

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of: )  
 )  
 DTE ELECTRIC COMPANY ) Docket No. 52-033-COL  
 )  
 (Fermi Nuclear Power Plant, Unit 3) )

---

APPLICANT'S RESPONSE TO POST-HEARING COMMISSION QUESTIONS

---

United States Nuclear Regulatory Commission Official Hearing Exhibit	
In the Matter of:	DTE ELECTRIC CO. (Fermi Nuclear Power Plant, Unit 3) Commission Mandatory Hearing
	<b>Docket #:</b> 05200033
	<b>Exhibit #:</b> DTE000011-MA-CM01
	<b>Admitted:</b> 03/09/2015
	<b>Rejected:</b>
	<b>Other:</b>
	<b>Identified:</b> 03/09/2015
	<b>Withdrawn:</b>
	<b>Stricken:</b>

David A. Repka  
 Tyson R. Smith  
 Winston & Strawn LLP  
 1700 K Street, NW  
 Washington, DC 20006

Bruce R. Maters  
 Jon P. Christinidis  
 DTE Electric Company  
 One Energy Plaza  
 Detroit, Michigan 48226

COUNSEL FOR DTE ELECTRIC  
 COMPANY

February 19, 2015

February 19, 2015

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	
	)	
DTE ELECTRIC COMPANY	)	Docket No. 52-033-COL
	)	
(Fermi Nuclear Power Plant, Unit 3)	)	

APPLICANT’S RESPONSE TO POST-HEARING COMMISSION QUESTIONS

INTRODUCTION

In accordance with the Order (Transmitting Post-Hearing Questions), dated February 11, 2015, DTE Electric Company (“DTE”) provides written answers to each of the questions posed to it by the Commission. In addition, DTE has provided a response to Question 4 in order to provide the Commission with DTE’s perspective on the issues addressed by the question. DTE also consulted with the NRC Staff on the exhibits referenced below. The NRC Staff had no objections.

APPLICANT’S RESPONSES TO COMMISSION QUESTIONS

**Question 3: Discuss the limitations that the design finality associated with the ESBWR Design Control Document (DCD) poses with respect to altering the requirements for RTNSS (“regulatory treatment of non-safety systems”) buildings as currently contemplated in the recently-revised Staff guidance.**

DTE Response

The ESBWR design certification was incorporated by reference into the Fermi 3 COL application. Design issues associated with the ESBWR, including RTNSS equipment related to protection from tornado and hurricane missiles, were resolved in the design certification rulemaking. Under 10 C.F.R. § 52.63, the treatment of RTNSS equipment in the ESBWR certified design is final and can only be changed in limited circumstances.

Regardless, the NRC Staff already has clarified that the revised RTNSS guidance, which became effective on August 2014, was considered by the NRC Staff in the context of the ESBWR design. In the *Federal Register* notice for the revised RTNSS guidance, the NRC Staff explained that, with respect to the ESBWR design, “the NRC staff does not intend to reevaluate the

adequacy of RTNSS SSCs,” because “the ESBWR design already meets the guidance discussed in this SRP Section.”<sup>1</sup>

**Question 4: During the hearing, the Staff testified that, when new species are listed under the Endangered Species Act (ESA) before the NRC reaches and finalizes a decision on a licensing action, the NRC will consult with the Fish and Wildlife Service (FWS) to determine whether the proposed action would have an adverse effect on the species. On December 11, 2014, the FWS issued a notice determining that a species of bird—the rufa red knot—had been designated as threatened under the ESA. The listing was expected to become effective on January 12, 2015. Consistent with Section 7 of the ESA, the NRC Staff initiated consultation with the FWS to evaluate the possibility that the rufa red knot may be present within the vicinity of the proposed Fermi Unit 3 site and, if so, whether NRC’s issuance of the COL could adversely affect it. During the uncontested hearing, the Staff noted that it could not make a final recommendation about issuance of the COL until it had concluded its consultation with FWS. Please indicate when the Staff expects to complete its consultation on the rufa red knot and how it intends to inform the Commission of the result of that consultation.**

#### DTE Response

DTE urges the NRC to take appropriate action to complete its ESA obligation and issue the Fermi 3 COL in timely manner. Extending the licensing process unnecessarily risks creating a never-ending cycle of new issues for the NRC Staff and DTE to address.<sup>2</sup> But, before delving into the specifics of the NRC Staff’s assessment of the rufa red knot, DTE would like to clarify the statutory and regulatory context of the NRC’s obligations under the ESA. Proper application of these requirements is imperative to avoid unnecessary delay in the Fermi 3 licensing process.

