November 19, 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)	)	

APPLICANT'S MOTION FOR RECONSIDERATION

INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.323(e) and 2.345(b), The Detroit Edison Company ("Detroit Edison") files this motion for reconsideration of a portion of the Atomic Safety and Licensing Board ("Board") decision in LBP-12-23.[1] Reconsideration is appropriate where, as here, the Board's decision overlooked or misapprehended a legal principle or decision that should have controlling effect.[2] And, given the Board's prior decisions relating to Contention 8 and precedent, Detroit Edison could not have reasonably anticipated that the Board's decision would hinge on an issue of perceived enforceability of mitigation measures submitted to (and accepted by) a State agency.

The Board's conclusion that an issue remains in dispute regarding the enforceability of the Eastern fox snake ("fox snake") mitigation plan is based on a clear and material legal error that invalidates the decision on Contention 8. Neither the National

[1] Detroit Edison has consulted with the Intervenors and the NRC Staff prior to filing this motion, as required by 10 C.F.R. § 2.323(b). The NRC Staff does not oppose the motion. The Intervenors oppose the motion.

[2] 10 C.F.R. § 2.323(e).

Environmental Policy Act ("NEPA") nor Commission precedent require that mitigation plans be adopted or otherwise imposed through enforceable mechanisms. And, in any event, there is a reasonable basis for the NRC Staff to find assurance that Detroit Edison will implement its mitigation plan.[3] Mitigation will be required by the Michigan Department of Natural Resources ("MDNR") through the State permitting process and Detroit Edison has also committed, under penalty of perjury, to implement the fox snake mitigation plan. There is no genuine dispute on implementation of the mitigation plan.

The legal standards applied by the Board also are inapplicable to the current circumstances. The Federal court "test" on which the Board relied applies only in the case of a "mitigated" Finding of No Significant Impact ("FONSI") in an Environmental Assessment ("EA"). The test does not apply to mitigation discussed, as in this case, in an Environmental Impact Statement ("EIS"). And, the Council of Environmental Quality ("CEQ") guidance that the Board considered does not apply to activities that fall outside the authority of the NRC or other Federal agencies (*e.g.*, State law). The basis for reconsideration is discussed further below.

BACKGROUND

In LBP-12-23, the Board found that Intervenors raised a genuine dispute as to whether the DEIS adequately addresses CEQ guidance regarding the appropriate use of mitigation and monitoring to support a conclusion in an EIS.[4] The Board relied upon Federal case law finding that agencies must justify reliance on mitigation in making a FONSI and identified a two-part test for satisfying this standard:

---

[3] "Fermi 3 Construction Habitat and Species Conservation Plan: Eastern Fox Snake (*Elaphe gloydi*)," Rev. 1, dated March 2012 (ADAMS Accession No. ML12163A577) ("mitigation plan").

[4] LBP-12-23 at 26.

> First, the proposed mitigation underlying the FONSI "must be more than a possibility" in that it is "imposed by statute or regulation or have been so integrated into the initial proposal that it is impossible to define the proposal without mitigation." Second, there must be some assurance that the mitigation measures "constitute an adequate buffer against the negative impacts that result from the authorized activity to render such impacts so minor as to not warrant an EIS."[5]

The Board based its decision on the first prong, and found that "DEIS fails to identify any statutory or regulatory requirements that will mandate implementation of the Conservation Plan and the additional monitoring the DEIS states will be necessary."[6] According to the Board, the DEIS "[i]nstead appears to simply assume that MDNR will take whatever actions are necessary to ensure that impacts to the snake are small and that necessary additional monitoring will occur."[7]

The Board also found that Intervenors raised a substantial question as to whether the DEIS adequately addresses the issues raised in CEQ Guidance. According to the Board, the CEQ Guidance states that "if an agency relies on mitigation to support a finding in an [EIS] or a [FONSI], the agency should ensure that mitigation commitments are implemented, monitor the effectiveness of such commitments, be ready to remedy failed mitigation, and involve the public in mitigation planning."[8] The Board acknowledged that the CEQ allows the implementing agency to rely on State agencies to impose mitigation, but found there is a substantial question as

---

5 *Id*. at 25 (internal citations omitted).

