

December 29, 2010

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

In the Matter of: ) Docket No. 52-033  
The Detroit Edison Company )  
(Fermi Nuclear Power Plant, )  
Unit 3) )

**INTERVENORS' MEMORANDUM IN OPPOSITION TO DTE'S 'MOTION  
TO STRIKE PORTIONS OF INTERVENORS' RESPONSE  
TO MOTION FOR SUMMARY DISPOSITION OF CONTENTION 8'**

Now come Intervenors Beyond Nuclear, Citizens for Alternatives to Chemical Contamination, Citizens Environmental Alliance of Southwestern Ontario, Don't Waste Michigan, Sierra Club (Michigan Chapter), Keith Gunter, Edward McArdle, Henry Newnan, 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 (hereinafter "Intervenors"), by and through counsel, and set forth their opposition to the "Motion To Strike Portions of Intervenors' Response to Motion for Summary Disposition of Contention 8" brought by DTE, the Applicant.

***DTE'S INTERPRETATION OF THE CONTENTION***

Intervenors' memorandum in opposition was designed to meet, in good faith, DTE's own interpretation of the gravamen of Contention No. 8. Applicant characterized the contention this way in its Motion (pp. 2, 3):

As the Board explained in its decision admitting a portion of Contention 8, Contention 8 is a contention under the National Environmental Policy Act ("NEPA") alleging that the ER fails to adequately assess the project's impacts on the Eastern Fox snake. LBP-09-16 at 62.

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At bottom, the admitted Contention 8 relates to (1) the discrepancy in the ER regarding the presence of Eastern Fox snakes at the Fermi Unit 3 site; and (2) the failure of the ER to discuss mitigation measures related to the Eastern Fox snake.

DTE believes that Contention No. 8 is one of omission, whereas Intervenor claim it is a "contention of inadequacy." Generally, the plain language of a contention will reveal whether the contention is a claim of omission, a specific substantive challenge to an application, or a combination of both. It may be necessary to examine the language of the contention bases to determine the scope of the contention. *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-16, 63 NRC 737, 742 (2006); *see also Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-08-2, 67 NRC 54, 63-65 (2008) (examining the language of the bases of contention to determine if it is a contention of inadequacy or a contention of omission).

The disagreement which prompted the Motion to Strike, then, comes down to one of scope, *i.e.*, whether DTE's initial denial of presence of the Eastern Fox Snake at the Fermi site - which includes Fermi units 1 and 2 on a two-square-mile area - is remedied by DTE's belated acknowledgment of the snake's presence together with a minimal, rote plan aimed at avoiding its road kill; or whether the project's impacts on the Eastern Fox Snake must be analyzed and quantified for their cumulative or synergistic effects on the snake from other human activities and projects expected to occur at the Fermi site contemporaneously to Fermi 3 construction. Intervenor submit that the scope of the project requires NEPA analysis of the impacts of the traffic and congestion from Fermi 3 construction, cooling tower salt deposition, refueling outages at Fermi 2, the new ISFSI at Fermi 2, and the human and traffic congestion from dismantling Fermi 1 must be

cumulatively analyzed before there can be a serious mitigation plan (even if such a plan cannot be imposed on DTE). Intervenors maintain that adding a poorly-considered mitigation plan into the mix without a predicate analysis of potential environmental impacts - cumulative ones - renders the mitigation plan legally inadequate, based upon the failure to follow the NEPA obligation to perform cumulative analysis.

When determining the scope of a contention, one looks not only to the contention itself, but also to the bases provided for the contention, which clarify the "reach" and "focus" of a contention. Those bases originally offered in support of a contention, together with the issues stated in the contention itself, establish an "envelope" within which information will be considered to be within the "reach" or "focus" of a contention and therefore relevant in litigation of the contention. *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), LBP-04-12, 59 NRC 388, 391 (2004) (characterizing *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002) and *Pub. Serv. Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988), *aff'd sub nom. Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 899 (1991)); *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 254 (2007).

#### ***Why There Should Be A 'Cumulative Effects' Analysis***

There can be no doubt but that NEPA requires the cumulative effects of an action to be disclosed in an environmental impact statement. *Kleppe v. Sierra Club*, 427 U.S. 390 (1976) *NRDC v. Callaway*, 24 F.2d 79, 88 (2d Cir. 1975); *Named Individual Members of San Antonio Conservation Society v. Texas Highway Dept.*, 446 F.2d 1013 (5th Cir.

