public interest.²²

Intervenor's seek review of the Board's dismissal of the resubmitted version of Contention 23; they do not request review of the Board's dismissal of the contention as originally proposed.²³

Intervenor's claim that the Board erred when it found late the version of Contention 23 that was submitted in response to the Staff's final EIS.²⁴ Intervenor's focus their argument on dicta in the Board's first ruling in which the Board recommended that the Staff consider

²¹ Intervenor's expressed concern in their petition for review that we would treat their contention as "legally intertwined" with the Board's request. Petition at 11-13; Reply at 1-5. We clarify that we do not view the two matters as legally intertwined but rather factually (and procedurally) intertwined. Although we address both matters in this decision, we consider them separately.

²² 10 C.F.R. § 2.341(b)(4)(i)-(v).

²³ See Petition at 1. We discuss both Board decisions here, however, for completeness.

²⁴ *Id.* at 2-3.

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Intervenors' transmission-corridor claims when preparing the final EIS.²⁵ They assert that the Board's recommendation to the Staff constituted new information, a new "dispute" with the draft EIS, that cured the contention's lateness the second time around.²⁶ Intervenors also assert that language in the final EIS relating to the transmission corridor is materially different from that in the draft EIS. They argue that this language raises an issue suitable for a new contention.²⁷

Intervenors acknowledge that they could have raised Contention 23 at the outset of this proceeding.²⁸ They assert that they purposely waited to see whether the Staff would supplement the analysis provided in DTE's environmental report at the draft EIS stage and that they again waited to see whether the Staff would take on the Board's recommendation in the final EIS. But our rules of practice require contentions to be raised at the earliest possible opportunity.²⁹ And although environmental contentions are, in essence, challenges to the Staff's compliance with NEPA, those contentions must be raised, if possible, in response to an applicant's environmental report.³⁰ Petitioners who choose to wait to raise contentions that

²⁵ *Id.* at 2-3, 6-11.

²⁶ *Id.* at 7-8.

²⁷ *Id.* at 8-11.

²⁸ *See id.* at 3-4, 6.

²⁹ *See* 10 C.F.R. § 2.309(b)(3)(i), (c). We amended our rules of practice in 2012, including the provision governing new or amended contentions in section 2.309(c). The standard for admitting a new or amended contention, however, was simplified rather than overhauled. *See* Final Rule, Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46,562, 46,571 (Aug. 3, 2012) (Part 2 Amendment). Both before and after the 2012 amendment, proponents of new or amended contentions were, and are, required to demonstrate "good cause" for their filing, which includes a demonstration that the information on which the new or amended contention is based is materially different from information previously available. *See* 10 C.F.R. § 2.309(c)(1)(i)-(iii); Part 2 Amendment, 77 Fed. Reg. at 46,571 (focusing the requirements on the factor given the most weight—"good cause").

³⁰ 10 C.F.R. § 2.309(f)(2); *see also* Part 2 Amendment, 77 Fed. Reg. at 46,566-67.

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could have been raised earlier do so at their peril. They risk the possibility that there will not be a material difference between the application and the Staff's review documents, thus rendering any newly proposed contention on previously available information impermissibly late.³¹

Contrary to Intervenor's claims, the Board's recommendation to the Staff in its first decision did not create a new reference point for determining whether the information raised in the second iteration of Contention 23 was timely raised. Our rules of practice require a material difference between the information on which the contention is based and the information that was previously available—for example, a difference between the environmental report and the draft EIS or the draft EIS and the final EIS.³² In both of its contention admissibility decisions the Board noted Intervenor's failure to point to any material difference between DTE's or the Staff's environmental documents. The Board was "satisfied that each of the issues that comprise the subject matter of the contention was discussed in the [Environmental Report]" and that "[t]he same issues were also reviewed in the [draft] EIS."³³ We see nothing that would cause us to disturb the Board's rulings on the timeliness of Contention 23 in this regard.

On appeal, Intervenor's point to language in the final EIS that they claim is materially different from information in the draft EIS.³⁴ But as the Staff and DTE point out, Intervenor's compare language from two distinct sections of the Staff's review documents.³⁵ When the same

³¹ See 10 C.F.R. § 2.309(c); see also *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-10, 75 NRC 479, 492-94 (2012).

³² 10 C.F.R. § 2.309(c), (f)(2); see also *Pilgrim*, CLI-12-10, 75 NRC at 488-89; *Pa'ina Hawaii, LLC*, CLI-10-18, 72 NRC 56, 87-88 (2010).

³³ Second Board Ruling at 21; see also *LBP-12-12*, 75 NRC at 775-76.

³⁴ See Petition at 8-11.

³⁵ NRC Staff Response to Petition at 13-14; DTE Response to Petition at 10-12.

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sections of both documents are properly aligned, there is in fact no difference between the draft EIS and the final EIS, let alone a material difference.³⁶ Therefore, this claim must fail. Because Intervenor has not demonstrated a substantial question warranting review of the Board's dismissal of their contention, we deny their petition for review.