The ESA and its implementing regulations require federal “action agencies” to consult with the FWS whenever their actions “may affect” an endangered or threatened species.<sup>3</sup> If the action agency — in this case, the NRC — determines that a particular action will have “no effect” on an endangered or threatened species, the consultation requirements are not triggered.<sup>4</sup> FWS

---

<sup>1</sup> 79 Fed. Reg. 37782, 37783 (July 2, 2014).

<sup>2</sup> To minimize this potential and as discussed further below in response to Question 5.b, should the NRC Staff be unable to reach a “no effect” determination or complete its consultation on the rufa red knot prior to issuance of the Commission’s decision on uncontested issues, DTE would support a license condition that prohibits it from making any irreversible or irretrievable commitment of resources until the NRC Staff completes its ESA reviews.

<sup>3</sup> 50 C.F.R. § 402.14(a).

<sup>4</sup> *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054 n.8 (9th Cir. 1994) (“[I]f the [action] agency determines that a particular action will have no effect on an endangered or threatened species, the consultation requirements are not triggered.”).

acknowledged this same point in its letter to the NRC on the Fermi 3 COL.<sup>5</sup> If the NRC determines that the proposed action “may affect” a listed species, then the next step is typically for the NRC to initiate consultation with FWS under Section 7 of the ESA. To support consultation, the NRC prepares a Biological Assessment (“BA”). If the NRC’s BA concludes that the proposed action “may affect but is not likely to adversely affect” a listed species or critical habitat and FWS concurs, then consultation ends. If the NRC’s BA concludes that the action is “likely to adversely affect” a listed species or critical habitat or FWS does not concur with the NRC’s “not likely to adversely affect” determination, then the next step in the consultation process is formal consultation and preparation of a Biological Opinion (“BiOp”).

This same process is described in NRC guidance documents, including NUREG-1748, Environmental Review Guidance for Licensing Actions Associated with NMSS Programs, at D-5 (Exh. DTE000012). The guidance explains that, if the proposed action will not affect listed species or habitat, the NRC may reach a “no effect” conclusion, which does not require FWS concurrence. The guidance also notes that a concurring response may be sought, but explains that concurrence is not required and is merely to bolster the administrative record.<sup>6</sup> This remains true whether the NRC makes its “no effect” determination as a standalone determination or as an amendment to its prior BA for the Fermi 3 project — that is, no matter the form of the NRC’s “no effect” determination, FWS concurrence is not required.

Briefly summarized, the initial NRC determination and its impact on the need for ESA consultation are as follows:

1. If the NRC’s determination is **No Effect** then the action may proceed without consultation with FWS.
2. If the NRC’s determination is **May Affect but Not Likely to Adversely Affect**, the NRC must consult with FWS. During consultation, FWS will review the BA and either will concur with the determination (at which point the consultation process ends) or will not concur with the determination. If FWS does not concur, FWS may recommend changes or mitigation measures to remove any adverse effects, or recommend formal consultation.

---

<sup>5</sup> See Fermi 3 FEIS at F-23 (“You [(NRC)] determined that the construction and operation of the facility will have ‘no effect’ on these six federally-listed species. Although our concurrence is not required under the Act, we [(FWS)] are in agreement with your findings.”) (emphasis added) (Exh. NRC000010D); *but see* Tr. at 168 (MS. SUTTON: “So let’s say our if our determination is a no effect, we still have to submit that determination to the Service so they can compare our action and any impacts onto the species and see if they concur with that determination.”). The transcript discussion is inconsistent with NRC guidance, the ESA, FWS correspondence, and FWS regulations.

