

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

In the Matter of:)	
)	Docket No. 52-033
The Detroit Edison Company)	
(Fermi Nuclear Power Plant, Unit 3))	February 19, 2013
)	

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**MOTION FOR RESUBMISSION OF CONTENTIONS 3 AND 13,
FOR RESUBMISSION OF CONTENTION 23 OR ITS ADMISSION
AS A NEW CONTENTION, AND FOR ADMISSION OF NEW
CONTENTIONS 26 AND 27**

Now come Intervenors Beyond Nuclear, *et al.*¹ (hereinafter “Intervenors”), by and through counsel, and move to resubmit amended Contentions 3 and 13, to resubmit amended Contention 23 or for its admission as a new contention, and for admission of two new contentions, referred to hereinafter as Contention 26 and Contention 27.

I. INTRODUCTION

This combined license (COL) proceeding involves the application of Detroit Edison Company (“DTE” or “Applicant”) under 10 C.F.R. Part 52, Subpart C, to construct and to operate a GE-Hitachi Economic Simplified Boiling Water Reactor (ESBWR) designated Unit 3 (“Fermi 3”), on its existing Fermi nuclear facility site near Newport City in Monroe County, Michigan.

¹In 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.

The Final Environmental Impact Statement (“FEIS”) for Fermi 3 was formally released to the public on January 16, 2013. The scheduling order of the assigned Atomic Safety and Licensing Board (“ASLB”) requires that any proffered pleadings, amendments or legal submissions are due on February 19, 2013² (since February 18 is a legal holiday, Presidents’ Day).

II. STANDARDS FOR ADMISSIBILITY OF FEIS-RELATED CONTENTIONS

The Nuclear Regulatory Commission (“NRC” or “Commission”), as lead agency for purposes of compliance with the National Environmental Policy Act (“NEPA”), must document and disclose the environmental issues which are engendered by this power plant project. *Crouse Corp. v. Interstate Commerce Comm’n*, 781 F.2d 1176 (6th Cir. 1986). NEPA imposes continuing obligations on the NRC, following completion of a preliminary environmental analysis, to re-evaluate its environmental disclosures in light of new and significant information received which casts doubt upon a previous environmental analysis. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989). Legal harm is caused under NEPA when an agency makes a decision without sufficiently considering information which NEPA requires be placed before the decisionmaker and public. *Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989). “The injury of an increased risk of harm due to an agency's uninformed decision is precisely the type of injury (NEPA) was designed to prevent.” *Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 448-49 (10th Cir. 1996).

Section 10 C.F.R. §2.309(f)(2) states that “[o]n issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's envi-

²*Detroit Edison Company* (Fermi Nuclear Power Plant, Unit 3), ASLBP No. 09-880-05-COL-BD01 (December 12, 2012) (slip op.).

onmental report.” It then provides, however, that a petitioner “may amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's documents.” 10 C.F.R. § 2.309(f)(2).

“Thus, for example, if the DEIS contains data or conclusions concerning the costs or benefits of the proposed action that differ significantly from those contained in the Environmental Report, the intervenor may file an amended contention, or an entirely new contention, to challenge the new data or conclusions.” *Calvert Cliffs 3 Nuclear Project, LLC, and Unistart Nuclear Operating Services, LLC* (Combined License Application for Calvert Cliffs Unit 3), LBP-10-24 at 7 (December 28, 2010). “This provision tempers the restrictive effect of the agency’s requirement that NEPA contentions be filed based on the ER by allowing petitioners or intervenors to challenge significantly different data or conclusions that appear for the first time in a NRC Staff NEPA document.” *Id.* at 7.

The use of the disjunctive phrase “data or conclusions” means it is sufficient that either data or conclusions in the FEIS differ significantly from those in the ER; both need not do so. A contention may therefore challenge a DEIS even though its ultimate conclusion on a particular issue (*e.g.*, the need for power) is the same as that in the ER or DEIS, as long as the FEIS relies on significantly different data than the ER or DEIS to support the determination. The reverse is also true: a significantly different conclusion in the DEIS may be challenged even though it is based on the same information that was cited in the ER. *Id.* at 7.

Also, the provision refers to “conclusions,” not “the conclusion” or “all conclusions.” Thus, even though the FEIS’s ultimate conclusion on a particular issue might be the same as

that in the ER or DEIS (*e.g.*, that there is a need for additional power generating capacity), other conclusions in the FEIS related to the ultimate conclusion might be challenged if they differ significantly from those in the ER or DEIS. These could also be a permissible basis for a new or amended contention, even though the ultimate conclusion remains unchanged. *Id.* at 7.

Thus, if the DEIS for Unit 3 contains either data or conclusions that differ significantly from those in the ER, intervenors may file contentions challenging the DEIS even though both the ER (*viz.*, the applicant) and the DEIS (the NRC Staff) each reach the same result. *Id.* at 8.

If intervenors fail to show that the FEIS contains new data or conclusions that differ from those in the DEIS, §2.309(f)(2) provides another alternative. It allows a new contention to be filed after the initial docketing with leave of the presiding officer upon a showing that:

- i. The information upon which the amended or new contention is based was not previously available;
- ii. The information upon which the amended or new contention is based is materially different than information previously available; and
- iii. The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

Id.

III. TIMELINESS OF SUBMISSION OF CONTENTIONS

Intervenors hereby timely resubmit amended and new contentions within the time period allowed for same by the ASLB's scheduling order. The ASLB's order recognizes as timely contentions which are predicated upon FEIS information, if submitted by February 18 (by operation of law, February 19), 2013. *Shaw Areva MOX Services, Inc.* (Mixed Oxide Fuel Fabrication Facility), LBP-08-10, 67 NRC 460, 493 (2008).

If a contention is timely under 10 C.F.R. § 2.309(f)(2)(ii), it is contradictory to rule that the intervenor must also satisfy the eight additional factors for nontimely filings found in 10

C.F.R. § 2.309(c). *Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-05-32, 62 NRC 813, 821 (2005). Since the ASLB specified the February 18 (by operation of law, 19), 2013 deadline in its December 12, 2012 scheduling order, the resubmitted and new contentions raised in this motion as a matter of law are “timely.” *Calvert Cliffs 3 Nuclear Project, LLC, and Unistar Nuclear Operating Services, LLC*, LBP-10-24 at 8, citing *Entergy Nuclear Vt. Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-07-15, 66 NRC 261, 266 n.11 (2007).

If the filing of a proposed new contention is not authorized by either alternative in §2.309(f)(2), then it may be evaluated under §2.309(c). The Commission has held that, even if a petitioner is unable to show that the NRC Staff’s NEPA document differs significantly from the ER, it “may still be able to meet the late filed contention requirements.”³ Similarly, if a contention based on new information fails to satisfy the three-part test of Section 2.309(f)(2)(i)-(iii), it may be evaluated under Section 2.309(c).⁴

IV. RESUBMITTED CONTENTION 3

MOTION TO RESUBMIT AND ADMIT CONTENTION 3 REGARDING THE LACK OF ENVIRONMENTAL ANALYSIS OF EFFECTS OF ‘LOW-LEVEL’ RADIOACTIVE WASTE ABSENT A RELIABLE MEANS OF PERMANENT DISPOSAL

Now come Intervenors, by and through counsel, and hereby move to resubmit and admit their former Contention 3 regarding the inadequate environmental analysis of the effects of

³*Calvert Cliffs 3 Nuclear Project, LLC, and Unistart Nuclear Operating Services, LLC*, LBP-10-24 at 8, citing *Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 363 (1993).

⁴*Calvert Cliffs 3 Nuclear Project, LLC, and Unistart Nuclear Operating Services, LLC*, LBP-10-24 at 8.

storage of “low-level” radioactive waste onsite at Fermi 3 absent a reliable means of permanent disposal.

Pursuant to 10 C.F.R. § 2.309(f)(1), Intervenors renew Contention 3, seeking consideration of new and significant information relevant to the Final Environmental Impact Statement (“FEIS”) for the Combined Operating License (“COLA”) for Fermi 3.

This contention is the only means of ensuring that the environmental implications of the onsite storage of class B, C and greater-than-C (“> C”) radioactive waste for up to ten (10) years will be properly identified, disclosed and analyzed.

1. Statement of Contention 3 (Amended)

The FEIS violates NEPA by failing to address the environmental impacts of the ‘low-level’ radioactive waste that it will generate in the absence of reliable licensed permanent disposal facilities or capability to isolate the radioactive waste from the environment for greater than 10 years.

2. Brief Explanation of the Basis for the Contention

In the early versions of the Final Safety Analysis Report for Fermi 3, the plant would not “utilize any temporary storage facilities to support plant operation.” FSAR, STD COL Subsect. 11.4-4-A, p. 11-10. DTE presumed the continuous availability of offsite land disposal of low-level radioactive waste (“LLRW”) when it calculated radiation effects in its Environmental Report. ER, Rev. 2, p. 5-150, Subsect. 5.7.1.6.

But things have changed; DTE now has signaled that it will store LLRW for up to a decade at the Fermi 3 plant site. The FEIS (at pp. 6-14 to 6-15) states:

Detroit Edison can currently ship Class A LLW to the Energy Solutions site in Clive, Utah and has done so (Detroit Edison 2011b); however, it cannot dispose of Class

B and C LLW at the Energy Solutions site in Barnwell, South Carolina. The Waste Control Specialists, LLC, site in Andrews County, Texas, is licensed to accept Class A, B, and C LLW from the Texas Compact (Texas and Vermont). As of May 2011, Waste Control Specialists, LLC, may accept Class A, B, and C LLW from outside the Texas Compact for disposal, subject to established criteria, conditions, and approval processes. Michigan is not currently affiliated with any compact.

Other disposal sites may also be available by the time Fermi 3 could become operational.

Detroit Edison has committed to implementing a waste minimization program for Fermi 3 (Detroit Edison 2011a); however, additional waste minimization measures could be implemented by the licensee to specifically reduce or eliminate the generation of Class B and C waste. . . . These measures would provide time for offsite disposal capability to be developed or onsite interim storage capacity to be added. Measures to reduce the generation of Class B and C wastes, such as reducing the service run length of resin beds, could increase the volume of LLW, but would not increase the total activity (in curies) of radioactive material in the waste. The volume of waste would still be bounded by or very similar to the estimates in Table S-3, and the environmental impacts would not be significantly different.

Detroit Edison has proposed a Solid Waste Management System for Fermi 3 that provides enough storage space to hold the total combined volume of 3 months of packaged Class A and 10 years of packaged Class B and Class C LLW generated during plant operations. If additional storage capacity for Class B and C LLW is required, Detroit Edison could elect to construct additional temporary storage facilities. Detroit Edison could also enter into an agreement with a third-party contractor to process, store, own, and ultimately dispose of LLW from Fermi 3.

The NRC staff anticipates that licensees would temporarily store Class B and C LLW onsite until offsite storage locations are available. Several operating nuclear power plants have successfully increased onsite storage capacity in the past in accordance with existing NRC regulations. This extended waste storage onsite resulted in no significant increase in dose to the public. In addition, the NRC issued Regulatory Issue Summary 2008-12 (NRC 2008), which Fuel Cycle, Transportation, and Decommissioning included guidance for the extended onsite interim storage of LLW. This guidance addressed the storage of waste in a manner that minimizes potential exposure to workers, which may require adding shielding and storing waste in packaging compatible with the waste composition (e.g., chemical and thermal properties).

In most circumstances, the NRC's regulations (10 CFR 50.59) allow licensees operating nuclear power plants to construct and operate additional onsite LLW storage facilities without seeking approval from the NRC. Licensees are required to evaluate the safety and environmental impacts before constructing the facility and make those evaluations available to NRC inspectors. A number of nuclear power plant licensees have constructed and currently operate such facilities in the United States.

Offsite disposal of waste remains an essential part of the plan; but presently, such

offsite disposal is not readily available to waste generators in Michigan.⁵ The COLA does not contemplate any but “temporary” onsite storage of Class B, C and greater-than-C wastes. The facility will prepare waste for routine shipment to a disposal site throughout Fermi’s entire operating life after the first decade, despite the fact that no such disposal site is currently available, let alone guaranteed available in future decades. The waste involved is potentially hazardous for far more than 60 years.

Even if, as DTE promised in the ER, “[t]he radioactive waste management systems are designed to maintain releases of radioactive materials in effluents to ‘as low as reasonably achievable’ levels in conformance with 10 CFR Parts 20 and 50, including the design objectives of 10 CFR 50 Appendix I,”⁶ these are the routine release levels which will require ongoing onsite management and understanding of the potential impact from permanent or very long-term storage of all the B, C and >C radioactive waste from operations on the site of generation.

3. Demonstration that the Contention is Within the Scope of the Proceeding

The contention is within the scope of the proceeding because it seeks compliance with NEPA and NRC implementing regulations, compliance with which is a prerequisite to COL licensure of Fermi 3.

⁵It is not true, as the NRC Staff claims in the FEIS, that “As of May 2011, Waste Control Specialists, LLC, may accept Class A, B, and C LLW from outside the Texas Compact for disposal, subject to established criteria, conditions, and approval processes.” The Texas Commission on Environmental Quality states that “Waste generated outside Texas and Vermont, must be specifically authorized through an agreement between the waste generator and the Texas Low-Level Radioactive Waste Disposal Compact Commission (TLLRWDC). The TLLRWDC application for import is currently under rule development and can be found at <http://www.tllrwdcc.org/information.html>.” (<http://www.tceq.texas.gov/permitting/radmat/licensing/generator-site-access>).

⁶ER, Rev. 2, pp. 3-37, Sect. 3.5.

4. Demonstration that the Contention is Material to the Findings NRC Must Make to License Fermi 3

This contention challenges the NRC's failure to fully comply with NEPA and federal regulations for the implementation of NEPA in its EIS for the proposed Fermi 3. Unless the NRC complies with the procedural requirements of NEPA and discloses and analyzes the environmental impacts of potential extended onsite LLRW storage, and identifies and discusses the potential factors which delay development of additional sites for offsite permanent disposal of LLRW, a COL cannot be granted for Fermi 3. Therefore the resubmitted Contention 3 articulates matters which must be resolved in order for the NRC to license this facility.

