

July 2, 2012

**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) )  
 )  
 )

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**INTERVENORS' RESPONSE IN OPPOSITION  
TO APPLICANT'S MOTION FOR SUMMARY DISPOSITION  
OF CONTENTION 8 (EASTERN FOX SNAKE)**

Now come Intervenors Beyond Nuclear, *et al.*<sup>1</sup> (hereinafter "Intervenors"), by and through counsel, and set forth their response in opposition to "Applicant's Motion for Summary Disposition of Contention 8." Intervenors urge that there are issues of material fact respecting claimed mitigation measures for the Eastern fox snake, a Michigan state-threatened species, and that the contention must proceed to a merits hearing.

**I. Legal Principles Governing Summary Disposition**

The burden of proof with respect to summary disposition rests

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<sup>1</sup>In addition to Beyond Nuclear, the Intervenors include: 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.

upon DTE, which must demonstrate the absence of any genuine issue of material fact. *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 102 (1993); *Dairyland Power Cooperative* (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 519 (1982), citing *Adickes v. Kress and Co.*, 398 U.S. 144, 157 (1970).

The moving party fails to meet its burden when the filings demonstrate the existence of a genuine material fact, when the evidence introduced does not show that the nonmoving party's position is a sham, when the matters presented fail to foreclose the possibility of a factual dispute, or when an issue arises as to the credibility of the moving party's evidentiary material. *Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-5, 63 NRC 116, 122 (2006).

## **II. Facts Demonstrating Issues of Material Fact, Requiring Denial of Summary Disposition**

DTE proposes ambitious mitigation measures to avoid unnecessary destruction of the Eastern fox snake ("EFS") and its habitat during the multi-year Fermi 3 construction phase. But significant reassurances are missing.

Earlier in this proceeding, the ASLB, with respect to Contention 8, attempted to resolve "the conflict between the ER's claim that the project would have only a small impact on the snake and that no mitigation measures were necessary, and the opinion of

[Michigan Department of Natural Resources, or "MDNR"] that 'going forward with the construction would not only kill snakes but destroy the habitat in which they live and possibly exterminate the species from the area,' and that mitigation should be considered."<sup>2</sup> There are now proposed mitigation measures, but they have not been adequately vetted by the state regulatory authority and there are no satisfactory enforcement arrangements in place. A discussion of the mitigation measures follows.

a. Site Plan and Layout Changes

DTE has changed the Fermi site layout to reduce wetland and open water impacts by approximately 127 acres, to approximately 40 acres, which will result in approximately 20 acres of permanent impacts to wetlands and open water impacts. DTE's MSD p. 6 (footnoting omitted).

b. Habitat Conservation Plan (HCP) Pledges

DTE's "Habitat and Species Conservation Plan" ("HCP") indicates as follows:

Both on-site and off-site habitat restoration and enhancement as well as off-site wetland mitigation will occur as part of this construction project. The Fermi 3 [Michigan Department of Environmental Quality, or "MDEQ"] wetland permit (File Number 10-58-0011-P) requires the construction of 107.31 acres of wetland mitigation to compensate for permanent and temporary wetland impacts. The mitigation site is located approximately 7.25 miles south of the proposed Fermi 3 location on an agricultural field on the southern border of the Monroe Power Plant site. The mitigation site will be constructed to compensate for approximately 35.55 acres of

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<sup>2</sup>LBP-11-14 at 17-18.

permanent and temporary impacts at the Fermi site. Of those 35.55 acres, 19.5 acres will be restored after construction is complete.

These measures are being conducted to maximize the functionality of these habitats for the presence of eastern fox snakes and other wildlife and offset loss of habitat from construction activities. As part of the effort to minimize loss or take of eastern fox snakes, some snakes may be relocated to completed and translocation-suitable mitigation areas to establish this rare species in additional areas. This evaluation will be done in conjunction with project environmental engineer or the project biologist/herpetologist and the MDNR.

*Id.*, Att. 1 to MSD, App. C., p. 1.

The HCP further narrates how EFS's will be intercepted and removed on a periodic basis during the snake's active season, either to undeveloped portions of the Fermi site, or offsite.