<sup>6</sup> FWS guidance describes an identical process. See U.S. Fish and Wildlife Services and National Marine Fisheries Services, “Endangered Species Act Consultation Handbook” (March 1998) (Exh. DTE000013) (“ESA Handbook”).

3. If the NRC's determination was **May Affect and Likely to Adversely Affect**, the Federal action agency needs to enter into formal consultation with FWS. The action may not proceed as designed until consultation is complete. During formal consultation, FWS will prepare a BiOp, which will include reasonable and prudent alternatives to protect the species.

In light of the above discussion, DTE believes that several points warrant clarification in the context of the NRC Staff's response to the red knot listing decision.

First, when new species are listed under the ESA, that action does not automatically trigger consultation with FWS. Instead, only if the NRC Staff (the action agency) concludes that an action "may affect" a listed species or critical habitat is consultation even necessary. If the NRC concludes that its action will have "no effect" on the rufa red knot, then no further action is required. Yet, for the rufa red knot, it is unclear whether the NRC made this initial determination.<sup>7</sup>

Second, DTE firmly believes that the NRC Staff has ample information to reach a "no effect" determination for the rufa red knot. DTE provided the following information to the NRC regarding the rufa red knot:

The rufa red knot is a long-distance migratory bird species that prefers marine coastal shorelines for foraging and resting during their migrations. There have been sightings of this species along various coastal shorelines within Michigan. Although the freshwater coastal shoreline areas of the property are located outside of potential future construction impact areas [(i.e., Fermi 3 construction areas)] and not associated with Fermi 2 license renewal-related activities, these areas were visually assessed for this species. It is the professional opinion of Cardno JFNew and GEI that, although the rufa red knot could incidentally utilize the freshwater coastal shoreline areas for resting or finding food (other than its preferred marine foods) during its long migrations, the species should not be impacted by any of the existing or proposed activities associated with the Fermi Site.

\* \* \*

The migration takes each individual along a course of over 19,000 miles annually, with most individuals following the Atlantic coastline and with major stopover areas including the Delaware Bay (Delaware Riverkeeper Network et al. 2005).

---

<sup>7</sup> See, e.g., Tr. at 157-159 (indicating that the NRC Staff contacted FWS to ask whether the NRC needed to reinitiate consultation, rather than first considering whether the NRC, as the action agency, could reach a "no effect" conclusion). As noted above, FWS concurrence is not required for a no effect determination — whether made a standalone determination or as an amendment to a pre-existing BA.

Rufa red knots concentrate in huge numbers at traditional staging grounds during migration. Delaware Bay is an important staging area during spring migration, where the knots feed on the eggs of spawning horseshoe crabs. It is estimated that nearly 90 percent of the entire population of rufa red knots can be present on the bay in a single day (Harrington 2001). A few individuals have been noted using a more inland route, being spotted in Kentucky, the Great Lakes region, Manitoba, and Alberta (Morrison and Harrington 1992, Niles et al. 2008), and thus may be rarely found in Michigan as a stopover site.

\* \* \*

In addition, none of the optimal feeding or overwintering habitats identified in the literature for the rufa red knot were identified on the subject property (i.e. specifically no horseshoe crabs or other preferred foods).

The subject property provides only temporary landing and resting habitat for this species during its long migrations and does not provide suitable (least not optimal) feeding habitat for this species, which prefers saline dependent horseshoe crabs.

\* \* \*

The rufa red knot is extremely rare in Michigan, and if it did incidentally land on the site to rest or find food, it would most likely be restricted to coastal shoreline habitats where no construction activities are proposed.<sup>8</sup>

Given the above information, a “no effect” conclusion for the red knot is appropriate and consistent with NRC conclusions in other licensing reviews. For example, in evaluating the potential impacts of a uranium recovery operation on the endangered whooping crane, the NRC Staff stated:

*Whooping Crane (Federal and State Endangered)*

There is a limited availability of highly suitable whooping crane habitat within the CBR facility, with the majority of sightings within Nebraska occurring in the Platte Valley that is located a considerable distance away in central Nebraska. Therefore, any presence of whooping cranes within the CBR facility and surrounding area would be expected to be infrequent