5. Concise Statement of the Facts or Expert Opinion Supporting the Contention, Along With Appropriate Citations to Supporting Scientific or Factual Materials

The NRC Staff shares DTE's assumption that it will be able to send its Class B, C, and >C radioactive waste offsite somewhere. But assuming Fermi 3 opens in 2020, and LLRW is stored onsite for the first decade, the FEIS does not address the availability of a disposal site circa 2030 or 2032, but offers only a factually-void pledge regarding the same. The FEIS fails to note that the availability of disposal space for Fermi 3 LLRW at the Waste Control Specialists (WCS) facility in Texas is subject to considerable uncertainty. The closing of the Vermont Yankee commercial nuclear power plant in Vermont involves great controversy wherein the State of Vermont insists that Entergy, the plant's owner, was to permanently shut down and decommission the plant in 2012. A bill has just been introduced in the Vermont legislature which would impose new, more stringent conditions on decommissioning the plant. The bill as introduced may be viewed at <http://www.leg.state.vt.us/docs/2014/bills/Intro/H-139.pdf>. Additional state restrictions on the removal of contaminated soil and other material will have

direct effects on the availability of LLRW disposal space at the WCS facility in Texas for non-compact waste generators such as DTE.

There is no serious discussion within the FEIS of the limitations on availability of offsite LLRW disposal that might preclude DTE's usage of WCS when it needs to dispose of waste offsite commencing in the early 2030's and continuing, presumably, for the remaining 50 years of Fermi 3's operating life.

6. Sufficient Information to Show the Existence of a Genuine Dispute With the Applicant and the NRC

It is imperative that the safety and security issues of extended onsite storage, which comprises *de facto* disposal, be addressed prior to generation of the waste. There is no disposal available for Classes B, C and >C of the so-called "low-level" radioactive waste. Greater-than-C is the hottest, most concentrated waste in the category.⁷ The FEIS should also address the fact that >C wastes require disposal in an even more protective manner than imposed for Classes B and C, and must be disposed of in a deep geologic repository unless a specific exemption is granted.

The decommissioning planning assumes that the process-generated "low-level" radioactive will not be present onsite at time of closure. DTE's Process Control Program, while explaining the methods of temporary storage, does not explain how DTE will comply with the need for permanent disposal of long-lasting radioactive waste in the absence of licensed disposal facilities for Classes B, C and >C waste. Even waste sent offsite to vendors for temporary storage or processing could be returned for storage in the absence of permanent disposal. DTE does not

⁷A GAO report indicates some of this waste can give a lethal dose in 20 minutes if exposed unshielded. GAO-RCED-98-40R Questions on Ward Valley pages 49-52, 1998.

address in its NEPA documents any detail regarding the ongoing onsite management and potential impact from storage of all the B, C and >C radioactive waste from operations at the site of generation. This discussion must appear in the FEIS.

Intervenors have here raised a “contention of omission,” *i.e.*, a claim, in the words of 10 C.F.R. § 2.309(f)(1)(vi), that “the application fails to contain information on a relevant matter as required by law . . . and the supporting reasons for the petitioner's belief.” *Pa’ina Hawaii, LLC* (Material License Application), LBP 06-12, 63 NRC 403, 413 (2006), *pet. for reconsideration denied*, CLI-06-25, 64 NRC 128 (2006) (contention satisfied the requirement to provide a specific statement of the legal or factual issue sought to be raised by alleging that the application failed to describe the emergency procedures for a prolonged loss of electricity).

Intervenors urge acceptance of this contention for litigation.

V. RESUBMITTED CONTENTION 13

MOTION TO RESUBMIT AND ADMIT NEW CONTENTION 13 REGARDING THE NEED AND DEMAND FOR POWER FROM THE FERMI 3 NUCLEAR POWER PLANT

Now come Intervenors, by and through counsel, and hereby move to resubmit their former Contention 13 regarding the lack of need and demand for the power which would be produced by Fermi 3.

Pursuant to 10 C.F.R. § 2.309(f)(1), Intervenors renew Contention 13, seeking consideration of new and significant information relevant to the Final Environmental Impact Statement (“FEIS”) for the Combined Operating License (“COLA”) for Fermi 3.

Under NEPA, this contention addresses the core issue of economic justification for the entire Fermi 3 enterprise by addressing the question of how much demand is there expected to be

for the electricity that would be produced by adding a large baseload plant to the DTE system. Analysis of need and demand is essential to determining whether Fermi 3 is the least environmentally-destructive means of addressing the power supply issues.

1. Statement of Contention 13 (Amended)

The Final Environmental Impact Statement (FEIS) does not contain the “hard look” required by NEPA or the Atomic Energy Act respecting need and demand for Fermi 3. It overestimates forecast demand for electricity through the decade of the 2020s, when Fermi 3 is planned to begin power generation. The FEIS relies on two flawed analyses of future demand, one of which predates and so does not account for the 2007-08 economic recession, and the other of which has consistently overestimated electrical consumption, belied by actual usage data, for every year since it was compiled. The FEIS analyses of need for power, energy alternatives and cost/benefit analysis are consequently skewed and grossly inaccurate, falsely justifying need for a new baseload nuclear plant because they are based on inaccurate, irrelevant and/or outdated information.

2. Brief Explanation of the Basis for the Contention

The NRC mandates that a COLA EIS associated with plant licensing must include a Need for Power analysis as part of the EIS’s cost-benefit analysis. 68 FR 55905, 55909. That analysis attempts to determine whether there is future electricity need that a proposed plant could supply. In so doing, the Need for Power analysis measures the benefit of a new nuclear plant in the EIS’s cost-benefit analysis, as a plant supplying electricity that is not needed does not provide a benefit. While the Need for Power analysis “should not involve burdensome attempts to precisely identify future conditions . . . it should be sufficient to reasonably characterize the costs and

benefits associated with the proposed licensing actions.” 68 FR 55910.

The Draft Environmental Impact Statement’s (“DEIS”) need for power analysis relied entirely on the Michigan Public Service Commission’s (“MPSC”) 21st Century Electric Energy Plan (“21st Century Plan”), a 2006 energy planning report that was prepared before the recession. DEIS pp. 8-7, 8-23. Because the demand forecast contained in the 21st Century Plan was calculated before the Great Recession, it failed to anticipate the dramatic consequential reduction in electricity demand. The 21st Century Plan predicted a 1.2% annual demand increase extending well into the future. This prediction is far greater than what has actually occurred since 2007, and is much higher than present estimates of future demand.

Intervenors objected to this reliance on the 21st Century Plan at the DEIS stage, arguing that since it “completely omits the second largest economic downturn in American history in its demand forecasting,” it cannot be “sufficient to reasonably characterize’ a realistic demand for power in Southeast Michigan over the next 15 years.”⁸ “It is arbitrary and clear error,” Intervenors continued, “for the DEIS to adopt as the main component of its cost-benefit analysis a demand forecast that is vastly greater than the licensee’s own projections and overly optimistic projections by EIA and MISO.”⁹

Possibly to placate Intervenors and other public commenters, the NRC Staff in the Final EIS (8-19) changed its perspective, somewhat, about the 21st Century Plan:

Because the MPSC 21st Century Electric Energy Plan was completed in 2007, it did not include any potential shifts in the demand for electricity due to the economic

⁸Intervenors’ “Motion for Resubmission of Contention 10, to Amend/Resubmit Contention 13, and for Submission of New Contentions” at 11 (January 11, 2012)..

⁹*Id.* at 13.

downturn that began in late 2008. The impacts of the recession were particularly severe in Michigan, due in large part to downturns in automobile manufacturing and supporting industries. Because the industrial sector represented a significant portion of electricity demand, especially in communities hosting automobile manufacturing and assembly facilities, the projections for growth in electricity demand contained in the MPSC Plan were never realized. Concurrent reductions in populations in those same communities eroded the residential electrical customer sector, further reducing the need for electricity. Consequently, the review team concluded it was prudent to determine, based on currently available electricity demand data, whether or not the projections discussed in the MPSC Plan were still relevant.

To remedy this, the Staff in the Final EIS consulted a 2008 North American Electric Reliability Corporation (“NERC”) Long-Term Reliability Analysis (“LTRA”). The LTRA is required to be compiled by federal law. In the FEIS, the NRC Staff compares the forecasts of the LTRA with the 21st Century report.¹⁰ Curiously, at footnote (b) on p. 8-6 of the FEIS, the Staff comments, “*Although more recent LTRAs have since been published, the review team has elected to refer to this 2008 version as the most appropriate analysis for use as independent corroboration of other need for power reports addressed in this analysis*” (Emphasis supplied). Even as it composed the Final EIS, the NRC Staff persisted in its pattern of choosing out-of-date forecasts.

In order for the NRC to incorporate a need for power analysis that is prepared by a state or regional authority rather than the licensee, the NRC must determine, according to its NEPA guidance (the Environmental Standard Review Plan (“ESRP”)) that the analysis is: (1) systematic; (2) comprehensive; (3) subject to confirmation; and (4) responsive to forecasting uncertainties. NUREG-1555 (Oct. 1999); Draft EIS at 8-12. The Final EIS need for power analysis

¹⁰At FEIS p. 8-20: “Based on the confirmatory analysis performed on the Michigan 21st Century Plan using an additional independent assessment (the NERC subregion LTRA), the review team determined the original assessment made by the MPSC Plan is still representative of the potential for future growth in electricity demand in the DTE Service Area. Therefore, the review team determined the original need for power assessment performed for the DEIS is still valid, and no revisions have been made to the analysis or the conclusions of this chapter for purposes of the FEIS.”

violates this guidance document because it remains unresponsive to forecasting uncertainties - indeed, the forecasts are consistently belied by actual demand, as described below. The NRC Staff's decision to freeze the forecast analysis at 2008 is not reasonable and falls well short of the "hard look" expected by NEPA.

3. Demonstration that the Contention is Within the Scope of the Proceeding

The contention is within the scope of the proceeding because it seeks compliance with NEPA and NRC implementation regulations for NEPA, compliance with which must be secured before Fermi 3 may be issued a Combined Operating License.

4. Demonstration that the Contention is Material to the Findings NRC Must Make to License Fermi 3

This contention challenges the NRC's failure to fully comply with NEPA and federal regulations for the implementation of NEPA in its EIS for the proposed Fermi 3. Unless the NRC complies with the procedural requirements of NEPA that are discussed in the contention, it cannot make a valid finding that Fermi 3 should be licensed. The contention is thus material to the findings the NRC must make in order to license this facility.

5. Concise Statement of the Facts or Expert Opinion Supporting the Contention, Along With Appropriate Citations to Supporting Scientific or Factual Materials

A. NERC Long-Term Reliability Assessment comparison

The year 2017 is the last year for an apples-to-apples comparison, and the forecast falls off dramatically, by 17%. In the 2008 NERC Long-Term Reliability Assessment report appears this statement: "The estimated Total Internal Demand (TID) of MISO for the 2008 summer season is 104,800 MW and is forecast to increase to 119,300 MW by 2017 [the final year of forecast data in the 2008 report]. The ECGR [equivalent compound growth rate] of the 2008 TID

forecast is about the same as the 2007 ECGR of 1.4%.¹¹ However, in the 2012 NERC report forecasting demand for 2017, the forecast for 2017 was only 98,729, **17% (seventeen per cent) lower** than the 2008 number. The MISO Peak Compound Annual Growth Rate (%) for summer is 1.05% , and for winter, 1.62%.¹² As NERC itself notes:

Overall projections of load growth for most entities remain at levels below earlier forecasts. The 2012 Annual Energy Outlook from the U.S. Department of Energy's Energy Information Agency (EIA) indicated that recovery from the recent recession will exhibit the weakest growth of any since 1960.¹⁶² As such, near-term increases in demand are not expected to realign with the more robust projections that were anticipated in projections made prior to the 2008 economic recession.¹³

B. EIA and Applicant's forecasts show .2% annual electric demand increase for Michigan, not 1.2%

According to the U.S. Energy Information Administration, the latest 2012 Electricity Market Module (EMM) Reliability First Region / Michigan reference case forecasts a maximum .219% electric annual demand growth rate for the area which includes DTE Energy's service delivery jurisdiction in southern Michigan for any year through 2021.¹⁴ This is approximately one-sixth of the levels of future demand the NRC Staff insists will materialize.

As it happens, DTE's own recent forecast is preferable to those used by the NRC. In a filing before the Michigan Public Service Commission, DTE states, "Service area electric sales are forecast to decrease from temperature-normalized sales of 49,894 GWh in 2011 to temperature-normalized sales of 49,280 GWh in 2017. This represents a 0.2% average annual

¹¹See <http://www.nerc.com/files/LTRA2008.pdf> , p. 167.

¹²http://www.nerc.com/files/2012_LTRA_FINAL.pdf , p. 261.

¹³*Id.* at 102.

¹⁴<http://www.eia.gov/oiaf/aeo/tablebrowser/#release=AEO2012&subject=6-AEO2012&table=62-AEO2012®ion=3-10&cases=ref2012-d020112c>

decrease in sales.” DTE electric sales will decline a total of 3% in the period 2011-2017, and peak demand will drop by 8%. DTE’s testimony in the MI PSC case for “Authority to Implement a Power Supply Cost Recovery Plan in its Rate Schedules for 2013 Metered Jurisdictional Sales of Electricity” Case No. U-17097, p. MBL-6, Testimony of Markus B. Leuker, DTE Manager of Corporate Energy Forecasting; see also Exh. A-8 <http://efile.mpsc.state.mi.us/efile/docs/17097/0001.pdf> , p. 140/248 of .pdf). This decreasing need and demand is based on slow economic recovery from the Great Recession that commenced in 2007-8. “*The massive deleveraging of both household and business debt remains a drag on growth.*” *Id.* p. MBL-9.

NERC and EIA forecasts for demand growth were wrong for 2012. Electric demand in Michigan dropped 1% YTD as of November 2012. According to EIA statistics, Michigan residential and commercial demand each declined 1%, and industrial demand was flat. Electric demand in the Midwest also declined 1% YTD 2012. http://www.eia.gov/electricity/monthly/epm_table_grapher.cfm?t=epmt_5_04_b.

