LBP-14-09

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ronald M. Spritzer, Chairman
Dr. Anthony J. Baratta
Dr. Randall J. Charbeneau

In the Matter of	Docket No. 52-033-COL
DETROIT EDISON COMPANY	ASLBP No. 09-880-05-COL-BD01
(Fermi Nuclear Power Plant, Unit 3)	July 7, 2014

MEMORANDUM
(Determining that Issues Related to Intervenors' Proposed Contention 23 Merit Sua Sponte Review Pursuant to 10 C.F.R. § 2.340(b) and Requesting Commission Approval)

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Before the Licensing Board is the question we raised in our Order of April 30, 2013: whether Intervenors' proposed Contention 23, although untimely filed, is appropriate for *sua sponte* Board review pursuant to 10 C.F.R. § 2.340(b).[1] Contention 23 alleged that the Staff's Draft and Final Environmental Impact Statements for the Fermi Unit 3 project failed to adequately evaluate the environmental impacts of the new high-voltage transmission line corridor that will be constructed to serve the Project. For the reasons explained below, the Board determines that two issues arising from the contention merit *sua sponte* review.[2] The Board therefore respectfully requests that the Commission approve the Board's determination that *sua sponte* review is warranted pursuant to § 2.340(b).

I. BACKGROUND

A. The Fermi 3 Transmission Corridor

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

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[1] Licensing Board Order (Denying Intervenors' Motion for Resubmission of Contentions 3 and 13, for Resubmission of Contention 23 or its Admission as a New Contention, and for Admission of New Contentions 26 and 27), at 22–24 (Apr. 30, 2013) (unpublished) [hereinafter Denial Order].

[2] The two specific issues are identified infra Section II.

[3] Letter from Jack M. Davis, DTE, to NRC, Detroit Edison Company Submittal of a Combined License Application for Fermi 3 (NRC Project No. 757) (Sept. 18, 2008) (ADAMS Accession No. ML082730763).

Fermi Unit 3 will require the construction and operation of transmission lines to connect it to the grid. The Final Environmental Impact Statement ("FEIS") explains the current status of plans for the transmission lines and the transmission corridor[4] in which the lines will be located:

> ITC Transmission has not yet formally announced a route for the offsite portion of the proposed new transmission line serving Fermi 3. Detroit Edison expects that the proposed new transmission line would be built within the existing Fermi 2 transmission corridor for approximately 18.6 mi extending outward from the Fermi site boundary. Detroit Edison expects that the remaining 10.8 mi, extending to the Milan Substation, would be built within an undeveloped right-of-way (ROW) possessed but not yet used by ITC Transmission.[5]

The FEIS estimates the total acreage to be occupied by the new transmission corridor as 1069.2 acres, assuming a 300-foot-wide corridor.[6] The FEIS states that the Fermi 3 site includes 1260 acres.[7] The latter figure includes the entire Fermi tract owned by DTE, including, but not limited to, the land where Fermi Unit 3 would be constructed.[8] The FEIS further reports:

> The western 10.8-mi segment of the proposed transmission corridor, which does not follow previously cleared and regularly maintained corridors, crosses a mosaic of pastures and forest, including forested wetlands, shrub/scrub, cropland, and developed land. Forested and emergent wetlands are present, and three wetlands extend more than 900 ft along the corridor. It is possible that towers may need to be placed in these wetlands in order to construct crossings. The proposed Milan Substation site is located entirely in an area of cropland and planted grassland.[9]

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[4] We will refer to the transmission lines and the corridor in which they will be constructed as "the transmission corridor."

[5] Division of New Reactor Licensing, Office of New Reactors, Final Environmental Impact Statement for the Combined Licensed (COL) for Enrico Fermi Unit 3, NUREG-2015, at 2-10 (Jan. 2013) [hereinafter FEIS] (citations omitted).

[6] FEIS at 2-47 (Table 2-7).

[7] Id. at 2-5.

[8] Id.

[9] Id. at 2-46 to 2-47 (citations omitted).

B. The Draft Environmental Impact Statement

On October 28, 2010, the NRC Staff and the U.S. Army Corps of Engineers ("USACE" or "the Corps") published the Draft Environmental Impact Statement ("DEIS") for the Fermi Unit 3 COL.[10] The DEIS states that the new transmission corridor for Fermi Unit 3 will be built and operated by ITC Transmission.[11] ITC Transmission operated as a wholly owned subsidiary of DTE until 2004.[12]

The DEIS further explained that the NRC categorizes the construction of transmission lines as a "preconstruction activity."[13] Preconstruction activities include various actions required to construct a nuclear power plant that, as the result of changes to agency regulatory policy made by the 2007 limited work authorization rule ("2007 LWA Rule"), the NRC now defines as outside its regulatory authority and therefore not part of the NRC action to license the proposed new plant.[14] Such preconstruction activities include, in addition to the construction of transmission lines, "clearing and grading, excavating, dredging, discharge of fill, erection of support buildings . . . , and other associated activities."[15] Because preconstruction activities are no longer included within the scope of the proposed NRC action, the Staff concluded it was not

[10] Office of New Reactors, Draft Environmental Impact Statement for Combined License (COL) for Enrico Fermi Unit 3, NUREG 2015, Vol. 1 (Oct. 2011) (ADAMS Accession No. ML11287A108) [hereinafter DEIS].

[11] Id. at 2-10.

[12] Applicant's Brief Opposing Sua Sponte Review of Environmental Impacts in the Offsite Transmission Corridor (May 30, 2013) unnumbered attach. at 2 (Affidavit of Peter Smith on Transmission Corridor Topics (May 30, 2013) [hereinafter Smith Affidavit]) [hereinafter Applicant Brief].

[13] DEIS at 1-6.

[14] Id. (citing Final Rule, Limited Work Authorizations for Nuclear Power Plants, 72 Fed. Reg. 57416 (Oct. 9, 2007)).

[15] Id.

required to evaluate their impacts as a direct effect of the NRC action. "Rather, the impacts of the preconstruction activities are considered in the context of cumulative impacts."[16]

C. The NRC's changing position on its authority to impose environmental restrictions on transmission lines that serve nuclear power plants

The Commission's position on the regulation of transmission lines for nuclear power plants has changed over several decades.

> Prior to the 1969 enactment of [the National Environmental Policy Act ("NEPA")], the Commission perceived its duties under the Atomic Energy Act primarily in terms of protecting the public from radiation hazards. NEPA, however, made "environmental protection a part of the mandate of every federal agency and department . . . (The Commission) is not only permitted, but compelled, to take environmental values into account" in carrying out its regular functions. Under NEPA, federal agencies must "use all practicable means" to avoid environmental "degradation" to the extent consistent with "other essential considerations of national policy." Thus, in the early 1970's the Commission began to consider the environmental implications of proposed nuclear facilities.[17]

In 1972, following enactment of NEPA,[18] the Commission adopted a major amendment to the definition of construction in 10 C.F.R. § 50.10(c) that generally prohibited, absent an NRC construction permit, "any clearing of land, excavation, or other substantial action that would adversely affect the natural environment of a site and construction of non-nuclear facilities (such as turbogenerators and turbine buildings) for use in connection with the facility. . . ."[19] This prohibition ensured that environmentally damaging activities related to construction of a new nuclear power plant would not occur before the agency's EIS was completed and the agency had balanced the benefits of all aspects of the project against their environmental costs. The Commission explained that this expansion of its permitting authority was

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[16] Id.

[17] Detroit Edison Co. v. NRC, 630 F.2d 450, 451 (6th Cir. 1980) (footnote and citations omitted) (quoting Calvert Cliffs Coordinating Comm., Inc. v. Atomic Energy Comm'n, 449 F.2d 1109, 1112 (D.C. Cir. 1971) and 42 U.S.C. § 4331(b)).

[18] National Environmental Policy Act of 1969, 42 U.S.C § 4321 (2012).

[19] 37 Fed. Reg. 5745, 5748 (Mar. 21, 1972).

> consistent with the direction of the Congress, as expressed in Section 102 of the NEPA, that, to the fullest extent possible, the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in that Act. Since site preparation constitutes a key point from the standpoint of environmental impact, in connection with the licensing of nuclear facilities and materials, these amendments will facilitate consideration and balancing of a broader range of realistic alternatives and provide a more significant mechanism for protecting the environment during the earlier stages of a project for which a facility or materials license is being sought.[20]

Thus, "[b]y 1974, the Commission had adopted an aggressive approach to its environmental responsibilities in the context of transmission line siting."[21] In that year, an Atomic Safety and Licensing Appeal Board, rejecting a legal challenge by Detroit Edison, ruled that the Commission could, as a condition of licensure, insist that off-site transmission lines built solely to serve a nuclear facility be designed to minimize environmental disturbance.[22] The United States Court of Appeals for the Sixth Circuit, whose jurisdiction includes Michigan, subsequently upheld the Commission's policy.[23]

In 2007, however, the NRC altered its regulatory approach, stating that changes were needed to allow some non-safety related activities to begin earlier than allowed under the regulations then in effect.[24] The preamble to the 2007 LWA Rule explains:

> [T]he nuclear power industry has reviewed the overall construction process based upon lessons learned from the construction and licensing process used for currently operating reactors. The industry submitted what is essentially a petition for rulemaking seeking changes to the LWA process, reflecting those lessons learned and their understanding of the current state of NEPA law. The NRC has reviewed the applicable law, and for the reasons stated elsewhere in this [statement of considerations], agrees with the petitioner that the current definition of construction and the current LWA requirements in § 50.10 are not compelled by NEPA or the Atomic Energy Act (AEA) of 1954, as amended. While the

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[20] Id. at 5746.

[21] Detroit Edison, 630 F.2d at 451.

[22] Detroit Edison Co. (Greenwood Energy Ctr., Units 2 & 3), ALAB-247, 8 AEC 936 (1974).

[23] Detroit Edison, 630 F.2d at 450.

[24] 72 Fed. Reg. at 57426.

> agency's regulations on construction and LWAs were a reasonable implementation of NEPA as understood in 1972, the NRC believes that, with more than 30 years experience in implementing NEPA and the evolving jurisprudence, the time is appropriate for reconsideration and revamping of these NRC requirements.[25]

Accordingly, the 2007 LWA Rule revised 10 C.F.R. § 50.10 and made conforming changes in 10 C.F.R. Parts 2, 51, and 52. The rule narrowed the scope of activities requiring permission from the NRC in the form of an LWA by eliminating the concept of "commencement of construction" formerly described in § 50.10(c) and the authorization formerly described in § 50.10(e)(1).[26]

> Instead, under the final LWA rule, NRC authorization would only be required before undertaking activities that have a reasonable nexus to radiological health and safety and/or common defense and security for which regulatory oversight is necessary and/or most effective in ensuring reasonable assurance of adequate protection to public health and safety or common defense and security.[27]

Thus, the building of transmission lines to serve a nuclear power plant is no longer classified as a construction activity and no longer requires authorization from the NRC.[28] The agency's NEPA regulations (10 C.F.R. Part 51) also exclude the building of transmission lines from the definition of "construction."[29]

An NRC Staff member, commenting on the proposed 2007 LWA Rule, contended that the proposal was inconsistent with NEPA:

> The impacts of the construction of a nuclear power plant that NRC now proposes to exclude from NRC regulations are probably 90 percent of the true environmental impacts of construction. Before even talking to the NRC, a power company can clear and grade the land, build roads and railroad spurs, erect permanent and temporary buildings, build numerous plant structures (e.g., cooling water intake and discharge, cooling towers), and build switchyards and

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[25] Id. at 57420.

[26] Id. at 57426.

[27] Id.

[28] 10 C.F.R. § 50.10(a)(2)(vii).

[29] Id. § 51.4(1)(ii)(G).

> transmission lines. After potentially doing all of that, THEN the company would come to the NRC and ask permission to build the power plant for which all of this work was done. How does this comply with NEPA?[30]

In response, the NRC stated that

> the pre-construction private actions of clearing, grading, access road construction, etc., will be considered in the cumulative impacts analysis in the LWA EIS as the baseline for analyzing the environmental impacts associated with the Federal action authorizing LWA activities. This information will be used when evaluating the environmental impacts of construction and operation of the proposed nuclear power plant.[31]

D. Contention 23

Intervenors filed a number of proposed new contentions in response to the DEIS. Among these was proposed Contention 23, which alleged that:

> The high-voltage transmission line portion of the project involves a lengthy corridor which is inadequately assessed and analyzed in the Draft Environmental Impact Statement.[32]

Intervenors claimed that the DEIS's discussion of "the environmental impacts to the approximately 1,000 acres of transmission corridor is deficient in a host of ways."[33] For example, Intervenors emphasized that substantial construction will take place in undeveloped wetlands, forests, and grasslands:

> NRC reports that "the final western 10.8 miles of transmission lines would be built in an undeveloped segment of an existing transmission ROW . . . Some transmission tower footings were installed there as part of earlier plans but were never used." NRC reports that the proposed new Fermi 3 transmission line corridor would cross open water, deciduous forest, evergreen forest, mixed forest, grassland, 93.4 acres of woody wetlands, and 13 acres of emergent herbaceous wetland. (Table 2-7, Vegetative Cover Types in the Proposed 29.4-mi Transmission Corridor, page 2-46). This shows what is at stake – major impacts, or perhaps even complete destruction, to irreplaceable habitat, vital for the viability of endangered and threatened species, as well as overall ecosystem

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[30] 72 Fed. Reg. at 57420.