---

<sup>8</sup> NRC-14-0073, “Response to License Renewal Environmental Request for Additional Information,” Enclosure 2, Final Threatened and Endangered Species Survey and Assessment Report (ADAMS Accession No. ML14344B000) (Exh. DTE000014) at 1, 3, 4, and 8. The FWS also does not even mention Michigan in its list of states with important habitat for the red knot. 78 Fed. Reg. 60024, 60033 (Sept. 30, 2013) (listing important red knot habitats, which do not include Michigan) (Exh. DTE000015).

and transient. Based on its analysis of the effects of project implementation and the current and potential status of this species in northwestern Nebraska, the NRC concludes that the relicensing of the CBR facility will have no adverse effect on the whooping crane.<sup>9</sup>

Similar to the circumstances for the whooping crane, there is no highly suitable red knot habitat at the Fermi site. The vast majority of sightings occur several states away. Any sightings at the Fermi site or surrounding area would be infrequent and transient.<sup>10</sup> And, even incidental use of the Fermi site would be limited to areas unaffected by construction activities. The NRC therefore ought to be able to reach a “no effect” determination for the red knot, just as it did for the whooping crane.<sup>11</sup> As noted above, if the NRC makes a “no effect” determination, consultation with (and concurrence from) FWS is not required.<sup>12</sup>

Lastly, if the NRC Staff determines that the proposed action “may affect” the rufa red knot and prepares a BA, the NRC Staff should act expeditiously in order to avoid causing unnecessary delay in this proceeding. The FWS published its listing decision for the rufa red knot on December 11, 2014, with an effective date of January 12, 2015. On December 22, 2014, the NRC Staff notified the Commission of the FWS listing decision. In that notice, the NRC Staff stated that, “[c]onsistent with Section 7 of the ESA, the NRC staff has promptly initiated consultation with the FWS to evaluate the possibility that the rufa red knot may be present within the vicinity of the proposed facility and, if so, whether the action would adversely affect it.” However, to date, DTE is unaware of any determination by the NRC Staff that the proposed action either will have “no effect” on or “may affect” the red knot. Nor is DTE aware of any BA

---

<sup>9</sup> “Final Environmental Assessment for the License Renewal of U.S. Nuclear Regulatory Commission License No. SUA-1534” (October 2014) (ADAMS Accession No. ML14288A517) (Exh. DTE000016) at 98.

<sup>10</sup> A single red knot was observed at the Fermi site more than 40 years ago. NRC-15-0028, “Revision to Response to License Renewal Environmental RAI SSSH-1,” dated February 18, 2015 (Exh. DTE000023). This is unsurprising, as the vast majority of individual red knots follow the Atlantic coastline and nearly 90 percent of the entire population of red knots can be present in the Delaware Bay in a single day. T&E Species Survey and Assessment at 3 (Exh. DTE000014).

<sup>11</sup> The NRC has made similar “no effect” determinations for another species, the least tern. *See, e.g.*, “Biological Assessment for License Renewal of Arkansas Nuclear One, Unit 2” (June 2004) (ADAMS Accession No. ML041560229) (Exh. DTE000017) (“ANO BA”) at 6 (no nesting locations on site, so “no effect”); “Biological Assessment of the Potential Impacts to Threatened and Endangered Species Resulting from an Additional 20 Years of Operation of the Fort Calhoun Station, Unit 1” (December 2002) (ADAMS Accession No. ML023450603) (Exh. DTE000018) at 9 (same).