But there remain unknowns or inconsistencies which create issues of material fact. The precise time at which the offsite mitigation acreage will be available to receive relocated snakes from the Fermi site is unclear. About 40 acres at Fermi will be disrupted for a period of years, meaning, that land will not be available as habitat by the EFS throughout the construction of Fermi 3. At the end of the construction process, half of that area will be restored to wildlife, although the environmental qualities of the property, in terms of such things as contamination, surface disruption and state of overgrowth, have not been described in the NEPA document. There is neither analysis nor discussion of whether the removal of some snakes formerly inhabiting the Fermi 3 construction footprint onto undeveloped nearby land might cause an

overcrowding effect.

The 107.31 acre farm field being re-wilded as mitigation habitat some miles from Fermi is a welcome step, but there is no characterization of that land in the HCP or other attachments. One cannot tell how long the land has lain fallow, how much petrochemical fertilizer or pesticide has been applied to it and what residue remains. As land adjacent to a huge coal-burning power plant, unusual levels of acidity, carcinogenic and toxic byproducts of coal, such as mercury, radiation and other chemicals must be presumed to be present in the soil. However, they are not accounted for at all in the HCP. Nor can Intervenors discern how much of its surface is, or has been, vegetated, nor whether there have been difficulties achieving it because of contamination.

Repurposing agricultural land as reptile habitat is rather experimental, especially given the history of coalburning for decades immediately above the mitigation farmland. The HCP and other documents contain insufficient consideration of toxicity. What if the toxic nature of the mitigation land inhibits or even destroys relocated snakes? The HCP also does not account for the need to develop the mitigation land over time to provide adequate food sources for the snake - nor for slow recovery of the snake if it encounters inadequate food supplies as a consequence of the likely contaminated state of the farmland.

The absence of a binding commitment to having the mitigation

habitat available contemporaneously to the removal of the EFS from the construction site suggests that the recovery of the population from construction of Fermi 3 may be retarded. The NEPA document must discuss this synchronization (or lack of it) in bringing the mitigation habitat land into play.

c. The Cosmetic Permit

DTE asserts that the April 2012 MDNR form which approves the mitigation plan "resolves" . . . "the 'conflict' between MDNR and Detroit Edison. . . ." See MDNR letter, Att. 2 to MSD. Interveners suggest that is not so.

The letter approving mitigation plans consists of blanks which have been checked alongside preprinted statements: that "Information received regarding the proposed Fermi 3 nuclear plant construction (DEQ File No. 10-58-0011-P) in Monroe County (section 28, T6S R10E) has been reviewed. The information was found to adequately address the concerns for potential threatened and endangered species to the site in question." But the approval does not explain with any particularity what, exactly, was reviewed by MDNR, nor what the basis for the approval is. The form refers only to the MDNR having been "provided information."

The approval rotely continues, "Based on the provided information, the proposed project should have minimal direct impacts on known special natural features at the location(s) specified if it proceeds according to the plans provided." The form then iden-

tifies the EFS as the "special natural feature", effects upon which are to be avoided.

Review of MDNR's website reveals that the agency has abandoned the regulatory mission of reviewing environmental permit requests:

The Michigan Department of Natural Resources (DNR) has ceased to accept review requests to the Environmental Review (ER) Program after September 16, 2011. Funding for the program was not included in the state budget for the fiscal year that began October 1, 2011. Project review requests can be sent to Michigan Natural Features Inventory (MNFI), a program of Michigan State University Extension. The DNR Endangered Species Assessment website has been one venue for people to get a general idea if protected species are in an area and to request a formal DNR review for potential impacts of a proposed project. That website will remain available, but the request submittal capabilities have been removed.

[http://www.michigan.gov/dnr/0,4570,7-153-10370\\_12141\\_12168-30516-,00.html](http://www.michigan.gov/dnr/0,4570,7-153-10370_12141_12168-30516-,00.html). The checked-box form referencing reviews of undescribed "documents" represents the sorry state of the art of environmental regulation in Michigan.

Below this statement on the MDNR form approval appears the information that the Michigan Natural Features Inventory will review projects for potential impacts to endangered species for payment of a fee. DTE did not request the Natural Features Inventory review the Fermi 3 plan for potential impacts. In DTE's Conservation Plan, Attachment 1 to the MSD, the only references to the Michigan Natural Features Inventory are uses by DTE of some of MNFI's literature.