B. The Board's Request for *Sua Sponte* Review

We turn now to whether issues pertaining to transmission-corridor environmental impacts should nevertheless be litigated in a contested proceeding before the Board. The Board specifically requests our approval to review two issues *sua sponte*:

- (1) "[w]hether the building of offsite transmission lines intended solely to serve . . . Fermi Unit 3 qualifies as a connected action under NEPA and, therefore, requires the Staff to consider its environmental impacts as a direct effect of the construction of Fermi Unit 3"; and
- (2) "[w]hether the Staff's consideration of environmental impacts related to the transmission corridor, performed as a cumulative impact review, satisfied NEPA's hard look requirement."³⁷

Section 2.340(b) sets forth the standard for *sua sponte* review in a combined license proceeding. With our express approval, a licensing board may make findings on a "serious safety, environmental, or common defense and security matter" not put into controversy by the

³⁶ Compare "Draft Environmental Impact Statement for Combined License (COL) for Enrico Fermi Unit 3" (Draft Report for Comment), NUREG-2105 (Oct. 2011), at 2-45, 3-17 (ADAMS accession no. ML13274A468 (package)) (DEIS), with "Environmental Impact Statement for the Combined License (COL) for Enrico Fermi Unit 3" (Final Report), NUREG-2105, Vols. 1-4 (Jan. 2013), at 2-46, 3-18 (ML12307A172, ML12307A176, ML12307A177, and ML12347A202) (FEIS).

³⁷ LBP-14-9, 80 NRC at ___ (slip op. at 16).

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parties.³⁸ This authority shall be used only in extraordinary circumstances.³⁹ We find that the two issues identified by the Board do not merit *sua sponte* review.

The Board appears to have focused on the distinctions between a direct impacts analysis and a cumulative impacts analysis, with the underlying conclusion that a cumulative impacts analysis will yield a shallower analysis than a direct impacts analysis. While that may be true in other cases, here the Staff has included what appears to be a comprehensive analysis of transmission-corridor impacts throughout the final EIS. Without commenting on the sufficiency of the Staff's review, we note that the Staff discussed transmission-corridor impacts in Chapters 2, 3, 4, 5, 9, and 10 of the final EIS, in addition to referencing those impacts in the cumulative impacts analysis in Chapter 7.⁴⁰

The final EIS itself is a source of minor confusion. Despite the final EIS's introductory statement that preconstruction activities (which would include transmission-line development)

³⁸ 10 C.F.R. § 2.340(b).

³⁹ *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22-23 (1998). The Board notes the absence of an express regulatory requirement that the authority for *sua sponte* review be used "sparingly" or in "extraordinary circumstances." LBP-14-9, 80 NRC at ___ (slip op. at 17-19). But our 1998 Policy Statement, which instructs boards to limit their use of *sua sponte* review, remains valid. Further, section 2.340(b) references the standard for Commission review in sections 2.323 and 2.341, both of which, we have held, require a heightened showing to prevent overuse, including a demonstration of "extraordinary circumstances." See 10 C.F.R. §§ 2.323(f), 2.341(f)(1) (governing referred rulings or certified questions that raise "significant and novel legal or policy issues" or issues whose early resolution "would materially advance the orderly disposition of the proceeding"); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant), CLI-12-13, 75 NRC 681, 685 (2012); cf. *Diablo Canyon*, CLI-12-13, 75 NRC at 687 (regarding the standard for interlocutory review). The Board correctly notes that "a request to engage in *sua sponte* review should not be undertaken lightly." LBP-14-9, 80 NRC at ___ (slip op. at 19).

⁴⁰ See FEIS at M-1 to M-2.

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are not part of the proposed action and are discussed in the context of cumulative impacts,⁴¹ the Staff further stated that it included “pertinent information related to . . . potential impacts from the transmission lines” as part of its “integrated evaluations of potential environmental impacts from the proposed Fermi 3 facilities.”⁴² Consequently, the Board’s discussion as to whether development of the transmission corridor is a “connected action” under NEPA, while thorough, is inapposite.⁴³ The Board’s treatment of this issue does not acknowledge that the Staff did discuss the proposed transmission corridor in the final EIS, across multiple chapters, together with the impacts of constructing and operating Fermi Unit 3.⁴⁴ The first issue proposed for review would therefore appear to be moot.⁴⁵

Moreover, much of the Board’s request fundamentally challenges the agency’s Limited Work Authorization Rule.⁴⁶ For example, the Board takes issue with the Staff’s classification of

⁴¹ FEIS at 1-7. The Board referenced this statement in its *sua sponte* request. See LBP-14-9, 80 NRC at ___ (slip op. at 15).

⁴² FEIS at M-1.

⁴³ See LBP-14-9, 80 NRC at ___ (slip op. at 20-42).

⁴⁴ See, e.g., FEIS at 4-3 (explaining that due to its collaboration with the United States Army Corps of Engineers in the environmental review, “the combined impacts of . . . preconstruction and construction activities . . . are presented in [Chapter 4]” even though “the environmental effects of preconstruction activities on each resource area would be addressed as cumulative impacts normally presented in Chapter 7”).

⁴⁵ In any event, the Board apparently has already established a position on this issue—after briefing from the parties—that the transmission corridor is “connected” to the licensing decision for Fermi Unit 3. See LBP-14-9, 80 NRC at ___ (slip op. at 27-28) (opining, “based on the information . . . before the Board,” that the transmission corridor appears to be a proposed action and that it has “no discernible purpose’ apart from connecting Fermi 3 to the grid”). For these reasons, further litigation of this issue would not significantly inform the record on the “connected action” question.

⁴⁶ See, e.g., LBP-14-9, 80 NRC at ___ (slip op. at 30-41); see generally Final Rule, Limited Work Authorizations for Nuclear Power Plants, 72 Fed. Reg. 57,416 (Oct. 9, 2007) (Limited Work Authorization Rule).