1971), *cert. denied*, 406 U.S. 933, 92 S.Ct. 1775 (1972); 40 C.F.R. §§ 1508.7, 1508.8.

In NRC proceedings involving NEPA, when several proposals for actions that will have a cumulative or synergistic environmental impact upon a region are pending concurrently before the NRC, their environmental consequences must be considered together. *Sequoyah Fuels Corp.* (Gore, OK, Site Decommissioning), LBP-99-46, 50 NRC 386 (1999). *Sequoyah Fuels Corp.* (Gore, OK, Site Decommissioning), LBP-99-46, 50 NRC 386 (1999). 6 at 57, citing *Kleppe*, 427 U.S. at 410. The term "synergistic" refers to the joint action of different parts - or sites - which, acting together, enhance the effects of one or more individual sites. *Sequoyah Fuels Corp.* (Gore, OK, Site Decommissioning), LBP-99-46, 50 NRC 386 (1999).

In *Kleppe*, the Supreme Court stated (at p. 410) that

. . . [W]hen several proposals for coal-related actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together. [Footnote omitted].

Only through comprehensive consideration of pending proposals can the agency evaluate different courses of action.

Obviously, the NRC must consider the cumulative and synergistic environmental consequences within the affected region - meaning, here, at least the two-square-mile Fermi site - which except for its built-up portions is deemed habitat for the Eastern Fox snake. CEQ regulations (40 C.F.R. §§ 1508.7 and 1508.27) require an analysis of whether it is "reasonable to anticipate cumulatively significant impacts" from the specific impacts of the proposed project which, when added to the impacts from "past, present and reasonably foreseeable future actions" are "related" to the proposed project. The regulation does not limit the inquiry to the cumulative impacts that can be expected from pro-

posed projects; rather, the inquiry also extends to the effects that can be anticipated from "reasonably foreseeable future actions." *Cf.* 40 C.F.R. § 1508.25(a)(2) (cumulative actions are "proposed actions ...").

No matter how small the incremental impacts of a project are expected to be, 40 C.F.R. § 1508.7 requires the NRC to "add [] [the incremental impacts] to other past, present, and reasonably foreseeable future actions." Once this is done, the NRC must "to the fullest extent practicable, [] quantify the various factors considered." 10 C.F.R. § 51.71; *cf. Hall v. Norton*, 266 F.3d 969, 978 (9th Cir. 2001) (EA that failed to quantify the cumulative emissions from potential development was inadequate, even when project would only contribute a small portion of overall emissions). See *United States v. Larionoff*, 431 U.S. 864, 872 (1977) ("In construing administrative regulations, 'the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'", quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

The regulation clearly mandates consideration of the impacts from actions that are not yet proposals as well as from actions - past, present, or future - that are not themselves subject to the requirements of NEPA. See 40 C.F.R. § 1508.7 ("past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions"). The future, unavoidable actions include multiple Fermi 2 refuelings, and likely the teardown of Fermi 1, along with expanded use of dry cask storage at Fermi 2.

The Nuclear Regulatory Commission reads post-*Kleppe* rulings to

indicate that to bring NEPA into play, a possible future action must at least constitute a "proposal" pending before the agency (*i.e.*, ripeness), and must be in some way interrelate with the action that the agency is actively considering. *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-14, 55 NRC 278, 295 (2002). The hurdle is easily surmounted as to Fermi 1 and 2, which must undergo NRC checks and balances for refueling and dismantling, the plans for which are well-known.

DTE acknowledged in the Environmental Report that "[m]ost of the past environmental impacts that occurred at the Fermi site were associated with the construction and operation of the existing Fermi 2 and the decommissioned prototype Fermi 1. These actions include the construction and operation of the two nuclear reactors and associated facilities." ER, Chapter 3, 5-197. Presumably, past environmental effects include construction and initiation of Fermi 2's ISFSI (which is also a present and future radiation-emitting source), and the salt deposition emissions from Fermi 2's cooling towers. The latter will pose intensified (and as yet unevaluated) environmental effects for the Eastern Fox Snake or its habitat, when combined with the expected deposition from Fermi 3's cooling tower setup.