6 *Id*. at 26.

7 *Id*.

8 *Id.* at 23-24, *citing* "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," 76 Fed. Reg. 3843, 3847 (Jan. 21, 2011) ("CEQ Guidance").

to the adequacy of the DEIS because it fails to identify any requirement by which the Detroit Edison mitigation plan is enforceable.[9]

DISCUSSION

A. The Board Applied an Incorrect Legal Standard to Detroit Edison's Mitigation Plan.

1. NEPA Does Not Require that Mitigation Measures Identified in an EIS Be Finalized, Adopted, or Legally Enforceable.

NEPA requires agencies to identify mitigation measures and their relevance to environmental impact conclusions "in sufficient detail to ensure that environmental consequences have been fairly evaluated."[10] NEPA does not however, contain a substantive requirement that a mitigation plan be formulated and adopted in an EIS.[11] An EIS need not present a mitigation plan that is legally enforceable, funded, or even in final form to comply with NEPA's procedural requirements.[12] As the Supreme Court held in *Methow Valley*, "[t]here is a fundamental distinction … between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on

---

9 *Id.* at 27-28.

10 *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989); *see also Neighbors of Cuddy Mountain v. United States Forest Serv.,* 137 F.3d 1372, 1380 (9th Cir. 1998) (an agency must take "the requisite 'hard look' at possible mitigating measures").

11 *Webster v. USDA*, 685 F.3d 411 (4th Cir. 2012); *San Juan Citizens Alliance v. Stiles*, 654 F.3d 1038, 1054 (10th Cir. 2011); *Northern Alaska Environmental Center v. Kempthorne,* 457 F.3d 969 (9th Cir. 2006).

12 *See Theodore Roosevelt Conservation Partnership v. Salazar*, 616 F.3d 497 (2010) (NEPA "does not require agencies to discuss any particular mitigation plans that they might put in place," nor does it "require agencies—or third parties—to effect any.") (internal citation omitted); *North Slope Borough v. Minerals Management Service*, 343 Fed. Appx. 272 (9th Cir. 2009) (holding that "a mitigation plan does not have to be legally enforceable to comply with NEPA.").

the other."[13] This is because "it would be inconsistent with NEPA's reliance on procedural mechanisms — as opposed to substantive, result-based standards — to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act."[14]

The legal principle from *Methow Valley* is applicable even where an EIS relies upon mitigation to support its conclusions regarding the severity of environmental impacts. That was the case in *Methow Valley*, where an EIS prepared by the Forest Service concluded that the mitigation measures discussed therein would greatly reduce the environmental impacts associated with a proposed ski area. The Supreme Court overturned the Ninth Circuit opinion finding that the Forest Service "had an affirmative duty" to ensure implementation of the mitigation measures before granting the requested permit.[15] The Court expressly rejected the Ninth Circuit's belief that it was "improper" for the Forest Service to rely on potential mitigation actions that *might* be taken by third parties, stating that "[b]ecause NEPA imposes no substantive requirement that mitigation measures actually be taken, it should not be read to read to require agencies to obtain an assurance that third parties will implement particular measures."[16] The circumstances from *Methow Valley* are replicated here. The NRC Staff considered the effect of mitigation measures in reducing impact to a State-listed species, but did not (and indeed, lacks authority to) require Detroit Edison to actually implement those measures.

---

13 *Methow Valley* at 352.

14 *Id.*, *citing Baltimore Gas & Electric Co*., 462 U.S. 87, 100 (1983).

15 *See id.* at 347 (*quoting Methow Valley Citizens v. Reg'l Forester*, 833 F.2d 810, 817 (9th Cir. 1987)).

16 *Id.* at 352.