[31] Id.

[32] Motion for Resubmission of Contention 10, to Amend/Resubmit Contention 13, and for Submission of New Contentions 17 through 24, at 41 (Jan. 11, 2012).

[33] Id.

> health. . . . DEIS Table 4-2 repeats the sensitive vegetative cover forms at risk from the proposed Fermi 3 transmission corridor: 170 acres of deciduous forest, 74 acres of woody wetlands, and 9 acres of herbaceous emergent wetlands.[34]

Intervenors maintained that the DEIS failed to adequately assess the impacts to these areas. For example, they criticized the DEIS for failing to provide any quantitative information about impacts to wetlands, such as the acreage that will be filled and/or destroyed.[35]

Intervenors also stressed potential impacts to threatened and endangered species:

> NRC's DEIS section 2.4.1.4 Important Terrestrial Species and Habitats – Transmission Lines (page 2-60) also reports the high biological stakes. Important species may occur along transmission lines, "but because the exact route of the corridor has not been finally determined, no surveys have yet been conducted to confirm the presence of any species." . . . [T]able 2-9 (page 2-61) shows state-listed and federally-listed species which inhabit the counties (Monroe, Washtenaw, Wayne) that would be crossed, including over 80 plant species, 8 insect species, 2 amphibian species, 4 reptile species (including the Eastern Fox Snake), a dozen bird species, and 2 mammal species. The Michigan Dept. of Natural Resources (MDNR/now DNRE) has not provided concurrence for the project to proceed, because DTE has provided no details about the transmission line corridor route for determining the damage that would be done to threatened and endangered species and their habitats. MDNR has identified five State-listed species likely present on the Fermi site, which could also be present along the proposed Fermi 3 transmission corridor. In addition to all of the above, the U.S. Fish and Wildlife Service has identified the eastern massasauga snake as a candidate species potentially inhabiting Washtenaw and Wayne Counties, and thus, at risk along the proposed new transmission corridor.[36]

Intervenors argued that the DEIS failed to provide sufficient information concerning transmission corridor impacts on threatened and endangered species.[37]

Intervenors further argued that maintenance of the transmission corridor will continue to impact wetlands and other environmental resources after construction is completed. They noted that, according to the DEIS, "'[d]uring operation of Fermi 3, the power transmission line

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[34] Id. at 44–45.

[35] Id. at 45.

[36] Id. at 45–46.

[37] Id. at 44–48.

system would need to be maintained free of vegetation by ITC Transmission. Vegetation removal activities would include trimming and application of herbicides periodically and on an as-needed basis along the transmission line corridor."[38] Intervenors complained of the failure to analyze the environmental consequences of these actions:

> It is clear that the deforestation will be an indefinitely long, or even permanent, condition. Although herbicides designed for use in wetlands are mentioned, no specifics are given. The impact of these biocides on species inhabiting the corridor is thus impossible to analyze, given the lack of specificity. The downgrade in the ecological quality and quantity (or even permanent loss and complete destruction) of forested wetlands in an extended area along the Fermi 3 transmission line corridor is a major ecosystem impact, which currently goes unreflected.[39]

E. The Board's Ruling on Proposed Contention 23

In its June 12, 2012 Order ruling on the DEIS contentions, the Board agreed with DTE and the Staff that proposed Contention 23 was untimely because the deficiencies Intervenors alleged were also present in DTE's Environmental Report. Thus, Intervenors had failed to establish that the contention was based on any data or conclusions in the DEIS that are significantly different from those in the ER.[40]

The Board stated, however, that while Contention 23 was untimely, "it raises substantial questions concerning the adequacy of the DEIS that the NRC Staff should carefully consider in preparing the FEIS."[41] Intervenors criticized the DEIS for, among other things, an inadequately defined route for the corridor,[42] a failure to identify endangered or threatened species along the corridor,[43] an inadequate discussion of impacts on wetlands and vegetation,[44] and a failure to

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[38] Id. at 49 (quoting DEIS at 3-31).

[39] Id. at 48.

[40] LBP-12-12, 75 NRC 742, 775–76 (2012).

[41] Id. at 776.

[42] Id. at 777–78.

[43] Id. at 776–77.

adequately investigate historic or cultural resources that may be affected.[45] The Board concluded that, "[g]iven the very limited analysis in the DEIS of [the environmental impacts] arising from the transmission line corridor, these claims may have been admissible had they been filed in a timely manner."[46]

The Board further observed that, even though the transmission corridor is a preconstruction activity and therefore not included in the COL application, construction and maintenance of the transmission corridor are sufficiently closely connected with Fermi Unit 3 that its environmental consequences must be fully analyzed in the FEIS as direct impacts of the proposed action.[47] Because the Staff must comply with NEPA regardless of whether Intervenors filed a timely contention, the Board recommended that "the NRC Staff consider the issues raised by Intervenors when it prepares the FEIS."[48]

F. EPA comments on the DEIS

The Board was not alone in recommending that transmission corridor impacts be fully evaluated in the FEIS as direct impacts of the proposed action. Like the Board, the United States Environmental Protection Agency ("EPA"), concluded that, even though the NRC may regard preconstruction activities as outside the scope of the COL application, "these activities are within the scope of the NEPA review because they are all connected actions, per 40 CFR 1508.25(a)(1)(iii)."[49] Specifically addressing the DEIS's failure to analyze the construction of the

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[44] Id. at 776–78.

[45] Id. at 778.

[46] Id.

[47] Id. at 778–80.

[48] Id. at 780.

[49] Letter from Kenneth Westlake, EPA, to Cindy Bladey, NRC, Re: Draft Environmental Impact Statement for the Combined License (COL) for Enrico Fermi Unit 3, Monroe County, Michigan, CEQ# 20110364, attach. 1, at 2 (Jan. 10, 2012) (ADAMS Accession No. ML12023A034).

transmission lines and the expansion of the substation as direct impacts of the proposed action, EPA commented:

> **Transmission Lines and Substation**
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> EPA understands that NRC analyzes impacts from the lengthening of the transmission lines and expansion of the Milan Substation as cumulative impacts and outside the scope of the COL permit application and accompanying NEPA document. However, per NEPA, EPA views these actions as connected to the granting of the license and, therefore, should be analyzed as direct impacts as a result of the proposed-action. The Draft EIS even acknowledges the connectedness of the building of Fermi 3 and the expansion of the Substation on page 3-17, lines 31-21, among other locations: "The 350-ft-by-ft-500-ft Milan Substation may be expanded to an area about 1000 ft by 1000 ft to accommodate the Fermi 3 expansion (Detroit Edison 2011 b)." Therefore, because the lengthening of the transmission lines and the expansion of the Substation are only necessitated by granting the COL license for Fermi 3, the Final EIS should analyze impacts from these two actions as direct impacts.
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> **Recommendation**: The Final EIS should analyze the construction of the transmission lines and the expansion of the Substation as actions part of the proposed action; any unavoidable impacts should be accounted and mitigated for.[50]

EPA also expressed concern

> about the amount of habitat lost in the transmission corridor and due to the proposed expansion of the Substation, at 1,069 and 21 acres, respectively. As outlined under Transmission Corridor and Substation, EPA views these developments as connected actions. Therefore, estimated impacts should be considered when preparing mitigation plans. This includes wetlands mitigation ratios.[51]

G. The Final Environmental Impact Statement

The FEIS for the Fermi Unit 3 COL was published in January 2013.[52] As it had done in the DEIS, the Staff defined the construction of the transmission corridor as a "preconstruction activity."[53] Again relying upon the 2007 LWA Rule, the Staff maintained that the NRC lacks

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[50] Id. at 14.

[51] Id. at 7.

[52] FEIS at i.

[53] Id. at 1-6.

regulatory authority over construction of the transmission corridor because it is a preconstruction activity.[54] The Staff again stated that "[b]ecause the preconstruction activities are not part of the NRC action, their impacts are not reviewed as a direct effect of the NRC action. Rather, the impacts of the preconstruction activities are considered in the context of cumulative impacts."[55] With respect to the environmental impacts raised by proposed Contention 23, the analysis in the FEIS is much like that in the DEIS.

In its comments on the FEIS, the EPA reiterated its earlier criticism, stating that "impacts resulting from the construction and maintenance of the new transmission lines and substations should be considered as direct impacts and mitigated for as part of the proposed project. Total impacts are estimated to be over 1000 acres of habitat, including over 93 acres of impacts to forested wetlands."[56]

H. The Board's ruling on re-submitted Contention 23

On February 19, 2013, Intervenors re-submitted proposed Contention 23, together with various other new and re-submitted contentions filed in response to the FEIS.[57] Intervenors summarized their claim as follows:

> The FEIS for a combined operating license for Fermi 3 fails to satisfy the requirements of NEPA because it does not address the environmental effects of the associated transmission line corridor extending nearly thirty (30) miles from the proposed plant site, despite the fact that the transmission lines are indispensable to completion of the power plant project, and the NRC Staff was ordered to analyze the transmission corridor within the FEIS by the Atomic Safety and Licensing Board. The FEIS fails to disclose what the U.S. Army Corps of

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[54] Id. at 1-6 to 1-7.

[55] Id. at 1-7.

[56] Letter from Kenneth Westlake, EPA, to Cindy Bladey, NRC, Re: Comments on the Final Environmental Impact Statement for the Combined License for Enrico Fermi Unit 3, Monroe County, Michigan, CEQ No. 20130006, attach. 1, at 1 (Feb. 19, 2013) (ADAMS Accession No. ML13063A434) [hereinafter EPA Comments on FEIS].

[57] Motion for Resubmission of Contentions 3 and 13, for Resubmission of Contention 23 or its Admission as a New Contention, and for Admission of the New Contentions 26 and 27 (Feb. 19, 2013).

> Engineers has determined to be the least environmentally damaging practical alternatives (LEDPAs) under the Clean Water Act, for some 30 jurisdictional wetlands and other water bodies within the transmission corridor, and there is no detailed discussion of mitigation measures which would be implemented to compensate for the water resource and upland damage. [58]

The Board again rejected Contention 23 as untimely. But the Board also concluded that, because the FEIS had been issued and the Board had ruled that Contention 23 remains procedurally defective, this was an appropriate point for Board consideration of whether Contention 23 merits *sua sponte* review under 10 C.F.R. § 2.340(b).[59] The Board allowed the parties to file briefs on the issue. Intervenors supported *sua sponte* review, while DTE and the Staff opposed it.[60]

II. BOARD DETERMINATION, SUPPORTING ANALYSIS, AND REQUEST FOR COMMISSION APPROVAL

The Board has determined that the following two related issues arising from Contention 23 merit *sua sponte* review, and requests Commission approval to undertake such review:

(1) Whether the building of offsite transmission lines intended solely to serve the new Fermi Unit 3 qualifies as a connected action under NEPA and, therefore, requires the Staff to consider its environmental impacts as a direct effect of the construction of Fermi Unit 3.

(2) Whether the Staff's consideration of environmental impacts related to the transmission corridor, performed as a cumulative impact review, satisfied NEPA's hard look requirement.

Below, we explain the reasons that support our determination. First, we discuss the regulatory standard for *sua sponte* review. Second, we review the NEPA requirements most

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[58] Id. at 22.

[59] Denial Order at 21–24.

[60] See Intervenors' Memorandum in Support of Sua Sponte ASLB Referral of Transmission Line Corridor NEPA Compliance Issue, at 1 (May 30, 2013). See also Applicant Brief at 1; NRC Staff Response to Board Order Concerning Proposed Sua Sponte Review of Contention 23, at 2 (May 30, 2013) [hereinafter Staff Response].

relevant to the environmental analysis of the transmission corridor. Next, we analyze the two specific issues and explain why they raise serious legal and factual questions that merit further review by the Board. Finally, we explain why the issues we have determined to be appropriate for *sua sponte* review can be distinguished from those likely to arise in the ordinary case. On the basis of this analysis, the Board respectfully requests that the Commission approve its determination.

A. The Standard for Sua Sponte Review

Under 10 C.F.R. § 2.340(b), a licensing board may request Commission approval to consider the merits of a serious environmental issue even when, as with Contention 23, it was excluded from the proceeding for procedural reasons.[61] This *sua sponte* regulation provides that the presiding officer shall

> make findings of fact and conclusions of law on any matter not put into controversy by the parties, but only to the extent that the presiding officer determines that a serious safety, environmental, or common defense and security matter exists, and the Commission approves of an examination of and decision on the matter upon its referral by the presiding officer . . . .[62]

The regulation does not define what constitutes a serious environmental issue, leaving that determination to the presiding officer subject to the Commission's approval.

Section 2.340(b)'s predecessor, unlike the current version, did not require Commission approval before a presiding officer could exercise *sua sponte* authority. It did, however, instruct presiding officers that their *sua sponte* review authority should only be used "sparingly" and in "extraordinary circumstances."[63] These terms were removed from the regulation in 1979.[64] The

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[61] See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), LBP-82-79, 16 NRC 1116, 1119 (1982).

