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NUCLEAR REGULATORY COMMISSION

Title: Detroit Edison Company
Fermi Nuclear Plant, Unit 3

Docket Number: 52-033-COL

ASLBP Number: 09-880-05-COL-BD01

Location: Monroe, Michigan

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1 UNITED STATES OF AMERICA

2 NUCLEAR REGULATORY COMMISSION

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4 ATOMIC SAFETY AND LICENSING BOARD PANEL

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6 HEARING

7 -----x

8 In the Matter of: : Docket No.

9 DETROIT EDISON COMPANY : 52-033-COL

10 : ASLBP No.

11 (Fermi Nuclear Power : 09-880-05-COL-BD01

12 Plant, Unit 3) :

13 -----x

14 Wednesday, October 30, 2013

15
16 Monroe County Courthouse

17 Board Meeting Room

18 125 E. Second Street

19 Monroe, Michigan

20
21 BEFORE:

22 RONALD M. SPRITZER, Chair

23 DR. ANTHONY J. BARATTA, Administrative Judge

24 DR. RANDALL J. CHARBENEAU, Administrative Judge

25

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P R O C E E D I N G S

9:27 a.m.

CHAIRMAN SPRITZER: As I indicated my name is Ron Spritzer. I'm the chairman of this Board. We are here in the matter of Detroit Edison Company. The specific facility at issue is Fermi Nuclear Power Plant Unit 3. Our docket number, NRC docket number is 52-033-COL.

And we are here today to conduct an evidentiary hearing on the two pending contentions in this case, contentions 8 and 15. There's one other contention that's been held in abeyance and we're not going -- or proposed and held in abeyance dealing with the Waste Confidence Rule. We're not hearing anything regarding that issue here today.

As I said I'm Ron Spritzer. I am an administrative judge and an attorney. I'll ask the other two judges sitting up here with me to introduce themselves.

JUDGE BARATTA: My name's Anthony Baratta. I'm the associate chief administrative judge with the Atomic Safety Licensing Board. My background includes about 45 years dealing with nuclear technology issues and such. I was formerly a professor at Penn State of nuclear engineering and I've been with the Panel for

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1 about 10 years.

2 JUDGE CHARBENEAU: I'm Randall Charbeneau.
3 I'm a part-time administrative judge with the Atomic
4 Safety and Licensing Board. I'm a faculty member in
5 civil and environmental engineering at the University
6 of Texas at Austin. I've been there since 1978. I've
7 been a member of the Board since 2008. Thank you.

8 CHAIRMAN SPRITZER: All right and let me
9 ask the parties to introduce themselves for the
10 record, I should say parties' representatives that is
11 since all parties are represented by counsel, the
12 attorneys who are representing each of the parties.
13 Why don't we start on my left with the applicant.

14 MR. T. SMITH: Yes, good morning. My name
15 is Tyson Smith. I'm an attorney with Winston &
16 Strawn. With me I have my partner David Repka also
17 with Winston & Strawn. And at the end of the table is
18 Bruce Matters who is assistant general counsel with
19 DTE.

20 CHAIRMAN SPRITZER: Very well. And for
21 the interveners?

22 MR. LODGE: Thank you. Good morning, my
23 name's Terry Lodge. I'm counsel for the joint
24 interveners. To my right is Michael Keegan who is
25 assisting us and is also one of the -- is a

1 representative of Don't Waste Michigan. To my left is
2 Arnold Gundersen who is our expert witness on
3 contention 15.

4 CHAIRMAN SPRITZER: Very well. And for
5 the NRC staff?

6 MS. CARPENTIER: I'm Marcia Carpentier.
7 I'm one of the attorneys for the NRC staff. And with
8 me are Megan Wright and Kevin Broach.

9 CHAIRMAN SPRITZER: Very well. Good
10 morning to everybody.

11 Hopefully you know where the breakout
12 rooms are located for each of the parties. Everybody
13 is set up as far as those are concerned? Okay.

14 I've been advised we may have -- this may
15 be a rather odd coincidence but there's apparently
16 going to be an alarm test at 10 a.m. related I believe
17 to DTE and the Fermi plant, an emergency zone alarm
18 test. It won't, however, require us to do anything.
19 We'll simply stay here. Somebody may come in the room
20 and say you don't need to leave, but other than that
21 we're not expecting that we'll have to evacuate the
22 premises.

23 In case -- hopefully everyone is clear
24 where the witnesses will be, but if not they will be
25 seated over to my right. We have three working

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1 monitors. I'm not sure whether -- was one of DTE's
2 panels, do you have four witnesses or is it the
3 maximum?

4 MR. T. SMITH: That's correct, we have
5 four witnesses for one panel, the contention 15.

6 CHAIRMAN SPRITZER: Well, we'll have to
7 work out some mutually satisfactory arrangement where
8 all the witnesses can have access to a monitor.

9 MR. T. SMITH: I'm sure we'll be able to
10 make do. Thank you.

11 CHAIRMAN SPRITZER: Okay. I should before
12 going any further, I don't know if there are any
13 representatives of the county here but we greatly
14 appreciate their making this excellent facility
15 available. We've had great luck.

16 We also had an outstanding facility from
17 the Montgomery County Community College yesterday
18 where we held our limited appearance session.

19 Of course we couldn't do these hearings or
20 limited appearance sessions without the assistance
21 from local governmental units and we greatly
22 appreciate that.

23 For this morning I think we'll take a
24 break at about 11 and then another break probably
25 around 12:30 for lunch.

1 There appear to be at least some members
2 of the public here. I'll briefly say what this --
3 what we are here to do. We are here to conduct as
4 I've said an evidentiary hearing on two contentions,
5 essentially two claims made by the group that's seated
6 in the center here, the joint interveners.

7 One of those contentions, contention 8,
8 concerns the adequacy of the document known as an
9 Environmental Impact Statement which was prepared by
10 the NRC staff based on -- in large part based on an
11 environmental report submitted by Detroit Edison, DTE,
12 and the contention concerns the adequacy of that
13 statement and particularly the adequacy of its
14 treatment of potential impacts to a species listed as
15 threatened under Michigan law known as the eastern fox
16 snake.

17 The second contention, contention 15,
18 concerns quality assurance issues, specifically the
19 claim that proper quality assurance procedures were
20 not followed in preparation of the application that
21 DTE submitted for a combined license from the NRC.
22 And we will be looking into that question and whether
23 those alleged inadequacies have been satisfactorily
24 remedied.

25 As far as for anyone who was at the

1 limited appearance session last night I think I
2 explained there that this proceeding, unlike that, is
3 a proceeding for the parties, well, essentially for
4 the judges to ask questions of the parties' witnesses.
5 It is not a public participation session although we
6 certainly welcome your presence here today and
7 hopefully you will find it interesting and
8 educational.

9 Late last night we, or at least it was
10 approximately 5 p.m. a motion was filed by the
11 interveners requesting that this proceeding be held in
12 abeyance or terminated, suspended. I'm not sure what
13 exact word was used.

14 I can say for the judges we're obviously
15 here ready to go and we have no interest in postponing
16 anything.

17 Does DTE share that view, that we should
18 proceed with this today?

19 MR. T. SMITH: Yes, Your Honor.

20 CHAIRMAN SPRITZER: And the staff?

21 MS. CARPENTIER: Yes, Your Honor.

22 CHAIRMAN SPRITZER: All right. Well, we
23 will proceed and hear the two contentions as we
24 intended to do. Mr. Lodge, you may of course either
25 file a request to add an additional contention to the

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1 case. That I assume will be briefed by the parties in
2 the normal manner and we'll address it as soon as
3 we're able to.

4 All right, in terms of the order of
5 proceeding here, this morning we will start with
6 opening statements from the parties. After that we
7 will proceed to move the exhibits into evidence. Each
8 party will submit the exhibits that are on their
9 exhibit list. We'll ask if there are any objections.
10 If not, they'll be admitted into evidence. We'll then
11 swear the witnesses and proceed with the questioning
12 of witnesses on contention 8.

13 During the course of the proceeding
14 parties have all submitted proposed written questions
15 for us to ask. Hopefully you all have index cards on
16 which you can submit additional questions. We will of
17 course consider those.

18 Seated to my left are two law clerks, Matt
19 Zogby and Onika Williams. They'll be available to
20 pick up the cards from you. You can make some sort of
21 hand signal or whatever. We don't mind you doing this
22 during the course of the proceeding, during the course
23 of the questioning. And they'll bring them up to us
24 and we'll get to them as soon as we're able to.

25 Seated next to the law clerks is of course

1 our court reporter. For the benefit of people here
2 who are witnesses please be careful to -- in our cases
3 we tend to get a lot of acronyms. And that's not
4 necessarily prohibited but when you're using an
5 acronym for the first time try to the extent you're
6 able to tell us what the acronym stands for. That way
7 the record is a lot easier to interpret both for us
8 and anybody else who might be looking at the
9 transcript of the case.

10 Other than that as far as rules or
11 witnesses you're more than welcome -- if you don't
12 understand the questions we're asking you're more than
13 welcome to ask us to state it more clearly. If you
14 want to look at an exhibit, something you believe to
15 be an exhibit in the case let us know. We do have as
16 you can see monitors available to bring up specific
17 exhibits electronically.

18 All right. I don't think I have anything
19 further in the way of preliminaries before we move
20 onto opening statements. But do either of my
21 colleagues have -- any of the parties have any issues
22 that need to be raised before we do opening
23 statements?

24 MR. T. SMITH: No, Your Honor.

25 CHAIRMAN SPRITZER: Mr. Lodge?

1 MR. LODGE: Just to clarify, when
2 testimony is ongoing we can submit questions.

3 CHAIRMAN SPRITZER: That's right. Write
4 them down on a card. Hopefully I'll be able -- in
5 legible --

6 MR. LODGE: I was going to say.

7 CHAIRMAN SPRITZER: Pen or pencil, it
8 doesn't matter, just as long as I can read it.
9 Preferably one question to a card unless you have two
10 that are short and can easily be read on one card.

11 All right. Very well. Let's proceed to
12 opening statements and we'll begin with the
13 interveners.

14 MR. LODGE: We believe that there has not
15 been adequate consideration nor are there adequate
16 guarantees in place for the mitigation arrangements
17 for the destruction of habitat and indeed some of the
18 actual individual eastern fox snake species which are
19 found at the site where the proposed Fermi 3 is to be
20 constructed.

21 I will reserve any further statement or
22 argumentation for closing. Thank you.

23 CHAIRMAN SPRITZER: All right, do you have
24 anything on contention 15 in the way of an opening?

25 MR. LODGE: Oh, I'm sorry. We also

1 believe that there is not reasonable assurance -- I
2 thought there would be a separate opening.

3 CHAIRMAN SPRITZER: No, we're doing
4 opening on all contentions right now.

5 MR. LODGE: As to contention 15 we do not
6 believe that the applicant has demonstrated nor can it
7 presently demonstrate that there is reasonable
8 assurance that matters of quality assurance have been
9 adequately addressed in the FSAR and that there are
10 serious deficiencies dating back to as early as 2007
11 which have implications right down through the present
12 and into the future developmental planning for the
13 Fermi 3 Nuclear Power Plant. Thank you.

14 CHAIRMAN SPRITZER: All right, thank you.
15 Let's hear next from the applicant, DTE. I take it
16 Detroit Edison is now known as DTE.

17 MR. T. SMITH: That's correct.

18 JUDGE CHARBENEAU: And we should refer to
19 them by that.

20 MR. T. SMITH: DTE Energy or DTE is fine.

21 CHAIRMAN SPRITZER: Okay, thank you.

22 MR. T. SMITH: DTE Electric, I'm sorry.
23 Good morning. We're here in Monroe today to discuss,
24 as you mentioned, two contentions related to the
25 application for a combined license or COL for the

1 Fermi 3 project.

2 First, there's contention 8 which as you
3 mentioned relates to the adequacy of the NRC staff's
4 evaluation of the potential impacts to the fox snake
5 in the Environmental Impact Statement.

6 And then contention 15 which relates to
7 the adequacy of the quality measures applied by DTE
8 during the development of the application and the QA
9 program to be applied to design and construction of
10 the facility.

11 As you'll hear I think from the DTE and
12 NRC staff witnesses the issues in both contentions
13 have been the subject of extensive reviews by both DTE
14 and the NRC staff and in the case of the fox snake by
15 the Michigan Department of Natural Resources, or MDNR.

16 DTE has fully addressed and resolved the
17 issues in both contentions, and both contentions
18 should be resolved in DTE's favor.

19 I think first some background is useful to
20 help us understand why these issues are now the
21 subject of the hearing. This isn't a case where the
22 interveners had identified a problem that was
23 overlooked or that was not resolved during the Fermi
24 3 application reviews.

25 Instead, at the core of each contention

1 are issues that were identified more than 4 years ago
2 by regulators during their review of the application,
3 MDNR for the fox snake and the QA issue by the NRC
4 staff.

5 Now, this is significant not only because
6 it demonstrates that these agencies were doing their
7 jobs and doing them well but also because these same
8 agencies that raised these concerns initially now
9 consider those issues resolved.

10 For its part MDNR has found DTE's
11 comprehensive fox snake mitigation plan to be
12 acceptable and the NRC staff for its part took a hard
13 look at those impacts including the mitigation plan
14 and the EIS.

15 And for contention 15 the NRC staff
16 determined after an in-depth review that DTE has and
17 will assure the quality of the safety-related
18 information in its application.

19 So, as we go through the hearing process
20 over the next couple of days you'll have on the one
21 hand expert public agencies charged with conducting
22 technical and environmental reviews of the application
23 who have decided that the application meets regulatory
24 requirements and is otherwise acceptable.

25 And on the other hand you have the

1 interveners who are focused narrowly on a single
2 moment in time, a snapshot in the past during a long,
3 multi-year review. They've latched onto issues that
4 have been identified by other agencies many years ago
5 and that have been long since considered, addressed
6 and resolved.

7 They offer no expert witnesses on
8 contention 8 and their expert on contention 15 has
9 identified no issues of material significance or flaws
10 in the application or the DTE QA program.

11 Now, that's not to minimize the importance
12 and potential significance of these issues. As DTE's
13 expert will testify later today DTE revised the site
14 layout in a way that substantially reduces the impacts
15 to wetlands which are the primary fox snake habitat.

16 DTE also developed a comprehensive
17 mitigation plan to minimize impacts to the fox snake
18 during construction. This included consulting with an
19 expert herpetologist who is here today to testify and
20 also introduce feedback from biologists at the State
21 of Michigan.

22 DTE's commitments to protect the fox snake
23 during construction, they're very significant. This
24 is a gold standard of mitigation plans. It includes
25 preconstruction surveys and relocations, employee

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1 trainings and pre-job briefs, barrier fences around
2 construction areas, vehicle speed limits, warning
3 signs, habitat restoration and eventually post-
4 construction monitoring.

5 Now, DTE's experts will testify that these
6 measures will not only be effective at minimizing
7 impacts to fox snakes but may even lead to improved
8 conditions for the species as a whole in the area.

9 So overall the NRC staff's assessment of
10 the fox snake impacts in the FEIS is reasonable and
11 represents a hard look at these issues. Contention 8
12 should be resolved in favor of DTE and the NRC staff.

13 With respect to contention 15 DTE is
14 confident that the safety-related information in its
15 application is of the highest quality. The company
16 has a long history in the nuclear industry including
17 a strong commitment to quality assurance. And for
18 Fermi 3 DTE has a QA program that meets industry
19 standards and NRC requirements.

20 Far from showing a lack of commitment to
21 QA as the interveners have alleged DTE has
22 demonstrated its commitment to QA throughout the
23 project, from the site investigation work to the COL
24 application to the ongoing COL review. DTE's
25 dedication and commitment to a quality product cannot

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1 seriously be questioned.

2 Contention 15 has two parts. The first
3 part of contention 15 relates to the safety-related
4 information that's in the application.

5 As DTE's witnesses will explain there's
6 really only a limited amount of safety-related
7 information in the application that DTE developed.
8 Most of the information in the application that's
9 safety-related is part of the ESBWR design which is
10 incorporated by reference into the application.

11 The DTE piece of safety-related
12 information is limited to Chapter 2 and portions of
13 Chapters 3 and 6 in the final safety analysis report.
14 DTE has the highest confidence of the quality of that
15 information.

16 All the safety-related information was
17 collected under an Appendix B or Part 50 Appendix B
18 quality assurance program which is the standard for
19 nuclear applications.

20 DTE's contract for site investigation
21 activities specifically required its contractor Black
22 & Veatch, or B&V, to have an Appendix B program. And
23 DTE knew that B&V had a preexisting program that had
24 been audited by an industry group, the Nuclear
25 Procurement Issues Committee, as well as other NRC

1 licenses.

2 Acceptance of work done under a vendor's
3 Appendix B program is absolutely allowed by regulation
4 and is typical in the nuclear industry. In fact, DTE
5 specifically informed the NRC that it intended to
6 apply B&V's QA program to site investigation work.

7 With respect to the site investigation
8 work itself you're going to hear directly from DTE and
9 B&V personnel who are personally responsible for that
10 work. This is going to include individuals who were
11 onsite while the work was being performed and who also
12 had the responsibility for assuring the quality of
13 that information as it was gathered.

14 They're going to personally attest to the
15 extensive controls that were in place including
16 training requirements, minimum qualifications,
17 detailed work instructions, verification activities
18 such as observation, surveillances and audits, and
19 record-keeping.

20 And perhaps most importantly there have
21 been no issues of material significance identified
22 with respect to the quality of any safety-related
23 information in the application.

24 If the program were as deficient as the
25 interveners claim surely there would be a material

1 problem that they could point to. That they point to
2 none I think is an obvious sign of the strength of
3 DTE's QA program.

4 Now, with respect to the second part of
5 contention 15, that concerns the adequacy of DTE's
6 current QA program and the one that will be applied to
7 future construction and operation of the plant. Here
8 again, all indicators lead inexorably to the
9 conclusion that DTE has established a QA program that
10 meets NRC requirements, industry standards and the
11 NRC-endorsed QA template.

12 For its part the NRC staff has performed
13 an extensive review and evaluation of the DTE program
14 and found it acceptable. While the interveners will
15 undoubtedly focus on individual comments, and
16 discrepancies, and issues that arose during the COL
17 review these only prove that the process worked as
18 intended.

19 A QA program is a system that's designed
20 to identify and capture issues and identify areas for
21 improvement and then take steps to correct errors,
22 avoid recurrence and drive improved performance. As
23 our experts will testify the Fermi 3 QA program has
24 worked and is working precisely as intended.

25 In the end DTE has taken a deliberate and

1 transparent approach to QA at every stage of the
2 application process. All safety-related information
3 in the application is of the highest quality. And
4 just as importantly DTE is fully committed to applying
5 the Fermi QA program if and when construction begins.
6 Contention 15 should be resolved in favor of DTE.
7 Thank you.

8 CHAIRMAN SPRITZER: Thank you. Last we
9 will hear from the NRC staff.

10 MS. WRIGHT: Thank you, Judges. Good
11 morning to the judges and parties and members of the
12 public. My name is Megan Wright and I'm representing
13 the NRC staff in this proceeding. Thank you for
14 providing us with the opportunity to address the two
15 contentions admitted by the Board.

16 Contentions 8 and 15 are without merit and
17 the Board should find as such. I will briefly
18 summarize the staff's position on the issues raised by
19 interveners in contention 8 and then I will address
20 the issues and staff's position on contention 15.

21 Contention 8 concerns the staff's analysis
22 in the final EIS of impacts to the eastern fox snake
23 from building activities on the proposed Fermi site as
24 well as mitigation for those impacts.

25 The Board should resolve contention 8 in

1 favor of the staff because the pre-filed testimony,
2 exhibits and the testimony that you will hear today
3 from NRC staff witnesses will demonstrate that the
4 staff reviewers took a hard look at reasonably
5 foreseeable impacts to the fox snake as well as
6 reasonable methods to mitigate these impacts.

7 With this information the Board will be
8 able to conclude that the final EIS meets the
9 requirements of NEPA and the NRC's regulations and
10 thus that contention 8 lacks merit.

11 The staff has demonstrated that the final
12 EIS satisfies NEPA's legal requirements. Under NEPA
13 the staff must take a hard look at environmental
14 impacts of a proposed action. However, this
15 requirement is tempered by a rule of reason. NEPA
16 does not require the elimination of adverse impacts,
17 but rather a reasoned consideration of them. The
18 staff is free to choose its own method for complying
19 with NEPA so long as it is reasonable.

20 As described in its direct testimony the
21 staff followed its guidance when evaluating the
22 reasonably foreseeable direct, indirect and cumulative
23 impacts to terrestrial resources in the final EIS
24 which includes impacts to the eastern fox snake.

25 The staff conclusion in the final EIS that

1 terrestrial resource impacts from building activities
2 could range from small to moderate indicates
3 conservatism in the staff's review approach.

4 As described in its testimony the staff
5 determined that moderate impacts to terrestrial
6 resources could occur if the eastern fox snake
7 mitigation plan proposed by the applicant is not
8 implemented.

9 But ultimately the staff concluded that
10 because a number of factors indicate that it is
11 reasonably foreseeable that the proposed mitigation
12 will occur impacts to terrestrial resources would be
13 small.

14 One of the factors considered by the staff
15 is that the State of Michigan has legal mechanisms in
16 place to require that protective measures be taken
17 when activities may result in the taking of a
18 protected species. Therefore, it is reasonable for
19 staff to conclude that the protective measures will be
20 taken by applicant as described in the proposed
21 mitigation plans because state law requires that such
22 measures be taken.

23 Also, the staff independently evaluated
24 the detailed and prescriptive measures proposed in the
25 mitigation plans.

1 You will also hear today that in the
2 professional opinion of the staff reviewers the
3 mitigation plans are comprehensive and consistent with
4 protective industry standard mitigation plans.

5 In conclusion, the staff's review complies
6 with NEPA's call to take a hard look at impacts and
7 alternatives. Although there are many reasons
8 supporting the staff conclusion that the proposed
9 mitigation for the eastern fox snake will occur and
10 that terrestrial ecology impacts will accordingly be
11 small the staff's analysis also evaluated the outcome
12 if no mitigation occurred.

13 If this unexpected scenario occurred the
14 staff concluded that impacts would not exceed
15 moderate. In light of its comprehensive review the
16 staff requests that the Board find in its favor
17 because the FEIS fully complies with NEPA.

18 Regarding contention 15 interveners allege
19 that applicant's quality assurance or QA program does
20 not meet the requirements of Appendix B to Part 50 and
21 that these deficiencies therefore adversely impact the
22 quality of the safety-related design information used
23 in NRC staff's review of the COL application.

24 As stated in staff's statement of position
25 and in staff pre-filed testimony activities subject to

1 Appendix B are those that are both site-specific and
2 affecting safety-related functions. The Board should
3 resolve contention 15 in favor of the applicant for
4 three reasons.

5 First, the staff conducted a thorough
6 technical review of the applicant's quality assurance
7 program description, or QAPD, and found that it meets
8 the regulatory requirements in Appendix B to Part 50.

9 You will hear from staff witnesses today
10 who will describe that process and will testify that
11 the QAPD was reviewed against the acceptance criteria
12 in the NRC standard review plan and found to meet all
13 relevant NRC regulatory requirements.

14 Staff witnesses will also testify that
15 applicant's QAPD was reviewed against NEI template
16 NEI-06-14A revision 7 and was found to be consistent
17 with this NRC-endorsed template.

18 Contrary to intervener's arguments the
19 applicant was not required to use this template as it
20 is guidance and was not required to inform the NRC if
21 it intended to deviate from this template.

22 Secondly, all pre-application issues
23 related to applicant's QA program have been resolved
24 using the licensing process. In 2009 staff raised
25 questions as to the adequacy of applicant's QA program

1 and conducted an inspection of QA activities in August
2 of 2009.

3 Following this inspection the staff issued
4 Notices of Violation, or NOV's, in 2009 and 2010,
5 citing three issues with applicant's QA program which
6 are categorized as severity level 4, the lowest level
7 assigned to the least significant safety violation.

8 As staff witnesses will testify applicant
9 responded to the NOV's by outlining corrective steps
10 taken to address the violations and staff found that
11 the information provided by applicant was sufficient
12 to resolve the NOV's.

13 Additionally, staff used the licensing
14 process and reviewed pre-application QA activities to
15 ensure that the deficiencies cited in the 2009 NOV did
16 not affect the quality of safety-related design
17 information in the COL application.

18 This review included the issuance of many
19 Requests for Additional Information, or RAIs, which
20 applicant responded to and which were resolved as
21 described in Chapter 17 of the SER. Staff witnesses
22 will testify as to how this process was executed and
23 how the issues were resolved.

24 Third and finally, audits and inspections
25 of applicant's contractor, Black & Veatch, which

1 handled many of applicant's pre-application activities
2 also show that its QA program complies with Appendix
3 B.

4 Staff conducted two separate audits and
5 inspections of Black & Veatch in 2007 and 2010. Black
6 & Veatch was found to be in compliance with the QA
7 requirements in Appendix B both times.

8 Applicant also conducted audits of Black
9 & Veatch activities which lent additional support for
10 the conclusion that Black & Veatch activities were
11 carried out under appropriate QA controls.

12 In sum, the NRC staff appropriately
13 utilized the Agency's licensing processes and
14 determined that the Fermi 3 QA program meets all
15 relevant NRC regulatory requirements with respect to
16 the design, construction and operation of the
17 facility.

18 In order to reach that determination staff
19 reviewed the QAPD against regulations and staff
20 guidance, conducted inspections of applicant's QA
21 activities, issued RAIs to collect and clarify
22 information, and conducted audits of applicant's
23 contractor, Black & Veatch to ensure that all pre-
24 application activities were done in a manner that does
25 not compromise the safety of the project. As such,

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1 the Board should find in favor of the applicant on
2 contention 15.

3 To conclude, NRC staff pre-filed
4 testimony, exhibits and the witness testimony you will
5 hear today demonstrate that neither contention 8 nor
6 contention 15 have merit. NRC staff respectfully
7 requests that the Board find in favor of the staff on
8 contention 8 and in favor of the applicant on
9 contention 15. Thank you.

10 CHAIRMAN SPRITZER: Thank you. Very well,
11 we'll move onto admission of exhibits. Why don't we
12 start with the interveners. I'm going to bring up
13 what I believe to be your final exhibit list. I think
14 we're going to have some matters to go over because
15 there were some exhibits that we declined to allow you
16 to file and others that you withdrew. And I want to
17 make sure we get -- we properly identify what those
18 are.

19 First of all, the list I'm looking at says
20 "Intervener's Final Public Exhibit List for Contention
21 15." Why don't we start with that? We've got several
22 marked as withdrawn.

23 Am I looking at your -- have I correctly
24 identified your final exhibit list? This actually
25 includes -- it says "Intervener's Final Public Exhibit

1 List for Contention 15."

2 MR. LODGE: Yes, Your Honor. This was
3 filed I believe before the Board's ruling.

4 CHAIRMAN SPRITZER: Okay. But is this the
5 final list you've actually submitted to us?

6 MR. LODGE: Correct, yes.

7 CHAIRMAN SPRITZER: All right. And it's
8 dated October 23, 2013.

9 MR. LODGE: Correct.

10 CHAIRMAN SPRITZER: And I take it you want
11 to move into evidence all the exhibits other than
12 those marked as withdrawn.

13 MR. LODGE: Correct. Yes, sir. And to
14 the extent necessary to have the record reflect that
15 we are requesting that the Board reconsider its order
16 of last week which denied I guess receipt into the
17 record of exhibits that were submitted after the
18 October 4 deadline.

19 CHAIRMAN SPRITZER: You may need to keep
20 your voice up. I can hear you but are you able to --
21 able to hear?

22 MR. LODGE: I will.

23 CHAIRMAN SPRITZER: Okay.

24 MR. LODGE: I'll do better.

25 CHAIRMAN SPRITZER: Okay. All right.

1 Here are the exhibits that I understand -- well, let
2 me list the exhibits first of all that we've excluded.
3 I appreciate your Motion for Reconsideration but we'll
4 deny that.

5 The excluded exhibits are 6, 34 and 35, 37
6 through 49, and 64. And if you disagree with that
7 please let me know.

8 MR. LODGE: No, I think that's correct.
9 That is correct, sir.

10 CHAIRMAN SPRITZER: All right. And the
11 withdrawn exhibits, you've marked a number of them on
12 here as withdrawn but I'll give you my understanding
13 of the ones that are withdrawn, 12 through 30, 32 and
14 33, 36, 50 through 55 and 65.

15 MR. LODGE: Correct.

16 CHAIRMAN SPRITZER: All right, so all
17 those have been withdrawn. Now, according to my
18 calculations therefore the ones that you would -- that
19 we would admit into evidence absent some further
20 objection from either DTE or the staff would be
21 Exhibits 1 through 5, Exhibit 7 although that one as
22 we indicated in our order of last week would be
23 admitted as an exhibit but not as new testimony, 8
24 through 11, 31, 56 through 63, 66 through 70. That
25 would be for contention 15.

1 MR. LODGE: Yes, that's correct.

2 CHAIRMAN SPRITZER: All right.

3 MR. LODGE: And we so move.

4 CHAIRMAN SPRITZER: Now, as to the ones
5 I've identified as exhibits that have neither been
6 withdrawn or that the Board has excluded are there any
7 further objections to those from either -- from DTE or
8 the staff?

9 MS. CARPENTIER: The staff renews its
10 objection to non-public Exhibits 57 and 59 for the
11 record but we do understand your ruling on the issue.

12 MR. T. SMITH: DTE has no objection.

13 CHAIRMAN SPRITZER: All right. The
14 exhibits listed as neither excluded nor withdrawn will
15 be admitted into evidence on contention 15.

16 (Whereupon, the above-referred to
17 documents were marked for identification as
18 Intervener's Exhibit Nos. 6, 34, 35, 37-49, 64 for the
19 record and were admitted into evidence).

20 CHAIRMAN SPRITZER: Eight, I understand
21 that you have four exhibits labeled Intervener's or
22 INTE, capital E, 1 through 4. Those -- to my
23 knowledge there have been no rulings. We haven't
24 withdrawn any of those exhibits. We haven't excluded
25 any. Are there any objections to those being admitted

1 into evidence?

2 MR. T. SMITH: DTE has no objections.

3 CHAIRMAN SPRITZER: Staff?

4 MR. ROACH: The staff has no objections.

5 CHAIRMAN SPRITZER: All right. So those
6 will be admitted into evidence on contention 8.

7 (Whereupon, the above-referred to
8 documents were marked for identification as
9 Intervener's Exhibit Nos. 1-4 for the record and
10 admitted into evidence).

11 CHAIRMAN SPRITZER: Are there any further
12 exhibits from interveners that I have not covered?

13 MR. LODGE: No, sir.

14 CHAIRMAN SPRITZER: Very good. All right,
15 let's move onto DTE. And we have one exhibit list
16 from you I believe.

17 MR. T. SMITH: That's correct.

18 CHAIRMAN SPRITZER: And just a minute
19 here. The copy I have doesn't actually have a date.
20 It says DTE Electric Company, Fermi COL proceeding.
21 I guess it has -- make sure we're on the same page so
22 to speak.

23 It has an identification number on the end
24 of page 7, the letters SF350993.8. Are we looking at
25 the same document?

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1 MR. T. SMITH: Yes.

2 CHAIRMAN SPRITZER: All right. And I take
3 it you move all those exhibits into evidence?

4 MR. T. SMITH: We so move.

5 CHAIRMAN SPRITZER: Any objection from
6 either interveners or staff?

7 MR. LODGE: None from interveners.

8 MS. CARPENTIER: None from staff.

9 CHAIRMAN SPRITZER: Those exhibits will
10 all be admitted into evidence therefore.

11 (Whereupon, the above-referred to
12 documents marked on the DTE Exhibit List for the
13 record were admitted into evidence).

14 CHAIRMAN SPRITZER: And then we'll move
15 onto the staff. And you have two exhibit lists as I
16 understand it, one for contention 8, one for
17 contention 15. Am I correct on that?

18 MS. CARPENTIER: Yes.

19 CHAIRMAN SPRITZER: All right. And this
20 was -- I'm looking at the version that says "Re-filed
21 9/20/13 with added Exhibits E-20, E-21 and E-22." And
22 the original apparently was submitted March 29. Is
23 that the final exhibit list for contention 8 for the
24 staff?

25 MR. ROACH: Yes, Judge Spritzer.

1 CHAIRMAN SPRITZER: All right. And I take
2 it you move those into evidence?

3 MR. ROACH: The staff moves.

4 CHAIRMAN SPRITZER: Any objection from
5 either DTE or the interveners to those exhibits?

6 MR. LODGE: None from interveners.

7 MR. T. SMITH: None from DTE.

8 CHAIRMAN SPRITZER: All right, they'll all
9 be admitted.

10 (Whereupon, the above-referred to
11 documents marked on the Staff Exhibit List for
12 Contention 8 for the record were admitted into
13 evidence).

