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)		February 13, 2012
	)	

* * * * *

REPLY IN SUPPORT OF 'MOTION FOR RESUBMISSION OF CONTENTION 10, TO AMEND/ RESUBMIT CONTENTION 13, AND FOR SUBMISSION OF NEW CONTENTIONS 17 THROUGH 24'

Now come Intervenors Beyond Nuclear, *et al.*[1] (hereinafter "Intervenors"), by and through counsel, and reply in support of their "Motion for Resubmission of Contention 10, to Amend and Resubmit Contention 13 and for Submission of New Contentions 17 Through 24."

I. REPLY AS TO LATE-FILED MOTION FOR RESUBMISSION

Respecting DTE's and the NRC Staff's disquiet over Intervenors' late filing as a result of their counsel's inadvertent misunderstanding of the filing deadline for the motion, counsel did not realize the deadline had passed until after it *had* passed, which is why the supporting reports and comments are dated close to January 11, 2012. The lateness was a total of 15 days, which the NRC Staff agrees "by itself is not enormous." It is less enormous than 15 days for the practical reason that the missed deadline was December 27, 2011, squarely in the middle of the

[1]In 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.

week between Christmas and New Year's Day, and it is probable that little prejudice befell the Staff or DTE for nearly a week after December 27. If what is at stake is a new intervention and there has been delay, the delay factor is extremely important and the later the petition to intervene, the more likely it is that the petitioner's participation will result in delay. *Detroit Edison Co.* (Greenwood Energy Center, Units 2 & 3), ALAB-476, 7 NRC 759, 762 (1978). The question is whether, by filing late, the petitioner has occasioned a potential for delay in the completion of the proceeding that would not have been present had the filing been timely. *Washington Pub. Power Supply Sys.* (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1180 (1983).

Intervenors submit that the 15-day belated filing will not cause delay in completion of the proceeding that would have otherwise not occurred. Even conceding the presence here of what the Staff calls (Answer at 9) "the general public's interest . . . in an efficient adjudicatory proceeding," Intervenors personify a significant portion of "the general public" in this case. Despite counsel's misjudgment about timing, it is inconceivable that the general public's interest - as opposed to, say, that of DTE - has been seriously prejudiced or abridged by the loss of 15 days (or, more realistically, 9 days, from January 3 to 11, 2012).

It is already established that the ASLB's hearing on any surviving environmental contentions will not occur until after November 2012, when NRC's final EIS is published. If Intervenors' quality assurance contention goes to hearing, that will not happen until after May 2013. The upshot is that Intervenors filed initial contentions in 2009 based on a 60-day deadline, which they met, but will not proceed to hearing, at the very earliest, before more than three and a half years have passed.

It is rhetorically advantageous, but meaningless, to berate Intervenors for their counsel's

failure to have moved for an extension of time within the 60-day period for reasons of counsel's excessive workload on unrelated matters. Had such a motion been filed, DTE and perhaps the Staff would have then argued to the ASLB that other commitments are not a valid cause for an extension. That's obvious from DTE's replication of the *Statement of Policy on Conduct of Licensing Proceedings,* CLI-81-8, 13 NRC 452, 454 (1981) at p. 4 fn. 9 of its Answer ("the fact that a party may have personal or other obligations or possess fewer resources than others to devote to the proceeding does not relieve that party of its hearing obligations").

Respecting the concerns of both Staff and DTE that admission of the proffered contentions might "broaden the issues," where there is little practical value to be gained from expediting the proceeding, the fact that a participant's participation would "broaden the issues" or "delay the proceeding" is less significant. In a licensing proceeding where the Staff's safety review is still several months from its due date for completion, the broadening/delaying factor carried only minimal weight. *Dominion Nuclear Connecticut, Inc*. (Millstone Nuclear Power Station, Units 2 & 3), LBP-05-16, 62 NRC 56, 68 (2005).

Intervenors have previously complied with every other substantive filing deadline in this litigation. They have not added a single unnecessary day to the timetable for conclusion of this case, despite the economic, time and logistical obstacles that typically beset grassroots interventions. This filing error, while regrettable, is not egregious, and should not be deemed fatal to the positive contribution this intervention has made and proposes to make.

II. REPLIES AS TO CONTENTIONS

CONTENTION 10 (Amended): The Walpole Island First Nation has learned of these proceedings and has petitioned the government of Canada for consultation and accommodation prefatory to joining these proceedings on the ground that tribal hunting and fishing rights, property rights and other concerns on the Great Lakes may be impaired by the construction and

operation of Fermi 3.

Intervenors disagree that they are raising in impermissible challenge to NRC regulations via this contention. 10 C.F.R. §51.1 merely limits the applicability of existing NRC regulations, excluding "any environmental effects which NRC's domestic licensing and related regulatory functions may have upon the environment of foreign nations." But NEPA statute still appears to apply to transboundary effects of a project originating in the U.S. *Cf. Sierra Club v. Adams*, 578 F.2d 389 (D.C.Cir.1978) (Department of Transportation and Federal Highway Administration fulfilled NEPA requirements for construction of the Darien Gap Highway through Panama without contesting its application); *National Org'n for Reform of Marijuana Laws (NORML) v. U.S.*, 452 F.Supp. 1226 (D.C.1978). ("in view of defendants' willingness to prepare an 'environmental analysis' of the Mexico effects of United States support of that nation's narcotics eradication program, together with the EIS required by NEPA as to the impact of that program upon the United States, the Court need not reach the issue and need only assume without deciding, that NEPA is fully applicable to the Mexican herbicide spraying program"). The District Court of Hawai'i has suggested that NEPA may apply to effects from a U.S. project on foreign soil if that country has not itself compiled an environmental document:

> NEPA may require a federal agency to prepare an EIS for action taken abroad, especially where United States agency's action abroad has direct environmental impacts within this country, or where there has clearly been a total lack of environmental assessment by the federal agency or foreign country involved. See *Sierra Club v. Adams*, 578 F.2d 389, *NORML*, 452 F.Supp. at 1233.

Greenpeace USA v. Stone, 748 F.Supp. 749, 761 (D.Hawai'i 1990). *See, e.g.*, the Council on Environmental Quality's *Guidance on NEPA Analyses for Transboundary Impacts*[2] ("NEPA

[2]http://ceq.eh.does.gov/nepa/regs/transguide.html

requires agencies to include analysis of reasonably foreseeable transboundary effects of proposed actions in their analysis of proposed actions in the United States").

