

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

STATEMENT OF MATERIAL FACTS
ON WHICH NO GENUINE DISPUTE EXISTS

The Detroit Edison Company (“Detroit Edison”) submits, in support of its motion for summary disposition of Contention 8, this statement of material facts as to which Detroit Edison contends that there is no genuine issue to be heard.

1. Detroit Edison filed its combined license (“COL”) application for Fermi Unit 3 on September 18, 2008. The application included an Environmental Report (“ER”) and a Final Safety Analysis Report (“FSAR”). The NRC published the Draft Environmental Impact Statement (“DEIS”) for Fermi 3 in October 2011.
2. In a letter dated February 15, 2010, Detroit Edison responded to several NRC Staff requests for additional information (“RAIs”) regarding the Eastern Fox snake (“fox snake”). Letter to NRC Document Control Desk from Peter W. Smith, Director, Nuclear Development – Licensing and Engineering, Detroit Edison Company, NRC3-10-0005, “Detroit Edison Company Response to NRC Requests for Additional Information Letter No. 2 Related to the Environmental Review” (ADAMS Accession No. ML100541329) (“NRC3-10-0005”). NRC3-10-0005 included revised content for the Fermi 3 COL application.
3. Fox snakes are present at the Fermi 3 site. In NRC3-10-0005, Detroit Edison provided updated information regarding the locations of fox snake sightings. Detroit Edison provided a map showing the locations where observations of fox snakes were made by Detroit Edison employees during the period from 1990 to 2007. NRC3-10-0005, Attachment 7, at 3; *id.*, Enclosure 1. Multiple sightings were made at each location during that period. *Id.* Between one and six snakes were observed per sighting. *Id.* In addition, the map shows two sightings made by Ducks Unlimited personnel during the site wetland survey in 2008. *Id.*
4. Subsequent to its initial application, Detroit Edison re-evaluated the proposed site layout and, based on that review, made changes to its application. In particular, Detroit Edison revised the site layout to reduce potential wetland impacts, which results in a reduction of

impact to primary fox snake habitat. *See* NRC3-09-0017, Attachment 2, at Figure 2.1-4 (responding to RAI GE3.1-1) (ADAMS Accession No. ML093650120). The State of Michigan accepted the revised site layout during its review of Detroit Edison's wetland permit application. Detroit Edison received its final MDEQ wetland permit on January 24, 2012. *See* MDEQ Wetland Permit No. 10-58-011-P, dated January 24, 2012 (ADAMS Accession No ML12037A243).

5. The revised site layout reduced wetland impacts by approximately 127 acres. *See* NRC3-11-0026, Attachment 1, at ER mark-up Section 4.3.1.2.2 (page 4-48 to 4-49) (reducing wetland and open water impacts from approximately 167 acres to approximately 40 acres). As described in Appendix C of Detroit Edison's Mitigation Plan, approximately 20 acres (50 percent) of the remaining impacted acreage will be temporary impacts and the wetlands will be restored following construction. Detroit Edison, "Habitat and Species Conservation Plan: Eastern Fox Snake (*Elaphe gloydi*)," March 2012, Appendix C at 1. The changes to the site layout also reduced overall impacts to undeveloped areas, including both wetland areas and non-wetland areas.¹ NRC3-11-0026, Attachment 1, at ER mark-up Section 4.3.1.2.2 at 4-49). Moreover, of those undeveloped areas that would be impacted by construction (including both wetland and non-wetland areas), approximately 147 acres of impacts will be temporary in nature, and the areas will be restored to a condition of equivalent or better ecological value once construction is complete. *Id.* at 4-5.
6. To offset habitat loss during construction of Fermi 3 facility, approximately 20 acres of temporarily impacted wetlands at the Fermi site will be restored to fox snake habitat after construction. Restoration will address foraging grounds, basking sites, shelter, snags, hibernacula, and nesting sites. Removal of certain invasive plant species will be conducted in targeted areas to enhance and improve habitat viability for snakes and other wildlife. Enhancement may also include the creation of wildlife culverts and permanent barrier fences in selected areas of high fox snake activity within the Fermi 3 site.
7. Detroit Edison will also create new fox snake habitat as part of its wetlands mitigation efforts. Specifically, Detroit Edison will restore wetlands and enhance existing wetlands in the coastal zone of Western Lake Erie. Habitat restoration will include multiple community types used by fox snakes such as Great Lakes Coastal Marsh, Southern Hardwood Swamp, and Inundated shrub swamp. In addition, upland habitat restoration and enhancement is proposed. Habitat restoration design will include fox snake habitat needs and species natural history. Habitat features will include foraging grounds, basking sites, shelter, snags, hibernacula, and nesting sites. The restoration will also benefit other species of herpetofauna known to occur in the region.
8. Overall habitat availability and quality for the fox snake will be greater after restoration and enhancement efforts than at present. As a result of the net gain in available habitat and improvements in available habitat, the fox snake will not be extirpated from the area, but rather will have an opportunity to expand its range.

¹ All undeveloped areas are assumed to be suitable fox snake habitat.