The MDNR permit has no legitimacy as a considered regulatory

order, on its face. Consideration of the HCP and associated items submitted to the agency was a shallow, checklist review. Absent a viable enforcement mechanism, there is no guarantee whatsoever that mitigation will take place. Indeed, a meaningful review by MDNR would have raised concerns about the potential for contamination of the 107.31-acre farmland mitigation habitat parcel adjacent to Monroe Power Plant.

d. The Cosmetic Mitigation

The ASLB has identified a critical failing in the Draft EIS which has implications for the larger population of Eastern fox snakes affected by the overall Fermi 3 project: the 29.4 miles of electrical transmission corridor for power distribution from Fermi 3, covering more than 1,000 acres, likely contain EFS populations. Dotted with wetlands and other EFS habitat and food sources, the corridor will see extensive clearing, grading and dispersion of pesticides and herbicides. But there is no HCP and no mitigation for the effects of project activities on this threatened species.

The ASLB, in its "Memorandum and Order (Ruling on Motion for Leave to Late-file Amended and New Contentions and Motion to Admit New Contentions)", *Detroit Edison Company* (Fermi Nuclear Power Plant, Unit 3), LBP-12-12, ASLBP No. 09-880-05-COL-BD01 (June 21, 2012) at pp. 44-45 noted as follows:

Although Contention 23 is untimely, it raises substantial questions concerning the adequacy of the DEIS that the NRC Staff should carefully consider in preparing the FEIS. Intervenor's present a number of criticisms of the DEIS's

limited evaluation of the environmental impacts of the transmission line corridor. For example, Intervenor emphasize that substantial construction will take place in undeveloped wetlands, forests, and grasslands. . . . Intervenor also stress potential impacts to threatened and endangered species. . . . Intervenor further argue that maintenance of the transmission corridor will continue to impact wetlands and other environmental resources after construction is completed.  
. . .

The ASLB further found that there is a strong likelihood that NEPA compliance respecting the transmission corridor has been "segmented" from the power plant project, and that the NRC cannot credibly maintain that consideration of environmental impacts there is outside its authority to intervene:

It appears that the sole purpose of the new transmission corridor is to transmit electrical energy generated by Fermi Unit 3, and that it would serve no useful purpose absent the new nuclear power plant. If that is true, the transmission corridor lacks independent utility (*i.e.*, it is a connected action) and must be fully evaluated in the FEIS. This remains true even though the NRC may define construction of the transmission corridor as a preconstruction activity, it is owned by a company other than the Applicant, and it is outside the NRC's regulatory jurisdiction. The NRC's obligations under NEPA include evaluating all environmental effects of the proposed action (including connected actions) that it has the authority to prevent. Even though the NRC does not license construction or operation of the transmission corridor, it has the authority to deny the license for Fermi Unit 3 if, for example, the total environmental costs of the new reactor and connected actions exceed the benefits. Denial of the license would effectively prevent harmful environmental impacts resulting from construction and operation of the transmission corridor, given that its sole purpose appears to be transmitting electrical energy generated by Fermi Unit 3.

*Id.* at pp. 47-48. Finally, the ASLB determined, ". . . the 'primary responsibility for compliance with NEPA lies with the Commission.'" [Citation omitted]. We recommend, therefore, that the

NRC Staff consider the issues raised by Intervenors when it prepares the FEIS." *Id.* at pp. 48-49.

### **III. Argument**

#### a. The MDNR Permit Is Substantively Void

Section 324.36503 of the Michigan Compiled Laws states, pertinently:

(1) The [Department of Natural Resources] *shall* conduct investigations on fish, plants, and wildlife in order to develop information relating to population, distribution, habitat needs, limiting factors, and other biological and ecological data to determine management measures necessary for their continued ability to sustain themselves successfully.

(Emphasis supplied). MDNR failed to fulfill its statutory obligation. The agency conducted no "investigation . . . to determine management measures necessary . . . ." for the EFS.

