UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	
	)	Docket No. 52-033-COL
THE DETROIT EDISON COMPANY (Fermi Nuclear Power Plant, Unit 3)	)	November 29, 2012
	)	
	)	

* * * * *

INTERVENORS' RESPONSE IN OPPOSITION TO APPLICANT'S MOTION FOR RECONSIDERATION OF DENIAL OF SUMMARY DISPOSITION OF CONTENTION 8 (EASTERN FOX SNAKE)

Now come Intervenors Beyond Nuclear, *et al.*[1] (hereinafter "Intervenors"), by and through counsel, and set forth their response in opposition to "Applicant's Motion for Reconsideration of Denial of Summary Disposition of Contention 8."

I. Summary of Argument

The Atomic Safety and Licensing Board's ("ASLB") decision relating to Contention 8 was reasonable, based on facts and argument presented by the parties, was anticipatable inasmuch as it consistently interprets and applies legal precedent involving the National Environmental Policy Act ("NEPA"). The issue of perceived enforceability of mitigation measures submitted to (and accepted by) a State agency falls within the span of mitigation

[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.

concerns envisioned by the Supreme Court in *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332 (1989).

Further, the Atomic Safety Licensing Board correctly found that there are issues of material fact respecting claimed mitigation measures for the eastern fox snake, a Michigan state-threatened species, and that the contention must proceed to a merits hearing. Contrary to Detroit Edison's claims, NEPA and Commission precedent require that mitigation plans must be presented within the Final Environmental Impact Statement for Fermi 3 in a way which is neither perfunctory nor conclusory. The current presentation is perfunctory and/or conclusory. Consequently, there currently is no reasonable basis for the NRC Staff to find assurance that Detroit Edison will implement its mitigation plan. There remains a genuine dispute on implementation of the mitigation plan.

II. Application of Analogous EA/FONSI Law Is Appropriate

The portion of the ASLB's Memorandum and Order which appears to have prompted DTE's reconsideration request is the Board's determination that it may analogize DTE's mitigation responsibilities to pre-existing court determinations on EA/FONSI mitigation:

> As the CEQ Guidance explains, although NEPA does not require mitigation of environmental impacts, it does require that, if a federal agency relies on mitigation to support a finding in an environmental impact statement (EIS) or a finding of no significant impact (FONSI), the agency should ensure that mitigation commitments are implemented, monitor the effectiveness of such commitments, be able to remedy failed mitigation, and involve the public in mitigation planning. The DEIS, however, fails to address those issues. Instead, the DEIS's conclusion that the impact on the eastern fox snake will be small appears to be based on the assumption that MDNR [Michigan Department of Natural Resources, hereinafter "MDNR"]will require implementation of DTE's Conservation Plan, and that MDNR will also require the monitoring that the Staff concluded would also be necessary. In other words, the DEIS assumes that MDNR will take the actions that the CEQ Guidance states are the responsibility of the federal agency that relies on mitigation to support a finding in its EIS. In substance, Intervenors question whether this reliance is consistent with the CEQ Guidance.

> Intervenors have raised a substantial question whether the DEIS adequately addresses the issues raised in the CEQ Guidance. Because DTE, the moving party in this instance, bears the burden of demonstrating that it is entitled to judgment as a matter of law, a substantial question whether the DEIS complies with applicable NEPA requirements is sufficient to defeat summary disposition. But the CEQ Guidance consists primarily of recommendations to federal agencies, not legally binding obligations. The Guidance "is not a rule or regulation, and the recommendations it contains may not apply to a particular situation based upon the individual facts and circumstances." It also "does not change or substitute for any law, regulation, or other legally binding requirement and is not legally enforceable." Some courts have declined to defer to similar interpretative guidance issued by CEQ.
>
> Fortunately, we need not resolve the question of the level of deference we should afford the CEQ Guidance, because the federal courts have developed similar rules for deciding when federal agencies may rely on mitigation to support a FONSI. To be sure, in the present case the NRC did not issue a FONSI, but it did rely on mitigation to support its finding that the impact of construction and pre-construction activities on the eastern fox snake will be small. Such a finding is sufficiently similar to a FONSI that the cases addressing that issue are also relevant to assessing the determination the Staff made in the DEIS concerning impacts to the snake. The CEQ Guidance recognizes the overlap between those two issues. We will therefore look to the federal case law for the governing legal requirements.