There is some probability that energy efficiency improvements are combining with the continued economic recession to slow electric demand growth in the DTE service area. The Michigan annual energy efficiency improvement mandate ramped up to a full 1% in 2012. Most states in the region also have efficiency mandates, and there may be considerable “natural” improvement under way owing to technological upgrades and the cost of doing business. The role of energy efficiency improvements in demand forecasting seemingly has been overlooked by the NERC and EIA.

Despite the availability of authoritative demand forecast data from recognized sources,

including DTE Energy itself, the NRC Staff clings in the FEIS to the anomalous conclusion that “the original assessment made by the MPSC [21st Century] Plan is still representative of the potential for future growth in electricity demand in the DTE Service Area. Therefore, the review team determined the original need for power assessment performed for the DEIS is still valid, and no revisions have been made to the analysis or the conclusions of this chapter for purposes of the FEIS.” FEIS p. 8-20.

6. Sufficient Information to Show the Existence of a Genuine Dispute With the Applicant and the NRC

The Nuclear Regulatory Commission considered in its response to a 2003 petition for rulemaking whether or not the need for power should be considered in NRC environmental impact statements (68 FR 55910). The NRC concluded (at 68 FR 55910) that:

The need for power must be addressed in connection with new power plant construction so that the NRC may weigh the likely benefits (e.g., electrical power) against the environmental impacts of constructing and operating a nuclear power reactor. ***The Commission emphasizes, however, that such an assessment should not involve burdensome attempts to precisely identify future conditions. Rather, it should be sufficient to reasonably characterize the costs and benefits associated with proposed licensing actions.*** (Emphasis supplied).

In the Final EIS Need for Power analysis, the Staff merely invokes a second over-optimistic forecast to try to legitimate the decrepit 21st Century Plan. It does not reasonably characterize the costs and benefits associated with the proposed licensing of Fermi 3 because it relies upon utterly-stale data which is of no value in predictive power forecasting. Despite the Staff’s persistent attempts at rehabilitating the thoroughly-discredited 21st Century Plan, the estimates of future demand, used to justify a giant new baseload addition to the DTE generating reserves within the next decade, are regularly debunked with the passage of time. Fermi 3 is not reasonably necessary; the NRC Staff has not only not precisely identified future conditions, it is

distressingly inaccurate in describing general forecast trends.

The NRC Staff's reliance in the FEIS on the 21st Century Plan forecasts in combination with the LTRA continues to confound reason even as it contravenes NRC guidance. The NRC's NEPA guidance document - the ESRP - requires that in order for the NRC to incorporate a Need for Power analysis that is prepared by a state or regional authority rather than the licensee, the NRC must determine that the analysis is: (1) systematic; (2) comprehensive; (3) subject to confirmation; and (4) responsive to forecasting uncertainties. NUREG-1555 (Oct. 1999). The FEIS's Need for Power analysis violates this guidance document because it is neither "subject to confirmation" nor "responsive to forecasting uncertainties."

Neither the 21st Century Plan nor the now-dated LTRA have properly accounted for the 2008 economic recession in their forecasts, and they cannot reasonably be considered to be "responsive to forecasting uncertainties" in light of electricity market conditions since their preparation.

The conventional wisdom that historically has applied to new power plant applications was not *whether* the utility will need additional generating capacity, but *when*. *Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2)*, LBP-80-30, 12 NRC 683, 691 (1980). The standard for judging the "need-for-power" in NRC licensing was whether a forecast of demand is reasonable and additional or replacement generating capacity is needed to meet that demand. *Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4)*, ALAB-490, 8 NRC 234, 237 (1978). Here, the forecast for demand advanced by the NRC Staff in the FEIS is not reasonable support for the conclusion that Fermi 3 provides the solution. The question respecting Fermi 3 is whether the weak Michigan economy and no-growth electricity

forecasts would benefit from addition of a huge new expensive baseload generating facility which will leave DTE's system with overcapacity of as much as 80% even as it crowds out development of less expensive, more job-rich and environmentally benign alternatives - which have the distinct advantage of being incremental additions to the generating system.

The NRC is obliged to make reasonable forecasts of the future. *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-455, 7 NRC 41, 48, 49 (1978); *Hydro Res., Inc.*, LBP-04-23, 60 NRC 441, 447 (2004), *review declined*, CLI-04-39, 60 NRC 657 (2004). The NRC Staff's demand forecast is not a reasonable forecast of the future need and economic justification for the proposed Fermi 3 plant. The clumsy economics articulated in the FEIS directly affect meaningful consideration of alternatives to building the nuclear plant. Until the matter of demand is realistically addressed, there cannot be meaningful discussion of preferable alternatives. If, under NEPA, the Commission finds that environmentally preferable alternatives exist, then it must undertake a cost-benefit balancing to determine whether such alternatives should be implemented. *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), ALAB-660, 14 NRC 987, 1004 (1981), citing *Consumers Power Co.* (Midland Plant, Units 1 & 2), ALAB 458, 7 NRC 155 (1978).

The NRC Staff's imponderable forecast analysis means that the NEPA "hard look" has not been given to objective need for the plant and indirectly, the FEIS discussion of alternatives. Photovoltaic solar, for example, is likely to be deployed on an industrial scale by the early 2020's. "Some factual basis (usually in the form of the Staff's environmental analysis) is necessary to determine whether a proposal 'involves unresolved conflicts concerning alternative uses of available resources - the statutory standard of Section 102(2)(E)." *Virginia Electric & Power Co.*

(North Anna Power Station, Units 1 & 2), LBP-85-34, 22 NRC 481, 491 (1985), quoting *Consumers Power Co.* (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312, 332 (1981). A “factual basis” is missing from the NRC Staff’s presentation on need and demand in the FEIS. Intervenors must be accorded the right to adjudicate their claim that need and demand is woefully out of touch with reality in that document, and that consequently, NEPA has been violated.

VI. NEW/RESUBMITTED CONTENTION 23

MOTION TO ADMIT NEW CONTENTION REGARDING THE ENVIRONMENTAL IMPLICATIONS OF THE TRANSMISSION CORRIDOR FOR THE FERMI 3 NUCLEAR POWER PLANT

Now come Intervenors, by and through counsel, and hereby move to admit a new contention regarding the lack of NEPA compliance regarding the transmission corridor for the proposed Fermi 3 Nuclear Power Plant.

Pursuant to 10 C.F.R. § 2.309(f)(1), Intervenors assert a new contention, or alternatively, resubmit their former Contention 23, as amended, seeking consideration of new and significant information from the Final Environmental Impact Statement (“FEIS”) for the COLA for Fermi 3 which is relevant to completion of NEPA analysis of the transmission corridor. Specifically, Intervenors request a hearing on the inadequately-disclosed and -described environmental implications of having an operational transmission line corridor extending for nearly thirty (30) miles between the regional electric grid and Fermi 3.

Pursuant to the National Environmental Policy Act (“NEPA”), this contention comprises the only way of ensuring that the environmental implications of the transmission corridor will not be segmented from the Fermi 3 COLA, and disclosed, if at all, in a future environmental impact statement, instead of in this proceeding. The transmission lines comprise the *sine qua non* of the

Fermi 3 power plant project: if they are not constructed, then there is no interconnection between Fermi 3 and the electricity markets to which its power is to be dispatched. In the FEIS, the building of Fermi 3 and the transmission infrastructure are closely related (FEIS p. 3-18): "The 350-ft-by-500-ft Milan Substation may be expanded to an area about 1000 ft by 1000 ft to accommodate the Fermi 3 expansion (Detroit Edison 2011 b)." The extension of the transmission lines and the expansion of the substation are necessitated if Fermi 3 is built. There is much evidence from the NEPA document itself where the FEIS improperly falls short of detailing and analyzing many impacts from the corridor portion of the Fermi 3 project.

1. Statement of Contention 23 (New/Amended)

The FEIS for a combined operating license for Fermi 3 fails to satisfy the requirements of NEPA because it does not address the environmental effects of the associated transmission line corridor extending nearly thirty (30) miles from the proposed plant site, despite the fact that the transmission lines are indispensable to completion of the power plant project, and the NRC Staff was ordered to analyze the transmission corridor within the FEIS by the Atomic Safety and Licensing Board. The FEIS fails to disclose what the U.S. Army Corps of Engineers has determined to be the least environmentally damaging practical alternatives (LEDPA's) under the Clean Water Act, for some 30 jurisdictional wetlands and other water bodies within the transmission corridor, and there is no detailed discussion of mitigation measures which would be implemented to compensate for the water resource and upland damage.

2. Brief Explanation of the Basis for the Contention

This contention is based on the ASLB's June 21, 2012 ruling in this litigation. In its "Memorandum and Order (Ruling on Motion for Leave to Late-file Amended and New Con-

tentions 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, the ASLB wrote:

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 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 as a regulatory agency cannot credibly maintain that even if the transmission corridor construction falls in the category of “preconstruction activity,” that environmental impacts from that activity fall outside NRC authority:

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. 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. The ASLB concluded that “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.

In a later order, the ASLB noted that the transmission corridor includes habitat for the Eastern Fox Snake, a state-threatened reptile species that is the subject, as to the Fermi 3 plant site, of forthcoming adjudication (Contention 8):

[T]he review team concludes that *the impacts from construction and preconstruction activities for Fermi 3 on terrestrial resources on the Fermi site and transmission line corridor would be SMALL to MODERATE* The potential for MODERATE impacts is limited to possible adverse effects on the eastern fox snake. The staff’s evaluation of the potential impacts on the eastern fox snake recognizes the potential for mitigation measures proposed by Detroit Edison. . . and approved by the MDNR to significantly reduce impacts on that species, thereby leading to SMALL impacts, but acknowledges the possibility of MODERATE impacts if proposed mitigation is not implemented as described in their plan.

(Emphasis supplied). “Memorandum and Order (Denying Motion for Reconsideration of the Board’s Order Denying Second Motion for Summary Disposition of Contention 8),” *Detroit Edison Company* (Fermi Nuclear Power Plant, Unit 3), ASLBP No. 09-880-05-COL-BD01 (January 30, 2013), p. 5 (citing p. 4-47 of FEIS).

The ASLB *sua sponte* ordered NEPA consideration within the Final EIS of the effects of construction and the as-built presence of transmission lines through and within the corridor, which the ASLB also considers to be a zone of habitat for the state-threatened Eastern Fox Snake.

Intervenors urge that the ASLB’s order that the transmission corridor be fully considered and analyzed within the Fermi 3 EIS is valid and one upon which the Intervenors have a right to rely. 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 ASLB has this prerogative 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). 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).

Intervenors did not know what the NRC Staff's response to being ordered to include the transmission corridor within the FEIS would be prior to the availability of the FEIS in January 2013, and so are proffering this renewed and amended contention in a timely fashion.

A. Section 404 controversies

At Section 1.1.1.2 of the FEIS (p. 1-5) appears the statement that "This EIS provides environmental information the USACE needs to complete, in part, its NEPA and public interest factor reviews and draw conclusions regarding the least environmentally damaging practicable alternative (LEDPA) and the public good for its permitting decision." If that is correct, then the Corps of Engineers is a party to having piecemealed the findings it supposedly must have under § 404 of the Clean Water Act, 33 U.S.C. § 1344, into two (2) parts: NEPA and public interest factor reviews (although both are dubious based on the lack of fact-specific disclosures in the FEIS); and the findings which the Corps must render concerning least environmentally destructive practical alternatives (LEDPA's), which findings will be made well after completion

of the FEIS. Moreover, the Corps actually admits that it has piecemealed its § 404 permitting into pre-FEIS and post-FEIS stages:

The USACE's independent regulatory permit decision documentation will reference relevant analyses from the EIS and, as necessary, include a *supplemental* public interest factor review, a CWA 404(b)(1) evaluation, a *supplemental* evaluation of cumulative impacts, *and other information and evaluations* that may be outside the NRC's scope of analysis and not included in this EIS. . . .

(Emphasis supplied). There admittedly is no requirement that § 404 permitting be concluded contemporaneously to approval of the FEIS. But the § 404 permitting will not involve "supplementation," because 100% of the informational basis will be generated at the future point when the matter of wetlands permitting is taken up.

The NRC Staff (FEIS p. 1-5) claims that "In this EIS, USACE evaluates the impacts of certain construction and maintenance activities proposed in waters of the United States, including jurisdictional wetlands that would be affected by the proposed activities." But a term search for "jurisdictional wetlands" throughout the 4 volumes of the FEIS produces nothing but parrottings of the term "jurisdictional wetlands" as being part of the § 404 process. There are no maps, no coordinates, no legal descriptions, no location descriptors, no problem descriptions, identifications of transmission tower sites, or analysis of environmental effects whatsoever within "jurisdictional wetlands" known to be present in the transmission corridor. In fact, at FEIS p. F-54 it says, "Wetland delineation surveys have not yet been conducted to determine the precise locations and extent of wetlands." And at FEIS p. 4-44 appears the admission, "A conceptual transmission line corridor has been identified, but wetland delineation surveys have not yet been conducted to determine the precise locations and extent of wetlands." Finally, Appendix J, p. J-2 of the FEIS contains this unsupported and unequivocal admission that within

the FEIS there is no attempt to identify jurisdictional wetlands in the transmission corridor:

Any subsequent changes to the proposed site plan and/or activities as a consequence of the USACE-identified LEDPA would result in fewer adverse impacts on waters of the United States than identified in the Final EIS.

These admissions prove violations of NEPA's requirement that disclosure of direct and cumulative environmental impacts be disclosed within the FEIS. Where adverse effects can be predicted, and the agency is in the position of having to balance the adverse effects against the projected benefits, the matter must, under NEPA, be decided in light of an environmental impact statement. *Sierra Club v. Marsh*, 769 F.2d 868, 880 (1st Cir.1985); 40 C.F.R. § 1508.27(b)(1), which says that "[a] significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial."

B. Disparate Assertion of Transmission Infrastructure Footprint

There is an additional basis for contention admissibility. There is a dispute of fact between the Environmental Report ("ER") and the DEIS and FEIS, upon which Intervenors should be allowed to resubmit their previous Contention 23. In the FEIS (at p. 2-46), it states:

For a portion of this eastern 18.6-mi segment of the proposed route, reconfiguring existing conductors may allow for the use of existing transmission infrastructure without the need for building additional transmission infrastructure.

