

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

In the Matter of:)	
)	Docket No. 52-033
The Detroit Edison Company)	
(Fermi Nuclear Power Plant, Unit 3))	August 7, 2014
)	

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**INTERVENORS’ REPLY MEMORANDUM IN SUPPORT OF MOTION
FOR COMMISSION APPROVAL OF LBP-14-09**

Now come Intervenors Beyond Nuclear, *et al.*¹ (hereinafter “Intervenors”), by and through counsel, and reply in support of their “Motion for Commission Approval of LBP-14-09.”

**I. Timeliness of Intervenors’ Objection to Exclusion
of Transmission Corridor from NEPA Analysis Is Irrelevant**

The briefs² of the NRC Staff (“Staff”), DTE Electric Co. (“DTE”), and *amicus* Nuclear Energy Institute (“NEI”) complain that the Intervenors failed to timely raise a contention at the Environmental Report stage about exclusion of the Transmission Corridor (“TC”) from the discussion of direct impacts in the Fermi 3 EIS. Had Intervenors alleged a contention at the outset, NRC Staff and DTE doubtless would have objected that the 2007 Limited Work Authorization regulation changes effectively disconnected the TC from the rest of the Fermi 3

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

²“DTE Brief” at 1, 7; “NEI Brief” at 8.

project as a preconstruction activity outside the NRC’s regulatory jurisdiction. The Staff and DTE made that argument against Intervenors when the latter raised the issue at the DEIS and FEIS stages of this proceeding.³ But the reality is, the timeliness of Intervenors’ bringing of Contention 23 is irrelevant; the TC is simply not “construction” according to NRC regulations, thus any attempt to file a contention would have been futile from the outset. The ASLB has identified a case-specific, factual contradiction to an agency regulation, which is beyond the legal reach of the Intervenors in this proceeding.

**II. Exclusion of the Transmission Corridor from Direct Impacts Analysis
Is a Case-Specific Factual Issue, Not a Generic Challenge to the LWA Regulation**

Inclusion of direct impacts analysis of the TC in the Fermi 3 EIS must happen for case-specific reasons, even if a decision ordering EIS analysis of the TC has implications beyond this COL proceeding. The ASLB has identified for the Commission a sheer violation of NEPA caused in this case by the 2007 changes to the definition of LWA “construction” representing a changed NRC policy as to what activities are Atomic Energy Act (“AEA”) covered. There is agreement that the TC must be addressed in some fashion under NEPA; the question is whether it shall be analyzed for its direct impacts, which are considerable, or for its cumulative impacts from the overshadowing Fermi 3 project, which allow the impacts to be construed as legally minimal even though they will be physically significant and unmistakable.

“Cumulative impact,” according to the Council on Environmental Quality, means:

³The NRC Staff objected to Intervenors’ motion to include the Corridor at the Draft EIS stage, see “NRC Staff Answer to Intervenors’ Motion,” ML 12037A270 (February 6, 2012) pp. 57-58; and also at the FEIS stage, see “NRC Staff Answer in Opposition to Intervenors’ Motion,” ML 13077A427 (March 18, 2013) p. 24. At the FEIS stage, DTE objected to the TC as being preconstruction activity, see “Applicant’s Answer to Proposed New Contentions,” ML 13077A477 (March 18, 2013) p. 24.

. . . . the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions. . . . Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.7. The direct impacts following upon development of the Transmission Corridor would easily comprise a “major federal action” in any other context. The acreage of the undeveloped 11-mile-long by 300-foot-wide swath of land which would be taken by the project is nearly as big as the entire Fermi plant site, itself. Conversion of these 1,069 acres to a right-of-way for transmission lines will require erection of large structures and stringing of mammoth power lines, which will continuously emit gross electrical impulses and will influence plant and animal routines. The disturbances associated with such construction activity will consist of clearance of dozens of acres of wetlands and forested uplands, much of which will have to be prohibited permanently from vegetative regrowth. The TC will consume dozens of acres for switching facilities and other fixtures; will see recurring maintenance activity such as industrial-strength herbicide use, widespread mechanical back-hoeing and bulldozing. There will be permanent destruction of habitat with as-yet poorly-identified impacts on existing flora and fauna. Native burial sites will be destroyed. Viewed as cumulative effects of a supposedly discrete Fermi 3 reactor construction project, the conversion and dedication of the TC to permanent industrial applications obscures the major physical changes to the corridor and derides the need for identification of mitigation measures to reduce the damage from the conversion.