Memorandum and Order, LBP-12-23, ASLBP No. 09-880-05-COL-BD01, pp. 23-25 (November 9, 2012).

As the ASLB noted in its decision,[2] the CEQ Guidance strongly advises that

> Agencies should not commit to mitigation measures considered in an EIS or EA absent the authority or expectation of resources to ensure that the mitigation is performed. In the decision documents concluding their environmental reviews, agencies should clearly identify any mitigation measures adopted as agency commitments or otherwise relied upon (to the extent consistent with agency authority or other legal authority), so as to ensure the integrity of the NEPA process and allow for greater transparency.

Intervenors concur with the ASLB that the circumstances of Contention 8 allow it to rely upon and analogize EA/FONSI mitigation cases which the Board cites at LBP-12-23, pp. 25-29. And Intervenors believe that the ASLB properly and unsurprisingly applied those case interpretations

[2]LBP-12-23 p. 24, fn. 133, citing CEQ Guidance, 76 Fed. Reg. at 3847.

to the issues raised by Contention 8. Intervenors will not rehash the Board's reasoning in this regard.

But as discussed below, Intervenors propose that even absent reliance on EA/FONSI precedent, the ASLB properly denied summary disposition based on the unassailable and noncontroversial holding of *Robertson v. Methow Valley Citizens Council* and its progeny.

III. *Robertson v. Methow Valley Citizens Council* Principles Sustain The Denial Of Summary Disposition

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) states that "NEPA requires that agencies consider the environmental impacts of their actions before they are taken, in order to ensure that `important effects [of the licensing decision] will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.' " An EIS must include a detailed statement regarding any adverse environmental effects that cannot be avoided, according to 42 U.S.C. Sec. 4332(2)(C)(ii). Implicit in this requirement is an understanding that the EIS will discuss the extent to which steps can be taken to mitigate adverse environmental consequences. *Methow Valley Citizens Council*, 490 U.S. at 351-52. Omission of a reasonably complete discussion of possible mitigation measures would undermine the action-forcing function of NEPA and prevent the agency and interested parties from properly evaluating the severity of the adverse effects. *Id.* at 352.

a. The Facts Reveal The Lack of Mitigation Specificity

The Intervenors previously argued factually against summary disposition. They showed that the MDNR letter which approved mitigation plans to protect the endangered eastern fox snake ("EFS") consists of blanks which have been checked alongside preprinted statements: that "Information received regarding the proposed Fermi 3 nuclear plant construction (DEQ File No.

10-58-0011-P) in Monroe County (section 28, T6S R10E) has been reviewed. The information was found to adequately address the concerns for potential threatened and endangered species to the site in question." But the approval does not explain with any particularity what, exactly, was reviewed by MDNR, nor what the basis for the approval is. The form refers only to the MDNR having been "provided information." The approval continues, "Based on the provided information, the proposed project should have minimal direct impacts on known special natural features [*viz.*, the EFS] at the location(s) specified if it proceeds according to the plans provided." The checked-box form only mentions unspecified "documents" having been reviewed by the MDNR.

Coupled with this, DTE's Habitat Conservation Plan states this:

> These measures are being conducted to maximize the functionality of these habitats for the presence of eastern fox snakes and other wildlife and offset loss of habitat from construction activities. As part of the effort to minimize loss or take of eastern fox snakes, some snakes may be relocated to completed and translocation-suitable mitigation areas to establish this rare species in additional areas. This evaluation will be done in conjunction with project environmental engineer or the project biologist/herpetologist and the MDNR.