<sup>12</sup> A “no effect” determination could be based, for example, on the absence of the species at the site, the lack of impacts to the species even if it were present at the site, or the lack of NRC jurisdiction over certain site activities.

prepared by the NRC Staff that has been sent to FWS for concurrence.<sup>13</sup> Prompt action and resolution of the ESA issue is critical to avoid undue delay in the Fermi 3 licensing process.<sup>14</sup>

**Question 5:** The Staff also testified that FWS plans to list the northern long-eared bat as a threatened species on April 2, 2015. The Staff stated that completion of consultation could delay a final licensing decision by one to six months, depending on whether additional surveys to look at roosting patterns are needed. The Staff also stated that it intends to proactively prepare a supplement to the biological assessment for the bat, so that it can be submitted promptly to the FWS if the species is listed as anticipated on April 2, 2015, and action has not been taken on the Fermi Unit 3 COL application. The applicant presented the position that it believes that the Staff has the authority to make a “no effects” determination now, presumably on the information provided by the applicant, and therefore, need not initiate consultation with FWS on the long-eared bat.

- a. What are the requirements under the ESA with respect to the prospective listing of a species as threatened or endangered?
- b. Can a COL be issued prior to consultation being completed given the Environmental Protection Plan? What are the possible ramifications of issuing a license without completing consultation and relying on a license condition?

DTE Response to 5.a

If the NRC Staff completes its consideration of the rufa red knot and the Commission issues its decision on uncontested issues on the schedule outlined in internal Commission procedures, the Fermi 3 COL could be issued prior to publication of final listing decision for the northern long-eared bat (scheduled for April 2, 2015). If the Fermi 3 COL were issued prior to a final listing decision, there would be no need for the NRC Staff to consult with FWS on the northern long-eared bat. Proposed species receive no statutory protection under the ESA.<sup>15</sup> Unlike threatened

---

<sup>13</sup> See, e.g., Tr. at 168 (MS. SUTTON: “So as of today, we are still working on our biological assessment determination.”).

<sup>14</sup> According to the Commission’s internal procedures, the Commission intends to issue an adjudicatory decision on the uncontested hearing no later than 4 months after the FSER and FEIS are both publicly issued. For Fermi 3, a decision on the uncontested hearing is therefore anticipated to be about March 18, 2015. In the absence of a “no effect” determination or a BA at this juncture, resolution of the ESA issue already may be critical path for COL issuance. However, if the NRC Staff is unable to complete consultation on the red knot prior to issuance of the uncontested hearing decision, the NRC could issue the Fermi 3 COL, subject to a license condition requiring completion of consultation prior to any irreversible or irretrievable commitment of resources. 16 U.S.C. § 1536(d); 15 C.F.R. § 402.09.

<sup>15</sup> FWS regulations at 50 C.F.R. § 402.10 provide for early conferences between the action agency and FWS “on any action which is likely to *jeopardize* the continued existence of

and endangered species, proposed species are not protected from “take,” nor are they subject to consultation requirements in the ESA.<sup>16</sup> DTE therefore urges the NRC Staff and the Commission to act expeditiously on the rufa red knot and in reaching an uncontested hearing decision to avoid unnecessary delay in issuing the Fermi 3 COL.

Nevertheless, because the ESA applies to private parties, DTE still would be subject to the prohibition on “take” of any species listed as threatened or endangered under the ESA. The prohibition on take of a listed species would apply during both construction and operation of Fermi 3 — even if a listing decision on the northern long-eared bat or any other species occurs after COL issuance. The Environmental Protection Plan (“EPP”) that is included as a license condition in the draft Fermi 3 COL specifically acknowledges these circumstances. The EPP requires DTE to notify the NRC if a newly-listed species is found to occur in an area affected by construction or operation of the plant or if any take of a listed species occurs at the site.

#### DTE Response to 5.b

If the NRC is unable to issue the Fermi 3 COL prior to the effective date of a listing decision on the northern long-eared bat, the NRC still could issue the Fermi 3 COL in a timely manner by reaching a “no effect determination” or by appropriately conditioning the Fermi 3 COL.

- Option 1: The NRC makes a timely “no effect” determination.<sup>17</sup> No consultation with FWS is required and the COL could be issued immediately. Because FWS concurrence is not required, there would be no need for a license condition pending receipt of such concurrence (even if the NRC Staff voluntarily elected to seek that concurrence).

---

any *proposed* species or result in the destruction or adverse modification of *proposed* critical habitat” (emphasis added). These provisions are inapplicable here given that the proposed action will not “jeopardize” a proposed species and FWS is not proposing critical habitat. *See also* ESA Handbook at 6-8 (comparing requirements for early conference and consultation) (Exh. DTE000013).