Until the Walpoles join these proceedings, the question will remain open for another day.

CONTENTION 13 (Amended): The Draft Environmental Impact Statement (DEIS) is inadequate to meet the requirements of NEPA or the Atomic Energy Act because it does not provide a reasonable cost/benefit basis for the NRC to decide to issue a combined operating license for the proposed Fermi 3 nuclear reactor. The DEIS analyses of Need for Power, Energy Alternatives and Cost/Benefit analysis are flawed and based on inaccurate, irrelevant and/or outdated information.

DTE and the Staff complain that Intervenors' critique of the DEIS need for power analysis merely repeats claims already made and rejected in this proceeding. That says more about the potential for collusive ignorance under the NRC regulation than it does about compliance with NEPA. DTE, for example, repeatedly accuses Intervenors of not providing new data or conclusions as between the ER and DEIS, then admits (DTE Answer at 16) that "the DEIS reaches the same conclusions and relies on the same data and information as the ER. . . ." Now, in 2012, the Staff has pretty completely adopted DTE's 2009 need projections, which in 2009 were predicated on flawed estimates of future power needs that predate the 5-year-old economic Great Recession, the chief value of which in 2012 is that the 2009 projections are three years more grossly out of true.

Because they cannot defend on matters of substance, the Staff and DTE defend on disingenuous issues of procedure, *i.e.*, that Intervenors have shown no particular differences between the benighted 2009 DTE analysis and the (inevitably) horridly-inadequate 2011 DEIS projections of need. Although the Need for Power analysis "should not involve burdensome attempts to precisely identify future conditions, . . . it should be sufficient to reasonably characterize the costs and benefits associated with the proposed licensing actions." 68 FR 55910. The 2011 DEIS

puppet show simply does not "reasonably characterize the costs and benefits" of the proposed plant. The insufficiency of the ER/DEIS conclusions has seamlessly passed from tragedy to farce: peak demand for electricity in Michigan decreased three of the five years since the 21st Century Plan was drafted, rather than steadily increasing as the Plan predicted. And *DTE's own expert forecasts in Public Service Commission rate cases contradict DTE's Environmental Report.* ***DTE's*** "Application for Approval of Its Biennial Review and to Amend Its Energy Optimization Plan" before the MPSC predicts a 0.9% annual average ***decrease*** in electricity sales between 2010 and 2015, which is a far cry from the halcyon days of the 2006 1.2% annual *increase* predictions. ***DTE*** does not predict any dramatic demand growth after 2015.[3] ***DTE*** found that "[t]he economy will continue its plodding recovery in 2012," and "is expected to decline for an eighth consecutive year in 2012 and . . . will decrease for several more years."[4]

Intervenors observed in their January 2012 Motion that the DEIS's reliance on the 21st Century Plan's demand forecast contravenes NRC guidance. NRC's Environmental Standard Review Plan ("ESRP"), requires that in order for the NRC to incorporate a Need for Power analysis that is prepared by a state or regional authority rather than the licensee, the NRC must determine that the analysis is, *inter alia*, subject to confirmation; and responsive to forecasting uncertainties. NUREG-1555 (Oct. 1999); Draft EIS at 8-12. The DEIS analysis violates this guidance, being neither "subject to confirmation" nor "responsive to forecasting uncertainties." The Need for Power analysis explicitly disregards ESRP Guidance directing the agency to

[3]MPSC Case No. U-16671, The Detroit Edison Company Direct Testimony of Sherrie L. Siefman (Sept. 2011).

[4]*Id*. at SLS – 10, SLS – 12.

specifically include "economic recession" in its analysis. *See* ESRP at 8.2.2-5. The DEIS contains the surprising, and unsupported, conclusion that the 21st Century Plan's forecast is "responsive to forecasting uncertainties" because the Plan was based on an "appropriate incorporation of existing and market conditions" - the inaccurate 2006 projection. DEIS at 8-14. The 2006 conditions are simply not the conditions pertaining as of the writing of the 2011 DEIS.

To accuse Intervenors of failing to discharge some imagined responsibility to hold up a mirror to Detroit Edison by filing new or amended contentions since 2009 postulates a ridiculous "stop-me-before-I-kill-again" scenario. Intervenors and the public had a right to expect DTE to harmonize its absurdly divergent projections at some point, or at least, for the NRC Staff to notice that they were unsupportable as prepared, in the face of dramatically-changing economic realities about deteriorating demand in the real world. Flailing Intervenors, instead, for pointing to 2010 and 2011 governmental forecasts which were equally available to DTE only heightens the farce.

The "new" information here is the discovery of the implacable denial of Detroit Edison, in collusion with the incurious NRC Staff, which have closed ranks to ensure that although the ER and DEIS conclusions harshly collide with reality, they need only agree with one another in order to exclude serious consideration of need and demand in this COLA licensing proceeding. Intervenors had a right to expect better of their regulator, and when their regulator demonstrated by its position taken in the DEIS the "new" information that its "hard look" would be fantastic denial of the existence and implications of the Great Recession, Intervenors then properly proffered a new contention.

DTE and the NRC Staff contrived to ignore the legal guidance cited by DTE (Answer at

21 fn. 77): *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 410 (1976); *Kansas Gas and Elec. Co.* (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 328 (1978) ("The most that can be required is that the forecast be a reasonable one in the light of what is ascertainable at the time made"). The forecast in the DEIS is decidedly not reasonable from the vantage point either of 2009 or 2011. The NRC Staff has not provided "the most that can be required," but instead has attempted to get away with the least that can slip by.

Even if a petitioner is unable to show that the NRC Staff's NEPA document differs significantly from the ER, it "may still be able to meet the late filed contention requirements." *Calvert Cliffs 3 Nuclear Project, LLC, and Unistart Nuclear Operating Services, LLC*, LBP-10-24 at 8, citing *Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 363 (1993). If a contention based on new information fails to satisfy the three-part test of §2.309(f)(2)(i)–(iii), it may be evaluated under §2.309(c). *Calvert Cliffs 3 Nuclear Project, LLC, and Unistart Nuclear Operating Services, LLC*, LBP-10-24 at 8.