Id., Att. 1 to DTE's MSD on Contention 8, App. C., p. 1.

But problematically, MDNR's website reveals that the agency has abandoned its regulatory mission of reviewing environmental permit requests:

> The Michigan Department of Natural Resources (DNR) has ceased to accept review requests to the Environmental Review (ER) Program after September 16, 2011. Funding for the program was not included in the state budget for the fiscal year that began October 1, 2011. Project review requests can be sent to Michigan Natural Features Inventory (MNFI), a program of Michigan State University Extension. The DNR Endangered Species Assessment website has been one venue for people to get a general idea if protected species are in an area and to request a formal DNR review for potential impacts of a proposed project. That website will remain available, but the request submittal capabilities have been removed.

http://www.michigan.gov/dnr/0,4570,7-153-10370_12141_12168-30516--,00.html. DTE did not request a Natural Features Inventory review of the Fermi 3 plan for potential impacts. In DTE's Conservation Plan, Attachment 1 to the MSD, the only references to the Michigan Natural Features Inventory are uses by DTE of some of MNFI's literature. The "specifics" of mitigation in the HCP, quoted above, are only that "some snakes may be relocated" and it will be done in consultation with a project engineer and possibly a MDNR herpetologist.

Intervenors contended in opposition to summary disposition - and the evidence remains unchanged - that based on these facts, the MDNR permit has no legitimacy as a considered regulatory order and that it is merely a checklist review. As the Board correctly understands (LBP-12-23 p. 22), Intervenors are not collaterally attacking the MDNR order, but instead, they "question whether this reliance [*viz*., "the DEIS assumes that MDNR will take the actions that the CEQ Guidance states are the responsibility of the federal agency that relies on mitigation to support a finding in its EIS"], is consistent with the CEQ Guidance. LBP-12-23 pp. 22, 24. It is fairly inferable from these facts that there is no guarantee mitigation will take place, and further, that there hasn't been a meaningful review nor involvement in the mitigation plan approval by MDNR. This is apparent from the lack of mention or consideration within the bare MDNR permit findings of the environmental aspects of the potentially-contaminated 107.31-acre former farmland parcel located adjacent to Monroe Power Plant, which DTE proposes to use as new EFS habitat in its mitigation scheme.

b. NEPA Requires 'Reasonably Complete' Discussion Of Mitigation Within An EIS

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

discussing alternatives to the proposed action, § 1502.14(f), and consequences of that action, § 1502.16(h), and in explaining its ultimate decision, § 1505.2(c)." It is not enough to merely list possible mitigation measures. *San Juan Citizens Alliance v. Stiles,* 654 F.3d 1038, 1053-54 (10th Cir. 2011), citing *Colorado Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1173 (10th Cir. 1999). Consistent with CEQ regulations, the EIS must include a " reasonably complete discussion of possible mitigation measures." *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 473 (9th Cir.2000). While under *Robertson*, courts may not require "a fully developed plan that will mitigate environmental harm before an agency can act," 490 U.S. at 352-53, and there is no substantive requirement that mitigation measures be implemented, *id.* at 353, it remains that the agency must discuss mitigation measures "in sufficient detail to ensure that environmental consequences have been fairly evaluated.... A mere listing ... is insufficient." *Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998) (internal quotations and citations omitted); *San Juan Citizens Alliance v. Stiles*, *supra*, 654 F.3d 1053-54; *Northwest Indian Cemetery Protective Assoc. v. Peterson*, 795 F.2d 688, 697 (9th Cir.1986), *rev'd on other grounds, Lyng v. Northwest Indian Cemetery Protective Assoc.*, 485 U.S. 439, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988). Some level of detail is necessary as a prerequisite to assuring that the agency has taken a "hard look" at the environmental consequences of its proposed action. *Robertson*, 490 U.S. at 352.