[62] 10 C.F.R. § 2.340(b)(1).

[63] 10 C.F.R. § 2.760a (1979) ("Matters not put into controversy by the parties will be examined and decided by the presiding officer only in extraordinary circumstances where he determines that a serious safety, environmental, or common defense and security matter exists. This authority is to be used sparingly.")

Commission subsequently stated, in a 1998 policy statement, that licensing board's should only use *sua sponte* review in extraordinary circumstances,[65] but the terms "sparingly" and "extraordinary circumstances" have never been reinserted into the regulations.[66]

In 2004, the Commission "codif[ied] appropriate portions of the [1998] Policy Statement," noting that the statement was developed "as a foundation for possible rule changes."[67] The 2004 rule codified the requirement that licensing boards request approval from the Commission prior to conducting *sua sponte* review of a matter not put into controversy.[68] Notably absent, however, was any requirement that the presiding officer's determination or the Commission's approval be limited to issues presenting "extraordinary circumstances." Evidently the Commission concluded that that particular aspect of the 1998 policy statement was not "appropriate" for inclusion in the new rule.

The 2012 rule revision, which clarified that *sua sponte* authority extends to Board review of combined license applications, states only that review "is limited to . . . serious matters not

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[64] See 44 Fed. Reg. 67088 (Nov. 23, 1979) (stating that the "amended rules eliminate an apparent constraint on boards").

[65] Policy on Conduct of Adjudicatory Proceedings, 63 Fed. Reg. 41872, 41874 (Aug. 5, 1998) (stating that *sua sponte* "authority is to be exercised only in extraordinary circumstances").

[66] In 1984, the NRC published a series of proposals developed by a Regulatory Reform Task Force that included reinsertion of the word "sparingly" and a requirement that any proposed use of *sua sponte* review be approved by a licensing board established to screen such proposals, though "[t]he individual proposals [were] not Commission proposals." See 49 Fed. Reg. 14698, 14703 (Apr. 12, 1984) ("Section 2.760a is revised to revoke the 1979 relaxation of the sua sponte rule for review of uncontested matters by adjudicatory boards. Experience under the relaxed standard has indicated that issues have been raised sua sponte which do not warrant such consideration. . . . the sua sponte authority of presiding officers to raise new issues will be limited to extraordinary circumstances and is to be used sparingly."). This document did not, as NRC Staff suggest, constitute a revocation of the 1979 rule change. Staff Response at 6 n.19. Two years later, the Commission published a proposed rule that "identified five proposals which merit continued consideration for possible inclusion in . . . the Commission's Rules of Practice," none of which addressed *sua sponte* review. 51 Fed. Reg. 24365, 24366 (July 3, 1986).

[67] 69 Fed. Reg. 2182, 2182, 2186 (Jan. 14, 2004) (emphasis added).

[68] Id. at 2210.

put into controversy by the parties that concern safety, common defense and security, or the environment that the Commission has approved for review upon the presiding officer's referral of the matter."[69] Again, there is no requirement of "extraordinary circumstances."

Given the historical development of the *sua sponte* provision and that Commission approval is now required prior to *sua sponte* consideration of an issue, the Commission is not constrained to approve only those issues that arise under "extraordinary circumstances." Still, a request to engage in *sua sponte* review should not be undertaken lightly. And it has not been. Recent years have seen sparing use of *sua sponte* review.[70] In 2011, in what would have been the first such request in twenty years, all members of the Licensing Board in Shaw AREVA MOX Services determined that extraordinary circumstances existed such that *sua sponte* review would have been warranted had the serious safety issue raised been deemed untimely.[71] Here also, the issues we have determined to be appropriate for *sua sponte* review are "extraordinary" in that they differ from those likely to arise in the ordinary case.[72]

B. NEPA Requirements

"The centerpiece of environmental regulation in the United States, NEPA requires federal agencies to pause before committing resources to a project and consider the likely environmental impacts of the preferred course of action as well as reasonable alternatives."[73] When an agency proposes a major Federal action significantly affecting the quality of the

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[69] 77 Fed. Reg. 46562, 46584 (Aug. 3, 2012).

[70] Shaw AREVA MOX Services (Mixed Oxide Fuel Fabrication Facility), LBP-11-9, 73 NRC 391, 422 (2011) (J. McDade, dissenting) (noting that "no Board has attempted to invoke *sua sponte* review in the past 20 years").

[71] Id. at 412, 422.

[72] See infra Section II(E).

[73] N.M. ex rel. Richardson v. Bureau of Land Mgmt., 565 F.3d 683, 703 (10th Cir. 2009) (citing 42 U.S.C. § 4331(b) (congressional declaration of national environmental policy); Pub. Citizen, 541 U.S. at 756–57; Marsh v. Or. Natural Res. Council, 490 U.S. 360, 371 (1989); and Forest Guardians v. U.S. Forest Serv., 495 F.3d 1162, 1172 (10th Cir. 2007)).

human environment, NEPA requires the preparation of an EIS concerning the proposed action.[74] The requirement to prepare an EIS is a procedural mechanism designed to assure that agencies give proper consideration to the environmental consequences of their actions.[75] However, NEPA does not require agencies to elevate environmental concerns over other appropriate considerations.[76]

The following NEPA requirements are particularly relevant here.

1. The Scope of an EIS

The "scope" of an EIS is defined as "the range of actions, alternatives, and impacts to be considered in an environmental impact statement."[77] The NRC regulation governing the scope of the EIS states that the agency should use the provisions of a CEQ regulation, 40 C.F.R. § 1502.4, for that purpose.[78] Section 1502.4 in turn directs that

> [a]gencies shall use the criteria for scope (§ 1508.25) to determine which proposal(s) shall be the subject of a particular statement. Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.[79]

Under the referenced CEQ regulation, the proposed action that is the subject of the EIS must include all "connected actions."[80] The definition of "connected actions" in § 1508.25 is also adopted by 10 C.F.R. § 51.14(b). Under § 1508.25, separate actions are "connected" if, among other things, they "[c]annot or will not proceed unless other actions are taken previously or simultaneously," or they "[a]re interdependent parts of a larger action and depend on the larger

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[74] 42 U.S.C. § 4332.

[75] See Vt. Yankee Nuclear Power v. Natural Res. Def. Council, 435 U.S. 519, 558 (1978).

[76] Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 (1980).

[77] 40 C.F.R. § 1508.25.

[78] 10 C.F.R. § 51.29(a)(1).

[79] 40 C.F.R. § 1502.4(a).

[80] Id. § 1508.25(a)(1).

action for their justification."[81] Thus, all connected actions as defined in § 1508.25 must be included within the scope of the proposed action evaluated in the NRC's FEIS.

In general, NEPA case law defines "connected actions" as those that lack "independent utility."[82] The Sixth Circuit applies that test.[83] Projects lack independent utility when it would be irrational, or at least unwise, to build one without the other.[84] For example, the Ninth Circuit held that the construction of a road to facilitate logging and the sale of timber from the logging were "connected actions" that had to be addressed in a single EIS.[85] The court pointed out that "the timber sales cannot proceed without the road, and the road would not be built but for the contemplated timber sales."[86]

The failure to include all connected actions within the scope of the proposed action is generally referred to as "segmentation." "'Segmentation' or 'piecemealing' occurs when an action is divided into component parts, each involving action with less significant environmental effects."[87] "Segmentation is to be avoided in order to 'insure that interrelated projects[,] the overall effect of which is environmentally significant, not be fractionalized into smaller, less significant actions.'"[88]

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[81] Id. § 1508.25(a)(1)(ii) and (iii). NRC's NEPA regulations specifically adopt this definition. See 10 C.F.R. § 51.14(b).

[82] See Soc'y Hill Towers Owners' Ass'n v. Rendell, 210 F.3d 168, 181 (3d Cir. 2000) (collecting cases); Nw. Res. Info. Ctr. v. Nat'l Marine Fisheries Serv., 56 F.3d 1060, 1067–69 (9th Cir. 1995) (collecting cases).

[83] Communities, Inc. v. Busey, 956 F.2d 619, 627 (6th Cir. 1992).

[84] Trout Unlimited v. Morton, 509 F.2d 1276 (9th Cir. 1974).

[85] Thomas v. Peterson, 753 F.2d 754, 758 (9th Cir. 1985).

[86] Id.

[87] Town of Huntington v. Marsh, 859 F.2d 1134, 1142 (2d Cir. 1988) (citing City of W. Chi. v. NRC, 701 F.2d 632, 650 (7th Cir. 1983)).

[88] Id. (quoting Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 298 (D.C. Cir. 1987)).

2. The FEIS must evaluate all reasonably foreseeable environmental impacts of the proposed action.

Once the NRC has properly defined the scope of the proposed action, including any connected actions, the agency's EIS must evaluate the environmental effects of the proposed action.[89] The NRC uses this information to "[d]etermine, after weighing the environmental, economic, technical, and other benefits against environmental and other costs . . . whether the combined license should be issued, denied, or appropriately conditioned to protect environmental values."[90] "The EIS must address all reasonably foreseeable environmental impacts . . . even if the probability of such an occurrence is low."[91] NEPA requirements, however, are subject to a rule of reason, and an EIS need not address "remote and highly speculative consequences."[92]

In 10 C.F.R. § 51.14(b), the NRC adopted the CEQ's definition of "effects" in 40 C.F.R. § 1508.8. Under the CEQ rule, effects include both direct effects, "which are caused by the action and occur at the same time and place," and indirect effects, "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." The CEQ regulation further provides:

> Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative.[93]

When information relevant to a reasonably foreseeable environmental effect is

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[89] 10 C.F.R. §§ 51.71(d), 51.90; 40 C.F.R. § 1508.25(a)(1).

[90] 10 C.F.R. § 51.107(a)(3).

[91] Blue Ridge Envtl. Def. League v. NRC, 716 F.3d 183, 188 (D.C. Cir. 2013) (citing 40 C.F.R. § 1502.22(b)).

[92] Deukmejian v. NRC, 751 F.2d 1287, 1300 (D.C. Cir. 1984) (quoting Trout Unlimited, 509 F.2d at 1283). See also Blue Ridge Envtl. Def. League, 716 F.3d at 189.

[93] 40 C.F.R. § 1508.8.

incomplete or unavailable, CEQ regulations require an agency to obtain the unavailable information and include it in the EIS so long as the costs are not exorbitant.[94] If the cost of obtaining the information is exorbitant, the agency must still include in the EIS a statement that the information is unavailable, the relevance of the unavailable information, a summary of existing credible scientific evidence, and the agency's evaluation of the impacts that might be caused.[95]

3. The FEIS must evaluate alternatives to the proposed action, including mitigation.

An EIS must include a detailed statement of reasonable alternatives to the proposed action.[96] When considering alternatives, agencies are to:

> (a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.
>
> (b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits. . . .[97]

The CEQ regulation itself and numerous courts have recognized that the alternatives analysis is the "heart of the environmental impact statement."[98] "The existence of reasonable but unexamined alternatives renders an EIS inadequate."[99]

The NRC's NEPA regulation governing preparation of a DEIS directs that it "include a preliminary analysis that considers and weighs the environmental effects of the proposed action;

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[94] See id. § 1502.22(a).

[95] See id. § 1502.22(b).

[96] 42 U.S.C. § 4332(2)(C)(iii). See also La. Energy Servs., L.P. (Claiborne Enrichment Ctr.), CLI-98-3, 47 NRC 77, 104 (1998).

[97] 40 C.F.R. § 1502.14.

[98] Id. See also Alaska v. Andrus, 580 F.2d 465, 474 (D.C. Cir.), vacated in part as moot sub nom. W. Oil & Gas Ass'n v. Alaska, 439 U.S. 922 (1978).

[99] Friends of Se.'s Future v. Morrison, 153 F.3d 1059, 1065 (9th Cir. 1998).

the environmental impacts of alternatives to the proposed action; and alternatives available for reducing or avoiding adverse environmental effects . . . ."[100] The NRC's regulation governing preparation of an FEIS imposes the same requirement by directing that the NRC Staff "prepare a final environmental impact statement in accordance with the requirements of . . . [10 C.F.R. § 51.71] for a draft environmental impact statement."[101]

4. Cumulative Impacts

Activities excluded from the scope of the proposed action may still be relevant to the NRC's NEPA analysis to the extent they affect the environmental baseline for the evaluation of cumulative impacts. Under CEQ regulations, "cumulative impact" is defined as the "impact on the environment that results from the incremental impact of the [proposed] action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions."[102]

In the FEIS, the Staff treated the construction of the transmission corridor as a separate non-federal action rather than a connected action. The Staff therefore evaluated the transmission corridor solely as a reasonably foreseeable future action that forms part of the environmental baseline for evaluating the cumulative impact of the proposed action, i.e., the licensing of the construction and operation of Fermi Unit 3.

5. Limitation on actions

An important consequence of the decision whether to include new construction within the scope of the proposed action is that, if it is included, it will be subject to the limitation on actions in 10 C.F.R. § 51.101(a). Under that provision, when the Staff prepares an EIS under 10 C.F.R. § 51.20, then until a record of decision is issued "[n]o action concerning the proposal

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[100] 10 C.F.R. § 51.71(d) (emphasis added).

