

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

In the Matter of:)	
)	Docket No. 52-033-COL
The Detroit Edison Company)	
(Fermi Nuclear Power Plant, Unit 3))	January 21, 2014
)	

* * * * *

**INTERVENORS' PROPOSED FINDINGS
OF FACT AND CONCLUSIONS OF LAW
ON CONTENTION 8 (EASTERN FOX SNAKE)**

Now come Intervenor Beyond Nuclear, *et al.*¹ (hereinafter "Intervenors"), by and through counsel, and pursuant to 10 C.F.R. § 2.1209 and the oral orders of the Atomic Safety and Licensing Board ("ASLB") on October 31, 2013, hereby submit their proposed findings of fact and conclusions of law on Contention 8.

FINDINGS OF FACT

1. The Board concluded earlier in this case² that "the DEIS fails to identify any statutory or regulatory requirements that will mandate implementation of the Conservation Plan and the additional monitoring the DEIS states will be necessary. Instead, the DEIS appears to simply assume that MDNR will take whatever actions are necessary to ensure that impacts to the snake are small and that necessary additional monitoring will occur."

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

²LBP-12-23 at 26.

2. The Board concluded in a subsequent order³ that “this unsupported assumption [that MDNR will take action to ensure impacts to the EFS are small] raises a legitimate question, appropriate for an evidentiary hearing, whether the DEIS complies with NEPA’s hard look requirement.” *Detroit Edison Company*, (Fermi Nuclear Power Plant, Unit 3), Docket No. 52-033-COL, ASLBP No. 09-880-05-COL-BD01 (January 30, 2013), pp. 3-4.

3. In the same order, the ASLB further noted that

The statutory provisions cited by DTE appear to establish an enforceable obligation for DTE to seek a permit from the MDNR if construction activities will result in a taking of the snake. However, they do not establish any enforceable requirement to implement DTE’s Conservation Plan. DTE also cites the MDNR checklist, but, although the checklist states that the impact on the snake will be small if DTE’s Conservation Plan is implemented, it provides no indication that MDNR will require implementation of the Plan.

4. The “Initial Written Testimony of DTE Electric Company” (“DTE Direct Testimony”) refers to the plans for creation of an offsite wetland mitigation area. *Id.* at A32, p. 16, and A40, p. 21. The actual plan is contained in DTE’s Exhibit 00009, the 351-page “Fermi 3 Aquatic Resource Mitigation Strategy and Final Design – July 2012” (ADAMS No. ML122580003). According to this document, the proposed offsite mitigation area is comprised of a portion of Detroit Edison’s Monroe Power Plant Site (Monroe Site). This site is approximately 7.25 miles from the Fermi site and located east of Interstate 75, north of La Plaisance Creek and immediately adjacent to Lake Erie (La Plaisance Bay). The area under consideration for use as mitigation is part of a 174-acre agricultural field. The site is currently farmed and includes small areas of remnant emergent wetlands and dikes which separate it from Lake Erie. DTE Exh. 9 p. 1.

³*Detroit Edison Company*, (Fermi Nuclear Power Plant, Unit 3), Docket No. 52-033-COL, ASLBP No. 09-880-05-COL-BD01, pp. 3-4 (January 30, 2013).

5. The plan discusses a four-year phased construction-conversion of this large site from the current use as farmland into a wetlands area, with emphasis upon creating habitat for the EFS. DTE Exh. 00009, pp. 17-20. There is no data on the historical contamination of the farmland from petrochemical fertilizers and pesticides.

6. The nearby Monroe Power Plant is the second largest-volume coal-burning power plant in the U.S., at 3,300 Mwe,⁴ and is at least 40 years old. In January 2009, the Monroe Power Plant was listed 5th nationally in terms of coal combustion waste (CCW) stored in nearby surface impoundments, with 4,110,859 pounds of coal combustion waste in 2006.⁵ The data came from the U.S. Environmental Protection Agency.

