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**DTE Energy**



*Via U.S. Mail*

December 14, 2010

Ms. Mary Vanderlaan  
Michigan Department of Natural Resources & Environment  
SE Michigan District Office  
27700 Donald Court  
Warren, MI 48092-2793

***Re: Detroit Edison Proposed Fermi 3 Power Plant -- Request for Alternative Approach to Coastal Zone Management Act Certification***

Dear Ms. Vanderlaan:

As you know, Detroit Edison has applied to the federal Nuclear Regulatory Commission (“NRC”) for a combined license for its proposed Fermi 3 project (“Project”). Based on preliminary plans, the Project will impact wetlands and, therefore, will require a permit under Part 303 of the Natural Resources and Environmental Protection Act, MCL § 324.30301 *et seq.*, from the Michigan Department of Natural Resources and Environment (“MDNRE”).

Section 307 of the Coastal Zone Management Act (“CZMA”), 16 U.S.C. §1456, requires, among other things, that after final approval by the Secretary of Commerce of a state’s coastal management program, an applicant for a federal license to conduct an activity affecting any land or water use or natural resource of the coastal zone of the state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the enforceable policies of the state’s approved program and that such activity will be conducted in a manner consistent with the program. 16 U.S.C. §1456(c)(3)(A) (“CZMA Certification”).<sup>1</sup>

In an early discussion, an MDNRE representative stated that MDNRE would object to any CZMA certification for the Project (meaning that the NRC cannot issue its license) unless and until Detroit Edison first obtains a Part 303 permit. Because of the difficulties that such

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<sup>1</sup> Detroit Edison’s application for the NRC license stated that the applicant “will certify to the NRC that the proposed project is consistent with Michigan’s federally-approved Coastal Zone Management Plan. Detroit Edison anticipates that the MDEQ will concur with the certification.” Application, Revision 1, March 2010, pg. 1-8. Detroit Edison is unable to review Michigan’s current Coastal Zone Management Plan. Although an April 2008 draft of the Plan is available on MDNRE’s website, we were advised that the Plan is under review and revision at this time.

sequencing would create for the Project (as further described herein), Detroit Edison requests that MDNRE employ an alternative approach to CZMA Certification for the Project.

As is explained below, both of the alternatives presented herein are permissible under the CZMA and would allow the NRC to issue its license before Detroit Edison needs to obtain a Part 303 permit for the Project. Both alternatives involve no risk of adverse environmental impact because state law will still require Detroit Edison to apply for and obtain a Part 303 permit for the Project.

Detroit Edison's reasons for this request include the following:

1. MDNRE has clear authority to waive CZMA Certification.

The CZMA provides that a State shall be deemed to have concurred in a certification if it does not act within 6 months:

At the earliest practicable time, the state or its designated agency shall notify the Federal agency concerned that the state concurs with or objects to the applicant's certification. If the state or its designated agency fails to furnish the required notification within six months after receipt of its copy of the applicant's certification, the state's concurrence with the certification shall be conclusively presumed.

16 U.S.C. §1456(c)(3)(A). Courts have held that under the Clean Water Act's ("CWA") similar "default waiver" provision,<sup>2</sup> a state may issue an affirmative waiver and need not passively wait for the deadline to pass. *Env'tl. Defense Fund, Inc. v. Alexander*, 501 F.Supp. 742, 771 (N.D. Miss. 1980) (Att. 1) ("[t]he section provides that a state shall be deemed to have waived its rights under § 401 if it 'fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year).' We do not interpret this to mean that affirmative waivers are not allowed. Such a construction would be illogical and inconsistent with the purpose of this legislation"). See also *City of Olmsted Falls v. U.S. EPA*, 266 F.Supp.2d 718, 726 (N.D. Ohio 2003) (Att. 2) (citing *Env'tl. Defense Fund*).

The same logic applies under the CZMA. This conclusion is bolstered by the fact that at least two states appear to have issued CZMA waivers. California guidance contemplates the issuance of waivers in some circumstances. See Attachment 3 (Q&A 12(b) and (c)). A federal court decision also describes a so-called "concurrence" from the State of Washington that was, in

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<sup>2</sup> "If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application." 33 U.S.C. § 1341(a)(1).

essence, a waiver of its authority to act. *City of Tacoma v. FERC*, 460 F.3d 53, 69 (D.D.C. 2006) (Att. 4).<sup>3</sup>

Accordingly, Detroit Edison requests that MDNRE exercise the discretion allowed to it by law, and issue a letter that expressly waives its concurrence with CZMA Certification for the Project.

