

they resist all attempts by Staff and DTE to suppress Intervenors' unfettered discretion to make arguments and argue inferences from anticipated evidence. DTE and the NRC Staff have in effect filed motions to strike² from legal argument in addition to moving for evidentiary rulings to exclude certain types of testimonial or documentary evidence from the record at trial.

The purpose of a motion *in limine* is to allow the trial court to rule in advance of trial on the admissibility and relevance of certain forecasted evidence. *See Luce v. U.S.*, 469 U.S. 38, 40 n. 2 (1984); *see also Palmieri v. Defaria*, 88 F.3d 136, 141 (2d Cir. 1996) ("[t]he purpose of an *in limine* motion is 'to aid the trial process by enabling the Court to rule in advance of trial on the relevance of certain forecasted evidence, as to issues that are definitely set for trial, without lengthy argument at, or interruption of, the trial'"). The use of the motion *in limine* to exclude evidence is borne out by the NRC's regulations. Licensing Boards may "on motion or on the presiding officer's own initiative, strike any portion of a written presentation or a response to a written question that is irrelevant, immaterial, unreliable, duplicative or cumulative." 10 C.F.R. § 2.319(d); *see also* § 2.319(e). By seeking to excise Intervenors' legal arguments from their Statement of Position, instead of requesting only an advance ruling to preclude certain evidence from use at trial, both Motions are fatally defective from a procedural standpoint and as to those efforts, should be denied.

Position statements filed by parties to NRC adjudications are attorney legal argument and are not, in and of themselves, evidence. Apparently the Staff and DTE lack confidence in the

²Indeed, DTE's motion *in limine* morphs into a motion to strike by the point of the final sentence of the motion: "[T]he Licensing Board should *strike* the Intervenors' arguments that are beyond the scope of admitted Contention 8."

Atomic Safety and Licensing Board's ability to discern what is and is not allowable argument over the inferences and conclusions to be derived from evidence, and instead demand an order the effect of which is to impose prior restraint on Intervenors' choices of legal tactics and positions.

II. References to Transmission Corridor As Beyond Scope of Contention 8

Without waiving their above objection, Intervenors hereby propose to make resolution of the evidentiary ruling sought by the NRC Staff and DTE uncomplicated.

Intervenors based their initial evidentiary presentation on the following passage, which is a statement by the NRC Staff which appeared in the Final Environmental Impact Statement (FEIS): “[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”³ Hence after equivocation as to whether the transmission corridor is properly excluded from the scope of the FEIS, the Staff in the end blessed its inclusion in the NEPA document as though it had been properly analyzed under federal law.

However, upon due consideration of the NRC and DTE motions, and in light of the ASLB's indication that it is considering, *sua sponte*, whether NEPA analysis should be ordered of the transmission corridor portion of the Fermi 3 plan, Intervenors offer the following means of resolving the question of whether the corridor should be at issue in the Contention 8 adjudication:

1) They agree to having stricken from “Intervenors’ Direct Examination and Case-in-Chief Presentation of Contention 8 (Eastern Fox Snake)” the section appearing at pp. 13-14,

³FEIS p. 4-447.

entitled “Failure to Include Transmission Corridor in Survey and Planning for Eastern Fox Snake Mitigation.”

2) They hereby offer to stipulate that they will not conduct direct or indirect evidentiary presentation at trial, nor conduct cross-examination which in any way suggests or refers to, the presence or absence of the Eastern Fox Snake (EFS) within the proposed 29.4 mile transmission line corridor. Further, Intervenors will not raise any argument concerning NEPA and its applicability to the corridor at that adjudication.

III. Intervenors Oppose the Striking of All Other Claimed Improprieties

In its Motion, DTE essays to have stricken from Intervenors’ Rebuttal Position Statement some items which are unrelated to the transmission corridor. While not waiving the objection that the wrong procedural device has been invoked by DTE, Intervenors respond to the remainder of DTE’s motion below.

A. Reply to Claimed Improper References to Planned Offsite Wetland Mitigation Area

DTE asserts that Intervenors should not be allowed to raise any controversies about the “planned offsite wetland mitigation area,” which involves the proposed rewilding of a farm field several miles from the Fermi site, despite the fact that this is a planned sanctuary mitigation area for the EFS.

Notably, the NRC Staff has not joined with DTE in this procedural challenge.

In the Board’s January 30, 2013 “Memorandum and Order (Denying Motion for Reconsideration of the Board’s Order Denying Second Motion for Summary Disposition of Contention 8)”, the ASLB stated as follows:

Contention 8, however, is not necessarily moot. It concerns the adequacy under NEPA of the assessment of the project’s impacts on the eastern fox snake and possible

alternatives that might reduce those effects. Intervenors may have reasons for questioning the analysis in the FEIS that are not presently before the Board but fall within the scope of Contention 8. Thus, DTE's Reconsideration Motion and the responses to that Motion are not the appropriate vehicle for deciding whether the FEIS complies with NEPA. The Board's resolution of Contention 8 should be based on filings that directly address the question whether the FEIS analyzes impacts to the snake in compliance with NEPA requirements.

Id. at 6.

DTE should not be allowed to use "wetlands mitigation" as a foil to investigation of the adequacy of EFS habitat mitigation. The information concerning the Corps of Engineers' 404 permit appears in the FEIS. The wetlands mitigation is also planned to serve as habitat mitigation, so the wetlands mitigation lies at the heart of the proposal. Accordingly, Intervenors properly may question the seriousness of DTE's commitment to wetlands mitigation. The answers to such questioning may yield evidence as to the certainty of arrangements under which the snake habitat mitigation plan will be implemented.