14 CHAIRMAN SPRITZER: And last but not least
15 we will do the staff's list for contention 15. And to
16 be sure again that we're talking about the same
17 document this one says "Submitted September 26, 2013,
18 Revised NRC Staff Exhibit List for Contention 15." Is
19 that the one, the latest version for the staff on
20 contention 15?

21 MS. CARPENTIER: Yes, it is.

22 CHAIRMAN SPRITZER: All right. And I take
23 it you move those into evidence.

24 MS. CARPENTIER: We do.

25 CHAIRMAN SPRITZER: Any objection from

1 either DTE or interveners to any of those exhibits?

2 MR. T. SMITH: None from DTE.

3 CHAIRMAN SPRITZER: Any objection from
4 interveners?

5 MR. LODGE: No.

6 CHAIRMAN SPRITZER: Very well, those will
7 all be admitted into evidence.

8 (Whereupon, the above-referred to
9 documents marked on the Staff Exhibit List for
10 Contention 15 for the record were admitted into
11 evidence).

12 CHAIRMAN SPRITZER: Finally, we have Board
13 Exhibits 1 and 2. We obviously let you know rather
14 late in the day about those. We tried to make them
15 available through the EIE system. I don't know
16 whether you were able to review them or not before
17 coming here today.

18 MR. T. SMITH: DTE was able to review them
19 and is familiar with them. We have no objection to
20 the NQA-1-1994.

21 NQA-2 as our witnesses can explain in more
22 detail has actually been superseded and is subsumed
23 within NQA-1-1994. DTE has committed to NQA-1-1994.
24 So we believe NQA-2 has no relevance to anything in
25 this proceeding so we don't believe it's necessary to

1 introduce it into evidence.

2 CHAIRMAN SPRITZER: From interveners, were
3 you able to review those documents?

4 MR. LODGE: We were, thank you.

5 CHAIRMAN SPRITZER: And if so, do you have
6 any objection to our --

7 MR. LODGE: We were and we have no
8 objections, thank you.

9 CHAIRMAN SPRITZER: And for the staff?

10 MS. CARPENTIER: We have no objections.

11 CHAIRMAN SPRITZER: All right. We'll
12 admit that into evidence.

13 (Whereupon, the above-referred to
14 documents were marked for the record as Board Exhibits
15 NQA-1-1994 and NQA-2 and were admitted into evidence).

16 CHAIRMAN SPRITZER: I understand your
17 position, Mr. Smith, but in order to ask the witness
18 to explain them we probably need to have them as
19 exhibits. So we'll admit NQA-2 for the purpose of
20 explaining what relevance, if any, it may have to this
21 proceeding.

22 Very well, let's move on then. Unless
23 there's anything further on exhibits let's move onto
24 -- well, let me ask first, are all the witnesses who
25 are going to testify on either contention here at the

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1 moment.

2 MR. T. SMITH: Yes, Your Honor, all of
3 DTE's witnesses are here.

4 MR. LODGE: Yes, Your Honor. Intervener's
5 witness is here.

6 CHAIRMAN SPRITZER: And for the staff?

7 MS. CARPENTIER: All staff witnesses are
8 also here.

9 CHAIRMAN SPRITZER: Very well. Let me ask
10 all the people who will be testifying as witnesses to
11 stand. I'm going to swear you in in a group. Please
12 answer "yes" as opposed to a shake or nod of the head
13 or a grunt or something like that. You will remain
14 under oath during the course of the proceeding
15 including when, of course, you testify. Very well.

16 (Whereupon, the witnesses were sworn).

17 CHAIRMAN SPRITZER: All right, unless
18 there's anything further of a procedural nature why
19 don't we proceed to the witnesses on contention 8. I
20 believe we're going to start first with the staff
21 witnesses. Staff counsel will introduce those
22 witnesses and they can come up and take a seat at the
23 witness stand.

24 MR. ROACH: Yes, Your Honor. The
25 witnesses for the NRC staff on contention 8 are Joseph

1 Peyton Doub and David Weeks.

2 WHEREUPON,

3 JOSEPH PEYTON DOUB

4 DAVID WEEKS

5 were called for examination by the NRC staff, having
6 been first duly sworn, assumed the witness stand, were
7 examined and testified as follows:

8 CHAIRMAN SPRITZER: The first three
9 monitors should all be operating. Bear with me a
10 minute. I'm going to bring something up on the screen
11 here.

12 All right, can we bring up the staff's
13 pre-filed direct testimony that's Exhibit NRC E-21?
14 We'll go to page 23. At the bottom. Can we go all
15 the way to the bottom of the page? Yes, okay.

16 Let's take a look at the last sentence
17 although of course you can read the whole paragraph if
18 you need to.

19 "In other words we concluded that the
20 potential impacts of building the project would be
21 small if the proposed mitigation were successfully
22 implemented but moderate if not."

23 What does the word "successful" or the
24 term "successfully implemented" mean? In your
25 opinion.

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1 MR. WEEKS: Successful implementation
2 would be -- consist of actually carrying out the
3 measures that are provided for in the plan. And that
4 the indicators of performance would be met in terms of
5 whether the -- in the case of the training for the
6 employees whether that would be carried out and duly
7 noted. And in the case of the habitat mitigation that
8 the steps outlined in the plan would be carried out
9 and then ultimately the vegetation and other habitat
10 characteristics, hydrology and so on would be measured
11 and would comply with the plan as written.

12 CHAIRMAN SPRITZER: How would one measure
13 success in terms of -- the plan has a number of
14 requirements, provisions, things that are going to be
15 done. What I'm trying to understand is how would one
16 measure success. I understand one component of it
17 would be do they actually do the things called for in
18 the plan. But are there other indicators that would
19 be used to measure success?

20 One that obviously comes to mind, at least
21 for me it seems obvious, would be to compare -- to
22 monitor in some way what happens to the snake
23 population over time which I would assume would
24 involve some initial study of how many snakes, how
25 many members of the species are present at the Fermi

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1 3 site and how that changes over time.

2 But tell me what -- if I'm wrong about
3 that in what ways there would be -- what someone would
4 look at to see if the plan is really working in terms
5 of protecting the species.

6 MR. WEEKS: The plan does not call for
7 research measures such as determining populations
8 onsite, but it does call for monitoring, of course
9 recording any instances where the fox snakes would be
10 located and relocated within the site, or at any point
11 to the offsite wetland mitigation site.

12 Those snakes that would be captured would
13 be -- have PIT transponder tags inserted into the
14 snakes that would enable the applicant's staff or
15 consultants to track those snakes so they would be
16 able to assess what is going on with those snakes that
17 were, in fact, found. So that would provide some
18 measure of saying are we -- what's happening to the
19 snakes that we find over time.

20 And that would be tracked for at least 5
21 years after all the building actions were carried out.

22 CHAIRMAN SPRITZER: Now, I take it by
23 building actions -- well, tell me what you mean by
24 that. My understanding was the period in which snakes
25 would be moved from wherever they happen to be at

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1 present would be areas that would be, what is it,
2 grade -- essentially the site preparation activities,
3 grading, excavating, clearing of vegetation, as
4 opposed to actual constructing the reactor building
5 and the generator and so forth. Am I mistaken about
6 that?

7 MR. WEEKS: My understanding is that, yes,
8 most of the activities that would potentially impact
9 the habitat or the individual fox snakes would be
10 during the site preparation and clearing.

11 CHAIRMAN SPRITZER: And the monitoring,
12 will that occur during the site preparation phase? As
13 well as after.

14 MR. WEEKS: It would begin then by
15 tracking those snakes that were captured and
16 relocated.

17 CHAIRMAN SPRITZER: And as I understand it
18 they could be relocated onsite and then when this
19 additional mitigated wetland area becomes available,
20 this is, I think it's a farm about near the Monroe
21 coal-fired plant, when that becomes available the
22 snakes could be relocated there as well?

23 MR. WEEKS: That's correct.

24 CHAIRMAN SPRITZER: And so both --
25 wherever they're relocated the snakes would be

1 monitored in some way to see, I assume if they
2 survive, number one.

3 MR. WEEKS: That's correct.

4 CHAIRMAN SPRITZER: And what else?

5 MR. DOUB: We would also track the
6 movement of the snakes and the behavior of the snakes.
7 It's not mere survival, but also behavior and response
8 to the new setting.

9 CHAIRMAN SPRITZER: Now, if as a result of
10 this monitoring it appears that snakes in one or both
11 of these locations where they may be transported,
12 either onsite wetlands or offsite, if they aren't
13 doing well what happens then? If anything.

14 MR. WEEKS: The intent is to assess what
15 is going on, determine what the causes for any
16 potential problems would be and to develop adaptive
17 measures to change whatever is happening to reduce the
18 impact on the snake. And I believe that that would
19 also involve consultation with the Michigan Department
20 of Natural Resources, or DNR.

21 MR. DOUB: The DNR would be -- the DNR
22 would be involved in reviewing the process. And they
23 would be -- the staff would expect that they would
24 prescribe adaptive measures should the monitoring
25 reveal potential problems.

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1 CHAIRMAN SPRITZER: Who's going to be in
2 charge of conducting the monitoring and reviewing the
3 results?

4 MR. WEEKS: Ultimately that would be the
5 applicant and any consultants that they would hire for
6 that.

7 MR. DOUB: But under the ultimate
8 direction of the Michigan Department of Natural
9 Resources. But the applicant would be the ones
10 collecting the monitoring field data.

11 JUDGE CHARBENEAU: How frequently are the
12 snakes identified in the field?

13 MR. WEEKS: They are somewhat secretive
14 and due to their habitat location and their coloring
15 not easily observed.

16 As I understand, DTE staff have observed
17 the snake on the site several times. The number is
18 somewhere on the order of 15 times over the last 10 or
19 so years, maybe a little more than that. Plus it was
20 observed twice during wetland delineation surveys for
21 preparation of the environmental report.

22 JUDGE CHARBENEAU: So the preconstruction
23 monitoring could be just a matter of seeing if you
24 have any identifications, is that correct?

25 MR. WEEKS: The --

1 JUDGE CHARBENEAU: For site --

2 MR. WEEKS: Yes, the mitigation plan calls
3 for all the areas to be disturbed to have a walk-down
4 a week before any construction activities and also the
5 day before. So that would be the first opportunity,
6 really, to make sure.

7 MR. DOUB: And the walk-down would be
8 performed by a qualified biologist who knows how to
9 recognize the fox snake, the eastern fox snake.

10 JUDGE CHARBENEAU: I've got a couple of
11 other questions. We had the limited appearance
12 hearings yesterday. And I understood from those that
13 there have been four populations of the snakes in this
14 region. Do you know that that's a correct number?

15 MR. WEEKS: We were unable to obtain the
16 document that was cited, but the Michigan Natural
17 Features Inventory, its primary document that
18 summarizes knowledge of the natural history of the
19 snake cites that document and others. And it is more
20 recent, includes other sources.

21 So the Michigan Natural Features Inventory
22 does not state that that is the case. It may or may
23 not be, I don't know.

24 MR. DOUB: If you go back to a paper that
25 was prepared by A. Conant in 1940 they document

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1 occurrences of the eastern fox snake and they tend to
2 be clustered on the western shore of Lake Erie, on the
3 northwestern shore of Lake Erie and Canada, and on the
4 -- on the eastern shore of Lake Huron, and clustered
5 around Saginaw Bay.

6 Although scientists do not recognize
7 distinct subpopulations of the eastern fox snake it is
8 recognized that there is a regional population that
9 encompasses most of the western shore of Lake Erie.

10 JUDGE CHARBENEAU: So that extends
11 aerially well beyond the 50-mile radius which I
12 understand was your reason for not considering a
13 finding of large if no actions were taken.

14 MR. WEEKS: That was part of our
15 assessment, yes.

16 MR. DOUB: Although if you look at the
17 7.5-mile radius that does encompass most of the
18 concentration of eastern fox snake observations on the
19 western shore of Lake Erie. Most, but not all.

20 CHAIRMAN SPRITZER: Let's bring up Exhibit
21 -- I believe it's DTE 14, that is 000014. Have you
22 both seen this document previously?

23 MR. WEEKS: Yes.

24 MR. DOUB: Yes.

25 CHAIRMAN SPRITZER: Do you know anything

1 -- I suspect this looks like this is a letter written
2 to DTE, not to the NRC staff, but do you have any
3 knowledge as to how this document came about?

4 MR. WEEKS: My understanding is that upon
5 completion of the eastern fox snake habitat and
6 species conservation plan prepared by DTE they
7 provided it to Michigan Department of Natural
8 Resources for their review since MDNR had previously
9 expressed the desire for DTE to prepare such a plan.

10 CHAIRMAN SPRITZER: All right. Can we
11 move down a little on the document? First, it says --
12 or I should say there's a box checked, this is down on
13 the second half of the page.

14 Well, first it says that the plan
15 submitted was found to adequately address the concerns
16 for potential threatened and endangered species at the
17 site in question. I take it that would be the Fermi
18 3 site?

19 MR. DOUB: Yes.

20 MR. WEEKS: That's what my understanding
21 is.

22 CHAIRMAN SPRITZER: Okay. And that the
23 proposed project should have minimal direct impacts on
24 known special natural features at the location
25 specified if it proceeds according to the plans

1 provided with the last five words underlined.

2 And then it notes that the one special
3 feature that may occur at the site is the eastern fox
4 snake. Can we go onto the next page?

5 It then says an endangered species permit
6 is required if, with the word "if" underlined,
7 activities will harm the species that are present,
8 including transplanting them to another location. And
9 the word "transplanting" is underlined.

10 Now, my interpretation of this document,
11 you tell me if I'm wrong, is what they're saying will
12 require a permit from MDNR is the implementation of
13 the plan because it will involve transplanting a
14 threatened species to different locations. Is that a
15 fair reading of the document?

16 MR. WEEKS: That's my understanding, yes.

17 CHAIRMAN SPRITZER: I don't see anything
18 here where MDNR is saying we will require a separate
19 permit, or let me rephrase that, where MDNR is saying
20 they will require DTE to apply for a take permit for
21 the construction activities that we've been talking
22 about. Do you see anything in here that indicates
23 that would be required?

24 MR. WEEKS: My reading of it is that the
25 taking permit is required for the activities that

1 would potentially result in a take and that those
2 activities would include implementation of the habitat
3 and species conservation plan. So I see it as one
4 action is my reading.

5 CHAIRMAN SPRITZER: So, your -- excuse me,
6 go ahead.

7 MR. DOUB: Also, I would note that the
8 statement says if activities will harm the species,
9 i.e., take, including but not necessarily limited to
10 transplant or actually a more correct scientific term
11 would be relocation of the snakes to another location.

12 So what this is saying is that if there is
13 take, harm, then a permit's required. And that permit
14 would have to also address the act of relocating the
15 snakes to other receiving habitats.

16 CHAIRMAN SPRITZER: If DTE -- well, let me
17 put it this way. Even with implementation of the
18 mitigation plan, full implementation of the mitigation
19 plan, is it your understanding that there would be, or
20 are realistically likely to be a taking of eastern fox
21 snake during the construction activities?

22 MR. WEEKS: It is reasonable to think that
23 some taking could occur, yes.

24 CHAIRMAN SPRITZER: How would that happen?
25 What would that consist of?

1 MR. WEEKS: Especially during site
2 clearing and preparation, since the snakes live on the
3 surface of the ground or just burrow at shallow depth
4 if they are not out on the surface and could move away
5 from disturbance they could be damaged by or crushed
6 by machinery and the bulldozing or other site
7 leveling.

8 MR. DOUB: Also, the loss of habitat would
9 constitute harm as well.

10 MR. WEEKS: Yes.

11 CHAIRMAN SPRITZER: Have either of you had
12 any discussions with MDNR about what they expect to
13 require from DTE in the way of incidental -- strike
14 that. In the way of a take permit?

15 MR. DOUB: Just via the written
16 correspondence that we have reviewed.

17 CHAIRMAN SPRITZER: Which would include
18 the exhibit we've just been looking at, I assume.

19 MR. DOUB: Correct.

20 MR. WEEKS: Yes.

21 CHAIRMAN SPRITZER: Any other documents
22 that you can recall off the top of your head?

23 MR. DOUB: As part of our review we
24 reviewed correspondence between the applicant and the
25 MDNR dating back to what's called the Sargent letter

1 which is one of our exhibits. So we have performed a
2 comprehensive review of all the correspondence
3 received.

4 We also note that the Michigan wetlands
5 permit issued also refers to the need for
6 implementation of the eastern fox snake mitigation
7 plan.

8 CHAIRMAN SPRITZER: Okay. All right. My
9 recollection was -- I think I know the document you're
10 referring to. This is the Michigan Department of
11 Environmental Quality wetlands permit?

12 MR. DOUB: Correct.

13 CHAIRMAN SPRITZER: My recollection is it
14 did refer to the potential need to get a permit. I
15 don't recall any indication that they had actually
16 reviewed the so-called mitigation plan that's been
17 talked about with respect to this contention.

18 MR. DOUB: It simply states that the
19 mitigation would have to be performed.

20 CHAIRMAN SPRITZER: All right. Well, we
21 have that document in evidence, I believe, so we can
22 see what it says.

23 Can we go back to the first page of the
24 exhibit? Let's go to the top of the page. This is
25 DTE 14.

1 I take it -- the documents you reviewed
2 that are in evidence, the MDNR documents that you have
3 reviewed and that led to your opinions that you've
4 expressed are documents that are in evidence in this
5 proceeding so we can look at them as well and draw our
6 own conclusions as to what they mean.

7 MR. DOUB: Yes.

8 CHAIRMAN SPRITZER: All right. Prior to
9 this case have either of you in your work had any
10 prior experience with the Michigan Department of
11 Natural Resources' implementation of the Michigan
12 Endangered Species Act?

13 MR. WEEKS: I have not.

14 MR. DOUB: I have prepared a biological
15 assessment for the Forest Service of a program non-
16 native invasive plant control on the Ottawa National
17 Forest. It was an environmental assessment and as
18 part of that in addition to authoring the biology
19 sections of the environmental assessment I also wrote
20 the biological assessment that had to address both the
21 federal species and per requirements of the Forest
22 Service impacts to what they call regional forests or
23 sensitive species that includes many of the state
24 species.

25 CHAIRMAN SPRITZER: Was that biological

1 assessment prepared for the United States Fish &
2 Wildlife Service or for the Michigan Department of
3 Natural Resources? Or both?

4 MR. DOUB: Both.

5 CHAIRMAN SPRITZER: Okay.

6 MR. DOUB: And that should be in my CV
7 which is one of the exhibits, E-2 or E-3.

8 CHAIRMAN SPRITZER: Is that the full
9 extent of your prior experience with the MDNR's
10 implementation of the Michigan Endangered Species Act?

11 MR. DOUB: Correct, but I do have
12 experience in a number of other states doing similar
13 work.

14 CHAIRMAN SPRITZER: What would -- let's
15 assume, as you predict, MDNR issues a permit that
16 requires implementation of the mitigation plan, DTE's
17 mitigation plan. How would MDNR go about verifying
18 compliance with that plan? If you know.

19 MR. WEEKS: I don't know, but I would
20 assume that part of that would be to review the
21 reports that DTE has said they will produce on the
22 data that they collect.

23 CHAIRMAN SPRITZER: Those would be the
24 monitoring reports you mentioned earlier?

25 MR. WEEKS: I assume that would be one, at

1 least one source of information they would use, yes.

2 MR. DOUB: We would expect that they would
3 develop a relationship with DTE over the course of the
4 implementation of the mitigation plan. However, these
5 details are not spelled out in the actual plans.

6 CHAIRMAN SPRITZER: So it would be up to
7 the state to determine how to best go about enforcing
8 the plan?

9 MR. DOUB: But the plan itself is prepared
10 in a highly detailed, prescriptive manner with very
11 exacting performance standards, actions that would be
12 performed and successes that would have to be
13 accomplished. So we would expect that the state would
14 -- that the state would -- we would expect that the
15 state would expect that the plan would be implemented
16 the way it was written.

17 MR. WEEKS: And the plan has to be
18 approved by the MDNR and I would assume that they
19 would include any permit conditions that they saw
20 necessary, including how they would verify the success
21 of the mitigation plan itself. So they could be
22 certain that the actions taken were, in fact,
23 effective, or at least to determine how effective they
24 were.

25 JUDGE BARATTA: So, you're -- let me

1 interrupt for a second. So, you're -- you're not
2 familiar with then the regulations that Michigan has
3 with regards to the implementation of the Natural
4 Resources and Environmental Protection Act, Act 451
5 that's referenced in Exhibit E-5, the -- you've cited
6 in your testimony.

7 MR. WEEKS: I am familiar with the law,
8 but the question posed earlier is whether we had prior
9 experience with the MDNR and its implementation of
10 that law.

11 JUDGE BARATTA: Okay. Have you looked at
12 the regulations that implement that law to see what is
13 actually required?

14 MR. WEEKS: I have not.

15 MR. DOUB: We do have in one of our
16 exhibits, I think it's E-18, we have the application
17 form that DTE would have to complete to obtain a
18 permit under Part 451.

19 JUDGE BARATTA: Okay, but you haven't
20 looked at any -- seen any like staff guidance, for
21 example, that MDNR looks at, uses to review the
22 mitigation plan?

23 MR. WEEKS: I have not looked at any
24 internal --

25 MR. DOUB: I'm not aware --

1 MR. WEEKS: -- internal rules.

2 JUDGE BARATTA: Okay, thank you.

3 CHAIRMAN SPRITZER: Do either of you have
4 any knowledge of how when it finds a violation, or
5 believes it has found a violation of the Endangered
6 Species Act what enforcement mechanisms are available
7 to the Michigan Department of Natural Resources? If
8 you don't know that's fine, I'm just asking whether
9 you have any knowledge about that area.

10 MR. WEEKS: You mentioned Endangered
11 Species Act. I assume you're talking the state.

12 CHAIRMAN SPRITZER: The state, that's
13 correct.

14 MR. DOUB: Part 451. I'm not aware of the
15 specific mechanisms.

16 MR. WEEKS: Nor am I.

17 CHAIRMAN SPRITZER: All right. I have
18 some questions for you that have been propounded to
19 us. The parties have asked us to ask a few. That has
20 been submitted before we got started today. Let me
21 get those out and we'll move onto those.

22 Does the NRC staff routinely employ a
23 bounding analysis in NEPA evaluations?

24 MR. DOUB: Yes, we do look at -- if there
25 is uncertainty in our analysis we will take a

1 conservative approach. We do adhere to the concept of
2 NEPA requires consideration of what is reasonably
3 foreseeable, not worst case. But we do employ a
4 degree of conservatism, and this degree of
5 conservatism is indeed reflected in our inclusion of
6 small to moderate rather than small or potential
7 impacts of terrestrial resources including the eastern
8 fox snake.

9 CHAIRMAN SPRITZER: Is the use of bounding
10 analyses permitted under NRC's NEPA guidance documents
11 such as the standard review plan, NUREG/1555?

12 MR. DOUB: To my knowledge there's nothing
13 prohibiting it.

14 CHAIRMAN SPRITZER: Do you know whether
15 it's mentioned at all in that guidance document? The
16 standard review plan.

17 MR. DOUB: I don't believe that term is
18 specifically used. But it's important to bear in mind
19 that NEPA calls for consideration of reasonably
20 foreseeable impacts.

21 CHAIRMAN SPRITZER: Now, in terms of -- I
22 understand the analysis you did and I'll refer to it
23 as a bounding analysis. You have the lower bound
24 which would be minimal impacts on the fox snake. I
25 assume that means full implementation of the

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1 mitigation plan and that it will in fact be successful
2 in identifying and transplanting snakes that might
3 otherwise be killed to a location where they're
4 successful. Is that a fair statement?

5 MR. DOUB: Yes. The term we use is small.
6 We conclude the impacts would be small. Small as
7 defined in 10 C.F.R. 451.

8 CHAIRMAN SPRITZER: And the upper bound
9 would be on the assumption that the mitigation plan
10 were not implemented at all.

11 MR. DOUB: Yes. And in that case we
12 conclude that the potential impacts would be moderate,
13 i.e., noticeable but not destabilizing.

14 CHAIRMAN SPRITZER: Destabilizing I take
15 it means you'd be having a significant impact on the
16 population of the eastern fox snake as a whole, not
17 just at the Fermi 3 site?

18 MR. DOUB: Actually we took a considerably
19 more conservative approach than that examining the
20 potential impacts in the context not of the eastern
21 fox snake as a species, but the regional population of
22 eastern fox snake on the western shore of Lake Erie.

23 So, if we had felt that the project would
24 destabilize simply that portion of the eastern fox
25 snake's distribution along the western shore of Lake

1 Erie then we would have concluded large, i.e.,
2 destabilizing impacts. But we did not feel -- even
3 with no mitigation at all we did not feel that these
4 destabilizing impacts to the eastern fox snake on the
5 western shore of Lake Erie would occur.

6 CHAIRMAN SPRITZER: Has anybody done any
7 studies of how many snakes there are on the eastern
8 shore of Lake Erie?

9 MR. DOUB: Because the eastern fox snake
10 is cryptic, i.e., its colors blend in with the
11 vegetation to effectively camouflage, typically most
12 scientific literature referring to the eastern fox
13 snake will use habitat as a metric for the occurrence
14 of the species. I'm not aware -- I am not aware of
15 any direct censusing. Doesn't mean that it hasn't
16 occurred but I'm not aware of it.

17 CHAIRMAN SPRITZER: All right. And for
18 the Fermi 3 site has there been any such censusing as
19 I believe you termed it?

20 MR. DOUB: No, not to my knowledge.

21 CHAIRMAN SPRITZER: Okay. Now, in terms
22 of the bounding analysis we have, I take it there's a
23 gray area between the upper and lower bounds where you
24 might have either partial but not complete
25 implementation of the mitigation plan. Is that one

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1 way you would wind up in this intermediate gray area?

2 MR. DOUB: Yes, it could fall somewhere
3 along the spectrum from small to moderate.

4 CHAIRMAN SPRITZER: And would that gray
5 area also include full implementation of the plan, but
6 you learn through monitoring that snakes aren't doing
7 very well, or at least some of them aren't doing very
8 well in the areas they've been relocated to.

9 MR. DOUB: That uncertainty is factored
10 into our range of small to moderate.

11 CHAIRMAN SPRITZER: So we could have
12 something in the gray area as a result of lack of full
13 implementation or lack of success, or some combination
14 of the two I take it.

15 MR. DOUB: And the impacts per our
16 analysis would still be no worse than moderate.

17 CHAIRMAN SPRITZER: All right, fine. Do
18 either of you know what the staffing levels for
19 endangered species mitigation oversight are at MDNR?

20 MR. WEEKS: I do not.

21 MR. DOUB: No.

22 CHAIRMAN SPRITZER: There's been some --
23 I believe we had an internet posting entered into
24 evidence in this case indicating that I think it's
25 called an environmental review program that MDNR does

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1 was terminated for lack of funding. Does that have
2 any -- first of all, do you recall what I'm referring
3 to?

4 MR. WEEKS: Yes.

5 CHAIRMAN SPRITZER: Does that have any
6 relationship to MDNR's ability to enforce mitigation
7 plans or permit requirements?

8 MR. WEEKS: We don't think it does. It
9 really refers to what MDNR actually already did at the
10 early stages of this project which was to evaluate the
11 environmental report and that actually I believe led
12 to the scoping letter, the so-called Sargent letter.
13 So that step has actually already happened.

14 And even with that what is referred to is
15 an early review stage. It does not reflect -- does
16 not refer to MDNR as enforcement or administration of
17 the law. It simply refers to early stage evaluation
18 of projects which now are to be covered by the
19 Michigan Natural Features Inventory for a fee.

20 MR. DOUB: In fact, that very notice
21 specifically calls out that all enforcement action
22 under Part 451 remains in place. It is simply the
23 termination of a service. It is not a change in the
24 regulations.

25 CHAIRMAN SPRITZER: No, I understand that.

1 JUDGE BARATTA: So you're referring to, I
2 guess it's NRC Exhibit E-19 is that notice.

3 MR. WEEKS: I don't recall which notice
4 that is. If you could put that --

5 MR. DOUB: Yes.

6 JUDGE BARATTA: Okay. And I guess what
7 you're referring to, if you go down to the bottom of
8 that it says -- references Public Law 451. Is that
9 the enforcement phase that you're talking about?

10 MR. DOUB: Yes, where it says endangered
11 species and wetland laws remain in place. Correct.

12 JUDGE BARATTA: Okay. So it's only that
13 opening paragraph where it refers to -- except review
14 requests to the environmental review program. Is that
15 -- that's where they would have -- are you saying that
16 that's where they would have submitted an
17 environmental report for them, for the MDNR to review
18 to determine if permits are required?

19 MR. DOUB: And in fact they did because
20 they initiated this in 2009 and the Sargent letter was
21 a response to just such a review. But because of
22 funding shifts in 2011 the DNR ceased providing that
23 review service directly for no fee and instead
24 offloaded that service to the Michigan Natural
25 Features Inventory which provides the same service for

1 a fee.

2 JUDGE BARATTA: Okay, thank you.

3 CHAIRMAN SPRITZER: Have either of you
4 ever heard the term "sentinel species?"

5 MR. DOUB: Yes.

6 CHAIRMAN SPRITZER: What does that refer
7 to?

8 MR. DOUB: It refers to a species impacts
9 to which can serve as an early warning of potential
10 greater impacts to other species.

11 CHAIRMAN SPRITZER: Is the eastern fox
12 snake a sentinel species?

13 MR. WEEKS: I've not in all the research
14 we did seen any reference to the eastern fox snake as
15 such a species.

16 MR. DOUB: I would not -- it would not be
17 my opinion that the eastern fox snake is a sentinel
18 species, except for the fact that declines in eastern
19 fox snake could be reflective of wetland losses that
20 have historically taken place along the western shore
21 of Lake Erie.

22 CHAIRMAN SPRITZER: If the eastern fox
23 snake is removed from a particular area on the Fermi
24 site did you look at the issue of how that would
25 impact species that remain in that area?

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1 MR. WEEKS: Excuse me, if you could
2 clarify, the species remaining in the area from which
3 the snakes were taken?

4 CHAIRMAN SPRITZER: Yes, exactly.

5 MR. WEEKS: We did not specifically
6 address that, but we did look at the broader picture
7 of impacts to wildlife on the site.

8 MR. DOUB: And in that consideration we
9 did consider food chain impacts. For example, the
10 eastern fox snake preys on small mammals, mice, voles,
11 et cetera. It is therefore part of the food chain.

12 So when we drew our overall conclusions of
13 small to moderate for impacts to terrestrial resources
14 we did consider those potential food chain impacts.

15 CHAIRMAN SPRITZER: What would those
16 impacts be?

17 MR. DOUB: The eastern fox snake is a
18 predator that feeds upon small mammals among other
19 prey sources. If you were to remove the eastern fox
20 snake from an area one might expect according to basic
21 ecological theory that populations of the prey species
22 would increase as a result. That in turn could affect
23 other species.

24 MR. WEEKS: Other predator species could
25 perhaps fill in the role that the eastern fox snake

1 was taking.

2 MR. DOUB: Yes.

3 MR. WEEKS: So over time there would be
4 some balance.

5 CHAIRMAN SPRITZER: Did you consider the
6 possibility -- this question refers to, I believe, the
7 mitigation site near the Monroe Power Plant. Did you
8 consider the possibility of toxicity in the soil there
9 as a result of emissions from the nearby coal-burning
10 plant?

11 MR. WEEKS: There were no indications,
12 there's no data that would indicate that that site in
13 any way would not be suitable for use as a wetland
14 mitigation site that would also potentially be used as
15 habitat for the eastern fox snake. It's currently in
16 agriculture production.

17 And although most of the planet is subject
18 to contamination and there may be something there,
19 there's a condition in the wetland mitigation plan
20 that calls for the site to be free of contaminants at
21 the completion of the mitigation process.

22 MR. DOUB: Yes, I believe it's performance
23 standard number 11 or 12 requires that the site be
24 free of various contaminants.

25 CHAIRMAN SPRITZER: Is that a performance

1 standard in the mitigation plan?

2 MR. DOUB: That's in the mitigation plan.

3 MR. WEEKS: In the wetland mitigation
4 plan.

5 MR. DOUB: The wetland mitigation plan
6 which is Appendix K I believe of the FEIS.

7 CHAIRMAN SPRITZER: All right. And would
8 that also cover agriculture pesticides? That
9 performance standard.

10 MR. WEEKS: I would assume so.

11 MR. DOUB: Yes.

12 CHAIRMAN SPRITZER: Assume or it would?

13 MR. WEEKS: Yes.

14 MR. DOUB: I would expect it, yes.

15 CHAIRMAN SPRITZER: Do you have any
16 understanding of how DTE will fund its mitigation
17 plan, including the monitoring that is supposed to
18 continue?