In the Draft EIS (DEIS), the comparable/analogous statement on this issue was:

By reconfiguring conductors, new lines in this portion of the route could use existing towers, but placement of additional transmission infrastructure may be necessary.

DEIS p. 3-17. In the Environmental Report (p. 3-17) appears this passage:

The first 18.6 mi of transmission lines (going west and north from Fermi) would be installed alongside the 345-kV lines that are already in place (Figure 3-8). By reconfiguring conductors, new lines in this portion of the route could use existing towers, but placement of additional transmission 27 infrastructure may be necessary.

To summarize, a change of direction by the NRC Staff took place somewhere between publication of the DEIS and the FEIS. Additional infrastructure development within the 18.6 mile stretch of the transmission corridor appears now to be passe. There is no explanation of that change of position, which is consistent with the unfortunate paucity of descriptive information in the NEPA documents about the anticipated footprint(s) from the transmission line infrastructure. And now, citing no specifics, the NRC Staff claims that instead of further disruption within the transmission corridor, there will be less. The Staff has changed its position on a major construction issue in the transmission corridor, yet provided the public with no supportive explanation.

3. Demonstration that the Contention is Within the Scope of the Proceeding

The contention is within the scope of the proceeding because it seeks compliance with NEPA and NRC-implementing regulations, as well as the Atomic Energy Act. The interconnection to the offsite regional grid which would be attained via the transmission corridor would comprise the primary electrical supply needed to run the safety and cooling systems which are key to controlling the temperature of the Fermi 3 core in the event of loss of onsite power and battery failure. Compliance with both federal statutes is obligatory before Fermi 3 may be licensed.

4. Demonstration that the Contention is Material to the Findings NRC Must Make to License Fermi 3

This contention challenges the NRC's failure to fully comply with the Atomic Energy Act as well as NEPA and its implementing federal regulations. Until the NRC complies with the procedural requirements of NEPA that are discussed in the contention, it cannot make a valid finding that Fermi 3 should be licensed. And if there is no NEPA compliance, it follows that the

Atomic Energy Act will be violated. Therefore the contention is material to the findings the NRC must make in order to license this facility.

5. Concise Statement of the Facts or Expert Opinion Supporting the Contention, Along With Appropriate Citations to Supporting Scientific or Factual Materials

A. 'Preconstruction' segmentation of transmission corridor from FEIS

Contrary to the Staff assertions (FEIS Appendix M, p. M-1) that "The final environmental impact statement (EIS) presents integrated evaluations of potential environmental impacts from the proposed Fermi 3 facilities, organized by environmental resource." It is apparent that the Staff has intentionally failed to integrate the transmission line impacts into the FEIS, despite being ordered to do so by the ASLB. For example, at FEIS p. M-1 appears this obstinate statement of the Staff's position, repeated at various turns throughout the FEIS:

Offsite transmission lines are not part of the Fermi 3 COL application, and any such lines would be built by ITCTransmission rather than Detroit Edison. Under NRC regulations in 10 CFR 50.10(a)(2)(vii), building of transmission lines is a preconstruction activity not subject to the Nuclear Regulatory Commission's regulatory authority. However, many preconstruction activities are within the regulatory authority of local, State, or other Federal agencies, and certain preconstruction activities require a permit from the U.S. Army Corps of Engineers.

This flies in the face of the ASLB ruling. The NRC Staff remains stuck at its DEIS arguments and rationales, which the ASLB has firmly ruled were not persuasive in light of its finding of unacceptable segmentation under NEPA of the transmission corridor from the plant construction and licensing.

There is an additional fact that proves that the NRC Staff has illegally segmented the transmission corridor from consideration as part of the overall power plant project. Section 2.2.2.1 of the Environmental Report states, "The 345 kV transmission system which provides power to and receives power from Ferm 2 is anticipated to serve Fermi 3." ER, Rev. 2, p.2-21

(Feb. 2011). In other words, a tie-in of Fermi 3 to the regional power grid is an obligatory safety step as well as the *sine qua non* of DTE's business plan. The Atomic Energy Act would be violated if there were no interconnection.

B. Void of discussion of pre-operational impacts during construction phase

Although the FEIS admits (FEIS p. 3-17) that “[t]ransmission lines and corridors are considered to interface with the environment during operation, because there are potential continuing impacts from electric fields, noise, and corridor maintenance,” there is no meaningful discussion of pre-operational impacts during construction. The thrust of the FEIS sections which mention the transmission corridor at all are speculative and do not reflect commitment to construction, much less to compliance with NEPA:

By reconfiguring conductors, new lines in this portion of the route could use existing towers, but placement of additional transmission infrastructure may be necessary. The remaining 10.8 mi of transmission lines to the Milan Substation would be located in an undeveloped portion of the transmission line corridor that was previously authorized for transmission use (Figure 3-8). Some transmission tower footings were installed as part of the original Fermi 3 plan, but the corridor has been minimally maintained. The 350-ft-by-500-ft Milan Substation may be expanded to an area about 1000 ft by 1000 ft to accommodate the Fermi 3 expansion (Detroit Edison 2011b). Most of the 18.6-mi portion of the route crosses agricultural land, but the undeveloped 10.8-mi. portion crosses a variety of land cover types including forest, agricultural lands, rural residential areas, and a golf course.

Id. DTE repeatedly distances itself from its NEPA responsibilities in the FEIS when it professes that “The offsite portions of the proposed Fermi 3 transmission system and associated corridors would be owned and operated by ITCTransmission. Detroit Edison has no control over the construction or operation of the transmission system and is not involved in the evaluation or decision making for proposed changes to or design of the transmission system.” FEIS p. 3-18. DTE may not insulate itself from the coverage of NEPA merely by conveniently eschewing its

obvious control over contracting.

C. Dispersion of transmission corridor impacts discussion throughout FEIS

Discussions of the transmission corridor impacts are scattered widely in the FEIS - a practice that has been found to be a symptom of violation of NEPA. *National Parks & Conservation Ass'n v. Bureau of Land Management*, 586 F.3d 735, 750¹⁵ (9th Cir. 2009). Table M-1 in the FEIS lists the sections and subsections of Chapter 2 (Affected Environment), Chapter 4 (Construction Impacts at the Proposed Site), Chapter 5 (Operational Impacts at the Proposed Site), and Chapter 7 (Cumulative Impacts) that contain pertinent information related to the review team's evaluation of potential impacts from the transmission lines. Then at p. M-1 appears this qualifier:

The review team considered transmission line impacts for all environmental resource areas addressed in Chapters 2, 3, 4, 5, and 7, not just those resources highlighted in Table M-1. *However, the discussion for other resources is limited in the final EIS text because construction and operation of transmission lines have limited relevance to impacts on these resource areas.*

(Emphasis supplied). So the scattered bits of discussion serve the purpose of diffusing public information and making meaningful analysis by Intervenors elusive at best.

D. All aspects of the transmission corridor remain in play

¹⁵“In determining whether an EIS fosters informed decision-making and public participation, we consider not only its content, but also its form. [Citation omitted]. Here, the discussion of eutrophication is neither full nor fair with respect to atmospheric eutrophication. A reader seeking enlightenment on the issue would have to cull through entirely unrelated sections of the EIS and then put the pieces together. To find the brief discussion of atmospheric eutrophication, a reader must begin in the ‘Biological Resources’ section, which then refers to data from the ‘Air Quality’ section, and then with respect to effects only on Joshua Tree, not the surrounding area. Rather than address eutrophication up front, the BLM instead attempts to cobble together a ‘hard look’ from various other analyses as varied as air quality and disease vector control. This patchwork cannot serve as a ‘reasonably thorough’ discussion of the eutrophication issue.

The route of the transmission lines will be brand new, and subject to change, until well after the FEIS stage. Everything remains in play.

The mysteries of the transmission corridor are not dispelled by language such as this (FEIS p. 2-10):

ITC Transmission *has not yet formally announced a route* for the offsite portion of the proposed new transmission line serving Fermi 3. *Detroit Edison expects that the proposed new transmission line would be built* within the existing Fermi 2 transmission corridor for approximately 18.6 mi extending outward from the Fermi site boundary. *Detroit Edison expects that the remaining 10.8 mi, extending to the Milan Substation, would be built* within an undeveloped right-of-way (ROW) possessed but not yet used by ITC Transmission (Detroit Edison 2011a). The route for the undeveloped ROW crosses mostly agricultural and forest land with scattered wetlands. No part of the route crosses designated or protected natural or recreational areas or areas with planned minerals development, although the route likely crosses some prime farmland. Land use restrictions within the corridor segments are governed by agreements between ITC Transmission and individual property owners along the corridor (Detroit Edison 2011a).

(Emphasis supplied). Obviously, wetlands and associated habitat of, for example, the Eastern Fox Snake could be eradicated by ITC Transmission without notification to the public. Since there has been no compliance with the federal Endangered Species Act, discussed *infra*, it is possible that as-yet unidentified plant or animal species could be wiped out. This is the danger of deferring the environmental investigation until after the licenses are granted. The FEIS is the final notification to the public. DTE's "expectations" of the route and its effects do not substitute for actual knowledge.

On FEIS pp. 4-8 to 4-9 appears mention that "approximately 10.8 mi of the corridor would be sited along new undeveloped right-of-way," the precise routing remaining undesignated. "New towers would require foundation excavations, and the new lines would be constructed, owned, and operated by ITC Transmission. The Milan Substation currently occupies 4 ac; it is likely that the substation footprint would be expanded to an area of approximately 23

ac, encompassing approximately 19 ac of additional land, to accommodate the three new transmission lines from Fermi 3 (Detroit Edison 2011a).” *Id.* This represents a four-fold expansion of the Milan substation, with no accompanying discussion of the effects of that much larger footprint. The FEIS continues:

The 10.8 mi corridor to the Milan substation is currently undeveloped, and building this portion of the line could disturb 393 ac of mostly forested and agricultural lands. A total of 1069 ac of land would be occupied by the 29.4-mi-long transmission line corridor.

FEIS p. 3-26. An additional 143 acres would be temporarily disrupted for temporary construction “laydown” activities:

A total of 143 ac have been identified for possible construction laydown areas (Detroit Edison 2011b): 60 ac in an agricultural field next to the proposed Fermi 3 switchyard, 20.5 ac north and west of the intersection of Fermi Drive and Doxy Road, and 61 ac located in separate parcels around the Quarry Lakes (Figure 3-2). Existing topsoil would be removed, geofabric would be laid down, and the areas would be surfaced with rock. It is anticipated that construction laydown areas would be used during construction and then restored following project completion.

FEIS p. 3-26. While there is mention of temporary disruption, there is no examination nor analysis of the disruptions to the environment that are likely. The use of temporary fencing while new lines are under construction could pose significant impacts for endangered, not to mention common, migrating species.

While “sediment and erosion control” will be used during construction, FEIS p. 4-9, it remains that forested areas will be denuded¹⁶ and will be subjected to periodic clearcutting throughout the occupation by the transmission lines. Then, herbicides will be applied, which will

¹⁶From FEIS p. 4-29: “the review team estimates that approximately 244 ac of forest cover would be permanently cleared to build the transmission line, including approximately 170 ac of deciduous forest and 74 ac of woody wetlands. The deciduous forest would be permanently converted to grassland or old field habitat, and the woody wetlands would be permanently converted to emergent wetlands.

not allow new sapling trees to grow to maturity. The deforestation will thus be permanent and biological and botanical diversity will be destroyed. The environmental effects remains un-discussed, other than to mention that deforestation will occur.

Since much of the acreage used for the corridor will be farmland, it is likely that livestock will graze beneath transmission lines, yet there is no discussion of the health and productivity effects from electromagnetism in proximity to 345Kv lines might have on agricultural animals (or their human tenders). There further is no mention of pesticide and herbicide exposure potential to livestock, nor how such exposures would harm the food supply.

E. Segmentation inhibits planning and disclosure of mitigation measures

With surprising alacrity, the NRC Staff admits to allowing segmentation of the transmission corridor from the remainder of the Fermi 3 project: “In siting the new transmission line, Detroit Edison would contact the State Historic Preservation Office (SHPO), FWS, MDEQ, and USACE.” FEIS p. 4-9. According to the FEIS (p. 4-52), “[a]ccording to FWS National Wetland Inventory mapping, the *identified transmission route crosses about 30 wetlands or other waters that may be regulated by the USACE and/or MDEQ (FWS 2010)*” (Emphasis supplied). Nevertheless, DTE and the NRC Staff have determined that mitigation measures which might be exacted by regulators will remain only prospective and that they will not be disclosed within the Fermi 3 FEIS.

For instance, water quality concerns in the wetlands are implicit in “vegetation management” - but use of herbicides, among other activities (FEIS) remains undetailed. This is the principal narrative addressing the topic:

It is expected that ITCTransmission would continue maintenance activities currently conducted on the existing transmission line corridors extending out from the

Fermi site. It is expected that ITC Transmission would extend these same practices to the new corridor and substation facilities. These activities include periodic removal and trimming of trees, mowing of herbaceous and low woody vegetation and cutting of large shrubs, and the use of pesticides and herbicides applied with either ground or aerial spraying methods. The corridors would be periodically inspected by helicopter or ground-patrolled to ensure that they are in proper condition for safe operation of the transmission line (Detroit Edison 2011a). Vegetation clearing would be limited to the minimum needed to allow access for maintenance vehicles and to prevent the growth of trees and other vegetation that could interfere with the operation of the lines (Detroit Edison 2011a).

FEIS p. 5-4.

Ongoing maintenance activities associated with transmission line operations would also include “[o]ccasional access to the transmission line corridors by maintenance vehicles,” which “may cause some temporary erosion and compaction along certain areas, especially if heavy vehicles are used in wet weather conditions and on any access roads that have gravel or other unpaved surfaces (Detroit Edison 2011a).” FEIS p. 5-3. Essentially, the FEIS admits that there will be heavy equipment driven through wetland areas, without any examination or analysis of what those irregular intrusions would mean under § 404 of the Clean Water Act, 33 U.S.C. § 1344 . Nor is there revelation of potential connections between heavy equipment activity and the admitted “[s]iltation of streams and wetlands and the disturbance of wildlife and wildlife habitat” which “may also occur during maintenance activities where the corridor crosses floodplains and wetlands.” FEIS p. 5-3. And while there is an admission (FEIS pp. 5-3 to 5-4) that “water diversion measures would be used to direct water off the sides of the access roads and prevent erosion impacts,” it remains only that “[t]he review team expects that Detroit Edison and . . . ITC Transmission. . . would be required in their operations to use best management practices (BMPs) outlined in a soil erosion and sedimentation control (SESC) plan or right-of-way (ROW) maintenance manual used by Detroit Edison and/or ITC Transmission.” There is not even a

commitment, but only a speculation. There is no examination or analysis of what “water diversions” might mean to wetlands and ephemeral pools.