2. The NRC license is needed first and will not obviate state permitting requirements.

The NRC license, if issued, would authorize construction and operation of the project subject to the conditions of the license and would not authorize any activity in regulated wetlands without separately required approvals in accordance with Part 303 and its implementing regulations at Mich Admin Code r 281.921 *et seq.* In accordance with 10 CFR § 52.104 (Duration of Licenses), operation is limited to 40 years following completion of Project construction and NRC certification under 10 CFR § 52.103(g) that all inspections, tests, and analysis acceptance criteria (“ITAAC”) have been met. The NRC license and regulations do not require construction to commence within any particular amount of time or limit the duration of the construction period. Obtaining the NRC combined license reduces project risk, is necessary to obtain financing, and is necessary for a decision to proceed with the Project. According to NRC Regulatory Guide 1.206 (which provides guidance regarding applications for combined licenses), the level of design required for the license is approximately 30 percent of the complete design (with the remainder verified by ITAACs). The Part 303 permit application, on the other hand, requires a much higher degree of design detail that will not be developed (typical of a ready to construct project) until much later in the Project. Thus, to support a Part 303 permit application at this time, Detroit Edison would need to artificially develop a level of design detail that is inconsistent with the current stage of the Project and that will change before construction begins. The application, therefore, would draw on MDNRE’s resources to review a permit application that will certainly be revised or require renewal before construction begins.

3. Project plans may change.

Even if Detroit Edison were to obtain a Part 303 permit at this time, for the reasons described above Detroit Edison’s specific Project implementation plans are uncertain at this early stage and, if the plans change, Detroit Edison likely would need to duplicate some or all of the permitting process, which would result in wasted resources. A likely example of why implementation plans may change relates to the final engineering design timetable and related

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<sup>3</sup> The state “concurrence” provided that the state “hereby declines its right to take action under its Coastal Zone Management authority... .” The U.S. Department of Commerce (which implements the CZMA) later ruled that this letter constituted a “conclusive concurrence” under the CZMA. *Id.* The state’s action was later invalidated because it violated state regulations, after which the state issued a conditional concurrence. *Id.* at 69-70. We are unaware of any Michigan regulations or MDNRE guidance documents governing CZMA concurrence or waiver. If any exist, please let us know.

construction methods to be used. Final engineering design for the GE Hitachi Economic Simplified Boiling Water Reactor (GEH ESBWR) is underway and is currently forecasted to be complete in approximately three years. As this design work progresses, new construction techniques (i.e., modularization) that are enabled through ever-advancing communication and logistics technologies likely will provide higher levels of construction effectiveness and efficiency. Therefore, it would be most efficient for all concerned if Detroit Edison obtains the NRC license, plans the Project, and then seeks a Part 303 permit when the time and plans are ripe to do so.

4. MDNRE may conditionally concur with CZMA Certification.

If MDNRE concludes that it cannot or will not waive CZMA Certification,<sup>4</sup> as an alternative, MDNRE may issue a letter stating that it concurs with CZMA Certification based on the condition that Detroit Edison must eventually obtain a Part 303 permit for any impacts to regulated wetlands. The CZMA regulations expressly authorize such “conditional concurrences.” 15 C.F.R. § 930.4; *see also City of Tacoma, supra* (describing conditional concurrence issued by State of Washington after the concurrence discussed above). The only limit on the conditions that can be imposed is that they must be “necessary to ensure consistency with specific enforceable policies of the [coastal zone] management program.” 15 C.F.R. § 930.4. Therefore, assuming that a Part 303 permit is necessary to ensure such consistency, it is clear that MDNRE may issue a CZMA concurrence with the condition that Detroit Edison must eventually obtain a Part 303 permit for any impacts to regulated wetlands.<sup>5</sup> However, Detroit Edison submits that there is no need to put in a federal permit that which is already required by state law. Therefore, a conditional concurrence is unnecessary and waiver should be the favored alternative.

For the foregoing reasons, Detroit Edison requests that MDNRE expressly waive or, in the alternative, conditionally concur with CZMA Certification for the Project.

Detroit Edison respectfully urges MDNRE to favorably respond to this request by February 15, 2011. A response by this date would greatly assist Detroit Edison with its NRC license application and Project scheduling.

We would welcome an opportunity to discuss this matter with you. Please contact me if you would like to arrange a meeting or if you have any questions.

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<sup>4</sup> In which case, Detroit Edison would respectfully request an explanation of any such decision.

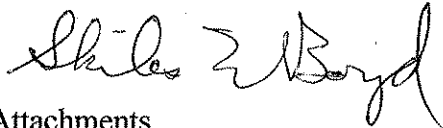
<sup>5</sup> Unlike CWA Section 401, which provides that a state’s conditions must be incorporated as terms of the federal license, the CZMA provides that the *project application* must be modified to reflect the agency’s conditions. If the federal agency refuses to include those conditions in its approval, the conditional concurrence is treated as an objection. 15 C.F.R. § 930.4(a)(2)-(3).

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December 14, 2010

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Sincerely,

A handwritten signature in cursive script, appearing to read "Shiles E. Boyd".

Attachments

cc: K. Gold  
D. Harwood  
A. Houssari  
P. Smith  
M. Solo  
R. Westmoreland

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