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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 Clean Water Act Section 401 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 401 of the Clean Water Act (“CWA”), 33 U.S.C. § 1341, requires, among other things, that an applicant for a federal license to conduct an activity that may discharge into the navigable waters must provide a certification from the state in which the discharge will originate a certification that the discharge will meet the water quality provisions of the CWA (“Section 401 Certification”).

In an early discussion, MDNRE staff stated that MDNRE would not issue a Section 401 Certification (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 sequencing will create for the Project (as further described herein), Detroit Edison requests that MDNRE employ an alternative approach to Section 401 Certification for the Project.

As is explained below, both of the alternatives presented herein are permissible under the CWA and would allow the NRC to issue its license before Detroit Edison needs to obtain a Part 303 permit for the Project. Both alternatives involves 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 Section 401 Certification.

MDNRE has the authority to waive Section 401 Certification, which would allow the NRC to issue its license without Detroit Edison first being required to obtain a Part 303 permit. In an interim guidance document, "Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes," dated April 2010 ("EPA Guidance"), the U.S. Environmental Protection Agency states that "[s]tates and tribes are authorized to waive §401 certification, either explicitly, through notification to the applicant, or by the certification agency not taking action." EPA Guidance, at p. 11 (copy attached as Att. A). See also *Env'tl. Defense Fund, Inc. v. Alexander*, 501 F. Supp. 742, 771 (N.D. Miss. 1980) (Att. B) ("a state may make an affirmative decision to waive §401 certification"), and *City of Olmsted Falls, v. U.S.E.P.A.*, 266 F.Supp.2d 718, 726 (N.D. Ohio 2003) (Att. C) ("On its face, Section 401(a)(1) and its supporting regulations, allow an applicant for a Section 404 permit to submit an express waiver from the state in order to satisfy Section 401").

Our brief review identified several states that actively issue waivers under Section 401:¹

- Alaska: to address a lack of staff resources, Alaska has developed detailed criteria to govern its issuance of waivers. The relevant factors are related to "the size of the wetlands fill, the type of activity being permitted, the proximity to a waterbody, and the wetlands functions and values." See Att. D.
- Minnesota: between 2001 and 2006, the state systematically waived certifications related to wetlands permits due to budget constraints. Minnesota still generally waives certification. See Att. E.
- Montana: the state's regulations appear to allow waiver of certification if the activity at issue will require a state-issued approval. We also located a Montana-issued waiver on the Internet. See Att. F.
- Texas: the state uses a two-tiered system. Smaller projects that agree to follow certain best management practices will be effectively waived, while other projects will be subject to individual review. In addition, attached is a copy of a waiver that had been issued by Texas's environmental agency for a similar project. See Att. G.
- Washington: we did not find any substantive guidance on when the state will issue a waiver, but found two examples of such waivers. See Att. H.

¹ Time constraints prevented us from reviewing every state's program, and the ones we were able to review were not researched in great detail.

- Alabama and Ohio: two cases we reviewed mention that these states had issued certification waivers for projects.

Montana's program, in particular, offers a common-sense approach: if a state-issued permit will be required anyway, any concerns the state may have can be addressed through that process instead of the certification process. Here, a waiver not would diminish Detroit Edison's duty to obtain permits required by, or MDNRE's ability to enforce, state laws such as Part 303, and MDNRE can address any concerns it has through the Part 303 permit process after the NRC license is issued.

Accordingly, Detroit Edison requests that MDNRE exercise the discretion allowed to it by law and issue a letter that expressly waives Section 401 Certification for the Project.²

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 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 implementation 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

² We are unaware of any MDNRE regulations formally governing when it may or may not waive Section 401 Certification. If MDNRE has any such regulations, or any relevant guidance documents, please let us know.

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 construction methods to be used. Final engineering design for the GE Hitachi Economic Simplified Boiling Water Reactor (GE 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 issue a conditional Section 401 Certification.

If MDNRE concludes that it cannot or will not waive Section 401 Certification,³ as an alternative, MDNRE may issue a Section 401 Certification based on the condition that Detroit Edison must eventually obtain a Part 303 permit for any impacts to regulated wetlands. This is allowed under CWA Section 401(d), and the condition would become an enforceable requirement in the NRC license. See *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994) (Att. I). We are aware of at least two instances where this was done in other states. See *Friends of the Earth v. U.S. Navy*, 841 F.2d 927, 930 (9th Cir. 1988) (Att. J) (noting that the State of Washington had “conditioned its issuance of the 401 certification on the Navy submitting the homeport project to the [State Shoreline Management Act] permit process”); and U.S. EPA’s Wetlands and 401 Certification Guidance at pp. 23-24 (Att. A) (describing Maryland certification that included conditions for applicant to obtain an approved grading and sediment control plan and watershed management plan).

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 approval is unnecessary and waiver should be the favored alternative.

For the foregoing reasons, Detroit Edison requests that MDNRE expressly waive or, in the alternative, issue a conditional Section 401 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.

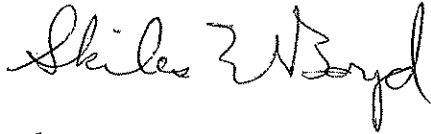
We would welcome an opportunity to discuss this matter with you. Please contact me if you would like to arrange a meeting or if you have any questions.

³ In which case, Detroit Edison would respectfully request an explanation of any such decision.

December 14, 2010

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Sincerely,

A handwritten signature in black ink, appearing to read "Skiles E. Boyd". The signature is written in a cursive style with a large, stylized initial "S".

Attachments

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

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