NRC regulations at 10 C.F.R. §2.309(f)(2) state that:

> The petitioner may amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's documents. Otherwise, contentions may be amended or new contentions filed after the initial filing only with leave of the presiding officer upon a showing that--
>
> (i) The information upon which the amended or new contention is based was not previously available;
>
> (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
>
> (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

Addressing requirement (i) above, Intervenors had a right to expect DTE to reconcile its irrationally divergent projections in the Environmental Report with the expert Michigan Public Service

Commission testimony it presented from circa 2008 through 2011. Alternatively, Intervenors had a right to expect that the NRC Staff would discharge NEPA's "hard look" obligation by doing more than accepting obviously suspect data and conclusions from DTE . The information that DTE would not, itself, update the ER, and that the NRC Staff, in lockstep, would decline to conform its DEIS analysis with reality is "new information" which became known only when the NRC Staff published the Draft EIS which uncritically reproduced DTE's stale projections. As to the requirement of subsection (ii), the new information on projections which has been supplied by Intervenors is based upon the realities in the electricity generating market from circa 2008-2009 through 2011. Finally, as commanded by subsection (iii), the amended or new contention "has been submitted in a timely fashion based on the availability of the subsequent information".

The question of when a new or amended contention must be filed in order to meet the late filing standard of 10 C.F.R. §2.309 – and specifically the critical criteria concerning "good cause" for late filing – calls for a judgment about when the matter is sufficiently factually concrete and procedurally ripe to permit the filing of a contention.

Intervenors submit, alternatively, that their contention meets the criteria of §2.309(c): (i) that good cause - or certainly, not very bad cause - exists for their failure to file on time; (ii) that as ongoing Intervenors, they have demonstrated a right to continue as party to the proceeding; (iii) that Intervenors have previously demonstrated an appropriate interest in the proceeding; (iv) that as representatives of significant interests within the general public, an order entered in the proceeding would affect Intervenors' interest; (v) that given the obduracy of the NRC Staff, there are no other means whereby Intervenors' interest will be protected in a meaningful way, beyond perfunctory notation in the DEIS public comments; (vi) the existing parties, DTE and NRC

Staff, will not be advancing Intervenors' interest on this issue; (vii) Intervenors' participation on this issue will broaden the issues but will not delay the proceeding; and (viii) Intervenors' participation can be expected to assist in developing a sound record.

Because the adequacy of the DEIS cannot be determined before it is prepared, contentions regarding its adequacy cannot be expected to be proffered at an earlier stage of the proceeding before the document becomes available. *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), CLI-83-19, 17 NRC 1041, 1049 (1983). Under 10 C.F.R. § 2.309(c), good cause may exist for a late-filed contention if it: (1) is wholly dependent upon the content of a particular document; (2) could not therefore be advanced with any degree of specificity in advance of the public availability of that document; and (3) is tendered with the requisite degree of promptness once that document comes into existence and is amenable to rejection on the strength of a balancing of all five of the late intervention factors set forth in that section. *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 & 2), ALAB-737, 18 NRC 168, 172 n.4 (1983), citing *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), CLI-83-19, 17 NRC 1041, 1045 (1983); *Kansas Gas & Electric Co.* (Wolf Creek Generating Station, Unit 1), LBP-84-1, 19 NRC 29, 31 (1984). See also *Kerr-McGee Chemical Corp.* (West Chicago Rare Earths Facility), LBP-89-16, 29 NRC 508, 514 (1989). Apart from the 15-day haggle, Intervenors have met these requirements with their contention filing.

Contention 13 should be admitted for hearing.

CONTENTION 17: The descriptions of terrestrial and wetland mitigation plans are insufficient and inadequate, legally and practically, in violation of NEPA requirements for a Draft Environmental Impact Statement.

DTE and the NRC Staff disagree that there must be DEIS disclosure of mitigation plans,

asserting that it is enough to promise such disclosure by the time of the Final EIS, and that the fact that the DEIS replicates the deferral of that responsibility in the ER, there is no genuine issue established by the Intervenors. The NRC Staff argues (Answer p. 27) that "the Intervenors cite to several cases, none of which provide support for their arguments that NEPA requires that other federal and state agencies' determinations as to the adequacy of proposed mitigation measures must be complete and included in the DEIS."

DTE and the NRC Staff do not understand that explicit NRC regulatory requirements for DEIS contents have been violated. According to the NRC's environmental regulations, which are the agency's mechanism for applying NEPA, 10 C.F.R. §51.70(b) requires that "The draft environmental impact statement . . . will be supported by evidence that the necessary environmental analyses have been made." Moreover, 10 C.F.R. §51.71(d) mandates that:

> . . . [T]he draft environmental impact statement will include a preliminary analysis that considers and weighs the environmental effects of the proposed action; the environmental impacts of alternatives to the proposed action; and *alternatives available for reducing or avoiding adverse environmental effects*. . . . The analysis for all draft environmental impact statements will, to the fullest extent practicable, quantify the various factors considered. To the extent that there are important qualitative considerations or factors that cannot be quantified, these considerations or factors will be discussed in qualitative terms. Consideration will be given to compliance with environmental quality standards and requirements that have been imposed by Federal, State, regional, and local agencies having responsibility for environmental protection, including applicable zoning and land-use regulations and water pollution limitations or requirements issued or imposed under the Federal Water Pollution Control Act. ***The environmental impact of the proposed action will be considered in the analysis with respect to matters covered by environmental quality standards and requirements irrespective of whether a certification or license from the appropriate authority has been obtained.***

(Emphasis supplied).

Further, §51.71(d) contains a footnote which says:

> 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.*** Where an environmental assessment of aquatic impact from plant discharges is available from the permitting authority, the NRC will consider the assessment in its determination of the magnitude of environmental impacts for striking an overall cost-benefit balance at the construction permit and operating license and early site permit and combined license stages, and in its determination of whether the adverse environmental impacts of license renewal are so great that preserving the option of license renewal for energy planning decision-makers would be unreasonable at the license renewal stage. When no such assessment of aquatic impacts is available from the permitting authority, NRC will establish on its own, or in conjunction with the permitting authority and other agencies having relevant expertise, the magnitude of potential impacts for striking an overall cost-benefit balance for the facility at the construction permit and operating license and early site permit and combined license stages. . . .