DTE has effectively only listed possible mitigation activities, not discussed details of actual intentions. Given the transparency obligatory under NEPA, a reading presently of the EIS does not prompt the conclusion that environmental consequences affecting the EFS have been fairly evaluated.

The inquiry into the level of specificity required to provide a reasonably complete mitigation discussion is necessarily contextual. See *Stiles*, *supra*, 654 F.3d at 1054. An EIS for a "large-scale, multi-step project" will generally demand less detail than an EIS for a "relatively contained, site-specific proposal." *Id.*; *Webster v. United States Dept. of Agriculture*, 685 F.3d 411, 431-32 (4th Cir. 2012). Intervenors submit that the Fermi 3 project proposal is "relatively contained" and "site-specific," hence more, rather than less, detail is demanded.

c. Mitigation Measures, Standing Alone, Are Unhelpful To An Understanding Of Environmental Impacts Prior To Construction

An MDNR endangered species coordinator was quoted in the Fermi Draft Environmental Impact Statement, Vol. 1, p. 5-22 as saying the following, in mid-2011:

> The [MDNR Endangered Species] Coordinator stated, however, that monitoring of the eastern fox snake population during and after building of Fermi 3 could help determine whether the direct impacts from increased traffic warranted additional mitigation measures.

The problem with this approach is that mitigation measures may help alleviate impact after construction, but they do not help to evaluate and understand the impact before construction. Indeed, reliance on mitigation measures presupposes approval because it assumes that - regardless of what effects construction may have on resources - there are mitigation measures that might counteract the effect, without first understanding the extent of the problem. *Northern Plains Resource Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1084-1085 (9th Cir. 2011)

This is inconsistent with what NEPA requires. NEPA aims (1) to ensure that agencies carefully consider information about significant environmental impacts and (2) to guarantee relevant information is available to the public. *Robertson*, 490 U.S. at 349. The use of mitigation measures as a proxy for baseline data does not further attainment of either purpose:

> First, without this data, an agency cannot carefully consider information about significant environment impacts. Thus, the agency 'fails] to consider an important aspect of the problem,' resulting in an arbitrary and capricious decision. *See Lands Council*, 537 F.3d at 987 (citation omitted). Second, even if the mitigation measures may guarantee that the data will be collected some time in the future, the data is not available during the EIS process and is not available to the public for comment. Significantly, in such a situation, the EIS process cannot serve its larger informational role, and the public is deprived of their opportunity to play a role in the decision-making process. See *Robertson*, 490 U.S. at 349. While the Board must prepare a detailed statement on " any adverse environmental effects which cannot be avoided should the proposal be implemented," 42 U.S.C. § 4332(C)(ii), this requirement does not contravene the Board's other obligation to ensure that data exists before approval so that the Board can understand the adverse environment effects *ab initio*.

Northern Plains Resource Council, *supra* at 1085.

Because "[an essential component of a reasonably complete mitigation discussion is an assessment of whether the proposed mitigation measures can be effective," *South Fork Band Council of Western Shoshone of Nevada v. United States Dept. of Interior*, 588 F.3d 718, 727 (9th Cir. 2009), the adverse environmental effects must be understood in advance of project approval. *See Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1151 (9th Cir. 1998) ("Without analytical data to support the proposed mitigation measures, we are not persuaded that they amount to anything more than a 'mere listing' of good management practices"). *See, also, City of Carmel-by-the-Sea v. United States Dept. of Transp*., 95 F.3d 892, 901 (9th Cir. 1996) ("Because the EIS/R [EIS Report] is based on stale scientific evidence, we hold that the EIS/R's proposed wetlands mitigation is inadequate").

Although DTE has surmounted its rank, undocumented denial of the presence of the eastern fox snake on the Fermi site, it has yet to proceed to seriously and scientifically define and physically quantify the extent of destruction of EFS habitat, or to address the environmental drawbacks to its mitigation plans. There is only shallow characterization of the former farmland

which is under consideration as new habitat. There is no quantification of the size of the population of snakes which would be affected or displaced, no assurance that the new mitigation site is appropriate for repurposing into habitat, no showing that the state regulatory agency, MDNR, can or will maintain a regulatory role here and in the event that it cannot and does not, no details of how DTE would propose to induce mitigation measures (other than its promise, under penalty of perjury, to implement unarticulated mitigation pledges[3]).