In mid-2011, the MDNR endangered species coordinator was quoted in the Fermi Draft Environmental Impact Statement, Vol. 1, p. 5-22 as follows:

The [MDNR Endangered Species] Coordinator stated, however, that monitoring of the eastern fox snake population during and after building of Fermi 3 could help determine whether the direct impacts from increased traffic warranted additional mitigation measures. An example of mitigation for traffic mortality impacts, if needed, would be installing fences along roads to serve as barriers to the snake and reduce the likelihood of snakes being hit by vehicles. Monitoring and implementing any necessary mitigation measures, as discussed in Section 5.3.1.1, would likely hold the effects on the eastern fox snake from project operation to minimal levels.

Even if the ASLB approves DTE's mitigation arrangements, the lack of staffing at the state agency leaves the public bereft of a means of guaranteeing that the environmental impacts of Fermi 3 on the

EFS will be mitigated.

"[W]hether the analysis is generic or site-by-site, it must be thorough and comprehensive. Even though the Commission's application of its technical expertise demands the 'most deferential' treatment by the courts," the Commission must nonetheless conduct "a thorough enough analysis" to merit deference from the courts. *State of New York v. Nuclear Regulatory Commission*, Case No. 11-1045 at 8 (D.C. Cir. June 8, 2012) (slip op.), citing *Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1118 (D.C. Cir. 1971).

The ASLB should not accept the Michigan DNR's approval of the HCP as a "thorough enough analysis" to merit deference.

b. Federal Requirements Expect Monitoring  
For Compliance With Mitigation Plans

The White House Council on Environmental Quality ("CEQ") spelled out the elements of binding mitigation commitments:

Agencies should clearly identify commitments to mitigation measures designed to achieve environmentally preferable outcomes in their decision documents. . . . [M]itigation commitments should be carefully specified in terms of measurable performance standards or expected results, so as to establish clear performance expectations. The agency should also specify the time frame for the agency action and the mitigation measures in its decision documents, to ensure that the intended start date and duration of the mitigation commitment is clear.

From U.S. Council on Environmental Quality, "Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of

Mitigated Findings of No Significant Impact," Federal Register Vol. 76, No. 14 (1/21/2011), pp. 3848-3849, [http://ceq.hss.doe.gov/current\\_developments/docs/Mitigation\\_and\\_Monitoring\\_Guidance\\_14Jan2011.pdf](http://ceq.hss.doe.gov/current_developments/docs/Mitigation_and_Monitoring_Guidance_14Jan2011.pdf) (hereinafter "Mitigation Guidance").

For agency decisions based on an EIS (viz., this COLA proceeding), CEQ regulations explicitly require that "a monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation." 40 C.F.R. §1505.2(c). The NRC's adaptation of NEPA mandates requires that the Record of Decision (ROD) "[s]ummarize any license conditions and monitoring programs adopted in connection with mitigation measures." 10 C.F.R. §51.103.

According to the CEQ Mitigation Guidance, "[a]gencies are expected to apply professional judgment and the rule of reason when identifying those cases that are important and warrant monitoring, and when determining the type and extent of monitoring they will use to check on the progress made in implementing mitigation commitments as well as their effectiveness. . . . The following are examples of factors that agencies should consider to determine importance: . . . Protected resources (e.g., parklands, *threatened or endangered species*, cultural or historic sites) and the proposed action's impacts on them. . . ." (Emphasis supplied). Fed. Reg., *supra* at 3849. The federal lead agency is to ensure "that the monitoring program tracks whether mitigation commitments are being performed as described in the NEPA and related decision documents

(i.e., implementation monitoring), and whether the mitigation effort is producing the expected outcomes and resulting environmental effects (i.e., effectiveness monitoring).” *Id.* at 3850.

c. The sua sponte Order for the FEIS to Include  
Transmission Corridor Effects Demonstrates that EFS Mitigation  
Is Incomplete for the Project

There can be no question but that here, the ASLB has, *sua sponte*, ordered NEPA consideration of the effects of construction of transmission lines through the corridor to be considered within the Final EIS. A licensing board has the power to raise *sua sponte* any significant environmental or safety issue in operating license hearings. 10 C.F.R. § 2.340(a) (formerly § 2.760a); *Consol. Edison Co. of N.Y.* (Indian Point Nuclear Generating Units 1, 2 & 3), ALAB-319, 3 NRC 188, 190 (1976); *Houston Lighting & Power Co.* (South Texas Project, Units 1 & 2), LBP-85-8, 21 NRC 516, 519 (1985). The Board’s independent responsibilities under NEPA may require it to raise environmental issues not raised by a party. *Tenn. Valley Auth.* (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-380, 5 NRC 572 (1977).