[101] Id. § 51.90.

[102] 40 C.F.R. § 1508.7.

may be taken by the Commission which would (i) have an adverse environmental impact, or (ii) limit the choice of reasonable alternatives."[103] Also, "[a]ny action concerning the proposal taken by an applicant which would (i) have an adverse environmental impact, or (ii) limit the choice of reasonable alternatives may be grounds for denial of the license."[104] For separate activities, on the other hand, there is no obligation on the Commission to avoid regulatory action before the record of decision is issued that would allow the activity to proceed, regardless of its environmental impact or its effect on the range of alternatives. And the applicant may proceed with (or allow its contractor to proceed with) an activity outside the scope of the proposal that would have an adverse environmental impact or limit the choice of reasonable alternatives even though the NEPA review is ongoing or has not even begun. This was precisely the point that the NRC Staff commenter made about the proposed 2007 LWA Rule.[105]

C. There is a serious question whether the building of an offsite transmission corridor intended solely to serve the new Fermi Unit 3 qualifies as a connected action under NEPA and, therefore, requires the Staff to consider its environmental impacts as a direct effect of the construction of Fermi Unit 3.

Given that the transmission corridor's sole apparent purpose is to serve the Fermi Unit 3 project and the new nuclear power plant would be useless without the new transmission lines, Intervenors (and the EPA) have raised a serious question whether the construction of the new transmission corridor should have been analyzed as a connected action in the FEIS.

In order for construction of the transmission corridor to constitute a connected action under 40 C.F.R. § 1508.25, three requirements must be met. First, the transmission corridor must be a proposed action rather than one that is merely conceivable.[106] Second, the transmission corridor must lack independent utility, that is, its sole purpose must be serving

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[103] 10 C.F.R. § 51.101(a)(1).

[104] Id. § 51.101(a)(2).

[105] 72 Fed. Reg. at 57420.

[106] See Kleppe v. Sierra Club, 427 U.S. 390, 410 & n.20 (1976).

Fermi Unit 3.[107] Third, for an action such as the transmission corridor that will not be constructed by or expressly permitted by the federal agency preparing the EIS, there must be sufficient federal control and responsibility that the action qualifies as a federal action.[108] We review each of these issues in turn.

1. Proposed Action

The FEIS states that "ITC Transmission has not yet formally announced a route for the offsite portion of the proposed new transmission line serving Fermi 3," but it also states that "Detroit Edison expects that the proposed new transmission line would be built" along the corridor identified in the FEIS.[109] The FEIS repeatedly refers to the "proposed" transmission corridor.[110] For example, the FEIS includes a map identifying the "Proposed Transmission Corridor from Fermi 3 to the Milan Substation."[111] The FEIS reports that "[t]hree new 345-kV transmission lines have been proposed to serve Fermi 3."[112] The FEIS also refers to "the proposed route from the Fermi 3 site in Monroe County to the existing Milan Substation in Washtenaw County."[113] Furthermore, in response to written questions propounded by the Board, DTE informed the Board that it is unaware of any other transmission corridor route

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[107] See Thomas, 753 F.2d at 759–60 (citing Trout Unlimited, 509 F.2d at 1276 (stating that an EIS must address interdependent projects when "[t]he dependency is such that it would be irrational, or at least unwise, to undertake the first phase if subsequent phases were not also undertaken.")).

[108] See Sw. Williamson Cnty. Cmty. Ass'n, Inc. v. Slater, 243 F.3d 270, 278–80 (6th Cir. 2001).

[109] FEIS at 2-10.

[110] See, e.g., id. at 2-61, 2-126, and 3-18 to 3-19. The fact that the Staff declares the transmission lines to be a proposed action is significant, as under CEQ regulations "[a] proposal may exist in fact as well as by agency declaration that one exists." 40 C.F.R. § 1508.23.

[111] FEIS at 2-11 (emphasis added).

[112] Id. at 4-8 (emphasis added).

[113] Id. at 2-208 (emphasis added).

currently under consideration.[114] An action with potential impacts subsequent to the initial federal action may not constitute a proposed action if it is insufficiently certain.[115] Here, by contrast, there is no doubt that offsite transmission lines would be built to serve Fermi 3 and no suggestion of any plan to build them anywhere but along the proposed route identified in the FEIS. Therefore, based on the information now before the Board, it appears that the transmission corridor identified in the FEIS is a proposed action.[116]

2. Independent Utility

The FEIS clearly shows that the purpose of the new transmission corridor is to serve Fermi Unit 3 (i.e., to transmit electrical energy from Fermi Unit 3 to the grid).[117] No party has identified any other function that the corridor is intended to serve. Just as the construction of a road to facilitate logging and the sale of timber that would result from that logging were connected actions,[118] so too the construction of a new nuclear power plant and the transmission corridor that will transmit the newly generated power to the grid are also connected actions.

DTE stated in response to a question from the Board that the new transmission lines

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[114] Applicant Brief at 8; Smith Affidavit at 5.

[115] See Webster v. U.S. Dep't of Ag., 2011 WL 8788223, at *8 (N.D.W. Va. June 13, 2011) (finding that the building of a water treatment plant to serve a proposed dam was not sufficiently certain and any attempt to determine environment impacts would be "speculative and contingent").

[116] Whether a project qualifies as a "proposal" is somewhat intertwined with the "independent utility" question. CEQ's regulations state that a "[p]roposal exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. Preparation of an environmental impact statement on a proposal should be timed so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal." 40 C.F.R. § 1508.23. In a situation such as this, where the granting of a license makes the building of offsite transmission lines inevitable, an evaluation of their direct environmental impacts will only be meaningful if engaged in before the license issuance.

[117] FEIS at 2-10 to 2-11, 3-17 to 3-19.

[118] Thomas, 753 F.2d at 758.

might possibly serve some as yet unidentified source of electrical energy if Fermi 3 is not constructed.[119] Absent additional evidence, this theoretical possibility is too speculative to establish that the transmission corridor actually has independent utility. Our view is supported by the Appeal Board's ruling in Greenwood upholding the NRC's authority to impose environmental restrictions on new transmission lines intended to serve two new Detroit Edison nuclear power plants.[120] The Licensing Board had described the new transmission lines "as an integral part of nuclear generating plants, observing that '[a] power plant without transmission lines is like an airplane that can't fly.'"[121] The Appeal Board agreed. As in this case, in Greenwood, DTE "could not represent that identical power lines along identical routes would be erected irrespective of the Greenwood nuclear facility."[122] The Appeal Board therefore had

> no hesitation in concurring in the Licensing Board's assumption that the lines are a foreseeable consequence of licensing construction of the nuclear power units. Indeed, no other conclusion is reasonable. Without transmission lines the Greenwood facility would be little more than a very expensive double boiler serving no discernible purpose. It is scarcely likely that Detroit Edison would embark upon such an enterprise even if given the green light by the regulatory bodies which oversee its operations.[123]

Here also, the proposed transmission corridor is an integral part of the Fermi 3 project with "no discernible purpose" apart from connecting Fermi 3 to the grid.

3. Federal Control and Responsibility

The FEIS does not refer to any purpose of the new transmission corridor other than serving Fermi 3. But the Staff did not analyze the transmission corridor as a connected action. Instead, it defined the construction of the transmission corridor as a "preconstruction activity,"

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[119] Applicant Brief at 8; Smith Affidavit at 5–6.

[120] Greenwood Energy Ctr., ALAB-247, 8 AEC at 936.

[121] Id. at 937.

[122] Id. at 939.

[123] Id.

and excluded it from the scope of the proposed action because of the 2007 LWA Rule narrowing the definition of "construction" and disclaiming NRC regulatory authority over all preconstruction activities.[124] Thus, the Staff evaluated the impacts of the transmission corridor solely "in the context of cumulative impacts."[125] In substance, the Staff concluded that the scope of the proposed federal action should include only the power plant and not the transmission corridor necessary to make the plant serve its intended purpose because, in the Staff's view, the transmission corridor is outside the scope of the federal action.

The requirement to prepare an EIS applies to "major Federal actions," not to private or state actions.[126] Thus, only those activities that have sufficient federal involvement to qualify as federal actions need be included in the scope of the proposed action evaluated in an EIS.[127] But this does not necessarily mean that the action in question must be taken or expressly authorized by a federal agency. In Southwest Williamson County Community Ass'n, Inc. v. Slater, the court defined the test for determining when a non-federal project should be analyzed under NEPA as a major federal action:

> With the CEQ regulations and case law in mind, we conclude that there are two alternative bases for finding that a non-federal project constitutes a "major Federal action" such that NEPA requirements apply: (1) when the non-federal project restricts or limits the statutorily prescribed federal decision-makers' choice of reasonable alternatives; or (2) when the federal decision-makers have authority to exercise sufficient control or responsibility over the non-federal project so as to influence the outcome of the project. If either test is satisfied, the non-federal project must be considered a major federal action. Both tests require a situation-specific and fact-intensive analysis. [128]

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[124] FEIS at 1-6 to 1-7.

[125] Id. at 1-7.

[126] 42 U.S.C. § 4332(2)(C).

[127] See Sw. Williamson Cnty., 243 F.3d at 278–80. But see Colo. Wild, Inc. v. U.S. Forest Serv., 523 F.Supp.2d 1213, 1224–25 (D. Colo. 2007) (rejecting the U.S. Forest Service's claim that road construction and development planned by a private party seeking access rights-of-way over national forest land "cannot be 'connected actions' under NEPA's regulations because the Forest Service lacks authority to control them").

[128] Sw. Williamson Cnty., 243 F.3d at 281 (footnote omitted).

We understand that construction of the transmission corridor has not begun. Therefore, the first test is not satisfied. This is not an instance where, at least thus far, "the non-federal project restricts or limits the statutorily prescribed federal decision-makers' choice of reasonable alternatives."[129] On the other hand, in this case "the federal decision-makers have authority to exercise sufficient control or responsibility over the non-federal project so as to influence the outcome of the project."[130] In Southwest Williamson County, the court held that the second test was not satisfied because the authority of the Federal Highway Administration ("FHWA") was limited to certain interchanges between a federally financed highway project and a state highway. "No part of the statute confers jurisdiction on the FHWA . . . to oversee the construction of the highway corridor that runs between the interchanges unless the state attempts to comply with federal regulations in order to seek federal reimbursement for construction costs."[131]

Here, by contrast, the NRC long interpreted its statutory authority under the Atomic Energy Act ("AEA")[132] to include conditioning approval of nuclear power plant licenses on environmentally acceptable routing of transmission lines.[133] The United States Court of Appeals for the First Circuit upheld the NRC's authority to regulate offsite transmission lines under the AEA, affirming a licensing board decision conditioning approval of permits to the Seabrook Nuclear Power Station on the rerouting of two offsite transmission lines to avoid environmental

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[129] Id. at 281–83.

[130] Id. at 283–84.

[131] Id. at 283.

[132] Atomic Energy Act of 1954, 42 U.S.C. § 2011 et seq. (2012).

[133] Pub. Serv. Co. of N.H. v. NRC, 582 F.2d 77, 82 (1st Cir. 1978). See discussion supra Section I(C).

impacts on marshlands, tree species, and migratory waterfowl.[134] Two years later, the Sixth Circuit also upheld the Commission's authority, unequivocally holding that "1) the regulation of off-site transmission lines is within the Commission's authority under Section 101 of the Atomic Energy Act; and 2) that nothing in the Atomic Energy Act precludes the Commission from implementing, through the issuance of conditional licenses, NEPA's environmental mandate."[135]

The holdings of the First and Sixth Circuits continue to be the law in those jurisdictions. Under those rulings, the NRC may consistently with the AEA and NEPA impose environmental restrictions on transmission lines built to serve nuclear power plants should it choose to do so. The NRC's regulations, including 10 C.F.R. §§ 50.36(b) and 51.107(a)(3), authorize the agency to impose environmental conditions in a license to prevent or mitigate adverse environmental impacts that might otherwise be caused by the construction or operation of a nuclear power plant.[136] "Environmental protection is a central part of NRC's core mission and is in its mission statement."[137] Thus, under Sixth Circuit precedent, "the federal decision-makers have authority to exercise sufficient control or responsibility over the non-federal project so as to influence the outcome of the project."[138]

To be sure, in the 2007 LWA Rule the NRC decided that the building of transmission lines to serve a nuclear power plant would no longer be classified as a construction activity and would no longer require authorization from the NRC.[139] Intervenors have not challenged the Rule and we would be precluded from hearing such a challenge had they done so, absent a

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[134] Pub. Serv. Co. of N.H., 582 F.2d at 80.

[135] Detroit Edison, 630 F.2d at 452.

[136] Progress Energy Fla., Inc. (Levy Cnty. Nuclear Plant, Units 1 & 2), LBP-13-4, 77 NRC 107, 217 (2013).

[137] Id.

[138] Sw. Williamson Cnty., 243 F.3d at 281.