2. The Test Applied in LBP-12-23 Is Inapplicable to the Present Circumstances.

As noted above, the Board applied a two-part test in LBP-12-23: (1) the proposed mitigation underlying a FONSI "must be more than a possibility" in that it is "imposed by statute or regulation or have been so integrated into the initial proposal that it is impossible to define the proposal without mitigation"; and (2) there must be some assurance that the mitigation measures "constitute an adequate buffer against the negative impacts that result from the authorized activity to render such impacts so minor as to not warrant an EIS."[17] But, this test simply is not applicable in the present circumstances.

The test applied by the Board applies only in the case of a "mitigated" FONSI — that is, mitigation must be enforceable only where the agency is relying on mitigation to reduce the severity of impacts to a level such that the agency can reach a FONSI (and therefore not prepare an EIS).[18] This is because an agency must prepare an EIS for a major Federal action unless it can reach a FONSI. Agencies cannot "take credit" for mitigation to reduce impacts below the "significant impact" threshold unless there is a means to ensure that the mitigation takes place. In contrast, once an agency proceeds to the EIS stage, the focus is on disclosure of impacts and alternatives that would reduce those impacts. The cases cited by the Board in footnotes 139-144 and 152-154 all involved EAs, where an agency was relying on mitigation measures to reach a FONSI. Those cases have no bearing on the present circumstances, where the NRC prepared an EIS. Because it is preparing an EIS, the NRC need not rely on enforceable

---

17 LBP-12-23 at 25 (internal citations omitted and emphasis added).

18 The *Federal Register* notice accompanying the CEQ Guidance cited by the Board confirms this point. The guidance states that "an agency does not have to prepare an EIS when the environmental impacts of a proposed action can be mitigated to a level where the agency can make a FONSI determination, provided that the agency or a project applicant commits to carry out the mitigation, and establishes a mechanism for ensuring the mitigation is carried out." 76 Fed. Reg. at 3843.

mitigation to ensure that impacts remain below the "significant" level. There is no authority under NEPA to compel mitigation as part of an EIS.

At bottom, there are distinct analytical frameworks for NEPA compliance depending on whether an agency is preparing an EA/FONSI or an EIS. Where, as here, an agency is not relying on a mitigated FONSI, and is instead preparing an EIS, enforceable mitigation is not necessary.

3. CEQ Guidance Does Not Recommend That Mitigation Measures Be Imposed Where the Agency Lacks the Underlying Authority to Impose Mitigation.

As an initial matter, CEQ Guidance is not binding on independent regulatory agencies, such as the NRC.[19] Moreover, the CEQ Guidance "is not a rule or regulation, and the recommendations it contains may not apply to a particular situation based upon the individual facts and circumstances."[20] The guidance also "does not change or substitute for any law, regulation, or other legally binding requirement and is not legally enforceable."[21] In short, the CEQ Guidance does not independently establish legal requirements and therefore cannot provide the basis for a genuine dispute.

Regardless, the CEQ Guidance does not suggest that mitigation must be enforced or imposed where, as here, the agency lacks the underlying authority to require performance of the mitigation. The *Federal Register* notice accompanying the CEQ Guidance states:

> It is an agency's underlying authority that provides the basis for the agency to commit to perform or require the performance of particular mitigation. That authority also allows the agency to implement and monitor, or to require the implementation and monitoring of, those

---

19 *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-876, 26 NRC 277, 284 n.5 (1987).

20 76 Fed. Reg. at 3846 n.5.

21 *Id*. (emphasis added).

> mitigation commitments to ensure their effectiveness. It further provides the authority to take remedial steps, so long as there remains federal decisional involvement in a project or other proposed action.[22]

CEQ also clarified that "existing authorities provide the basis for agency commitments to implement mitigation and monitor its success."[23]

Agencies should not commit to or, in the case of a permit or license, require mitigation measures considered in an EIS or EA "absent the authority … to ensure that the mitigation is performed."[24] The NRC's jurisdiction to impose mitigation measures (*e.g.*, through a license condition) is linked to federal statutes that provide substantive authority to the NRC with respect to their subject matter, such as the Atomic Energy Act ("AEA") and the Endangered Species Act ("ESA").[25] Because the fox snake is not a Federally-listed species, there are no legal authorities by which the NRC, as a Federal agency, could condition a license to require mitigation of impacts to the fox snake based on Michigan law.[26] Further, the Supreme Court explicitly rejected the proposition that NEPA can "be read to require agencies to obtain an

---

22 *Id*. at 3844.