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the proposed transmission lines as a “preconstruction activity” rather than “construction.”⁴⁷ In the Limited Work Authorization Rule, however, we expressly excluded transmission lines from the delineated “construction” activities that would require NRC approval before being undertaken.⁴⁸ We would not allow a litigant to challenge a rule in an NRC adjudicatory proceeding absent a showing of special circumstances;⁴⁹ we likewise will not allow the Board to do the same.⁵⁰

The Board’s second issue proposed for review, aside from its reference to cumulative impacts, is in essence a concern about the overall sufficiency of the Staff’s transmission-corridor analysis. But this is a potentially amorphous issue that does not appear to lend itself well to a contested proceeding, and the Board has not given us the benefit of a roadmap of what specifically would be litigated with regard to the Staff’s analysis. For example, the Board opines that the Staff must evaluate reasonable alternatives as well as measures to mitigate any detrimental environmental impacts.⁵¹ But again, without making a sufficiency finding, the Staff discussed the proposed transmission corridor in its alternatives analysis (including alternative sources of electricity and alternative sites) and also discussed potential mitigation measures for constructing new transmission lines in its main analysis of the impacts of constructing and

⁴⁷ LBP-14-9, 80 NRC at __ (slip op. at 28-29).

⁴⁸ See 10 C.F.R. §§ 50.10(a)(2)(vii), 51.4 (defining “construction”); see *also* Limited Work Authorization Rule, 72 Fed. Reg. at 57,417 (requiring NRC authorization “only before undertaking activities that have a reasonable nexus to radiological health and safety and/or common defense and security”).

⁴⁹ See 10 C.F.R. § 2.335(a), (b).

⁵⁰ See LBP-14-9, 80 NRC __ (slip op. at 31-32).

⁵¹ See *id.* at __ (slip op. at 23-25, 51).

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operating Fermi Unit 3.⁵² Our rules of practice are designed to avoid such an unfocused inquiry in contested proceedings.⁵³

In February of this year, we will be holding the uncontested hearing on the *Fermi* combined license application. The uncontested hearing will provide us with an opportunity to review the sufficiency of the Staff's environmental (and safety) analyses. Given that the Board's request, at bottom, questions the sufficiency of the Staff's consideration of the environmental impacts of the proposed new transmission lines for Fermi Unit 3, the issue whether the Staff has taken a "hard look" at the environmental impacts of the transmission corridor is among the range of issues that are appropriately before us in the uncontested hearing.⁵⁴ Thus, as part of

⁵² See, e.g., FEIS at 4-60 (noting "that the small streams that would be crossed by the proposed transmission line corridor could be easily spanned without placing structures in stream channels and that [best management practices] would be implemented to protect water quality in streams during building activities"); *id.* at 9-7 (noting that "new transmission lines would be needed to deliver power from the alternative coal-fired plant and that these lines would be identical in both capacity and location to the lines being proposed to support Fermi 3"); *id.* at 9-87 (noting that "[e]nvironmental conditions along the transmission line corridor [for the alternative Belle River-St. Clair site] are similar to those of the site, with a mixture of cropland, wooded areas, and some wetlands").

⁵³ See 10 C.F.R. § 2.309(f)(1)(i)-(vi). The Board, to be sure, is not strictly bound by the contention admissibility rules when requesting approval to review issues *sua sponte*. But our contested proceedings must be governed by some level of specificity to ensure the proceeding is conducted efficiently, with fairness to all of the parties. Cf. Final Rule, Rules of Practice in Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,179 (Aug. 11, 1989) (amending the rules of practice to "ensure[] that the resources of all participants in NRC proceedings are focused on real issues and disputes among the parties").

⁵⁴ We reject Intervenor's argument that the uncontested hearing "is not a serious avenue of relief." Intervenor's Reply Brief at 10. As the Intervenor notes, compliance with NEPA is the responsibility of the NRC. See Petition at 3, 6. In the uncontested hearing it is our duty to ensure, among other things, that we have adhered to our obligations under that statute. See 10 C.F.R. § 51.107(a). We therefore find the uncontested proceeding to be an appropriate venue in which to address the transmission-corridor issue.

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this hearing, we will take the Board's concerns regarding examination of the environmental impacts of the transmission corridor in the final EIS under advisement.

III. CONCLUSION

Intervenors have failed to raise a substantial question warranting review of the Board's dismissal of Contention 23. We therefore *deny* the petition for review. In addition, we *deny* the Board's request for *sua sponte* review. We will review the adequacy of the Staff's environmental review, including consideration of transmission-corridor environmental impacts, as part of the uncontested hearing.

IT IS SO ORDERED.

For the Commission

NRC Seal

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 13th day of January, 2015.

Concurring Opinion of Commissioner Baran

I concur in the result of the memorandum and order but write separately to respectfully express my disagreement with the majority's treatment of the Board's request for *sua sponte* review in section IIB. In my view, this portion of the opinion would benefit from a more tailored discussion of only those issues necessary to reach a decision. I do not believe it is necessary for the opinion to characterize the Board's request for *sua sponte* review as "fundamentally challeng[ing]" the Limited Work Authorization Rule, the Board as having "already established a position" on the question of whether the transmission corridor construction is a connected action under NEPA, or the requested review of the Staff's transmission corridor analysis as "potentially amorphous" and "unfocused." I also do not believe that it makes sense for the opinion to state that "the Staff has included what appears to be a comprehensive analysis of transmission-corridor impacts throughout the final EIS." This description of the Staff's analysis as "comprehensive" could leave readers with the impression that the Commission is prejudging the sufficiency of the final EIS in advance of the uncontested hearing. The juxtaposition of this description with the subsequent statement that the Commission is not "commenting on the sufficiency of the Staff's review" may also confuse readers.