(Emphasis supplied). The regulations thus appear to ***mandate*** consideration of wetlands and other mitigation arrangements within the DEIS, and further ***obligate*** disclosure of such information within the pages of the Draft EIS (DEIS "***will include*** . . . alternatives available for reducing or avoiding adverse environmental effects"). 10 C.F.R. §51.71(d).

Intervenors have therefore posited a valid contention of omission.

CONTENTION 18: The Endangered Species Act consultation and biological assessment ("BA") are incomplete, and there is no adequate substitute for the BA which appears within the DEIS. This makes the DEIS dependent upon completion of the BA and as a practical matter, precludes the public a participation/comment opportunity on the Endnagered Species Act at the DEIS stage. This disclosure violates NEPA requirements for a Draft Environmental Impact Statement.

The NRC Staff and DTE strenuously argue that it is acceptable to have not included the Endangered Species Act-required biological assessment in the DEIS. However, this is violative of NRC regulations and NEPA.

The Staff observes (NRC Staff Answer at 32):

> The Staff will also provide its initial BA to FWS, obtain FWS's comments on the BA and DEIS, and obtain additional information, if necessary to address FWS's comments in the FEIS and BA. These actions will satisfy NEPA's requirement that,

> '[p]rior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.' 42 U.S.C. § 4332(2)(c). . . .

The Staff backs up this argument with fn. 13, also appearing in its Answer at 32: "Complying with consultation responsibilities does not relieve an agency of its obligation to assess and consider the impacts to threatened and endangered species under NEPA; that must be done in the context of the EIS. 50 C.F.R. §402.06(a)."

There are two serious problems with these arguments. First, the "detailed statement" mentioned in the NEPA excerpt above is the Environmental Impact Statement, of which the Draft EIS is a *draft*. There is nothing in NEPA which disturbs the presumption from the plain reading of NEPA that the ESA consultation must occur during the drafting stage of the EIS, prior to the publication of the DEIS. While the general substantive policy of NEPA is "flexible," the Act's "procedural" provisions "are designed to see that all federal agencies do in fact exercise the substantive discretion given them. These provisions are not highly flexible. Indeed, they establish a *strict standard of compliance*." *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission*, 449 F.2d 1109, 1112 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972); *Friends of the River v. F.E.R.C.*, 720 F.2d 93, 110 (D.C. Cir. 1983); *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1243 (D.C. Cir. 1980).

Second, the ESA regulation cited - 50 C.F.R. §402.06(a) - does not contain the words "that must be done in the context of the EIS." Those are the authorship of the NRC Staff. Rather, 50 C.F.R. §402.06(b) states "Where the consultation or conference has been consolidated with the interagency cooperation procedures required by other statutes such as NEPA or FWCA, the results should be included in the document***s*** required by those statutes." (Emphasis supplied).

Both the Draft EIS and the Final EIS are "documents" required by NEPA in this licensing proceeding. It follows that the "results" of the "consultation" "should be included" in the DEIS.

Intervenors have posited a contention of omission which should be respected.

CONTENTION 19: Consumptive water uses from the Great Lakes Basin have not been properly addressed in accordance with the Great Lakes Compact, and the required approval process and approvals, if any, are not delineated in the DEIS, in violation of NEPA.

The NRC Staff and DTE have failed to understand that Intervenors have raised more than a permit-listing problem. Intervenors assert that the DEIS review team has articulated "an estimated annual consumption of 7.6 billion gallons of water" by Fermi 3, but has trivialized it as only about 4% of the current total consumptive use of Lake Erie with the conclusion that mitigation is not warranted, despite the potential for loss of lake volume to become a much more significant issue as a consequence of global warming. Intervenors warn that such a withdrawal could in the not too distant future be viewed as "*per se* unreasonable" under the Great Lakes Compact. There is an issue of the failure to explain mitigation measures within the DEIS for water withdrawals for Fermi 3.

NRC regulations at 10 C.F.R. §51.70(b) require that "The draft environmental impact statement . . . will be supported by evidence that the necessary environmental analyses have been made." That has not occurred in the Fermi 3 DEIS for water withdrawals. And 10 C.F.R. §51.71(d) mandates that:

> . . . [T]he draft environmental impact statement will include a preliminary analysis that considers and weighs the environmental effects of the proposed action; the environmental impacts of alternatives to the proposed action; and *alternatives available for reducing or avoiding adverse environmental effects*. . . . The analysis for all draft environmental impact statements will, to the fullest extent practicable, quantify the various factors considered. . . . The environmental impact of the proposed action will be considered in the analysis with respect to matters covered by environmental quality standards and requirements irrespective of whether a certification or license from the

appropriate authority has been obtained.

The impacts associated with so large a water withdrawal have not been considered in the DEIS. This is a valid contention of omission as a violation of NRC regulations which specify DEIS contents.

CONTENTION 20: The DEIS does not adequately evaluate thermal pollution issues associated with the discharge of cooling water into Lake Erie, in violation of NEPA.

In the first line of their Motion discussion, Intervenors pointed out that "the DEIS notes the issues with thermal pollution on its discharge cooling water into Lake Erie but does not properly evaluate these issues as serious and fails to provide potential mitigation options for the Fermi 3 facility." The NRC Staff's Answer (at 40) candidly admits that "The thermal plume analysis in the DEIS relies on the analysis presented in the ER and is substantially the same as that analysis" - a revealing comment that goes a long way to explain why there is so little divergence between the Staff's publication of the DEIS, and DTE's Environmental Report.

The implication which follows upon that admission is that the 2009 data and modeling done by DTE have not been updated to account for the rapidly-expanding algae problems afflicting Lake Erie. Consequently, there is no meaningful mitigation plan included in the DEIS to reduce Fermi 3's significant thermal contribution to Lake Erie (and consequently promotion of a worsened algae problem).