19 MR. DOUB: Actually, the fox snake
20 mitigation plan, Exhibit E-5, specifically identifies
21 a funding source.

22 CHAIRMAN SPRITZER: Which is what?

23 MR. FITZGERALD: It clarifies it would be
24 funded directly by DTE's budget.

25 MR. WEEKS: Construction budget.

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1 CHAIRMAN SPRITZER: Do you know who is --
2 well, we can move on. Is there a current date for
3 commencement of preconstruction activities at Fermi 3?

4 MR. WEEKS: I'm not aware of one.

5 MR. DOUB: That would be more a question
6 for the applicant.

7 CHAIRMAN SPRITZER: All right. In terms
8 of the site preparation activities that we've been
9 talking about including ground-clearing, excavation,
10 and so forth, do you know the approximate time period
11 that's expected to take once it does start?

12 MR. DOUB: I believe the site preparation
13 activities would probably extend over the course of
14 perhaps 2 years. But again we don't have specific
15 dates from the applicant as to when this work would
16 begin.

17 CHAIRMAN SPRITZER: Before the site
18 preparation work begins is there going to be any
19 monitoring to try and identify areas where the snake
20 is likely to be located?

21 MR. WEEKS: Well, the -- our assessment
22 based on the most recent available information about
23 the natural history of the fox snake is that virtually
24 all the undisturbed areas and naturally vegetated
25 areas of the Fermi 3 site are potential fox snake

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1 habitat.

2 MR. DOUB: And the fox snake mitigation
3 plan calls for walk-downs of these areas prior to
4 disturbance. So any naturally vegetated area would be
5 walked down prior to disturbance. Any snakes found
6 would be tagged and relocated according to the plan.

7 CHAIRMAN SPRITZER: In the final
8 Environmental Impact Statement volume 1 page 425
9 there's a statement to the effect that EPA recommends
10 that to minimize work on wetlands should be performed
11 during frozen ground conditions if feasible.

12 But then at Section 2.3.2 of the Fermi 3
13 operational conservation and monitoring plan for the
14 eastern fox snake appears the statement that land-
15 clearing activities should be scheduled to be
16 performed out of the fox snake's hibernation periods
17 so that they are active, easier to locate and safely
18 removed from the area.

19 I take it what this question is suggesting
20 is that there is some potential conflict there with,
21 on the one hand recommending work in wetlands being
22 done during frozen ground conditions, and work being
23 done during warmer periods for protection of the
24 snake. Do you have any idea how those two
25 recommendations will be reconciled?

1 MR. WEEKS: My understanding is that EPA
2 was providing what would be a fairly standard approach
3 to work in wetlands where if the ground is frozen
4 there's less ground disturbance. But it also says if
5 feasible. And there's many considerations when it
6 comes to construction that the applicant would be more
7 aware of.

8 But one of those possible reasons for not
9 conducting the site preparation during frozen
10 conditions would be to protect another resource,
11 including the eastern fox snake.

12 CHAIRMAN SPRITZER: Did the NRC staff
13 prepare any estimates of eastern fox snake survival
14 assuming implementation of the removal of large
15 numbers of the snake to the re-wilded farmland?

16 MR. DOUB: Once again it's important to
17 bear in mind that the relocated snakes would be
18 monitored, would be tagged and monitored.

19 CHAIRMAN SPRITZER: No, I understand that,
20 but my question is simply did the staff prepare any
21 estimate of survival of the species if they're
22 relocated to the farmland.

23 MR. DOUB: No, because we expected that
24 that issue would be addressed by this proposed
25 monitoring.

1 MR. WEEKS: And the monitoring would be an
2 ongoing activity over several years and provide
3 opportunities to address any problems.

4 CHAIRMAN SPRITZER: Is DTE presently the
5 owner of the farmland we were just talking about, the
6 one that's going to be used for the wetland
7 mitigation?

8 MR. DOUB: While I believe so that would
9 be a question for the applicant.

10 CHAIRMAN SPRITZER: All right. Do you
11 know if any arrangements exist or are planned to be
12 established to assure that the mitigation farmland
13 will serve in perpetuity as mitigation for the eastern
14 fox snake?

15 MR. WEEKS: I believe that there's a
16 requirement for a conservation easement to be placed
17 on that property as a condition of the permit. I
18 think that's actually -- that wetland mitigation would
19 be conducted as a condition of the U.S. Army Corps of
20 Engineers permit, wetland permit. And that is one of
21 the conditions that they would put in their permit,
22 that it would be protected from development in
23 perpetuity.

24 CHAIRMAN SPRITZER: I know that the
25 Michigan Department of Environmental Quality has

1 issued its wetland permit. Is there a 404 permit
2 issued by the Corps as of today?

3 MR. WEEKS: I stand corrected. Actually
4 what I was reading was from the MDEQ permit. It was
5 not the Army Corps of Engineers but it's the same
6 mitigation area.

7 MR. DOUB: To answer your question,
8 though, the Corps is still reviewing the application
9 so the 404 permit has not yet been issued. But we
10 expect that it will be.

11 CHAIRMAN SPRITZER: Are there any means
12 available for enforcement of the mitigation plan by
13 private parties?

14 MR. WEEKS: I'm not sure I understand the
15 question fully.

16 MR. DOUB: I don't either.

17 CHAIRMAN SPRITZER: All right. You may be
18 familiar in the environmental law context with the
19 concept of citizen enforcement. For example, there
20 are certain federal statutes like the Clean Water Act,
21 Clean Air Act that permit citizen enforcement in
22 various circumstances.

23 I think what this question is getting at
24 is is there any mechanism available if a private party
25 thought DTE wasn't doing what it was required to do

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1 under the mitigation plan that they could enforce that
2 in some way.

3 MR. WEEKS: I do not know.

4 MR. DOUB: I don't know but I would
5 imagine -- I would expect that a private party could
6 bring that to the attention of the Corps of Engineers
7 or the Michigan Department of Natural Resources. I
8 suspect they would take action accordingly. But I
9 don't know exactly what the mechanism would be.

10 CHAIRMAN SPRITZER: Is a combined license
11 transferrable by the licensee? Assuming one is issued
12 for Fermi Unit 3.

13 MR. DOUB: I do not know.

14 MR. WEEKS: That would be perhaps a
15 question for our legal staff.

16 MR. DOUB: Yes.

17 CHAIRMAN SPRITZER: All right, fine. As
18 far as the monitoring reports, the reports of the
19 monitoring that you referred to previously, would
20 those be available to the public or only to MDNR?

21 MR. WEEKS: I don't know. Perhaps the
22 applicant could address that.

23 CHAIRMAN SPRITZER: We have a lot of
24 questions I'd like to ask MDNR. Unfortunately we
25 don't have that option.

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1 Finally, who will be in charge of
2 implementing the mitigation plan? That is, will it --
3 I assume it will be a DTE employee. Is that
4 realistic?

5 MR. WEEKS: Again, that's a question for
6 the applicant. But that I assume would be an employee
7 or --

8 MR. DOUB: Or a contractor.

9 MR. WEEKS: -- a contractor.

10 MR. DOUB: Under the direction of an
11 employee.

12 CHAIRMAN SPRITZER: All right. So did the
13 NRC staff though, given that you were relying on this
14 mitigation plan as a -- or expecting the mitigation
15 plan to be implemented and to be successful to some
16 degree, did you look at all at the question of who --
17 what the qualifications would be for the person who
18 would be in charge of implementing this plan?

19 MR. WEEKS: The qualifications of the
20 individual who was primarily responsible for
21 developing the plan are excellent.

22 CHAIRMAN SPRITZER: No, I'm familiar with
23 that, but that's -- it's not clear to me that that
24 individual will be in charge of implementing it. We
25 can ask DTE as you point out. I'm just asking whether

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1 the staff looked into this issue. If you didn't
2 that's fine, I just want to know.

3 MR. DOUB: The staff's reasonably
4 foreseeable expectation would be that the plans would
5 be implemented by appropriately qualified personnel.
6 But I cannot say with exact specificity who would be
7 in charge of the plan.

8 CHAIRMAN SPRITZER: All right, I think
9 this would be a good moment to take a break. We'll do
10 the questions that have been submitted by the parties
11 and we may or may not have anything further for you.

12 Why don't we come back -- it's now
13 according to that clock it's 11 o'clock. So we'll try
14 and come back 10 after 11.

15 (Whereupon, the foregoing matter went off
16 the record at 10:57 a.m. and went back on the record
17 at 11:12 a.m.)

18 CHAIRMAN SPRITZER: All right, I think
19 we're ready to go back on the record. I don't have
20 any further questions for you two gentlemen but my
21 colleagues do so I'll let them proceed.

22 JUDGE CHARBENEAU: I just have one
23 question. This may have been answered.

24 When Michigan DNR issues a 451 Act permit
25 do they assign an individual to the permit to follow

1 up, do you know?

2 MR. WEEKS: I don't know.

3 MR. DOUB: I would expect they would but
4 I don't know.

5 JUDGE BARATTA: The draft EIS, what did it
6 say about the impact on the eastern fox snake?

7 MR. WEEKS: It said that impacts would be
8 small.

9 JUDGE BARATTA: And the final EIS says?

10 MR. WEEKS: Small to moderate.

11 JUDGE BARATTA: Okay. What was the reason
12 or rationale for changing that?

13 MR. WEEKS: We -- we looked at the
14 response to the draft EIS and looking at the totality
15 of the comments and the facts before us we decided it
16 would be best to take a more conservative approach,
17 recognizing that however unlikely implementation of
18 the mitigation plan was, that it was entirely likely
19 that the mitigation plan would be implemented and
20 reasonably successful. But there is nothing that
21 would totally preclude the possibility that the --
22 that that would all work as planned.

23 So we saw that it is reasonable to think
24 it is possible that the mitigation would not be
25 entirely successful. However, we do still believe the

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1 most likely outcome is that the implementation will be
2 successful and impacts will be small.

3 MR. DOUB: It was simply a more
4 conservative interpretation of the same information
5 Bruce added in the DEIS.

6 JUDGE BARATTA: Okay, so it wasn't a
7 question of lacking confidence in DTE's commitment to
8 the mitigation effort?

9 MR. DOUB: No.

10 MR. WEEKS: That's correct. We are still
11 fully confident that DTE will do as they say and that
12 the law will be implemented.

13 JUDGE BARATTA: Or the ability of Michigan
14 to enforce the requirements. There's no lack of
15 confidence in that?

16 MR. WEEKS: No, sir.

17 MR. DOUB: We remain as confident as we
18 were with the draft.

19 JUDGE BARATTA: Okay. That's all the
20 questions that I have.

21 CHAIRMAN SPRITZER: All right. I believe
22 we are finished with you, gentlemen, so you may step
23 down. Thank you for your testimony.

24 And next we will hear from the DTE
25 witnesses on contention 8. If DTE counsel would

1 identify your witnesses for us?

2 MR. T. SMITH: Yes, the DTE witnesses on
3 your right. The first witness is Peter Smith who's
4 the director of nuclear licensing and engineering for
5 the Fermi 3 project. Then you have Mr. Randy
6 Westmoreland who's the environmental lead for the
7 Fermi 3 project. And then you have David Mifsud who
8 is our expert herpetologist.

9 WHEREUPON,

10 PETER SMITH

11 RANDY WESTMORELAND

12 DAVID MIFSUD

13 were called for examination by the DTE, having been
14 first duly sworn, assumed the witness stand, were
15 examined and testified as follows:

16 CHAIRMAN SPRITZER: Very well. Let's
17 bring up DTE Exhibit 000001, that's five zeroes and
18 then the number one. And turn to page 11. Right, it
19 indicates the eastern fox snake is not listed as
20 threatened or endangered, nor is it a candidate
21 species under the federal Endangered Species Act.
22 Perhaps Mr. Mifsud, am I pronouncing your name right?
23 Is it *miff-sudd*?

24 MR. MIFSUD: *Miff-sudd*, correct.

25 CHAIRMAN SPRITZER: Do you know why it is

1 not a candidate species under the federal Endangered
2 Species Act?

3 MR. MIFSUD: To my understanding it has
4 not been previously proposed for federal listing. It
5 is protected as a state threatened species in Michigan
6 and it is both provincially and federally protected in
7 Canada. The range extends from Michigan/Ohio into
8 Ontario. In Ohio it's a species of special concern.

9 CHAIRMAN SPRITZER: Okay. Is that
10 designation under Ohio law, is that equivalent to
11 threatened or endangered, or do you know?

12 MR. MIFSUD: I do not believe it is.

13 CHAIRMAN SPRITZER: Okay. It's a lesser
14 designation?

15 MR. MIFSUD: Correct.

16 CHAIRMAN SPRITZER: But it is in some
17 manner protected under Ohio law it sounds like?

18 MR. MIFSUD: If it's similar to Michigan
19 law it's indicating that there is a no-take, meaning
20 you can't collect the animal, possess it, harm,
21 harass. There's no possession of the species. It is
22 a species that is in decline but not at a level such
23 that it warrants threatened or endangered status.

24 CHAIRMAN SPRITZER: All right, let's go to
25 page 15 of the same document. And probably in the

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1 middle of the page I believe. Yes, in kind of toward
2 the -- there's a sentence starting in about the middle
3 of the page that we have up here.

4 Under the mitigation plan DTE will remove
5 eastern fox snakes during preconstruction and
6 construction up to a 90 percent targeted collection
7 goal with continuing opportunistic collection.

8 I believe the question would again be for
9 you, Mr. Mifsud. What does targeted collection goal
10 refer to?

11 MR. MIFSUD: The targeted collection goal
12 is referencing the number of individuals within the
13 population at the Fermi facility that we want to
14 collect during the preconstruction phase.

15 CHAIRMAN SPRITZER: So I take it 10
16 percent could permissibly be uncollected pursuant to
17 the plan.

18 MR. MIFSUD: Based off of the way our
19 plans are designed we have built-in redundancies. The
20 objective was to a minimum of 90 percent during the
21 first 6 to 8 weeks prior to any construction
22 activities.

23 From that point there would be another
24 walk-down 1 week prior to construction and then the
25 day of construction additional assessments looking for

1 fox snakes.

2 Importantly, also as part of the
3 construction mitigation plan contractors are obligated
4 to learn about the eastern fox snake as well. If they
5 encounter the snakes they are to stop work activities,
6 inform the site point person who's in charge of the
7 fox snakes for the project to inform them that a snake
8 is present and to stop work.

9 MR. WESTMORELAND: And I'd just add to
10 that for preconstruction activities where the
11 potential would be there for an impact on fox snake
12 there would be a daily pre-job briefing. In that pre-
13 job brief the folks doing the work would be reminded
14 that they are to stop if they see a fox snake and wait
15 until it's removed or collected.

16 CHAIRMAN SPRITZER: Okay. So if I'm
17 understanding what you're telling me the 90 percent
18 targeted collection goal is what you try to do
19 initially. And then you're going to do the
20 individual, what do you call them, walk-downs of
21 specific construction sites later to try and go above
22 the 90 percent?

23 MR. MIFSUD: That is correct.

24 CHAIRMAN SPRITZER: Okay. So ultimately
25 you'd hope to remove all the snakes, I take it, from

1 construction areas, not just 90 percent of them.

2 MR. MIFSUD: That would be the objective,
3 correct.

4 JUDGE CHARBENEAU: Does the 90 percent
5 presuppose that you know the total number that are
6 there?

7 MR. MIFSUD: I'm sorry?

8 JUDGE CHARBENEAU: Does the 90 percent
9 presuppose that you know the total number that were
10 originally there?

11 MR. MIFSUD: The approach that we're
12 taking includes establishing barrier fences within the
13 construction areas. And by doing so we're using a
14 capture-per-unit effort approach to getting to that 90
15 percent mark. Meaning the areas that are going to be
16 under construction will be fenced off and measures
17 implemented within those areas to collect the snakes
18 during their active season.

19 So it is not to presume that we know prior
20 to that, but within the framework of that time period
21 that we're working once we have achieved a low enough
22 capture-per-unit effort where our efforts over an
23 entire day or two and we're not recovering snakes, the
24 presumption will be that we have collected out that
25 area. Again, during that 6 to 8 week period if we

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1 encounter additional snakes we would obviously remove
2 those.

3 JUDGE CHARBENEAU: Do you do an initial
4 minor disturbance of the land in order to just to
5 mobilize the snakes beforehand?

6 MR. MIFSUD: I'm sorry, I don't
7 understand.

8 JUDGE CHARBENEAU: Is there any action
9 taken before you actually would go into construction
10 to do a minor disturbance of the property to mobilize
11 the snakes so you would be able to capture?

12 MR. MIFSUD: To the extent that any land
13 disturbance would be is to establish the barrier
14 fence. What we're relying on is a visual observation,
15 visual detection.

16 As previously indicated the snakes can be
17 quite cryptic. We are implementing barrier fences as
18 I mentioned, but also utilizing cover objects. The
19 snakes are attracted to mud and wood objects, flat
20 surfaces, plywood, corrugated metal roofing and we're
21 using that as an attractant to draw the snakes in.

22 As we're walking doing transect surveys,
23 walking up and down these potential construction areas
24 the movement of our feet would potentially result in
25 having a snake become mobilized. But nothing invasive

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1 to cause the animals to be disrupted.

2 CHAIRMAN SPRITZER: Let's go to page 19 of
3 the same document. Again that's DTE 1. Yes, that's
4 good. And this is the question 37 and the answer that
5 I'm focusing on.

6 Metrics of success will be gauged through
7 the accomplishment of measures of habitat restoration,
8 enhancement and mitigation success found in Appendix
9 C of the mitigation plan. If problems or deficiencies
10 in the mitigation or restoration plans are identified
11 corrective actions will be taken.

12 Who decides what corrective actions will
13 be taken if problems or deficiencies in the mitigation
14 or restoration plans are identified?

15 MR. WESTMORELAND: That would be the lead
16 biologist at the time who would be somebody recognized
17 within DTE as a subject matter expert biologist.

18 CHAIRMAN SPRITZER: Whose lead biologist,
19 DTE's or MDNR's?

20 MR. WESTMORELAND: DTE's.

21 CHAIRMAN SPRITZER: Okay. That leads to
22 a question I'd asked earlier of the staff and probably
23 was more appropriate for DTE to answer and that is who
24 is going to be in charge of the mitigation plan.
25 Implementing the mitigation plan I should say.

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1 MR. P. SMITH: So we obviously haven't
2 hired --

3 CHAIRMAN SPRITZER: Right, I understand.

4 MR. P. SMITH: -- that position yet. But
5 we would be looking for someone of the right
6 qualifications.

7 CHAIRMAN SPRITZER: The reason I ask is
8 there was somewhere, I think it was on -- we don't
9 have to bring this up, but my recollection is in
10 Appendix C page 1 there was reference to an
11 environmental engineer or project
12 herpetologist/biologist.

13 That made me wonder, well, which is it
14 going to be. Are you going to have an environmental
15 engineer in charge of this plan, or a herpetologist,
16 or some combination of the two? Have you gotten that
17 far in your thinking that you can answer that?

18 MR. P. SMITH: No, we haven't, but we have
19 a large environmental monitoring and resources
20 division within the company of which Mr. Westmoreland
21 came from originally before this project. And they
22 develop specialties and have specialties to support
23 whatever the company's needs are.

24 CHAIRMAN SPRITZER: I'm neither an
25 environmental engineer nor a herpetologist, but it

1 strikes me there's a significant difference between
2 the two, party in terms of the ability to implement a
3 plan like this. It seems to me it calls for a
4 substantial amount of expertise in biology. Mr.
5 Mifsud appears to have that.

6 On the other hand, an environmental
7 engineer, and I certainly mean no disrespect to the
8 profession as my colleague to the left is one of them,
9 but they don't generally have training, at least in my
10 understanding, in the kind of skills that would be
11 required to implement a monitoring and species
12 protection plan like this that is very detailed.

13 Mr. Mifsud, do you have any response to
14 that?

15 MR. MIFSUD: One thing I would like to
16 build on is as part of the monitoring itself the
17 reports are submitted to the Department of Natural
18 Resources and they in turn would review those. And as
19 part of the renewal of the following year's take
20 permit, as part of the whole threatened/endangered
21 species permit there's the obligation of submitting
22 the monitoring reports. And as these deficiencies are
23 identified, assuming any are identified, the DNR would
24 be engaged as part of that process in making the
25 corrective actions.

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1 MR. WESTMORELAND: I'd like to add the
2 reason the environmental engineer is in there is
3 because at every site including Fermi there's usually
4 several given the title environmental engineers on
5 staff that are responsible for monitoring the
6 environment on the site, all the regulatory compliance
7 and environmental compliance.

8 So, you know, like Peter said we haven't
9 gotten that far down the road but I would imagine we
10 would hire someone like a Mr. Mifsud, if not Mr.
11 Mifsud himself to oversee the implementation of this
12 plan. And there would be other folks within DTE that
13 would be trained by an individual like himself and
14 that would work to assist in the implementation.

15 CHAIRMAN SPRITZER: Have you prepared --
16 this plan sounds like it's going to require a good
17 deal of effort. Have you prepared a cost estimate yet
18 for what you think the cost will be?

19 MR. MIFSUD: At one point I was asked to
20 develop a preliminary proposal based of of the
21 information we had at the time.

22 CHAIRMAN SPRITZER: And what was the
23 result?

24 MR. MIFSUD: To be honest I don't
25 remember. I guess I don't understand the question,

1 the results.

2 MR. T. SMITH: Judge Spritzer, I believe
3 DTE would likely consider specific cost information to
4 be proprietary information.

5 CHAIRMAN SPRITZER: All right. Well,
6 we'll save that if we need to for -- are these
7 gentlemen going to be available when and if we do have
8 a question and answer session for proprietary issues?

9 MR. T. SMITH: Certainly we can make them
10 available, yes.

11 CHAIRMAN SPRITZER: Okay. Great. Let's
12 move on then. Well, let me return just briefly to
13 this issue of what happens if problems or deficiencies
14 in the mitigation or restoration plans are identified.
15 Let's assume hypothetically that MDNR says we think
16 certain things need to be done differently. And DTE
17 may agree, they may disagree. Is there any procedure
18 for working out differences of that nature?

19 MR. MIFSUD: Typically the resolution
20 comes from both parties. In my previous experiences
21 on projects such as this the resolution or proposed
22 resolutions are already proposed.

23 One thing I guess I would -- not to de-
24 emphasize the potential risks, but there's a number of
25 safeguards and implementations that are put into this

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1 project that I'm at least for myself quite proud of
2 that limit the potential of this.

3 We wanted to introduce this as an
4 additional safeguard that these things could happen.
5 But the reality is based off the natural history,
6 based on the efforts that DTE has initiated in terms
7 of utilizing and implementing the mitigation plan from
8 my personal feelings and opinion that the likelihood
9 of deficiencies would be very low.

10 That being said, the DNR and DTE would
11 likely come together to find a resolution to whatever
12 matters were to come up.

13 MR. P. SMITH: Let me add that the take
14 permit of which the mitigation plan is a part of is an
15 annual permit. Is that incorrect? And so we would be
16 subject to the annual permitting aspect of this to
17 ensure that our mitigation plan would correct any
18 deficiencies.

19 MR. LODGE: Your Honor, could the
20 witnesses keep their voices up? When they lean away
21 from the microphone it almost is not amplified at all.

22 CHAIRMAN SPRITZER: All right. I think
23 that would help particularly to our court reporter.
24 I'm able to understand them but if anybody else is
25 having a problem, let us know.

1 All right, let's return to DTE Exhibit
2 000014. That's four zeroes followed by 14.

3 JUDGE CHARBENEAU: Before we go on from
4 this question you said that the take permit is an
5 annual permit. What is the duration of the
6 construction period where you would have the need for
7 a take period -- or a take permit?

8 MR. P. SMITH: It would be a number of
9 years.

10 JUDGE CHARBENEAU: So, 2 or 3?

11 MR. P. SMITH: No, I think it would
12 probably be more like 6 or 7.

13 JUDGE CHARBENEAU: Oh, okay. Thank you.

14 CHAIRMAN SPRITZER: All right, we're
15 looking again at DTE Exhibit 14. Move up a little.
16 There we go.

17 Mr. Mifsud, I believe you would have been
18 involved in this in some way. Can you explain to me
19 how this document came about? If you know.

20 MR. MIFSUD: Yes. Mr. Westmoreland and
21 myself met with Lori Sargent and Dan Kennedy of the
22 Department of Natural Resources Wildlife Division.
23 They are the individuals who are charged with
24 overseeing the threatened and endangered species
25 program and any permits that are issued.

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1 We went to meet with them to discuss the
2 proposed -- the eastern fox snake mitigation plan to
3 get their feedback and to discuss with them any
4 concerns that they might have about the project.

5 This letter is a response to the plans
6 which are -- is this tone? I don't want to be too
7 loud either. I have a tendency to be loud.

8 CHAIRMAN SPRITZER: No, you're fine. The
9 louder the better.

10 MR. MIFSUD: Okay. DTE Exhibit 6 which is
11 the eastern fox snake mitigation plan. That is the
12 plan that we submitted at that time of the meeting
13 with the MDNR.

14 CHAIRMAN SPRITZER: Okay. And I take it
15 the meeting was focused on the eastern fox snake as
16 opposed to other species that might be present at the
17 site?

18 MR. MIFSUD: Correct.

19 CHAIRMAN SPRITZER: Let's go to the next
20 page. Just so you know where this line of questioning
21 is coming from, we're trying to figure out what MDNR
22 is really going to do here. We don't have a permit.
23 We have projections about what's going to be in a
24 permit.

25 I'm looking at this document and it says

1 an endangered species permit is required if -- with
2 the word "if" underlined -- activities will harm the
3 species that are present including transplanting --
4 again underlined -- them to another location.

5 As I read it -- or certainly that can be
6 interpreted to say that what they're going to require
7 a permit for is actually the transplanting, not the
8 construction activity itself.

9 MR. MIFSUD: It will require a permit for
10 transplanting or translocation is another term that we
11 use for that. That is in addition to any construction
12 activities on the site.

13 For example, if I were to be the person
14 who is doing the translocation, the rescue and
15 recovery, that would be potentially covered under my
16 current threatened/endangered species permit
17 regardless of the construction permit that DTE would
18 have or the take permit that DTE would have for
19 impacts associated with construction.

20 CHAIRMAN SPRITZER: Did this whole issue
21 of what DTE needed to apply to MDNR for a permit for
22 come up at this meeting you've described that led to
23 this document?

24 MR. WESTMORELAND: I just want to back up
25 a little bit and just put this in context. DTE had

1 been engaging with the DNR for several years.

2 So we first met with the DNR back in 2009
3 and sat down and gave them an overview of the project
4 and said here's our project we're planning. You know,
5 will we require a take permit? What is the process?
6 What would you need?

7 And as we sat with them they said well,
8 you're going to need a mitigation plan for the fox
9 snake. So that's when it started.

10 And we had drafted one plan and then they
11 gave some comment on it and then we came to this final
12 plan here after meeting three times in person.

13 CHAIRMAN SPRITZER: Okay. I understand
14 that part. But did they tell you at the meeting that
15 led to this document, DTE 14, we will expect you to
16 apply for an incidental take permit for your
17 construction activity, not just for the translocation
18 of the snake.

19 MR. WESTMORELAND: Yes.

20 CHAIRMAN SPRITZER: And that's your
21 understanding of their position as of today?

22 MR. WESTMORELAND: It is.

23 CHAIRMAN SPRITZER: And as part of the
24 application for that permit you will have to provide
25 a mitigation plan?

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1 MR. WESTMORELAND: That is correct.

2 CHAIRMAN SPRITZER: And they will review
3 that and presumably decide whether they still believe
4 it's adequate or not and so forth.

5 MR. WESTMORELAND: Yes. They may, you
6 know, want to add more. It depends on who is --

7 CHAIRMAN SPRITZER: And you would expect
8 that to be incorporated in the permit as a condition
9 of the permit. That is, the implementation of the
10 plan.

11 MR. WESTMORELAND: Yes. Absolutely.

12 CHAIRMAN SPRITZER: Okay. Do their
13 permits typically have any kind of stipulated penalty
14 for non-compliance? If you know. I'm just asking.

15 MR. MIFSUD: Off the top of my head I
16 don't recall. I do know that they can do a stop work
17 order and which can be quite costly on a project,
18 something of this caliber.

19 MR. WESTMORELAND: The actual act itself
20 indicates that there are potential criminal penalties
21 for non-compliance.

22 CHAIRMAN SPRITZER: Who would initiate
23 that -- regardless of whether we're talking about
24 civil or criminal penalties. If MDNR came to the
25 conclusion you weren't complying with your permit in

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1 some way what kind of action could they take under
2 their authority as you understand it and how would
3 that come about? If you know.

4 MR. MIFSUD: The department has a law
5 enforcement division that would be charged with
6 enforcing any criminal actions. As Randy mentioned
7 both financial penalties as well as potential
8 enjailment for violation of the take. Or the permit.

9 CHAIRMAN SPRITZER: If they want to
10 initiate an enforcement action do you know whether --
11 this is a legal question so if you don't know tell me
12 you don't know. But do they have the legal authority
13 to initiate an action on their own? Or do they have
14 to go to, for example, the state attorney general and
15 get his authorization?

16 MR. MIFSUD: That I don't know the
17 specifics of.

18 JUDGE BARATTA: To go to another exhibit.
19 Could we bring up DTE 000012? And I guess go to page
20 6. I think that's it. That's the -- yes, go to page
21 6. It's actually the sixth page in the exhibit as
22 opposed to -- does that clarify who has the authority
23 to -- and could you describe what this is? It's an
24 excerpt from what?

25 MR. MIFSUD: Is the question addressed to

1 me?

2 JUDGE BARATTA: Whoever.

3 MR. MIFSUD: Yes, it's the Department of
4 Natural Resources Environmental Protection Act, Act
5 451 that was modified in 1994 which is the Threatened
6 and Endangered Species Act for Michigan.

7 JUDGE BARATTA: And this says what then as
8 to who can enforce it?

9 MR. MIFSUD: As it reads Section 36506, a
10 law enforcement officer, police officer, sheriff,
11 deputy, or conservation officer shall enforce this
12 part and the rules promulgated under this part.

13 JUDGE BARATTA: Okay. And this part
14 refers to the --

15 MR. MIFSUD: The Threatened and Endangered
16 Species Act.

17 JUDGE BARATTA: Does that answer your
18 question?

19 CHAIRMAN SPRITZER: No, not really, but he
20 had told me before he didn't know whether they have
21 independent enforcement authority or whether they have
22 to go through -- as I understand your testimony you do
23 not know whether in order to bring an enforcement
24 action the MDNR has -- it can do that entirely on its
25 own, or it has to go through the state attorney

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1 general's office.

2 MR. MIFSUD: Yes, that's beyond my scope.

3 CHAIRMAN SPRITZER: That's fine.

4 MR. MIFSUD: I can say that if someone
5 were to take a deer illegally a conservation officer
6 has the legal authority to arrest, fine that
7 individual. In the context of this situation I don't
8 know if additional measures. But any one of the
9 groups indicated there has the legal authority to
10 enforce the Threatened and Endangered Species Act.

11 CHAIRMAN SPRITZER: Right, I understand
12 that. I'm trying to envision how MDNR could go about
13 enforcing this plan. It involves a number of
14 different steps, procedures that DTE will have to take
15 during the site preparation work.

16 It seems to me wouldn't someone from MDNR
17 have to be onsite fairly regularly to check up on what
18 DTE is doing in order to be able to tell whether you
19 were actually implementing the plan?

20 MR. P. SMITH: I'm not going to speak for
21 MDNR but from our perspective when we commit to a plan
22 we comply with it.

23 CHAIRMAN SPRITZER: No, I understand, and
24 I'm not disputing. All I'm asking is what MDNR could
25 do, how they would go about as a practical matter

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1 trying to determine compliance.

2 MR. MIFSUD: The DNR within their
3 guidelines are allowed to visit a site. Through a
4 cooperative agreement also between the U.S. Fish &
5 Wildlife Service there is property on the DTE grounds
6 that is under a cooperative agreement.

7 As indicated in the list of authorized
8 agents who can do enforcement the Fish & Wildlife
9 Service conservation officer would also be eligible as
10 a deputized sheriff to do enforcement and the Fish &
11 Wildlife Service staff is out at the site. The DNR
12 would have the legal authority to visit the site to
13 conduct an inspection if there was reason to believe
14 that there was anything that was not being conducted
15 within the scope of the permit.