23 *Id*.

24 *Id*. at 3847.

25 NEPA is a procedural statute that provides the NRC with no additional substantive authority to condition a license. *Methow Valley*, 490 U.S. 332, 350 (1989); *see also* Statements of Consideration, Limited Work Authorizations for Nuclear Power Plants; Final Rule, 72 Fed. Reg. 57,427 (Oct. 9, 2007) (acknowledging that NEPA, by itself, does not expand the NRC's authority to impose requirements unrelated to the AEA).

26 *Compare* LBP-12-23 at 27 n.150, *citing Center for Biological Diversity v. Bureau of Land Management*, __ F.3d __, 2012 WL 5193100 (9th Cir. Oct. 22, 2012). Unlike the Federally-listed species that BLM was obligated to protect under Federal law (the ESA), the NRC has no authority to protect a State-listed species under State law.

assurance that third parties will implement particular measures."[27] Thus, contrary to the Board's conclusions in LBP-12-23 at 24, it is not the NRC's responsibility — nor does the NRC have the legal authority — to impose mitigation measures or monitoring related to the fox snake.

This does not, however, mean that the mitigation plan can be ignored by Detroit Edison, nor does it mean that Detroit Edison may "halt or modify implementation" of the mitigation plan "as it chooses." Instead, as discussed below, Michigan law requires Detroit Edison to obtain a permit and mitigate impacts to the fox snake during construction. And, as contemplated by the CEQ Guidance, it is appropriate for a permitting agency's NEPA analysis to account for mitigation or monitoring measures that will be required of the applicant by another regulatory authority.[28] The NRC Staff did exactly that in the DEIS.[29] It was therefore entirely appropriate for the NRC Staff to rely on MDNR to monitor implementation of the construction mitigation plan.

---

27 *Methow Valley* at 353 n.16. To find that an agency's EIS must not only characterize anticipated mitigation and relevance to the agency conclusion but also ensure that mitigation will occur and be effective goes far beyond the holding in *Methow Valley*, which emphasized that NEPA demands only an informed decision, not a particular outcome. A mitigation plan "need not be legally enforceable, funded or even in final form to comply with NEPA's procedural requirements." *National Parks & Conservation Ass'n v. United States Dep't of Transp.,* 222 F.3d 677, 681 n.4 (9th Cir. 2000).

28 *See* 76 Fed. Reg. at 3847 ("Alternatively, the authority for the mitigation may derive from legal requirements that are enforced by other Federal, state, or local government entities (*e.g.*, air or water permits administered by local or state agencies).").

29 The DEIS properly considers the need for a mitigation plan, discusses the role of the mitigation plan with respect to impacts on the fox snake, explains that MDNR is responsible for reviewing and approving the mitigation plan, and states that MDNR will likely require monitoring of the fox snake in order to assess the effectiveness of Detroit Edison's mitigation measures. DEIS at 4-25, 4-35. MDNR's authority is discussed further below.

4. Detroit Edison Will Implement the Mitigation Plan During Fermi 3 Construction.

The Board defined the remaining disputed issue in Contention 8 as whether the Staff has "reasonably relied on assumptions about the future actions of MDNR."[30] As discussed below, Michigan law prohibits any "take" of State-listed species, such as the fox snake; imposes permit requirements; and provides enforcement authority. As a result, the NRC Staff's assumptions regarding future actions of MDNR are based on undisputed statutory obligations and permitting requirements.[31] There is no basis for presuming that MDNR will refuse to meet its obligations or that Detroit Edison will violate State law.