Intervenors urge that explicit NRC regulatory requirements for DEIS contents have been violated. Within NRC's environmental regulations, 10 C.F.R. §51.70(b) requires that "The draft environmental impact statement . . . will be supported by evidence that the necessary environmental analyses have been made." And 10 C.F.R. §51.71(d) mandates that:

> . . . [T]he draft environmental impact statement will include a preliminary analysis

> that considers and weighs the environmental effects of the proposed action; the environmental impacts of alternatives to the proposed action; and *alternatives available for reducing or avoiding adverse environmental effects*. . . . The analysis for all draft environmental impact statements will, to the fullest extent practicable, quantify the various factors considered. To the extent that there are important qualitative considerations or factors that cannot be quantified, these considerations or factors will be discussed in qualitative terms. Consideration will be given to compliance with environmental quality standards and requirements that have been imposed by Federal, State, regional, and local agencies having responsibility for environmental protection, including applicable zoning and land-use regulations and water pollution limitations or requirements issued or imposed under the Federal Water Pollution Control Act. ***The environmental impact of the proposed action will be considered in the analysis with respect to matters covered by environmental quality standards and requirements irrespective of whether a certification or license from the appropriate authority has been obtained.***

(Emphasis supplied).

Further, §51.71(d) contains a footnote 3 which says:

> 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.***

(Emphasis supplied). The regulations seem to ***mandate*** disclosure of detailed mitigation steps and an explanation of factors going into the thermal discharge phenomenon. These disclosures are required to appear within the pages of the Draft EIS (DEIS "***will include*** . . . alternatives available for reducing or avoiding adverse environmental effects"). 10 C.F.R. §51.71(d). And unless they are finally included in the DEIS, the DEIS remains incomplete. Intervenors have stated a valid contention of omission.

CONTENTION 21: Evaluation of the wetland areas that would be impacted by the construction and operation of the reactor, and the potential status of selected wildlife within those areas, is not fully and properly addressed in the DEIS, in violation of NEPA.

This contention asserts the lack of detailed mitigation plans for wetlands loss and state-

threatened plant and animal species. In particular, Intervenors expressed concerns about a lack of adequacy of the DEIS discussion of DTE's avoidance and minimization statement, and therefore its compensatory mitigation plan. The Staff and DTE have handed responsibility for this off to the U.S. Army Corps of Engineers, which has not yet granted the requisite Section 404 permit, much less delineated mitigation steps aimed at avoiding and minimizing adverse impacts to aquatic resources.

According to the NRC's environmental regulations, which are the agency's mechanism for applying NEPA, 10 C.F.R. §51.70(b) requires that "The draft environmental impact statement . . . will be supported by evidence that the necessary environmental analyses have been made." Moreover, 10 C.F.R. §51.71(d) mandates that:

> . . . [T]he draft environmental impact statement will include a preliminary analysis that considers and weighs the environmental effects of the proposed action; the environmental impacts of alternatives to the proposed action; and *alternatives available for reducing or avoiding adverse environmental effects*. . . . The analysis for all draft environmental impact statements will, to the fullest extent practicable, quantify the various factors considered. To the extent that there are important qualitative considerations or factors that cannot be quantified, these considerations or factors will be discussed in qualitative terms. Consideration will be given to compliance with environmental quality standards and requirements that have been imposed by Federal, State, regional, and local agencies having responsibility for environmental protection, including applicable zoning and land-use regulations and water pollution limitations or requirements issued or imposed under the Federal Water Pollution Control Act. ***The environmental impact of the proposed action will be considered in the analysis with respect to matters covered by environmental quality standards and requirements irrespective of whether a certification or license from the appropriate authority has been obtained.***

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> 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.*** Where an environmental assessment of aquatic impact from plant discharges is available from the permitting authority, the NRC will consider the assessment in its determination of the magnitude of environmental impacts for striking an overall cost-benefit balance at the construction permit and operating license and early site permit and combined license stages, and in its determination of whether the adverse environmental impacts of license renewal are so great that preserving the option of license renewal for energy planning decision-makers would be unreasonable at the license renewal stage. When no such assessment of aquatic impacts is available from the permitting authority, NRC will establish on its own, or in conjunction with the permitting authority and other agencies having relevant expertise, the magnitude of potential impacts for striking an overall cost-benefit balance for the facility at the construction permit and operating license and early site permit and combined license stages. . . .

(Emphasis supplied). The regulations thus appear to mandate consideration of wetlands mitigation arrangements within the DEIS, and further obligate disclosure of such information within the pages of the Draft EIS (DEIS "***will include*** . . . alternatives available for reducing or avoiding adverse environmental effects"). 10 C.F.R. §51.71(d).

Because the requisite analyses and DEIS disclosures have not occurred, Intervenors have posited a valid contention of omission.

CONTENTION 22: The DEIS calls for scrutiny only of transportation aspects of the use of unusually enriched fuel in the Fermi 3 reactor, which is not adequately disclosed, nor is there analysis of the potential reactor operations accident implications from use of higher-enriched fuel for fissioning, nor evaluation of the increased potential for higher levels of emissions of radioactivity in air and water from normal operations.

When Intervenors first reviewed DTE's Answer to this contention, they initially considered terminating their pursuit of it. However, closer scrutiny of the ESBWR Design Control Document, ML26A6642AD Rev. 9, dated December 2010 reveals that the DEIS is inaccurate in its disclosure of the enrichment levels of the fuel slated for use in Fermi 3. Specifically, Table 1.3-1, which was correctly identified to Michael Keegan of Don't Waste Michigan by Mr. Hale of the NRC as the location of information about the U-235 enrichment

level of Fermi 3 fuel, indicates that the "first core" at Fermi 3 (which is the only planned ESBWR) would be enriched at a 2.08% level, not 4.6%. Keegan learned of that fact only two (2) days before Intervenors filed their January 11, 2012 motion in this matter which contained Contention 22. Because Vol. 1, p. 6-19 of the DEIS refers only to 4.6% U-235, it appears that the DEIS fails to meet NRC regulatory requirements for draft environmental impact statements.

Section 51.71 of 10 C.F.R. Part 51 requires a DEIS to "identify any methodologies used and sources relied upon, and" to "be supported by evidence that the necessary environmental analyses have been made." The discrepancy between 2.08% "first core" fuel in Fermi 3 and 4.6% enriched fuel is neither disclosed nor explained in the analysis.