16 CHAIRMAN SPRITZER: I understand they have
17 the authority. I guess what I'm getting at, and I
18 won't belabor the point any further, but it just seems
19 to me this would be a -- under the Clean Water Act,
20 for example, you're probably familiar with discharge
21 permits under the Clean Water Act. Somebody violates
22 that permit, you have a discharge monitoring report,
23 you look at the number, they're out of compliance,
24 we're done.

25 For this it seems much more complicated.

1 You'd have to be there, I would think, to monitor in
2 some way what's actually going on at the site.

3 MR. WESTMORELAND: The only requirement in
4 the plan at this point is for an annual monitoring
5 report to the DNR.

6 CHAIRMAN SPRITZER: Okay. So you do have
7 that.

8 MR. WESTMORELAND: Yes.

9 CHAIRMAN SPRITZER: And that would provide
10 them information they could look at. I take it that's
11 basically going to tell them although in a more
12 complicated way are you succeeding --

13 MR. WESTMORELAND: Yes.

14 CHAIRMAN SPRITZER: -- with what you're
15 trying to accomplish which is ultimately to protect
16 the species, not just to implement the plan. Right?

17 MR. MIFSUD: Correct.

18 JUDGE BARATTA: You mentioned guidelines.
19 I'd like to ask you the same question I asked the
20 staff earlier. We have before us in Exhibit 12 the
21 act. And then are there implementing regulations and
22 guidelines to the staff as to how that act is in fact
23 implemented?

24 MR. MIFSUD: The staff is required to
25 evaluate the plans to minimize impacts. To my

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1 knowledge I do not believe that there is a specific
2 set of guidelines, a punch list if you will of
3 specific things that need to be addressed. They rely
4 on the expertise within the department as well as
5 relying on outside experts with background in
6 particular tags or organisms that are being considered
7 for the threatened/endangered species permit impacts.

8 JUDGE BARATTA: Anybody want to add
9 anything to that? No. What about for the guidelines
10 for enforcement of the act? You mentioned I think how
11 they review the mitigation plan, but what about for
12 enforcement of the act?

13 MR. MIFSUD: I guess could you -- I don't
14 understand the question.

15 JUDGE BARATTA: Well, enforcement of the
16 permit that would be issued under the act I should
17 say.

18 MR. MIFSUD: Their enforcement is, as I
19 mentioned they have the authority to visit a site, to
20 conduct inspections if they feel there is a warranted
21 need to do so. The mitigation monitoring report will
22 also entail any sorts of, as we discussed, any
23 potential deficiencies, the successes of the program
24 and the project, the number of animals relocated, and
25 any take that occurred during that time frame.

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1 If the take is deemed by the state to be
2 in excess they would potentially consult with DTE and
3 their consultants to review that. At the end of the
4 year DTE is obligated to submit that monitoring report
5 before they can get a new permit.

6 And the permits are also tied to other
7 conditions. For example, as a condition of the
8 wetlands permit they have to maintain an active
9 threatened/endangered species permit. So there is
10 some checks and balances with other regulatory
11 agencies in making sure that the permit conditions are
12 maintained.

13 CHAIRMAN SPRITZER: Are you familiar with
14 the term "sentinel species?"

15 MR. MIFSUD: Yes.

16 CHAIRMAN SPRITZER: Is the eastern fox
17 snake a sentinel species?

18 MR. MIFSUD: I would not go as far as to
19 say it's a sentinel species, but it is considered a
20 bioindicator species. It has a mid-level position on
21 food webs meaning that it is both a predator and a
22 prey item.

23 And one of the things that we caution on
24 this is that there will potentially be take on a
25 project on this scale. There's take going on at Fermi

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1 potentially right now. Bald eagles, redtail hawks,
2 blue herons, large snapping turtles, any number of
3 things will predate or eat an eastern fox snake. So
4 when we look at those potential impacts we have to
5 also consider that there's natural predation that goes
6 on.

7 So the eastern fox snake is a coastal
8 wetlands specialist. It occurs in a relatively narrow
9 band of habitat along the Lake Erie/Lake Huron
10 shoreline within Michigan.

11 Because of the association with those
12 habitats we do use it as an indication of its presence
13 that there are certain habitat types present. But
14 that being said it also can be somewhat of an adaptive
15 species that occurs in a variety of different
16 landscapes within this region.

17 CHAIRMAN SPRITZER: What will the impact
18 be on the remaining species in areas from which the
19 fox snake is, what's the term, transported?
20 Translocated?

21 MR. MIFSUD: Translocated? Wherever the
22 eastern fox snake is being relocated we have discussed
23 the fact that while we're conducting that it would be
24 irresponsible to not also collect an eastern garter
25 snake or a turtle that might be in that same region.

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1 So we're going to be relocating the herpetofauna with
2 the emphasis on the eastern fox snake which is the
3 state threatened species.

4 That being said, as part of those areas
5 where activities are going to be constructed the
6 animals are going to -- anything within that area is
7 ultimately going to be displaced. So there would not
8 be a disruption in terms of higher prey item densities
9 because those areas would at least during the
10 construction phase for temporary impacts be non-
11 habitat.

12 CHAIRMAN SPRITZER: You used the term
13 herpetofauna, I believe. Could you spell that perhaps
14 for the benefit of our court reporter and tell us what
15 it means?

16 MR. MIFSUD: Sure. I have to write it
17 down some days myself here. H-E-R-P-E-T-O-F-A-U-N-A.
18 Herpetofauna refers to the regional amphibian and
19 reptile species assemblage, the different amphibians
20 and reptiles that occur within a particular area. So
21 if we refer to the herpetofauna of the Fermi facility
22 we're referring to those facilities that are specific
23 to that area.

24 CHAIRMAN SPRITZER: Has there been any
25 characterization of the alternate site, that's the

1 site near the Monroe Power Plant in terms of toxicity
2 of the soil?

3 MR. WESTMORELAND: We haven't done any
4 kind of analytical testing on the soil, at least not
5 our group. I'm not aware of any other work like that
6 through DTE although that's possible.

7 But we have no reason to believe that that
8 site is contaminated. It's been farmed for many, many
9 years and is currently farmed.

10 The -- I've walked the site with
11 representatives from the DEQ and the Army Corps
12 several times. They're quite happy with that site for
13 mitigation and they express no concerns about
14 contamination of the site.

15 CHAIRMAN SPRITZER: DEQ is -- what is
16 that?

17 MR. WESTMORELAND: Michigan Department of
18 Environmental Quality.

19 CHAIRMAN SPRITZER: Okay. I guess this
20 question is for you, Mr. Mifsud. What are the
21 staffing levels for endangered species mitigation
22 oversight at the Michigan Department of Natural
23 Resources? If you know.

24 MR. MIFSUD: I don't know the specifics
25 because the Department of Natural Resources has

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1 reorganized multiple times in the last few years.

2 I know at least the two people we're
3 dealing with on a regular basis are Dan Kennedy and
4 Lori Sargent. But they do have a support staff and
5 including the law enforcement department that does do
6 site inspections.

7 CHAIRMAN SPRITZER: Do you know the
8 staffing level of the enforcement department?

9 MR. MIFSUD: I do not.

10 CHAIRMAN SPRITZER: All right, I'm going
11 to be continuing with questions that have been given
12 to us by the parties. I'll try and interpret them as
13 best I can.

14 Right now I take it there's no current
15 date for start of site preparation work at the Fermi
16 3 site.

17 MR. P. SMITH: That's correct.

18 CHAIRMAN SPRITZER: When in relation to
19 the start of site preparation work would
20 implementation of the mitigation plan start?

21 MR. P. SMITH: We've got a number of
22 mitigation plans. For example, the wetlands
23 mitigation plan which would be for the Monroe site
24 that we've just talked about --

25 CHAIRMAN SPRITZER: Right.

1 MR. P. SMITH: We'd have to start that in
2 advance of or contemporaneous with the start of site
3 activities.

4 In our schedule for when we make a
5 decision to go forward actually the first couple of
6 years of that schedule are mostly devoted to planning
7 and mobilizing activities. So there's a fair lag
8 before we would actually start physical construction
9 of preparing the site.

10 So there's -- that whole period would be
11 available to be doing any characterization work that
12 we would need to to determine where the populations
13 are and start implementing the mitigation plan. So we
14 haven't made a specific time line on that but it would
15 be in advance of the construction as described in the
16 mitigation plan.

17 JUDGE CHARBENEAU: How long does it take
18 to receive a permit? For take.

19 MR. MIFSUD: The threatened/endangered
20 species permit?

21 JUDGE CHARBENEAU: Yes.

22 MR. MIFSUD: It depends on the project and
23 the time frame. Typically a couple of months at the
24 most.

25 JUDGE CHARBENEAU: Would you apply for the

1 permit well before you would consider construction
2 just to have it on hand, or is that something you
3 would do in the immediate?

4 MR. P. SMITH: We did not apply for a take
5 permit for fox snake because of the annual expiration.
6 There was no point in doing that prior to knowing
7 exactly when we were going to actually start having to
8 implement that.

9 JUDGE CHARBENEAU: But you would apply for
10 a permit as part of your decision to move forward with
11 construction.

12 MR. P. SMITH: We would apply for the
13 permit at the appropriate time after we've made a
14 decision to go forward commensurate with the
15 activities that we would be engaging.

16 CHAIRMAN SPRITZER: Have you made any
17 estimate of eastern fox snake survival assuming
18 implementation of the removal of large numbers of
19 eastern fox snake to the re-wilded farmland?

20 MR. MIFSUD: We haven't evaluated the
21 mitigation area. The emphasis for this project will
22 first and foremost be to mitigate onsite, keeping the
23 eastern fox snakes within the current Fermi facility
24 to the extent possible.

25 The goal in terms of the referencing for

1 potential relocation of animals to the mitigation
2 would be as a secondary or tertiary step. Once that
3 facility or once that area has successfully progressed
4 to a point that would potentially support the eastern
5 fox snakes include the opportunity for relocating
6 neonates or juvenile animals that would be young of
7 the year or juvenile snakes to inoculate that to help
8 expand the population.

9 MR. P. SMITH: I'd just like to add that
10 a large percentage of the site is unimpacted by
11 anything related to a Fermi 3 construction which is
12 available for -- as habitat for relocation of snakes
13 relative to the amount of area that we're actually
14 going to impact.

15 MR. WESTMORELAND: Or 800 acres.

16 CHAIRMAN SPRITZER: That's the Fermi site
17 as a whole I take it you're referring to, not the
18 farmland.

19 MR. P. SMITH: The Fermi site as a whole
20 is twelve hundred and sixty some acres of which 650
21 acres of are part of the Detroit International
22 Wildlife Refuge that are co-managed with the U.S. Fish
23 & Wildlife Service. And then our actual impacted area
24 for construction of all types is --

25 MR. WESTMORELAND: Well, the wetland

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1 impact is about 35 acres and the overall construction
2 impact once construction is complete is 50 acres.
3 That's including restoration after construction.

4 MR. MIFSUD: That's for both wetland and
5 upland.

6 MR. WESTMORELAND: Yes.

7 CHAIRMAN SPRITZER: So I take it if you
8 don't have the offsite mitigation area ready when you
9 start trying to translocate snakes you'll have wetland
10 area onsite that you can move them to?

11 MR. P. SMITH: Correct.

12 CHAIRMAN SPRITZER: And that's part of
13 your plan?

14 MR. P. SMITH: And that's the focus. The
15 use of the Monroe mitigation site is really an extra
16 alternative that if we need to we would have that
17 available.

18 CHAIRMAN SPRITZER: Now with respect to
19 the offsite farmland that you'll use as wetland
20 mitigation is that owned by DTE already?

21 MR. P. SMITH: Yes, it's part of the
22 Monroe Power Plant property.

23 CHAIRMAN SPRITZER: And there was some
24 mention earlier of a conservation easement. What can
25 you tell us about that?

1 MR. P. SMITH: That's correct. As part of
2 the wetlands permit when you mitigate, use
3 compensatory mitigation, part of that is you have to
4 provide a perpetual conservation easement for that
5 property which would prevent you from, or anybody else
6 from in the future of withdrawing that as wetland.

7 CHAIRMAN SPRITZER: And that would be true
8 even if you sold the property to someone else?

9 MR. P. SMITH: Yes, that's true. To my
10 understanding.

11 CHAIRMAN SPRITZER: All right. How will
12 mitigation be guaranteed if DTE receives a permit? I
13 think this is referring to a permit from the NRC, the
14 combined license that you're seeking. And
15 subsequently sells and transfers that license, the
16 COL.

17 MR. P. SMITH: So we're talking about
18 mitigation related to the fox snake?

19 CHAIRMAN SPRITZER: Exactly.

20 MR. P. SMITH: I know licenses are
21 transferrable but I'm sure there's a lot of legalities
22 that I don't understand about transfer of licenses.

23 But just from the perspective is it's not
24 just the license, it's everything that goes along with
25 the license that's part and parcel of it. From my

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1 understanding of other license transfers that I'm
2 aware of that have occurred.

3 CHAIRMAN SPRITZER: Okay. Will there be
4 any provision -- we've heard a lot about the
5 monitoring that will be done pursuant to the
6 mitigation plan. Is there any way that that will be
7 -- the monitoring reports will be available for the
8 public? People outside of the state regulators to
9 look at.

10 MR. WESTMORELAND: Well, I can say that
11 when we submit it to the MDNR it's essentially a
12 public document and it can be easily FOIA'd.

13 CHAIRMAN SPRITZER: Does MDNR ever require
14 a posting of a performance bond, or performance of
15 obligations under a take permit?

16 MR. WESTMORELAND: They never discussed
17 that with us in terms of the take permit that I
18 recall.

19 MR. MIFSUD: Not that I'm aware of.

20 CHAIRMAN SPRITZER: We asked a question
21 earlier, or I asked a question that had been
22 propounded by one of the parties earlier about EPA's
23 concern on the one hand of doing work during the
24 period when the ground is frozen versus the indication
25 in the plant that it would be better to do site

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1 disturbance activity when the snakes are not in
2 hibernation. How have you attempted to reconcile
3 those two concerns?

4 MR. WESTMORELAND: So, what I recall in
5 our wetland permit, we had some provisions around
6 where appropriate do work in the wintertime. And what
7 I'm recalling specifically is one aspect of the permit
8 was the relocation of our transmission towers, the
9 transmission corridor which would actually kind of go
10 through an emergent wetland between forested wetland.

11 And where the agencies considered that
12 truly a temporary impact because it would only take a
13 couple of months to do. And you'd basically be just
14 digging a small foundation but you're going to have to
15 bring heavy equipment in. And so if you do that
16 particular piece of work in the wintertime it will
17 minimize the impact to the surrounding wetlands
18 greatly. So in that case that kind of thing makes
19 sense. And that's what I recall that was for.

20 MR. MIFSUD: And to build on that, within
21 wetlands the eastern fox snake does not hibernate
22 within the wetlands. The objective to collect the
23 animals during and have the construction activities
24 during the active season. Because for the areas that
25 are upland we would have the greatest opportunity to

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1 maximize the success of collection and relocation.
2 They do not hibernate within the wetlands themselves,
3 though, so the two would not be conflicting.

4 CHAIRMAN SPRITZER: Okay. I understood
5 your counsel's objection earlier to talking about
6 specific amounts of cost, but I think this question
7 may avoid that problem. Will there be funds,
8 regardless of the amount, dedicated to accomplishing
9 the mitigation and the follow-up monitoring?

10 MR. P. SMITH: Absolutely.

11 CHAIRMAN SPRITZER: Where will they come
12 from?

13 MR. P. SMITH: They'll come from the
14 construction financing as part of the overall project.
15 To put it in perspective, when we looked at the costs
16 associated with the mitigation plan they're a very,
17 very small portion of the overall construction cost.

18 We saw the letter from 2012 where MDNR
19 reviewed your mitigation plan. Have you had any
20 further contacts with MDNR since then about mitigation
21 at the Fermi site? For the eastern fox snake, that
22 is.

23 MR. WESTMORELAND: No, not that I recall.

24 CHAIRMAN SPRITZER: Do you agree with the
25 staff's conclusion that if mitigation for the eastern

1 fox snake were ultimately not successful that impacts
2 on the species would be no greater than moderate? And
3 I guess you'll have to use the NRC's definition of
4 "moderate" if you know what it is.

5 MR. WESTMORELAND: I agree with that.

6 MR. MIFSUD: I would say yes. When you
7 consider also in the previous questions there was a
8 discussion of the number of populations that occur.

9 Michigan has four known populations. The
10 biggest population would be that which occurs within
11 Wayne and Monroe Counties. When you consider the
12 proximity of the Fermi facility to adjacent contiguous
13 coastal habitats that are available to the snakes you
14 have Pointe Mouillee, you have Lake Erie Metropark to
15 the north. To the south you have Pointe Aux Peaux as
16 well as Sterling State Park. All four of these
17 locations support populations -- are part of the
18 corridor and support eastern fox snakes at those.

19 And building on that too, one of the
20 things that is important to consider is even with all
21 those protected areas or those natural areas that are
22 parklands the Fermi facility long-term has a
23 uniqueness to it that from the standpoint that it is,
24 even with these temporary or permanent impacts, it is
25 actually the most highly protected area within that

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1 region in the sense that one of the biggest threats to
2 eastern fox snakes is actually persecution by people.

3 Within the open protected areas on the
4 Fermi facility there are armed guards keeping people
5 from going within those regions, potentially harassing
6 and causing harm to the eastern fox snake. So there's
7 a uniqueness to the facility that actually affords a
8 level of protection that is not typically seen in that
9 area.

10 So at maximum I would say that moderate
11 would be an appropriate designation, though DTE is
12 committed and I believe that the impacts are going to
13 be small.

14 CHAIRMAN SPRITZER: With respect to the
15 offsite mitigation area will there be any kind of
16 security or limitations on public access there? Or
17 will that be freely open to the public?

18 MR. WESTMORELAND: I'd have to go look at
19 the specifics, but I believe it's limited access.

20 CHAIRMAN SPRITZER: But in the event for
21 snakes relocated onsite there will not be people just
22 walking on and off your property, is that a fair
23 statement?

24 MR. P. SMITH: That's correct. The site
25 is encompassed by a fenced owner-controlled area.

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1 CHAIRMAN SPRITZER: All right. Very well.
2 I think we've covered everything that I need to cover.
3 Do either of you have any further questions?

4 JUDGE CHARBENEAU: I guess just one.
5 During the construction period will conservation
6 personnel have free access to the entire area under
7 contract?

8 MR. P. SMITH: I believe that's the case.
9 Clearly we have access rules that we have to follow
10 but we currently have access for conservation officers
11 and other outside agencies, and we make arrangements
12 to bring them onsite. And they can see whatever they
13 want.

14 JUDGE BARATTA: Are you at all familiar
15 with kind of the everyday monitoring that DNR does?
16 For example, do they routinely show up on an irregular
17 basis to check out things?

18 MR. WESTMORELAND: Do you mean show up at
19 our -- at the Fermi site presently?

20 JUDGE BARATTA: Yes.

21 MR. WESTMORELAND: No. I'm not aware of
22 that, not the DNR. A lot of other agencies do. You
23 know, if there's a permit or something. But that kind
24 of drives it a lot of times is they're, you know, MPDS
25 permit they're monitoring, is there some other kind of

1 soil erosion, sedimentation permit they're monitoring.
2 A dredge permit. That's when regulatory agencies
3 typically show up. So you know, if we have a take
4 permit ongoing the odds of --

5 JUDGE BARATTA: You would expect them to
6 show up then?

7 MR. WESTMORELAND: Yes, much more likely.

8 JUDGE CHARBENEAU: How about Fish &
9 Wildlife conservation officers? Do they show up
10 regularly?

11 MR. WESTMORELAND: We interact with the
12 Fish & Wildlife officers a fair amount. They come to
13 site. They plan projects. They're not policing
14 because -- for the most part because the site's
15 protected and the eight hundred some acres of the
16 site, or the 650 acres for the wildlife refuge is
17 protected and it's basically undisturbed. And they
18 don't have a lot of concern about that.

19 MR. P. SMITH: We have a cooperative
20 agreement with Fish & Wildlife for the management of
21 the Detroit International Wildlife Refuge portion of
22 the site. So they're frequently involved onsite and
23 a good relationship with the people onsite who
24 administer it.

25 CHAIRMAN SPRITZER: All right. I think

1 we're done with questions on contention 8. We did say
2 we'd go to 12:30 but unless anybody has any violent
3 objections I think this would be a good time to take
4 the break for lunch, come back and we'll proceed to
5 contention 15.

6 If that's acceptable we'll adjourn. I
7 think let's try and get back -- why don't we aim for
8 1:30 for resuming. And we will start, I believe first
9 on the list will be the DTE witnesses on contention
10 15. Is that the order? Let me check.

11 MR. T. SMITH: I don't believe that's the
12 order that you had established previously.

13 CHAIRMAN SPRITZER: Let's stick to
14 whatever the order was we have on our schedule. I
15 thought it was DTE first. Oh no, it's Mr. Gundersen.
16 Sorry. And then we will proceed to the DTE witnesses.

17 (Whereupon, the foregoing matter went off
18 the record at 12:09 p.m. and went back on the record
19 at 1:28 p.m.)

20 CHAIRMAN SPRITZER: All right, let's go
21 back on the record. Is everybody here that needs to
22 be here? Apparently they are.

23 A couple of housekeeping matters. First,
24 we had mentioned -- Mr. Smith had brought up the issue
25 about one of my questions on contention 8 getting into

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1 a proprietary issue. We suggested we would defer that
2 till a later session. I think in retrospect we don't
3 need to do that so if those witnesses want to leave
4 they may. They're certainly not required to leave but
5 they don't need to stay for just one question.

6 MR. T. SMITH: Okay, thank you. And we
7 could in a public setting give you a range if that
8 would be helpful.

9 CHAIRMAN SPRITZER: Sure, that would be.

10 MR. T. SMITH: It's on the order of a
11 couple of hundred thousand dollars at most. Not \$1
12 million, more than \$10,000. So, in that range.

13 CHAIRMAN SPRITZER: Okay, fine. That's
14 helpful.

15 The schedule for the rest of today, we're
16 going to try and go till about 5:30. It will depend
17 where we are.

18 We've been told that the doors close at 5
19 so if you go out after 5 be sure and have somebody
20 there to let you back in or you're going to get rather
21 chilly.

22 As I said we'll go to about 5:30. We'll
23 probably take two brief breaks in between so we're not
24 torturing people.

25 During Mr. Gundersen's testimony I'm going

1 to be asking a number of questions that have been
2 given to me by counsel for the staff and DTE. There
3 are going to be some instances in there where you may
4 need to help me and direct me to a particular portion
5 of the document. You want me to have the witness look
6 at some of the documents or multiple-page documents
7 and it's not immediately obvious to me what portions
8 you want me to have him look at. So just keep that in
9 mind. I'll ask you of course as we're going through
10 that.

11 Unless there's anything else why don't we
12 proceed with the interveners' witness on contention
13 15. And if counsel for interveners will introduce
14 your witness.

15 MR. LODGE: Thank you. At this time the
16 interveners call Arnold Gundersen to testify.

17 WHEREUPON,

18 ARNOLD GUNDERSEN
19 were called for examination by the interveners, having
20 been first duly sworn, assumed the witness stand, were
21 examined and testified as follows:

22 MR. GUNDERSEN: Good afternoon.

23 CHAIRMAN SPRITZER: Good afternoon, Mr.
24 Gundersen, and welcome. And I remind you, of course,
25 you're still -- you've been sworn this morning and you

1 are still under oath.

2 JUDGE CHARBENEAU: Mr. Gundersen, I'd like
3 to start off with a couple of questions going through
4 your non-proprietary testimony.

5 And I noticed in a couple of parts of your
6 testimony that you criticize DTE for deviating from
7 the NRC NEI template without having first specifically
8 notified the NRC.

9 Can you point to exactly where the
10 requirement is that the NRC be noted of any
11 deviations?

12 MR. GUNDERSEN: It's on -- actually I
13 found confirmation of it in DTE's initial statement of
14 position on contention 15 of April 30 on page 28.

15 They say applicants are using a template
16 -- applicants using the template must address
17 conformance with the NRC's regulatory guidance by
18 including a commitment to applicable regulatory guides
19 or by providing an alternative or exception to be
20 reviewed by the NRC staff.

21 So I think that's recognition by DTE that
22 there was an obligation that when you deviate from the
23 template you're required as they say to provide an
24 alternative or exception to be reviewed by the NRC
25 staff.

1 JUDGE CHARBENEAU: No, I was thinking more
2 of pointing to an NRC requirement or NEI requirement.

3 MR. GUNDERSEN: I don't have that on the
4 top of my head, but as I said, DTE has already entered
5 this on the record. So I think that I'll go with that
6 sentence from DTE.

7 JUDGE CHARBENEAU: Okay. In your
8 responses to questions 14 and 15 from your testimony
9 you disagree with the NRC decision concerning
10 violation A of the Notice of Violation.

11 As you look at in particular Appendix B
12 does the NRC regulations refer to applicants?

13 MR. GUNDERSEN: Actually 10 C.F.R. 50.2 on
14 definitions says, quote, "An applicant means a person
15 or entity applying for a license." It doesn't say,
16 what DTE misinterpreted the law to say that they had
17 already applied and what the NRC then later accepted
18 the misinterpretation. The definition in 10 C.F.R.
19 50.2.

20 And it applies interestingly not just to
21 Part 50 licenses but to Part 52 licenses. It says an
22 applicant is a person or entity applying for a
23 license.

24 Now, my position is that DTE notified the
25 NRC in February of '07 that they were applying. But

1 more importantly, in May, May 31 of `07 DTE responded
2 as if they were the applicant. This is a DTE -- this
3 was in DTE's testimony, same -- the April 30, 2013
4 testimony, page 13, footnote 27.

5 It's a 4-page letter from Detroit Edison,
6 DTE, 000047. And it was dated May 31 of `07.

7 It's interesting, it's their voluntary
8 response to the RIS. And in it there's five times
9 where they are asked does the applicant plan to submit
10 an environmental report. What scope and schedule does
11 the applicant project for the site characterization?
12 What month and year will the applicant complete a
13 detailed design information? So, in that document
14 they had the opportunity to say we're not the
15 applicant until we apply, but they answered
16 affirmatively that in fact they were the applicant.

17 So I think the history of Part 50.2 saying
18 that you are an applicant when you notify the NRC
19 you're applying and DTE's response just 4 -- 3 months
20 after they notified the NRC, they didn't take
21 exception to the concept of applicant until 2009 when
22 the NOV came up. So I think the record's pretty clear
23 that they believed they were the applicant until it
24 was inconvenient.

25 JUDGE CHARBENEAU: Well, does that mean

1 that the staff would need to maintain a record of all
2 correspondence on ADAMS for all inquiries before an
3 application was received?

4 MR. GUNDERSEN: I believe the staff
5 misinterpreted NRC regulations and that you're an
6 applicant from the time you apply, you notify the --
7 you're an applicant from the time you notify the NRC
8 you are applying.

9 It's a dangerous precedent that gets
10 established if that's not true because all of the
11 deliberate misconduct requires an applicant. Employee
12 protection requires an applicant. Completeness and
13 accuracy requires an applicant. Part 21 requires an
14 applicant. Appendix B requires an applicant.

15 And if we don't consider quality assurance
16 necessary until you file your application to me that
17 means that deliberate misconduct, employee protection,
18 completeness and accuracy of information, Part 21 all
19 use those same terms. So the entire fabric of a
20 license application is torn to shreds unless the
21 applicant really is the applicant at the time they
22 notify the NRC of their intent.

23 JUDGE CHARBENEAU: We'll bring that up
24 again with staff.

25 Did the applicant or soon-to-be applicant

1 have a quality assurance program in place before the
2 application was submitted?

3 MR. GUNDERSEN: In 2008, early 2008 a
4 quality assurance program was put in place. But the
5 purpose was very limited. The documents DTE 000106,
6 and I cite it in my testimony. It was the DTE COLA
7 selection and chapter review and applicant.

8 DTE said, quote, "The regulations require
9 that DTE as an owner retain responsibility for
10 complying with specific requirements" and then they
11 put "relative to COLA submittal to achieve quality
12 results."

13 It goes on to say that they implemented a
14 quality assurance program but it was very limited to
15 -- it was very limited to just the COLA preparation
16 document itself. So the quality assurance --

17 JUDGE CHARBENEAU: Receiving the document
18 --

19 MR. GUNDERSEN: -- was on the COLA
20 documentation itself.

21 And the only reason that was implemented
22 according to this document is that they were afraid of
23 completeness and accuracy issues if they -- when they
24 filed. Without a QA program on the COLA application
25 itself they were afraid that they might run into legal

1 issues on completeness and accuracy.

2 And then of course the constraint there
3 was that they said that the reason they didn't want to
4 do it was that the schedule to complete the work would
5 be aggressive which is why they limited their QA
6 effort to just the COLA application itself.

7 JUDGE CHARBENEAU: Would you judge -- I
8 believe that was the QA program that's referred to as
9 the ND QAPD.

10 MR. GUNDERSEN: Yes.

11 JUDGE CHARBENEAU: Would you agree that
12 that quality assurance program was sufficient for
13 review of the material being transferred from Black &
14 Veatch to DTE for submittal to NRC as a license? Did
15 it follow sufficiently the parts of Appendix B that
16 would be necessary for that transfer?

17 MR. GUNDERSEN: You know, I have other
18 concerns about who is the quality assurance manager
19 and the organizational structure and things like that
20 that fall under that QAPD.

21 I would agree that they had -- they
22 attempted to have a quality assurance program in place
23 for the transfer of information as it related to the
24 license amendment. I really can't answer was it
25 adequate enough based on the time I spent on this

1 application.

2 JUDGE CHARBENEAU: As a vendor providing
3 services did Black & Veatch have an Appendix B quality
4 assurance program in place during the DTE geotechnical
5 program?

6 MR. GUNDERSEN: Black & Veatch had its own
7 program. It had an Appendix B program, yes.

8 JUDGE CHARBENEAU: Okay. So that work was
9 done under quality assurance under an Appendix B
10 program.

11 MR. GUNDERSEN: Not under the --

12 JUDGE CHARBENEAU: No, I understand but
13 Black & Veatch did have.

14 MR. GUNDERSEN: Black & Veatch had a
15 program, yes.

16 JUDGE CHARBENEAU: Okay. And this is a
17 question regarding your question 20 in your testimony.
18 By June of 2007 had Geovision or ARM Geophysics done
19 any work as part of the geotechnical program? I think
20 you'll see that there are two dates listed there, one
21 is April and one is June.

22 MR. GUNDERSEN: I believe I have another
23 answer in there on that. There was the quick start
24 schedule indicated that within 7 weeks of contract
25 award geotechnical work was done. That's another --

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1 I'll need a minute here to look at my testimony.

2 But what I said here is that geotechnical
3 work had begun in April.

4 JUDGE CHARBENEAU: The program was
5 initiated in April.

6 MR. GUNDERSEN: And then what I also said
7 was that in June B&V conducted pre-work surveillance.

8 JUDGE CHARBENEAU: And the question was
9 had these two entities done any work at that time on
10 behalf of the geotechnical program for Fermi 3. To
11 your knowledge.

12 MR. GUNDERSEN: Yes, I was just looking.
13 I had analyzed the PERT chart that they had developed
14 and there were quick start dates. And I believe I can
15 find that in about a minute or two if I look. But to
16 my knowledge, yes, the geotech work had begun at that
17 time.

18 JUDGE CHARBENEAU: That's probably true
19 but I was wondering whether these two -- because the
20 criticism in that question response was these two
21 companies had not been reviewed. And my question was
22 had they done any work at that point in time.

23 MR. GUNDERSEN: I have question 20 open
24 but I was looking to try to find that quick start
25 response. If you'll just give me a minute I might be

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1 able to find it.

2 JUDGE CHARBENEAU: Fine.

3 MR. GUNDERSEN: The answer is yes but it's
4 found in the proprietary -- my proprietary response,
5 question 5 in my proprietary response confirms that
6 the work was begun. But I guess I can't go into it
7 any further than that.

8 JUDGE CHARBENEAU: We'll look at that at
9 a later time. Thank you.

10 Okay, this is a follow-up part of that
11 question though. In your Q 21 response you state that
12 two non-nuclear vendors with non-nuclear QA programs
13 were used. Were these two programs the same ones,
14 Geovision and ARM Geophysics, referred to?

15 MR. GUNDERSEN: Yes, they were.

16 JUDGE CHARBENEAU: In your earlier
17 response did you not state that the -- in June 2007
18 that Black & Veatch did a QA audit and found them
19 acceptable?

20 MR. GUNDERSEN: Black & Veatch did an
21 audit of their programs and found them acceptable,
22 that's true. But their programs, I think what I was
23 trying to say was that these programs had not been
24 quality assurance blessed or developed by those firms
25 for quality assurance application. But it was Black

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1 & Veatch's opinion that the analysis was adequate to
2 meet Black & Veatch's QA program.