[139] 10 C.F.R. § 50.10(a)(2)(vii).

showing of special circumstances.[140] But an agency's narrowed construction of its statutory authority, as distinct from an express prohibition by Congress, may not be used to limit the agency's obligations under NEPA.[141] "NEPA's legislative history reflects Congress's concern that agencies might attempt to avoid any compliance with NEPA by narrowly construing other statutory directives to create a conflict with NEPA. Section 102(2) of NEPA therefore requires government agencies to comply 'to the fullest extent possible.'"[142] The Supreme Court has explained that this statutory directive was "neither accidental nor hyperbolic."[143] Thus, courts have held that NEPA obligations supplement existing statutory authority and "must be complied with to the fullest extent, unless there is a clear conflict of statutory authority."[144] In short, absent clear conflict an agency cannot interpret its way out of its NEPA responsibilities.

Also, although the NRC now takes the position that it lacks authority to impose environmental restrictions on transmission corridors, Border Power Plant Working Group supports the view that the transmission corridor impacts should have been analyzed as a direct effect of the NRC action even under that new interpretation.[145] In that case, an environmental group challenged two federal agencies' issuance of permits and rights-of-way allowing two

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[140] 10 C.F.R. § 2.335.

[141] Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172, 1213 (9th Cir. 2008); Sierra Club v. Mainella, 459 F. Supp. 2d 76, 105 (D.D.C. 2006) (distinguishing agency NEPA responsibilities in situations where "an agency has 'no ability' because of lack of 'statutory authority' to address the impact" with situations where an agency "is only constrained by its own regulation from considering impacts").

[142] Ctr. for Biological Diversity, 538 F.3d at 1213 (quoting Forelaws on Bd. v. Johnson, 743 F.2d 677, 683 (9th Cir.1985)). See also Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla., 426 U.S. 776, 787 (1976) (quoting House and Senate Conferees, who inserted the "fullest extent possible" language into NEPA, to say that "no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance").

[143] Flint Ridge Dev. Co., 426 U.S. at 787.

[144] Calvert Cliffs, 449 F.2d at 1115.

[145] See Border Power Plant Working Grp. v. U.S. Dep't of Energy, 260 F. Supp. 2d 997, 1012–18 (S.D. Cal. 2003).

utilities to build electricity transmission lines to connect new power plants in Mexico with the power grid in southern California. The Mexican plants were outside the jurisdiction of the federal agencies. Nevertheless, the district court held that increased air pollution in California resulting from two "export turbines" at one of the Mexican plants was a direct effect of the new transmission lines, and that DOE therefore had to evaluate the air pollution impacts under NEPA.[146] The same analysis applies here. Although the NRC has renounced regulatory jurisdiction over the transmission lines, the construction of the lines and the resulting environmental impacts will be a direct effect of the COL, should it be issued, and must be analyzed as such under NEPA.

Both the Staff and Applicant emphasize that the offsite transmission lines will be owned and operated by ITC Transmission and not by DTE.[147] For this reason, Applicant notes, "Staff relied on publicly available information and reasonable expectations of the configurations that ITC Transmission would likely use for the offsite corridor based on standard industry practice."[148] But the significance placed on this fact by Staff and Applicant appears misplaced. Multiple projects are often deemed connected actions despite being undertaken by separate entities.[149] In fact, projects undertaken by separate entities may still be considered connected actions even in the absence of formal agreement between the parties.[150] After all, "NEPA

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[146] Id.

[147] Staff Response at 10; Applicant Brief at 5.

[148] Applicant Brief at 5.

[149] See, e.g., Hammond v. Norton, 370 F. Supp. 2d 226, 247–53 (D.D.C. 2005) (ruling that the Bureau of Land Management improperly segmented consideration of two pipeline projects being constructed by two separate companies despite evidence that they lacked independent utility and thus qualified as connected actions); Natural Res. Def. Council v. Hodel, 865 F.2d 288 (D.C. Cir. 1988) (rejecting as inadequate an FEIS that failed to consider the cumulative impacts on migratory species caused by multiple outer-continental lease sales in the California and Alaska regions).

[150] See Hammond, 370 F. Supp. 2d at 245, 251 (making clear that a determination that actions are connected does not rest upon formal agreement between the entities undertaking the

mandates a case-by-case balancing judgment on the part of federal agencies," not the private parties seeking federal action.[151] If it is established that ITC Transmission's proposed new transmission corridor lacks independent utility, the Staff should have included it within the scope of the proposed action, analyzed its impacts as direct effects of the NRC action, and evaluated alternatives available for reducing or avoiding any adverse environmental effects.[152]

4. The 2007 LWA Rule and Statement of Considerations

According to DTE, "the Commission has specifically directed, by regulation, that the impacts of 'preconstruction' activities be addressed cumulatively with the impacts authorized by a combined license," and that "[t]his is precisely the approach taken by the NRC Staff."[153] That argument would have merit only if the provision cited by DTE, 10 C.F.R. § 51.45(c), repealed, materially altered, or directed the Staff to ignore the NRC and CEQ regulations previously described which require that the proposed action that is the subject of an agency EIS include all "connected actions" as defined in 40 C.F.R. § 1508.25.[154] Section 51.45(c) contains no language to that effect. Concerning preconstruction activities, it merely provides that

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actions, and noting EPA's argument that "CEQ does not require a formal agreement in order for two projects to be defined as connected actions").

[151] Calvert Cliffs, 449 F.2d at 1123.

[152] We note, additionally, that nothing in the FEIS suggests that the NRC Staff gave much, if any, consideration to EPA's suggestion that offsite transmission lines should have been considered as a connected action. See FEIS, app. E, at E-42 to E-43. While NEPA does not require "an agency preparing an EIS to respond to EPA concerns, [an agency's] failure even to address them in the EIS at the very least brings into question the sufficiency of the agency's analysis." Hammond, 370 F. Supp. 2d at 251 (citing Citizens Against Burlington v. Busey, 938 F.2d 190, 201 (D.C. Cir. 1991) (stating that an agency "does not have to follow the EPA's comments slavishly—it just has to take them seriously."); Natural Res. Def. Council v. Hodel, 865 F.2d at 297–99 (stating that the court considered the failure to meaningfully address EPA concerns in its decision that FEIS did not comply with NEPA); and Alaska v. Andrus, 580 F.2d at 475 (stating that EPA's determination that the EIS was unsatisfactory "did give rise to a heightened obligation on [the lead agency's] part to explain clearly and in detail its reasons for proceeding")).

[153] Applicant Brief at 12.

[154] See supra Section II(B)(1).

> [a]n environmental report prepared at the . . . combined license stage under § 51.50(c) must include a description of impacts of the preconstruction activities performed by the applicant at the proposed site (i.e., those activities listed in paragraph (1)(ii) in the definition of 'construction'' contained in § 51.4), necessary to support the construction and operation of the facility which is the subject of the . . . combined license application. The environmental report must also contain an analysis of the cumulative impacts of the activities to be authorized by the . . . combined license in light of the preconstruction impacts described in the environmental report.[155]

This direction concerns the content of the ER, a document prepared by the applicant. The definition of the scope of the EIS, however, is the responsibility of the NRC Staff.[156] For the purpose of defining the scope of the proposed action that is to be the subject of an EIS, the Staff is instructed to use 40 C.F.R. § 1502.4, which directs that "[p]roposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement."[157] Section 51.45(c) does not alter that obligation or the obligation to include within the scope of the proposed action all connected actions as defined in § 1508.25.

DTE also relies on the Statement of Considerations for the 2007 LWA Rule (the "SOC").[158] Courts regularly rely upon the preamble in interpreting an agency rule.[159] Similarly, the Commission often refers to the Statement of Considerations as an aid in interpreting the agency's regulations.[160] But the preamble, unlike the rule itself, does not have the force of law

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[155] 10 C.F.R. § 51.45(c).

[156] Id. §§ 51.28, 51.29.

[157] 40 C.F.R. § 1502.4. Under 10 C.F.R. § 51.29(a)(1), the Staff is directed to use that provision to determine the scope of the proposed action that is the subject of an agency EIS.

[158] See Applicant Brief at 11–12.

[159] See Nat'l Mining Ass'n v. EPA, 59 F.3d 1351, 1355 n.7 (D.C. Cir. 1995).

[160] Pa'ina Haw., LLC (Materials License Application), CLI-08-3, 67 NRC 151, 163 n.46 (2008) (quoting Duke Energy Corp. (Catawba Nuclear Station, Units 1 & 2), CLI-04-11, 59 NRC 203, 208 n.12 (2004)).

and may not be used to expand the reach of the regulations.[161] Thus, the SOC, while it may be used to interpret any ambiguous text of the 2007 LWA Rule, cannot add new requirements or prohibitions. As we have explained, § 51.45(c) contains no language modifying the Staff's obligation under NRC and CEQ regulations to include connected actions in the scope of the proposed action, and the SOC cannot interpret what the regulation itself does not contain.

The SOC also does not invalidate the reasoning underlying the decisions of the First and Sixth Circuits that upheld the NRC's authority to impose environmentally protective restrictions on transmission lines. The SOC discusses the Commission's reasons for changing its interpretation of its statutory authority, but it did not address those rulings of the courts of appeal. The Commission acknowledged that its previous broad assertion of regulatory jurisdiction over activities now classified as "preconstruction" was "a reasonable implementation of NEPA as understood in 1972 . . . ."[162] The SOC also stated that the NRC's broad definition of "construction" in the pre-2007 version of the 10 C.F.R. § 50.10(c) was originally added to Part 50 "due to the interpretation that the enactment of NEPA required the NRC to expand its permitting/licensing authority."[163] But the Commission stated that "subsequent judicial decisions have made it clear that NEPA is a procedural statute and does not expand the jurisdiction delegated to an agency by its organic statute."[164]

Although the NRC concluded it had overestimated NEPA's legal effect, the federal courts of appeal decisions upholding the NRC's authority to impose environmental restrictions on transmission lines were not premised on the theory that NEPA had expanded the jurisdiction

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[161] See A & E Coal Co. v. Adams, 694 F.3d 798, 802 (6th Cir. 2012) (explaining that the preamble "merely explains why the regulations were amended" and did "not expand their reach"). See also Curators of the University of Missouri (TRUMP-S Project), CLI-95-1, 41 NRC 71, 98 (1995) (stating that NRC guidance cannot prescribe requirements).

[162] 72 Fed. Reg. at 57420.

[163] Id. at 57427.

[164] Id.

delegated to the NRC by its organic statute (the AEA). In Detroit Edison, the Sixth Circuit upheld the Commission's authority to regulate transmission lines in order to prevent environmental damage, making clear that this authority was founded upon the AEA:

> The Commission is empowered by [the AEA] to regulate off-site transmission lines; in the exercise of that power it must pursue the objectives of the Atomic Energy Act and NEPA simultaneously. Under the Atomic Energy Act, the Commission can issue conditional licenses for regulatory purposes. There can be no objection to its use of the same means to achieve environmental ends as well.[165]

In its brief in Detroit Edison, the NRC argued that NEPA requires consideration of all significant environmental impacts of a proposed action, including off-site transmission lines that are solely attributable to a proposed nuclear power plant.[166] The NRC also argued that the Commission is required "to administer the Atomic Energy Act in accordance with the 'national policy of environmental protection'" and, therefore, "must have the authority to use its license conditioning power when necessary to protect the environment."[167] Additionally, the NRC asserted that the AEA and NEPA provide independent sources of authority to condition licenses based upon the environmental impacts related to off-site transmission lines. But the court of appeals, in ruling that the NRC had appropriately interpreted the AEA to include regulatory authority over attendant transmission lines, made clear that "[w]e need not, and do not, decide whether NEPA is an independent source of substantive jurisdiction."[168] Thus, the court did not base its holding on the theory that NEPA had expanded the NRC's jurisdiction beyond that already provided in the AEA.

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[165] Detroit Edison, 630 F.2d at 454.

[166] Brief for Respondents at 10, Detroit Edison, 630 F.2d 450 (No. 78-3196). The Brief was also filed on behalf of the United States, represented by the Department of Justice.

[167] Id. at 19.

[168] Detroit Edison, 630 F.2d at 452.

Similarly, the First Circuit did not assume that NEPA had expanded the NRC's jurisdiction. Rather, the court of appeals understood that NEPA required the NRC to construe its existing statutory authority consistently with NEPA's goals:

> NEPA's mandate has been given strict enforcement in the courts, with frequent admonitions that it is insufficient to give mere lip service to the statute and then proceed in blissful disregard of its requirements. Section 102(2)(C) is an "action forcing" provision, which imposes a duty upon federal agencies to act so as to effectuate the purposes of the statute to the fullest possible degree. The directive to agencies to minimize all unnecessary adverse environmental impact obtains except when specifically excluded by statute or when existing law makes compliance with NEPA impossible. As stated by the court in Calvert Cliffs, "Unless (specific statutory) obligations are plainly mutually exclusive with the requirements of NEPA, the specific mandate of NEPA must remain in force." Unless there are specific statutory provisions which necessarily collide with NEPA, the Commission was under a duty to consider and, to the extent within its authority, minimize environmental damage resulting from Seabrook and its transmission lines.[169]

The First Circuit found no "inevitable clash" between the NRC's broad regulatory authority under the AEA and the action-forcing provisions of NEPA.