While the general substantive policy of NEPA is "flexible," the Act's "procedural" provisions "are designed to see that all federal agencies do in fact exercise the substantive discretion given them. These provisions are not highly flexible. Indeed, they establish a *strict standard of compliance*" (Emphasis supplied). *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission*, 449 F.2d 1109, 1112 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972); *Friends of the River v. F.E.R.C.*, 720 F.2d 93, 110 (D.C. Cir. 1983); *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1243 (D.C. Cir. 1980).

Intervenors have articulated a contention of omission which must be fulfilled for the NEPA document to be deemed compliant with NRC regulations.

Contention 23: 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.

The transmission corridor exemplifies a "NEPA lite" approach taken to environmental

compliance. In a January 9, 2011 (should be 2012) comment letter[5] to the NRC which was not available in the NRC's ADAMS system until after January 11, 2012, the U.S. Fish and Wildlife Service noted that "[t]he construction of the transmission lines will require a separate section 7 [Endangered Species Act] consultation as it is considered a separate project by the Nuclear Regulatory Commission (NRC)." Segmentation of the transmission corridor is proven not only by that observation, but also is admitted by DTE's insistence (DTE Answer at 63) that because a separate company, ITC Transmission, would be responsible for management of the corridor and has made no application for permits, no NEPA compliance is required at this point.

So despite the truism that a power plant without transmission lines is a useless anomaly, the NRC has decoupled an as-yet incomplete but highly-essential component of Fermi 3 - one inextricably intertwined with the commercial success of the new plant - from the NEPA process. At the same time, both the Staff and DTE proceed to attack Intervenors for not having timely stated their contention. The public is forced to rely on generalities, little to no current quantitative data, no biological assessment, no state-agency surveys of wetland impacts or state-endangered species, and broad references to transmission corridor, from which Intervenors were expected to forge a highly-specific contention.

Fragmented decisionmaking in nuclear projects is forbidden by NEPA. In *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231 (3d Cir.1980), *cert. denied*, 449 U.S. 1096, 101 S.Ct. 893, 66 L.Ed.2d 824 (1981), a residents' association challenged an attempt to build and operate a water decontamination system to process radioactive water that

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[5]ADAMS ML 12026A464, found at http://adamswebsearch2.nrc.gov/webSearch2/main.jsp?AccessionNumber='ML12026A464'

accumulated after the Three Mile Island accident. The Alliance feared that partially decontaminated water would be released into the environment. Among its claims was that the NRC was violating NEPA by authorizing construction of the system to begin before preparation of an environmental evaluation of its disposal plan. The Alliance argued that the NRC was fragmenting its decisionmaking - it was delaying a final decision on how it would resolve the disposal problem, thereby eluding the scrutiny of an EIS, but nevertheless it had tacitly elected a partial solution through allowing construction of the decontamination system. Postponing preparation of an EIS until private parties had been permitted to expend large sums on construction, the Alliance said, would distort the final evaluation and choice of solution by the NRC and any reviewing court. *Id.* at 239-40. Yet because the case was still under consideration, there was no final order the Alliance could challenge under the Hobbs Act. *Id*. at 236.

The Third Circuit stated, "Segmentation of a large or cumulative project into smaller components in order to avoid designating the project a major federal action has been held to be unlawful," and the court proceeded to find that the district court had jurisdiction to compel NRC compliance with NEPA by prohibiting segmentation and forcing the preparation of an EIS. *Id*. at 240. The appellate panel ruled that "a claim that NRC is not complying with the National Environmental Policy Act states a cause of action over which the district courts have subject matter jurisdiction." *Id*. at 241.

By providing only "NEPA lite" disclosures, the NRC Staff has evidently developed the NEPA "hardly look" standard. Especially insulting is the charge (DTE Answer at 58) that Intervenors "identify no impacts that were overlooked or not considered in the DEIS" - a charge made when the exact routing of the transmission lines has not been identified. Far from

"discuss[ing] all impacts from transmission-related activities, as required by NEPA" (DTE Answer at 59), the DEIS catalogs probable environmental effects without specifically tying them to any particular part of many miles of corridor. For example, by pronouncing in glittering generalities that ITC Transmission will perform minimal intrusions on habitat, use "best management practices" and only "approved" herbicides, DTE and the Staff fail to provide the public with meaningful information to ascertain what plant or animal species could be affected, what specific mitigation measures would be invoked to protect the environment and cut down negative impacts and toxic chemical buildups. A "trust us" pledge to take care to avoid harming wetlands and other bodies of water is not a mitigation scheme (see DTE Answer at 60). In fact, DTE admits (Answer at 61) that "because the final detailed design of the new transmission lines is not complete, development of specific mitigation measures is premature." While it is true as a general observation that final detailed mitigation plans need not be in place prior to the completion of the NEPA process, 10 C.F.R. §51.70(b) requires that "The draft environmental impact statement . . . will be supported by evidence that the necessary environmental analyses have been made." And 10 C.F.R. §51.71(d) mandates that:

> . . . [T]he draft environmental impact statement will include a preliminary analysis that considers and weighs the environmental effects of the proposed action; the environmental impacts of alternatives to the proposed action; and *alternatives available for reducing or avoiding adverse environmental effects*. . . . The analysis for all draft environmental impact statements will, to the fullest extent practicable*, quantify the various factors considered. To the extent that there are important qualitative considerations or factors that cannot be quantified, these considerations or factors will be discussed in qualitative terms*. . . . *The environmental impact of the proposed action will be considered in the analysis with respect to matters covered by environmental quality standards and requirements irrespective of whether a certification or license from the appropriate authority has been obtained.*

(Emphasis supplied). Moreover, the NRC as lead agency is on the hook to provide NEPA

disclosures now for this portion of the Fermi 3 plan. 10 C.F.R. §51.71(d) contains a footnote which says:

> 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.* Where an environmental assessment of aquatic impact from plant discharges is available from the permitting authority, the NRC will consider the assessment in its determination of the magnitude of environmental impacts for striking an overall cost-benefit balance at the construction permit and operating license and early site permit and combined license stages, and in its determination of whether the adverse environmental impacts of license renewal are so great that preserving the option of license renewal for energy planning decision-makers would be unreasonable at the license renewal stage. When no such assessment of aquatic impacts is available from the permitting authority, NRC will establish on its own, or in conjunction with the permitting authority and other agencies having relevant expertise, the magnitude of potential impacts for striking an overall cost-benefit balance for the facility at the construction permit and operating license and early site permit and combined license stages. . . .