3 JUDGE CHARBENEAU: In your question 22
4 response you refer to the quality assurance program
5 for the ESBWR design process. And my question here is
6 why is this necessary for DTE.

7 MR. GUNDERSEN: I would agree with you,
8 the ESBWR portion of the QA program does not fall
9 under contention 15.

10 JUDGE CHARBENEAU: Okay, thank you.

11 CHAIRMAN SPRITZER: Mr. Gundersen, I'm
12 going to ask you some questions going to your
13 experience and background. We of course have your
14 very detailed CV so we know a lot about you already,
15 but there's some specific questions I have.

16 First, have you ever worked in the quality
17 assurance department for an NRC-licensed power
18 reactor?

19 MR. GUNDERSEN: No, I was responsible on
20 a Part 50 license application as the lead nuke. And
21 --

22 CHAIRMAN SPRITZER: Lead nuke? What is
23 that?

24 MR. GUNDERSEN: The lead nuclear engineer,
25 I'm sorry. And I worked side by side with the QA

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1 professionals as we developed a QA plan. It was a
2 Part 50 license that was later canceled. It was New
3 York State Electric & Gas Units 1 and 2. And no.

4 I have routinely worked with quality
5 assurance and in that case actually helped them build
6 a program. But I was not in the QA department.

7 CHAIRMAN SPRITZER: The New York license
8 application you referred to, when was that?

9 MR. GUNDERSEN: '77 to '79 or '80.

10 CHAIRMAN SPRITZER: And again what quality
11 assurance-related work have you done since then?

12 MR. GUNDERSEN: As the senior VP of an
13 inspection division, ultrasonic inspection, and as a
14 senior VP of an engineering division I would routinely
15 interface with quality assurance.

16 But again, as an engineering professional
17 working with quality assurance and not in quality
18 assurance.

19 CHAIRMAN SPRITZER: What time period was
20 the work you've just referred to?

21 MR. GUNDERSEN: From 1980 to 1990.

22 CHAIRMAN SPRITZER: Okay. Have you ever
23 testified before an Atomic Safety and Licensing Board
24 on quality assurance issues?

25 MR. GUNDERSEN: I submitted testimony on

1 Bellefonte about quality assurance. That was not --
2 there was no ASLB though. And Bellefonte had serious
3 quality assurance problems that were confirmed by NRC
4 Chairman Jaczko.

5 I don't believe I've ever testified in
6 front of an august body like this on quality
7 assurance.

8 CHAIRMAN SPRITZER: So I take it you have
9 never been found either qualified or not qualified to
10 give expert testimony on quality assurance issues
11 prior to this proceeding that you're in today.

12 MR. GUNDERSEN: Yes, that's correct. I've
13 never been disqualified, right.

14 CHAIRMAN SPRITZER: Or qualified, either
15 one.

16 MR. GUNDERSEN: Well, that's true, because
17 I've never been in a hearing like this before.

18 CHAIRMAN SPRITZER: Right. Are you now or
19 have you ever been certified as a quality assurance
20 auditor?

21 MR. GUNDERSEN: No, I have not.

22 CHAIRMAN SPRITZER: Have you taken any
23 recent training courses on quality assurance? I'll
24 take recent to mean approximately the last 10 years.

25 MR. GUNDERSEN: No, I have not.

1 CHAIRMAN SPRITZER: Do you have any
2 experience in developing new quality assurance
3 programs?

4 MR. GUNDERSEN: I think I addressed that.
5 I worked with -- from the inception of a nuclear
6 program, a Part 50 license, I worked with quality
7 assurance professionals to come up with a QA program.

8 And then of course as a senior vice
9 president whenever we had a project that required QA
10 we would develop our own QA plan and work with quality
11 assurance to make sure that was implemented.

12 CHAIRMAN SPRITZER: Have you read the
13 American Society of Mechanical Engineers Standard NQA-
14 1 entitled "Quality Assurance Requirements for Nuclear
15 Facility Applications?"

16 MR. GUNDERSEN: It's voluminous but I have
17 at points in my life read parts of it. So I think
18 I've probably read the whole thing over time, yes.

19 CHAIRMAN SPRITZER: And have you read
20 Regulatory Guide 1.28 Quality Assurance Program
21 Requirements Design and Construction, Revision 3? Or
22 any revision.

23 MR. GUNDERSEN: Reg 1.28. I don't know if
24 it was revision 3 or not, I'm sorry.

25 CHAIRMAN SPRITZER: But you have read

1 Regulatory Guide 1.28?

2 MR. GUNDERSEN: Yes.

3 CHAIRMAN SPRITZER: All right. Now, do
4 you agree -- we're going to move on from your
5 qualifications. Do you agree the delegation as
6 specifically allowed under NRC regulations in 10
7 C.F.R. Part 50 Appendix B criterion looks like roman
8 numeral i. Take a look at that certainly.

9 MR. GUNDERSEN: The applicant may
10 delegate, but the applicant cannot delegate
11 responsibility for overall QA but can delegate
12 implementation of QA programs to others. But there
13 has to be an applicant in order for delegation to
14 occur and DTE and the NRC are saying that there was no
15 applicant until the day they applied. So I agree that
16 that's exactly what Appendix B requires, that an
17 applicant may delegate, but there must be an applicant
18 in order for that delegation to occur.

19 CHAIRMAN SPRITZER: On that question of
20 the meaning "applicant," I take it, and correct me if
21 I'm wrong, once an entity gets, receives a combined
22 license it would no longer be an applicant, it would
23 be a licensee. Is that the general -- your
24 understanding?

25 MR. GUNDERSEN: Yes, I think so.

1 CHAIRMAN SPRITZER: Do they continue to be
2 subject to the Appendix B QA requirements after they
3 become a licensee?

4 MR. GUNDERSEN: Yes, they do.

5 CHAIRMAN SPRITZER: Would that suggest to
6 you then that perhaps the term "applicant" was not
7 intended to be given a precise, literal meaning?

8 MR. GUNDERSEN: It's in the definitions in
9 50.2 so I think it was given a precise, literal
10 meaning as any person applying for a license. You
11 know, they felt it was important enough to define in
12 50.2.

13 CHAIRMAN SPRITZER: All right. You
14 mentioned the distinction between allowing --
15 authorizing implementation by a different -- an
16 applicant authorizing implementation, but also being
17 required to retain responsibility. Can you elaborate
18 on what your understanding of that distinction is?

19 MR. GUNDERSEN: Yes. When you -- I think
20 it goes back to the ASLB on Midland. You cannot have
21 a self-executing QA program. You can't turn over
22 responsibility to a vendor to do your QA for you,
23 which is exactly what DTE did for the period from '07
24 through '08.

25 So I guess I would go back to the Midland

1 decision in that it appears in this case that there
2 was a self -- what would I call it here -- yes, a
3 self-executing QA program which is doomed to fail.

4 CHAIRMAN SPRITZER: I take it you mean by
5 "self-executing" one where the applicant does not
6 retain responsibility for implementation of the QA
7 program.

8 MR. GUNDERSEN: The term "self-executing"
9 came from the ASLB on Midland. And I believe it was
10 one where the applicant did not retain responsibility
11 and overall control of the work which happened here
12 until sometime in '08 or potentially even into '09.

13 JUDGE BARATTA: Referring to your
14 testimony, in a statement by choosing to delegate the
15 quality assurance function to a subcontractor in the
16 COLA development of the Fermi 3 licensing project, and
17 it goes on. But my question really is the delegation
18 of the execution of the quality assurance program, is
19 that allowed by Appendix B and NQA-1?

20 MR. GUNDERSEN: As long as you retain
21 adequate oversight functions. For instance, having a
22 QA manager in your own QA program, you can delegate
23 the responsibility to a third party.

24 JUDGE BARATTA: Okay. Now, you mentioned
25 that you had in fact read NQA-1 at one time or

1 another. Can we bring up Board Exhibit 1, please?

2 And could you go to page little roman numeral iv?

3 Okay, and let's see. Go down a little further on that
4 page there. All right.

5 If you take a look at the paragraph that
6 starts out, "The standard sets forth." Do you want to
7 enlarge that? Not that big.

8 (Laughter)

9 JUDGE BARATTA: You've heard, of course,
10 that the staff says that -- interpreted Appendix B to
11 require someone -- the term "applicant" to apply only
12 to someone who has actually filed an application. But
13 could you give me your interpretation of that sentence
14 that says the standard set forth requirements and also
15 the following sentence that says a quality assurance
16 program requirements, particularly with respect to the
17 word "siting." What do you think that means there in
18 terms of NQA-1 and QA?

19 MR. GUNDERSEN: I lined up -- before I
20 came here I lined up Appendix B with NQA-1 on Article
21 2 of Appendix B which shows up as basic requirement 2
22 in NQA-1. And to me they matched.

23 JUDGE BARATTA: Well, they should. If you
24 look at the --

25 MR. GUNDERSEN: Yes.

1 JUDGE BARATTA: In the beginning of NQA-1
2 I think there may be a statement that says that.

3 But what I was particularly interested in,
4 you notice the word "siting" appears in there?

5 MR. GUNDERSEN: Yes.

6 JUDGE BARATTA: What does that mean in
7 terms of the activities that were conducted prior to
8 2008 by DTE?

9 MR. GUNDERSEN: Well, to me that's the
10 geotechnical borings, especially -- frankly, I'm not
11 too, too worried about the meteorological side of
12 this, but the geotechnical side, especially
13 considering the structural issues still in play on the
14 development of this license, adequate control of the
15 boring program needed to be not just within DTE's
16 responsibility but also properly overseen by -- I'm
17 sorry, they needed to be not just within the control
18 of B&V, but also under the quality assurance oversight
19 of DTE.

20 JUDGE BARATTA: Is that what this says?

21 MR. GUNDERSEN: I interpreted NQA-1 as
22 basically saying the program shall be -- this is NQA-1
23 Basic Requirement 2. And it says the program shall be
24 established at the earliest time consistent with
25 schedule and they're referring to the QA program.

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1 And then it says management of those
2 organizations implementing the quality assurance
3 program or portions of those thereof shall regularly
4 assess the adequacy. So, there is the program and
5 then there's management of organizations that
6 implement the program.

7 JUDGE BARATTA: What I'm trying to get at
8 though is what -- would those siting activities that
9 were conducted prior to 2008 have to be covered by a
10 quality assurance program.

11 MR. GUNDERSEN: Absolutely, yes.

12 JUDGE BARATTA: Based on the statements
13 that are in NQA-1.

14 MR. GUNDERSEN: I believe that the most
15 critical work on this project was done in the 2007
16 time frame to get the boring data right. The sites on
17 karst which is like what is in Florida, for instance,
18 with the sinkholes. And I was actively involved in
19 the Levy County project before it was canceled.

20 And karst geography is extraordinarily
21 difficult for heavy structures to withstand. The
22 problems that Fermi is encountering now are almost
23 identical to the problems that Levy County was
24 encountering on the karst geography.

25 And the determination of where you can put

1 such a heavy weight as a nuclear plant is all driven
2 by the work that was done in 2007. And I believe that
3 not only did B&V need a program but also they needed
4 adequate oversight by DTE as well.

5 JUDGE BARATTA: Even though the staff says
6 that they were not an applicant and therefore Appendix
7 B did not apply.

8 MR. GUNDERSEN: I understand -- I think
9 this whole debate revolves around that one word,
10 "applicant." And I don't think the staff made the
11 right decision.

12 I go back to the definition in Part 50.2
13 which says the applicant is someone who is applying
14 for a license, not someone who has applied. So I
15 think the staff misinterpreted that.

16 But they had a right to misinterpret
17 because 3 months later in May DTE wrote to the NRC in
18 a voluntary response to the RIS and the question said
19 does the applicant do this or that or the other thing.
20 And DTE never took exception to the NRC's question.
21 They basically said that DTE has contracted B&V to run
22 the program and I'm okay with that.

23 But they also led the NRC to believe in
24 May of 2007 that they were the applicant. So that
25 didn't ever get addressed until the NOV at sort of the

1 third or fourth quarter of 2009.

2 And it's specifically addressed in the NRC
3 emails in mid-2009 where the NRC recognized that an
4 applicant must have quality assurance oversight of its
5 contractors which didn't exist. So, I think that the
6 NRC believed until the NOV response that an applicant
7 was somebody who was in the process of applying. And
8 I don't know why the NRC reversed itself in 2009 and
9 basically ignored Part 50.2 definition.

10 JUDGE BARATTA: Let's assume for a moment
11 that the staff is right. How would you see -- well,
12 have the applicant, DTE, or the staff ever referenced
13 NQA-1 in any of their testimony? Or any of their --

14 MR. GUNDERSEN: Yes, I've seen NQA-1
15 referenced in DTE's April testimony, for instance,
16 yes.

17 JUDGE BARATTA: So it's something that you
18 feel applies in this case.

19 MR. GUNDERSEN: Yes.

20 JUDGE BARATTA: Okay. Then how -- if they
21 didn't have a QA program during that time period, or
22 they didn't retain responsibilities required by NQA-1
23 now, not Appendix B, how could they satisfy the
24 requirement that the siting be done as seems to be
25 implied here under a quality assurance program?

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1 MR. GUNDERSEN: I'm sorry, could you ask
2 that question a second time?

3 JUDGE BARATTA: The question is if they --
4 let's assume that Appendix B because it uses the word
5 "applicant" means literally they had to have filed an
6 application. But NQA-1 which both the staff and
7 applicant, at least the applicant as referenced,
8 requires a QA program during siting. If DTE did not
9 have responsibility for a QA program how could they
10 satisfy NQA-1 which they seem to think is an important
11 standard that they have to satisfy?

12 MR. GUNDERSEN: I don't believe that NQA-1
13 can be satisfied unless there is an applicant, unless
14 DTE had a program in place in '07 to monitor those
15 site activities.

16 And I did search NQA-1 for the word
17 "applicant" and a definition and I couldn't find one.
18 It might be there but I couldn't find one. When this
19 Board said they were going to put in NQA-1 into
20 evidence I went through NQA-1 for that definition.
21 And the only definition I can find is in 50.2. So.

22 JUDGE BARATTA: Okay. If we could go to
23 page Arabic numeral 59, please. Okay, that Section
24 2.20. Could you read the title associated with
25 Subpart 2.20? Just scroll down a little bit. Here it

1 is.

2 MR. GUNDERSEN: Oh, okay, 2.20. I'm
3 sorry.

4 JUDGE BARATTA: Yes.

5 MR. GUNDERSEN: Quality Assurance
6 Requirements for Subsurface Investigations for a
7 Nuclear Power Plant.

8 JUDGE BARATTA: Is that what they were
9 doing, subsurface investigations, during 2007?

10 MR. GUNDERSEN: I'm not sure where I am in
11 NQA-1. It's broken into the mandatory part and the
12 not mandatory part.

13 JUDGE BARATTA: This is the Part 2 which
14 is the not mandatory.

15 MR. GUNDERSEN: The not. Okay, so this is
16 in Part 2 of that.

17 JUDGE BARATTA: It's the old NQA-2 I
18 think.

19 MR. GUNDERSEN: No, there are some --
20 there are some subsurface investigations which are not
21 mandatory and some of which are mandatory.

22 JUDGE BARATTA: Okay. But subsurface
23 investigations in general you say some are -- or have
24 to have QA requirements and some don't.

25 MR. GUNDERSEN: Yes, that's correct.

1 JUDGE BARATTA: Okay. So were they doing
2 subsurface investigations during 2007?

3 MR. GUNDERSEN: Yes, they were.

4 JUDGE BARATTA: Do you know if those would
5 have required mandatory QA requirements?

6 MR. GUNDERSEN: I believe some of them
7 must have had QA requirements and some may not have.

8 JUDGE BARATTA: Okay.

9 CHAIRMAN SPRITZER: I've gotten since
10 during the time Judge Baratta's been asking you
11 questions one more question on qualifications. Have
12 you worked in a QA capacity under programs committed
13 to ASME NQA-1, 1994 edition?

14 MR. GUNDERSEN: I became a nuclear
15 whistleblower in 1990. My work before that was as a
16 senior VP in the industry. After 1990 a partner at
17 Winston & Strawn said Arnie, in this business you're
18 either for us or against us, and you just crossed the
19 line. So, while I've continued in the nuclear
20 business as a consultant mainly to NGOs and the State
21 of Vermont I have not been employed by a nuclear
22 vendor or a nuclear licensee since 1992.

23 CHAIRMAN SPRITZER: Okay. I think you've
24 answered that question.

25 If the NRC had chosen to issue a violation

1 for the pre-application period and had used your
2 definition of "applicant" how would it make a
3 difference now to the issues that are before us in
4 this proceeding?

5 MR. GUNDERSEN: According to the NRC's own
6 emails leading up to the issuance of the NOV, I'm on
7 page 12 of my original testimony, this puts into
8 question the quality of the overall application. Page
9 13, the NRC felt -- that was an NRC statement in an
10 NRC email.

11 Another NRC statement. Fermi is not
12 meeting the requirements of 52.79(a)(25) which
13 requires an applicant to provide a QA program
14 consistent with Appendix B. Page 14 similarly,
15 Detroit Edison does not have a QA program for the
16 design phase of Fermi 3. Our QA folks believe DTE
17 needs to have oversight of B&V in the form of a QA
18 program and without it their application is
19 incomplete.

20 Then finally it was -- it's not an email,
21 it was in a memorandum between two branch chiefs
22 saying it's not evident that the FSAR provides a QA
23 program that governs the design activities performed
24 in support of the FSAR.

25 So, I guess to finish a long answer to a

1 short question, I basically believe that the
2 foundation document for this siting, I would agree
3 with the NRC's emails and memorandums up until the
4 time they issued the NOV in that the quality of the
5 entire licensing process until that time is called
6 into question because DTE didn't have a program in
7 place to provide adequate oversight to the B&V
8 contractor.

9 CHAIRMAN SPRITZER: Okay.

10 JUDGE CHARBENEAU: Let me ask a follow-up
11 question. This goes back to your response on question
12 21 concerning do non-nuclear vendors with non-nuclear
13 QA programs. Do you know whether Geovision and ARM
14 Geophysics were working under their own QA programs,
15 or were they working under Black & Veatch's QA
16 program?

17 MR. GUNDERSEN: I would assume they were
18 hired with their own program and then Black & Veatch
19 either modified that program, or put their program on
20 top of the subcontractor's program as an umbrella
21 program.

22 They couldn't be doing work without a
23 quality assurance program. So either they did it
24 themselves or they worked under the umbrella of B&V
25 and I don't know which.

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1 JUDGE CHARBENEAU: Thank you.

2 CHAIRMAN SPRITZER: Do you agree that
3 delegation is specifically addressed in the Nuclear
4 Energy Institute quality assurance program
5 description, a template in Part 2 Section 2.2? And I
6 can -- I believe I can show you that section if that
7 would be helpful. Or if you have it.

8 MR. GUNDERSEN: You probably would be
9 faster than me if you can.

10 CHAIRMAN SPRITZER: All right. Can we
11 bring up Exhibit -- this is DTE Exhibit 91 page 12.
12 We can move around. I assume we're looking at, yes,
13 Section 2.2.

14 MR. GUNDERSEN: I see it.

15 CHAIRMAN SPRITZER: Delegation of work.

16 MR. GUNDERSEN: And your question was do
17 I believe delegation is allowed?

18 CHAIRMAN SPRITZER: Under this provision.

19 MR. GUNDERSEN: The answer is yes. I
20 think I said that earlier. But delegation of the QA
21 function does not mean that you don't have to also
22 provide adequate oversight through your own program.
23 But delegation to B&V is certainly allowed assuming
24 DTE had a program in place as well which it did not.

25 CHAIRMAN SPRITZER: I notice in that

1 regard the language of this Section 2.2 includes the
2 parenthetical at the end of the second sentence
3 requiring -- well, it doesn't use the term "applicant"
4 but whoever it's referring to shall retain the
5 responsibility for the program's effectiveness. That
6 seems to me to be parallel to what Appendix B
7 requires.

8 MR. GUNDERSEN: Yes, I think it is and I
9 think that's maybe more eloquently stated than I did.
10 But DTE needed to retain responsibility. But it
11 certainly had the right to delegate to B&V QA
12 functions.

13 JUDGE BARATTA: What types of activities
14 or evidence if you like that they did retain
15 responsibility would you expect to find? Give me some
16 examples of how they would demonstrate they retain
17 responsibility.

18 MR. GUNDERSEN: Well, first off they would
19 need to have QA professionals on the staff which they
20 didn't have. Secondly -- this is in '07.

21 And secondly, they would have needed to
22 have reporting responsibilities clearly defined for
23 those professionals that went outside the normal
24 reporting relationship. I've never met a QA manager
25 who wasn't proud of the fact that his dotted line

1 worked up to a senior VP three levels above me and
2 that allowed him the ability, although hopefully he
3 would never use it, to go over my boss's head and over
4 his boss's head. So that structure needed to be in
5 place.

6 In addition, an adequate audit function of
7 the ongoing work would be necessary.

8 I mentioned in my testimony DTE recognizes
9 that they put this program in place too late. There
10 was a comment in their PowerPoint addressing the NOV
11 if we had it to do over again we would have had a QA
12 program in place sooner. So I think that DTE
13 belatedly recognized that by not having a program in
14 place they got behind the eight ball.

15 CHAIRMAN SPRITZER: Is it your position
16 that DTE never informed the NRC of its intent to
17 delegate some QA functions to Black & Veatch?

18 MR. GUNDERSEN: I think that's not my
19 position. The letter, it's actually introduced by
20 DTE, their April 30 -- I'm sorry, in their April 30 of
21 this year, 2013, testimony page 32, footnote 27, they
22 introduce a document DTE 000047 dated May 31, '07,
23 where they do acknowledge that B&V will be doing
24 quality assurance work.

25 But in that same document they also

1 acknowledge that they are the applicant. And I can
2 understand where the NRC then would get lulled into
3 complacency believing that Appendix B was adequately
4 being implemented.

5 And it was only in '09 when the NRC
6 realized that B&V was delegated but that DTE was not
7 the applicant.

8 CHAIRMAN SPRITZER: Okay. Can we bring up
9 DTE 000048? I believe we want to look at the -- go to
10 the top of page 2. And the paragraph says, DTE Energy
11 has contracted Black & Veatch to support preparation
12 of the COL application -- I assume that's what's
13 intended. The Black & Veatch quality assurance
14 program which meets the requirements of 10 C.F.R. 50
15 Appendix B and ASME NQA-1 is being applied to the
16 geotechnical investigation work scope.

17 So I take it this letter does indeed
18 inform the NRC that Black & Veatch will be doing
19 geotechnical investigation under Black & Veatch's
20 quality assurance program?

21 MR. GUNDERSEN: There was two letters
22 submitted at the same time 000047 and this one's
23 000048. And I would agree that the NRC was aware that
24 B&V was the quality assurance contractor on the job.

25 But they also identified themselves,

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1 Detroit Edison also identified themselves as the
2 applicant in answering the voluntary response to the
3 RIS in 000047.

4 So, I'm okay with DTE being brought in.
5 That's not the question. These responsibilities
6 didn't have to be solely hired or solely staffed by
7 DTE. But the quality oversight could not -- the
8 responsibility for overseeing that could not be
9 delegated. And DTE has acknowledged that they did.

10 They said we are not the applicant until
11 the day we applied and therefore Appendix B doesn't
12 apply until the day we applied. And I think that 047
13 lulled the NRC into complacency because they were --
14 they didn't take exception to being an applicant in
15 2007. And it wasn't until 2009 when the NRC quality
16 assurance staff dug into this.

17 There was -- based on the FOIA request on
18 billings, NRC billings. The NRC spent 450 hours over
19 the time from February of '07 until the license was
20 submitted, they spent 450 total hours over that
21 roughly 18-month time span.

22 And in that though almost half, 220 of
23 those hours were in the first quarter and the other
24 220 of those hours were over the remainder of the 15
25 months which doesn't amount to a heck of a lot of NRC

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1 oversight.

2 That first quarter's oversight was the
3 team of structural engineers, I'm sorry, geotechnical
4 engineers who went out to the site and observed the
5 borings. They went out on the impression based on 047
6 that DTE was the applicant. And I think they were
7 lulled into complacency as a result.

8 CHAIRMAN SPRITZER: We'll be hearing from
9 the NRC staff later and they can explain their
10 position in more detail.

11 But at least one way that I read their
12 position in this proceeding is for purposes of issuing
13 a Notice of Violation they have agreed with DTE that
14 they can't issue a Notice of Violation until DTE
15 becomes an applicant.

16 I don't understand them to be saying, at
17 least not necessarily, however, that they believe
18 Appendix B requirements simply don't apply at all
19 until the application is submitted. If that were to
20 be their position would that give you some greater
21 degree of comfort? That is, they would acknowledge
22 that information submitted -- safety-related
23 information in the COLA must meet Appendix B
24 requirements, but they can't cite DTE for a violation
25 of those requirements till they actually become an

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1 applicant.

2 MR. GUNDERSEN: I guess I get back to that
3 tapestry that has to be woven at the beginning of the
4 project. And it's Appendix B, it's Part 21, it's
5 whistleblower protection. And if you claim not to be
6 the applicant for Appendix B, then your whistleblowers
7 are not protected. Then your materially false
8 statements are not violations. So the interpretation
9 of the staff and DTE I think tears that whole fabric
10 apart.

11 And in fact, Dave Lochbaum at the Union of
12 Concerned Scientists has told me that this has become
13 the new NRC standard. He was approached by a
14 whistleblower on Bellefonte during the COL pre-COLA
15 phase of Bellefonte who had whistleblowing
16 allegations. And he went to the NRC on that
17 whistleblower's behalf and was rejected for the reason
18 that there was no applicant until the day you applied.

19 And I think that's a dangerous precedent.
20 And frankly, what --

21 MR. T. SMITH: Judge Spritzer, I think
22 we'd like to object to Mr. Gundersen's hearsay about
23 what other people told him about some other
24 application that's not available in the record. It's
25 not admitted into evidence.

1 CHAIRMAN SPRITZER: All right, well, yes,
2 I don't think we need to get into other --

3 MR. GUNDERSEN: It was on the record. It
4 is in my testimony.

5 CHAIRMAN SPRITZER: Let me ask you this
6 question, Mr. Gundersen. Would it make a difference
7 in your testimony if you knew -- let me ask you to
8 assume it was the case that the definition of
9 "applicant" in Section 50.2 that you referred to was
10 new and only put into the regulations in August 2007.
11 Assume that to be true. Would that make a difference
12 to your testimony here today?

13 MR. GUNDERSEN: I don't believe it does
14 because again the entire regulatory framework is
15 preconditioned on protections and punishments for
16 applicants. And to wait until a COLA is received to
17 me seems like that whole regulatory fabric is torn
18 asunder.

19 CHAIRMAN SPRITZER: Was Black & Veatch
20 relying on the Fermi 2 quality assurance program at
21 the time of the core borings?

22 MR. GUNDERSEN: I discuss that in my
23 testimony. Black & Veatch had uncontested facts and
24 they gave a list of approved vendors. Fermi 2 was not
25 on that Black & Veatch response of approved vendors.

1 But yet Black & Veatch relied on Fermi 2 for some of
2 the core boring work. And I don't know how you can do
3 that. You're either on the approved list or you can't
4 be relied upon.

5 So I base my opinion on the uncontested
6 facts that were in the -- I believe in the RAI where
7 a vendor list, approved vendor list was given and one
8 of those was not Fermi 2.

9 JUDGE BARATTA: Was it the core boring, or
10 was it the meteorological data they got from Fermi 2?

11 MR. GUNDERSEN: It was core boring. Oh,
12 there was -- they did use the Fermi 2 met tower for
13 the meteorological data. And -- but as I said I'm
14 not, you know, that's a long-established program
15 that's essentially continuous for 30 years. And the
16 data from that program I didn't look at because I just
17 -- I felt that the core borings were more important.

18 CHAIRMAN SPRITZER: Let's go to the top of
19 DTE 000048 which is up on the screen. Is there a
20 letterhead up here? Yes. It looks to me like this
21 letter is written on -- again, that's Exhibit 48 -- on
22 Fermi 2 letterhead. Does it look that way to you, Mr.
23 Gundersen?

24 MR. GUNDERSEN: Yes, I saw that too. It
25 wasn't a very professional letterhead. It looks like

1 that got typed in. But I would agree they give a
2 return address of Fermi 2.

3 CHAIRMAN SPRITZER: Is it your
4 understanding that at the time this letter was
5 written, May 31, 2007, the Fermi 2 quality assurance
6 program was being applied to pre-application
7 activities for Fermi 3?

8 MR. GUNDERSEN: I looked at this letter,
9 that was just the return address. And it was signed
10 by an executive at DTE, not someone at Fermi 2.

11 So I guess Fermi 2 had an NRC-approved QA
12 program but that doesn't mean that it's -- that that
13 material can be accepted on Fermi 3 unless it's on the
14 approved vendors list for the work on Fermi 3.

15 CHAIRMAN SPRITZER: All right. Apart from
16 the objection about Fermi 2 not being on the approved
17 vendors list, is there any reason why DTE couldn't use
18 a Fermi 2 QA program that met Appendix B requirements
19 to supervise work -- pre-application work, safety-
20 related pre-application work for Fermi 3?

21 MR. GUNDERSEN: I think there were two
22 different entities, the Fermi 2 and the separate --
23 the Fermi 3 licensing project was a separate entity
24 that needed its own QA program.

25 So, yes, I don't see how -- first of all

1 I don't believe that occurred. I don't think DTE used
2 any QA program. They relied on B&V. And then over
3 time they wrote a QAPD that was designed to handle
4 COLA transmittal information initially and then it
5 over time grew to be more comprehensive.

6 But it should have been the Fermi 3 QAPD
7 that should have driven the site characterization work
8 on the site borings. And that of course didn't happen
9 because all those site borings were done before the
10 QAPD was ever developed.

11 CHAIRMAN SPRITZER: Do you agree that the
12 Black & Veatch QA program complies with 10 C.F.R. Part
13 50 Appendix B and NQA-1?

14 MR. GUNDERSEN: Yes, I think that's
15 probably true.

16 CHAIRMAN SPRITZER: So you're not claiming
17 that Black & Veatch's QA program is deficient under
18 NRC regulations.

19 MR. GUNDERSEN: Correct.

20 CHAIRMAN SPRITZER: What sections of the
21 Fermi 3 application contain safety-related material
22 that is based on site investigation activities?

23 MR. GUNDERSEN: It was announced earlier
24 today. It was all of Chapter 2 and I believe portions
25 of 3 and 6.

1 My biggest concern is the geotechnical
2 work. That seems to be where I spent more of my time.

3 CHAIRMAN SPRITZER: Now, do you claim that
4 specific data collected during the site investigation
5 is of poor quality and cannot be used in the COL
6 application?

7 MR. GUNDERSEN: I guess I would rely on
8 the NRC emails that occurred before the NOV, and that
9 the entire program was jeopardized because -- the
10 entire program was jeopardized because DTE didn't have
11 an Appendix B program in place. So I would agree with
12 what the NRC determined in June of 2009 in that series
13 of emails that I quoted.

14 CHAIRMAN SPRITZER: Well, someone such as
15 myself who's a lawyer and not an engineer and is quite
16 new to this, I guess one of the issues that I'm having
17 a problem with is if Black & Veatch has a QA program
18 that meets NRC requirements, they follow that program,
19 but let's assume you're correct that the applicant,
20 DTE, was supposed to have more actively supervised the
21 work B&V was doing, looking over their shoulder more
22 frequently. Why can't the NRC staff go back and
23 confirm to its own satisfaction that B&V did in fact
24 follow its own valid QA program, its own program that
25 meets Appendix B requirements? Why can't the staff do

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1 that and say in the end this violation, if there was
2 one, didn't make any difference?

3 MR. GUNDERSEN: You know, again, I think
4 it gets back to that issue of the fabric. The
5 integrity of that work is -- B&V wasn't building this
6 plant for B&V. They were building it for Detroit
7 Edison.

8 And as part of that the regulatory web has
9 protections for whistleblowers in Part 21 and
10 materially false statements. And none of that was
11 B&V's responsibility. All of that was DTE's
12 responsibility. So they had to exert oversight over
13 B&V or else the integrity of all that work product can
14 be questioned.

15 If employees were afraid to bring a
16 concern forward because they were not protected under
17 employee protection because they weren't an applicant.
18 The program is useless unless it has the web. It's
19 not just Appendix B. It's the web of five or six
20 things that the applicant must have in place as this
21 data is being developed.

22 CHAIRMAN SPRITZER: I'm not really
23 familiar with the whistleblower protections you're
24 referring to. Is it the case that once you become an
25 applicant you have to have certain whistleblower

1 protections in place?

