UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

In the Matter of	Docket No. 52-033-COL
DETROIT EDISON COMPANY	ASLBP No. 09-880-05-COL-BD01
(Fermi Nuclear Power Plant, Unit 3)	January 30, 2013

MEMORANDUM AND ORDER
(Denying Motion for Reconsideration of the Board's Order Denying Second Motion for Summary Disposition of Contention 8)

Detroit Edison Company ("DTE" or "Applicant") has filed a Motion for Reconsideration of the Board's Order denying its Second Motion for Summary Disposition of Contention 8.[1] The NRC Staff filed a Response supporting the Motion.[2] Intervenors filed an Answer in Opposition to the Motion.[3] For the reasons explained below, the Board denies the Motion.

A. Summary of the Board's ruling denying summary disposition of Contention 8.

Contention 8 alleges that the NRC has violated NEPA by failing to adequately evaluate the impact of construction of Fermi Unit 3 on the eastern fox snake, a species listed as

[1] Applicant's Motion for Reconsideration (Nov. 19, 2012) [hereinafter "Reconsideration Motion" or "Motion"].

[2] NRC Staff Answer to Applicant's Motion for Reconsideration (Nov. 29, 2012).

[3] Intervenors' Answer in Opposition to Applicant's Motion for Reconsideration of Denial of Summary Disposition of Contention 8 (Eastern Fox Snake) (Nov. 29, 2012) [hereinafter "Int. Recon. Opp."].

threatened under the Michigan Natural Resources and Environmental Protection Act,[4] and possible alternatives that might reduce those impacts.[5] The Staff, in its Draft Environmental Impact Statement (DEIS), concluded that the impact of construction and pre-construction activities on the snake will be small. The Staff premised this finding on its assumption that the Michigan Department of Natural Resources (MDNR) will require mitigation to protect the snake from the impacts of such activities, and will also require monitoring, in addition to the measures identified in DTE's Conservation Plan, that would be necessary to support development and implementation of effective mitigation measures.[6]

In response to DTE's Second Motion for Summary Disposition of Contention 8, Intervenors cited guidance issued by the Council on Environmental Quality (CEQ) that addresses, among other things, the appropriate use of mitigation and monitoring in Environmental Impact Statements (EISs), as well as to support a finding of no significant impact (FONSI).[7] The CEQ Guidance acknowledges that NEPA does not impose a general duty on federal agencies to mitigate adverse environmental effects, but the Guidance recommends that, if an agency commits to mitigation measures in its EIS, then it should take steps to ensure that mitigation commitments are implemented, monitor the effectiveness of such mitigation

---

[4] M.C.L.A. §§ 324.36501 et seq.

[5] LBP-09-16, 70 NRC 227, 286 (2009), aff'd, CLI-09-22, 70 NRC 932. Contention 8 was filed based on the Applicant's Environmental Report. However, in LBP-12-23, at 29-30, the Board ruled that Contention 8 also applies to the Draft Environmental Impact Statement under the "migration tenet." That aspect of the Board's ruling is not challenged in the Reconsideration Motion.

[6] LBP-12-23 at 15-16 (citing DEIS at 4-36, 4-44).

[7] LBP-12-23 at 18-19 (citing Intervenors' Response in Opposition to Applicant's Motion for Summary Disposition of Contention 8 (Eastern Fox Snake) (July 2, 2012) at 11 (citing and quoting U.S. Council on Environmental Quality, "Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact," 76 Fed. Reg. 3843 (Jan. 21, 2011) [hereinafter CEQ Guidance])).

commitments, and be able to remedy failed mitigation.[8] The Board also reviewed federal case law holding that, if mitigation is used to support a FONSI, it should either have been included in the original proposal or required by statute or regulation.[9]

The Board noted that, under the CEQ Guidance, "the authority for the mitigation may derive from legal requirements that are enforced by other Federal, state, or local government entities (e.g., air or water permits administered by local or state agencies)."[10] Thus, the Staff's EIS may rely on mitigation imposed and monitored by other agencies, including state agencies, to support its finding that the impact on the snake will be small. But, to show that the Staff has taken the hard look NEPA requires, the EIS should explain the statutory or regulatory requirements relied on and the reasons for concluding that the application of those requirements will realistically result in the implementation of the mitigation and monitoring that the EIS assumed would occur. The Board concluded, however, that "the DEIS fails to identify any statutory or regulatory requirements that will mandate implementation of the Conservation Plan and the additional monitoring the DEIS states will be necessary. Instead, the DEIS appears to simply assume that MDNR will take whatever actions are necessary to ensure that impacts to the snake are small and that necessary additional monitoring will occur."[11] The Board concluded that this unsupported assumption raises a legitimate question, appropriate for an

---

[8] LBP-12-23 at 18-19 (citing CEQ Guidance, 76 Fed. Reg. at 3847).

[9] Id. at 25.

[10] Id. at 27 (quoting the CEQ Guidance, 76 Fed. Reg. at 3847).

[11] LBP-12-23 at 26.

evidentiary hearing, whether the DEIS complies with NEPA's hard look requirement.[12] Accordingly, the Board denied summary disposition of Contention 8.[13]

B. Board Ruling on the Reconsideration Motion.

1. The Reconsideration Motion is moot.

DTE's Reconsideration Motion argues that the Board should have granted summary disposition of Contention 8 based on the analysis in the DEIS. The Motion is moot because the FEIS, issued in January 2013,[14] supersedes the DEIS, and it contains a different analysis of construction impacts on the snake than that contained in the DEIS. Thus, the appropriate focus of litigation concerning Contention 8 is now the FEIS.