For these reasons, this section of the memorandum and order could simply state:

With respect to whether the building of offsite transmission lines for Fermi Unit 3 qualifies as a connected action under NEPA, the Board's request for *sua sponte* review appears relevant only to determining if an analysis of the direct effects of such activities is warranted. However, the Staff examined the impacts of the proposed transmission corridor on land use, terrestrial ecology, aquatic ecology, historic and cultural resources, and nonradiological health in Chapters 2, 3, 4, 5, 9, and 10 of the final EIS, in addition to referencing those impacts in the cumulative impacts analysis in Chapter 7. Without commenting on the sufficiency of the review, there is no question that the Staff discussed the environmental impacts of the proposed transmission corridor in multiple chapters of the final EIS. Consequently, a *sua sponte* review by the Board of the legal question of whether a direct effects analysis was required is unnecessary. At their core,

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both issues raised by the Board relate to the sufficiency of the Staff's consideration of the environmental impacts of the proposed new transmission corridor for Fermi Unit 3. The upcoming uncontested hearing is a natural time for the Commission to examine whether the staff has taken the requisite "hard look" at the environmental impacts of the transmission corridor in its final EIS.

Fermi Nuclear Power Plant, Unit 3, Docket No. 52-033-COL
MEMORANDUM AND ORDER (CLI-15-01)

Detroit Edison Company
One Energy Plaza, 688 WCB
Detroit, Michigan 48226
Bruce R. Maters, Esq.
matersb@dteenergy.com

Winston & Strawn, LLP
1700 K Street, NW
Washington, DC 20006-3817
Counsel for the Applicant
Noelle Formosa, Esq.
nformosa@winston.com
David Repka, Esq.
drepka@winston.com
Tyson R. Smith, Esq.
trsmith@winston.com
Carlos L. Sisco, Senior Paralegal
CSisco@winston.com

Nuclear Energy Institute
1201 F Street NW
Suite 1100
Washington, DC 20004
Jonathan Rund, Esq.
jmr@nei.org

Beyond Nuclear, Citizens for Alternatives
To Chemical Contamination, Citizens
Environmental, Alliance of Southwestern
Ontario, Don't Waste Michigan, Sierra Club,
et al.

316 N. Michigan Street, Suite 520
Toledo, OH 43604-5627
Terry J. Lodge, Esq.
tjlodge50@yahoo.com
Michael J. Keegan, Esq.
mkeeganj@comcast.net

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

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

Dated at Rockville, Maryland,
this 14th day of January, 2015

Attachment 6

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Allison M. Macfarlane, Chairman
Kristine L. Svinicki
William C. Ostendorff
Jeff Baran
Stephen G. Burns

In the Matter of

DTE ELECTRIC COMPANY

(Fermi Nuclear Power Plant, Unit 3)

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Docket No. 52-033-COL

CLI-14-10

MEMORANDUM AND ORDER

Intervenors¹ challenge the Atomic Safety and Licensing Board's ruling on the merits of Contention 15A/B in favor of the applicant, DTE Electric Company.² For the reasons set forth below, we deny the petition for review.

I. BACKGROUND

This proceeding concerns DTE's combined license application to construct and operate a GE-Hitachi Economic Simplified Boiling Water Reactor (ESBWR) on the Fermi site in Monroe

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

² *Intervenors' Petition for Review of LBP-14-07 (Ruling for Applicant on Quality Assurance)* (June 17, 2014) (Petition). See generally LBP-14-7, 79 NRC __ (May 23, 2014) (slip op.).

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County, Michigan.³ In November 2009, after they were admitted as parties to the proceeding, Intervenor filed Contention 15, a new contention regarding DTE's quality assurance program.⁴ In June 2010, the Board admitted and reformulated the contention into two subparts, A and B.⁵

In support of their contention, Intervenor relied on an NRC Staff notice of violation that was issued to DTE in October 2009 for failure to comply with the quality-assurance requirements in 10 C.F.R. Part 50, Appendix B from March 2007 to February 2008 while Black and Veatch, a contractor for DTE, performed site-investigation activities for the development of DTE's combined license application.⁶ As reformulated by the Board, the introductory language

³ See Detroit Edison Company; Notice of Hearing, and Opportunity To Petition for Leave To Intervene and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation on a Combined License for Fermi 3, 74 Fed. Reg. 836 (Jan. 8, 2009). Intervenor petitioned for leave to intervene, proposing fourteen contentions. The Board admitted four: Contentions 3, 5, 6, and 8. LBP-09-16, 70 NRC 227, 306 (2009). In three separate opinions, the Board granted summary disposition of Contentions 3, 5, and 6 in favor of DTE. See Order (Granting Motion for Summary Disposition of Contention 3) (July 9, 2010) (unpublished); Order (Granting Motion for Summary Disposition of Contention 5) (Mar. 1, 2011) (unpublished); LBP-12-23, 76 NRC 445, 452 (2012) (among other things, granting summary disposition of Contention 6). In the decision challenged here, the Board found in favor of the Staff on the merits of Contention 8. LBP-14-7, 79 NRC at ___ (slip op. at 2); see *infra*. We will address in a separate decision the Board's request for *sua sponte* review of issues related to Intervenor's proposed Contention 23. See LBP-14-9, 80 NRC ___ (July 7, 2014) (slip op.).

⁴ *Supplemental Petition of 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 for Admission of a Newly-Discovered Contention, and for Partial Suspension of COLA Adjudication* (Nov. 6, 2009) (Proposed Contention 15).

⁵ LBP-10-9, 71 NRC 493, 499 (2010).

⁶ See Proposed Contention 15, at 1-5.

