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)		March 29, 2013
	)	
	;	

* * * * *

INTERVENORS' DIRECT EXAMINATION AND CASE-IN-CHIEF PRESENTATION OF CONTENTION 8 (EASTERN FOX SNAKE)

Now come Intervenors Beyond Nuclear, *et al.*[1] (hereinafter "Intervenors"), by and through counsel, and present below their direct examination testimony and case-in-chief presentation on Contention 8 in this proceeding.

INTERVENORS' CASE-IN-CHIEF

My name is Terry J. Lodge, I am an attorney and counsel of record for the Intervenors in this combined operating license (COL) proceeding. Because of the nature of the evidentiary presentation of Intervenors, which involves official notice of pertinent documents and facts, an oath is not a prerequisite to making this presentation. Nonetheless, I make the following representations on behalf of Intervenors, acknowledging and being mindful of the oath I took to become a member of the bar.

Contention 8 in this COL proceeding concerns the adequacy under NEPA of the investigation and disclosure of the Fermi 3 nuclear power plant project's impacts on the Eastern

[1]In addition to Beyond Nuclear, the Intervenors include: Citizens for Alternatives to Chemical Contamination, Citizens Environmental Alliance of Southwestern Ontario, Don't Waste Michigan, Sierra Club (Michigan Chapter), Keith Gunter, Edward McArdle, Henry Newnan, Derek Coronado, Sandra Bihn, Harold L. Stokes, Michael J. Keegan, Richard Coronado, George Steinman, Marilyn R. Timmer, Leonard Mandeville, Frank Mantei, Marcee Meyers, and Shirley Steinman.

Fox Snake ("EFS") and possible alternatives, including mitigation, that might reduce those effects. Intervenors have reasons for questioning the investigation and analysis of alternatives that appears in the Final Environmental Impact Statement ("FEIS"). Those reasons include the insufficiency of NEPA compliance, in the form of nondisclosure of pertinent details of the mitigation plans for the protection of the Eastern Fox Snake, and the resulting inadequacy of commitment by DTE Energy ("DTE"), the Applicant for an operating license for Fermi 3.

Defects in the FEIS, if adjudicated by the ASLB, are deemed to be violations of NEPA and would then have to be revised or otherwise changed before the EIS could be deemed legally final and part of an operable permit to construct the power plant.

The questions before the ASLB, then, are whether the FEIS analyzes impacts to the Eastern Fox Snake in compliance with NEPA requirements, and whether planned mitigation is real, or ephemeral. The Intervenors believe that the FEIS does not meet legal standards and that proposed mitigation is insufficient because of unaddressed considerations imposed by the National Environmental Policy Act and no firm implementation arrangements.

Contention 8, as admitted by the Board,[2] states as follows:

> [T]he ER fails to adequately assess [Fermi Unit 3]'s impacts on the Eastern Fox Snake and to consider alternatives that would reduce or eliminate those impacts.

Contention 8 is a "contention of omission." A contention of omission claims that "the application fails to contain information on a relevant matter as required by law . . . ."[3] To prevail on a contention of omission, the missing information must be provided in a manner that satisfies the applicable legal standards, which here means compliance with NEPA and its caselaw

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[2]LBP-09-16, 70 NRC at 286.

[3]10 C.F.R. § 2.309(f)(1)(vi).

interpretations.

In practice before the Nuclear Regulatory Commission, where the matter in controversy is a legal contention that there has been a failure to comply with NEPA and 10 C.F.R. Part 51, the Licensing Board may rule on the contention where use is made of the existing evidentiary record as well as additional material of which it can take official notice. *Metro. Edison Co.* (Three Mile Island Nuclear Station, Unit 1), LBP-81-60, 14 NRC 1724, 1728 (1981). Given that Contention 8 is a contention of omission, Intervenors rely for their proofs on record documents and things of which official notice can readily and properly be taken.