<sup>16</sup> The term “take” means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19).

<sup>17</sup> A “no effect” determination could be based on the absence of the species at the site, the lack of impacts to the species even if it were present at the site, or the lack of NRC jurisdiction over certain site activities. For example, if the NRC finds that the only potential impacts to the species involve preconstruction activities, the ESA consultation requirements would not apply to the NRC action. The ESA only reaches activities that are “authorized, funded, or carried out” by federal agencies. 16 U.S.C. § 1536(a)(2). Clearing trees is, under NRC regulations, a preconstruction activity that does not require prior NRC approval. 10 C.F.R. § 50.10(a)(2)(iii). Issuing the COL therefore would not “authorize” any action that could affect the northern long-eared bat.

- Option 2: The NRC conditions issuance of the Fermi 3 COL on satisfaction of ESA requirements. If consultation with FWS is still ongoing but the COL is otherwise ready to be issued, the NRC could impose a license condition prohibiting certain activities until consultation is complete. For example, if NRC finds potential effects from preconstruction activities (e.g., clearing of trees), the NRC could impose a license condition prohibiting site clearing until consultation is complete.<sup>18</sup> Such a license condition maintains the status quo until completion of the consultation process and ensures that issuance of the COL has “no effect” on a listed species prior to completion of consultation. This approach is fully consistent with Section 7(d) of the ESA, which prohibits irreversible or irretrievable commitment of resources — but not agency action — prior to completion of consultation.<sup>19</sup>

**Question 6: In the event that the FWS lists the long-eared bat, the Staff indicated during the mandatory hearing that the agency would have to wait for a response from FWS before proceeding with the licensing action even if the Staff concludes that issuing the COL will have no effect on that species. Please reconcile this position with the text of 50 C.F.R. § 402.14(a), which reads, “Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required . . . .” In addition, please reconcile this position with the following federal precedents, *Water Keeper Alliance v. U.S. Dept. of Defense*, 271 F.3d 21, 31-32 (1st Cir. 2001) (noting that “the preparation of a biological assessment does not automatically push the parties into formal consultation, but rather, formal consultation follows only if a biological assessment shows that the action ‘may affect listed species or critical habitat’”), and *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054 n.8 (9th Cir. 1994) (“Thus, if the agency determines that a particular action will have no effect on an endangered or threatened species, the consultation requirements are not triggered.”).**

#### DTE Response

As discussed above, no consultation is necessary if the Fermi 3 COL is issued prior to publication of final listing decision for the northern long-eared bat. Consultation also is not necessary if the NRC Staff concludes that the proposed action will have “no effect” on a listed species — whether based on the absence of any impacts to the species or the lack of NRC jurisdiction over activities that may impact the species. This is fully consistent with 50 C.F.R. § 402.14(a) and the Courts’ holdings in *Water Keeper Alliance v. U.S. Dept. of Defense* and *Pacific Rivers Council v. Thomas*. As FWS acknowledges in the Fermi 3 FEIS (at F-23), FWS concurrence on a no effect determination is not required by the ESA.

---

<sup>18</sup> DTE would not object to such a license condition, provided the NRC Staff was moving expeditiously to complete consultation with FWS.

<sup>19</sup> 16 U.S.C. § 1536(d); *see also* 15 C.F.R. § 402.09.

Here, the NRC Staff has sufficient information to reach a “no effect” conclusion for the northern long-eared bat. The northern long-eared bat has never been observed at the Fermi site (during wildlife surveys or otherwise) and there is no evidence that the bat has ever been present at the site. According to FWS, the species is not commonly encountered in Michigan except in parts of the northern Lower Peninsula and portions of the Upper Peninsula — both areas far from the Fermi site, which is in the far southeast Lower Peninsula. Review of the FWS and Michigan Natural Features Inventory rare species explorer databases for threatened and endangered species did not return any results for the long-eared bat in Monroe County, and no other federal, state, or local sources were found that showed the presence or sighting of the northern long-eared bat in Monroe County.<sup>20</sup>