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of Contention 15 referenced the Staff's findings in the October 2009 notice of violation.⁷ In Subpart A of the contention, Intervenor argued that the NRC may not issue a combined license for Fermi Unit 3 until DTE either corrects the information obtained from Black and Veatch's site-investigation activities or demonstrates that its quality was not affected by the violation.⁸ And in Subpart B of the contention, Intervenor challenged DTE's general commitment to comply with NRC quality-assurance regulations. Intervenor asserted that the NRC cannot issue a license until DTE demonstrates that it has adopted and implemented a sufficient quality assurance program.⁹

⁷ LBP-10-9, 71 NRC at 510 ("Detroit Edison (DTE) failed to comply with Appendix B to 10 C.F.R. Part 50 to establish and implement its own quality assurance (QA) program when it entered into a contract with Black and Veatch (B&V) for the conduct of safety-related combined license (COL) application activities and to retain overall control of safety-related activities performed by B&V. This violation began in March 2007 and continued through at least February 2008. Further, DTE failed to complete internal audits of QA programmatic areas implemented for the Fermi 3 COL Application, and DTE also has failed to document trending of corrective actions to identify recurring conditions adverse to quality since the beginning of the Fermi Unit 3 project in March 2007."). The Staff issued a revised notice of violation in April 2010 after a response from DTE. See *id.* at 500-01. The admitted contention, however, focused on the October 2009 notice of violation.

⁸ *Id.* at 510-11 ("These deficiencies adversely impact the quality of the safety[-] related design information in the FSAR [(Final Safety Analysis Report)] that is based on B&V's tests, investigations, or other safety-related activities. Because the NRC may base its licensing decision on safety-related design information in the FSAR only if it has reasonable assurance of the quality of that information, it may not lawfully issue the COL until the deficiencies have been adequately corrected by the Applicant, or until the Applicant demonstrates that the deficiencies do not affect the quality of safety-related design information in the FSAR.").

⁹ *Id.* at 511 ("Although DTE claims that in February 2008 it adopted a QA program that conforms to Appendix B, DTE has failed to implement that program in the manner required to properly oversee the safety-related design activities of B&V. This demonstrates an ongoing lack of commitment on the part of DTE's management to compliance with NRC QA regulations. The NRC cannot support a finding of reasonable assurance that the plant, as built, can and will be operated without endangering the public health and safety until DTE provides satisfactory proof of a fully-implemented QA program that will govern the design, construction, and operation of Fermi Unit 3 in conformity with all relevant NRC regulations.").

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DTE later moved for summary disposition of Contention 15A/B, which the Staff supported.¹⁰ The Board denied DTE's motion, however, and found that genuine issues of material fact remained in dispute between the parties.¹¹ Thus, Contention 15A/B proceeded to an evidentiary hearing along with Intervenor's Contention 8, which challenged the adequacy of the Staff's final environmental impact statement with regard to the effects of construction and operation of Fermi Unit 3 on the eastern fox snake, a state-listed threatened species, as well as the adequacy of the mitigation measures planned for its protection.¹² The Board held the evidentiary hearing on October 30 and 31, 2013.¹³ After weighing the parties' testimony and exhibits, the Board ruled on the merits of both contentions and found in favor of the Staff on Contention 8 and DTE on Contention 15A/B.¹⁴

Intervenor's petition for review followed. Intervenor's challenge only the Board's ruling on the quality-assurance issues in Contention 15A/B; they do not seek review of the Board's ruling on Contention 8.¹⁵ DTE and the Staff oppose the petition for review.¹⁶

¹⁰ *Applicant's Motion for Summary Disposition of Contention 15* (Apr. 17, 2012); *NRC Staff Answer to Applicant's Motion for Summary Disposition of Contention 15* (May 7, 2012). Intervenor's opposed summary disposition. See *Intervenor's Response in Opposition to Applicant's Motion for Summary Disposition of Contention 15* (May 17, 2012).

¹¹ LBP-12-23, 76 NRC at 480.

¹² See generally LBP-09-6, 70 NRC at 285-92 (admitting Contention 8); LBP-11-14, 73 NRC 591, 604 (2011) (denying DTE's first motion for summary disposition of Contention 8); LBP-12-23, 76 NRC at 465 (denying DTE's second motion for summary disposition of Contention 8).

¹³ Tr. at 271-712.

¹⁴ LBP-14-7, 79 NRC at __ (slip op. at 2).

¹⁵ Petition at 1.

¹⁶ *Applicant's Answer Opposing Petition for Review of LBP-14-07* (July 14, 2014) (DTE Opposition); *NRC Staff's Answer to Intervenor's Petition for Review of LBP-14-07* (July 14, (continued . . .))

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II. DISCUSSION

We will grant a petition for review at our discretion, upon a showing that the petitioner has raised a substantial question as to whether

- (i) a finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) a necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (iii) a substantial and important question of law, policy, or discretion has been raised;
- (iv) the conduct of the proceeding involved a prejudicial procedural error; or
- (v) any other consideration that we may deem to be in the public interest.¹⁷

Intervenors argue that review is warranted here because they have raised a substantial question as to each of these considerations.¹⁸ We disagree. Intervenors have not presented a substantial question that would justify review of the Board's ruling on Contention 15A/B.