Under 10 C.F.R. § 2.337(f), official notice may be taken of any fact of which U.S. courts may take judicial notice. In addition, Licensing Boards may take official notice of any scientific or technical fact within the knowledge of the NRC as an expert body. The sweep of noticeable information is considerable. Pursuant to 10 C.F.R. § 2.337(f), for example, the Commission may take official notice of publicly-available documents filed in the docket of a Federal Energy Regulatory Commission proceeding.[4]

Pursuant to 10 C.F.R. § 2.337(f), Intervenors request the ASLB to take official notice of the facts cited in the formal record of this COL proceeding, and in particular of certain facts set forth in the filings of the respective parties to this case regarding Contention 8 and the Eastern Fox Snake. Finally, there will be reference in Intervenors' case-in-chief to evidentiary matters which as to authenticity, are unassailable, specifically, State of Michigan statutory law and State administrative policy.

NONCOMPLIANCE WITH NEPA REQUIREMENTS FOR DISCLOSURE AND IMPLEMENTATION OF MITIGATION FOR EASTERN FOX SNAKE

[4] *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235 (1996).

The Eastern Fox Snake (*Pantherophis gloydi*) ("EFS") is State-listed as threatened. Primarily an open wetland species, this snake inhabits emergent wetlands along Great Lakes shorelines and associated drainages where cattails (Typha spp.) are common. Although primarily an open wetland species, Eastern Fox Snakes also occupy drier habitats such as vegetated dunes and beaches, and they occasionally travel along ditches and into nearby farm fields, pastures, and woodlots. Little is known about the life history of the EFS. They are typically active from mid-April to late October, usually throughout the day except during periods of intense heat. Breeding probably occurs annually beginning at 2 to 4 years of age, with mating occurring in June or early July. The eggs are deposited in rotten stumps, mammal burrows, soft soil, or mats of decaying vegetation. Eastern Fox snakes eat small rodents and amphibians, insects, and earthworms (Lee 2000). In 2007, nine (9) occurrences of the EFS were reported in Monroe County (Detroit Edison 2011a). The snake was sighted twice on the Fermi site in June 2008 (Detroit Edison 2011a). Detroit Edison records show 15 sightings on the Fermi site between 1990 and 2007. Sightings have occurred on or near roads and buildings. All undeveloped areas of the Fermi site can be considered habitat for the EFS (Detroit Edison 2010b).[5]

Of the 1260 ac. of the Fermi site, there are approximately 833 ac. of terrestrial habitat; much of it is potentially suitable habitat for the EFS. Fermi 3 building activities would affect approximately 197 ac. of potential fox snake habitat (see FEIS Section 4.3.1.1). Of the potential EFS habitat that would be disturbed, approximately 21 ac. would be emergent wetland, the snake's preferred habitat. About 51 ac. of potential snake habitat would be converted permanently to developed uses. The remaining 146 ac. of disturbed habitat would be restored to the pre-

[5]FEIS p. 2-53.

project vegetative cover type. The three largest areas to be disturbed (*i.e.,* parking areas, construction laydown, and Fermi Road construction) are expected to be rehabilitated to a condition of equivalent or better general ecological value following completion of the project, although forest and other habitat with woody vegetation would take years to re-establish many pre-project ecological functions.[6]

Traffic into the site and vicinity would increase greatly during construction of Fermi 3 nuclear power plant. Currently, approximately 800 employees and 150 contract supplemental employees operate Fermi 2 nuclear power plant, which became operational in 1988. Increased traffic associated with construction and operation of Fermi 3 has the potential to increase Eastern Fox Snake mortality, resulting from vehicle-wildlife interactions. Approximately 2900 construction workers would be employed at the peak of construction with corresponding traffic increases into the Fermi site, and additional traffic from deliveries (Detroit Edison 2011a).[7]

Edison's Habitat and Species Conservation Plan (Detroit Edison 2012a) lists several specific minimization and mitigation actions to reduce net impacts on the snake, including the education of construction workers through use of a site-specific Eastern Fox Snake manual, relocating snakes from work areas to other suitable habitat, and inspecting undeveloped areas for snakes prior to initiating work. Specific measures to mitigate impacts called for in the plan include walking down work areas to inspect for the snake, developing procedures for capturing and relocating snakes, instructing workers to halt work in the presence of an EFS until it can be relocated, and maintaining a log of monitoring efforts and actions taken. Additionally, the plan

[6]FEIS p. 4-36.