The nondisclosure within the FEIS of mitigation efforts aimed at the transmission corridor grossly violates NEPA. 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). That is missing here. 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., threatened or endangered species, cultural or historic sites*) and the proposed action's impacts on them. . . .” (Emphasis supplied). 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,” 76 Fed. Reg. 3843, 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.

CEQ regulations require an agency to discuss possible mitigation measures in defining the scope of the EIS, 40 CFR § 1508.25(b), in discussing alternatives to the proposed action, § 1502.14(f), and consequences of that action, §1502.16(h), and in explaining its ultimate decision, § 1505.2(c).” It is not enough to merely list possible mitigation measures. *San Juan Citizens Alliance v. Stiles*, 654 F.3d 1038, 1053-54 (10th Cir. 2011), citing *Colorado Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1173 (10th Cir. 1999). Consistent with CEQ regulations, the EIS must include a “reasonably complete discussion of possible mitigation measures.” *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 473 (9th Cir.2000). While according to *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352-3 (1989), courts may not require “a fully developed plan that will mitigate environmental harm before an agency can act,” and there is no substantive requirement that mitigation measures be implemented, *id.* at 353, it remains that the agency must discuss mitigation measures “in sufficient detail to ensure that environmental consequences have been fairly evaluated. . . . A mere listing . . . is insufficient.” *Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998) (internal quotations and citations omitted); *San Juan Citizens Alliance v. Stiles*, *supra*, 654 F.3d 1053-54; *Northwest Indian Cemetery Protective Assoc. v. Peterson*, 795 F.2d 688, 697 (9th Cir. 1986), *rev'd on other grounds*, *Lyng v. Northwest Indian Cemetery Protective Assoc.*, 485 U.S. 439, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988). Some level of detail is necessary as a prerequisite to assuring that the agency has taken a "hard look" at the environmental consequences of its proposed action. *Robertson*, 490 U.S. at 352.

F. No Endangered Species Act consultation

Remarkably, DTE has not undertaken an Endangered Species Act consultation or

biological assessment respecting the transmission corridor, nor does the NRC Staff seem to understand that the NRC's own compliance with the ESA is pertinent to the FEIS:

FWS (2009) identified several terrestrial species that are listed under the ESA or candidates for listing that could occur in the area of the proposed offsite transmission line corridor, some of which are not known to occur at the Fermi site. Species identified as potentially present in Monroe County are the Indiana bat, Karner blue butterfly, and eastern prairie fringed orchid. For Wayne County, the species identified are the Indiana bat and eastern prairie fringed orchid. For Washtenaw County, the species identified are the Indiana bat, Mitchell's satyr butterfly, and eastern prairie fringed orchid. FWS also noted that the eastern massasauga, a candidate species, may be present in Washtenaw and Wayne Counties.

Prior to installation of the offsite transmission line, FWS and MDNR would need to review detailed information on the transmission line corridor. The agencies may, at that time, require surveys of the proposed transmission line corridor for the presence of important species and habitat.

FEIS p. 2-61. On FEIS pp. 2-62 through 2-65 are listed 108 "Federally and State-Listed Terrestrial Species That Have Been Observed in Monroe, Washtenaw, and Wayne Counties and May Occur within the Transmission Line Corridor" (108 species listed: 80 plants; 8 insects; 2 amphibians; 4 reptiles; 12 birds; 2 mammals). The absence of any consultations yet between DTE and the U.S. Fish and Wildlife Service and the Michigan Department of Natural Resources leaves the FEIS critically incomplete and as a practical matter leaves mitigation up to a contractor - ITC Transmission - which is not a party to these proceedings and which has not participated in any way in securing regulatory approvals which are disclosed within the FEIS.¹⁷ Lack of biological

¹⁷From FEIS p. 5-41: "Transmission lines from Fermi 3 would be owned by Detroit Edison up to the point of their interconnection with the proposed Fermi 3 switchyard. Outward from interconnection with the Fermi 3 switchyard, ITC Transmission would own the lines and other transmission system equipment. Although Detroit Edison will maintain ownership and control of the land in the new onsite transmission corridor, Detroit Edison expects to contract with ITC Transmission to maintain the transmission towers and lines located on Detroit Edison property (Detroit Edison 2011a).

Accordingly, the impacts from operation and maintenance of transmission lines discussed in this EIS are based on publicly available information and reasonable expectations of the configurations and practices that ITC Transmission would likely follow based on standard industry practice."

assessment and agency consultation deprives the public entirely of its participation/comment opportunity on Endangered Species Act considerations, and as to NEPA, participation and comment opportunity respecting state-endangered species.

For example, the fact that there will be a dramatic change in the wetland type of the 93.4 acres of wetlands in the as-yet undeveloped western, 10.8 mile stretch of corridor has serious but unknown scientific implications for flora and fauna:

Approximately 93.4 ac of forested wetland occur within the expected transmission line corridor; most, if not all, would be permanently cleared of trees (Detroit Edison 2011a). These wetlands would be converted to scrub-shrub or emergent wetlands to maintain clearance for the conductors.

FEIS p. 4-44. Other planned environmental changes will stress creatures, whether endangered or not:

Electricity transmission systems have the potential to affect terrestrial ecological resources through corridor maintenance, bird collisions with transmission lines and towers, and electromagnetic fields (EMFs) (NRC 1996).

FEIS p. 5-22. Herbicides and pesticides will be used in an area with at least 30 jurisdictional water courses or bodies of water, and there will be wetlands degradation from heavy vehicles. And without a shred of site-specific data from a biological assessment or otherwise, the FEIS (at p. 5-23) relies on conclusory and dated 1996 NRC license renewal GEIS language to conclude that “bird collisions associated with the operation of transmission lines do not typically cause long-term reductions in bird populations” and that “the impacts on wildlife populations from continued ROW maintenance are not typically significant.” In the western 10.8 mile stretch, “three wetlands are much wider, at 1302 ft, 903 ft, and 1339 ft (Detroit Edison 2011a). Since the upper limit of spans between transmission structures is typically 900 ft, it is anticipated that development of this undeveloped segment of corridor might require the placement of one tower

or pole in each of these wetlands.” FEIS p. 2-65.

Despite this complex of human intrusions which will be visited upon wildlife and wild plants, the NRC Staff anomalously insists that “The overall effect of operation of the new line on wildlife is expected to be *minor* because maintenance activities would be limited and because most of the corridor has been previously developed and, in less-maintained areas, there are existing disturbances such as farming, neighboring residences, and roadways.” FEIS p. 5-23.

For any federal action that may affect a threatened or endangered species, the agency contemplating the action must undertake a "Section 7" consultation with the consulting agency to ensure that the federal action is not likely to jeopardize "the continued existence of" an endangered or threatened species and will not result in the "destruction or adverse modification" of the designated critical habitat of the listed species. 16 U.S.C. §1536(a)(2); *see Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059, 1063 (9th Cir. 2004). Here, the NRC is required to ask FWS in writing whether, in its opinion, a listed or proposed species may be present in the action area. 16 U.S.C. §1536(c)(1). If FWS responds that no protected species are present, the consultation requirement ends. If, however, FWS responds that there may be an endangered or threatened species in the action area, the agency is required to prepare a biological assessment (“BA”), which identifies any listed species within the area and evaluates the potential effects of the action on those species. 16 U.S.C. §1536(c)(1); 50 C.F.R. §402.02.

The consultation process concludes with the consulting agency issuing a Biological Opinion. *See Ariz. Cattle Growers' Assoc. v. United States Fish and Wildlife Serv.*, 273 F.3d 1229, 1239 (9th Cir. 2001). This opinion must address both species jeopardy and critical habitat by considering the current status of the species, the environmental baseline, the effects of the

proposed action, and the cumulative effects of the proposed action. *Gifford Pinchot*, 378 F.3d at 1063. In formulating its biological opinion, the agency "shall use the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2); *see* 50 C.F.R. § 402.14(g)(8); *Pacific Coast Fed'n of Fishermen's Ass'n, Inc. v. National Marine Fisheries Service*, 265 F.3d 1028, 1034 (9th Cir. 2001).

The BA requirement can be fulfilled as part of the agency's procedural requirements established by the NEPA. 16 U.S.C. §1536(c)(1). Similarly to NEPA, a BA is required for all federal actions which constitute a "major construction activity," whether or not a listed species is suspected in the area. 50 C.F.R. §402.12(b)(1). A "major construction activity" is defined as "a construction project (or other undertaking having similar physical impacts) which is a major Federal action significantly affecting the quality of the human environment as referred to in [NEPA]." 50 C.F.R. §402.02. The term "major" reinforces the term "significantly," but has no meaning independent of it. *Andrus v. Sierra Club*, 442 U.S. 347, 364 n. 23, 99 S.Ct. 2335, 2344 n. 23, 60 L.Ed.2d 943 (1979); 40 C.F.R. § 1508.18. The regulations promulgated to institute NEPA also specifically provide that "major" actions include approving permits for construction. 40 C.F.R. §1508.18(b)(4).

When an agency prepares an EIS, it is complying with the BA requirement of 16 U.S.C. § 1536(c), provided that one of the environmental impacts discussed is the impact on threatened and endangered species. *Sierra Club v. U.S. Army Corps Engineers*, 295 F.3d 1209, 1220 (9th Cir. 2002). The Fermi 3 FEIS reflects that threatened/endangered species impacts investigation and analysis has been done only for the site of the proposed plant, not the transmission corridor. There is no biological assessment included within the FEIS, merely a suggestion that one will be

performed in the future. This deprives the public of an adequate comment opportunity at the NEPA document stage; all it has before it is a “plan to have a plan.”

The harm to a public plaintiff in a NEPA circumstance is manifest when an agency makes a decision without sufficiently considering information NEPA requires be placed before the decision-maker and public. *Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989). That information includes comments and feedback from public participants. The courts expect that “Persons challenging an agency's compliance with NEPA must structure their participation so that it . . . alerts the agency to the [parties'] position and contentions, in order to allow the agency to give the issue meaningful consideration.” *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764 (2004). Plaintiffs “waive their right to challenge [the final NEPA result]” if “they did not raise that issue during the administrative process.” *Protect Lake Pleasant, LLC v. Connor*, No. CIV 07-454-PHX-RCB, 2010 WL 5638735, at *37 (D.Ariz. July 30, 2010).

Here, Intervenors and the public are being deprived of a procedural right accorded them under NEPA by not having access to the result of a transmission corridor-related ESA consultation and any biological assessment that results, as a part of the FEIS stage.

G. Number and location of high-voltage lines in corridor remains indeterminate

Detroit Edison anticipates that three new 345-kV transmission lines would be needed to serve Fermi 3. These lines would connect Fermi 3 to the Milan Substation and would likely follow a single 29.4-mi route. FEIS p. 7-7. From the lack of confirmation as to how many lines are to be strung, there can be no firm conclusion as to whether there will be multiple corridors, whether the corridors' footprint(s) can be minimized, nor how to measure the electromagnetic effects on flora and fauna, nor the bird collisions that might be occasioned. The environmental

effects could be multiples and are not even firmly routed.¹⁸ This major activity remains unquantified, even at the end of the NEPA phase.

Approximately 10.8 miles of the 29.6 mile route would cross undeveloped rural land, where the environmental effects are considerably less documented. Making matters worse, the FEIS agrees that “[a]t this time, it is not known whether other utility transmission lines might be developed in the area that could contribute to cumulative impacts.”

This latter conclusion seems contrived. Without much data, the NRC Staff’s assumption is that environmental impacts will be “small,” but it is coupled with an admission that cumulative effects are unknown. In the following hubristic conclusion, the NRC Staff admits that cumulative effects should be considered, aren’t considered, but considered and mitigated, there should be no problem:

Impacts related to building the proposed Fermi 3, associated facilities, and transmission lines on aquatic habitat and biota could result from altered hydrology, erosion, stormwater runoff of soil and contaminants, and direct disturbance or loss of aquatic habitats. In addition to having a minor potential impact on recreationally or commercially important fish species that could occur in the vicinity of the Fermi site, building Fermi 3 could also affect some Federally or State-listed aquatic species in the western basin of Lake Erie or in the lower Swan Creek watershed, including northern riffleshell (*Epioblasma torulosa rangiana*), pugnose minnow (*Opsopoeodus emeiliae*), rayed bean (*Villosa fabalis*), salamander mussel (*Simpsonaias ambigua*), sauger (*Sander canadensis*), silver chub (*Macrhybopsis storeriana*), and snuffbox (*Epioblasma triquetra*) (Section 4.3.2.3). However, the likelihood that building activities could affect these species is low and, if mitigation identified in Section 4.3.2.5 is implemented, the impacts of Fermi 3 preconstruction and construction activities, including development of associated transmission lines, would be SMALL. These effects should not measurably increase cumulative impacts on those species within the geographic area of interest. Other

¹⁸Indeed, DTE states, and the Staff echoes, that “the description presented here of the terrestrial resources that interface with the transmission line corridors is based on publicly available information and reasonable expectations of the configurations that ITC Transmission would likely use based on standard industry practice. The information described in this subsection does not imply commitments were made by ITC Transmission or Detroit Edison, unless specifically noted.” FEIS p. 2-45.

construction projects that occur along the shores of Lake Erie's western basin or within watersheds that drain into the western basin would contribute in similar ways to the impacts on aquatic habitats and biota within the geographic area of interest, although the overall cumulative level of impact is difficult to quantify.