(. . . continued)

2014) (Staff Opposition). On July 25, 2014, Intervenors e-mailed a request for an extension of time to file a reply until July 28, 2014, because Intervenors' counsel experienced problems with his computer hard drive. *Intervenors' Motion for Enlargement of Time to Reply in Support of Petition for Review* (July 30, 2014), at 1-2 & n.1. Intervenors e-mailed their replies on July 28, 2014, and on July 30, 2014, they filed the replies and the motion for extension of time on the electronic hearing docket. *Intervenors' Reply to NRC Staff Answer to Petition for Review of LBP-14-07 (Ruling for Applicant on Quality Assurance)* (July 30, 2014), at i n.1; *Intervenors' Reply to DTE Answer Opposing Petition for Review of LBP-14-07 (Ruling for Applicant on Quality Assurance)* (July 30, 2014), at i n.1. Because Intervenors' extension request is unopposed and because Intervenors have shown good cause for the modest extension, we grant the motion. See 10 C.F.R. § 2.307(a). In addition, we grant Intervenors an enlargement of the page-limit for their petition for review. See DTE Opposition at 2; 10 C.F.R. § 2.341(b)(2) (Intervenors' petition exceeded the limit by three pages). *But see infra* note 41.

¹⁷ 10 C.F.R. § 2.341(b)(4)(i)-(v).

¹⁸ See Petition at 2. Although Intervenors cite only the considerations in section 2.341(b)(4)(ii) through (v), they also invoke subsection (i) as a basis for review, arguing that the Board "ignored the greater weight of the evidence" with respect to the adequacy of DTE's quality assurance oversight of the safety-related pre-application services performed by its contractor, Black and Veatch. See *id.* at 2-3.

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Intervenors argue that the Board erred in finding that DTE demonstrated by a preponderance of the evidence that it appropriately remained responsible for quality assurance over Black and Veatch, DTE's contractor for pre-application, site-investigation activities.¹⁹ But for many of Intervenors' attempts in their petition for review to point to information in the record that supports their view—i.e., that safety-related information in DTE's application is “unreliable” or that DTE lacks a “commitment” to comply with the NRC's quality-assurance requirements—DTE and the Staff point to information in the record that demonstrates that Intervenors may have misinterpreted the evidence or failed to demonstrate its relevance to the issues in dispute.²⁰

For example, Intervenors challenge the reliability of Black and Veatch's subsurface site investigations for DTE during the pre-application period, claiming that those investigations were the “root cause of . . . site characterization issues that continue to plague the Fermi 3 Licensing Project.”²¹ But DTE witnesses explained at the hearing that recent seismic and geotechnical work on the proposed Fermi 3 site is related to ESBWR design changes and lessons-learned activities from the March 11, 2011, Fukushima accident in Japan.²² And Intervenors cite a DTE presentation to an industry working group in response to the October 2009 notice of violation as evidence that DTE's quality assurance program was poorly managed.²³ But DTE witnesses

¹⁹ See *id.* at 2-3.

²⁰ Compare *id.* at 12-23, with Staff Opposition at 13-17, and DTE Opposition at 8-13.

²¹ Petition at 13 (internal quotation marks omitted).

²² See Staff Opposition at 16 (citing Tr. at 541-42).

²³ Petition at 15 (citing Ex. INTS 068, *Testimony of Arnold Gundersen Supporting [] Intervenors Contention 15: DTE COLA Lacks Statutorily Required Cohesive QA Program* (Apr. 30, 2013), at (continued . . .)

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referenced the presentation as evidence of its “willingness to discuss lessons-learned with the industry as well as its continual improvement efforts.”²⁴

We give substantial deference to licensing board findings of fact, and we will not overturn a board’s factual findings unless they are “not even plausible in light of the record viewed in its entirety.”²⁵ The Board made extensive factual findings to support its conclusion that DTE satisfied the requirements of 10 C.F.R. Part 50, Appendix B, all of which were supported by the evidence presented by DTE and the Staff. Specifically, the Board noted that DTE used a vendor with an Appendix B quality assurance program, required by contract that Black and Veatch’s work conform with that program, reviewed a prior audit of that program, employed an owner’s engineer to oversee Black and Veatch’s quality assurance efforts, and ultimately did not accept work from Black and Veatch until DTE established its own quality assurance program.²⁶ Moreover, the Board may reject evidence that it finds unpersuasive or not credible. Therefore, we see nothing that would suggest that the Board’s findings were implausible or not supported by the record.

Intervenors also argue that the Board committed prejudicial procedural error by excluding from the record a number of Intervenors’ late-filed exhibits.²⁷ Intervenors assert that

(. . . continued)

35 (Gundersen Testimony)). The testimony of Intervenors’ witness on this point referenced an excluded exhibit. See *id.* at 4-5 (citing Ex. INTS 068, Gundersen Testimony at 35); see *also* text accompanying notes 27-43.

²⁴ DTE Opposition at 12.

²⁵ *David Geisen*, CLI-10-23, 72 NRC 210, 224-25 (2010) (internal quotation marks omitted); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11, 26 (2003).

²⁶ LBP-14-7, 79 NRC at ___ (slip op. at 38-39).

²⁷ Petition at 2.

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the Board should have overlooked their late filing because Intervenor's expert relied on the exhibits in his pre-filed testimony.²⁸ They claim that this error was prejudicial because the exhibits, which included internal DTE e-mails and presentations, demonstrated that DTE lacked a sufficient quality assurance program during the development of its application.²⁹

But the Board provided Intervenor's multiple opportunities to file these exhibits in a timely manner.³⁰ Intervenor's requested two extensions of the original filing deadline, which the Board granted.³¹ And after the Board made it clear that no further extensions would be granted, Intervenor's nevertheless failed to meet the Board's final exhibit-filing deadline.³² The Board also provided Intervenor's an opportunity to seek reconsideration of its decision to exclude the

²⁸ *Id.* at 2, 6.

²⁹ *See id.* at 3-6.