7. There has been no presentation within the FEIS of soil status: no depiction of pH levels, no explanation of any toxic chemical depositions accrued from the decades of proximate coal usage, no discussion of the presence of radioactive contamination or mercury, which are significant and toxic byproducts of the burning of coal. There is discussion within Exh. 00009 to spread new topsoil up to 6" thickness generally on the mitigation farmland, but no revelation as to the origin of that material, nor any mention as to its chemical and physical constituents. *Id.*, p. 20.

8. Overall, the mitigation plan is quite ambitious. But there is no final, binding commitment from DTE which guarantees construction of the mitigation wetland, nor even to construct it to the standards expressed in Exh. 00009. But there is no final, binding commitment from DTE which guarantees construction of the mitigation wetland, nor even to construct it to

⁴http://en.wikipedia.org/wiki/Monroe_Power_Plant

⁵http://www.southernstudies.org/assets_c/2009/01/tri_top_100_surf_imp_rels_p11.html

the standards expressed in Exh. 9. Instead, DTE and the NRC Staff resort to hollow affirmations of the applicability of state or federal law.⁶ These observations, while of some interest, say nothing of the potential status of wetland and habitat mitigation regulatory activities of the state government of Michigan some, perhaps many, years in the future.

9. One NRC Staff witness testified that “In any event, this change [MDNR’s website statement discontinuing environmental reviews] does not affect the Fermi Unit 3 project because the NRC and the Applicant took advantage of the MDNR environmental review process long before the MDNR discontinued the service.” “Prefiled Direct Testimony of J. Peyton Doub and David A. Weeks Regarding Contention 8” (“Staff Direct Testimony”) at p. 29.

10. Another witness for the Staff provided this specious conclusion of adequate assurance: “We believe that the specificity of the proposed monitoring activities, coupled with the Applicant’s definitive identification of a funding source for implementing the eastern fox

⁶See DTE Direct Testimony p. 23: “If the project proceeds, DTE must obtain a permit from MDNR that will require mitigation of impacts to the Eastern Fox Snake. Because construction of Fermi 3 has the potential to impact Eastern Fox Snakes, DTE must apply for a ‘take’ permit. As part of any permit, MDNR necessarily will require mitigation to minimize impacts to the Eastern Fox Snake, as mandated by Michigan law. This has been confirmed in discussions with MDNR regarding the Eastern Fox Snake.”

And at p. 24: “Q51. How will MDNR ensure that DTE implements the Mitigation Plan?

A51. (PS, RW, DM) Michigan law prohibits any ‘take’ of State-listed species, such as the Eastern Fox Snake. Michigan law also imposes permit requirements and provides enforcement authority.”

Also, *see* the “Prefiled Direct Testimony of J. Peyton Doub and David A. Weeks Regarding Contention 8” (“Staff Direct Testimony”) at p. 22, A-18: “This plan, which will be enforced by the USACE and MDEQ under applicable federal and state regulations...” without elaboration of the enforcement mechanisms. And A22, *id.* at p. 26: “A22. [DAW, JPD] The Applicant’s eastern fox snake mitigation plan presents specific, prescriptive measures for reducing the potential for inadvertent losses of individuals and for enhancing habitat during the building of Unit 3. . . . Because the Applicant prepared and made public these plans, and submitted them to the NRC in support of its application, we concluded that it is reasonably foreseeable that the Applicant will carry out the proposed mitigation. We also consider the Applicant’s reiteration of these intentions in filings before the Board under penalty of perjury to be an additional indicator of credibility.”

snake mitigation and monitoring (see A22), indicates that it is reasonably foreseeable that the Applicant would follow through on the proposed monitoring.” Staff Direct Testimony, A25 at p. 30.

11. At adjudication, moreover, NRC Staff witnesses admitted that one potential outcome of the mitigation efforts could be “moderate” negative effects on the EFS even if all proposed mitigation is fully implemented. Tr. p. 329 (Doub). DTE’s experts agree that “moderate” destruction of the EFS is a distinct possibility. Tr. p. 382.