> Both the Atomic Energy Act of 1954 and the Energy Reorganization Act of 1974 confer broad regulatory functions on the Commission and specifically authorize it to promulgate rules and regulations it deems necessary to fulfill its responsibilities under the Acts. In a regulatory scheme where substantial discretion is lodged with the administrative agency charged with its effectuation, it is to be expected that the agency will fill in the interstices left vacant by Congress. The Atomic Energy Act of 1954 is hallmarked by the amount of discretion granted the Commission in working to achieve the statute's ends. The Act's regulatory scheme "is virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objective." The agency's interpretation of what is properly within its jurisdictional scope is entitled to great deference, and will not be overturned if reasonably related to the language and purposes of the statute.[170]

Based on this understanding, the First Circuit upheld the agency's decision to include transmission lines that serve a nuclear power plant within the definition of "utilization facility" in

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[169] Pub. Serv. Co. of N.H., 582 F.2d at 81 (emphasis added) (footnotes and citations omitted) (quoting Calvert Cliffs, 449 F.2d 1109, 1125 (D.C. Cir. 1971)).

[170] Id. at 82 (citations omitted) (quoting Siegel v. Atomic Energy Comm'n, 400 F.2d 778, 783 (D.C. Cir. 1968)).

42 U.S.C. § 2014(cc).[171] It further held that the NRC could, consistent with its authority under the AEA, impose permit conditions on the routing of the transmission lines in order to further NEPA's mandate.[172] Thus, the First Circuit's ruling, like that of the Sixth Circuit, was not premised on the theory that NEPA had expanded the jurisdiction delegated to the NRC in the AEA.

The SOC states that "the elimination of the blanket inclusion of site preparation activities [including transmission lines] in the definition of construction . . . does not violate NEPA."[173] As we have already stated, we have no authority to consider that issue. But we find nothing in either the text of the LWA Rule or the SOC that prohibits inclusion of the construction and maintenance of a specific transmission line within the scope of the proposed NRC action when those activities qualify as a connected action under the applicable regulations and case law, as they likely do in this instance. This may be an appropriate opportunity for the Commission to clarify whether, in the event of a conflict between general statements in the SOC and the specific law that applies in the jurisdiction where the proposed facility will be located, the Staff and licensing boards should follow the controlling law in the jurisdiction when defining or reviewing the scope of the proposed action.

5. Impact of Excluding Transmission Corridor from the Scope of Proposed Action

DTE and the Staff maintain that the question whether the transmission corridor should have been analyzed as a connected action rather than as part of the cumulative impact analysis

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[171] See id. at 82–83.

[172] Id. at 86 ("In this instance, the Commission used one of its statutory powers in the furtherance of NEPA, whose mandate the Commission must follow. The Commission is under a dual obligation: to pursue the objectives of the Atomic Energy Act and those of the National Environmental Policy Act. 'The two statutes and the regulations promulgated under each must be viewed in Para (sic) Materia.' We find that the Commission correctly discharged its responsibilities here." (citation omitted) (quoting Citizens for Safe Power, Inc. v. NRC, 524 F.2d 1291, 1299 (D.C. Cir. 1975))).

[173] 72 Fed. Reg. at 57427.

is merely of academic interest because, they maintain, the Staff took the required hard look at the corridor's impacts.[174] For several reasons, we are not persuaded that the issue is merely a matter of semantics.

First, excluding the transmission corridor from the scope of the proposed action also removes it from the limitation on actions in 10 C.F.R. § 51.101(a).[175] When an activity is excluded from the scope of the proposed action, the effect is to allow construction to begin – or even be completed – before the agency has completed its NEPA review. But NEPA's purpose "is to influence the decision making process 'by focusing the [federal] agency's attention on the environmental consequences of a proposed project,' so as to 'ensure . . . that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.'"[176] "[W]hen a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered."[177] Thus, the NEPA analysis of the proposed action must be completed before, not after, construction begins. In this case, the Staff has completed the FEIS for Fermi 3 and, as far as the Board is aware, construction of the transmission corridor has not started. But the record of decision has not been issued and, accordingly, the § 51.101(a) limitation on actions remains in effect. Therefore, excluding the transmission corridor from the scope of the proposed action may allow construction of the corridor to begin before the NRC has balanced the benefits of the Fermi 3 project against all of its environmental costs, despite NEPA's goal of a fully informed agency decision before the

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[174] Applicant Brief at 13; Staff Response at 11.

[175] See supra Section II(B)(5).

[176] Colo. Wild, Inc., 523 F.Supp.2d at 1219 (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989)).

[177] Id. (emphasis omitted) (quoting Sierra Club v. Marsh, 872 F.2d 497, 500 (1st Cir. 1989) (Breyer, J.)).

proposed action is authorized.

We are also not persuaded that excluding the transmission corridor from the proposed action had no effect on the depth of the environmental analysis. In Colorado Wild, where the defendants made the same argument as DTE and the Staff, the district court found "fair grounds for litigation regarding Defendants' assertion that the treatment of the highway interchanges and Village development as cumulative impacts in the FEIS was sufficient under NEPA even if these actions should have been treated as 'connected actions' under the statute's implementing regulations."[178] The administrative record reflected "a heated debate" on that issue, and the court concluded that "this debate would not have occurred unless the label attached to these actions made a difference to the content, scope and/or depth of analysis."[179] We similarly find that the Staff's refusal to evaluate the transmission corridor as a connected action may have "made a difference to the content, scope and/or depth of analysis." As we explain in Section II(D) below, the FEIS provided very limited information concerning the transmission corridor's impacts to wetlands, streams, threatened and endangered species, and historical and cultural resources. By contrast, the FEIS provides a far more in-depth analysis of the impact of the construction and operation of Fermi Unit 3 on those resources.[180] It is likely that the Staff's decision to exclude the transmission corridor from the scope of the proposed action influenced the far more limited analysis it received.

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[178] Colo. Wild, Inc., 523 F.Supp.2d at 1225.

[179] Id. at 1225–26.

[180] See, e.g., FEIS at 2-33 to 2-44 and 2-66 to 2-78 (describing impacts on wetlands and aquatic resources); id. at 2-48 to 2-59 and 2-82 to 2-125 (describing impacts on terrestrial and aquatic species and habitats); id. at 2-195 to 2-207 (describing impacts on historic and cultural resources).

6. Conclusion

There is a serious question whether the transmission corridor is a connected action under NEPA and whether the Staff should have evaluated its environmental impacts as a direct effect of the proposed action.

D. There is a serious question whether the Staff's consideration of environmental impacts related to the transmission corridor, performed as a cumulative impact review, satisfies NEPA's hard look requirement.

Although the Staff did not consider the transmission corridor to be part of the proposed action, it included some information about the corridor's environmental impacts in its evaluation of cumulative impacts. The Staff and DTE claim that this analysis was sufficient to satisfy NEPA requirements. We find, however, a serious question whether those requirements were satisfied.

"The principal goals of an FEIS are twofold: to force agencies to take a 'hard look' at the environmental consequences of a proposed project, and, by making relevant analyses openly available, to permit the public a role in the agency's decision-making process."[181] The FEIS must comply with Sections 102(2)(A), (C), and (E) of NEPA and the agency's Part 51 regulations.[182] NEPA Section 102(2)(C) requires that an EIS provide a detailed statement concerning among other things, "the environmental impact of the proposed action," "any adverse environmental effects which cannot be avoided should the proposal be implemented," and "any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."[183] The Part 51 regulations impose equivalent requirements.[184] There is a serious question whether the Staff satisfied those requirements

[181] Claiborne, CLI-98-3, 47 NRC at 87 (citing Robertson, 490 U.S. at 349–50; Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 443 (4th Cir. 1996)).

[182] See 10 C.F.R. § 51.107(a)(1).

[183] 42 U.S.C. §§ 4332(C)(i), (ii), (v).

[184] 10 C.F.R. §§ 51.45(b)(1), (2), (5) (listing ER requirements); id. § 51.71 (requiring that the DEIS address the matters specified in § 51.45); id. § 51.90 (requiring that the Staff prepare the FEIS in accordance with the requirements of § 51.71 for a DEIS).

regarding transmission corridor impacts on wetlands, streams, threatened and endangered species, and historical and cultural resources. The Staff acknowledged that, in those areas, it lacked the necessary surveys to determine the extent of impacts to federally and state-listed species, wetlands, and other resources. But, rather than obtaining the necessary information or explaining why it could not be obtained, the Staff assumed that the necessary surveys would be conducted by other agencies in their regulatory reviews, that adequate mitigation to prevent environmental damage would be imposed by those other agencies, and that accordingly the environmental impacts would be minimal. In so doing, the Staff effectively deferred the analysis required by NEPA until a later date and delegated the NRC's NEPA responsibilities to other agencies. An impact statement cannot fulfill its role of providing "a springboard for public comment"[185] if it defers indefinitely and delegates to other agencies the duty to inform the public of the environmental impacts of the proposed action and potential measures to mitigate those impacts.

For example, concerning impacts of the transmission lines on "Important Terrestrial Species," the FEIS acknowledges that the United States Fish and Wildlife Service ("FWS") "identified several terrestrial species that are listed under the [Endangered Species Act] or candidates for listing that could occur in the area of the proposed transmission line corridor, some of which are not known to occur at the Fermi site."[186] The FEIS includes a table listing numerous federally and state-listed species that "[m]ay occur with the Transmission Line Corridor."[187] But the FEIS fails to identify the species that do in fact occur within the corridor and the potential impacts to those species. Instead, it states that "[f]ield surveys of the corridor

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[185] Robertson, 490 U.S. at 349 (citation omitted).

[186] FEIS at 2-61.

[187] Id. at 2-62.

route have not yet been conducted to confirm the presence of any species,"[188] and that no additional monitoring is planned along the proposed transmission line corridor.[189] The FEIS reports that "[p]rior to installation of the offsite transmission line, FWS and [the Michigan Department of Natural Resources] would need to review detailed information on the transmission line corridor. The agencies may, at that time, require surveys of the proposed transmission line corridor for the presence of important species and habitat."[190] In other words, the surveys necessary to determine whether the transmission corridor will harm "important species and habitat" were not conducted during preparation of the FEIS, but may be conducted by other agencies at unknown future dates, which may not be until after the NRC has issued the COL. The Staff failed to explain why it did not require such surveys to assist in preparation of the FEIS.

Similarly, with regard to endangered or threatened freshwater species that may occur in streams crossed by the transmission corridor, the FEIS fails to provide the information necessary to determine either the species that will be affected or the extent of the impacts. For example, concerning the Northern Riffleshell, a federally listed endangered freshwater mussel species, the FEIS explains that "[t]he survival of this species depends on the protection and preservation of suitable habitat host fish species," but that "it is currently unknown if appropriate habitats are present in stream areas that are crossed by the proposed transmission line corridor."[191] Concerning the Purple Lilliput, a freshwater mussel species listed as endangered by the State of Michigan, the FEIS reports that "it is currently unknown if appropriate habitats

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[188] Id. at 2-61.

[189] Id. at 2-65.

[190] Id. at 2-61.

[191] Id. at 2-104.

are present in stream areas that are crossed by the proposed transmission line corridor."[192] As with terrestrial species, the FEIS includes a table (Table 2-16) identifying "Federally and State-listed aquatic species that have a potential to occur along the new transmission line route . . . ."[193] But the Staff reported that "it is not known whether suitable habitat or populations of species identified in Table 2-16 occur in portions of the drainage that would be crossed by the proposed transmission route."[194] Again, rather than identifying the species that the transmission corridor will impact and the nature of the impacts, the FEIS defers the analysis until some unknown future date, informing the reader that "[t]he [Michigan Department of Environmental Quality ("MDEQ")] and/or USACE may require surveys of the proposed transmission line corridor to evaluate the presence of important species and habitat."[195] As with terrestrial species, the Staff failed to explain why it did not require such surveys so that the necessary information could have been included in the FEIS.

The East Lansing Field Supervisor of the FWS, in his comments on the DEIS, was unable to concur in the Staff's conclusions regarding the impact of the transmission corridor on threatened and endangered species:

> You have also made a determination of effects for the 29.4 miles of proposed transmission lines associated with the project. We are not able to concur with your effects determinations for the proposed transmission lines at this time. Your evaluation indicates that terrestrial and/or aquatic surveys for listed species will be conducted once the location of the transmission line corridors have been finalized. We will defer concurrence with your determinations until corridor locations are finalized and we have reviewed the results of future surveys. We also recommend that future surveys include those for the Indiana bat and for listed mussel species at stream crossings when the stream bottom is to be disturbed. Future consultation should be completed prior to submission of Michigan Department of Environmental Quality and/or the Army Corps of Engineers permit applications for stream crossings or wetland fill associated with

[192] Id. at 2-105.

[193] Id. at 2-101, 2-126.

[194] Id. at 2-126.