There are many references throughout DTE's evidentiary presentation to the offsite relocation site planned for EFS which are trapped and removed from the Fermi 3 plant site. *See, e.g.*, "Initial Written Testimony of DTE Witnesses" at A32, p. 16; A35, p. 18; A18 p. 7 (where the proposed mitigation is credited with anticipated "SMALL" impacts on the EFS); A19 p. 8; A40 p. 21; A50 p. 25. Also, *see* DTE Exh. 6, "Habitat and Species Conservation Plan," App. C, p. 1; and App. D, p. 3. And, *see* DTE Exh. 9, "Fermi 3 Aquatic Resource Mitigation Strategy and Final Design," in its entirety.

As previously noted above, in its January order, the Board sees its resolution of Contention 8 to require evidentiary filings "that directly address the question whether the FEIS analyzes impacts to the snake in compliance with NEPA requirements." Intervenors seek, by their litiga-

gation strategy, to address that question.

In addition, by presenting evidence of offsite mitigation habitat creation as part of its case-in-chief, DTE has opened the proverbial door with its own witness testimony, and must allow cross-examination and proffers of rebuttal evidence to be undertaken to test DTE's direct case sufficiency and veracity. An intervenor may cross-examine a witness on those portions of his testimony which relate to matters that have been placed in controversy by any party to the proceeding, as long as the intervenor has a discernible interest in the resolution of the particular matter. *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 & 2), CLI-75-1, 1 NRC 1 (1975), *aff'g* ALAB-244, 8 AEC 857 (1974). Intervenors may build their case "defensively" through cross-examination. *Tenn. Valley Auth.* (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-463, 7 NRC 341, 356 (1978); *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 & 2), LBP-85-20, 21 NRC 1732, 1745 (1985), *rev'd and remanded on other grounds*, CLI-86-8, 23 NRC 241 (1986).

For these reasons, that portion of DTE's "Motion in *limine*" labeled section B, "Characterization of the Offsite Wetland Mitigation Area is Outside the Scope of Admitted Contention 8" should be denied.

B. Reply to DTE Argument that References to Corps of Engineers Must Be Stricken

At pp. 6-7 of its Motion in *limine*, DTE seeks to have stricken from Intervenors' Position Statement (DTE calls it Intervenors' "Presentation") references made to the inefficacy of U.S. Army Corps of Engineers oversight of mitigation activity.

Intervenors' recitation of the Corps of Engineers' poor enforcement of replacement wetlands obligations raises an argument directly testing the adequacy of DTE's evidence. A

central controversy within Contention 8, as framed by the Board, is the adequacy of assurances that there will be habitat mitigation for the EFS. While, indeed, the Corps' function is to determine whether Section 404 of the Clean Water Act is being properly enforced to cause the creation of replacement wetlands, and not to assure avoidance of the EFS' extirpation in order to build Fermi 3, there is an undeniable overlap here. If the DTE-pledged creation of offsite wetlands habitat - which is simultaneously a species habitat creation activity *and* a Section 404-wetlands mitigation activity - is not undertaken in fulfillment of one aim, then it also will not be undertaken in fulfillment of the other. Intervenor's have articulated another means of testing the veracity of the DTE pledge of new EFS habitat, and no more, by their argument. If there were guarantees that Section 404 mitigation were to be undertaken, that fact might lend credibility to the conclusion that new EFS habitat will be created and ease DTE's proof burden.

DTE's objection fails on an even narrower basis: DTE, not the Intervenor's, is the party which first raised the matter of the Corps of Engineers' involvement at A18 of DTE's direct testimony:

Based on threatened and endangered species surveys, known threatened and endangered species locations, historical records, life history information, and information provided by DTE, and based on the NRC Staff review team's independent evaluation, the NRC Staff concludes that the impacts from construction and pre-construction activities for Fermi 3 on terrestrial resources on the Fermi site and transmission line corridor would be SMALL to MODERATE. This conclusion was based on the NRC Staff's independent review of mitigation measures proposed by DTE, *including the compensatory wetland mitigation required by the U.S. Army Corps of Engineers* and Michigan Department of Environmental Quality ("MDEQ"), and DTE's planned mitigation measures for the Eastern Fox Snake.

Id. at 7. Intervenor's necessarily and legitimately suggest that the poor Corps record of enforcement of Section 404 mitigation wetlands permits might rebut or at least probe the credibility of the basis for the NRC Staff's conclusion. DTE obviously considers the Staff

conclusion to be a resounding affirmation of the certitude that there will be EFS habitat mitigation.

WHEREFORE, Intervenors pray the Licensing Board accept their consent and stipulation as to references to the proposed transmission corridor for Fermi 3, and that the Board reject and overrule all other relief sought by either DTE or the NRC Staff.

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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)	May 28, 2013
(Fermi Nuclear Power Plant, Unit 3))	
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing “INTERVENORS’ REPLY IN OPPOSITION TO DTE AND NRC STAFF MOTIONS *IN LIMINE* ON CONTENTION 8 (EASTERN FOX SNAKE)” have been served by me upon the following persons via Electronic Information Exchange this 28th day of May, 2013:

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