2 MR. GUNDERSEN: Yes. There's four. I
3 bring them up in my -- I'm sorry, I have too many
4 stickies.

5 CHAIRMAN SPRITZER: Take your time.

6 MR. GUNDERSEN: Okay, yes, Part 52 has
7 three examples of where you must have programs in
8 place as an applicant that affect the very integrity
9 of the data collection as well as the FSAR. 52.4 is
10 about deliberate misconduct and an applicant is
11 clearly referenced in there. 52.5 is on employee
12 protection. And again, as an applicant you must have
13 employee protection in place. 52.6 was on
14 completeness and accuracy which was a concern that DTE
15 had as they were developing this document. And then
16 of course Part 21 also requires that you be an
17 applicant to have a Part 21 process.

18 So it's not just QA. So the fifth wheel
19 here is the QA. But it's that entire web of
20 protections that are in place and legal recourse by
21 the NRC that's in place. And if you're not an
22 applicant and the NRC's position stands then the
23 entire integrity of all the data that was collected
24 has got to be suspect.

25 CHAIRMAN SPRITZER: So if we have, and I'm

1 not remotely suggesting anything like this happened,
2 but if it were the case that someone working at Black
3 & Veatch or one of its subcontractors working on
4 safety-related work said something is really not being
5 done correctly here, if DTE is an applicant there will
6 be a whistleblower program that individual could go to
7 and say --

8 MR. GUNDERSEN: Yes, that's correct.

9 CHAIRMAN SPRITZER: -- there's a problem.
10 But if they're not an applicant there would be no such
11 program.

12 MR. GUNDERSEN: That's correct.

13 CHAIRMAN SPRITZER: And without such a
14 program it's kind of hard to sit back now and say
15 well, we do or don't know whether that would have made
16 any difference.

17 MR. GUNDERSEN: Yes, that's correct.

18 JUDGE BARATTA: Let's say for argument's
19 sake that they were just evaluating the feasibility of
20 building a plant there. That is to say they would do
21 some test borings to see what's there. Would you
22 consider them to be an applicant -- would you consider
23 that they would have to have been considered an
24 applicant under Appendix B at that phase? In other
25 words when do they become -- when does the work have

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1 to be covered by an Appendix B program?

2 MR. GUNDERSEN: Well, in this case a site
3 was already chosen. And I've been involved on
4 projects where many sites were in play and you pop
5 down a couple of borings on each site and not need
6 quality assurance.

7 When you narrow it down to the likely
8 candidate at that point a QA program comes into play
9 because at that point the integrity of the data drives
10 the remainder of the process.

11 JUDGE BARATTA: And in your opinion they
12 were beyond that point in 2007.

13 MR. GUNDERSEN: They were beyond that
14 point not because they hadn't chosen an NSSS design,
15 that's irrelevant. But they had already chosen the
16 site. So the site boring work definitely would fall
17 under a QA program.

18 JUDGE CHARBENEAU: Let me try something on
19 the other side of the fabric. Could the NRC have
20 written a Notice of Violation to DTE back in April
21 2007 when the DTE nuclear development program was
22 established?

23 MR. GUNDERSEN: I think the NRC believed
24 that they had an applicant at that time. Certainly in
25 May of 2007 they believed they had an applicant at

1 that time because DTE answered questions on behalf of
2 the applicant.

3 So between -- there's not much to write
4 about, to write an NOV on from the time February 15
5 roughly when they announced that they were going to
6 build some sort of plant at Fermi, and the May letter
7 that came across announcing that they were an
8 applicant. Not much went on.

9 But, so I guess -- so I believe the NRC
10 believed there was an applicant at the time they
11 applied because that's what 50.2 says. An applicant
12 is someone who is applying. And the announcement that
13 they were applying came in February of '07.

14 JUDGE CHARBENEAU: I'm having a very hard
15 time trying to understand the basis for a Notice of
16 Violation that's received before an application is
17 received. I don't understand how there's any
18 enforcement capability. Or authority.

19 MR. GUNDERSEN: There clearly is
20 enforcement capability on, for instance, whistleblower
21 issues. If you're working for an applicant under an
22 applicant's program and you have whistleblower
23 concerns relating to the data that's collected you are
24 protected.

25 So, I think the NRC -- and separately not

1 just whistleblowing but on the deliberate misconduct
2 and things like that.

3 JUDGE CHARBENEAU: But if I'm working for
4 Black & Veatch at that time period I have all those
5 protections because I'm working under their Appendix
6 B quality assurance program which has those
7 protections.

8 MR. GUNDERSEN: Not by the NRC's position
9 which says if you're not an applicant you don't have
10 those protections. And that's what happened at the
11 plant I'm not allowed to discuss.

12 CHAIRMAN SPRITZER: Do you agree that DTE
13 had in place -- well, let me stop you. We've been
14 going at you for about an hour and 15 minutes so I
15 think you probably need a little rest. Why don't we
16 come back in 15 minutes. We'll give people 15 minutes
17 this time. So we'll start again at about 3 o'clock.

18 (Whereupon, the foregoing matter went off
19 the record at 2:41 p.m. and went back on the record at
20 2:59 p.m.)

21 CHAIRMAN SPRITZER: We're ready to go back
22 on the record. Mr. Gundersen, you're still under
23 oath. Do you agree that DTE had in place an Appendix
24 B NQA-1 quality assurance program prior to accepting
25 any COL application work product from Black & Veatch?

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1 MR. GUNDERSEN: The scope of the program
2 was limited to accepting COL material. But they did
3 have a program in place to accept COL-related
4 material.

5 CHAIRMAN SPRITZER: What does that mean
6 precisely, accept? I mean, they get a document from
7 Black & Veatch that says we've done the following
8 tests and here's the data? What do they do with it at
9 that point?

10 MR. GUNDERSEN: Well, in my experience,
11 and this was a point of contention. I was involved
12 with the ASLB in January of this year on San Onofre
13 where the FSAR does not contain all of the design
14 bases of the plant. It's more of a top document.

15 And supporting information for that FSAR,
16 Friends of the Earth who I was representing believed
17 was part of that process. So the top document, the
18 COL in this case, is much smaller, much more limited
19 than all of the raw data that's compiled before it
20 gets to the COL.

21 So, they didn't have a program in place to
22 determine the adequacy of the raw data, but they did
23 have a program in place to make sure that the written
24 data they got from B&V to support the COL was
25 transmitted and handled in a controlled fashion.

1 CHAIRMAN SPRITZER: Okay. But the actual
2 development of the data, the raw data, that would in
3 your opinion that was not done under an Appendix B
4 program at least prior to submission of the
5 application?

6 MR. GUNDERSEN: Yes, it's a little more
7 than my opinion though. 000106 which is that document
8 I referred to before which was the decision to have a
9 QA program in place just for the COLA transmittals
10 clearly identifies that the only reason they had that
11 program in place was to avoid issues on oath and
12 affirmation.

13 And their concern is expanding it, this is
14 a DTE document, DTE's concern in expanding even to
15 that level of quality assurance was that the schedule
16 to complete this work is aggressive. So, they
17 incorporated a QA program on the transmittals because
18 they were afraid of affirmation -- under oath and
19 affirmation issues. But the remainder of the data was
20 not addressed until later.

21 CHAIRMAN SPRITZER: Do you have any basis
22 to conclude that DTE did not conduct its acceptance
23 reviews in accordance with standard work instructions
24 including SWI-03-001-001-0529 entitled "COLA Section
25 and Chapter Review and Acceptance Process?"

1 MR. GUNDERSEN: I think the only piece of
2 this process that was controlled was the COLA
3 acceptance review process.

4 CHAIRMAN SPRITZER: Okay. Didn't DTE
5 conduct audits and surveillances of the B&V QA program
6 after February of 2008?

7 MR. GUNDERSEN: I'm sorry, I cannot
8 remember when the first audit of the overall B&V
9 program was completed.

10 CHAIRMAN SPRITZER: What specific data
11 accepted by DTE during this period do you claim is of
12 poor quality and cannot be used in the COL
13 application?

14 MR. GUNDERSEN: Well, my biggest concern
15 is the structural logs of data that was collected
16 onsite. Specifically, when you do a boring the
17 qualifications of the people doing the boring are
18 obviously important. The raw core itself, the
19 integrity of that core is important. Where that core
20 is stored and how it's transmitted to the storage
21 location is important. And how it's accessed and
22 analyzed after the fact and when it's pulled out of
23 storage is also important.

24 So, my biggest concern on the work done in
25 '07 and '08 is the geotech work. Because it spins

1 over into these structural problems that are still
2 part of this docket.

3 These are incredibly heavy buildings and
4 making sure the integrity of that, the foundation
5 document, literally the foundation document to me is
6 the most important piece.

7 And I don't see any data that shows that
8 DTE had exercised oversight of that process in `07 and
9 into `08.

10 JUDGE CHARBENEAU: Does that mean that you
11 question the Black & Veatch work and quality assurance
12 program? Since they were the ones that were doing the
13 work at that time.

14 MR. GUNDERSEN: If a B&V employee had
15 concerns about that program he was not protected
16 because there was no applicant, there was no
17 whistleblower program. So, the integrity of the Black
18 & Veatch information is -- has to be questioned based
19 on the NRC's position that you're not an applicant
20 until the day you apply.

21 JUDGE CHARBENEAU: If I'm a Black & Veatch
22 employee, I'm working under an Appendix B quality
23 assurance program, I don't have protections? As a
24 Black & Veatch employee.

25 MR. GUNDERSEN: I addressed that in my

1 testimony that the NRC's position is you don't have
2 protection unless the application has been submitted.

3 JUDGE CHARBENEAU: No, if I'm a -- I'm not
4 a Detroit Edison employee, I'm a B&V employee doing
5 work out in the field, doing the geotechnical work.
6 I'm not protected as I'm doing that work under their
7 Appendix B program?

8 MR. GUNDERSEN: 52.5 says that you must be
9 an applicant and the applicant must have appropriate
10 protections in place. Black & Veatch was not the
11 applicant. So without an applicant I don't believe
12 the Black & Veatch employees were protected using the
13 NRC's present position on quality assurance which got
14 us here today.

15 CHAIRMAN SPRITZER: Have you read Chapter
16 17 of the applicant's Fermi 3 final safety analysis
17 report including the Fermi 3 quality assurance program
18 description?

19 MR. GUNDERSEN: Yes, I think I actually
20 had a head-to-head comparison with Chapter 17 COLA
21 versus the NEI guidelines. Yes, I have.

22 CHAIRMAN SPRITZER: Have you read the NRC
23 staff's safety evaluation of Chapter 17? I take it
24 that's Chapter 17 of the FSAR, the final safety
25 analysis report.

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1 MR. GUNDERSEN: No, I have not.

2 CHAIRMAN SPRITZER: Do you agree that the
3 Fermi 3 quality assurance program description
4 satisfies Appendix B as well as NQA-1? I take it this
5 was what was submitted in September 2008.

6 MR. GUNDERSEN: Do I agree that the QAPD
7 satisfies NQA-1 and Appendix B? I believe it was
8 implemented in pieces. You know, the first piece was
9 on the transfer. At this point it is more
10 comprehensive. So, yes, as it was implemented in
11 pieces I do believe that the pieces that it was
12 implemented on did meet Appendix B and NQA-1.

13 CHAIRMAN SPRITZER: Okay. Have you
14 identified any specific concerns with DTE's
15 implementing procedures? I take it that means
16 implementing procedures for the Fermi 3 QAPD.

17 MR. GUNDERSEN: I don't believe those were
18 in the documents that DTE sent us. I don't remember
19 reading a lot of B&V implementing procedures.

20 My concern is on the quality of the
21 geotechnical data.

22 CHAIRMAN SPRITZER: All right. Has DTE
23 performed audits and surveillances since submitting
24 the COL application?

25 MR. GUNDERSEN: Yes, it has.

1 CHAIRMAN SPRITZER: Does DTE have a
2 corrective action program?

3 MR. GUNDERSEN: Now it does, yes.

4 CHAIRMAN SPRITZER: Do you have any
5 concerns with the manner in which DTE has implemented
6 the Fermi 3 quality assurance program description
7 since becoming an applicant?

8 MR. GUNDERSEN: My concern is that the
9 geotechnical foundations that were used in `07 and `08
10 are -- that raw data is now driving the seismic
11 structural analysis which is occurring now on the
12 ESBWR foundation. And I don't know how you can have
13 any faith in the integrity of that raw data given that
14 DTE had a self-executing QA program back in `07 and
15 `08.

16 CHAIRMAN SPRITZER: Have you been able to
17 identify any pattern or trend of corrective actions to
18 suggest that the Fermi 3 corrective action program was
19 not functioning effectively?

20 MR. GUNDERSEN: I address that in pages 3,
21 4 and 5 of the proprietary testimony. I did have
22 concerns but obviously we can't talk about them today.

23 CHAIRMAN SPRITZER: All right.

24 MR. GUNDERSEN: They're on pages -- it's
25 question 2 which runs from page 3 to page -- question

1 2 which runs from page 3 to page 5 of the proprietary
2 testimony does address some specific concerns.

3 CHAIRMAN SPRITZER: Okay. Very good. We
4 can read that.

5 The Notice of Violation issued by the NRC,
6 did it identify any problem with the safety-related
7 information in the Fermi 3 COL application?

8 MR. GUNDERSEN: The Notice of Violation
9 was vague but the emails and internal memorandum
10 leading up to it were quite specific and did identify
11 problems with the overall quality of the information
12 developed until that date.

13 CHAIRMAN SPRITZER: Now, Appendix B
14 contains a criterion 18, roman numeral XVIII, entitled
15 Audits. Are you familiar with that?

16 MR. GUNDERSEN: Yes.

17 CHAIRMAN SPRITZER: Does that criterion
18 contain any specific direction on the frequency of
19 audits?

20 MR. GUNDERSEN: No, it does not.

21 CHAIRMAN SPRITZER: Did DTE perform an
22 annual audit of Black & Veatch following issuance of
23 the proposed Notice of Violation?

24 MR. GUNDERSEN: DTE did audit Black &
25 Veatch after the NOV, yes they did.

1 CHAIRMAN SPRITZER: All right. Has DTE
2 performed annual audits subsequent to the Notice of
3 Violation?

4 MR. GUNDERSEN: Yes, they have.

5 CHAIRMAN SPRITZER: Criterion 16, again
6 that's roman numeral XVI in Appendix B entitled
7 Corrective Action. Are you familiar with that
8 criterion?

9 MR. GUNDERSEN: I'm sure I've read it. I
10 was trying to think when you said 16 which one was it.
11 I'm definitely familiar with criteria 16 Corrective
12 Action.

13 CHAIRMAN SPRITZER: Does that criterion
14 require corrective action trending?

15 MR. LODGE: Your Honor, I'd like to object
16 on grounds that this document says whatever it says
17 and I'm not sure that it is relevant to pick the
18 witness's brain as to whether or not he can recall.

19 CHAIRMAN SPRITZER: Right, I understand
20 your objection. I'd like an answer to the question.

21 MR. GUNDERSEN: Off the top of my head I
22 cannot remember if trending and tracking is part of
23 it, or it's -- Appendix B is a pretty broad document
24 so I would guess that it does not get into the weeds
25 on the tracking frequency and trending data. But I'm

1 sorry, I cannot remember the exact words of Section
2 16.

3 CHAIRMAN SPRITZER: Okay. Did DTE perform
4 corrective action trending following issuance of the
5 proposed Notice of Violation?

6 MR. GUNDERSEN: Yes, they do. They do
7 have a corrective action trending program now.

8 CHAIRMAN SPRITZER: And has DTE performed
9 corrective action trending subsequent to the notice --
10 well, I think you just answered that question. Sorry.

11 DTE states that while it was not legally
12 required to have an Appendix B program before it
13 became an applicant it nevertheless had in place an
14 Appendix B program, the nuclear development quality
15 assurance program description starting in February
16 2008. You argue that DTE was subject to Appendix B
17 requirements before it became an applicant. What
18 difference does it make whether DTE was legally
19 required to have an Appendix B program so long as DTE
20 voluntarily implemented such a program prior to
21 becoming an applicant?

22 MR. GUNDERSEN: I don't think DTE had the
23 right to voluntarily implement the program first of
24 all. It was a requirement that had to be met.

25 Secondly, the only thing in their QAPD

1 that was implemented was the transfer of data on the
2 COLA which is that 000106 document. And the rest of
3 that material revolved over time.

4 I think the point of the NRC emails shows
5 that they had no control over the design process
6 leading up to that point because they didn't have
7 their own QA program in force for the whole program.
8 It was a very narrow focus QA program designed to save
9 schedule and designed to be sufficient to support the
10 oath and affirmation that is required to be part of
11 the DTE COLA submittal is their exact words.

12 The reason they put that part of the
13 program in place is that they wanted a program that
14 was, quote, "sufficient to support the oath and
15 affirmation that is required to be part of the DTE
16 COLA submittal."

17 Other than that there was no program in
18 place to assess the broader data that was being
19 developed and analyzed until after the NOV was in
20 place. And that was identified in all those NRC
21 emails back and forth in June where the NRC was pretty
22 clear that they had no program in place to assure the
23 design of the project up until that time.

24 CHAIRMAN SPRITZER: You've stated a
25 general concern regarding geotechnical raw data that

1 you say is now driving seismic and structural analysis
2 regarding the ESBWR, the proposed reactor foundations.
3 Can you be more specific as to the analysis you are
4 referring to?

5 MR. GUNDERSEN: There currently is a
6 significant problem as the project is being designed
7 with the weight of the structure on the karst
8 geography that's below the surface which is one of the
9 reasons why the docket is delayed as much as it is.

10 That analysis draws upon the foundation
11 documents, literal foundation documents, from `07 and
12 `08. So, and I believe the integrity of that `07-`08
13 data is questionable because of -- actually because of
14 the NRC's words back in `09 when they were evaluating
15 the QA program.

16 And if the data they collected is
17 questionable in `07 and `08 then the analysis they're
18 doing now that relies on that data is also -- has to
19 be questionable.

20 CHAIRMAN SPRITZER: Can you please give an
21 example of how you think the lack of whistleblower
22 protections pre-September 2008 could be significant?
23 I take it this is referring to the Fermi 3 site, not
24 other plants.

25 MR. GUNDERSEN: Well, let's say a core

1 boring is stored improperly and labeled improperly.
2 Or in the wrong location, in the wrong bin with the
3 wrong number on it or something like that. And an
4 employee becomes aware of that improper placement.

5 He's got no outlet -- he or she has no
6 outlet for that concern unless DTE is an applicant at
7 which point he or she has some protections. So the --
8 I'm choking on the word. The security of supply --
9 that's not the term. The sanctity of supply -- the
10 chain of command, that's the word. I'm sorry. The
11 chain of --

12 JUDGE BARATTA: Custody?

13 MR. GUNDERSEN: Yes.

14 JUDGE BARATTA: Chain of custody?

15 MR. GUNDERSEN: Yes, chain of custody.

16 I'm sorry. The chain of custody must be assured from
17 the time the sample's drawn out to the time it's put
18 into a bin and then the time it's withdrawn from that
19 bin and analyzed.

20 If an individual is aware that there's a
21 problem they have no vehicle to bring that forward
22 unless there is an applicant and unless whistleblower
23 protections apply.

24 JUDGE BARATTA: Wouldn't that -- I mean
25 the example you gave is clearly one where

1 whistleblower concerns could come in. But wasn't --
2 wouldn't that aspect of the example actually be done
3 by Black & Veatch which did have a QA program? And
4 would they have likely had a whistleblower program as
5 a result too?

6 MR. GUNDERSEN: I think that's the
7 question that Judge Charbeneau asked too. Does the
8 B&V program have whistleblower protection built into
9 it. And as I read -- whistleblower protection is
10 52.5. As I read 52.5 there has to be an applicant to
11 have the protections. And B&V was a contractor. And
12 without an applicant that that contract is associated
13 to the answer is no.

14 CHAIRMAN SPRITZER: I'm going to ask you
15 some specific questions now about the quality
16 assurance program description for Fermi 3.

17 Do you agree that the nuclear development
18 QA manager was a position that existed only while the
19 nuclear development quality assurance program
20 description was in effect?

21 MR. GUNDERSEN: I think I address that on
22 page 17 of the non-proprietary testimony. And the
23 problem is the COLA says there's somebody called the
24 new plant oversight manager and lists responsibilities
25 for that new plant oversight manager. But the RAI

1 reply says there's a nuclear development QA manager
2 that has the same responsibilities.

3 And then as I said earlier the quality
4 assurance begins with titles and organizational
5 structure. And here's two documents with two
6 different names for the same person, or for the same
7 responsibilities. So I don't really know if there was
8 a nuclear development QA manager or if that person was
9 the new plant oversight manager. There's -- the data
10 is conflicted. The COLA disagrees with the RAI reply.

11 CHAIRMAN SPRITZER: If I understand your
12 answer correctly you do agree that the nuclear
13 development QA manager and the new plant oversight
14 manager, they appear to have the same
15 responsibilities, those two titles.

16 MR. GUNDERSEN: It looks like -- to me it
17 looks like DTE didn't have a title for the person that
18 assumed those responsibilities. One document, the
19 COLA, calls that person a new plant oversight manager.
20 And the RAI reply gives the same responsibilities to
21 someone entitled the nuclear development QA manager.

22 So I don't know if there was a nuclear
23 development QA manager or if there was a new plant
24 oversight manager, and at which point the transition
25 in title occurred. Clearly the RAI reply disagrees

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1 with the COLA. And to me that's unacceptable. That's
2 an indication -- QA is all about titles and
3 organizational structure. And for that kind of a
4 problem to manifest itself as late as the RAI replies
5 tells me that even that late in '09 there were serious
6 organizational problems.

7 CHAIRMAN SPRITZER: Wouldn't it be
8 reasonable to interpret that -- the different titles,
9 nuclear development QA manager and new plant oversight
10 manager to simply mean that at one point there was a
11 title that had those responsibilities. Then the title
12 changed but the responsibilities remained the same.

13 MR. GUNDERSEN: Well, the term "QA
14 manager" sneaks into the lexicon after the NOV whereas
15 the new plant oversight manager was part of the docket
16 when it was docketed in '08. It appears that as time
17 evolved the title was changed to a quality assurance
18 manager.

19 So the role of quality assurance after the
20 docket was -- after the COL was docketed begins to
21 have a prominent role. But the role of quality
22 assurance before it was docketed and even while it was
23 early in the docketing stage is minimized as the
24 COLA's own words indicate. A new plant oversight
25 manager's reporting responsibilities was lower in the

1 organization than a nuclear development QA manager.

2 CHAIRMAN SPRITZER: What about the title
3 director of quality management in the Fermi 3 quality
4 assurance program description revision 1? Have you
5 seen that title and description?

6 MR. GUNDERSEN: I know I have and I'm
7 sorry, I -- I was actually, that was an example, I was
8 doing a head-to-head comparison with NEI's criteria
9 and DTE's criteria. And I found more than just
10 nuances in the words of their descriptions. It looked
11 like to me that as the COL was being written QA was
12 pushed down in the organization further than I would
13 have anticipated that to be.

14 CHAIRMAN SPRITZER: You've reviewed DTE's
15 direct and rebuttal testimony in this case?

16 MR. GUNDERSEN: Yes, I did.

17 CHAIRMAN SPRITZER: On contention 15?

18 MR. GUNDERSEN: Yes, I did.

19 CHAIRMAN SPRITZER: Do you still maintain
20 that there was a 3-month long gap from April 2009
21 through June 2009 in which there was no person in
22 charge of QA?

23 MR. GUNDERSEN: Yes. The data that I base
24 that on was accurate. Since that time DTE has
25 presented additional information. But I think that

1 shows the confusion in the docket early on and really
2 doesn't exonerate DTE for correcting the record at
3 this late date. There was confusion and the RAI
4 response where that came from indicated a poorly put
5 together document.

6 CHAIRMAN SPRITZER: After reviewing DTE's
7 direct and rebuttal testimony do you still maintain
8 that there was insufficient independence between
9 quality assurance and the line organization?

10 MR. GUNDERSEN: There was no QA person for
11 a long period of time. They even acknowledge that.
12 They also acknowledge that they wish they had
13 implemented QA sooner. So yes, I definitely believe
14 that there was no -- there wasn't enough structural
15 independence between QA and the line organization.

16 CHAIRMAN SPRITZER: Is DTE's approach to
17 separation and independence consistent with the NEI
18 template?

19 MR. GUNDERSEN: I'm assuming you mean
20 within DTE. I mean we went over the issue of -- I
21 don't believe its approach in having Black & Veatch
22 essentially run the entire program was correct.

23 As the DTE program developed which at this
24 point is '09 it was -- it became consistent with NQA-1
25 and other documents.

1 CHAIRMAN SPRITZER: Can we bring up DTE
2 Exhibit 94? Perhaps DTE counsel can let me know if
3 we're at the right -- we are? Okay.

4 Does this help to improve your
5 understanding of the transition of titles and
6 responsibility in the various quality assurance
7 program descriptions?

8 MR. GUNDERSEN: I think I answered that,
9 that the --

10 CHAIRMAN SPRITZER: Well, I'm talking
11 about this specific document.

12 MR. GUNDERSEN: Yes, the middle line there
13 says that the new plant oversight manager title was
14 changed in October of '09 to a different title.

15 CHAIRMAN SPRITZER: Okay. And can we
16 bring up DTE 15?

17 JUDGE BARATTA: Before you do that, this
18 chart, what -- does not address anything prior to
19 February 2008 from what you can see, is that --

20 MR. GUNDERSEN: Yes, that's correct. But
21 that table I put together in my testimony comparing
22 the new plant oversight manager with the director of
23 quality management was based on the data available at
24 the time. And it appeared to me that DTE was trying
25 to paper over the fact that they had no quality

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1 assurance manager until October of 2009 which this
2 document supports.

3 CHAIRMAN SPRITZER: Let's bring up DTE 15.
4 All right. I'm going to need a little help in
5 locating.

6 MR. T. SMITH: It was just that same
7 figure.

8 CHAIRMAN SPRITZER: Oh, it's the same --
9 all right. Do you understand that DTE's Request for
10 Additional Information response specifically addressed
11 the organization in place during site investigation
12 activities, that is, before COL submittal? And we can
13 bring that up for you if you want to look at it.

14 MR. GUNDERSEN: The RAI specifically
15 addressed --

16 CHAIRMAN SPRITZER: This is DTE Exhibit
17 54. Is this non-proprietary?

18 MR. T. SMITH: It is non-proprietary.

19 CHAIRMAN SPRITZER: And it's DTE 54. And
20 we're going to go to attachment 1 at page 3.

21 MR. T. SMITH: It's page 5.

22 CHAIRMAN SPRITZER: Oh, is it page 5?
23 Sorry.

24 MR. T. SMITH: Well, it's page 5 of the
25 PDF.

1 CHAIRMAN SPRITZER: Okay.

2 MR. T. SMITH: The bottom of the page.

3 CHAIRMAN SPRITZER: Down to the bottom,
4 all right.

5 MR. T. SMITH: And I guess the point here
6 was to look at the response to the italicized portion
7 is the question that DTE was responding to and discuss
8 the positions and persons who were in place during the
9 pre-application activities and the ND QAPD.

10 CHAIRMAN SPRITZER: Okay. Do we need to
11 go onto the next page?

12 MR. T. SMITH: On the next page you'll see
13 the response that Mr. Gundersen has been referring to
14 where he says there was some confusion about the
15 titles. And the RAI differed from what was in the
16 COLA. And the point is that the RAI addressed the
17 period before the COL was submitted.

18 CHAIRMAN SPRITZER: All right. So let me
19 repeat the question, Mr. Gundersen. Do you understand
20 that the RAI response specifically addressed the
21 organization in place during the site investigation
22 activities, that is, before the COL submittal?

23 MR. GUNDERSEN: Could you back up to the
24 -- no, not on this document. The three-bar slide that
25 you had put up. That's it. If that's the case this

1 slide is wrong because it would have had to be the
2 NDQA manager role change. The COL was submitted in
3 September of `09 -- of `08 rather and this shows the
4 transition occurring in October. So I understood what
5 the words said that we read, but this slide disagrees
6 with those words.

7 CHAIRMAN SPRITZER: All right. I think
8 you've answered the question.

9 Do you agree that the environmental report
10 is not a safety-related document?

11 MR. GUNDERSEN: Yes, I do.

12 CHAIRMAN SPRITZER: Several of the
13 corrective action request examples that you highlight
14 discuss issues that were identified prior to any
15 information being sent to the NRC or included in the
16 COL application. Can you explain why this is not a
17 positive outcome?

18 MR. GUNDERSEN: Is that in the proprietary
19 section?

20 MR. T. SMITH: I'm sorry, could he please
21 repeat the question?

22 CHAIRMAN SPRITZER: Yes. Several of the
23 corrective action request examples that you highlight
24 discuss issues that were identified prior to any
25 information being sent to the NRC or included in the

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1 COL application. Can you explain why this is not a
2 positive outcome?

3 That's the question. I think he's asking
4 if he responds is he going to be getting into
5 proprietary information.

6 MR. T. SMITH: I think that responding to
7 the question doesn't require him to get into
8 proprietary information.

9 CHAIRMAN SPRITZER: All right. I believe
10 you can respond. If they have a problem they'll
11 immediately let us know.

12 MR. GUNDERSEN: I would agree that at
13 least one, maybe two of those occurred before. But
14 the trend continued after. So I think the trend is
15 disturbing and is a problem.

16 If the trend had stopped it wouldn't have
17 been a problem. But the fact is that problems in it
18 looks like September of '08 carried over into '09 as
19 well.

20 CHAIRMAN SPRITZER: The purpose of a QA
21 program is to identify problems. Is that a fair
22 statement? In safety-related information, that is.

23 MR. GUNDERSEN: That's one of the purposes
24 of a QA program, yes. I would like to say it's to
25 prevent problems from occurring in the first place.

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1 And then if a problem arises to identify it soon
2 enough that trends like the ones I identified don't
3 develop.

4 JUDGE BARATTA: Could we go back to DTE
5 Exhibit 54, the one you had up a moment ago? And
6 let's go to just page 7 of the document. And go down,
7 a little further down the page there where you get to
8 1, item 1 there.

9 I draw your attention to that paragraph
10 that begins with the number 1 and then all field and
11 laboratory activities would be performed. It mentions
12 this fact that the Black & Veatch quality assurance
13 and part of the Black & Veatch would be performed --
14 part of the quality assurance would be performed by
15 someone from another division of Black & Veatch. And
16 that it says would perform a series of pre-work
17 surveillance, audit activities and such. Now, that
18 individual I believe is referred as the owner/engineer
19 elsewhere in the testimony and such.

20 What's the problem with having somebody
21 like that as opposed to a DTE employee perform those
22 audits and such which are things that you had
23 mentioned earlier would indicate responsibility?

24 MR. GUNDERSEN: Can I read that? The
25 owner's engineer was Black & Veatch and DTE also

1 contracted Black & Veatch to do the quality assurance.
2 I have a small problem with the fact that there's a
3 conflict of interest that it's the same firm.

4 But the broader problem is that the owner
5 didn't own the quality assurance program. So, whether
6 it's Black & Veatch inspecting Black & Veatch, or
7 whether it was Shaw inspecting Black & Veatch is a
8 secondary problem to the fact that the applicant
9 abrogated its responsibility to assume that top role
10 and provide adequate quality assurance direction to in
11 this case the Black & Veatch quality assurance
12 function.

13 JUDGE BARATTA: So even though that would
14 be a separate contract presumably and that individual
15 would be responsible solely to DTE for that function
16 you don't feel that's sufficient -- that DTE maintains
17 sufficient responsibility in that case? Is that what
18 you're saying?

19 MR. GUNDERSEN: I don't think there's a
20 sufficient arm's length relationship between a B&V
21 employee and the owner engineer's organization and B&V
22 and the QA organization. But essentially the money's
23 going to go to the same corporation so there's a
24 conflict there.

25 But what I've -- I really didn't get into

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1 that because I didn't think that was the important
2 issue as I was writing it.

3 The key is that as the NRC noted in their
4 email exchanges back in June of 2009 there was no
5 responsibility by DTE for the design functions, for
6 quality assurance oversight of the design functions
7 and they needed to do that.

8 And I think that's supported by what the
9 ASLB said at Midland, that you can't have a self-
10 executing QA program and that's really what it had
11 become.

12 JUDGE BARATTA: Thank you.

13 CHAIRMAN SPRITZER: Bear with me a moment,
14 Mr. Gundersen. I'll be right back with you as soon as
15 I find something here.

16 Have you seen in the record that DTE hired
17 two QA professionals to oversee quality assurance for
18 Fermi 3? Did they eventually do that?

19 MR. GUNDERSEN: Yes, they eventually hired
20 QA professionals to do that, yes.

21 CHAIRMAN SPRITZER: I believe you stated
22 in your testimony, I haven't been able to find the
23 exact location, that DTE had no intention of hiring QA
24 professionals.