Further, there are no caves at the Fermi site that could be used as a hibernacula, no maternity roost trees, and only limited Fermi 3 impact areas that could even serve as potential summer roosting habitat for individual bats. And, even in those few areas, the number of suitable roost trees at the site naturally will continue to decline over time due to continued loss of ash trees from the emerald ash borer infestation.<sup>21</sup> Northern long-eared bats are therefore unlikely to be present at the Fermi site, and the project would have “no effect” on the species.<sup>22</sup>

Significantly, a “no effect” determination for the northern long-eared bat would be consistent with NRC “no effect” determinations for bat species made in other NRC licensing reviews. For example, during its review of the PSEG Early Site Permit, the NRC Staff specifically discussed the potential for impacts to the northern long-eared bat.<sup>23</sup> The NRC Staff noted that northern long-eared bats are not known to occur on the PSEG site and concluded that “hibernacula, maternity roost, and foraging habitat for the northern long-eared bat do not exist on the PSEG Site, and building activities associated with a new nuclear power plant would have no effect on

---

<sup>20</sup> T&E Species Survey and Assessment at 4 (Exh. DTE000014).

<sup>21</sup> Numerous ash trees with no bark or less than 5% bark exist onsite and are no longer potential suitable habitat for the long-eared bat.

<sup>22</sup> At the uncontested evidentiary hearing, an NRC Staff witness noted that the agency had not yet looked at the surveys provided by DTE. Tr. at 169. Yet, the NRC Staff witness claimed that, according to FWS guidance, the NRC could not make a no effect determination without two summer surveys showing no bats in the area. *Id.*, citing “Northern Long-Eared Bat Interim Conference and Planning Guidance,” dated January 6, 2014 (Exh. DTE000019). DTE was unable to locate a statement indicating that two summer surveys were needed to make a “no effect” determination. However, the guidance does indicate (at G-1) that summer survey results are typically valid for two seasons (though the period can be increased based on local conditions). Regardless, a “no effect” determination is for the NRC to make in the first instance, not FWS.

<sup>23</sup> “Biological Assessment of the Potential Effects on Federally Listed/Proposed Listed Endangered or Threatened Species from the Proposed Early Site Permit for the PSEG Site” (June 2014) (ADAMS Accession No. ML14183B316) (Exh. DTE000020) at Appendix F, page 22, 29-30.

this species.”<sup>24</sup> While there is *potential* foraging and roosting habitat at the Fermi site, northern long-eared bats are not known to occur on the Fermi site or in Monroe County and there are no hibernacula at the Fermi site or in Monroe County. The absence of northern long-eared bats at the site and in the larger geographic area therefore should lead to a similar no effect conclusion as that reached for the PSEG site.

The NRC applied a similar methodology in making a “no effect” determination for both the northern long-eared bat and Indiana bat in connection with Sequoyah license renewal. The NRC noted that the action area for Sequoyah does not contain suitable habitat for hibernation for either species. However, the NRC acknowledged that 278 acres of habitat suitable for roosting and foraging exist at the site.<sup>25</sup> But, because there was no evidence to indicate “occurrences of hibernacula, maternity colonies, or individual northern long-eared bats in the action area or in the larger geographical area of Hamilton County,” the NRC staff concluded that the northern long-eared bat is unlikely to occur within the action area. As a result, the NRC staff concluded that the proposed action would have “no effect” on the northern long-eared bat.<sup>26</sup> Like the Sequoyah site for northern long-eared and Indiana bats, the Fermi site does not contain suitable habitat for northern long-eared bat hibernation, nor is there evidence to indicate occurrences of northern long-eared bat hibernacula, maternity colonies, or individual bats in the action area or in the larger geographical area of Monroe county. And, like the Sequoyah site, the Fermi site contains only *potential* habitat suitable for foraging and summer roosting.<sup>27</sup> DTE therefore would expect the NRC to reach similar conclusions in both cases.