The Board has the prerogative to consider raising serious issues *sua sponte*, especially where an issue is excluded from the proceeding because it has not been properly raised, rather than because it has been rejected on its merits. *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 & 2), LBP-82-

79, 16 NRC 1116, 1119 (1982). An ASLB may raise a safety issue *sua sponte* when sufficient evidence of a serious safety matter has been presented that would prompt reasonable minds to inquire further. Very specific findings are not required since they could cause prejudgment problems. The Board need only give its reasons for raising the problem. *Southern Cal. Edison Co.* (San Onofre Nuclear Generating Station, Units 2 & 3), LBP-81-36, 14 NRC 691, 697 (1981).

By ordering complete NEPA consideration of transmission corridor effects as part of the FEIS, it follows that mitigation of those effects must be addressed by a habitat conservation plan for the Eastern fox snake. Since the ASLB has determined that construction of the transmission lines through the corridor is part of the overall construction project, and summary disposition obligates a showing that the EFS has been satisfactorily mitigated for the overall project, the Board may not presently grant summary disposition to DTE on Contention 8.

#### **IV. Conclusion**

Given the austere governance of Michigan, it is doubtful whether the MDNR will have available the personnel to monitor DTE's compliance with its HCP for the Eastern fox snake.

An evidentiary hearing is warranted here, because DTE has provided neither sufficient proofs of genuine regulatory scrutiny of its plan, nor procedures to assure its implementation if it were

approved. Since genuine issues of material fact are in dispute, DTE's motion should be denied and the matter set for hearing. *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 119-20 (1993).

**WHEREFORE**, Intervenors respectfully pray the ASLB deny DTE's Motion for Summary Disposition of Contention 8.

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**STATEMENT OF FACTS DEMONSTRATING ISSUES  
OF MATERIAL FACT, IN SUPPORT OF INTERVENORS'  
RESPONSE IN OPPOSITION TO DTE'S 'MOTION FOR  
SUMMARY DISPOSITION OF CONTENTION 8'**

Now come the Intervenor herein, by and through counsel, and set forth material facts in support of their opposition to "Applicant's Motion for Summary Disposition of Contention 8."

1. DTE has changed the Fermi site layout to reduce wetland and open water impacts by approximately 127 acres, to approximately 40 acres, which will result in approximately 20 acres of permanent impacts to wetlands and open water impacts. DTE's MSD p. 6.

2. DTE's "Habitat and Species Conservation Plan" ("HCP") indicates as follows:

Both on-site and off-site habitat restoration and enhancement as well as off-site wetland mitigation will occur as part of this construction project. The Fermi 3 MDEQ wetland permit (File Number 10-58-0011-P) requires the construction of 107.31 acres of wetland mitigation to compensate for permanent and temporary wetland impacts. The mitigation site is located approximately 7.25 miles south of the proposed Fermi 3 location on an agricultural field on the southern border of the Monroe Power Plant site. The mitigation site will be constructed to compensate for approximately 35.55 acres of permanent and temporary impacts at the Fermi site. Of those 35.55 acres, 19.5 acres will be restored after construction is

complete.

These measures are being conducted to maximize the functionality of these habitats for the presence of eastern fox snakes and other wildlife and offset loss of habitat from construction activities. As part of the effort to minimize loss or take of eastern fox snakes, some snakes may be relocated to completed and translocation-suitable mitigation areas to establish this rare species in additional areas. This evaluation will be done in conjunction with project environmental engineer or the project biologist/herpetologist and the MDNR.

Att. 1 to MSD, App. C., p. 1.

3. The precise timing of availability of the offsite mitigation acreage for snakes which are moved from the Fermi site is not clear. About 40 acres at Fermi will be disrupted for a period of years, meaning, that land will not be habitable by the EFS. At the end of the construction process, half of that area will be restored to wildlife, although the environmental qualities of that property, in terms of contamination, surface disruption and state of overgrowth have not been described in the NEPA document. There is no analysis or discussion of whether the removal of some snakes formerly inhabiting the Fermi 3 construction footprint onto undeveloped nearby land might cause an overcrowding effect.