[7]FEIS p. 4-37.

calls for a 15-mile-per-hour speed limit on roads crossing potential EFS habitat on the Fermi site and a requirement for drivers on such roadways to stop and wait for any EFS to move out of the way (Detroit Edison 2012a).[8]

The Endangered Species Coordinator for the State of Michigan, Department of Natural Resources ("MDNR") has ostensibly reviewed Detroit Edison's proposed Habitat and Species Conservation Plan for the EFS and has found it to be acceptable (Sargent 2012).[9] The April 6, 2012 MDNR form letter which approves the mitigation plan consists of check-marked blanks alongside preprinted statements: that "Information received regarding the proposed Fermi 3 nuclear plant construction (DEQ File No. 10-58-0011-P) in Monroe County (section 28, T6S R10E) has been reviewed. The information was found to adequately address the concerns for potential threatened and endangered species to the site in question."[10] There is no enumeration of which items of information were reviewed by MDNR. The approval letter further states that, "Based on the provided information, the proposed project should have minimal direct impacts on known special natural features at the location(s) specified if it proceeds according to the plans provided." And the form letter identifies the EFS as the "special natural feature" which must be protected at the location.[11]

At the website of the MDNR, which is the state agency charged with implementing and

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[8] *Id.*

[9] *Id.*

[10] ADAMS ML 12163A583, Attachment 2 to ADAMS ML 12163A582, Applicant's Motion for Summary Disposition of Contention 8, proffered by Intervenors as an exhibit in support of their case-in-chief.

[11] *Id.*

overseeing the state law protecting endangered and threatened plant and animal species, appears this statement:

> The Michigan Department of Natural Resources (DNR) has ceased to accept review requests to the Environmental Review (ER) Program after September 16, 2011. Funding for the program was not included in the state budget for the fiscal year that began October 1, 2011. Project review requests can be sent to Michigan Natural Features Inventory (MNFI), a program of Michigan State University Extension. The DNR Endangered Species Assessment website has been one venue for people to get a general idea if protected species are in an area and to request a formal DNR review for potential impacts of a proposed project. That website will remain available, but the request submittal capabilities have been removed.
>
> The Environmental Review program started in 1980. This program was created to proactively conserve endangered species. The DNR Wildlife Division and Department of Environmental Quality (DEQ) worked with businesses and citizens on a project-by-project basis to minimize harm to rare fish, wildlife and plants. This cooperative program balanced environmental concerns and economic development goals. The Environmental Review program is related to Part 365, Endangered Species Protection, of the Natural Resources and Environmental Protection Act (Act 451 of the Michigan Public Acts of 1994), which remains in place. During Fiscal Year 2010, 2,366 environmental reviews were requested.
>
> Examples of projects that were reviewed include wind turbines, gypsy moth treatments, sea lamprey treatments, transportation improvements (airports, waterways, highways), new housing developments and telecommunication towers. Environmental reviews were also done as part of permit application reviews within the aquatic nuisance control program, and the land and water interface consolidated permitting process which includes permits in lakes, streams, wetlands, floodplains, dunes and the Great Lakes. The DEQ will continue to screen permit applications for the potential need for Part 365 permits.
>
> MNFI will review projects for potential impacts to endangered species, but there will now be a cost to the requestor for these services. For information on environmental reviews or to request environmental reviews, contact Ed Schools, Senior Conservation Scientist, at 517-373-0798 or schools@msu.edu, or visit the MNFI website. Private environmental consultants also may be contacted to perform assessments of proposed projects and their potential to harm protected species. See a list of consultants with Michigan Endangered Species Permits.
>
> Endangered species and wetland laws remain in place. Under Part 365 of Public Act 451 people are not allowed to take or harm any endangered or threatened fish, plants or wildlife. That DNR still will be responsible for issuing permits and enforcement relative to the take of endangered and threatened species.[12]