Whether it’s considered “preconstruction” activity, or not, the TC is the *conditio sine qua non* of the Fermi 3 project. Electric lines strung along its 29-mile length will transport power generated by the reactor to the Grid, but the Corridor also will serve as the principal conduit for lines which transmit electricity to Fermi to continuously power the Fermi 3 reactor, safety and

cooling systems. Besides its utilitarian role in the economic success of Fermi 3, the TC must fulfill a vital safety role, contrary to the NRC Staff's misstatement,⁴ as the primary avenue for offsite power to keep Fermi 3 systems running in the event of an onsite loss-of-power crisis.

Viewed in that light, the TC *is* within the scope of the AEA.

Although transmission line construction is now a "preconstruction" feature under the 2007 LWA changes, the TC will only be built if Fermi 3 is built. DTE put it this way:

Preconstruction is not limited to activities that occur prior to NRC-licensed construction. Many preconstruction activities could and probably will be performed concurrently with construction.

DTE Brief at 4, fn. 8 (9/27 of .pdf)

So the reactor project and the transmission corridor are inextricably intertwined. They are two components of a unified project, for safety and utilitarian reasons.

III. The Commission Must Apply NEPA Regulatory Guidance of the Council on Environmental Quality

DTE maintains, at Brief p. 8, fn. 27 (13/27 of .pdf) that "[t]he NRC is not bound by CEQ regulations," ostensibly because the Commission is an "independent" federal agency. But it is beyond cavil that Council on Environmental Quality regulations for the implementation of NEPA "impose a duty on all federal agencies." *Marsh v. Oregon Natural Res Council*, 490 U.S. 360, 372 (1989). The NRC is a federal agency and therefore must answer this call to duty. See also *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979) ("holding that the CEQ's NEPA interpretations are entitled to substantial deference."); accord, *NY v. NRC*, 681

⁴At Staff Brief p. 9, the Staff makes the incorrect assertion that the TC, "in addition to not being an activity controlled by DTE, it is not a safety-related activity or subject to NRC approval. . .," hence outside the coverage of the AEA.

F.3d 471, 476 (2012).

The federal courts have historically held the NRC accountable to the NEPA prohibition against segmentation of a licensed project. *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231, 241 (3rd Cir. 1980) (claim that NRC has segmented an AEA project in violation of NEPA “states a cause of action over which the district courts have subject matter jurisdiction. . .”). More damning to DTE’s argument, however, is the fact that the NRC Staff, in its Brief at 12 and fn. 57, cites the Council on Environmental Quality regulation which defines segmentation (40 C.F.R. § 1508.25(a)) and clearly considers the NRC to be bound by it.

The Commission accords CEQ regulations “substantial deference.” It adopted them, with a few exceptions, in 1984. The Commission considers itself not to be bound by those portions of the CEQ regulations that have some substantive effect on Commission performance of its regulatory functions. 49 Fed. Reg. 9,352 (Mar. 12, 1984); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-02, 33 NRC 61 (1991). So while the NRC considers itself free to ignore the CEQ requirement of providing worst-case scenarios, it is obligated to apply the CEQ segmentation regulations when it regulates.

IV. The Power to Issue Regulations Is Not the Power to Change the Law

The manifest error made by NEI, the Staff and DTE is to assume that by redefining what is AEA-covered activity, the scope of NEPA can be diminished. But the power to issue regulations is not the power to change the law, and it is for the courts, to which the task of statutory construction is ultimately entrusted, to determine whether or not administrative interpretations are consistent with the intent of Congress and the words of a statute. *Social Security Board v. Nierotko*, 327 U.S. 358, 368-370, 66 S.Ct. 637, 90 L.Ed. 718 (1946); *United States v. New*

England Coal & Coke Co., 318 F.2d 138, 143 1st Cir. 1963) (“[T]he power to issue regulations is not the power to change the law”); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976) (“It is clear that if a conflict [with regulations] exists, the statute controls”); *Housing Authority of City of Omaha, Nebraska v. United States Housing Authority*, 468 F.2d 1, 5 (8th Cir. 1972) (“We acknowledge that HUD's promulgation of these rules cannot be interpretive support as to the extension of its own power”).