12. Although wetlands mitigation requirements mandate that the mitigation site, a farm field controlled by DTE, near DTE’s coal-fired Monroe plant, be free of contaminants, and even though NRC Staff witnesses admitted that included the expectation that agricultural pesticides not contaminate the site, there was no discussion of how that end would be assured. Tr. p. 335. DTE’s witness Westmoreland confirmed that there has been zero chemical analysis of the mitigation field at all. Tr. p. 372.

13. There is no known legal claim for enforcement of the mitigation arrangements that can be filed by a private citizen. Instead, there is only the mechanism of bringing allegations of noncompliance to the attention of the U.S. Army Corps of Engineers or the Michigan Department of Natural Resources. Tr. p. 341.

14. The “identified funding source” is merely a pledge by DTE to include funds for mitigation in its budget for development of Fermi 3, once construction commences. *Id.* p. 26.⁷

15. There further is no tangible assurance of mitigation resulting from the regulatory

⁷“Furthermore, the Applicant has identified specific funding sources for implementing the eastern fox snake mitigation plan. The plan states that funding for the mitigation measures while Unit 3 is being built would be provided as part of the Unit 3 construction budget.”

involvement of the U.S. Army Corps of Engineers. First, the Corps has not as of this date issued its Section 404 Clean Water Act permit,⁸ which supposedly will require the wetlands mitigation described in DTE Exh. 00009. Second, the Corps in 2005 was pilloried by the federal General Accounting Office for significant and repeated failures to monitor and follow through on the enforcement of the terms of wetlands compensation development plans. The GAO accused the Corps of performing compliance inspections of as few as 15% of such mitigation efforts.⁹ There is no evidence in the record from which the ASLB can reasonably conclude confidently that the longstanding inefficacy of Corps enforcement has changed - no evidence that the Corps will undertake rigorous enforcement of permitted activities.

II. CONCLUSIONS OF LAW

A. Burden of Proof/Going Forward

16. Because this Contention involves NRC compliance with NEPA respecting the identification of and protection of the Eastern Fox Snake and its habitat, the NRC Staff bears the ultimate burden to demonstrate compliance with NEPA. *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-01-9, 53 NRC 239, 249 (2001). A licensee generally bears the ultimate burden of proof. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-697, 16 NRC 1265, 1271 (1982), but intervenors must give some basis for further inquiry. *Three Mile Island, supra*, 16 NRC at 1271, citing *Pennsylvania Power and Light Co. and Alleghany Electric Cooperative, Inc.* (Susquehanna Steam Electric Station, Units 1 & 2),

⁸NRC Staff testimony, Tr. p. 340.

⁹“Wetlands Protection: Corps of Engineers Does Not Have an Effective Oversight Approach to Ensure That Compensatory Mitigation Is Occurring,” GAO-05-898, p. 5 (Sep 8, 2005), <http://www.gao.gov/products/GAO-05-898>

ALAB-613, 12 NRC 317, 340 (1980). Hearings are held on only those issues that an intervenor brings to the fore. The burden of going forward on any issues that make it to the hearing process is on the intervenor which is pursuing that issue. *Private Fuel Storage, L.L.C.* (ISFSI), LBP-05-12, 61 NRC 319, 326 (2005), *aff'd Private Fuel Storage, L.L.C.* (ISFSI), CLI-05-19, 62 NRC 403 (2005).

17. Intervenors provided their *prima facie* case-in-chief in the form of administratively-noticeable documentary evidence comprised principally of material already in the record of this COLA proceeding. In their presentation, they have demonstrated that there are some specific, but other vague or nonspecific, expressions of intention on the part of DTE to mitigate for the “small” to “moderate” harm the Fermi 3 preconstruction and construction projects will cause to the Eastern Fox Snake. Intervenors have met their initial burden, and the burden of persuasion shifts primarily to the NRC Staff, and ultimately, to DTE as the Applicant.