NEPA mandates that the environmental analysis of Fermi 3 must take a "hard look" at individually insignificant, but cumulatively significant, impacts (10 C.F.R. § 1508.27(b)(7)), so as to prevent harm to the surrounding ecosystem - the fragile habitat which sustains the Eastern Fox snake - by a thousand small cuts. Intervenors urge the Commission to require DTE to include within that "hard look" a serious set of analyses of the synergistic effects of construction congestion for Fermi 3, together with refueling employees' traffic

impacts at Fermi 2, and the workers dismantling Fermi 1; along with the effects of snake exposure to the ISFSI as an alternative sunning/lazing site, to precisely what impacts the multi-year but temporary loss of the construction-disrupted 95 or 100 acres which DTE predicts will be borrowed from the snake's habitat during construction of Fermi 3. An DTE should be obliged to include within its ER analyses a careful inquiry into the implications, if any, of recurring salt deposition from the expanded array of cooling towers which will result from the construction of Fermi 3.

#### **CONCLUSION**

Although federal agencies are given considerable discretion to define the scope of NEPA review, that does not obviate them from considering connected, cumulative, and similar actions together to prevent an agency from "dividing a project into multiple 'actions,' each of which individually has an insignificant environmental impact, but which collectively have a substantial impact." *Wetlands Action Network v. United States Army Corps of Eng'rs*, 222 F.3d 1105, 1118 (9th Cir.2000) (quoting *Thomas v. Peterson*, 753 F.2d 754, 758 (9th Cir.1985)).

For these reasons, the Motion to Strike should be denied; cumulative impacts analysis ordered; and summary disposition of Contention 8 denied to the Applicant.

Respectfully,

/s/ Terry J. Lodge  
Terry J. Lodge (Ohio 0029271)  
316 N. Michigan St., Ste. 520  
Toledo, OH 43604-5627  
(419) 255-7552  
Fax (419) 255-8582  
Counsel for Intervenors

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CERTIFICATE OF SERVICE

I hereby certify that copies of "INTERVENORS' MEMORANDUM IN OPPOSITION TO DTE'S MOTION TO STRIKE PORTIONS OF INTERVENORS' RESPONSE TO MOTION FOR SUMMARY DISPOSITION OF CONTENTION 8'" have been served on the following persons via Electronic Information Exchange this 24th day of December, 2010:

Ronald M. Spritzer, Chair  
Administrative Judge  
Atomic Safety and Licensing  
Board Panel  
Mail Stop: T-3F23  
U.S. Nuclear Regulatory  
Commission  
Washington, DC 20555-0001  
E-mail: Ronald.Spritzer@nrc.gov

Office of Commission Appellate  
Adjudication  
Mail Stop O-16C1  
U.S. Nuclear Regulatory  
Commission  
Washington, DC 20555-0001  
E-mail: OCAAMail@nrc.gov

Michael F. Kennedy  
Administrative Judge  
Atomic Safety and Licensing  
Board Panel  
Mail Stop: T-3F23  
U.S. Nuclear Regulatory  
Commission  
Washington, DC 20555-0001  
E-mail: Michael.Kennedy@nrc.gov

Office of the Secretary  
ATTN: Docketing and Service  
Mail Stop: O-16C1  
U.S. Nuclear Regulatory

Commission  
Washington, DC 20555-0001  
E-mail: HEARINGDOCKET@nrc.gov

Randall J. Charbeneau  
Administrative Judge  
Atomic Safety and Licensing  
Board Panel  
Mail Stop: T-3F23  
U.S. Nuclear Regulatory  
Commission  
Washington, DC 20555-0001  
E-mail:  
Randall.Charbeneau@nrc.gov

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

David Repka, Esq.  
Tyson R. Smith, Esq.  
Counsel for the Applicant  
Winston & Strawn, LLP  
1700 K Street, NW  
Washington, DC 20006-3817  
E-mail: drepka@winston.com  
trsmith@winston.com

Marcia Carpentier  
Counsel for the NRC staff

U.S. Nuclear Regulatory  
Commission  
Mail Stop O-15 D21  
Washington, DC 20555-0001  
(301) 415-4126  
Marcia.Carpentier@nrc.gov

/s/ Terry J. Lodge  
Terry J. Lodge (Ohio 0029271)  
316 N. Michigan St., Ste. 520  
Toledo, OH 43604-5627  
(419) 255-7552  
Fax (419) 255-8582  
Tjllodge50@yahoo.com

Counsel for Intervenors