FEIS p. 7-23. The NRC review team further decides that with projected climate change and past, present, and reasonably foreseeable future actions in the lower Swan Creek watershed and the western basin of Lake Erie, cumulative impacts on aquatic resources would be "moderate" but that within that framework since "incremental impacts from NRC-authorized activities would be SMALL," that "no further mitigation would be warranted." FEIS p. 7-27. It is outlandish and illogical (especially since unexplained) that the NRC Staff has concluded that a large, macro, environment-harming phenomenon which would cause "moderate" effects will have only "small" (and unstated and unanalyzed) effects on the Fermi 3 nuclear power plant construction project and its associated 30-mile transmission corridor.

H. No compliance in corridor with NHPA

The story is nearly identical in the realm of historical and cultural resources. The established 18.6 miles of transmission corridor has historic resources which have not been fully documented, while the undeveloped 10.8 mile stretch from the Sumpter-Post Road junction in Wayne County west to the existing Milan substation in Washtenaw County, has yet to be scrutinized under the National Historic Preservation Act.

There was no Phase 1, on-the-ground investigation of historic or cultural properties performed in the estimated transmission corridor. Instead, efforts to identify cultural resources along the proposed transmission line route consisted of "site file research for the entire proposed transmission line route and a field view of the proposed new portion of the route." FEIS p. 2-208. The APE [area of potential effects] for the site file search for the entire proposed trans-

mission line route was defined as a 1.5-mi area around the proposed route from the Fermi 3 site in Monroe County to the existing Milan Substation in Washtenaw County. Site file searches identified a total of 77 previously recorded archaeological resources within the proposed transmission line route APE; no previously recorded architectural resources or NRHP-listed or NRHP-eligible historic properties were identified (Detroit Edison Corporation 2011a). *Id.* Six of the 77 archaeological resources would be crossed by that portion of the proposed transmission line route that would require a new corridor. These six archaeological resources, which consist of five prehistoric archaeological sites and one historic archaeological site, were previously determined to not be NRHP-eligible (see Table 2-63). It bears noting that there is no disclosure of the process by which National Register eligibility was determined for these 6 sites, which can be of special importance when native American tribal participation must be solicited.

Even in the established offsite transmission corridor area of potential effect, not all historic resources have been investigated and a determination made as to their eligibility for the National Register of Historic Places: “[P]revious cultural resource identification efforts indicated the presence of two archaeological resources and 83 architectural resources offsite, but within the indirect APE for Fermi 3. Neither of the two archaeological resources has been evaluated for NRHP eligibility (Demeter et al. 2008).” FEIS p. 4-100. The Staff admits that building Fermi 3 would significantly affect the viewshed from the offsite APE’s (“These alterations would consist of the introduction of new power plant facilities, including buildings and structures, into the existing viewsheds and settings of the 21 determined or recommended NRHP-eligible architectural resources and the settings of the two previously archaeological sites that have not been evaluated for NRHP eligibility,” FEIS pp. 4-100 to 4-101).

And respecting the undeveloped prospective corridor area, there is even less information published in the FEIS:

The approximately 11-mi portion of the proposed offsite transmission line route from the Sumpter-Post Road junction in Wayne County to the Milan Substation in Washtenaw County will require a new transmission line route and *may* result in impacts on historic and/or cultural resources. The process of building new transmission lines *may* result in direct impacts on previously and as-yet-unidentified archaeological or architectural resources crossed by the proposed transmission lines or indirect visual impacts on as-yet unidentified architectural resources in the vicinity of the new transmission lines. Cultural resource impacts would be evaluated during the siting process of transmission lines whose exact location is undetermined. Thus, the potential for direct and indirect or visual impacts Construction Impacts at the Proposed Site exists, and *in the absence of more detailed information, these impacts cannot be evaluated with certainty.*

Emphasis supplied. FEIS pp. 4-101 to 4-102. The NRC Staff, in its gross ignorance of the historic resources in the corridor nonetheless agreed that they will suffer potentially devastating effects without mitigation, and assigned a “moderate” effects - mid-range severity - rating: “The combined impacts from preconstruction and construction activities were described in Section 4.6 and determined to be MODERATE.” However, “[i]f preconstruction activities associated with the offsite transmission lines resulted in significant alterations to the cultural environment, then *additional impacts could be realized.*” (Emphasis added). FEIS p. 7-31. And the Staff clings to its all-purpose palliative, that the NRC really has no responsibility to protect those resources: “According to 10 CFR 50.10(a)(2)(vii), transmission lines are not included in the definition of construction and are not an NRC authorized activity. Therefore, the NRC considers the offsite proposed transmission lines to be outside the NRC’s APE and therefore not part of the NRC’s consultation.” FEIS p. 4-102.

This position derogates the ASLB’s cautions in LBP-12-12:

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.

The ASLB should not countenance this persistent and clear intention of violating NEPA on the part of the NRC Staff.

6. Sufficient Information to Show the Existence of a Genuine Dispute With the Applicant and the NRC

A. For NEPA purposes, there is no distinction between preconstruction and other activities

Although the NRC does not consider "preconstruction" activities to be within the scope of the COL application, per 10 CFR § 51.45(c), that contravenes the express directives contained in that regulation:

The environmental report must include an analysis that considers and balances the environmental effects of the proposed action, the environmental impacts of alternatives to the proposed action, and alternatives available for reducing or avoiding adverse environmental effects. . . . An environmental report prepared at the early site permit stage under § 51.50(b), limited work authorization stage under § 51.49, construction permit stage under § 51.50(a), or combined license stage under § 51.50(c) *must include a description of impacts of the preconstruction activities* performed by the applicant at the proposed site (*i.e.*, those activities listed in paragraph (1)(ii) in the definition of "construction" contained in § 51.4), necessary to support the construction and operation of the facility which is the subject of the early site permit, limited work authorization, construction permit, or combined license application. The environmental report *must also contain an analysis of the cumulative impacts of the activities to be authorized by the limited work authorization, construction permit, or combined license in light of the*

preconstruction impacts described in the environmental report.

Emphasis supplied.

Moreover, “preconstruction activities” are within the scope of the NEPA review because they are all connected actions, per 40 C.F.R. § 1508.25(a)(1)(iii) as “interdependent parts of a larger action and depend on the larger action for their justification.” For example, Table 3-2 identifies “deep excavation” or the “excavation of the basemat for the reactor” as a preconstruction activity. However, but for the larger action (the issuance of the COL), the excavation of the basement for the reactor need not occur. Thus, all preconstruction activities should be analyzed as *direct* impacts. This might be a valid delineation if “preconstruction” activities were either completed or ongoing at the time of the document’s issuance. But as noted on FEIS page 4-62: “Detroit Edison plans to begin the preconstruction work specific to Fermi 3 in 2013 and to complete all building activities in 2021.” So even preconstruction activities are deemed to be “specific to Fermi 3,” bolstering the argument that they should be analyzed as direct impacts under NEPA. As direct impacts, the magnitudes of impacts described in the FEIS by NRC as SMALL, MODERATE, or LARGE significantly change, and warrant stronger or additional mitigation measures.

And as § 51.45(c) states, preconstruction activities should also be analyzed in terms of cumulative impacts. The FEIS should include activities specific to the Fermi 3 site that have been deemed “pre-construction,” rather than the generic activities listed in Table 3-2. Finally, if any construction-related activities have commenced, these should be identified in the FEIS.

B. The issues of fact are manifest within the FEIS

Even if the ASLB concludes that Intervenors have not shown that the FEIS contains new

data or conclusions that differ from those in the DEIS, §2.309(f)(2) provides another alternative. It allows a new contention to be filed after the initial docketing with leave of the presiding officer upon a showing that:

- i. The information upon which the amended or new contention is based was not previously available;
- ii. The information upon which the amended or new contention is based is materially different than information previously available; and
- iii. The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

Id.

In the instance of the transmission corridor's exclusion from the EIS, the ASLB determined that Intervenor did not raise the controversy in 2009 with their initial petition. However, the ASLB proceeded in LBP-12-12, to order the corridor to be subjected to NEPA analysis, in an order grounded in extensive reasoning. The Staff appears to have almost entirely ignored that order. Intervenor had a right to expect that the ASLB order would be followed scrupulously by the Staff, and learned with the publication of the FEIS that the expectation had not been fulfilled. This is new information, materially different from that previously available, and Intervenor have timely proffered their amended or new contention on the corridor EIS.

The contemplated physical changes to the 1,069-acre transmission corridor include erection of major kilovoltage transmission lines and towers, clear-cutting hundreds of acres of trees, and major alterations of some wetlands. They collectively comprise a "major federal action significantly affecting the quality of the human environment." NEPA, 42 U.S.C. § 4332(2)(C)(i). This duty to carefully consider information regarding a project's environmental impacts is nondiscretionary. *Silva v. Romney*, 473 F.2d 287, 292 (1st Cir. 1973). Federal agencies are held to a "strict standard of compliance" with the Act's requirements. *Calvert Cliff's Coordinating*

Commission v. AEC, 449 F.2d 1109, 1112 (D.C. Cir. 1971).

The test for "major Federal action" and "significantly affecting" is fused into a single criterion: significance. An action is major if it is significant and if significant, requires preparation of an EIS. 40 C.F.R. § 1508.27. The degree of environmental impact determines significance. "Significantly" involves "intensity", which (40 C.F.R. § 1508.27(b)) "refers to the severity of impact" - *i.e.*, that environmentally negative consequences may occur in implementation of the project. Regarding "intensity," "one speaks of the severity of adverse impacts, not beneficial impacts." *Friends of Fiery Gizzard v. Farmers Home Administration*, 61 F.3d 501, 504 (6th Cir. 1995). At 40 C.F.R. § 1508.27(b) are 10 measures of "intensity" of an impact.

The public has no burden of showing significant effects: "To [require an EIS], a plaintiff need not show that significant effects will in fact occur ... *raising substantial questions whether a project may have a significant effect is sufficient.*" (Emphasis supplied). *Anglers of the Au Sable v. U.S. Forest Service*, Case #05-10152-BC (E.D. Mich. N.D. 2005) at 13-14, citing *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1149-50 (9th Cir. 1998) (EIS required if "substantial questions are raised" about effects on environmental quality).

Because the changes effected by the Fermi 3 project in the transmission corridor will be major, they must be analyzed in the FEIS. NEPA and the Council on Environmental Quality ("CEQ") regulations implementing NEPA are intended to ensure that environmental considerations are "infused into the ongoing programs and actions of the Federal Government," *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 371 n.14 (1989), NEPA imposes on agencies a continuing obligation to gather and evaluate new information relevant to the environmental impact of its actions. *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1023-24 (9th

Cir. 1980) ; 40 C.F.R. § 1509(c)(1)(ii). “An agency that has prepared an EIS cannot simply rest on the original document. The agency must be alert to new information that may alter the results of its original environmental analysis, and continue to take a ‘hard look’ at the environmental effects of [its] planned action, even after a proposal has received initial approval.” *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 557-58 (9th Cir. 2000) (quoting *Marsh*, 490 U.S. at 373-74). The need to supplement under NEPA when there is new and significant information is found throughout the NRC regulations. *See* 10 C.F.R. §§ 51.92 (a)(2), 51.50(c)(iii), 51.53(b), 51.53(c)(3)(iv).

The ASLB’s June 21, 2012 injunction to the NRC Staff that +“the primary responsibility for compliance with NEPA lies with the Commission,” and that “We recommend . . . that the NRC Staff consider the issues raised by Intervenors when it prepares the FEIS,” *id.* at pp. 48-49, constitutes “new and significant information.” This finding thrust NEPA consideration of the transmission corridor onto the NRC Staff. The information is “new” because it arose, *sua sponte*, as an ASLB order finding that there was inadequate analysis under NEPA of the transmission corridor, which in the opinion of the Board, appeared to be segmented from the remainder of the Fermi 3 project.

The ASLB order to include the transmission corridor in the FEIS is “significant” because it required an extraordinary level of concern be given the reality that operation of Fermi 3 means completion of the corridor, and that use of the transmission corridor would necessarily affect “unique characteristics of the geographic area such as . . . prime farmlands, wetlands . . . or ecologically critical areas ” as well as “the degree to which the action may adversely affect an endangered or threatened species or its habitat.” 40 C.F.R. § 1508.27(b)(3) and (9).

As the fundamental purposes of NEPA are: (1) to guarantee that the government takes a “hard look” at all of the environmental consequences of proposed federal actions before the actions occur, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); and (2) to “guarantee[] that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision,” *id.* at 349, the NRC cannot meet the fundamental purposes of NEPA if it does not include all of environmental changes and the costs associated therewith from construction of, and ongoing use of, the transmission corridor. *See Sierra Club v. Sigler*, 695 F.2d 957, 979 (5th Cir. 1983) (“There can be no ‘hard look’ at the costs and benefits unless all costs are disclosed.”). “The discussion of steps that can be taken to mitigate adverse environmental consequences plays an important role in the environmental analysis under NEPA.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989).

An EIS must also contain “means to mitigate adverse environmental impacts.” 40 C.F.R. 1502.16(h). It must be a “reasonably complete discussion of possible mitigation measures.” *Robertson*, 490 U.S. at 352. Mitigation measures may be found insufficient when the agency fails to study the efficacy of the proposed mitigation, fails to take certain steps to ensure the efficacy of the proposed mitigation (such as including mandatory conditions in permits), or fails to consider alternatives in the event that the mitigation measures fail. *Id.* Here, the NRC Staff has failed in each of these respects. “Even though the Commission’s application of its technical expertise demands the ‘most deferential’ treatment by the courts,” the NRC 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).

VII. NEW CONTENTION 26

MOTION FOR ADMISSION OF CONTENTION OF OMISSION FOR FAILURE TO UNDERTAKE AND CONCLUDE ENDANGERED SPECIES ACT CONSULTATION RELATIVE TO TRANSMISSION LINE CORRIDOR

Now come Intervenors, by and through counsel, and hereby move to admit a new contention regarding the lack of federal Endangered Species Act (“ESA”) compliance concerning the proposed transmission line corridor for the proposed Fermi 3 Nuclear Power Plant.