The Michigan Natural Resources and Environmental Protection Act (Public Act 451 of 1994) protects all species listed as threatened and endangered in Michigan, including the fox snake.[32] Michigan Compiled Laws ("MCL") Part 365 makes it unlawful to "take" a State-threatened species, such as the fox snake, without a permit from the MDNR.[33] Applications for take permits must be filed with MDNR and, specifically, with the MDNR officials that reviewed,

---

30 LBP-12-23 at 22.

31 The Board found that disputes over future actions by third parties can defeat a summary disposition motion. LBP-12-23 at 22, *citing Gulf States Utilities Co.* (River Bend Station, Unit 1), LBP-95-10, 41 NRC 460 (1995). But, in *River Bend*, the factual dispute centered on whether a bankruptcy court would adequately fund facility operations due to uncertainty over the scope of its obligations to protect the public interest. *Id.* at 471. Here, in contrast, MDNR has a *non-discretionary* duty under Michigan law to prohibit "take" of a fox snake without a permit.

32 *See* Michigan Administrative Code ("MAC") 299.1025 (listing the fox snake as a threatened species).

33 MCL 324.36505. "Take" means, "in reference to fish and wildlife, to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or attempt to engage in any such conduct." MCL 324.36501(f).

and concurred with, Detroit Edison's mitigation plan.[34] Mechanisms are also available to enforce the prohibition on "take" and MDNR permitting requirements.[35]

Because fox snakes are present at the site and because construction activities have the potential to result in "take" of fox snakes, Detroit Edison must apply for and obtain a permit from MDNR prior to performing any site construction activities.[36] Permits issued by MDNR are only valid for 12 months. Because Detroit Edison does not plan to begin construction or other activities that would result in "take" of fox snakes in the next 12 months, there is no present obligation for Detroit Edison to obtain a take permit or implement mitigation. Nevertheless, to ensure that the mitigation plan addresses MDNR concerns, Detroit Edison engaged in extensive discussions with MDNR and revised the mitigation plan to address MDNR comments and concerns. Ultimately, MDNR agreed that, under the mitigation plan, Fermi 3 construction would have "minimal impacts" on the fox snake.[37]

Since there is no permit obligation at present, MDNR does not yet have a vehicle to impose mitigation as a condition of the permit. When Detroit Edison applies for the permit, MDNR necessarily will require mitigation to minimize impacts to the fox snake, as mandated by

---

34 *See* "Requesting Permits" (available at http://www.michigan.gov/dnr/0,4570,7-153-10370_12141_12168-30522--,00.html); Motion for SD Contention 8, Attachment 2 (concluding that Fermi 3 construction should have minimal direct impact on fox snakes under the mitigation plan).

35 MCL 324.36506 directs law enforcement officers, police officers, sheriff's deputies, or conservation officers to enforce Part 365 part and the related rules.

36 This duty is reinforced in the MDEQ wetland permit on January 24, 2012. *See* MDEQ Wetland Permit No. 10-58-011-P, dated January 24, 2012 (ADAMS Accession No ML12037A243). The permit notes the presence of fox snakes at the site and reiterates the need for Detroit Edison to obtain an MDNR permit prior to commencing construction activities. *Id*. at 4.

37 Motion for SD Contention 8, Attachment 2.

Michigan law.[38] And, Detroit Edison will be obligated to implement the mitigation plan.[39] There is no dispute that, if the project proceeds, Detroit Edison must obtain a permit from MDNR that will require mitigation of impacts to the fox snake.[40]

At bottom, Michigan law is unambiguous regarding the need for a State permit and mitigation of impacts to the fox snake. Detroit Edison also has committed to implement the mitigation plan as part of Fermi 3 construction activities.[41] This commitment, made under penalty of perjury, provides an alternate basis for assuming mitigation.[42] The Intervenors have

---

38 The NRC Staff's reliance on MDNR is not based on a *generic* assurance of another agency being "on duty." Rather, as is evident in the DEIS and in NRC Staff affidavits filed in support of summary disposition, the NRC Staff conducted a *site-specific* inquiry and reached *site-specific* conclusions regarding impacts on fox snakes. The NRC Staff reasonably relied on MDNR's statutory obligations and the detailed plan to prevent or mitigate impacts to the fox snake. Accordingly, *New York v. NRC*, which involved the adequacy of a *generic* assessment of spent fuel pool leaks, does not suggest any inadequacy in the NRC Staff's *site-specific* evaluation of impacts to fox snakes.