25 MR. GUNDERSEN: Actually DTE said that.

1 I could find it in half a minute.

2 CHAIRMAN SPRITZER: All right. It's on
3 page 35 of 38, question 39. It's a DTE quote. It
4 says, I think at the time Bing put the QA plan
5 together we had not envisioned hiring a deco QA
6 professional. Conventionally the QA plan needs to be
7 owned by deco and the QA professional, i.e., a QA
8 manager role needs to have a reporting relationship at
9 a level that is independent of line functions to which
10 the program applies.

11 So this personnel performing QA oversight
12 function are not subject to line influence. And the
13 key was that they had not envisioned hiring someone to
14 fulfill that role. It was written in January of '08.

15 CHAIRMAN SPRITZER: Have you identified
16 any information developed during the site
17 investigation that is inaccurate?

18 MR. GUNDERSEN: I haven't reviewed --
19 that's not part of the ADAMS database and it wasn't
20 part of what we were given by DTE. There are no
21 boring logs and calculations and things like that to
22 review. It was not part of the information I was
23 privy to to analyze.

24 CHAIRMAN SPRITZER: So I take it your
25 position is more that the information can't be trusted

1 because it wasn't developed under an appropriate QA
2 program.

3 MR. GUNDERSEN: Yes, that's correct. That
4 is my position.

5 CHAIRMAN SPRITZER: Have you identified
6 any specific instance of a material safety significant
7 error in a safety-related portion of the Fermi 3 COL
8 application?

9 MR. GUNDERSEN: No, the calculational
10 basis for the geotechnical foundation work that's
11 ongoing is a serious concern of mine. But again we
12 were not provided any of that analysis to dissect as
13 to its accuracy.

14 CHAIRMAN SPRITZER: Now, other than the
15 violation described in the NOV issued by the NRC staff
16 have you identified any other violation of NRC QA
17 requirements?

18 MR. GUNDERSEN: Yes, it's broader than the
19 NOV. It was the -- and frankly if it were just the
20 NOV I don't think this report would have the legs it
21 has.

22 It was -- the NOV was the culmination of
23 a series of NRC emails and internal memoranda that
24 questioned the entire integrity of the design process
25 up until June of 2009. I mean, QA professionals

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1 within the NRC. It's not Arnie Gundersen speaking but
2 QA professionals within the NRC felt that the entire
3 process was jeopardized because DTE did not exercise
4 a quality assurance role. And so it goes beyond the
5 NOV and in fact is -- the NOV is the end of a long
6 series of critical dialogue that's important to my
7 reaching the conclusion I did.

8 CHAIRMAN SPRITZER: In the Board's order
9 of February 28, 2013 in our question 8 we asked the
10 interveners to explain what difference they maintain
11 existed between the Black & Veatch quality assurance
12 program and the applicant's Fermi 3 QA program.

13 The answer to that basically told us that
14 our question was irrelevant. You're entitled to that
15 position of course if you want to maintain it, but I'd
16 still like an answer to the question. Can you tell me
17 what difference there was, if any, between the Black
18 & Veatch quality assurance program and the applicant's
19 Fermi 3 QA program? If there is one.

20 MR. GUNDERSEN: I think the Midland ASLB
21 decision speaks to that. The ASLB in Midland said you
22 can't have a self-actuating QA program. And without
23 a DTE program in place that's effectively what was
24 happening, that the B&V program can't be a proxy for
25 DTE assuming overall responsibility for the quality of

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1 not just the COLA document, but the quality and
2 integrity of all the work that goes into it as well.

3 CHAIRMAN SPRITZER: I certainly understand
4 your position on that and you've stated it many times.

5 What I'm asking though is -- let me refer
6 specifically to the Fermi 3 QA program that was
7 submitted with the COLA in September 2008, the license
8 application in September of 2008.

9 In terms of just looking at those programs
10 side by side is there any significant difference
11 between them? I'm not asking whether one can be used
12 as a substitute for the other.

13 MR. GUNDERSEN: Oh, I'm sorry. You want
14 me to line up the QAPD for the COLA and compare that
15 to the quality assurance plan for Black & Veatch.

16 CHAIRMAN SPRITZER: Yes.

17 MR. GUNDERSEN: I would say the -- while
18 the words don't match, the intent of both documents
19 mirrors each other.

20 CHAIRMAN SPRITZER: All right.

21 MR. GUNDERSEN: Can I add to that?

22 CHAIRMAN SPRITZER: As long as it's
23 responsive to the question and not another question.

24 MR. GUNDERSEN: Yes. No, adding to the
25 response. I would add, though, that the staff in June

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1 of 2009 felt that the quality assurance program that
2 drove the 2007-2008 and early 2009 work was inadequate
3 to support the COLA. And that series of emails
4 involving some of the attorneys who are here today is
5 actually the foundation of the fact that unless you
6 assume ownership you don't really have quality.

7 JUDGE BARATTA: You're aware that once the
8 NRC staff modified the Notice of Violation I think
9 didn't DTE go out and do an audit of Black & Veatch?

10 MR. GUNDERSEN: Yes, they did.

11 JUDGE BARATTA: And they also did trending
12 I think?

13 MR. GUNDERSEN: I'm sorry?

14 JUDGE BARATTA: They did trending
15 analysis.

16 MR. GUNDERSEN: Yes, they did.

17 JUDGE BARATTA: Okay. Is it possible for
18 that to rehabilitate the data that was collected prior
19 to 2008?

20 MR. GUNDERSEN: I thought a lot about that
21 and I -- and I come back to that issue of the fabric
22 including QA but also the whistleblower protection,
23 the materially false statements, the oath and
24 affirmation and Part 21. If you're not the applicant
25 in one you're not the applicant on any of those. And

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1 without that web, without that fabric behind it I
2 don't think that '07-'08 data can be reconstituted.

3 JUDGE BARATTA: What about in some of the
4 testimony I think there's reference to other
5 applicants making -- doing audits of Black & Veatch's
6 program.

7 MR. GUNDERSEN: I noticed that. And the
8 example was River Bend. It's interesting because
9 River Bend is portrayed as being in front of Black &
10 Veatch when in fact River Bend actually was docketed
11 after this project. So instead of it being a plant
12 that was well down the runway and toward takeoff, in
13 fact its takeoff occurred after the Fermi 3 COLA was
14 provided to the NRC in September.

15 So that it's not like we had a program
16 that was well established. In fact, the River Bend
17 program arrived on the NRC's desk later.

18 Then the other issue is that I don't see
19 anywhere in law where a license is -- because I'm
20 licensed to this guy I can then use the same program
21 with another person. I don't see that within 10
22 C.F.R. that there's transferability of a contractor's
23 program from one to the other when the owner of the
24 program is not assuming responsibility.

25 CHAIRMAN SPRITZER: All right, Mr.

1 Gundersen. I'm sure it's going to break your heart
2 but I think we're done with questions for you for now.

3 MR. GUNDERSEN: Okay, thank you. Thank
4 you very much.

5 CHAIRMAN SPRITZER: And it's about 4
6 o'clock so we'll take another 15-minute break and
7 we'll come back -- this time I believe I'm correct
8 that the next witnesses up will be the applicant's
9 witnesses on contention 15.

10 MR. T. SMITH: Yes, Your Honor.

11 (Whereupon, the foregoing matter went off
12 the record at 3:55 p.m. and went back on the record at
13 4:13 p.m.)

14 CHAIRMAN SPRITZER: Let's go back on the
15 record. We seem to still be missing a couple of
16 people. Can we get started?

17 MR. T. SMITH: Yes, Your Honor. Our
18 witnesses are ready.

19 CHAIRMAN SPRITZER: Okay. Would you
20 please introduce your witnesses to us?

21 MR. T. SMITH: To the farthest from you we
22 have Peter Smith who is the director of nuclear
23 licensing and engineering for the Fermi 3 project. He
24 testified earlier on the fox snake contention.

25 Next to him we have Steve Thomas who's the

1 project manager for B&V. Next to him we have Mr. Stan
2 Stasek who's the director of quality management at
3 DTE. And then next to him we have Mr. Ron Sacco who
4 is the head of quality assurance for B&V.

5 CHAIRMAN SPRITZER: Very well. Good
6 afternoon, gentlemen. And you are -- all of you have
7 already been sworn in. You're of course still under
8 oath.

9 WHEREUPON,

10 PETER SMITH

11 STEVE THOMAS

12 STAN STASEK

13 RON SACCO

14 were called for examination by DTE, having been first
15 duly sworn, assumed the witness stand, were examined
16 and testified as follows:

17 JUDGE BARATTA: All right. I'd like to
18 begin by asking a few questions relative to your
19 initial direct testimony. I'm looking at page 2. Can
20 we get -- Andy, could you bring up the DTE's direct
21 testimony? I don't have the exhibit number. And go
22 to page 2. Should be page 2 I think. That's the
23 Arabic numeral 2. Go down towards the bottom of the
24 page there.

25 Referring to this statement where the

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1 application review phase of the project DTE has
2 ensured through systematic processes that the
3 suppliers, et cetera. Could you describe what those
4 systematic processes were prior to 2008? Because
5 previous to that it references the pre-application
6 phase and COL application review phase.

7 MR. P. SMITH: So, prior -- when we
8 embarked on this project we went and -- went out with
9 requests for proposals from engineering firms who were
10 doing similar activities for other applicants or
11 prospective applicants in that time frame, developing
12 COLA products. And we specified in our requests for
13 proposal that they demonstrate that they have a
14 quality assurance program in place that meets the
15 requirements of 10 C.F.R. 50 Appendix B. So that was
16 the first step.

17 And then during our review of the bids all
18 of the prospective suppliers that were qualified and
19 we reviewed their proposals we verified in the
20 proposal review that they had provided evidence in
21 fact that they did have a functioning Appendix B QA
22 program.

23 JUDGE BARATTA: In the case of Black &
24 Veatch what was that verification that you used?

25 MR. P. SMITH: So, there was a previous

1 NUPIC audit that had been performed.

2 JUDGE BARATTA: Could you explain what
3 NUPIC is?

4 MR. P. SMITH: Stan --

5 MR. STASEK: Would you like me to do that?

6 MR. P. SMITH: Please.

7 MR. STASEK: Okay, NUPIC stands for the
8 Nuclear Procurement Issues Committee. It was a
9 committee that was formed quite a few years ago
10 because of the additional resources that were becoming
11 necessary to monitor and audit all of the vendors that
12 the operating plants had in place.

13 For instance, at Fermi there's several
14 dozen vendors that they maintain on their approved
15 suppliers list. And if they had to go and do the
16 required audits of those vendors it would be a very
17 large group of folks needed to do that.

18 So NUPIC was formed and their function was
19 to do resource-sharing between the utilities such that
20 all of us could take credit I'll say for the audits
21 that were done by the NUPIC format. Meaning it's a
22 combined team that goes from representatives from
23 different utilities to a vendor. They use standard
24 checklists from vendor to vendor so that there is
25 consistency between the audits that are done. And

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1 then there's information-sharing between the
2 utilities. And that's really a standard for the
3 industry these days and has been for several years.

4 JUDGE BARATTA: Okay. You heard Mr.
5 Gundersen identify what he felt might be attributes
6 that would show that DTE retained responsibility for
7 the QA program, one of which was the audit function.
8 Do you feel that a NUPIC audit would satisfy that
9 function?

10 MR. STASEK: The NUPIC audits are done on
11 all of the vendors that are on approved supplier lists
12 throughout the industry and as such yes, I agree that
13 if there was a NUPIC audit that was done by another
14 plant. When I say another plant we all take turns
15 leading those audits. So for instance, I believe in
16 2007 the NUPIC audit was led by River Bend.

17 MR. P. SMITH: Entergy.

18 MR. STASEK: Entergy. And so that
19 information is available on their central database and
20 yes, we could take credit for that.

21 JUDGE BARATTA: Did DTE actually review
22 the NUPIC audit or the audit that Entergy did of Black
23 & Veatch? The audit report.

24 MR. P. SMITH: Yes.

25 JUDGE BARATTA: Were there any

1 deficiencies that you recall?

2 MR. P. SMITH: None that I recall.

3 MR. STASEK: In addition to the review
4 that Peter did when I started on the project in March
5 of 2009 we subsequently did an audit of NUPIC
6 ourselves. I wanted to do that. I was new to the
7 project and wanted to ensure that we had an up-to-date
8 approved suppliers list that we were looking at
9 putting in place.

10 And so in July of 2009 we performed an
11 audit of Black & Veatch as well. And during that
12 audit we also reviewed the earlier NUPIC audit and did
13 not identify that there was any issues that were
14 identified during that previous audit as well.

15 JUDGE BARATTA: Could we go to question
16 number 21 which is on page 7? Okay. In question
17 number 21 the response says there are no QA
18 requirements applied prior to submittal of a COL
19 application. Earlier I believe we had NQA-1 up and
20 that clearly requires QA for siting and in particular
21 Section 2.20 references subsurface investigations.
22 How do you reconcile the statement that appears in
23 your answer 21 with the NQA-1 requirements?

24 MR. P. SMITH: So first of all, at the
25 time we started this project and started working

1 toward this project in late 2006 and were preparing
2 our requests for proposal the term "applicant" had yet
3 to be defined within the regulation.

4 JUDGE BARATTA: NQA-1 does not use the
5 term "applicant."

6 MR. P. SMITH: I understand that. So we
7 also understood our obligation to provide quality
8 information in support of our application and that,
9 the way we went about doing that was we went about
10 finding a vendor who had in place a quality assurance
11 program that met the requirements. And chose to use
12 that program for the conduct of all of the safety-
13 related site investigation work and other COLA
14 development work. And that was our plan from the
15 beginning.

16 In addition to that in the same time frame
17 the inspection guidance for the pre-application
18 geotechnical inspection or audit also had a discussion
19 in there that there is no requirement for a
20 prospective applicant to have a QA program in place.

21 JUDGE BARATTA: That seems to conflict
22 with what NQA-1 clearly says.

23 MR. P. SMITH: Wait, but we didn't
24 conflict with NQA-1 because we applied a program that
25 met the NQA-1 requirements to the subsurface

1 investigation and all of the other safety-related
2 aspects of the application.

3 JUDGE BARATTA: But NQA-1 -- doesn't NQA-1
4 still use language similar to Appendix B without the
5 term "applicant," namely that you have to retain
6 responsibility. It allows delegation of the authority
7 to conduct the program but you have to retain
8 responsibility for that QA program.

9 MR. P. SMITH: And we clearly were
10 responsible for the work product.

11 JUDGE BARATTA: Okay.

12 MR. P. SMITH: We imposed contractual
13 requirements on our vendors. We were actively
14 involved in the site activities. We did not receive
15 any work product from the vendor until we had our own
16 program in place.

17 JUDGE BARATTA: Let's go back to your
18 active involvement in the site investigations. Could
19 you describe exactly what was done?

20 MR. P. SMITH: So, the geotechnical
21 investigation plan, for example, was developed by
22 Black & Veatch. It was sent to DTE Energy for our
23 review and approval.

24 We facilitated all of the site work, all
25 of the coordination with the existing plant. We were

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1 in the field all the time that there were people
2 working on our site throughout the entire geotechnical
3 investigation. So we had firsthand knowledge of what
4 work was being done.

5 JUDGE BARATTA: You may have -- but when
6 you say firsthand knowledge it sounds -- what you
7 describe is more the type of thing involved in
8 scheduling and site access, and not verification that
9 procedures are being properly followed.

10 MR. P. SMITH: So in addition to that I
11 had personnel from my extension, the owner's engineer
12 who were assisting me in providing oversight. Plus I
13 was aware that Black & Veatch was providing from their
14 quality assurance organization within Kansas City
15 oversight of the activities.

16 JUDGE BARATTA: You've heard a question
17 about the owner's engineer as whether or not there was
18 sufficient separation from the two organizations. How
19 do you reconcile the comments made by Mr. Gundersen
20 that there was not?

21 MR. P. SMITH: So, there was probably more
22 separation than was needed. So if you take a typical
23 organization like we have at DTE Energy where we have
24 a line organization and a quality assurance
25 organization at some point within that organization

1 they all report to a common point.

2 Within Black & Veatch the owner's engineer
3 organization was based out of Ann Arbor and it was
4 completely independent from the line organization
5 within Black & Veatch Kansas City that was performing
6 the site investigation work.

7 And the QA that was in Kansas City of
8 Black & Veatch as well.

9 JUDGE BARATTA: So because they're two
10 physically separated but common company you --

11 MR. P. SMITH: All utilities have exactly
12 the same setup within their own organizations.
13 Ultimately the QA organization and the line
14 organization in any company that has a quality
15 assurance program ends up at a common point.

16 JUDGE BARATTA: Isn't it true typically
17 that in the utility or any organization that has a QA
18 program that the line function, production function
19 shall we say, is separate from the quality assurance
20 and they only come together at the very top?

21 MR. P. SMITH: They come together -- Stan,
22 if you can describe the level that they --

23 MR. STASEK: In response to your question,
24 yes, that's true. It really relates to what do you
25 consider at the top.

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1 So, when you look at an operating nuclear
2 plant, for instance, the QA organization and the line
3 organization, they meet at the top typically at the
4 chief nuclear officer role. That's defined as really
5 the uppermost senior leader level that is full-time
6 associated with nuclear.

7 So what we've had on the project is that
8 same concept as well where when I first joined the
9 project Peter Smith was the line organization lead, I
10 was the QA organization lead and we both reported to
11 the director for nuclear development who at the time
12 was the uppermost full-time leader associated with the
13 project.

14 And that's a minimum. In some
15 organizations the QA group actually can report up
16 through a totally separate chain up to the company
17 president or up to the CEO. But as a minimum that's
18 typically how the industry is aligned.

19 JUDGE BARATTA: And when did you join the
20 project?

21 MR. STASEK: I joined the project in March
22 of 2009.

23 JUDGE BARATTA: Okay. So who performed
24 that function prior to March 2009? And was that
25 reporting relationship comparable?

1 MR. P. SMITH: Yes, it was. It was
2 identical, in fact. It was Jim Warner who filled
3 initially the ND QAPD manager role that was described
4 until Stan came onboard and we had transitioned into
5 the Fermi 3 QAPD after we had submitted the
6 application. And those reporting were both to the
7 director of nuclear development, myself and.

8 JUDGE BARATTA: The bar chart that we saw
9 a little while ago had Mr. Warner on it, did it not?

10 MR. P. SMITH: It did.

11 JUDGE BARATTA: Okay. And did it -- it
12 seemed to show -- it only went back to 2008. Did Mr.
13 Warner have that position prior to 2008?

14 MR. P. SMITH: No. Mr. Warner came
15 onboard around the February time frame of 2008.

16 Prior to that time we had not staffed our
17 nuclear development organization. It was minimally
18 staffed. There was myself. I had a financial analyst
19 working with me.

20 And then the model that we were heading
21 down the path which was also common in that time frame
22 was using an owner's engineer organization to expand.
23 So the owner's engineer performed a lot of functions
24 for us in the early days of this project.

25 JUDGE BARATTA: And who did that owner's

1 engineer report to?

2 MR. P. SMITH: That owner's engineer
3 reported to me. But at that time we didn't have the
4 ND QAPD in place. We put that in place in February of
5 2008 and that's when we also staffed the organization.

6 JUDGE BARATTA: But at that time were you
7 not performing subsurface investigations of the site?

8 MR. P. SMITH: That was done previously
9 which is what we've been talking about a whole bunch
10 today from essentially April of 2007 up until February
11 of 2008 that we did not have a DTE Energy QA program
12 in place for this project that we relied on.

13 JUDGE BARATTA: And I go back to how do
14 you meet the requirements that are in NQA-1 to retain
15 responsibility for the program even though it allows
16 you to delegate the program to a contractor.

17 MR. P. SMITH: But that implies that we
18 have to have a program to -- well I'm trying to figure
19 out how a greenfield plant with a non-nuclear
20 background would enter this business.

21 I mean, one approach would be to up-front
22 develop a QA program.

23 JUDGE BARATTA: That's correct.

24 MR. P. SMITH: Another approach is the
25 approach that we took.

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1 JUDGE BARATTA: The question is does that
2 approach meet NQA-1 or not. I think that's what we're
3 here to determine. Okay.

4 MR. P. SMITH: Well, I think just to add
5 on that though, you know, I think it's fundamentally
6 how did we assure quality in the work product.

7 JUDGE BARATTA: Well, yes, that's the
8 question.

9 MR. P. SMITH: Ultimately --

10 JUDGE BARATTA: I mean, how do you, you
11 know, ensure that. You do agree that the subsurface
12 investigations that were done in 2007 involved
13 investigations that were safety-related or would
14 support safety-related --

15 MR. P. SMITH: Absolutely, which is why we
16 insisted that they be done under a program.

17 JUDGE BARATTA: And the basis for saying
18 that it was done under a program is strictly that
19 Black & Veatch had a program.

20 MR. P. SMITH: Had a program.

21 JUDGE BARATTA: Which had been audited by
22 other folks doing similar work. Is that correct?

23 MR. P. SMITH: Correct.

24 JUDGE BARATTA: Actually I guess it's more
25 that there was a NUPIC audit, not -- because in the

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1 testimony I think don't you talk to both?

2 MR. P. SMITH: So there was a NUPIC audit
3 that was done in the end of 2007. There was an
4 earlier audit -- oh, 2006, I'm sorry. Thank you,
5 Steve. In 2006. And that's what we based our
6 selection on.

7 There was a subsequent audit done in the
8 end of 2007 that we were invited to participate in but
9 were unable to by Entergy.

10 JUDGE BARATTA: Going to the owner's
11 engineer concept, you said you had him doing -- or her
12 doing a variety of functions, correct?

13 MR. P. SMITH: Correct.

14 JUDGE BARATTA: Were any of those
15 functions -- did they perform both line functions? Or
16 as well as --

17 MR. P. SMITH: They weren't safety-
18 related. We had the owner's engineer gather data for
19 us. Mine our document library to fulfill responses
20 for a request for information from Black & Veatch
21 Kansas City on the COLA project.

22 We had the owner's engineer do a site
23 planning for us as to where we would locate a cooling
24 tower, help us select cooling tower technology.

25 The owner's engineer facilitated our

1 reactor technology selection effort. Owner's engineer
2 developed an early implementation schedule. A number
3 of activities.

4 JUDGE BARATTA: Did that particular
5 individual have QA training? And if so, what level?

6 MR. P. SMITH: So, the owner's engineer is
7 an organization. It's not an individual.

8 The owner's engineer within one of the
9 tasks that we had set out originally for the owner's
10 engineer was the development of the Fermi -- I'm
11 sorry, the ND QAPD. And so that was an activity. And
12 within the organization they had Mr. Ashworth and
13 there was one other individual too that I don't recall
14 his name right now that were QA professionals.

15 JUDGE BARATTA: And are they the same ones
16 that observed the activities at the site?

17 MR. P. SMITH: Yes.

18 JUDGE BARATTA: And are they the same ones
19 who -- I believe there was reference to -- yes.

20 MR. P. SMITH: I'm sorry, I just wanted to
21 clarify. So, Mr. Ashworth from the owner's engineer
22 was out on the site and the other individual who I
23 can't recall his name right now was out as well. From
24 the owner's engineer side.

25 And then in addition to that Black &

1 Veatch Kansas City, QA organization, the Appendix B
2 NQA-1 performed surveillances of activities
3 periodically on the site. And the individual who did
4 that was Art Layfield.

5 JUDGE BARATTA: What was done relative to
6 the data that came from Fermi 2 to ensure that it was
7 collected under a QA program? Were any audits or
8 reviews done of the Fermi 2 program?

9 MR. P. SMITH: Not from a Fermi 3
10 perspective. So I think what you're referring to --
11 well, first of all, I think met data was mentioned
12 previously.

13 JUDGE BARATTA: Yes.

14 MR. P. SMITH: Met data is collected under
15 the Fermi 2 met tower. It's an operational met tower.
16 It's part and parcel of operations. That data is
17 logged, computer logged.

18 What we did is we got downloads of the
19 information from the Fermi 2 plant computer system and
20 transmitted that to Black & Veatch for use in the COLA
21 under a request for information from Black & Veatch.

22 JUDGE BARATTA: How was that, the
23 transmittal of that data done so as to ensure that
24 there was a clear chain of custody to avoid any
25 manipulation of the data? If there was no QA program

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1 that DTE --

2 MR. P. SMITH: Right. Go ahead, Steve,
3 and answer the question.

4 MR. THOMAS: As part of the COLA
5 development we established a process called the
6 request for information process, also referred to as
7 the RFI process. So that was done underneath our QA
8 program, underneath the Black & Veatch program.

9 So we submitted -- and the RFI process
10 allowed us to request information from DTE or from GEH
11 or other vendors that we needed design input for for
12 the COLA.

13 One of those RFIs related to the met data
14 that we requested from DTE. So as part of that RFI
15 process we would fill out the request with the
16 information that we were looking for. DTE would then
17 provide that information and they would sign saying
18 here's the information. And then we would sign that
19 we received the information and that it met our needs.

20 Now, in the case of the met data what we
21 did to ensure the fidelity of the data or the
22 usability of the data, we didn't just use the data
23 carte blanche. We went and reviewed all that data and
24 established a criteria for which data should be
25 excluded. Because sometimes an instrument will stick

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1 or you know, for example, and we don't want to use
2 incorrect data.

3 So that review of that data was all
4 documented as part of a Black & Veatch calculation
5 which had a preparer, a verifier and an approver. And
6 then that data could be used as input into the various
7 analyses that relied on that data.

8 JUDGE BARATTA: Okay, and that was a Black
9 & Veatch developed process. Correct?

10 MR. THOMAS: That's correct.

11 JUDGE BARATTA: What did DTE do to ensure
12 that Black & Veatch was following that process? Isn't
13 that a requirement typically of a QA program, to make
14 sure that a vendor is following their processes?

15 MR. P. SMITH: So, during the COLA
16 development the next phase for us was the acceptance
17 review of that information. So when it was turned
18 into the COLA work product we had our ND QAPD in place
19 and all of its implementing procedures. And we had
20 checklists and we had review packages that were
21 produced by B&V for us to review and comment on.

22 And those included all of the sources of
23 information. Not physically the sources of
24 information but we were able to verify that there was
25 a path via the DBM, the site development basis matrix

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1 for each chapter and section that there was a
2 reference to a B&V calculation, a reference to where
3 the source was and that there were trails. So we
4 reviewed that as well as we reviewed it against --

5 JUDGE BARATTA: Right. When you do it
6 isn't it true that when you do a calculation under a
7 QA program typically what you have is a set of calc
8 notes with sample calculations followed by a series of
9 checks and balances? Is that true?

10 MR. P. SMITH: Go ahead and describe the
11 calculation.

12 MR. THOMAS: I think that's a fair summary
13 but I believe that's a very brief summary. The
14 calculation obviously has several sections --

15 JUDGE BARATTA: I can't testify. That's
16 why I'm asking you.

17 MR. THOMAS: Yes, it has design inputs.
18 We have to identify all the design inputs. All the
19 design inputs have to have a reference so that whoever
20 is doing the independent verification can go back and
21 not necessarily have -- and not have to rely on the
22 preparer. But he can verify that that calculation is
23 correct based on the information that's presented. So
24 there's design inputs.

25 Any assumptions that are made in the

1 calculation are identified, what the basis for those
2 assumptions, the methodology is provided in the
3 calculation and then the results. And then obviously
4 whatever attachments that you have to go with that
5 calculation.

6 MR. P. SMITH: So, but every calculation
7 is not reviewed by an in-line QA person. QA -- the
8 quality is built into the system that develops the
9 calculation. The calculation was developed under a
10 procedure that tells you what the criteria are for
11 design inputs. It tells you if you're going to use an
12 analytical method how you have to validate the
13 analytical method you're going to use, various
14 attributes like that.

15 The function of quality assurance in that
16 system is in the performance of audits and
17 surveillances that verify on a sampling basis that
18 those procedures and programs are being followed.

19 JUDGE BARATTA: All right, that's my --
20 understood. Now, the question is did your acceptance
21 program do any surveillance to or sampling of the data
22 that was cited.

23 Did you not say earlier that you checked
24 to make sure there was something referenced where the
25 data came from? Did you go back to that reference?

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1 MR. P. SMITH: No, we didn't go beyond
2 that because that function was fulfilled by Black &
3 Veatch quality assurance in their oversight of the
4 COLA development.

5 JUDGE BARATTA: But how did you ensure
6 that they in fact performed that oversight?

7 MR. P. SMITH: Because I had access to the
8 audits and surveillance reports that Black & Veatch
9 did.

10 JUDGE BARATTA: What I asked a minute ago,
11 did you go back and look at those to make sure that
12 they were in compliance.

13 MR. P. SMITH: Well, no, I did not go and
14 physically look at everything that Black & Veatch did.

15 JUDGE BARATTA: But did you sample at
16 least?

17 MR. P. SMITH: No. The extent of the
18 review that we did for acceptance was as I described
19 against the checklists and verifying that we had
20 evidence of the information and how it had been
21 developed.

22 JUDGE BARATTA: So I go back to how did
23 you maintain responsibility as required by NQA-1 for
24 the QA.

25 MR. P. SMITH: I think that is maintaining

1 responsibility.

2 JUDGE BARATTA: I'm sorry, I'm a little
3 skeptical about that. You want to ask a few questions
4 while I catch up?

5 JUDGE CHARBENEAU: Let me ask a couple.
6 Can we go forward to page -- trying to get to Q 28.
7 Forty-eight, I'm sorry. It's probably page 28. Yes,
8 it's page 29. There we are.

9 Okay, if we start with the line that says
10 during the initial -- this is -- now we're looking at
11 the time period, as I understand kind of a time line
12 contract with Black & Veatch is March 2007. The
13 nuclear development program for DTE was established in
14 April 2007, and the DTE quality assurance program in
15 February 2008. So we're at the time frame prior to
16 2008.

17 And we're seeing here that during this
18 initial phase there were no audits. There was no
19 surveillance by DTE personnel. And yet further down
20 there's an assertion that DTE is providing oversight.
21 What exactly are we doing at that time?

22 MR. P. SMITH: During the conduct of the
23 site investigations? So this is the sentence. In
24 addition to the applicable programs for operating the
25 Fermi Unit 2 for access work control and contractor

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1 oversight were utilized for that site work. Is that
2 what you're referring to?

3 JUDGE BARATTA: Yes.

4 MR. P. SMITH: Okay. So that -- so I was
5 paired with BNV's site manager who -- all of the
6 contractor personnel, the drillers, the B&V
7 geotechnical engineers, the laborers, everybody who
8 was involved in the drilling. And we were paired and
9 basically our daily routine looked something like
10 this, is that on the day that -- on a particular day
11 we'd have our first morning meeting, pre-job brief and
12 go through the activities for the day.

13 Typically we were operating three drill
14 rigs in three different locations on the site. I had
15 an interface responsibility with the Unit 2 operations
16 department because they needed to know where I was
17 drilling onsite on that particular day.

18 Once all of those things were fulfilled I
19 -- and I had one other person who we were trading off
20 for the period of time. We went out throughout the
21 day and observed the activities at the drill rigs.

22 JUDGE CHARBENEAU: So you were actually
23 observing the activities, the collection of core?

24 MR. P. SMITH: Yes.

25 JUDGE CHARBENEAU: Were there any -- and

1 you were aware of the work plan for that day.

2 MR. P. SMITH: Yes, I was.

3 JUDGE CHARBENEAU: Were there any daily
4 notes that were being kept?

5 MR. P. SMITH: By me?

6 JUDGE CHARBENEAU: -- in the record.

7 MR. P. SMITH: Not by me.

8 JUDGE CHARBENEAU: By anybody in DTE?

9 MR. P. SMITH: No.

10 JUDGE CHARBENEAU: So the oversight was
11 really just sight and not record.

12 MR. P. SMITH: That's correct.

13 JUDGE CHARBENEAU: If we go down another
14 sentence below that, in addition to the applicable
15 programs of the operating Fermi 2 unit for access work
16 control and contractor oversight were utilized. What
17 is the nature of the use of the Fermi 2?

18 MR. P. SMITH: So, the Fermi 2 access --
19 so since we were within the owner-controlled area of
20 the plant I had to provide site access for all of the
21 people who were working on the project which we ran
22 them through all of the Fermi 2 general orientation
23 training program and background qualifications and all
24 of the things for site access for all the folks that
25 were doing this. So that was just complying with the

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1 access rules.

2 JUDGE CHARBENEAU: Okay, so the mention of
3 Fermi 2 has nothing to do with their quality assurance
4 program.

5 MR. P. SMITH: Exactly. It's solely we
6 were working on the Fermi 2. Fermi 2 has to be
7 operationally cognizant of things that are --
8 activities that are going on on the site from both an
9 operations and security standpoint.