Likewise, in assessing the potential impacts to the gray bat from license renewal at ANO, the NRC explained that, while the gray bat is known to occur near the ANO site, where the species resides in caves upstream of the Dardanelle Lock and Dam (10 miles from ANO), “[n]one have been observed in the vicinity of ANO-2 or the transmission line rights-of-way.”<sup>28</sup> The NRC

---

<sup>24</sup> *Id.* at 29-30.

<sup>25</sup> Draft NUREG-1437, Supplement 53, “Generic Environmental Impact Statement for License Renewal of Nuclear Plants Supplement 53 Regarding Sequoyah Nuclear Plant, Units 1 and 2” (ADAMS Accession No. ML14211A454) (Exh. DTE000021) at 3-79.

<sup>26</sup> *Id.* at 3-80 and 4-45. The NRC used identical logic in concluding “no effect” on the Indiana bat. *Id.*

<sup>27</sup> For USEC’s American Centrifuge Project, the NRC noted that the Indiana Bat had not been observed at the site, but determined that suitable summertime habitat was present at the site. The NRC specifically noted that construction noise could temporarily disrupt bat activities or preclude Indiana bats from their potentially suitable habitat, but nevertheless concluded that construction and operation of the ACP would have “no effect” on the species. NUREG-1834, “Environmental Impact Statement for the Proposed American Centrifuge Plant in Piketon, Ohio” (April 2006) at 1-29, 4-27 (ADAMS Accession No. ML061250131) (Exh. DTE000022).

<sup>28</sup> ANO BA (Exh. DTE000017) at 6.

Staff therefore determined that the proposed license renewal would have no effect on gray bats. Like the gray bat at ANO, no northern long-eared bats have been observed at the Fermi site (or in Monroe County). And, unlike for ANO, where gray bats reside in caves near the site, no hibernacula for the northern long-eared bat are located near the Fermi site or in Monroe County.

Overall, DTE strongly believes that a “no effect” determination for the northern long-eared bat on the Fermi 3 application is appropriate — whether based on the absence of any impacts from building Fermi 3 or the lack of NRC jurisdiction over certain activities. A “no effect” determination is consistent with the methodology applied by the NRC Staff in making “no effect” determinations for other licensing actions and also with NRC and FWS regulations. As a result, even if the northern long-eared bat were listed as threatened or endangered prior to COL issuance, the NRC Staff should conclude that building Fermi 3 would have “no effect” on the northern long-eared bat.

Respectfully submitted,

/s/ signed electronically by \_\_\_\_\_  
David A. Repka  
Tyson R. Smith  
Winston & Strawn LLP  
1700 K Street, NW  
Washington, DC 20006

Bruce R. Maters  
Jon P. Christinidis  
DTE Electric Company  
One Energy Plaza  
Detroit, Michigan 48226

COUNSEL FOR DTE ELECTRIC  
COMPANY

Dated at Washington, District of Columbia  
this 19th day of February 2015

CERTIFICATION

I am responsible for the responses to the above questions. I certify that these answers were prepared by me or under my direction, and I adopt the answers as part of my sworn testimony in this proceeding. I hereby certify under penalty of perjury that the foregoing is true and complete to the best of my knowledge, information, and belief.

Executed in accord with 10 C.F.R. § 2.304(d),

signed electronically by Peter W. Smith

Peter W. Smith

DTE Electric Company

One Energy Plaza

Detroit, MI 48226

[smithpw@dteenergy.com](mailto:smithpw@dteenergy.com)

Dated at Detroit, Michigan  
this 19th day of February 2015

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of: )  
 )  
DTE ELECTRIC COMPANY ) Docket No. 52-033-COL  
 )  
(Fermi Nuclear Power Plant, Unit 3) )

CERTIFICATE OF SERVICE

I hereby certify that copies of “APPLICANT’S RESPONSE TO POST-HEARING COMMISSION QUESTIONS” in the above captioned proceeding have been served via the Electronic Information Exchange this 19th day of February 2015.

Respectfully submitted,

/s/ signed electronically by  
Tyson R. Smith  
Winston & Strawn LLP  
1700 K Street, NW  
Washington, DC 20006

COUNSEL FOR DTE ELECTRIC  
COMPANY