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[12]http://www.michigan.gov/dnr/0,4570,7-153-10370_12141_12168-30516--,00.html

DTE Energy is not known to have requested to have a Natural Features Inventory review of the Fermi 3 plan for potential impacts.

After construction of Fermi 3 is completed, the "Habitat and Species Conservation Plan" ("HCP") prepared by DTE calls for a minimum of 5 years' monitoring of Eastern Fox Snakes once the proposed Fermi 3 facilities are built.[13]

DTE has changed the Fermi site layout to reduce wetland and open water impacts by approximately 127 acres, to approximately 40 acres, which will result in approximately 20 acres of permanent impacts to wetlands and open water impacts.[14]

The HCP indicates as follows:

> Both on-site and off-site habitat restoration and enhancement as well as off-site wetland mitigation will occur as part of this construction project. The Fermi 3 MDEQ wetland permit (File Number 10-58-0011-P) requires the construction of 107.31 acres of wetland mitigation to compensate for permanent and temporary wetland impacts. The mitigation site is located approximately 7.25 miles south of the proposed Fermi 3 location on an agricultural field on the southern border of the Monroe Power Plant site. The mitigation site will be constructed to compensate for approximately 35.55 acres of permanent and temporary impacts at the Fermi site. Of those 35.55 acres, 19.5 acres will be restored after construction is complete.
>
> These measures are being conducted to maximize the functionality of these habitats for the presence of eastern fox snakes and other wildlife and offset loss of habitat from construction activities. As part of the effort to minimize loss or take of eastern fox snakes, some snakes may be relocated to completed and translocation-suitable mitigation areas to establish this rare species in additional areas. This evaluation will be done in conjunction with project environmental engineer or the project biologist/herpetologist and the MDNR.[15]

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[13]"Habitat and Species Conservation Plan" ("HCP"), ADAMS ML 12163A577, Att. 1 to ADAMS ML 12163A582, Applicant's Motion for Summary Disposition of Contention 8, App. C., p. 1, offered herewith as an exhibit.

[14]ADAMS ML 12163A582, Applicant's Motion for Summary Disposition of Contention 8 at 6.

[15]"Habitat and Species Conservation Plan" ("HCP"), ADAMS ML 12163A577, Att. 1 to ADAMS ML 12163A582, Applicant's Motion for Summary Disposition of Contention 8, App. C., p. 1.

The precise timing of availability of the offsite mitigation acreage for snakes which are moved from the Fermi site is not clear. There is no discussion of the environmental qualities or impacts to the 19.5 acres at the Fermi site which are to be restored to habitat for the EFS following Fermi 3's construction. No information about possible contamination, surface disruption and state of overgrowth have been described in the NEPA document. There is no analysis or discussion of whether the removal of some Eastern Fox Snakes formerly inhabiting the Fermi 3 construction footprint and moving them onto undeveloped nearby land, might cause an overcrowding effect.