39 *U.S. Army Installation Command* (Schofield Barracks, Oahu, Hawaii, and Pohakuloa Training Area, Island of Hawaii, Hawaii), CLI-10-20, 72 NRC 185, 194 & n.48 (2010) (refusing to assume that licensee would act contrary to applicable law); *cf. Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-01-9, 53 NRC 232, 235 (2001) ("[I]n the absence of evidence to the contrary, the NRC does not presume that a licensee will violate agency regulations wherever the opportunity arises.").

40 *See* Motion for SD Contention 8, Attachment 2 (Letter from L. Sargent, Endangered Species Specialist, MDNR, to R. Westmoreland, Detroit Edison, dated April 6, 2012). MDNR recognizes that (1) the fox snake should be protected from harm from all activities associated with the project; and (2) an endangered species permit is required.

41 *See* Affidavit for Peter Smith at ¶9. The NRC has previously relied on voluntary commitments by applicants to mitigate impacts on State-listed species. *See, e.g.*, *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-12-02, 75 NRC __ (slip op. Feb. 9, 2012 at 72); "Vogtle Electric Generating Plant Early Site Permit and Limited Work Authorization EA and Finding of No Significant Impact" (ADAMS Accession No. ML101670592).

42 Although the Board asserts that this commitment is meaningless since Detroit Edison can halt or modify the commitment as it sees fit, applicant statements, when made by witnesses under penalty of perjury and before the presiding officer, establish "clear, unambiguous commitments" upon which the Board may rely. *Commonwealth Edison*

articulated no basis for presuming that MDNR or Detroit Edison will fail to comply with State laws or that Detroit Edison will refuse to meet its commitment. It is not enough for the Intervenors to merely "question" whether Detroit Edison will conduct mitigation — the Intervenors must provide more than suspicions or bald assertions to maintain a factual dispute.[43] Here, the Intervenors provided no expert or legal support that calls into question the need for an MDNR permit or mitigation. There is no genuine dispute on this issue.

B. Detroit Edison Could Not Have Reasonably Anticipated the Legal Standard Applied By the Board.

The Board previously addressed the need for mitigation of potential impacts to fox snakes from construction of Fermi 3.[44] In LBP-11-14, the Board agreed with Detroit Edison that NEPA imposes no substantive requirement that mitigation measures actually be taken.[45] The Board went on to state:

> Thus, although we agree that NEPA does not mandate implementation of a mitigation plan, the requirement that "mitigation be discussed in sufficient detail to ensure that environmental consequences have been fully evaluated" means the ER should explain, at a minimum, the mitigation measures DTE intends to take to protect the eastern fox snake, the effect DTE believes those measures will have if implemented, and the basis of that belief.[46]

Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-43, 22 NRC 805, 806-807 (1985).

43 *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-40, 54 NRC 526, 536 (2001). The Intervenors must aver specific facts in rebuttal to those presented by the NRC Staff and Detroit Edison.

44 As noted above, the fox snake is not listed as endangered or threatened under the Federal ESA. The fox snake is only designated for protection under State law.

45 *See* 73 NRC 591, 604 (2011) (quoting *Laguna Greenbelt, Inc. v. U.S. Dep't of Transp.*, 42 F.3d 517, 528 (9th Cir. 1994) (internal citation omitted)).

46 *Id*. at 608 (emphasis added).

Detroit Edison provided precisely this information in its second motion for summary disposition on Contention 8. Detroit Edison described, in detail, the mitigation measures that Detroit Edison would take in the mitigation plan, including efforts to avoid impacts to fox snakes and measures intended to reduce the severity of impacts where they could not be avoided. Detroit Edison also assessed the effectiveness of the mitigation measures, and included monitoring activities to confirm their effectiveness. Detroit Edison also provided the basis for its conclusions, including expert testimony and documents showing that State wildlife officials had concurred with the mitigation plan. Having met the standard described previously by the Board, Detroit Edison could not have reasonably anticipated that the Board would deny summary disposition based on the lack of Federally-enforceable mitigation.