Pursuant to 10 C.F.R. § 2.309(f)(1), Intervenors assert a new contention, seeking consideration of new and significant information from the Final Environmental Impact Statement (“FEIS”) for the COLA for Fermi 3 which is relevant to initiation and completion of a Section 7 Endangered Species Act consultation between the NRC Staff and appropriate personnel from the U.S. Fish and Wildlife Service. There has not been a biological assessment conducted of the 1,069-acre proposed transmission corridor area to identify federally- and state-threatened and -endangered plant and animal species, nor has the requisite interagency consultation occurred. The assessment and consultation process might resolve in the development of mitigation plan arrangements, and those mitigation arrangements must be disclosed in the FEIS for the Fermi 3 project. They do not presently appear in the FEIS because there has been no ESA compliance.

1. Statement of Contention

There has been no federal Endangered Species Act (“ESA”) biological assessment of the plant and animal species within the proposed transmission line corridor which itself is part of the proposed Fermi 3 power plant project and there are no ESA mitigation arrangements published in

the Fermi 3 FEIS for a combined operating license.

2. Brief Explanation of the Basis for the Contention

The COL applicant, DTE, has not undertaken an Endangered Species Act consultation or biological assessment respecting the transmission corridor, and the NRC Staff appears not to understand that the NRC's own compliance with the ESA is pertinent to the FEIS:

FWS (2009) identified several terrestrial species that are listed under the ESA or candidates for listing that could occur in the area of the proposed offsite transmission line corridor, some of which are not known to occur at the Fermi site. Species identified as potentially present in Monroe County are the Indiana bat, Karner blue butterfly, and eastern prairie fringed orchid. For Wayne County, the species identified are the Indiana bat and eastern prairie fringed orchid. For Washtenaw County, the species identified are the Indiana bat, Mitchell's satyr butterfly, and eastern prairie fringed orchid. FWS also noted that the eastern massasauga, a candidate species, may be present in Washtenaw and Wayne Counties.

Prior to installation of the offsite transmission line, FWS and MDNR would need to review detailed information on the transmission line corridor. The agencies may, at that time, require surveys of the proposed transmission line corridor for the presence of important species and habitat.

FEIS p. 2-61. On FEIS pp. 2-62 through 2-65 are listed 108 "Federally and State-Listed Terrestrial Species That Have Been Observed in Monroe, Washtenaw, and Wayne Counties and May Occur within the Transmission Line Corridor" (108 species listed: 80 plants; 8 insects; 2 amphibians; 4 reptiles; 12 birds; 2 mammals). The absence of any consultations yet between DTE and the U.S. Fish and Wildlife Service and the Michigan Department of Natural Resources leaves the FEIS critically incomplete and as a practical matter leaves mitigation up to a contractor - ITC Transmission - which is not a party to these proceedings and which has not participated in any way in securing regulatory approvals which are disclosed within the FEIS.¹⁹ Lack of biological

¹⁹From FEIS p. 5-41: "Transmission lines from Fermi 3 would be owned by Detroit Edison up to the point of their interconnection with the proposed Fermi 3 switchyard. Outward from interconnection with the Fermi 3 switchyard, ITC Transmission would own the lines and other transmission system

assessment and agency consultation deprives the public entirely of its participation/comment opportunity on Endangered Species Act considerations, and as to NEPA, its participation and comment opportunity respecting federally- and state-endangered and -threatened species.

There will be a dramatic change in the wetland type of the 93.4 acres of wetlands in the as-yet undeveloped western, 10.8 mile stretch of corridor, which could have serious but unknown scientific implications for flora and fauna:

Approximately 93.4 ac of forested wetland occur within the expected transmission line corridor; most, if not all, would be permanently cleared of trees (Detroit Edison 2011a). These wetlands would be converted to scrub-shrub or emergent wetlands to maintain clearance for the conductors.

FEIS p. 4-44. Other planned environmental changes in the corridor will stress creatures, whether endangered or not :

Electricity transmission systems have the potential to affect terrestrial ecological resources through corridor maintenance, bird collisions with transmission lines and towers, and electromagnetic fields (EMFs) (NRC 1996).

FEIS p. 5-22. Herbicides and pesticides will be used in this area, which contains at least 30 jurisdictional water courses or bodies of water, and there will be wetlands degradation from heavy vehicles. Without a shred of site-specific data from a biological assessment or otherwise, the FEIS (at p. 5-23) relies on conclusory and dated 1996 NRC license renewal GEIS language to conclude that “bird collisions associated with the operation of transmission lines do not typically cause long-term reductions in bird populations” and that “the impacts on wildlife populations

equipment. Although Detroit Edison will maintain ownership and control of the land in the new onsite transmission corridor, Detroit Edison expects to contract with ITC Transmission to maintain the transmission towers and lines located on Detroit Edison property (Detroit Edison 2011a).

Accordingly, the impacts from operation and maintenance of transmission lines discussed in this EIS are based on publicly available information and reasonable expectations of the configurations and practices that ITC Transmission would likely follow based on standard industry practice.”

from continued ROW maintenance are not typically significant.” In the western 10.8 mile stretch, “three wetlands are much wider, at 1302 ft, 903 ft, and 1339 ft (Detroit Edison 2011a). Since the upper limit of spans between transmission structures is typically 900 ft, it is anticipated that development of this undeveloped segment of corridor might require the placement of one tower or pole in each of these wetlands.” FEIS p. 2-65.

In a recent order in this case, the ASLB noted that the transmission corridor includes habitat for the Eastern Fox Snake, a State of Michigan-threatened reptile that is the subject, as to the Fermi 3 plant site, of forthcoming adjudication (Contention 8):

[T]he review team concludes that *the impacts from construction and preconstruction activities for Fermi 3 on terrestrial resources on the Fermi site and transmission line corridor would be SMALL to MODERATE* The potential for MODERATE impacts is limited to possible adverse effects on the eastern fox snake. The staff’s evaluation of the potential impacts on the eastern fox snake recognizes the potential for mitigation measures proposed by Detroit Edison. . . and approved by the MDNR to significantly reduce impacts on that species, thereby leading to SMALL impacts, but acknowledges the possibility of MODERATE impacts if proposed mitigation is not implemented as described in their plan.

(Emphasis supplied). “Memorandum and Order (Denying Motion for Reconsideration of the Board’s Order Denying Second Motion for Summary Disposition of Contention 8),” *Detroit Edison Company* (Fermi Nuclear Power Plant, Unit 3), ASLBP No. 09-880-05-COL-BD01 (January 30, 2013), p. 5 (citing p. 4-47 of FEIS).

Despite this complex of human intrusions which will be visited upon wildlife and wild plants and their critical habitats, the NRC Staff anomalously insists that “[t]he overall effect of operation of the new line on wildlife is expected to be *minor* because maintenance activities would be limited and because most of the corridor has been previously developed and, in less-maintained areas, there are existing disturbances such as farming, neighboring residences, and

roadways.” FEIS p. 5-23. The final required NEPA document, Fermi 3's FEIS, contains no information which suggests that a biological assessment was done, nor a F&WS consultation undertaken.

This contention is being timely proffered according to the ASLB’s December 12, 2012 scheduling order.

3. Demonstration that the Contention is Within the Scope of the Proceeding

The contention is within the scope of the proceeding because it seeks compliance with NEPA and NRC-implementing regulations in the form of disclosure of required permits and mitigation arrangements within the FEIS. Adherence to NEPA in this fashion must be demonstrated before Fermi 3 may be licensed.

4. Demonstration that the Contention is Material to the Findings NRC Must Make to License Fermi 3

This contention challenges the NRC’s failure to fully comply with NEPA and federal regulations for the implementation of NEPA in its EIS for the proposed Fermi 3. Unless the NRC complies with the procedural requirements of NEPA that are discussed in the contention, it cannot make a valid finding that Fermi 3 should be licensed. The contention is thus material to the findings the NRC must make in order to issue a license.

5. Concise Statement of the Facts or Expert Opinion Supporting the Contention, Along With Appropriate Citations to Supporting Scientific or Factual Materials

For any federal action that may affect a threatened or endangered species, the agency contemplating the action must undertake a "Section 7" consultation with the consulting agency to ensure that the federal action is not likely to jeopardize "the continued existence of" an endangered or threatened species and will not result in the "destruction or adverse modification" of the

designated critical habitat of the listed species. 16 U.S.C. §1536(a)(2); *see Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059, 1063 (9th Cir. 2004). Here, the NRC is required to ask FWS in writing whether, in its opinion, a listed or proposed species may be present in the action area. 16 U.S.C. §1536(c)(1). If FWS responds that no protected species are present, the consultation requirement ends. If, however, FWS responds that there may be an endangered or threatened species in the action area, the agency is required to prepare a biological assessment (“BA”), which identifies any listed species within the area and evaluates the potential effects of the action on those species. 16 U.S.C. §1536(c)(1); 50 C.F.R. §402.02.

The consultation process concludes with the consulting agency issuing a Biological Opinion. *See Ariz. Cattle Growers' Assoc. v. United States Fish and Wildlife Serv.*, 273 F.3d 1229, 1239 (9th Cir. 2001). This opinion must address both species jeopardy and critical habitat by considering the current status of the species, the environmental baseline, the effects of the proposed action, and the cumulative effects of the proposed action. *Gifford Pinchot*, 378 F.3d at 1063. In formulating its biological opinion, the agency "shall use the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2); *see* 50 C.F.R. § 402.14(g)(8); *Pacific Coast Fed'n of Fishermen's Ass'n, Inc. v. National Marine Fisheries Service*, 265 F.3d 1028, 1034 (9th Cir. 2001).

The BA requirement can be fulfilled as part of the agency's procedural requirements established by the NEPA. 16 U.S.C. §1536(c)(1). Similarly to NEPA, a BA is required for all federal actions which constitute a “major construction activity,” whether or not a listed species is suspected in the area. 50 C.F.R. §402.12(b)(1). A “major construction activity” is defined as “a construction project (or other undertaking having similar physical impacts) which is a major

Federal action significantly affecting the quality of the human environment as referred to in [NEPA].” 50 C.F.R. §402.02. The term “major” reinforces the term “significantly,” but has no meaning independent of it. *Andrus v. Sierra Club*, 442 U.S. 347, 364 n. 23, 99 S.Ct. 2335, 2344 n. 23, 60 L.Ed.2d 943 (1979); 40 C.F.R. § 1508.18. The regulations promulgated to institute NEPA also specifically provide that “major” actions include approving permits for construction. 40 C.F.R. §1508.18(b)(4).

When an agency prepares an EIS, it is complying with the BA requirement of 16 U.S.C. § 1536(c), provided that one of the environmental impacts discussed is the impact on threatened and endangered species. *Sierra Club v. U.S. Army Corps Engineers*, 295 F.3d 1209, 1220 (9th Cir. 2002).

The Fermi 3 FEIS reflects that threatened/endangered species impacts investigation and analysis has been done only for the site of the proposed plant, not the transmission corridor. There is no biological assessment included within the FEIS, merely a suggestion that one will be performed in the future. This deprives the public of an adequate comment opportunity at the NEPA document stage; all it has before it is a “plan to have a plan.”

6. Sufficient Information to Show the Existence of a Genuine Dispute With the Applicant and the NRC

Intervenors have here raised a “contention of omission,” *i.e.*, a claim, in the words of 10 C.F.R. § 2.309(f)(1)(vi), that “the application fails to contain information on a relevant matter as required by law . . . and the supporting reasons for the petitioner's belief.” *Pa’ina Hawaii, LLC* (Material License Application), LBP 06-12, 63 NRC 403, 413 (2006), *pet. for reconsideration denied*, CLI-06-25, 64 NRC 128 (2006) (contention satisfied the requirement to provide a specific statement of the legal or factual issue sought to be raised by alleging that the application

failed to describe the emergency procedures for a prolonged loss of electricity).

The record compiled by the agency must be sufficient to determine the mitigation measures being used to compensate for adverse environmental impacts stemming from the original proposal that, unmitigated, would be significant. *Spiller v. White*, 352 F.3d 235, 241 (5th Cir.2003) (quoting *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 682 (D.C. Cir. 1982)). Although proposed mitigation measures need not be laid out to the finest detail, even within the more labor-intensive context of an environmental impact statement, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989) , it is still required “that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated.” *Miss. River Basin Alliance v. Westphal*, 230 F.3d 170, 176-77 (5th Cir.2000) (quoting *Robertson*, 490 U.S. at 352, 109 S.Ct. 1835). An EIS involving mitigation must include “a serious and thorough evaluation of environmental mitigation options for [a] Project to allow its analysis to fulfill NEPA's process-oriented requirements [.]” *Miss. River Basin Alliance*, 230 F.3d at 178.

Besides losing the opportunity to comment upon any BA or resulting Biological Opinion within the NEPA framework, the public here stands to lose another procedural guarantee of disclosure of mitigation arrangements for potential endangered or threatened species.

The harm to a public plaintiff in a NEPA circumstance is manifest when an agency makes a decision without sufficiently considering information NEPA requires be placed before the decision-maker and public. *Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989). That information includes comments and feedback from public participants. The courts expect that "Persons challenging an agency's compliance with NEPA must structure their participation so

that it. . . alerts the agency to the [parties'] position and contentions, in order to allow the agency to give the issue meaningful consideration." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764 (2004). Plaintiffs "waive their right to challenge [the final NEPA result] if "they did not raise that issue during the administrative process." *Protect Lake Pleasant, LLC v. Connor*, No. CIV 07-454-PHX-RCB, 2010 WL 5638735, at *37 (D.Ariz. July 30, 2010).

Intervenors request that their ESA contention be admitted for adjudication.

VIII. NEW CONTENTION 27

MOTION FOR ADMISSION OF CONTENTION OF OMISSION FOR FAILURE TO UNDERTAKE AND CONCLUDE HISTORIC RESOURCES INVESTIGATION AND MITIGATION RELATIVE TO TRANSMISSION LINE CORRIDOR

Now come Intervenors, by and through counsel, and hereby move to admit a new contention regarding the lack of National Historic Preservation Act ("NHPA") compliance concerning the proposed transmission line corridor for the proposed Fermi 3 Nuclear Power Plant.

Pursuant to 10 C.F.R. § 2.309(f)(1), Intervenors assert a new contention, seeking consideration of new and significant information from the Final Environmental Impact Statement ("FEIS") for Fermi 3 which is relevant to initiation and completion of investigations and mitigation arrangements, if indicated, for historic and cultural resources pursuant to the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470 *et seq.* ("§ 106").