NEPA compliance requires a “hard look” which should not be thwarted by the mere creation of new corporate components to undertake and manage a larger effort. For these reasons, the U.S. Environmental Protection Agency has officially criticized the lack of direct impacts analysis of the TC in the Fermi 3 EIS documents. The USEPA occupies a unique role among the federal agencies involved with environmental impact statement compilation and review. See § 309(a) of the Clean Air Act (42 U.S.C. § 7609(a)).⁵

The USEPA commented at the Fermi Draft Environmental Impact Statement (DEIS) stage that:

. . . EPA is concerned 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.

USEPA comment letter, ML 12023A034, January 10, 2012, p. 7. In addition, the USEPA said:

Transmission Lines and Substation

EPA understands that NRC analyzes impacts from the lengthening of the

⁵The U.S. EPA Administrator “shall review and comment in writing on the environmental impact of any matter relating to . . . any major Federal agency action . . . to which section 4332(2)© of this title applies. . . Such written comment shall be made public at the conclusion of any such review.”

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 21-31, 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.***

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.

(Emphasis added). *Id.*, p. 14. And at the Final Environmental Impact Statement (FEIS) stage, the USEPA transmitted this § 309 comment:

Comment 0078-31 pertains to impacts as a result of the construction and maintenance of the transmission lines and substations. While EPA appreciates the addition of Appendix M as a reference, ***we reiterate our previous comment 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.

(Emphasis supplied). USEPA comment letter, ML13063A434, February 19, 2013, "Detailed Comments on the FEIS," p. 1. USEPA has repeatedly asserted that the transmission corridor and Milan substation are pertinent to the granting of a COL and that they should be analyzed for direct impacts, including for mitigation computation purposes (such as replacement of wetlands).

"Segmentation" or "piece-mealing" may be suspected after an evaluation of such factors as whether the proposed segment (1) has logical termini; (2) has substantial independent utility; (3) does not foreclose the opportunity to consider alternatives; and (4) does not irretrievably commit federal funds for closely-related projects. *Piedmont Heights Civic Club, Inc. v.*

Moreland, 637 F.2d 430, 439 (5th Cir. 1981) (citing cases from the 7th Cir., 9th Cir., and 8th Cir.). “When the segmentation project has no independent justification, no life of its own, or is simply illogical when viewed in isolation, the segmentation will be held invalid.” *Macht v. Skinner*, 715 F.Supp. 1131, 1135 (D.D.C.1989), *aff’d*, 889 F.2d 291 (D.C.Cir.1989)

**V. The Transmission Corridor Has Not Been Analyzed
For Cumulative Impacts, Rendering the FEIS Incomplete**

The catalog of failings in the FEIS “cumulative effects” discussion of the TC is long. Jurisdictional wetlands have not yet been delineated,⁶ so they are not identified on maps. The size of the physical footprint of the Milan substation has not been firmly decided, so it is not clear what impacts would occur as a consequence. Historic and cultural resources surveys are incomplete. See admissions at FEIS pp. 4-100 through 4-102.

The routes of the three 345kV lines through the corridor have not been chosen. FEIS p. 2-10. Threatened and endangered species identification and aquatic information is not taken from actual survey work, but from Fish and Wildlife Service records and the Michigan Natural Features Inventory. FEIS pp. F-45 F-47, F-53, 54. No one knows whether the 30 wetlands and other waters along the corridor route are jurisdictional to the Army Corps of Engineers or the Michigan Department of Environmental Quality. FEIS p. F-56. At FEIS p. F-70 it says that “It is not known whether suitable stream habitat or populations of the snuffbox mussel occur along the proposed offsite transmission line corridor.” See also FEIS p. F-77. Surveys have not been done to identify whether the endangered Eastern Massasauga Rattlesnake or Indiana bat, and those species’ habitats, lie in or along the proposed corridor. FEIS pp. F-75, F-85. The incomplete

⁶See FEIS pp. F-54 4-44 and Apx. J, p. J-2.

biological assessment puts threatened and endangered species at risk of further harm and even extirpation. The NRC Staff has failed to conclude Endangered Species Act requirements for the TC. See letter at pp. F-21 to F-23 of the FEIS (FWS supervisor states that the agency is “not able to concur with your effects determinations for the proposed transmission lines at this time. . . . We will defer concurrence with your determinations until corridor locations are finalized and we have reviewed the results of future surveys”). Without a completed biological assessment conducted of the TC to identify federally and state-threatened and -endangered plant and animal species, with requisite interagency consultation, mitigation arrangements are not disclosed in the FEIS.