(Emphasis supplied).

The DEIS (and before it, the ER) segmented the transmission line part of Fermi from the rest of the project. This is classic segmentation and avoidance of NEPA treatment of the project as a meaningful whole. The NEPA document is fatally incomplete and should be rejected following hearing on the particulars of this issue.

Contention 24: The public health effects and impacts from routine, licensed radiological emissions in air and water from the proposed Fermi 3 have been inadequately assessed, analyzed and disclosed in the Draft Environmental Impact Statement, in violation of NEPA.

The report from Intervenors' expert, Joseph Mangano, MPH/MBA, contains calculations and assessement of epidemiological consequences from the 25-year operation history of Fermi 2. There are statistically noteworthy increases in the rate of all major types of cancer, coinciding with the period just after Fermi 2 went into full-scale operation, and also, the rates of

hospitalization for cancers, benign neoplasms and congenital anomalies. Mangano completed the rudiments of a cumulative effects analysis that must be undertaken prior to operations of a Fermi 3 nuclear plant. With nearly 50 years' worth of permissible, daily or regular radiological emissions from Fermi 1 and Fermi 2, and the proximity within a couple of miles of the Monroe Power Plant, a huge coal-burner which exudes radiation as a daily constant, and another coal burning plant about 8 miles south of Fermi at Luna Pier, there is a critical need for a baseline analysis of radiological effects on public health as a prerequisite to the Fermi 3 project.

Under NEPA implementing regulations, an agency prepares a draft EIS in which it evaluates the proposed action and its direct, indirect, and cumulative impact on the environment. 40 C.F.R. §1502.14 (2006). NEPA requires that an EIS provide "cumulative effects" analysis based on actual data. The NEPA defines "cumulative effects" as "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...." *Id.* §1508.7. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. *Wilderness Workshop v. U.S. Bur. of Land Mgmt*., 531 F.3d 1220, 1228 n. 8 (10th Cir.2008); *Utah Envtl. Congress v. Richmond*, 483 F.3d 1127, 1133, 1139-40 (10th Cir.2007). NEPA does not prohibit approval of projects with negative cumulative effects; it only requires that they be considered and disclosed. *Utah Environmental Congress v. Richmond*, 483 F.3d 1127, 1140 (10th Cir. 2007).

Section 5.9.3.2 of the DEIS contains an admission that, conservatively speaking, any amount of radiation may pose some risk of causing cancer or a severe hereditary effect and that the risk is higher for higher radiation exposures, and further concurs with the recent BEIR study

by the National Research Council (2006) that any increase in dose, no matter how small, results in an incremental increase in health risk.

Intevenors have demonstrated an ample probability that there are cumulative effects from radiologically-linked activity in Monroe County, Michigan through the present. Certainly, the wholly-permissible emissions of radiation in air and water from a new Fermi 3 will be additive, and must be seriously accounted for within the NEPA document..

/s/ Terry J. Lodge
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February 13, 2012

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)	)	
	)	
	)	

* * * * *

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "REPLY IN SUPPORT OF 'MOTION FOR RESUBMISSION OF CONTENTION 10, TO AMEND/RESUBMIT CONTENTION 13, AND FOR SUBMISSION OF NEW CONTENTIONS 17 THROUGH 24'" have been served on the following persons via Electronic Information Exchange this 13th day of February, 2012:

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IN REPLY REFER TO:

January 9, 2011

9043.1
ER 11/1002

Mr. Bruce Olson
Project Manager
Environmental Projects Branch 2
Division of New Reactor Licensing
Office of New Reactors
U.S. Nuclear Regulatory Commission,
Washington, DC 20555-0001

Dear Mr. Olson:

The U.S. Department of Interior (Department) has reviewed the Draft Environmental Impact Statement (DEIS) for the Combined License (COL) for the Enrico Fermi Unit 3 proposed by Detroit Edison Company (DTE) (NUREG-2105). Fermi 3 is co-located with Units 1 and 2, Monroe County, Michigan, on the shore of Lake Erie. These comments have been prepared under the authority of the Fish and Wildlife Coordination Act (48 Stat. 401, as amended; 16 U.S.C. 661 et seq.), the Endangered Species Act of 1973 (ESA), as amended, and are consistent with the intent of the National Environmental Policy Act of 1969 and the U. S. Fish and Wildlife Service's Mitigation Policy.

Federally Threatened and Endangered Species

To facilitate compliance with Section 7(c) of the Endangered Species Act of 1973, as amended, Federal agencies are required to obtain information from the U. S. Fish and Wildlife Service (FWS) concerning any species, listed or proposed to be listed, that may be present in the area of proposed action.

The DEIS identifies six federally-listed species in Monroe County, Michigan that may inhabit the project area. The FWS is reserving substantive comments regarding federally listed species until they are provided an opportunity to review the forthcoming biological assessment. At that time, consultation pursuant section 7 of the ESA will continue. The construction of the transmission lines will require a separate section 7 consultation as it is considered a separate project by the Nuclear Regulatory Commission (NRC). The FWS recommends that the NRC not issue a license for Fermi 3 until section 7 consultation has been completed.

Bald Eagles

There is a known bald eagle territory that overlaps DTE's FERMI 3 project boundary. As outlined in the FWS Bald Eagle Management Guidelines (http://www.fws.gov/midwest/eagle/guidelines/guidelines.html), the FWS recommends no construction activity within a buffer distance of 660 feet from any existing or recently existing nest if the proposed activity is visible from the nest and/or a resulting structure will be over three stories tall. Because the locations of proposed project-related construction activities appear to fall outside the recommended 660 foot nest buffer around the current active nest, the FWS has determined that this project, at this time, is unlikely to result in take of breeding eagles. This determination should only be considered valid as long as activities associated with the chosen project alternative continue to fall outside of the aforementioned 660 foot buffer around the current active eagle nest and there are no new eagle nests identified in the area.
It is worth noting that the breeding pair of eagles that occupy the nearby territory have constructed five nests in the last ten years (resulting in one new nest approximately every other year) on FERMI property, and have used all but one of them for nesting during that same time period. An unused nest was constructed in 2011 and is likely to be used for breeding at some point in the future. Because these eagles frequently relocate nest sites, and because the project start date may be one or several years down the road, it is very difficult to predict impacts to these eagles from this project. As such, FWS recommends that DTE remain in close contact with FWS Field Office in Michigan regarding changes in eagle nest locations. If a new nest were to be built, or an inactive nest be occupied in the future and project activities cannot be modified to avoid a potential disturbance, an eagle take permit may be necessary.