The established 18.6 miles of transmission corridor has historic resources which have not been fully documented, while the undeveloped 10.8 mile stretch from the Sumpter-Post Road junction in Wayne County west to the existing Milan substation in Washtenaw County, has yet to be scrutinized under the National Historic Preservation Act.

This position derogates the ASLB's cautions in LBP-12-12:

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.

The ASLB should not countenance this persistent and clear intention of violating NEPA on the part of the NRC Staff.

The FEIS contains statements asserting that there has been some inquiry into the presence of historic and cultural resources within the transmission corridor which might be eligible for entry in the National Historic Register. However, that inquiry was limited to the 18-mile stretch of developed transmission corridor. Supposedly 6 of 77 properties of interest were identified, but the FEIS does not contain details of the investigations which were undertaken. None of the identified properties were deemed NRHP-eligible. Further, the nearly 11 mile undeveloped but planned stretch of transmission corridor has not been subjected to an historic and cultural resources investigation. The FEIS contains no information on any other attempts to comply with Section 106.

1. Statement of Contention

The FEIS for Fermi 3 fails to satisfy the requirements of the National Historic

Preservation Act (“NHPA”), 16 U.S.C. § 470 *et seq.* (“§ 106”), because it does not address the effects upon historic and cultural resources of the planned development of infrastructure, and the destruction of natural land and water resources and viewsheds within the transmission line corridor which extends nearly thirty (30) miles from the proposed plant site. The identification process of cultural and historical properties has not been completed, nor are there mitigation plans in place for any National Register-eligible properties affected by the transmission corridor development.

2. Brief Explanation of the Basis for the Contention

This contention is based on the ASLB’s June 21, 2012 ruling in this litigation. 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 p. 46, the ASLB wrote:

Intervenors criticize the DEIS for, among other things, an inadequately defined route for the corridor, a failure to identify endangered or threatened species along the corridor, an inadequate discussion of impacts on wetlands and vegetation, and *a failure to adequately investigate historic or cultural resources that may be affected*. Given the very limited analysis in the DEIS of these and other environmental impacts arising from the transmission line corridor, these claims may have been admissible had they been filed in a timely manner.

(Emphasis supplied).

The ASLB also found in LBP-12-12 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 as a regulatory agency cannot credibly maintain that even if the transmission corridor construction falls in the category of “preconstruction activity,” that

environmental impacts from that activity fall outside NRC authority:

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. 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.

Intervenors did not know what the NRC Staff's response to being ordered to include the transmission corridor within the FEIS would be prior to the availability of the FEIS in January 2013, and so are proffering this renewed and amended contention in a timely fashion.

3. Demonstration that the Contention is Within the Scope of the Proceeding

The contention is within the scope of the proceeding because it seeks compliance with the NHPA, and NHPA compliance may be conducted as part of the compilation of the requisite NEPA document. There must be demonstrated compliance with the NHPA before Fermi 3 may be licensed.

4. Demonstration that the Contention is Material to the Findings NRC Must Make to License Fermi 3

This contention challenges the NRC's failure to fully comply with NHPA as a component of the NEPA process culminating in the FEIS. Unless the NRC complies with the procedural requirements of NHPA that are discussed in the contention, there can be no valid finding that Fermi 3 should be licensed. Therefore the contention is material to the findings the NRC must make in order to license this facility.

5. Concise Statement of the Facts or Expert Opinion Supporting the Contention, Along With Appropriate Citations to Supporting Scientific or Factual Materials

There are several steps which the NRC Staff must take to comply with the NHPA. If the agency's undertaking could affect historic properties, the NRC must determine the scope of appropriate identification efforts and proceed to identify historic properties in the area of potential effects. The NRC must review background information, consult with the State Historic Preservation Office (SHPO) and tribes (given that prehistoric archeological resources have been found, seek information from such knowledgeable parties, and conducts additional studies as necessary. Properties not listed on the National Register are evaluated against the National Park Service's published criteria, in consultation with the SHPO and any Indian tribe or Native organization that may attach religious or cultural importance to them.

If questions arise about the eligibility of a given property, the NRC may seek a formal determination of eligibility from the National Park Service. Section 106 review gives equal consideration to properties that have already been included in the National Register as well as those that have not been so included, but that meet National Register criteria.

If the agency finds that no historic properties are present or affected, it provides documentation to the SHPO and, barring any objection in 30 days, proceeds with its undertaking. If the agency finds that historic properties are present, it proceeds to assess possible adverse effects based on criteria found in the Advisory Council on Historic Preservation's regulations. If there is agreement that there will be no adverse effect, the agency proceeds with the undertaking, subject to any agreed-upon conditions.

If there will be an adverse effect on the historic or cultural resource from the planned project, or if the parties cannot agree and ACHP determines within 15 days that there is an

adverse effect, the NRC must consult to seek ways to avoid, minimize, or mitigate the adverse effects. This consultation takes place with the SHPO and others, who may include Indian tribes and Native organizations, local governments, permit or license applicants, and members of the public. ACHP may participate in consultation when there are substantial impacts to important historic properties, when a case presents important questions of policy or interpretation, when there is a potential for procedural problems, or when there are issues of concern to Indian tribes or Native organizations. Consultation usually results in a Memorandum of Agreement (MOA), which outlines agreed-upon measures that the agency will take to avoid, minimize, or mitigate the adverse effects. In some cases, the consulting parties may agree that no such measures are possible, but that the adverse effects must be accepted in the public interest.

If an MOA is executed, the agency proceeds with its undertaking under the terms of the MOA.

If consultation proves unproductive, the agency or the SHPO, or ACHP itself, may terminate consultation. If a SHPO terminates consultation, the agency and ACHP may conclude a MOA without SHPO involvement.

In the instance of the Fermi 3 transmission corridor portion of the power plant project, there was no Phase 1, on-the-ground investigation of historical or cultural properties performed in the estimated transmission corridor. Instead, efforts to identify cultural resources along the proposed transmission line route consisted of “site file research for the entire proposed transmission line route and a field view of the proposed new portion of the route.” FEIS p. 2-208. The APE [area of potential effects] for the site file search for the entire proposed transmission line route was defined as a 1.5-mi area around the proposed route from the Fermi 3 site

in Monroe County to the existing Milan Substation in Washtenaw County. Site file searches identified a total of 77 previously recorded archaeological resources within the proposed transmission line route APE; no previously recorded architectural resources or NRHP-listed or NRHP-eligible historic properties were identified (Detroit Edison Corporation 2011a). *Id.* Six of the 77 archaeological resources would be crossed by that portion of the proposed transmission line route that would require a new corridor. These six archaeological resources, which consist of five prehistoric archaeological sites and one historic archaeological site, were previously determined to not be NRHP-eligible (see Table 2-63). It bears noting that there is no disclosure of the process by which National Register eligibility was determined for these 6 sites, which can be of special importance when Native American tribal participation must be solicited.

Even in the established offsite transmission corridor area of potential effect, not all historical resources have been investigated and a determination made as to their eligibility for the National Register of Historic Places: “[P]revious cultural resource identification efforts indicated the presence of two archaeological resources and 83 architectural resources offsite, but within the indirect APE for Fermi 3. Neither of the two archaeological resources has been evaluated for NRHP eligibility (Demeter et al. 2008).” FEIS p. 4-100. The Staff admits that building Fermi 3 would significantly affect the viewshed from the offsite APE’s: “These alterations would consist of the introduction of new power plant facilities, including buildings and structures, into the existing viewsheds and settings of the 21 determined or recommended NRHP-eligible architectural resources and the settings of the two previously archaeological sites that have not been evaluated for NRHP eligibility.” FEIS pp. 4-100 to 4-101.

Respecting the admittedly undeveloped corridor, there is even less information available

in the FEIS:

The approximately 11-mi portion of the proposed offsite transmission line route from the Sumpter-Post Road junction in Wayne County to the Milan Substation in Washtenaw County will require a new transmission line route and *may* result in impacts on historic and/or cultural resources. The process of building new transmission lines *may* result in direct impacts on previously and as-yet-unidentified archaeological or architectural resources crossed by the proposed transmission lines or indirect visual impacts on as-yet unidentified architectural resources in the vicinity of the new transmission lines. Cultural resource impacts would be evaluated during the siting process of transmission lines whose exact location is undetermined. Thus, the potential for direct and indirect or visual impacts Construction Impacts at the Proposed Site exists, and *in the absence of more detailed information, these impacts cannot be evaluated with certainty.*

Emphasis supplied. FEIS pp. 4-101 to 4-102. The NRC Staff agrees that these resources will suffer potentially devastating effects without mitigation, and assigned a “moderate” effects - mid-range severity - rating: “The combined impacts from preconstruction and construction activities were described in Section 4.6 and determined to be MODERATE.” However, “[i]f preconstruction activities associated with the offsite transmission lines resulted in significant alterations to the cultural environment, then *additional impacts could be realized.*” (Emphasis added). FEIS p. 7-31. And the Staff insists that the NRC really has no responsibility to protect those resources: “According to 10 CFR 50.10(a)(2)(vii), transmission lines are not included in the definition of construction and are not an NRC authorized activity. Therefore, the NRC considers the offsite proposed transmission lines to be outside the NRC’s APE and therefore not part of the NRC’s consultation.” FEIS p. 4-102.

6. Sufficient Information to Show the Existence of a Genuine Dispute With the Applicant and the NRC

Intervenors had a right to rely on the ASLB’s June 12, 2012 order in LBP-12-12 which directed the NRC Staff to cease its segmenting of the corridor from the power plant FEIS. With

the publication of the FEIS on January 16, 2013, Intervenor learned for the first time that the NRC Staff conclusively intends to violate the NHPA by not incorporating historical and cultural properties identification and protection into the FEIS.

According to ACHP guidelines enacted pursuant to the NHPA, “The agency official must, except where appropriate to protect confidentiality concerns of affected parties, provide the public with information about an undertaking and its effects on historic properties and seek public comment and input.” 36 C.F.R. § 800.2(d)(2). Also, “[i]n consultation with the SHPO, the agency official shall plan for involving the public in the section 106 process. The agency official shall identify the appropriate points for seeking public input and for notifying the public of proposed actions, consistent with § 800.2(d).” 36 C.F.R. § 800.3(e).

As noted, the initial process for identifying historically or culturally important properties is not yet complete. There is no NRC plan for public participation under NHPA in the Fermi 3 transmission corridor historic and cultural resources analysis, although it is acceptable for the federal agency to use the NEPA track to solicit public participation in deciding on mitigation for National Register-eligible properties.²⁰

By demonstrating the lack of adequate identification of historical and cultural resources, as well as the absence of a public participation plan for the Section 106 NHPA process, Intervenor has provided sufficient information to show that a genuine dispute exists with the NRC

²⁰36 C.F.R. § 800.8(a)(1): “Federal agencies are encouraged to coordinate compliance with section 106 and the procedures in this part with any steps taken to meet the requirements of the National Environmental Policy Act (NEPA). Agencies should consider their section 106 responsibilities as early as possible in the NEPA process, and plan their public participation, analysis, and review in such a way that they can meet the purposes and requirements of both statutes in a timely and efficient manner. The determination of whether an undertaking is a “major Federal action significantly affecting the quality of the human environment,” and therefore requires preparation of an environmental impact statement (EIS) under NEPA, should include consideration of the undertaking's likely effects on historic properties.”

Staff on a material issue of law or fact as between the DEIS and FEIS.

Intervenors have here raised a “contention of omission,” *i.e.*, a claim, in the words of 10 C.F.R. § 2.309(f)(1)(vi), that “the application fails to contain information on a relevant matter as required by law . . . and the supporting reasons for the petitioner's belief.” *Pa'ina Hawaii, LLC* (Material License Application), LBP 06-12, 63 NRC 403, 413 (2006), *pet. for reconsideration denied*, CLI-06-25, 64 NRC 128 (2006).

The record compiled by the agency must be sufficient to determine the mitigation measures being used to compensate for adverse environmental impacts stemming from the original proposal that, unmitigated, would be significant. *Spiller v. White*, 352 F.3d 235, 241 (5th Cir. 2003) (quoting *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 682 (D.C. Cir. 1982)). Although proposed mitigation measures need not be laid out to the finest detail, even within the more labor-intensive context of an environmental impact statement, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989), it is still required “that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated.” *Miss. River Basin Alliance v. Westphal*, 230 F.3d 170, 176-77 (5th Cir. 2000) (quoting *Robertson*, 490 U.S. at 352, 109 S.Ct. 1835). An EIS involving mitigation must include “a serious and thorough evaluation of environmental mitigation options for [a] Project to allow its analysis to fulfill NEPA's process-oriented requirements.” *Miss. River Basin Alliance*, 230 F.3d at 178.

The public here stands to lose the procedural guarantee of disclosure of mitigation arrangements for historic or cultural resources extant within the transmission line corridor of the proposed Fermi 3. The harm to a public plaintiff in a NEPA circumstance is manifest when an

agency makes a decision without sufficiently considering information NEPA requires be placed before the decision-maker and public. *Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989). That information includes comments and feedback from public participants. The courts expect that "Persons challenging an agency's compliance with NEPA must structure their participation so that it. . . alerts the agency to the [parties'] position and contentions, in order to allow the agency to give the issue meaningful consideration." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764 (2004). Plaintiffs "waive their right to challenge [the final NEPA result] if "they did not raise that issue during the administrative process." *Protect Lake Pleasant, LLC v. Connor*, No. CIV 07-454-PHX-RCB, 2010 WL 5638735, at *37 (D.Ariz. July 30, 2010).

Intervenors request that their NHPA contention be admitted for adjudication.

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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
Before the Atomic Safety and Licensing Board**

In the Matter of)	Docket No. 52-033
The Detroit Edison Company)	February 19, 2013
(Fermi Nuclear Power Plant, Unit 3))	
)	

* * * * *

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing “MOTION FOR RESUBMISSION OF CONTENTIONS 3 AND 13, FOR RESUBMISSION OF CONTENTION 23 OR ITS ADMISSION AS A NEW CONTENTION, AND FOR ADMISSION OF NEW CONTENTIONS 26 AND 27” have been served on the following persons via Electronic Information Exchange this 19th day of February, 2013:

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