A 107.31 acre farm field is being re-wilded as mitigation habitat some miles from Fermi, but there is no characterization of that land in the HCP or other documents in the FEIS. It is thus not possible to tell how long the land has lain fallow, how much petrochemical fertilizer or pesticide has been applied to it or whether any residue remains. This land is adjacent to a huge coal-burning power plant, the Monroe Power Plant, the second largest-volume coal-burning power plant in the U.S., at 3,300 Mwe,[16] which is at least 40 years old. In January 2009, the Monroe Power Plant was listed 5th nationally in terms of coal combustion waste (CCW) stored in surface impoundments, with 4,110,859 pounds of coal combustion waste in 2006.[17] The data came from the U.S. Environmental Protection Agency. There has been no presentation within the FEIS of soil status: no depiction of pH levels, no explanation about any toxic chemical depositions accrued from the decades of coal usage nearby, nor the presence of radioactive contamination or mercury, which are byproducts of the burning of coal. There further is no topographical de-

[16]http://en.wikipedia.org/wiki/Monroe_Power_Plant

[17]http://www.southernstudies.org/assets_c/2009/01/tri_top_100_surf_imp_rels_p11.html

scription of the field, no description of how much of the surface of the field is covered with vegetation or deemed to be wetland, nor delineation of the wetland type or types present on the property.

There is no description of the process by which the restoration of the farm field to wetland habitat will be achieved, what types of revegetation would be sought, what types of wetlands will be restored, nor any expression of the timetable for the whole process to take place (including any remediation, if warranted following soil analysis). There is no commitment to having the mitigation farmland available contemporaneously to the removal of the EFS from the construction site, hence, the FEIS contains no projections nor discussion of the anticipated rate of recovery of the EFS as a consequence of construction of Fermi 3.

Reading the MDNR website, cited above, *in pari materia* with Michigan state law suggests that there will be no enforcement of the mitigation efforts outlined in the FEIS. Section 324.36503 of the Michigan Compiled Laws[18] states, pertinently:

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

(Emphasis supplied).

According to the FEIS at 5-24:

> An Endangered Species Specialist for the Michigan Department of Natural Resources (MDNR) reviewed Detroit Edison's proposed Fermi 3 Construction Habitat and Species Conservation Plan and Fermi 3 Operational Conservation and Monitoring Plan for the eastern fox snake. MDNR issued a letter to Detroit Edison on April 6, 2012, stating that the plans adequately address concerns for potential threatened and

[18]A copy of this statute is hereby offered into the record.

> endangered species at the Fermi site (Sargent 2012). The plans include provisions for monitoring of the eastern fox snake population during and after building of Fermi 3, which would help determine whether the impacts from increased traffic warranted additional mitigation measures. An example of proposed mitigation for traffic mortality impacts is installing fences along roads to serve as barriers to the snake and reduce the likelihood of snakes being hit by vehicles. Monitoring and implementing any mitigation measures required by MDNR, as discussed in Section 5.3.1.1, could potentially reduce the effects on the eastern fox snake from project operation to minimal levels.
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> The FEIS comments, without elaboration, on the mitigation plan for the snake:
>
> > [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.[19]

The NRC Staff thus considers DTE's mitigation promises to be "potential," but clearly recognizes the possibility of worsened risks and actual harm to the EFS "if proposed mitigation is not implemented as described in [DTE's] plan."

The White House Council on Environmental Quality ("CEQ") recently offered federal agencies guidance on creating binding mitigation commitments out of the NEPA process:

> Agencies should clearly identify commitments to mitigation measures designed to achieve environmentally preferable outcomes in their decision documents. . . .[M]itigation commitments should be carefully specified in terms of measurable performance standards or expected results, so as to establish clear performance expectations. The agency should also specify the time frame for the agency action and the mitigation measures in its decision documents, to ensure that the intended start date and duration of the mitigation commitment is clear.[20]

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[19]FEIS p. 4-47 (emphasis original).

[20]From U.S. Council on Environmental Quality, "Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact," Federal Register Vol. 76, No. 14 (1/21/2011), pp. 3848-

But the NRC has not enacted regulations which would give effect to the CEQ's guidance. There are to be no NRC staff resources dedicated to ensuring implementation of the creation of new snake habitat, if the FEIS is definitive.