³⁰ *See* Order (Adopting Transcript Corrections, Denying Intervenor's Post-Hearing Motion for Admission for Excluded Exhibits, and Closing the Record) (Feb. 4, 2014), at 2-5 (unpublished) (Post-Hearing Board Order).

³¹ *See* Order (Granting Intervenor's Motions for Extension of Time, Requesting List of Objections from the NRC Staff, and Explaining Board Procedure in the Event of a Continued Government Shutdown) (Oct. 3, 2013), at 2 (unpublished) (October 3 Board Order); *see generally* Intervenor's Motion for Extension of Time for Submission of Exhibits and Prefiled Testimony with Exhibit References (Sept. 26, 2013); Intervenor's Second Motion for Extension of Time for Submission of Exhibits and Prefiled Testimony with Exhibit References (Oct. 1, 2013). Intervenor's originally filed all of their exhibits for Contention 15 as one document. *See* Tr. at 239-41. The Board directed Intervenor's to refile them by September 26, 2013, a date that Intervenor's counsel stated could be met "easily." Order (Summarizing Pre-hearing Conference) (Sept. 20, 2013), at 2 (unpublished); Tr. at 241.

³² October 3 Board Order at 2. Although the Board stated that no further extension would be granted past October 4, 2013, Intervenor's continued to file their exhibits through October 7, 2013. *See* Post-Hearing Board Order at 3.

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late-filed exhibits “as soon as possible after the close of the hearing.”³³ Intervenor filed their motion for reconsideration almost two months later.³⁴

Although Intervenor claim to have “vastly inferior litigation resources,” they are represented by counsel.³⁵ But even if Intervenor were appearing *pro se*, we would still expect adherence to board directives.³⁶ Regardless of a party’s resources, “[f]airness to all involved in NRC’s adjudicatory procedures requires that every participant fulfill the obligations imposed by and in accordance with applicable law and Commission regulations.”³⁷

Moreover, we give broad discretion to our licensing boards in the conduct of NRC adjudicatory proceedings, and we generally defer to board case-management decisions.³⁸

³³ Tr. at 649-50; see also *id.* at 709-10.

³⁴ *Intervenor’s Post-Hearing Motion for Reconsideration for Admission of Excluded Intervenor Exhibits on Contention 15* (Dec. 27, 2013). DTE and the Staff objected to the timing of the motion for reconsideration due to its arrival during the parties’ preparation of proposed findings of fact and conclusions of law. *Applicant’s Response to Intervenor’s Motion to Reconsider Exclusion of Untimely Exhibits* (Jan. 6, 2014), at 1-2 & n.5; *NRC Staff Answer Opposing Intervenor’s Post-Hearing Motion for Reconsideration of Excluded Exhibits on Contention 15* (Jan. 6, 2014), at 4. Intervenor claimed that they were merely providing the rationale for their timely oral motion at the hearing. *Reply in Support of Intervenor’s Post-Hearing Motion for Reconsideration of Admission of Excluded Intervenor Exhibits on Contention 15* (Jan. 13, 2014), at 1. Our rules require motions for reconsideration to be filed within ten days of the action for which reconsideration is requested. 10 C.F.R. § 2.323(e).

³⁵ Petition at 6.

³⁶ See *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-14, 71 NRC 449, 469 (2010); accord *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 21-22 (1998) (1998 Policy Statement) (noting the obligation of all parties to follow the procedures in 10 C.F.R. Part 2 and board scheduling orders).

³⁷ *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 454 (1981) (1981 Policy Statement).

³⁸ See 10 C.F.R. § 2.319 (“A presiding officer has the duty to conduct a fair and impartial hearing according to law, to take appropriate action to control the prehearing and hearing (continued . . .)

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Licensing boards are expected to set procedures to ensure the case is managed efficiently, in a manner that is fair to all of the parties.³⁹ And a board may take disciplinary action against a party that “fails . . . to comply with any prehearing order,” as long as the action is just.⁴⁰ The Board’s actions in this case are consistent with our expectations for orderly case management.⁴¹

In any event, the Board “reviewed the parties’ filings and the [excluded] exhibits . . . and found that they would not add anything of significance to the record.”⁴² We are not persuaded by Intervenor’s arguments on appeal that the excluded evidence would have done otherwise—i.e., that it would have changed the Board’s findings on Contention 15.⁴³ Given all of these

(. . . continued)

process, to avoid delay and to maintain order. The presiding officer has all the powers necessary to those ends”); *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-07-28, 66 NRC 275, 275 (2007); see also 10 C.F.R. § 2.321(c).

³⁹ 10 C.F.R. § 2.319(k) (authorizing boards to “[s]et reasonable schedules for the conduct of the proceeding and take actions reasonably calculated to maintain overall schedules”); see also *1998 Policy Statement*, CLI-98-12, 48 NRC at 19 (“Current adjudicatory procedures and policies provide a latitude to the Commission, its licensing boards and presiding officers to instill discipline in the hearing process and ensure a prompt yet fair resolution of contested issues in adjudicatory proceedings.”); *1981 Policy Statement*, CLI-81-8, 13 NRC at 453 (“The Commission’s Rules of Practice provide the board with substantial authority to regulate hearing procedures.”).

⁴⁰ 10 C.F.R. § 2.320.

⁴¹ In other proceedings we have imposed or upheld disciplinary measures against parties and their representatives when they failed to comply with board directives and procedural rules. See, e.g., *Indian Point*, CLI-07-28, 66 NRC at 275; *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-06-4, 63 NRC 32, 38-39 (2006); Order of the Secretary (Dec. 19, 2007) (unpublished) (ADAMS accession no. ML073531806) (*Indian Point* license renewal proceeding).