4. A 107.31 acre farm field is being re-wilded as mitigation habitat some miles from Fermi, but there is no characterization of that land in the HCP or other attachments, which makes it impossible to tell how long the land has lain fallow, how much petrochemical fertilizer or pesticide has been applied to it and what residue remains. As land adjacent to a huge coal-burning power plant, unusual levels of acidity, carcinogenic and toxic byproducts of coal, such as mercury, radiation and other chemicals must be presumed to be present in the soil. However, they are not accounted for at all in the HCP. Nor can Intervenor discern how much of its surface is, or has been, vegetated, nor whether there have been difficulties achieving it because of contamination.

5. The absence of a commitment to having the mitigation farmland available contemporaneously with the removal of the EFS from the construction site suggests that the recovery of the population from construction of Fermi 3 may be hampered.

6. The April 2012 MDNR letter form which approves the mitigation plan consists of blanks which have been checked alongside preprinted statements: that "Information received regarding the proposed Fermi 3 nuclear plant construction (DEQ File

No. 10-58-0011-P) in Monroe County (section 28, T6S R10E) has been reviewed. The information was found to adequately address the concerns for potential threatened and endangered species to the site in question." There is no delineation of which items were reviewed by MDNR. The approval continues, "Based on the provided information, the proposed project should have minimal direct impacts on known special natural features at the location(s) specified if it proceeds according to the plans provided." And the form identifies the EFS as the "special natural feature" not to be impacted at the location.

7. At MDNR's website appears this statement:

The Michigan Department of Natural Resources (DNR) has ceased to accept review requests to the Environmental Review (ER) Program after September 16, 2011. Funding for the program was not included in the state budget for the fiscal year that began October 1, 2011. Project review requests can be sent to Michigan Natural Features Inventory (MNFI), a program of Michigan State University Extension. The DNR Endangered Species Assessment website has been one venue for people to get a general idea if protected species are in an area and to request a formal DNR review for potential impacts of a proposed project. That website will remain available, but the request submittal capabilities have been removed.

[http://www.michigan.gov/dnr/0,4570,7-153-10370\\_12141\\_12168-30516-,00.html](http://www.michigan.gov/dnr/0,4570,7-153-10370_12141_12168-30516-,00.html).

8. Somewhat below this statement on the MDNR approval form appears the information that the Michigan Natural Features Inventory will review projects for potential impacts to endangered species for payment of a fee.

9. DTE did not request the Natural Features Inventory review the Fermi 3 plan for potential impacts.

10. Section 324.36503 of the Michigan Compiled Laws states, pertinently:

(1) The [Department of Natural Resources] *shall* conduct investigations on fish, plants, and wildlife in order to develop information relating to population, distribution, habitat needs, limiting factors, and other biological and ecological data to determine management measures necessary for their continued ability to sustain themselves successfully.

(Emphasis supplied).

11. In mid-2011, the MDNR endangered species coordinator was quoted in the Fermi Draft Environmental Impact Statement, Vol. 1, p. 5-22 as follows:

The [MDNR Endangered Species] Coordinator stated, however, that monitoring of the eastern fox snake population during and after building of Fermi 3 could help determine whether the direct impacts from increased traffic warranted additional mitigation measures. An example of mitigation for traffic mortality impacts, if needed, would be installing fences along roads to serve as barriers to the snake and reduce the likelihood of snakes being hit by vehicles. Monitoring and implementing any necessary mitigation measures, as discussed in Section 5.3.1.1, would likely hold the effects on the eastern fox snake from project operation to minimal levels.

12. The White House Council on Environmental Quality ("CEQ") spelled out the elements of binding mitigation commitments:

Agencies should clearly identify commitments to mitigation measures designed to achieve environmentally preferable outcomes in their decision documents. . . . [M]itigation commitments should be carefully specified in terms of measurable performance standards or expected results, so as to establish clear performance expectations. The agency should also specify the time frame for the agency action and the mitigation measures in its decision documents, to ensure that the intended start date and duration of the mitigation commitment is clear.