9. In order to further reduce the potential impacts to the fox snake, Detroit Edison also developed a *Habitat and Species Conservation Plan: Eastern Fox Snake (Elaphe gloydi)* (“Mitigation Plan”). NRC3-10-0005, Attachment 7, at Enclosure 2; *see also* Mitigation Plan, Revision 1, dated March 2012. The plan describes measures to enhance employee awareness of fox snakes and to reduce impacts to the snakes and their habitat from Fermi 3 construction activities, including training, pre-job briefings, preconstruction surveys, construction mitigation, and monitoring.
10. Prior to beginning daily work on a developed or already disturbed area, designated employees will walk down the site and observe for fox snakes. In addition, roadways used for construction related vehicles will also be walked down on a daily basis when the snakes are most likely to be present on or along roadways. Any fox snakes located in these areas will be removed by a designated Detroit Edison employee who will then relocate the snakes to undeveloped areas of the site which will not be impacted by Fermi 3 construction.
11. One week and again one day prior to clearing undeveloped areas, the areas will be walked through by a team led by a biologist familiar with fox snakes and their habitat. Land clearing activities should be scheduled to be performed outside of the fox snakes hibernation periods so that they are active and therefore easier to locate and safely remove from the area. During this walkthrough, any fox snakes observed will be captured and relocated to an undeveloped location on site that will not be impacted by Fermi 3 construction activities. The lead biologist will ensure that the snakes are not harmed while being captured, transported or released. Potential hiding places for the snakes will be uncovered and searched. Construction workers will continue to observe for snakes as clearing progresses. If a construction worker observes a fox snake during work activities, they will stop work until the snake clears the area or until designated personnel can clear it from the area.
12. As fox snakes are a mobile species there is the potential for fox snakes to be killed by construction related vehicles. The measures identified above (*e.g.*, collection and translocation, barrier fencing) will provide a substantial degree of protection for fox snakes which migrate to active roadways. Employees will be aware of the presence of fox snakes and reminded of their protected status on a daily basis during pre-job briefs. Roadways will be walked down daily in order to ensure that snakes are not present or, if present, removed from the path of danger. Vehicle drivers will be required to stop their vehicles in order to prevent fox snakes from being struck. To further create awareness about the danger posed to snakes from vehicles, road signs indicating that fox snakes are present and must be yielded to will be installed along construction related roadways. And, construction related vehicles will be held to a speed limit of 15 mph while within the construction area. This low rate of speed allows for fox snakes to be identified on or along roadways by vehicle drivers prior to being struck.
13. The Mitigation Plan utilizes proven techniques and technology to collect as many fox snakes as possible from impacted areas and ensure their survival once they are relocated

to unimpacted areas. The targeted collection and relocations of fox snakes will include visual encounter surveys, cover object surveys, barrier fence surveys, mark-recapture, and radio telemetry. Under the plan, Detroit Edison will remove fox snakes during pre-construction and construction up to a 90% targeted collection goal, with continuing opportunistic collection.

14. Initial fox snake collection efforts will focus on construction impact areas and adjacent areas and collection will be conducted on a daily basis prior to clearing and grubbing. Collection techniques will include hand collection via visual encounter and use of barrier fence, drift fence, and artificial cover objects. During the peak of site preparation activities, snake collection will be conducted daily during the fox snake's active season.
15. Collected fox snakes that are injured will be taken to a qualified reptile veterinarian for treatment and maintained offsite until healed and deemed suitable for release. Other collected fox snakes will be relocated to an on-site "safe zone" or, once complete, to the off-site mitigation site. Temporary snake barrier fences around the "safe zone" and mitigation site will prevent collected snakes from moving into active construction areas and will help snakes acclimate to the mitigation site. These efforts will significantly reduce potential impacts to the fox snake.
16. All captured fox snakes will be marked with a Passive Integrated Transponder ("PIT") tag (some will also be fitted with radio transmitters) for future identification and detection and monitored during the site preparation and post site preparation phases. After the site preparation construction phase is complete and the bulk of fox snakes are relocated outside of the construction zone, monitoring will be conducted to assess their movement, habitat use (including created hibernacula), and population health. Monitoring will be conducted at on-site locations, where fox snakes were relocated to, and at the off-site mitigation area. Monitoring also will be conducted in all areas restored, enhanced, or created as part of the Fermi 3 facility construction. Monitoring will include use of visual encounter surveys, cover objects, mark-recapture (including PIT tag and radio telemetry), and barrier fence surveys. Fox snakes that wander back near construction zones will be relocated outside to safe areas. Monitoring will occur 3-5 days per week when fox snakes are active and monthly during winter inactivity. Monitoring will be conducted during the entire site preparation construction phase.
17. Sampling will be conducted once site preparation work is complete and for a minimum of five years after completion of the site preparation construction phase. Sampling protocols will target and address key biological, ecological, and natural history requirements of fox snakes. Sampling will be conducted year round to also evaluate the efficacy and use of fox snake hibernacula.
18. The Mitigation Plan includes an annual monitoring report during construction and for five years after site preparation is complete. Metrics of success will be gauged through the accomplishment of *Measures of Habitat Restoration, Enhancement, and Mitigation Success* found in Appendix C of the Mitigation Plan. If problems or deficiencies in the

various restoration plans are identified, corrective actions will be taken to fix or address these situations.

19. The Mitigation Plan was submitted to the Michigan Department of Natural Resources and the Environment (“MDNRE”) for their review and comment. On April 6, 2012, Lori Sargent, Endangered Species Specialist, MDNRE, sent a letter to Detroit Edison regarding MDNRE’s review of the Mitigation Plan. MDNRE found the Mitigation Plan acceptable, as documented the April 6, 2012, letter.
20. Detroit Edison will implement the Mitigation Plan during Fermi 3 construction activities.

/s/ signed electronically by _____

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