10 I had to get permits to be able to do core
11 borings which were digs, considered excavations within
12 the Fermi 2 work control process. We had -- we were
13 listed on the daily schedule of Fermi 2 activities so
14 there was cognizance within the Fermi 2 organization
15 that we were doing things. And if we had issues that
16 had the potential for impacting Fermi 2 we reported
17 through that chain. So it was really to fulfill the
18 interface activities.

19 And for doing work on a nuclear power
20 plant site there are expectations regarding contractor
21 oversight from the standpoint of there's a lot of
22 operating experience in the early two thousands
23 regarding contractor workforces causing upsets in
24 plants.

25 And so we established -- well, Fermi 2,

1 and I was part of the Fermi 2 organization originally,
2 that's where I came from -- established expectations
3 and procedures for contractor oversight.

4 A lot of it had to do with industrial
5 safety and ensuring that the industrial safety was
6 done correctly, ensuring that all of the rules of the
7 site were followed appropriately and there was -- and
8 I fulfilled those roles from a Fermi 2 perspective.

9 JUDGE CHARBENEAU: Were you the only
10 individual from DTE that was taking this action?

11 MR. P. SMITH: Well, I had one other
12 individual who was a former operations manager from
13 Fermi 2. And during the whole course of the site
14 investigation we traded off and shared so that we had
15 continuous coverage over all the time that there was
16 onsite activities.

17 JUDGE CHARBENEAU: And at the same time
18 the owner's engineer organization was there as well.

19 MR. P. SMITH: They weren't -- some
20 owner's engineer people were physically onsite, some
21 of them that were doing research in response to
22 requests for information.

23 If you're referring to the two individuals
24 that had a QA background from the owner's engineer,
25 they periodically came onsite. But the large bulk of

1 the owner's engineer work that I described of cooling
2 tower, technology selection was actually done out of
3 the Ann Arbor office of Black & Veatch.

4 JUDGE CHARBENEAU: I thought, and maybe
5 it's even on the next page, but let me just kind of
6 check my memory. I thought there was a reference that
7 the owner's engineer was also doing some audits and
8 surveillance.

9 MR. P. SMITH: That's correct. He called
10 them surveillances and he wrote surveillance reports.

11 JUDGE CHARBENEAU: And audits as well.

12 MR. P. SMITH: I don't believe he did
13 anything that was called an audit. I don't recall
14 that.

15 JUDGE CHARBENEAU: Okay. I think you're
16 correct. I think on the next page or so there's a
17 listing of four surveillance reports.

18 So, all of the oversight that you were --
19 DTE was providing at this time was coordinated through
20 you and another individual in observing -- being aware
21 of the work plan and observing presumably that the
22 work plan was being followed and kind of just
23 observing what was going on.

24 MR. P. SMITH: Correct. And we did, you
25 know, I was particularly concerned about industrial

1 safety activities. So we did stop work on more than
2 one occasion to ensure that we had no industrial
3 safety accidents or we didn't cause any issues for the
4 Fermi 2 organization.

5 JUDGE CHARBENEAU: Any analyses were being
6 done then by Black & Veatch under their quality
7 assurance program?

8 MR. P. SMITH: That's correct. So at each
9 drill rig Black & Veatch had a qualified geotechnical
10 engineer or geologist that was supervising the
11 drilling and core recoveries. And then they were
12 examining the cores and creating the logs,
13 photographing and everything else that went along with
14 that. And I observed them doing that on a frequent
15 basis.

16 JUDGE CHARBENEAU: Okay. And then all of
17 that work product was just put in storage until
18 roughly the February 2008 time period.

19 MR. P. SMITH: No, the information was fed
20 back to Black & Veatch Kansas City and they started
21 their evaluations to develop the COLA. So that work
22 was ongoing in Kansas City. All of the back --

23 JUDGE CHARBENEAU: I guess all of the
24 product -- you've got the oversight coming from the
25 owner's engineer. You're doing the observing. The

1 analyses are being done in Kansas City.

2 MR. P. SMITH: Correct.

3 JUDGE CHARBENEAU: And anything that is
4 done there is put into storage until October or
5 February of --

6 MR. P. SMITH: Yes, it started to arrive
7 in the new year, in 2008. We didn't start reviewing
8 any of it until we had our procedures and programs and
9 people in place.

10 JUDGE CHARBENEAU: So that's roughly the
11 February 2008 time period with your ND --

12 MR. P. SMITH: QAPD.

13 JUDGE CHARBENEAU: -- quality assurance
14 program.

15 MR. P. SMITH: That's correct.

16 MR. T. SMITH: Perhaps Mr. Sacco could
17 elaborate on some of the quality measures that B&V was
18 applying during that period.

19 MR. SACCO: Of course. Black & Veatch
20 obviously had a QA program that met Appendix B. We've
21 had one for a number of years. So once we had the
22 contract it was my responsibility to make sure we had
23 a QA program implemented within the DTE project for
24 Black & Veatch.

25 So we had quality assurance procedures.

1 There were also project procedures that had to meet
2 NQA-1 and those were reviewed and approved by me among
3 others.

4 And there were detailed site procedures
5 for how the work would be collected and stored and
6 whatever. A person who was working for me, Art
7 Layfield, was doing site surveillances to make sure
8 that people were following those processes and
9 procedures as they were doing the site collection
10 work.

11 And also he did surveillances of how these
12 samples were handled, the chain of custody
13 surveillances, also surveillances of the supplies as
14 well. So we did the QA oversight for all those
15 activities at the site.

16 JUDGE CHARBENEAU: This is in the early
17 time period.

18 MR. SACCO: That's correct. Certainly
19 from day one we had a QA program in place.

20 JUDGE BARATTA: And that was specified in
21 that -- I think it's the PMM.

22 MR. SACCO: Well, it's basically a two-
23 part process. There's B&V nuclear's QA program, its
24 approved QA program. And then within that, within the
25 PMM you have a specific project quality plan which

1 talks about how you're going to implement that
2 corporate program, which procedures you're going to
3 use, which procedures are you not going to use. Which
4 ones do you need. So it kind of lays it out on that
5 basis how the program is going to be applied to you
6 and your subcontractors.

7 JUDGE BARATTA: And that is in that PMM.

8 MR. SACCO: It's in the PMM.

9 JUDGE BARATTA: It's an exhibit I believe.

10 MR. SACCO: Yes, that's correct.

11 JUDGE BARATTA: Which exhibit is that?

12 MR. T. SMITH: I believe DTE 000056 was
13 revision zero of the project management memorandum.
14 March 30 of 2007.

15 JUDGE BARATTA: Sorry to interrupt.

16 JUDGE CHARBENEAU: No, that's fine. Go
17 ahead if you want to.

18 JUDGE BARATTA: No, no, go ahead.

19 JUDGE CHARBENEAU: Let me jump to an issue
20 that Mr. Gundersen has brought up. Under the
21 contracts between Black & Veatch Kansas City and
22 owner's engineer Ann Arbor and Detroit Edison what
23 protections and whistleblowers let's say protections
24 are available for somebody observing the work or this
25 work that was going on? Are there any protections

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1 available?

2 MR. SACCO: Within the Black & Veatch
3 program absolutely. In fact, you talk about the NUPIC
4 checklist that is used by all auditors in nuclear.
5 There's a specific line item in that checklist that
6 talks about having a whistleblower protection,
7 addressing the Energy Reorganization Act Section 210
8 or 211.

9 And it's part of being able to pass an
10 audit, you have to show that you have what we called
11 an employee concerns program which we did. And you
12 have to show that you've got the postings all over the
13 work areas. You also have to show that you've trained
14 people to that procedure. So if you don't do that you
15 don't pass a NUPIC audit. So we definitely had that
16 program in place.

17 And as a Black & Veatch procedure there's
18 no option to not follow it. You have to follow it.
19 And it's very specific as what people can do to report
20 these, who they report them to. The reporting
21 mechanism is to someone totally separate from either
22 the nuclear line management or QA. It's a separate
23 nuclear compliance manager who will handle all
24 employee concerns and under strict confidence. So it
25 is in place within Black & Veatch corporate to make

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1 sure that you are following those processes.

2 JUDGE BARATTA: Can you point to in the
3 PMM is there a procedure cited that would describe
4 that program?

5 MR. SACCO: The procedure is called
6 nuclear procedure or NP 1.2 in our program. I'm not
7 sure where it is in the record.

8 JUDGE BARATTA: Maybe DTE could see if
9 they can find that.

10 MR. T. SMITH: Certainly.

11 JUDGE BARATTA: Okay, sorry. Did DTE at
12 any time audit Black & Veatch to determine that in
13 fact they were in accordance -- that the work was in
14 fact conducted in accordance with the PMM?

15 MR. P. SMITH: Not specifically to the PMM
16 in process. I don't recall, Stan, whether we looked
17 at that during the 2009.

18 MR. STASEK: If we're talking post
19 application, yes, in July of 2009 we did look at the
20 PMM.

21 JUDGE BARATTA: You mean you paid these
22 guys, you didn't make sure that they were doing what
23 you told them to do?

24 MR. STASEK: In 2009 we reviewed the PMM
25 and it's actually a document that can be revised based

1 upon the activities that are currently going on at a
2 particular time. And so we did need to re-look at the
3 most recent revision to the PMM to ensure that the
4 activities going on in 2009 were being conducted in
5 accordance with procedures.

6 JUDGE BARATTA: And let's see, this is
7 curious. There was a Black & Veatch audit done of
8 Black & Veatch. Or I guess actually what it was, in
9 the testimony there's mention of an audit that was
10 contracted by Black & Veatch during this time period.
11 Anyone recall that? There's reference to it in Black
12 & Veatch audit report number 07NP01. It's on page 25
13 of the testimony. I think it's DTE Exhibit 21.

14 MR. SACCO: I'm not sure. Black & Veatch
15 performs an annual audit of itself, Black & Veatch
16 Nuclear, which is not performed by someone -- not led
17 by someone from my organization. We get someone
18 independent to do the evaluation -- or the audit, lead
19 the audit of our program.

20 It's assisted by my QA staff, but the lead
21 auditor is not someone who works for me because we
22 wanted to make sure we had an independent look at our
23 program. And that is done annually.

24 JUDGE BARATTA: Basically what my question
25 was what the purpose of it and who did it. Okay, yes.

1 All right.

2 JUDGE CHARBENEAU: In that audit do they
3 go back in and review the oversight that's being
4 provided to the different projects at Black & Veatch?

5 MR. SACCO: Yes. It encompasses
6 everything that we do in Black & Veatch Nuclear. So
7 we would look at all active projects and pretty much
8 do a sampling of everything that's going on that's
9 available for the 18 criteria. So obviously a project
10 doesn't necessarily hit the 18 criteria of NQA-1, we
11 wouldn't hit.

12 But for major projects, for projects that
13 have a large scope we would pretty much look at all
14 aspects of their QA program as part of that annual
15 audit.

16 And that audit is like -- it's a week or
17 two-week long audit. So it's meant to look at all
18 activities to make sure that we are performing our QA
19 function in accordance to requirements.

20 JUDGE CHARBENEAU: And is the results from
21 that audit shared with DTE during a transfer of -- I'm
22 sorry -- during the transfer of the information past
23 the February 2008 time period? So that that -- does
24 the audit essentially transfer to DTE?

25 MR. SACCO: We provide our audit reports.

1 And what we also do is any findings that we have
2 against the project we would definitely inform the
3 Detroit Edison of those as well as the audit report.

4 MR. STASEK: And from the DTE side my
5 organization does an annual evaluation of Black &
6 Veatch as part of maintaining them on our approved
7 suppliers list.

8 And then once every 3 years, we just did
9 one I think it was last year, we re-audit the Black &
10 Veatch organization and we would be looking at those
11 audit results as well.

12 JUDGE CHARBENEAU: Would it be possible
13 for you to go back and take credit or semi-credit for
14 an audit that was done back in the 2007 time period?
15 An independent Black & Veatch audit of the work that
16 was being done at your site at that time period.
17 Before you had a quality assurance program in place.

18 MR. STASEK: That's -- I mean obviously
19 that's a mechanism that can be used to provide
20 additional information as to performance levels at any
21 given period of time. And the audits are maintained
22 in your Documentum system, your records archive
23 system.

24 JUDGE CHARBENEAU: I was going to say you
25 take credit for the supplier audits that are done.

1 MR. STASEK: And the supplier audits, when
2 they are done they do look at the internal audits as
3 well.

4 MR. SACCO: And the audit record is much
5 more than just the audit report. The audit record
6 also includes all -- the checklist which itself is a
7 document like about this thick. And also it has --
8 which has exact resources, exactly what you looked at
9 during that audit and exactly to which you are finding
10 either sat or unsat, satisfactory or unsatisfactory.
11 So that information is all in the audit file.

12 And it also includes the people you talked
13 to. It also includes backup information so that you
14 can justify what you've found. So an audit package is
15 actually quite large.

16 And if someone chooses to go back and look
17 at a 2007 audit all that information is readily
18 available in our Documentum system.

19 JUDGE BARATTA: To get back now to the
20 issue of Black & Veatch did an internal audit. You
21 shared it with DTE from what I gather. But in 2007-08
22 time frame what did DTE do with that report? Did you
23 review it? Did you --

24 MR. P. SMITH: I don't recall reviewing
25 that report, no.

1 MR. SACCO: There's a lot of documentation
2 that routinely goes to our clients such as the PMM.
3 Every time we did an issue of the PMM we would send it
4 to our client. So there's a lot of documentation that
5 goes just through the process of just performing a
6 project. Part of that PMM talks about some of the
7 things that we share with our clients. So there's a
8 lot of documentation that's available.

9 JUDGE BARATTA: So, prior to I guess it
10 was February 2008 when Mr. Warner came onboard the
11 main check on Black & Veatch were what I'll call
12 surveillance activities, is that correct?

13 MR. P. SMITH: That's correct.

14 JUDGE BARATTA: There was no auditing done
15 of Black & Veatch other than the NUPIC audit. And
16 there was no inspections done of Black & Veatch, is
17 that also true?

18 MR. P. SMITH: So, Black & Veatch was
19 subject to the pre-application geotechnical audit that
20 was done in --

21 JUDGE BARATTA: By NUPIC.

22 MR. P. SMITH: No, by NRC in July of 2007.

23 JUDGE BARATTA: But that -- I'm looking
24 for what DTE did.

25 MR. P. SMITH: So, you used the term

1 "inspection" and so --

2 JUDGE BARATTA: I apologize.

3 MR. P. SMITH: -- that's why I answered
4 that way.

5 JUDGE BARATTA: Okay, I understand. I
6 apologize. I'm sorry I confused you.

7 MR. P. SMITH: That's okay.

8 JUDGE BARATTA: There were no DTE
9 inspections done.

10 MR. P. SMITH: No.

11 JUDGE BARATTA: During that time.

12 MR. P. SMITH: No.

13 MR. SACCO: Just as a matter of record so
14 that you understand what kind of oversight a company
15 such as Black & Veatch Nuclear gets, since I've been
16 with the company, it's been 7 years, we average being
17 audited about six times a year by various clients.
18 Some of them are utilities, some of them are
19 manufacturers, reactor manufacturers. Some of them
20 are other clients that we have.

21 So it's almost literally like every other
22 month we have somebody coming in and doing an audit of
23 our program. So we get looked at pretty much
24 constantly.

25 JUDGE BARATTA: And a point of

1 clarification relative -- I just want to make sure I
2 understand the Fermi 2 role. That was basically to
3 ensure access control, industrial safety, but there
4 was no -- did they do anything more than that?

5 MR. P. SMITH: It was all of the plant
6 interfaces. So that the plant operating authority was
7 aware of the activities that were going on on the
8 Fermi 2 site. So we performed all of the interface
9 activities.

10 JUDGE CHARBENEAU: This may already be in
11 the record but I'll just ask it one more time. Going
12 back to the actual coring that is being done for the
13 geotechnical work, that's being observed by Mr. Smith
14 and his colleague.

15 In terms of documenting quality assurance
16 Black & Veatch has people on the ground observing the
17 handling of the cores, the storing of the cores, the
18 recording of depths and everything else. That's all
19 going on at the same time independently of --

20 MR. P. SMITH: That's correct. Now, Mr.
21 Layfield who was from the Black & Veatch quality
22 assurance organization out of where we have the COLA
23 contract wasn't onsite continuously.

24 JUDGE CHARBENEAU: So these would be
25 periodic visits to document quality control.

1 MR. P. SMITH: Correct.

2 JUDGE CHARBENEAU: Roughly the frequency
3 of those?

4 MR. SACCO: During the activities of the
5 2007 time frame where all the activities were
6 happening I would venture it was once a month. I
7 mean, it was probably even a little more than that.

8 Anytime that we were aware there were
9 significant activities going on at the site Art would
10 go -- we would dispatch Art to go to the site.
11 Because a lot of times in the process of doing the
12 work at the site there's a lot of setup and whatever.
13 But when we were aware of significant activities Art
14 would be there to review the cores coming out, the
15 chain of custody, the boxing them up, how the lab
16 handled them. You know, and that all would be
17 documented on his surveillance report.

18 JUDGE CHARBENEAU: Were those
19 surveillances scheduled, or unannounced?

20 MR. SACCO: The very nature of
21 surveillances is that you do them based on the
22 activities being conducted whenever you're doing it.

23 So we might schedule a surveillance
24 because we do have a surveillance schedule, but that
25 doesn't necessarily mean you would do that

1 surveillance. For instance, you might schedule it for
2 doing it at a particular time and you find out really,
3 well, the activity is really not going to happen till
4 next week so you do it next week.

5 So it was scheduled but it was a very
6 flexible schedule. That's one of the great things
7 about surveillances. They're not audits that require
8 a 30-day notice and advance planning or whatever.

9 Surveillances are pretty in and out types
10 of things where you go there, you go there with a
11 specific plan, you go there to look at specific
12 activities and you write it up and it's meant to be a
13 quick turnaround in a few days.

14 JUDGE BARATTA: You had some surveillance
15 reports that were put in as exhibits. I think they're
16 41, 42 and 43. And they cover different things from
17 July, August and September of 2007.

18 Did any of those identify any
19 deficiencies?

20 MR. SACCO: There were issues identified
21 within some of the audit reports -- I mean, excuse me,
22 some of the surveillance reports. They were all
23 considered relatively minor.

24 There's one of the things that when I go
25 over the audit -- I mean the surveillance report with

1 Art prior to its publication we have a back and forth
2 discussion. Okay, is this a significant issue. Does
3 this require follow-up. Is this something that's just
4 a documentation or just a step skipped in the
5 procedure. So we go back and forth and decide whether
6 or not -- the significance of it.

7 And most of them were, you know, of the
8 type that oh, where's the document, or where's the
9 attachment, or this box was marked this. It might
10 have been an incorrect marking. You know, relatively
11 minor types of things that are easily corrected. I
12 don't recall any issue in the surveillance as being
13 what we would consider significant.

14 JUDGE BARATTA: During the 2007, the ones
15 that were cited there, did -- this is a question for
16 DTE. Did you review any of those surveillance
17 reports?

18 MR. P. SMITH: Yes.

19 JUDGE BARATTA: Okay. And did you take
20 any action as a result of that, like go beat them up
21 or anything?

22 MR. P. SMITH: So, in working with the
23 site manager all of the issues that were identified in
24 the surveillances were corrected.

25 For example, Art referred to the marking

1 of boxes. Well, the issue there was the spec said
2 mark it on the top and mark it on the end, for
3 example, and it was only marked on the top.

4 Another issue that was identified was the
5 internals of the core boxes, the first -- one of the
6 earlier sets of core boxes we had the internals were
7 stapled instead of screwed and so they were fragile.
8 And so that issue was corrected. Those were the kinds
9 of issues that I recall from these surveillances.

10 And B&V was already on top of them fixing
11 them. So we reviewed them collectively and assured
12 they were corrected.

13 JUDGE CHARBENEAU: Was most of the field
14 work done by B&V employees, or was it subcontractors?

15 MR. P. SMITH: So I -- go ahead, Steve.

16 MR. THOMAS: I would say most of it was
17 done by -- well, speaking to the individuals who were
18 actually -- the geotechnical engineers and the
19 geologists who were manning the drill rigs most of
20 those were direct B&V employees. We had one or two
21 that were subcontractors basically from an agency firm
22 that were directly working for us underneath our
23 control.

24 But it wasn't like -- it wasn't a
25 subcontract company, it was like a seconded labor

1 person that we brought in.

2 MR. P. SMITH: The drilling was done, the
3 physical drilling was done by a company called Boart
4 Longyear. The companies that brought in downhole
5 instrumentation to do downhole instrumentation were
6 subcontractors to B&V as well.

7 JUDGE CHARBENEAU: And they had gone
8 through QA training before coming into the field?

9 MR. THOMAS: That is correct.

10 JUDGE CHARBENEAU: And were the
11 individuals that were handling the cores, were those
12 B&V employees?

13 MR. P. SMITH: The geotechnical engineers
14 and geologists were yours, and those were the guys
15 that were trained and qualified under your program.

16 MR. THOMAS: That's correct.

17 JUDGE CHARBENEAU: And as well the people
18 running the geophysical logs.

19 MR. THOMAS: That's the same people. The
20 people who were manning the drill rigs were the people
21 who are -- or the person who was -- when I say manning
22 the drill rig what I mean, the geotechnical engineer
23 or the geologist who is standing by the drill rig
24 monitoring what's going on.

25 JUDGE CHARBENEAU: Not who's actually --

1 MR. THOMAS: Recording all the
2 information. He's not actually running it.

3 JUDGE CHARBENEAU: Okay.

4 MR. THOMAS: He's more in a supervisory
5 role who is watching what's going on. He's obviously
6 interfacing with the drill rig operator, but he's the
7 one recording all the data, taking the pictures,
8 filling out the logs.

9 JUDGE CHARBENEAU: And there are early
10 morning meetings each day before work?

11 MR. P. SMITH: That's correct.

12 JUDGE CHARBENEAU: Going through work
13 plans.

14 MR. P. SMITH: Yes.

15 JUDGE CHARBENEAU: And you were part of
16 those?

17 MR. P. SMITH: Yes, I was.

18 JUDGE BARATTA: Going to question 63 which
19 appears on page 40. Did the company agree with the
20 findings -- this is referring to the -- I believe the
21 Notice of Violation of November 9, 2009. At least
22 what's in the Answer.

23 You state that because you were not an
24 applicant prior to September 18, 2008 thus were not
25 subject to Appendix B requirements to this date.

1 Again, I go back to this issue of NQA-1 requires
2 subsurface investigation to be conducted under a QA
3 program.

4 How can you say and later on it says DTE
5 took responsibility for the program. Are you
6 referring to the program prior to becoming an
7 applicant or after becoming an applicant? At that
8 point.

9 MR. P. SMITH: I believe we had
10 responsibility for the entire conduct of our COLA
11 application. I think the issue is how we went about
12 fulfilling that responsibility.

13 JUDGE BARATTA: That's exactly --

14 MR. P. SMITH: So, and that's what we --
15 that's the position that we have taken. We were
16 always focused on making sure that the information
17 that we gathered was done in a quality manner.

18 JUDGE BARATTA: And you exercised that
19 through organizational oversight, is that one of the
20 ways you did it?

21 MR. P. SMITH: Yes.

22 JUDGE BARATTA: And that was through the
23 use of an individual within this organizational --
24 excuse me, the --

25 MR. P. SMITH: The owner's engineer.

1 JUDGE BARATTA: The owner's engineer, yes.

2 MR. P. SMITH: Yes.

3 JUDGE BARATTA: Got the acronym but I
4 couldn't get the name. Sorry. The owner's engineer
5 as well as I gather you did some surveillances
6 yourself.

7 MR. P. SMITH: Right. But I didn't write
8 anything. I think that's -- unlike what my owner's
9 engineer representatives did is they documented what
10 they looked at.

11 JUDGE BARATTA: Okay. Was there anything
12 else that you did that -- I mean we have the NUPIC
13 audit that established that at least at that time they
14 were qualified. And you did the surveillances. And
15 you had the owner's engineer doing some of the work.
16 Any other activities?

17 MR. P. SMITH: And then of course what we
18 talked about previously. Once we started to receive
19 the COLA work product from B&V in 2008 which we did
20 under our program.

21 JUDGE BARATTA: And I take it there were
22 no programmatic issues identified at any time during
23 that period prior to becoming an applicant that were
24 of concern.

25 MR. P. SMITH: No.

1 JUDGE BARATTA: What about once they
2 became -- you became an applicant? You refer to
3 audits later on in your testimony that were done in
4 2010-2011. These are Exhibits 59 and 60. Without
5 going into detail on those were there any programmatic
6 issues that were identified later on?

7 MR. STASEK: So we're referring to the
8 audits that we did of --

9 JUDGE BARATTA: Yes.

10 MR. STASEK: -- Black & Veatch in 2010 and
11 2011?

12 JUDGE BARATTA: Yes.

13 MR. STASEK: I don't remember specifics
14 offhand. However, nothing comes to mind that
15 indicated that there was anything significant. If we
16 identified any issues they were lower tiered issues
17 and did not affect whether or not we would retain them
18 on the approved suppliers list.

19 JUDGE BARATTA: Okay.

20 MR. P. SMITH: Stan, I think the exhibits
21 were the -- our annual audits of Fermi 3, not of B&V
22 I think. In 59 and 60. Yes. I'm sorry, that's why
23 I wanted to make sure you had it.

24 JUDGE BARATTA: Okay. I'm sorry. Was I
25 mistaken as to what they were?

1 MR. P. SMITH: Right. That's what I
2 believe, yes. I believe they were -- because we did
3 an audit of B&V in July of 2009 which would have been
4 our first of -- and then 3 years later we did another
5 audit of B&V. And then in the interim years we do an
6 annual supplier evaluation.

7 JUDGE BARATTA: And did any of those show
8 any problems?

9 MR. P. SMITH: There was nothing
10 significant out of either of the two supplier audits
11 or the supplier evaluations.

12 MR. THOMAS: So while I was reading here
13 was your question associated with the vendor audits,
14 or was that associated with the internal audits of the
15 Fermi 3 quality assurance program?

16 JUDGE BARATTA: Okay. I guess -- yes, I
17 guess -- I'm sorry. It was the internal audits. The
18 annual audit of implementation of the Fermi 3 quality
19 assurance program description requirements which is
20 Exhibit 59 and 60. I misstated it.

21 MR. P. SMITH: So that's the QA audit that
22 Stan's organization or Mr. Stasek's organization does
23 of my implementation of the QAPD.

24 MR. STASEK: And yes, there were audit
25 findings that occurred as a result of those audits.

1 We identified that to the line organization. They
2 initiated corrective action request documents, CARs,
3 to address those. They did address those. And we
4 reviewed their resolution and had no further issues
5 following that. We felt their corrective actions were
6 appropriate.

7 JUDGE BARATTA: And were the -- there was
8 audit findings that dealt with -- or actually NRC
9 inspection findings dealing with trend reports, right?
10 Is that correct?

11 MR. STASEK: That's correct.

12 JUDGE BARATTA: Okay. Where does the
13 requirement for trending arise from?

14 MR. STASEK: From a regulation standpoint
15 there are no regulations requiring trending of
16 corrective actions. Where there was a requirement
17 specified was in the Fermi 3 QAPD that specified that
18 trending of corrective actions would be performed and
19 that if there were any -- I'm paraphrasing -- if there
20 were any adverse trends identified that would be
21 documented and communicated to management.

22 And then in the summer of 2009 I caused a
23 revision to one of our procedures to occur and that
24 embedded a requirement to do trending of corrective
25 actions.

1 JUDGE BARATTA: Does NQA-1 require
2 trending?

3 MR. SACCO: NQA-1 discusses trending in
4 the non-mandatory appendices. It's not required.
5 It's guidance.

6 JUDGE BARATTA: And what's considered best
7 practices?

8 MR. STASEK: So best practices within the
9 nuclear industry is that programs will include a
10 trending requirement.

11 Just from a background standpoint if you
12 look at 10 C.F.R. 50 Appendix B criterion 16
13 associated with corrective action it indicates that
14 for conditions adverse to quality that you establish
15 corrective actions for those.

16 For significant conditions adverse to
17 quality you establish a corrective action such that
18 you prevent reoccurrence. So it's considered a really
19 bad thing if you have a reoccurrence of something
20 really significant.

21 And the way the industry has addressed
22 that is to establish lower tiered trending such that
23 if you find your issues when they're less significant
24 you will never end up having to deal with a
25 significant issue adverse to quality that repeated.

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1 And so trending is a good thing. It's a
2 standard within the industry. And such that we did
3 include that in the Fermi 3 program as well.

4 JUDGE BARATTA: All right. One last
5 question. Did we find that Black & Veatch program for
6 the employee concerns?

7 MR. T. SMITH: No, Black & Veatch, that
8 particular procedure I believe you referred to as NP
9 1.2 is not an exhibit in this -- that's been
10 submitted.

11 JUDGE BARATTA: Okay.

12 MR. THOMAS: Just to add to that really
13 quick because I think the question was is that
14 procedure listed in the PMM as being --

15 JUDGE BARATTA: Yes, that was the
16 question. Yes.

17 MR. THOMAS: And the PMM does not cull out
18 that procedure specifically, but it does say that we
19 are in attachment Charlie of the PMM. It does say
20 that we're going to perform all the safety-related
21 aspects in accordance with the nuclear quality
22 assurance program which would include a full suite of
23 the nuclear procedures including NP 1.2.

24 JUDGE BARATTA: Okay, so that's how it
25 gets into the program.

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1 MR. THOMAS: Exactly. Exactly.

2 JUDGE BARATTA: Okay.

3 JUDGE CHARBENEAU: Let me just ask one
4 more question. During the time period pre-application
5 what was the communication stream with the NRC?

6 MR. P. SMITH: So, initially in February
7 of 2007 we informed NRC of our intent to submit a
8 combined license application along with many, many
9 others in that time frame.

10 And then subsequently to that, and I'm
11 just going to have to build my recollections, we
12 submitted a letter which indicated or provided the
13 timing of when we were going to do our geotechnical
14 investigation in order to inform NRC of when it would
15 be appropriate to come and perform the pre-application
16 inspection of those activities. I think we did that
17 at the end of May.

18 And I think at about the same time at the
19 end of May we responded to a regulatory issue summary
20 which NRC sends out on an annual basis trying to do
21 their resource planning for the future years, and asks
22 several questions regarding the timing and other
23 issues about the prospective application. And that
24 was the -- I believe the extent of the formal
25 communication.

1 We had the pre-application geotechnical
2 audit in July. There was a report issued on that.

3 Also on the environmental side there were
4 two similar interactions, environmental T-1 and T-2
5 meetings to look at the in-progress of the
6 environmental report in development.

7 And we had some visits from the
8 construction inspection branch in Region 2 again
9 trying to figure out what our future plans were going
10 to be from a resource planning standpoint.

11 CHAIRMAN SPRITZER: All right, it's 5:30.
12 We are done for today. We will have to ask these
13 witnesses to return tomorrow. And then we will
14 proceed to the NRC staff witnesses.

15 I think it would be realistic that we can
16 finish tomorrow for people to take into account in
17 their planning. That does mean counsel should be
18 prepared to make their closing arguments tomorrow.
19 I'm not sure exactly when that will be but we should
20 be able to finish the whole proceeding tomorrow. So,
21 in terms of getting ready for tomorrow assume that
22 counsel will be making closing arguments.

23 And I think it's realistic to expect we
24 will have questions for you unlike opening statements
25 where we pretty much let you tell us what you wanted

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1 without questions. We would expect to be asking some
2 questions tomorrow.

3 Very well. Are there any procedural
4 issues we need to address before we all go home for
5 the evening?

6 MS. CARPENTIER: Your Honor, the witnesses
7 for contention 8 would like to know if they're excused
8 from attendance tomorrow.

9 CHAIRMAN SPRITZER: I don't have any
10 further questions for them. I don't see any reason
11 for them to return.

12 MS. CARPENTIER: Thank you.

13 CHAIRMAN SPRITZER: We will have -- there
14 were some questions I should note. There were some
15 questions propounded by DTE and the staff for the
16 interveners on contention 8. Those -- we'll take
17 those up in the closing arguments since we didn't have
18 a witness to ask those of.

19 Yes, sir?

20 MR. LODGE: What time is the convening
21 time tomorrow morning?

22 CHAIRMAN SPRITZER: I believe we're
23 starting at 9:30 again.

24 MR. LODGE: Still 9:30? All right.

25 CHAIRMAN SPRITZER: And as I said we

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1 should be able to finish. So, if people want to
2 change travel reservations to get out of here tomorrow
3 night that would be realistic.

4 Very well, thank you. We'll see you
5 tomorrow morning.

6 (Whereupon, the foregoing matter went off
7 the record at 5:29 p.m.)
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