18. Once a party has introduced sufficient evidence to establish a *prima facie* case, the burden then shifts to the applicant, which as part of its overall burden of proof, must provide a sufficient rebuttal to satisfy the Board that it should reject the contention as a basis for denial of the permit or license. *La. Power & Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1093 (1983), citing *Consumers Power Co.* (Midland Plant, Units 1 & 2), ALAB-123, 6 AEC 331, 345 (1973); *La. Power & Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 56 (1985).

B. Sufficiency of the Evidence in NEPA Contentions

19. Federal Council on Environmental Quality (“CEQ”) regulations require an agency to “discuss possible mitigation measures in defining the scope of the EIS.” 40 CFR § 1508.25(b).

It is not enough to merely list possible mitigation measures. *San Juan Citizens Alliance v. Stiles*, 654 F.3d 1038, 1053-54 (10th Cir. 2011), citing *Colorado Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1173 (10th Cir. 1999). Consistent with CEQ regulations, the EIS must include a “reasonably complete discussion of possible mitigation measures.” *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 473(9th Cir.2000).

20. While per *Robertson*, courts may not require “a fully developed plan that will mitigate environmental harm before an agency can act,” 490 U.S. at 352-53, and there is no substantive requirement that mitigation measures be implemented, *id.* at 353, it remains that the agency must discuss mitigation measures “in sufficient detail to ensure that environmental consequences have been fairly evaluated.... A mere listing ... is insufficient.” *Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998) (internal quotations and citations omitted); *San Juan Citizens Alliance v. Stiles*, *supra*, 654 F.3d 1053-54; *Northwest Indian Cemetery Protective Assoc. v. Peterson*, 795 F.2d 688, 697 (9th Cir.1986), *rev'd on other grounds*, *Lyng v. Northwest Indian Cemetery Protective Assoc.*, 485 U.S. 439, 108S.Ct. 1319, 99 L.Ed.2d 534 (1988). Some level of detail is necessary as a prerequisite to assuring that the agency has taken a "hard look" at the environmental consequences of its proposed action. *Robertson*, 490 U.S. at 352.

21. Assessment of the evidence here points to the conclusion that NEPA’s transparency obligation has not been met. Environmental consequences for the Eastern Fox Snake, following upon the Fermi 3 project, still have not been fully identified. Because the assessment of environmental consequences is incomplete, there is a companion violation of NEPA for nondisclosure to the public.

22. The purpose of an Environmental Impact Statement is two-fold: to “ensure that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts[,]” and to see “that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision.” *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)). Relevant information as to the chemistry and nature of the existing and replacement soils where the mitigation wetlands are to be built has not been provided to the public, and there are insufficient assurances to the public that the mitigation activity to produce high-quality replacement wetland are real.

23. One of the NRC’s adjudicatory regulations, 10 C.F.R. § 51.107(a) (3), mandates that in a proceeding for the issuance of a combined license, the presiding officer will “[d]etermine, after weighing the environmental, economic, technical, and other benefits against environmental and other costs, and considering reasonable alternatives, whether the combined license should be issued, denied, or appropriately conditioned to protect environmental values. . . .”

24. Applying the facts to the law, we deny the combined license and require compliance with NEPA as to the mitigation investigation and the public disclosure deficits. We further find, as a matter of law, that compensatory wetlands development must be accomplished according to the specifics articulated by the Applicant.

25. Intervenors’ evidence is sufficiently persuasive to raise legitimate doubt as to whether there has been adequate compliance with NEPA, and consequently, a ruling in their favor is warranted. *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2),

ALAB-756, 18 NRC 1340, 1344-1345 (1983) .

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the ASLB finds for Intervenors and against DTE Energy and the NRC Staff on Contention 8. **IT IS FURTHER ORDERED** that the matter of NEPA investigation, analysis, disclosure and compliance respecting the ways and means of the Eastern Fox Snake is hereby remanded to the NRC Staff for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "INTERVENORS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW ON CONTENTION 8" have been served by me upon the following persons via Electronic Information Exchange this 21st day of January, 2014:

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