The non-disclosure of these details in the FEIS means that the NRC as lead agency has not provided a true and accurate statement of the environmental impact of the proposed action. Consequently, there is not accurate consideration of alternatives to the proposed destructive effects in the corridor, nor of mitigation, and no clear grasp of the “irreversible and irretrievable commitments of resources” that would occur with implementation of the Fermi 3 project and its associated transmission lines. *See* 42 U.S.C. § 4332(2)©. The FEIS does not contain the “full and fair discussion” of significant environmental impacts that is “supported by evidence that the agency has made the necessary environmental analyses.” 40 C.F.R. § 1502.1. There is no germane analysis of the direct and cumulative impacts of the overall project. *See* 40 C.F.R. §§ 1508.7, 1508.8, 1508.25.

VI. The ‘Uncontested’ or ‘Mandatory’ Hearing Is Inadequate Redress

The NRC Staff and DTE suggest in their Briefs (Staff at 2, DTE at 20) that any concerns over the TC handling in the FEIS should be addressed at the final, “uncontested” hearing, mo-

meats before the Commission’s final vote on the Fermi 3 COL. If that occurs, the Staff’s strategic refusal to adhere to the constraints of NEPA will have succeeded. The mandatory hearing per AEA §§ 185b, 189a (42 U.S.C. §§ 2235(b), 2239(a)) is not a serious avenue of relief. It is only the *Commission*, and not Intervenors, which may raise the corridor controversy at that time.

Public participation is excluded:

The mandatory hearing, which is required by section 189a of the AEA, does not involve public participation - regardless of whether a contested hearing with public participation has occurred. *See Exelon Generation Co, LLC* (Early Site Permit for Clinton ESP Site), CLI-05-17, 62 NRC 5, 49 (2005) (“The scope of the Intervenors’ participation in adjudications is limited to their admitted contentions, *i.e.*, they are barred from participating in the uncontested portion of the hearing. Any other result would contravene the objectives of our ‘contention’ requirements”).

(Emphasis supplied). *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-12-11 at 4, fn. 17 (April 16, 2012).

VII. Conclusion: Sua Sponte Referral for Adjudication Is Justified

In an absurd argument, DTE suggests that it would be willing to permanently limit the power output from Fermi 3 by about 44% via use of only existing power lines, as “proof” that the transmission corridor is not unlawfully segmented from the Fermi reactor project.⁷ Since that would contradict the project purpose, plunge the company into bankruptcy and incur the wrath of utility shareholders, it must be seen parabolically, as evidence of segmentation.

NEI, petitioner for the LWA rule change in 2006 (NEI Brief at 3), has merely repurposed its original lobbying efforts as an *amicus* filing. The NRC Staff would decouple the requirement of secure offsite backup power from the NRC’s regulatory responsibilities under the Atomic Energy Act. The Commission must insist that the power to change the rules is not the power to

⁷DTE Brief at 8, fn. 30 (13/27 of .pdf).

change NEPA, which remains a crucially important means of requiring that the public be told the truth about environmental costs of suspect power plant plans. The Commission must affirm the efficacy of NEPA, and order the ASLB to adjudicate this controversy.

/s/ Terry J. Lodge
Terry J. Lodge (OH #0029271)
316 N. Michigan St., Ste. 520
Toledo, OH 43604-5627
(419) 255-7552
Fax (419) 255-7552
Tjlodge50@yahoo.com
Counsel for Intervenors

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing “INTERVENORS’ REPLY MEMORANDUM IN SUPPORT OF MOTION FOR COMMISSION APPROVAL OF LBP” were served by me upon the parties to this proceeding via the NRC’s Electronic Information Exchange system this 7th day of August, 2014.

/s/ Terry J. Lodge
Terry J. Lodge (OH #0029271)
316 N. Michigan St., Ste. 520
Toledo, OH 43604-5627
(419) 255-7552
Fax (419) 255-7552
Tjlodge50@yahoo.com
Counsel for Intervenors