[195] Id. at 2-126.

the transmission line towers.[196]

The FEIS also states that the NRC, in conjunction with the USACE, chose to comply with the National Historic Preservation Act ("NHPA") through the NEPA process.[197] As the lead Federal Agency in this process, the NRC has responsibility for determining potential impacts on the cultural environment under NEPA and on historic and cultural resources that may qualify for the National Register of Historic Places ("NRHP") under NHPA § 106.[198] However, as with other impacts, the FEIS fails to fully evaluate the impact of offsite transmission lines on these historic and cultural resources. Despite acknowledgement that "[t]he proposed new approximately 11-mi transmission line route . . . has been assessed as having a moderate to high potential for identifying archaeological resources . . ., no Phase I cultural resource investigations were conducted" during DTE's preparation of the ER.[199] Though NRC subsequently conducted 106 consultations with interested federal, state, and tribal entities, the NRC did not consult on the impact of offsite transmission lines because it does not consider "the building of transmission lines [to be] an NRC-authorized activity" and considers the "proposed transmission lines to be outside the NRC's [area of potential effects]."[200] Thus, the Staff states only that there is an "approximately 11-mi portion of the proposed offsite transmission line route [that] will require a new transmission line route and may result in impacts on historic and/or cultural resources" that "could be minor" or "could be greater."[201]

Despite the lack of essential information in these and other areas, the Staff concluded

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[196] Id., app. F, at F-23.

[197] Id. at 2-193.

[198] Id. at 5-91.

[199] Id. at 2-207.

[200] Id. at 2-212.

[201] Id. at 4-101 to 4-102.

that the environmental impacts of the transmission corridor would be minimal. In large part, it relied on permits and certifications it assumed would be issued and enforced by other federal and state agencies. For example, concerning impacts on federally and state-listed aquatic species, the Staff stated that

> [b]uilding of offsite transmission lines could affect Federally and State-listed organisms in the vicinity of stream crossings in the same ways as described in the previous section for commercially and recreationally important species. Additional regulatory review of proposed plans for construction of the needed transmission lines, which would be built, owned, and maintained by ITC Transmission, may be conducted by the MDEQ and/or USACE, and potential impacts on Federally and State-listed aquatic species are expected to be addressed through mitigation measures and [Best Management Practices ("BMPs")] required under issued permits.[202]

The Staff's conclusion that wetland impacts would be "minimal" similarly relied on permits and mitigation it assumed would be required by other agencies:

> A conceptual transmission line corridor has been identified, but wetland delineation surveys have not yet been conducted to determine the precise locations and extent of wetlands. Permanent impacts on wetland areas would be mitigated according to a wetland mitigation plan ITC Transmission would develop in coordination with the MDEQ and/or USACE, as necessary. Any mitigation measures required for the impacts are expected to be determined by ITC Transmission in coordination with applicable regulatory agencies, which may include the MDEQ and/or USACE, at the time permit applications are submitted.[203]

The Staff also stated:

> Offsite hydrological alterations are associated with the proposed new or expanded transmission line corridors where the lines cross wetlands and drainages. The impacts of hydrological alterations resulting from both onsite and offsite construction activities would be localized and reduced with the implementation of BMPs and mitigation measures required by the necessary permits and certifications. Any impacts on USACE jurisdictional water resources associated with the compensatory mitigation construction activities proposed by Detroit Edison would be evaluated by the USACE during its permit evaluation process.[204]

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[202] Id. at 4-56 (emphasis added).

[203] Id. at 4-44 to 4-45 (emphasis added).

[204] Id. at 4-15 (emphasis added).

As to impacts on historic and cultural resources, the Staff declared that "any further investigations to identify the presence of cultural and historic resources and to evaluate the NRHP-eligibility of such resources would be the responsibility of ITC Transmission, who would conduct such investigations in accordance with applicable regulatory and industry standards to assess impacts."[205]

Based on the foregoing review of the FEIS, the Board has identified the following probable deficiencies.

1. Unavailable or Incomplete Information

The FEIS repeatedly states that the NRC lacked the information necessary to fully evaluate the environmental impacts associated with offsite transmission lines. The FEIS failed to address CEQ's NEPA regulation requiring an agency to do more than simply state that necessary information is unavailable[206] -- a regulation that "clearly contemplates original research if necessary."[207] A determination of minimal environmental impact would make little sense when an agency lacks essential information and has not sought to compile it through independent research. To rule otherwise "would turn NEPA on its head, making ignorance into a powerful factor in favor of immediate action where the agency lacks sufficient data."[208] The

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[205] Id. at 4-102.

[206] 40 C.F.R. § 1502.22. The regulation requires an agency to acquire the information that is lacking if it is "essential to a reasoned choice" and "costs of obtaining it are not exorbitant." If the costs are exorbitant, the regulation still requires the agency to state that the information is unavailable, explain the relevance of the unavailable information, summarize existing credible scientific evidence, and evaluate potential impacts.

[207] Save Our Ecosystems v. Clark, 747 F.2d 1240, 1249 (9th Cir. 1984) ("Federal agencies routinely either do their own studies or commission studies of the particular area in which a proposed project is to be located. Almost every EIS contains some original research. And, almost every time an EIS is ruled inadequate by a court it is because more data or research is needed."). The court cited district court interpretations that have imposed the same NEPA requirement to conduct original research, if necessary. See, e.g., Montgomery v. Ellis, 364 F. Supp. 517, 528 (N.D. Ala.1973) (stating that "NEPA requires each agency to undertake research needed adequately to expose environmental harms").

[208] Sierra Club v. Norton, 207 F. Supp. 2d 1310, 1334–35 (S.D. Ala. 2002).

FEIS makes no effort to explain why the NRC could not obtain the information, spurning analysis in favor of conclusory statements about the lack of environmental impact and assurances that any potential impacts will be remedied in the future. But, as the First Circuit has stated, "[a] conclusory statement unsupported by . . . explanatory information of any kind not only fails to crystallize issues, but affords no basis for a comparison of the problems involved with the proposed project and the difficulties involved in the alternatives."[209]

2. Reliance on Anticipated Certifications

As previously described, the Staff assumed in the FEIS that because the transmission corridor will require permits from various federal and state agencies, the construction and operation of the transmission corridor will have only small or minimal impacts on wetlands, streams, and endangered or threatened species. There is a significant question whether such blanket reliance on predicted future action by other regulatory agencies is sufficient to satisfy NEPA's hard look requirement.

In Calvert Cliffs Coordinating Committee, Inc. v. Atomic Energy Commission, the D.C. Circuit explained why merely referencing an actual or anticipated certification by another agency fails to satisfy NEPA requirements:

> Certification by another agency that its own environmental standards are satisfied involves an entirely different kind of judgment [from that required by NEPA]. Such agencies, without overall responsibility for the particular federal action in question, attend only to one aspect of the problem: the magnitude of certain environmental costs. They simply determine whether those costs exceed an allowable amount. Their certification does not mean that they found no environmental damage whatever. In fact, there may be significant environmental damage (e.g., water pollution), but not quite enough to violate applicable (e.g., water quality) standards. Certifying agencies do not attempt to weigh that damage against the opposing benefits. Thus the balancing analysis remains to be done. It may be that the environmental costs, though passing prescribed standards, are nonetheless great enough to outweigh the particular economic and technical benefits involved in the planned action. The only agency in a

[209] Silva v. Lynn, 482 F.2d 1282, 1285 (1st Cir. 1973) (citations omitted).

> position to make such a judgment is the agency with overall responsibility for the proposed federal action-the agency to which NEPA is specifically directed.[210]

The D.C. Circuit's analysis is fully applicable to the present case. For example, the Staff assumed that damage to wetlands and other jurisdictional waters of the United States would be minimal because permits from the Corps would be required. But the Corps' regulations do not require that it reduce all impacts to a minimal level. When reviewing an application for a 404 permit under the Clean Water Act, the Corps evaluates whether the issuance of the permit is in the public interest, weighing all relevant factors, including economic, environmental, and aesthetic concerns.[211] The Corps may not issue a permit if there exists a "practicable alternative . . . which would have less adverse impact on the aquatic system," the permit would cause "significant degradation of the water of the United States," or "appropriate and practicable" mitigation has not been undertaken.[212] However, the regulations governing Corps review do not require that mitigation measures insure minimal environmental impacts, as the FEIS seems to suggest.

Moreover, the NRC's Part 51 regulations prohibit such blanket reliance on Clean Water Act permits:

> Compliance with the environmental quality standards and requirements of the Federal Water Pollution Control Act (imposed by EPA or designated permitting states) is not a substitute for, and does not negate the requirement for NRC to weigh all environmental effects of the proposed action, including the degradation, if any, of water quality, and to consider alternatives to the proposed action that are available for reducing adverse effects.[213]

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[210] Calvert Cliffs, 449 F.2d at 1123.

[211] 33 C.F.R. §§ 320.4(a)(1), 323.3(g).

[212] 40 C.F.R. §§ 230.10(a), (c), (d).

[213] 10 C.F.R. § 51.71(d) & n.3.

The Staff's reliance on predicted future regulation is also similar to the argument that the D.C. Circuit rejected in New York v. NRC.[214] The NRC argued that its environmental assessment did not need to deal with the potential impacts of leaks from spent fuel pools because its monitoring and regulatory compliance program would prevent such leaks. The court stated:

> That argument . . . amounts to a conclusion that leaks will not occur because the NRC is "on duty." With full credit to the Commission's considerable enforcement and inspection efforts, merely pointing to the compliance program is in no way sufficient to support a scientific finding that spent-fuel pools will not cause a significant environmental impact during the extended storage period.[215]

Similarly, in the FEIS, the Staff relied on compliance programs of other federal and state agencies to support its findings that the impact of the transmission corridor upon environmental resources will be small or minimal. Such blanket reliance is subject to serious question.

3. Inadequate Analysis of Mitigation

The FEIS's limited discussion of mitigation suffers from the same problem as its analysis of environmental consequences. Courts have held that an EIS must include "a serious and thorough evaluation of environmental mitigation options."[216] "Mitigation must be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated."[217] Rather than identifying and evaluating potential mitigation options, the FEIS merely assumes that mitigation for the transmission corridor's impacts to wetlands, streams, and threatened and endangered species will be adequately addressed in permit reviews to be conducted by other agencies. As a result, the FEIS fails to provide a detailed evaluation of potential mitigation

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[214] New York v. NRC, 681 F.3d at 481.

[215] Id.

[216] Miss. River Basin Alliance v. Westphal, 230 F.3d 170, 178 (5th Cir. 2000).

[217] Id. at 176–77 (quoting Robertson, 490 U.S. at 352).

measures, as required, but only a series of predictions that the issue will be adequately addressed in other reviews.

4. Conclusion

There is a serious question whether the analysis of transmission corridor impacts in the FEIS satisfies NEPA's hard look requirement.

E. Sua Sponte Review is Warranted

We have explained that the two issues the Board has identified raise serious factual and legal questions regarding the Staff's compliance with NEPA. Those issues can readily be distinguished from those likely to arise in the ordinary case. First, the Staff's failure to include the transmission corridor as part of the proposed action significantly reduced its scope, both in terms of the total area affected and the environmental resources that would be impacted. The Staff effectively eliminated from the proposal nearly half of the total acreage that will be affected by the entire project.[218] The Staff's narrow definition also meant that potential impacts to important environmental resources were excluded from the scope of the proposed federal action. For example, as EPA noted in its comments on the FEIS, the construction and maintenance of the new transmission lines and substations are estimated to impact "over 1000 acres of habitat, including over 93 acres of impacts to forested wetlands."[219] The construction and maintenance of the new transmission lines will also potentially impact streams, threatened and endangered species, and historic and cultural resources. Given the size of the transmission corridor and the environmental resources it will affect, the corridor clearly represents a major component of the environmental impact of the Fermi Unit 3 project.

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[218] The FEIS estimates the total acreage of the transmission corridor as 1069.2 acres. FEIS at 2-47 (Table 2-7). The Fermi site as defined in the FEIS (which includes the entire property owned by DTE, not just the site of Fermi Unit 3) is 1260 acres. FEIS at 2-5.

[219] EPA Comments on FEIS at 1.

The Staff might have compensated for its narrow definition of the proposed action by including in the FEIS a thorough analysis of the potential environmental impacts of the transmission corridor, as the agency committed to do in the SOC.[220] But the Staff instead deferred major components of the required analysis to other agencies that it assumed would eventually undertake the necessary surveys and develop appropriate mitigation -- even though such regulatory actions, even if they occur as predicted, may not take place until after the COL is issued. This gives rise to the problem that the rule against segmentation seeks to avoid, "when the environmental impacts of projects are evaluated in a piecemeal fashion and, as a result, the comprehensive environmental impacts of the entire Federal action are never considered or are only considered after the agency has committed itself to continuation of the project." [221]

The Appeal Board observed that "in inquiring on its own initiative into the transmission line question, that Board was discharging an important function assigned to it. Licensing boards have independent responsibilities in the realm of the enforcement of the NEPA command; i.e., their role is not confined to the arbitration of those environmental controversies as may happen to have been placed before them by the litigants in the particular case.[222] Though this responsibility has changed -- now requiring Commission approval before a board may exercise its responsibility -- the authority still exists, as the Commission has made clear.[223] This authority

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[220] 72 Fed. Reg. at 57417, 57421.

[221] 72 Fed. Reg. at 57427–28.