IV. Conclusion

A motion for reconsideration should not include new arguments or evidence unless a party demonstrates that its new material relates to a Board concern that could not reasonably have been anticipated. *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), LBP-84-10, 19 NRC 509, 517-18 (1984). While DTE has introduced a new argument - that EA/FONSI caselaw does not provide proper analogues to the ASLB by which to measure compliance with NEPA mitigation obligations - could reasonably have been anticipated. In response to summary disposition, Intervenors brought to the Board's attention the 2011 CEQ guidance document, which encourages reliance by lead federal agencies to comply with NEPA mitigation requirements by requiring EIS mitigation discussions to trend toward enforceable measures. Despite creating for itself an opening to reply on summary disposition,[4] DTE omitted to mention or respond in any way to Intervenors' CEQ mitigation guidance line of argument. Instead, DTE contended that Intervenors' reply in opposition to summary disposition ventured beyond the

[3]See Motion for Reconsideration at p. 2.

[4]On July 9, 2012, DTE filed a "Motion for Leave to File a Reply on Contention 8," accompanied by a proffered "Reply to Response in Opposition to Summary Disposition of Contention 8."

scope of the Contention 8, as admitted.

The Commission revised the Rules of Practice in 2004 with respect to motions for reconsideration by adopting a "compelling circumstances" standard for motions for reconsideration. See 69 Fed. Reg. 2,182, 2,207 (Jan. 14, 2004); 10 C.F.R. §§ 2.323(e) and 2.345(b) [former §§ 2.730 and 2.771]. This standard, which is a higher standard than that established by prior caselaw, is intended to permit reconsideration only where manifest injustice would occur in the absence of reconsideration and the claim could not have been raised earlier. Unfortunately for DTE, the claim that it was blindsided by the Board's choice to follow the logic of the Council on Environmental Quality - logic which it left unrebutted - is not compelling, especially since DTE could have raised its counter-argument to the CEQ guidance at the reply stage.

Even if the ASLB finds that "compelling circumstances" exist to scrutinize the Motion for Reconsideration, the Board properly should reject it. The burden of proof with respect to summary disposition rests upon DTE, which must demonstrate the absence of any genuine issue of material fact. *Advanced Medical Systems, Inc*. (One Factory Row, Geneva, Ohio 44041), CAI-93-22, 38 NRC 102 (1993). As the Board has already found, DTE failed to meet its burden when negating existence of a genuine material fact, in the form of a void of meaningful evaluation and analysis of a genuine mitigation scheme.

NEPA requires that the NRC Staff be able to "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962)); *see also Ohio River Valley Envtl. Coal., Inc. v. Kempthorne*,

473 F.3d 94, 102-103 (4th Cir. 2006). Without analytical data to support the proposed mitigation measures, the ASLB appropriately concludes that it is presently unpersuaded that the mitigation claims of the applicant, DTE, amount to anything more than a "'mere listing' of good management practices." *Idaho Sporting Congress v. Thomas*, *supra,* 137 F.3d 1151.

There remaining genuine issues of material fact in dispute, DTE's reconsideration motion should be denied and the matter set for hearing. *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CAI-93-22, 38 NRC 98, 119-20 (1993).

WHEREFORE, Intervenors respectfully pray the ASLB deny DTE's Motion for Reconsideration.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "INTERVENORS' RESPONSE IN OPPOSITION TO DTE MOTION FOR RECONSIDERATION OF DENIAL OF SUMMARY DISPOSITION OF CONTENTION 8" have been served on the following persons via Electronic Information Exchange this 29th day of November, 2012:

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