Additionally, since the project is located in the proximity of eagle foraging and roosting habitat both during breeding and in the winter, along with the above finding, the FWS encourages you to implement the following recommendations to further avoid impacting bald eagles:

- Minimize potentially disruptive activities (as outlined in the Guidelines) and development in the eagles' direct flight path between any known nests, roost sites and/or important foraging areas.
- Avoid loud, intermittent noises within one-half mile of known eagle nest locations during the breeding season and known eagle use areas when eagles are present .
- Protect and preserve potential roost and nest sites by retaining, when possible, mature trees and old growth stands within one-half mile of water.
- Employ industry-accepted best management practices to prevent birds from colliding with any lines, poles, and tower supports.
- Use pesticides, herbicides, fertilizers, and other chemicals only in accordance with federal and state laws.

Migratory Birds

The DEIS identifies several species of woodland and grassland bird species or their habitats that fall under protection of the Migratory Bird Treaty Act. Because the proposed project site very likely provides nesting habitat for migratory birds, we have concerns that the proposed project may also impact migratory birds. Under the Migratory Bird Treaty Act of 1918, as amended, it is unlawful to take, capture, kill, or possess migratory birds, their nests, eggs, or young. We

recommend that removal of potential nesting habitat associated with the proposed project be completed before spring nesting begins or initiated after the breeding season has ended to avoid take of migratory birds, eggs, young, and/or active nests. Specifically, we recommend that no habitat disturbance, destruction, or removal occur between April 15 and August 15 to minimize potential impacts to migratory birds during their nesting season, but please be aware that some species may initiate nesting before April 15.

Wildlife Habitat

Approximately 197 acres of terrestrial wildlife habitat on the proposed Fermi 3 site will be disturbed and of that, 51 acres will be permanently lost. We would recommend DTE develop a wildlife management plan to compensate for the loss of wildlife habitat to be reviewed and approved by the FWS Field Office in Michigan. There will be approximately 130 acres of grassland-type habitat either permanently or temporarily lost due to the construction of Fermi 3 and associated appurtenances. The plan should include development of quality grassland habitat to offset the loss and to provide nesting habitat for grassland avian species (i.e., bobolink, Eastern meadowlark, savannah sparrow).

Wetlands and Aquatic Habitats

Approximately 34.5 acres of wetlands will be affected from the construction of Fermi 3. Of that, 27.7 acres will be temporarily disturbed and will be restored. Approximately 8.3 acres would be permanently lost at the site. To offset any wetland loss, DTE has developed an aquatic resource mitigation plan that includes restoring or enhancing approximately 82 acres of wetland offsite in the coastal zone of Western Lake Erie. The FWS agrees conceptually with the mitigation plan although according to the FWS's mitigation plan, coastal wetlands may be considered Category 1, with a goal of "no loss of existing habitat value." Therefore, the 0.80 acres of emergent coastal wetlands proposed to be impacted by the project should not lose any existing habitat value.

Pgs. 2-74, and 9-202: The information presented in the document on the Lake Erie fishery could be more thorough. USGS suggests that the Final EIS include the information available from the website: http://www.glsc.usgs.gov/_files/reports/2009LakeErieMonitoring.pdf

Pg. 2-121: The document does not indicate that the tubenose goby (*Proterorhinus semilunaris)* has been collected in Swan Creek. USGS suggests the Final EIS include the information on the tubenose goby available from the website:
http://nas.er.usgs.gov/queries/factsheet.aspx?SpeciesID=714

Pg. 9-153: The information presented in the document on the Lake Huron fishery could be more thorough. USGS suggests the Final EIS include the information available from these websites:
http://www.glsc.usgs.gov/_files/reports/2009LakeHuronDemersal.pdf
http://www.glsc.usgs.gov/_files/reports/2009LakeHuronPreyfish.pdf

Pg. 9-202, paragraph 3: The tubenose goby (*Proterorhinus semilunaris*) is not included in the list of nuisance species. USGS suggests the Final EIS include the tubenose goby as a nuisance species. A suggested reference can be found at:
http://nas3.er.usgs.gov/queries/CollectionInfo.asp?SpeciesID=714&HUCNumber=41000

Water Intake

DTE has proposed a closed circuit cooling system with a cooling basin cooling tower for Fermi 3. This closed system can significantly reduce the water use by 96 to 98%, and significantly reduce the impingement or entrainment of aquatic organisms. DTE has also proposed a through screen velocity of 0.5 ft/s or less under all operating conditions which should also reduce entrainment and impingement. The system also allows impinged organisms to be washed from the traveling screens to be directed back to Lake Erie via a fish return system. We laud these measures to reduce entrainment/impingement but the DEIS has not addressed impingement of diving ducks. There are water intake structures at other nuclear power plants in the Great Lakes where this has become a problem. Ducks may be attracted to the intake structures to feed on the guagga/zebra mussels that colonized the intake and the surrounding substrate. The DEIS has not stated the depth of the intake. The depth could be greater than a diving duck's diving capabilities but DTE should address this issue in the forthcoming FEIS.

Summary

The FWS will provide more substantive comments regarding federally listed threatened and endangered species after they are provided the opportunity to review the biological assessment (BA). In the DEIS, on page 5-21, it is stated that "the Review Team will prepare a BA prior to issuance of final EIS", at which time the U. S. Fish and Wildlife Service, East Lansing Field Office will review the BA. Wetland loss should be mitigated and any affected coastal wetland should not lose any exiting habitat value. A wildlife management plan should be developed and provided to the local FWS Office for review and comment. The impingement of diving ducks should be addressed in any forthcoming NEPA documents.

We appreciate the opportunity to provide these comments.

Sincerely,

Lisa Chetnik Treichel
Program Manger,
Land, Energy and Transit Projects

cc: Dave Larsen & Jeff Gosse, USFWS, Bloomington. MN