⁴² Post-Hearing Board Order at 5.

⁴³ See *Pilgrim*, CLI-10-14, 71 NRC at 470-71; see generally Petition at 4-6. Furthermore, as a practical matter, the Board had an opportunity to consider the exhibits as part of Intervenor’s (continued . . .)

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considerations, we see no reason to disturb the Board's decision to exclude Intervenor's late-filed exhibits.

Finally, Intervenor's argue that review is warranted because the Board's decision constituted a *de facto* exemption or waiver of the NRC's quality-assurance regulations that "deprived the public of notice and an opportunity to adjudicate the basis for [DTE's] unprecedented [quality assurance] program model."⁴⁴ Intervenor's argument that the Board granted DTE an exemption from the quality-assurance requirements in 10 C.F.R. Part 50, Appendix B, or applicable quality-assurance guidance, is incorrect.⁴⁵ The Board disagreed with Intervenor's interpretation that Appendix B requires an applicant to have its own in-house quality assurance program in order to satisfy the requirement that an applicant "retain responsibility" over the services of a contractor for certain safety-related activities.⁴⁶ Rather, the Board found that DTE appropriately delegated to Black and Veatch the establishment and implementation of the quality assurance program for pre-application activities and maintained "direct supervision, oversight, and contractual control of [Black and Veatch] and its [quality assurance] program."⁴⁷

The plain language of Appendix B supports the Board's view and demonstrates that Intervenor's fail to raise a substantial question with respect to the purported exemption. Criterion I of Appendix B expressly authorizes an applicant to "delegate to others, such as contractors,

(. . . continued)

pre-filed testimony, which quoted or referenced some of the excluded material. See Ex. INTS 068, Gundersen Testimony at 26-36.

⁴⁴ Petition at 3.

⁴⁵ Intervenor's incorrectly assert that DTE was required to obtain an exemption from NEI 06-14A, which is a non-binding guidance document. See *id.* at 25.

⁴⁶ LBP-14-7, 79 NRC at ___ (slip op. at 29).

⁴⁷ *Id.* at ___ (slip op. at 39).

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agents, or consultants, the work of establishing and executing the quality assurance program, or any part thereof, but shall retain responsibility for the . . . program.”⁴⁸ The analysis of whether an applicant has “retained responsibility” is a factual issue, and, as discussed above, Intervenor has not shown that the Board’s resolution of this issue in favor of DTE was “clearly erroneous.”⁴⁹

Moreover, the NRC provided members of the public an opportunity to request a hearing on all safety and environmental issues within the scope of DTE’s combined license application, including quality assurance. Indeed, the Board admitted this very challenge to DTE’s quality assurance program, and provided Intervenor with a full and fair opportunity to question its sufficiency.⁵⁰ We therefore reject Intervenor’s claim that the Board “deprived the public of notice and . . . opportunity to adjudicate”⁵¹ this issue.

⁴⁸ 10 C.F.R. pt. 50, app. B (I. Organization).

⁴⁹ *Id.* § 2.341(b)(4)(i); *see also supra* note 25 and accompanying text.

⁵⁰ In addition, the evidentiary hearing was open to the public. *See* Tr. at 271-712. The Board also held a limited appearance session for members of the public to comment on DTE’s combined license application. *See* Tr. at 1-79 (Oct. 29, 2013); *see generally* 10 C.F.R. § 2.315(a).

⁵¹ Petition at 3.

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III. CONCLUSION

Intervenors have failed to raise a substantial question warranting review of the Board's ruling on Contention 15A/B. We therefore *deny* the petition for review.

IT IS SO ORDERED.⁵²

For the Commission

NRC SEAL

/RA/

Rochelle C. Baval
Acting Secretary of the Commission

Dated at Rockville, Maryland,
this 16th day of December, 2014.

⁵² During the pendency of this appeal, Intervenors moved to recuse then-Commissioner William D. Magwood, IV from participating in this decision. *Intervenors' Motion for Recusal of Commissioner Magwood from Participating in Deliberations on Petition for Review of LBP-14-07* (June 25, 2014). Commissioner Magwood denied the motion on July 14, 2014. Decision on the Motion of Beyond Nuclear for Recusal from Participation in Deliberations on Petition for Review of LBP-14-07 (July 14, 2014). Commissioner Magwood has since left the agency and did not participate in this decision.

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MEMORANDUM AND ORDER (CLI-14-10)

Detroit Edison Company
One Energy Plaza, 688 WCB
Detroit, Michigan 48226
Bruce R. Maters, Esq.
matersb@dteenergy.com

Winston & Strawn, LLP
1700 K Street, NW
Washington, DC 20006-3817
Counsel for the Applicant
Noelle Formosa, Esq.
nformosa@winston.com
David Repka, Esq.
drepka@winston.com
Tyson R. Smith, Esq.
trsmith@winston.com
Carlos L. Sisco, Senior Paralegal
CSisco@winston.com

Nuclear Energy Institute
1201 F Street NW
Suite 1100
Washington, DC 20004
Jonathan Rund, Esq.
jmr@nei.org

Beyond Nuclear, Citizens for Alternatives
To Chemical Contamination, Citizens
Environmental, Alliance of Southwestern
Ontario, Don't Waste Michigan, Sierra Club,
et al.

316 N. Michigan Street, Suite 520
Toledo, OH 43604-5627
Terry J. Lodge, Esq.
tjlodge50@yahoo.com
Michael J. Keegan, Esq.
mkeeganj@comcast.net

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

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

Rockville, Maryland
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