C. The Board Should Grant Summary Disposition on Contention 8

There is a reasonable (and undisputed) basis for the NRC Staff's presumption in the DEIS that Detroit Edison will implement the mitigation plan. Prior to construction, Detroit Edison is required under State law to apply for a permit from MDNR. That permit will impose mitigation with respect to the fox snake. And, regardless, Detroit Edison separately committed, under penalty of perjury, to implement fox snake mitigation. The NRC Staff therefore properly, and within the scope of its NEPA authority, accounted for the mitigation in the DEIS.

At bottom, the dispute that formed the basis for Contention 8 has been conclusively resolved. Detroit Edison has taken action to reduce impacts of the project on fox snakes and has developed a detailed mitigation plan to be applied during construction. Its motion for summary disposition addressed both the effectiveness and the adequacy of mitigation for the fox snake. The Intervenors have offered no expert to challenge the adequacy of the mitigation plan or to suggest that State law (and regulatory process) will not be followed. As a result, there remains no genuine issue as to any material fact relevant to the Contention 8.

Detroit Edison is entitled to a decision as a matter of law.

CONCLUSION

For the above reasons, Detroit Edison respectfully seeks reconsideration of the legal conclusions surrounding mitigation of impacts to the fox snake from Fermi 3 construction. The Board should grant summary disposition of Contention 8 in favor of Detroit Edison and the NRC Staff.

Respectfully submitted,

/s/ signed electronically by
David A. Repka
Tyson R. Smith
Rachel Miras-Wilson
Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006

Bruce R. Maters
Jon P. Christinidis
The Detroit Edison Company
One Energy Plaza
Detroit, Michigan 48226

COUNSEL FOR THE
DETROIT EDISON COMPANY

Dated at Washington, District of Columbia
this 19th day of November 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)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "APPLICANT'S MOTION FOR RECONSIDERATION" in the captioned proceeding have been served via the Electronic Information Exchange ("EIE") this 19th day of November 2012, which to the best of my knowledge resulted in transmittal of the foregoing to the following persons.

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Ronald M. Spritzer, Chair
Michael F. Kennedy
Randall J. Charbeneau
E-mail: rms4@nrc.gov
E-mail: mfk2@nrc.gov
E-mail: Randall.Charbeneau@nrc.gov

Johanna Thibault, Law Clerk
Ann Hove, Law Clerk
E-mail: jrt3@nrc.gov
E-mail: ann.hove@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop O-16C1
Washington, DC 20555-0001
Hearing Docket
E-mail: hearingdocket@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-15D21
Washington, DC 20555-0001

Marian Zobler, Esq.
Marcia Carpentier, Esq.
Sara Kirkwood, Esq.
Robert M. Weisman, Esq.
Anthony Wilson, Esq.
Joseph Gilman, Paralegal
E-mail: mlz@nrc.gov
E-mail: marcia.carpentier@nrc.gov
E-mail: sara.kirkwood@nrc.gov
E-mail: rmw@nrc.gov
E-mail: Anothony.Wilson@nrc.gov
E-mail: jsg1@nrc.gov
OGC Mail Center : OGCMailCenter@nrc.gov

Beyond Nuclear, Citizens for Alternatives to Chemical Contamination, Citizens Environmental, Alliance of Southwestern Ontario, Don't Waste Michigan, Sierra Club et al.
316 N. Michigan St., Ste. 520
Toledo, OH 43604-5627
Terry J. Lodge, Esq.
E-mail: TJLodge50@yahoo.com

Beyond Nuclear
Reactor Oversight Project
6930 Carroll Avenue Suite 400
Takoma Park, MD 20912
Paul Gunter, Director
E-mail: paul@beyondnuclear.org

/s/ signed electronically by
Tyson R. Smith
Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006

COUNSEL FOR THE
DETROIT EDISON COMPANY