[222] Tenn. Valley Auth. (Hartsville Nuclear Power Plant, Units 1A, 2A, 1B & 2B) ALAB-380, 5 NRC 572, 575 (1977).

[223] Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), CLI-82-20, 16 NRC 109 (1982). The Appeal Board has likewise stressed the need for licensing boards to judiciously exercise the *sua sponte* authority when faced with a serious, and unraised, issue. La. Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076 1111-12 (1983) (noting that Zimmer should not be read to present an "insurmountable barrier" to the exercising of *sua sponte* authority).

cannot reasonably be limited to only a situation which "involves a significant environmental impact of a type not considered previously" and "could destabilize an environmental resource or . . . involve[s] severe adverse environmental impacts."[224] A serious environmental issue also exists when an FEIS only cursorily deals with important environmental issues and concludes that impacts will be small based largely on unavailable and incomplete information and predicted future certifications from other agencies. A serious issue is also presented when the Staff's NEPA analysis significantly understates the scope of the proposed federal action, particularly when it does so on a basis that conflicts with the law of the federal judicial circuit where the new facility will be located. Moreover, as justification for the agency's rule change excluding transmission lines and other pre-construction activities from the scope of its proposed action, the NRC committed that "the effects of the non-Federal activities would be considered during any subsequent 'cumulative impacts' analysis."[225] It is at least questionable whether the Staff's analysis of the impact of offsite transmission lines satisfies this commitment. The Staff's alleged failure to live up to a commitment the NRC made to justify a significant change in policy is a serious issue that a board should be permitted to address.

Although the FEIS may be deficient in significant respects, a contested hearing may enable the Board to cure those deficiencies and thus bring the agency into compliance with NEPA and 10 C.F.R. Part 51. "Boards frequently hold hearings on contentions challenging the staff's final environmental review documents . . . . In such cases, '[t]he adjudicatory record and Board decision (and . . . any Commission appellate decisions) become, in effect, part of the FEIS.'"[226] Thus, the Staff's FEIS, along with the adjudicatory record, becomes the relevant

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[224] Applicant Brief at 9.

[225] 72 Fed. Reg. at 57417.

[226] Nuclear Innovation N. Am. LLC (S. Tex. Project, Units 3 & 4) CLI-11-06, 74 NRC 203, 208–09 (2011) (citing Claiborne, CLI-98-3, 47 NRC at 89 and Phila. Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-819, 22 NRC 681, 705–07 (1985)).

record of decision for the environmental portion of the proceeding.[227] Federal courts of appeal have approved of this process in which an EIS is effectively amended through the adjudicatory process.[228] The Board's review would encompass all pertinent information properly before it, including the FEIS and the witness testimony and exhibits that were received into evidence at the evidentiary hearing. The Board would base its decision on whether the FEIS complies with NEPA on those sources of information, and that decision, along with the rest of the record for this proceeding, would in effect become part of the FEIS.

The Staff and DTE maintain, however, that if any further inquiry needs to be made concerning the issue raised by Contention 23, it should be made by the Commission during the mandatory hearing (also referred to as an "uncontested hearing") rather than in a contested hearing.[229] But the mandatory hearing ordinarily takes place at the end of the licensing proceeding.[230] If the FEIS is found deficient at that point, the need to cure the deficiencies through amendment of the FEIS could substantially delay the licensing process. The Board, by contrast, can minimize the potential delay by taking up the issue as soon as the Commission authorizes *sua sponte* review.[231]

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[227] See, e.g., Pac. Gas & Electric Co. (Diablo Canyon Power Plant Indep. Spent Fuel Storage Installation), CLI-08-26, 68 NRC 509, 526 (2008), petition for review denied on other grounds, San Luis Obispo Mothers for Peace v. NRC, 635 F.3d 1109 (9th Cir. 2011).

[228] New England Coal. on Nuclear Pollution v. NRC, 582 F.2d 87, 93–94 (1st Cir. 1978); Citizens for Safe Power, 524 F.2d at 1294 n.5. See also Ecology Action v. Atomic Energy Comm'n, 492 F.2d 998, 1001–02 (2d Cir. 1974).

[229] See Staff Response at 3, 12–16; Applicant Brief at 2 n.5.

[230] The Staff's target for completing the FSER is July 2015, so the mandatory hearing will not take place before mid-2015 at the earliest. Application Review Schedule, http://www.nrc.gov/reactors/new-reactors/col/fermi/review-schedule.html.

[231] In Zimmer, the Commission ordered a Licensing Board not to exercise *sua sponte* authority because the Commission had already initiated an "ongoing investigation" to deal with the issues raised. Zimmer, CLI-82-20, 16 NRC at 110. Here, by contrast, the NRC Staff has completed the FEIS, it has provided no indication of any intent to revise the document, and the Commission has not instructed the Staff to reconsider the transmission line issue.

Furthermore, the uncontested hearing, unlike a contested hearing, would make it more difficult to cure deficiencies in the FEIS through the hearing process. Although several federal courts of appeal have accepted that a contested hearing may cure deficiencies in the FEIS,[232] no court of appeals has given the same effect to an uncontested hearing. The function of the uncontested hearing is only to review the adequacy of the Staff's work, not to make a de novo inquiry into NEPA issues.[233] Thus, an uncontested hearing would make it more difficult to cure deficiencies in the FEIS by, for example, developing relevant information on the environmental impacts of the transmission corridor that the Staff omitted.

In addition, the uncontested hearing excludes public participation in the review of the FEIS. Because "[t]he scope of the Intervenors' participation in adjudications is limited to their admitted contentions," they are "barred from participation in the uncontested portion of the hearing."[234] Thus, unlike contested proceedings, there is no public participation in an uncontested (i.e., mandatory) hearing. The only participants would be DTE and the Staff, with no opportunity for the Intervenors to offer evidence or to argue their position. Thus, in substance, the Staff and DTE would limit any further inquiry to a hearing in which they will participate but from which the Intervenors will be excluded.

But public participation is essential to the justification for allowing amendment of an FEIS through an agency hearing. In the Limerick licensing proceeding, the Appeal Board had to determine whether the presiding officer's findings and conclusions modified the FEIS in the absence of the agency regulation that had previously required that they be given that effect.[235] The NRC's NEPA regulations require a request for public comment on a DEIS and a

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[232] See supra note 228 and accompanying text.

[233] Dominion Nuclear N. Anna, LLC (Early Site Permit for N. Anna ESP Site), CLI-05-17, 62 NRC 5, 35–36, 39 (2005).

[234] Id. at 49.

[235] Id.

supplement to a DEIS distributed in accordance with 10 C.F.R. § 51.74,[236] and on any supplement to the FEIS prepared pursuant to 10 C.F.R. § 51.92(a) or (b).[237] The intervenor in the Limerick proceeding therefore argued that "NEPA's purpose in providing the opportunity for public comment on an environmental statement [would be] thwarted by board amendment of an [FEIS]."[238] The Appeal Board disagreed because the licensing board's hearing "arguably allows for additional and a more rigorous public scrutiny of the [FEIS] than does the usual 'circulation for comment.'"[239] Given that the opportunity for rigorous public scrutiny of the FEIS was essential to the Appeal Board's decision that the FEIS could be amended through the hearing process, eliminating such public participation would weaken the rationale of that determination.

If the FEIS violates NEPA and Part 51, the Intervenors' failure to file Contention 23 in response to DTE's ER will not excuse the agency's violation. The "primary responsibility for compliance with NEPA lies with the Commission."[240] The issues here concern the scope of the FEIS and its failure to adequately assess the environmental impacts of a critical component of the Fermi 3 project, basic issues that the Staff must correctly evaluate whether or not they were raised by Intervenors.[241] Moreover, Intervenors previously notified the NRC of their concern by filing proposed Contention 23 in response to the DEIS. EPA raised the same concern, arguing that the environmental impacts of the transmission corridor should have been evaluated as direct effects of the proposed action. And the Board itself raised the same issue in its ruling

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[236] 10 C.F.R. § 51.73.

[237] Id. § 51.92(f)(1).

[238] Limerick, ALAB-819, 22 NRC at 707.

[239] Id.

[240] New York v. NRC, 681 F.3d at 482 (citing Pub. Citizen, 541 U.S. at 764). Accord Pa'ina Haw., LLC (Materials License Application), CLI-10-18, 72 NRC 56, 82 (2010).

[241] See 10 C.F.R. § 51.29(a)(1).

holding that the DEIS version of Contention 23 was untimely.[242] The Staff therefore had both the legal obligation to correctly define the scope of the FEIS and ample notice that Intervenors, the EPA, and the Board questioned whether the Staff had adequately fulfilled that obligation. Thus, if Intervenors are correct that the Staff should have analyzed the transmission corridor as a connected action and that the FEIS is materially deficient, Intervenors' failure to file Contention 23 in response to the Applicant's ER will not excuse the agency's potential violation of NEPA and Part 51.[243] It would therefore be in the public interest to address the issues now rather than postponing their resolution indefinitely.

III. CONCLUSION

For these reasons, the Board determines that *sua sponte* review of the two issues previously described is warranted and respectfully requests that the Commission authorize such review.

THE ATOMIC SAFETY
AND LICENSING BOARD
/RA/

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Ronald M. Spritzer, Chairman
ADMINISTRATIVE JUDGE
/RA/

_____
Dr. Anthony J. Baratta
ADMINISTRATIVE JUDGE
/RA/

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Dr. Randall J. Charbeneau
ADMINISTRATIVE JUDGE

Rockville, Maryland
July 7, 2014

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[242] See supra Section I(E).

[243] See Vt. Dep't of Pub. Serv. v. United States, 684 F.3d 149, 156 (D.C. Cir. 2012) (stating that, in an action under the Hobbs Act for review of an NRC final order, exhaustion of remedies is not a jurisdictional requirement).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
DETROIT EDISON COMPANY	)	Docket No. 52-033-COL
	)	
(Fermi Nuclear Power Plant, Unit 3)	)	
	)	
(Combined License)		

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM (Determining that Issues Related to Intervenors' Proposed Contention 23 Merit Sua Sponte Review Pursuant to 10 C.F.R. § 2.340(b) and Requesting Commission Approval) (LBP-14-09)** have been served upon the following persons by Electronic Information Exchange.

Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Ronald M. Spritzer, Chair
Administrative Judge
E-mail: Ronald.Spritzer@nrc.gov

Randall J. Charbeneau
Administrative Judge
E-mail: Randall.Charbeneau@nrc.gov

Kirsten Stoddard, Law Clerk
E-mail: kirsten.stoddard@nrc.gov

Onika Williams, Law Clerk
Email: onika.williams@nrc.gov

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop O-16C1
Washington, DC 20555-0001
Hearing Docket
E-mail: hearingdocket@nrc.gov

Detroit Edison Company
One Energy Plaza, 688 WCB
Detroit, Michigan 48226
Bruce R. Matters, Assistant General Counsel
E-mail:
matersb@dteenergy.com

Docket No. 52-033-COL
MEMORANDUM (Determining that Issues Related to Intervenors' Proposed Contention 23 Merit Sua Sponte Review Pursuant to 10 C.F.R. § 2.340(b) and Requesting Commission Approval) (LBP-14-09)

Winston & Strawn, LLP
1700 K Street, NW
Washington, DC 20006-3817
Counsel for the Applicant
David Repka, Esq.
Rachel Miras-Wilson, Esq
Tyson R. Smith, Esq.
Noelle Formosa, Esq.
Carlos L. Sisco, Senior Paralegal

E-mail:
drepka@winston.com
trsmith@winston.com
rwilson@winston.com
nformosa@winston.com
CSisco@winston.com

Pillsbury Winthrop Shaw Pittman, LLP
2300 N Street, NW
Washington, DC 20037-1122
Counsel for Progress Energy
Robert Haemer, Esq.
E-mail: robert.haemer@pillsburylaw.com

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-15D21
Washington, DC 20555-0001
Marcia Carpentier, Esq.
Sara Kirkwood, Esq.
Robert M. Weisman, Esq.
Anthony Wilson, Esq.
Patrick Moulding, Esq.
Michael Spencer, Esq.
Catherine Scott, Esq.
Megan Wright, Esq.
Nicholas Koontz, Paralegal
marcia.carpentier@nrc.gov
sara.kirkwood@nrc.gov
robert.weisman@nrc.gov
anthony.wilson@nrc.gov
Patrick.Moulding@nrc.gov
michael.spencer@nrc.gov
catherine.scott@nrc.gov
megan.wright@nrc.gov
nicholas.koontz@nrc.gov

OGC Mail Center : OGCMailCenter@nrc.gov

Beyond Nuclear, Citizens for Alternatives to Chemical Contamination, Citizens Environmental, Alliance of Southwestern Ontario, Don't Waste Michigan, Sierra Club et al.
316 N. Michigan Street, Suite 520
Toledo, OH 43604-5627
Terry J. Lodge, Esq.
Michael J. Keegan, Esq.
E-mail: tjlodge50@yahoo.com
E-mail: mkeeganj@comcast.net

Beyond Nuclear
Reactor Oversight Project
6930 Carroll Avenue Suite 400
Takoma Park, MD 20912
Paul Gunter, Director
E-mail: paul@beyondnuclear.org

[Original signed by Clara Sola]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 7th day of July 2014