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13. CEQ regulations explicitly require that "a monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation" where there is an EIS. 40 C.F.R. §1505.2(c). The NRC requires that the Record of Decision (ROD) "[s]ummarize any license conditions and monitoring programs adopted in connection with mitigation measures." 10 C.F.R. §51.103.

14. According to the CEQ Mitigation Guidance, "[a]gencies are expected to apply professional judgment and the rule of reason when identifying those cases that are important and warrant monitoring,

and when determining the type and extent of monitoring they will use to check on the progress made in implementing mitigation commitments as well as their effectiveness. . . . The following are examples of factors that agencies should consider to determine importance: . . . Protected resources (e.g., parklands, *threatened or endangered species*, cultural or historic sites) and the proposed action's impacts on them. . . ." (Emphasis supplied). Fed. Reg., *supra* at 3849.

15. The federal lead agency is to ensure "that the monitoring program tracks whether mitigation commitments are being performed as described in the NEPA and related decision documents (*i.e.*, implementation monitoring), and whether the mitigation effort is producing the expected outcomes and resulting environmental effects (*i.e.*, effectiveness monitoring)." *Id.* at 3850.

16. The miles of electrical transmission corridor for power distribution from Fermi also likely contain Eastern fox snake populations for which there is no mitigation plan.

The ASLB, in its "Memorandum and Order (Ruling on Motion for Leave to Late-file Amended and New Contentions and Motion to Admit New Contentions)", *Detroit Edison Company* (Fermi Nuclear Power Plant, Unit 3), LBP-12-12, ASLBP No. 09-880-05-COL-BD01 (June 21, 2012) at pp. 44-45 noted as follows:

Although Contention 23 is untimely, it raises substantial questions concerning the adequacy of the DEIS that the NRC Staff should carefully consider in preparing the FEIS. Intervenors present a number of criticisms of the DEIS's limited evaluation of the environmental impacts of the transmission line corridor. For example, Intervenors emphasize that substantial construction will take place in undeveloped wetlands, forests, and grasslands. . . . Intervenors also stress potential impacts to threatened and endangered species. . . . Intervenors further argue that maintenance of the transmission corridor will continue to impact wetlands and other environmental resources after construction is completed.  
. . . .

17. The ASLB further found that there is a strong likelihood that NEPA compliance respecting the transmission corridor has been "segmented" from the power plant project, and that the NRC cannot credibly maintain that consideration of environmental impacts there is outside its authority to intervene:

It appears that the sole purpose of the new transmission corridor is to transmit electrical energy generated by Fermi Unit 3, and that it would serve no useful purpose absent the

new nuclear power plant. If that is true, the transmission corridor lacks independent utility (*i.e.*, it is a connected action) and must be fully evaluated in the FEIS. This remains true even though the NRC may define construction of the transmission corridor as a preconstruction activity, it is owned by a company other than the Applicant, and it is outside the NRC's regulatory jurisdiction. The NRC's obligations under NEPA include evaluating all environmental effects of the proposed action (including connected actions) that it has the authority to prevent. Even though the NRC does not license construction or operation of the transmission corridor, it has the authority to deny the license for Fermi Unit 3 if, for example, the total environmental costs of the new reactor and connected actions exceed the benefits. Denial of the license would effectively prevent harmful environmental impacts resulting from construction and operation of the transmission corridor, given that its sole purpose appears to be transmitting electrical energy generated by Fermi Unit 3.

*Id.* at pp. 47-48.

18. Finally, the ASLB determined, “. . . the ‘primary responsibility for compliance with NEPA lies with the Commission.’ [Citation omitted]. We recommend, therefore, that the NRC Staff consider the issues raised by Intervenors when it prepares the FEIS.” *Id.* at pp. 48-49.

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July 2, 2012

**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  
(Fermi Nuclear Power Plant, )  
Unit 3) )  
)

\* \* \* \* \*

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing "INTERVENORS' RESPONSE IN OPPOSITION TO DTE MOTION FOR SUMMARY DISPOSITION OF CONTENTION 8" and its accompanying "STATEMENT OF MATERIAL FACTS" have been served on the following persons via Electronic Information Exchange this 2nd day of July, 2012:

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