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

According to the CEQ Mitigation Guidance, "[a]gencies are expected to apply professional judgment and the rule of reason when identifying those cases that are important and warrant monitoring, and when determining the type and extent of monitoring they will use to check on the progress made in implementing mitigation commitments as well as their effectiveness. . . . The following are examples of factors that agencies should consider to determine importance: . . . protected resources (*e.g.*, parklands, *threatened or endangered species,* . . .) and the proposed action's impacts on them. . . ."[21]

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)."[22]

3849, http://ceq.hss.doe.gov/current_developments/docs/Mitigation_and_Monitoring_Guidance_14Jan2011.pdf (hereinafter "Mitigation Guidance").

[21] Fed. Reg., *supra* at 3849.

[22] *Id.* at 3850.

FAILURE TO INCLUDE TRANSMISSION CORRIDOR IN SURVEY AND PLANNING FOR EASTERN FOX SNAKE MITIGATION

The miles of electrical transmission corridor for power distribution from Fermi also likely contain Eastern Fox Snake populations for which there is no mitigation plan. The ASLB, in its "Memorandum and Order (Ruling on Motion for Leave to Late-Filed Amended and New Contentions and Motion to Admit New Contentions)"[23] found that there is a strong likelihood that NEPA compliance respecting the transmission corridor has been "segmented" from the power plant project, and that the NRC cannot maintain that consideration of environmental impacts in the corridor is outside its authority to intervene:

> It appears that the sole purpose of the new transmission corridor is to transmit electrical energy generated by Fermi Unit 3, and that it would serve no useful purpose absent the new nuclear power plant. If that is true, the transmission corridor lacks independent utility (*i.e.*, it is a connected action) and must be fully evaluated in the FEIS. This remains true even though the NRC may define construction of the transmission corridor as a preconstruction activity, it is owned by a company other than the Applicant, and it is outside the NRC's regulatory jurisdiction. . . . 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.[24]

Finally, the ASLB determined, ". . . the 'primary responsibility for compliance with NEPA lies with the Commission.' [Citation omitted]. We recommend, therefore, that the NRC Staff consider the issues raised by Intervenors when it prepares the FEIS."[25]

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[23] *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.

[24] *Id.* at pp. 47-48.

[25] *Id.* at pp. 48-49.

According to FEIS statements, the Eastern Fox Snake's presence in the transmission corridor for Fermi 3 has not been fully investigated and documented. These include:

"…Field surveys of the corridor route have not yet been conducted to confirm the presence of any species. . . . Prior to installation of the offsite transmission line, FWS and MDNR would need to review detailed information of 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." This appears at p. 2-61 of the FEIS.

Also, "…The Michigan Department of Natural Resources (MDNR) (Detroit Edison 2009d) identified eight terrestrial State-listed and endangered animal and plant species that are known to occur or that could occur on or in the vicinity of the Fermi site. . . .Field studies in 2007, 2008, and 2009 identified one State-listed animal (eastern fox snake) and one State-listed plant species (American lotus [Nelumbo lutea] on the Fermi site (Detroit Edison 2009b)…" This is at FEIS p. 4-31.

Additionally, at Volume 4, page H-7 of the FEIS, there is a chart stating that consultations with the Michigan Natural Resources Department "regarding the potential impacts on threatened and endangered species" are "ongoing" as of the time of publication of the FEIS in late January 2013. And the NRC Staff review team which wrote the FEIS concludes that without mitigation, construction and preconstruction activities at the Fermi site and in the transmission corridor could be moderately adverse for the EFS:

> [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.[26]

The NRC Staff does not disclose how it arrived at the conclusion of merely "moderate" damage to the EFS, which is more evidence of omission under NEPA, but the inescapable conclusion is that the EFS species, alone, will suffer adversely if a successful mitigation effort is not made.

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[26]FEIS p. 4-47 (emphasis original).

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "INTERVENORS' DIRECT EXAMINATION AND CASE-IN-CHIEF PRESENTATION OF CONTENTION 8 (EASTERN FOX SNAKE)" have been served upon the following persons via Electronic Information Exchange this 29th day of March, 2013:

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