The situation here is analogous to that where a contention is filed based on the DEIS and the Staff subsequently issues the FEIS. NRC case law recognizes that a contention based on a NEPA document may "migrate" to a subsequently issued NEPA document if the two documents are sufficiently similar with respect to the issue that is the subject of the contention.[15] By analogy, a summary disposition motion (or, in this instance, a motion for reconsideration of a ruling denying summary disposition) based on a DEIS could also apply to the FEIS if the second NEPA document was substantially equivalent concerning the issue that is the subject of the summary disposition motion. But here the two NEPA documents differ significantly concerning that issue.

---

[12] Id. at 27.

[13] Id. at 29.

[14] Office of New Reactors, Final Environmental Impact Statement for Combined License (COL) for Enrico Fermi Unit 3, NUREG-2105, Vols. 1-4 (Jan. 2013) (ADAMS Accession Nos. ML12307A172, ML12307A176, ML12307A177, ML12347A202).

[15] Progress Energy Florida, Inc. (Combined License Application for Levy County Nuclear Power Plant, Units 1 and 2), LBP-11-1, 73 NRC 19, 25-26 (2011).

As previously explained, the issue on which the Board denied summary disposition of Contention 8 is the Staff's failure to explain and support its assumption in the DEIS that the MDNR will require mitigation and monitoring sufficient to ensure that the impact of construction on the snake will be small. This led the Board to conclude, based on the CEQ Guidance and federal case law, that the Staff must identify "the statutory or regulatory requirements it is relying on and its reasons for concluding that the application of those requirements will actually result in the mitigation and monitoring it assumes will occur."[16] DTE's request that the Board reconsider that ruling would still present a live question if the FEIS's analysis of construction impacts on the snake relied on the same assumption and reached the same conclusion as the DEIS.[17] But the Staff no longer limits its analysis to predicting that the impact on the snake will be small because of mitigation and monitoring it assumes MDNR will require. Instead, the Staff now describes a range of potential impacts, stating that the impact of construction on the snake will be "SMALL to MODERATE" depending on whether mitigation is implemented.[18] The FEIS explains:

> [T]he review team concludes that the impacts from construction and preconstruction activities for Fermi 3 on terrestrial resources on the Fermi site and transmission line corridor would be SMALL to MODERATE . . . . The potential for MODERATE impacts is limited to possible adverse effects on the eastern fox snake. The staff's evaluation of the potential impacts on the eastern fox snake recognizes the potential for mitigation measures proposed by Detroit Edison. . . and approved by the MDNR to significantly reduce impacts on that species, thereby leading to SMALL impacts, but acknowledges the possibility of MODERATE impacts if proposed mitigation is not implemented as described in their plan.[19]

Thus, the Staff at least implicitly acknowledges that mitigation may not occur and that impacts to the snake will increase (to moderate) if it does not.

---

[16] LBP-12-23 at 27.

[17] See Progress Energy Florida, Inc., LBP-11-1, 73 NRC at 25-26.

[18] FEIS at 4-47.

[19] Id.

Because of this change in the Staff's analysis, the question whether it had an adequate basis for assuming that MDNR will require DTE to implement mitigation no longer presents a live controversy.[20] Contention 8, however, is not necessarily moot. It concerns the adequacy under NEPA of the assessment of the project's impacts on the eastern fox snake and possible alternatives that might reduce those effects.[21] Intervenors may have reasons for questioning the analysis in the FEIS that are not presently before the Board but fall within the scope of Contention 8. Thus, DTE's Reconsideration Motion and the responses to that Motion are not the appropriate vehicle for deciding whether the FEIS complies with NEPA. The Board's resolution of Contention 8 should be based on filings that directly address the question whether the FEIS analyzes impacts to the snake in compliance with NEPA requirements.[22]

The Board therefore concludes that DTE's Reconsideration Motion is moot.

2. In any event, DTE's Motion fails to satisfy the Commission's demanding standard for reconsideration.

Even if it is not moot, DTE's Reconsideration Motion fails to identify a significant factual or legal matter that the Board overlooked. Instead, as the excessive length of its Motion suggests,[23] DTE attempts to comprehensively reargue the Board's ruling and advance new

---

[20] "Generally, a case will be moot when the issues are no longer 'live,' or the parties lack a cognizable interest in the outcome." Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192, 200 (1993) (citation omitted).

[21] LBP-12-23 at 20.

[22] The Board's Order modifying the schedule directs that new motions for summary disposition of Contention 8 should be filed by February 18, 2013. Licensing Board Order (Modifying the Schedule) at 2 (Dec. 12, 2012) (unpublished). Any new motion concerning Contention 8 may incorporate previous arguments and materials previously supplied to the Board to the extent they are relevant to deciding whether the FEIS complies with NEPA.

[23] DTE's Reconsideration Motion is 15 pages, despite the requirement that such motions be limited to 10 pages. 10 C.F.R. § 2.323(e).

arguments that it could have presented earlier. DTE's Motion thus fails to satisfy the demanding requirements for seeking reconsideration.

a. DTE fails to show compelling circumstances.

Under 10 C.F.R. § 2.323(e), a motion for reconsideration may not be filed except with leave of the Licensing Board, "upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not reasonably have been anticipated, that renders the decision invalid." When the Commission revised its hearing procedures in 2004, it strengthened the standard for reconsideration motions, stating that:

> This standard, which is a higher standard than the existing case law, 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. In the Commission's view, reconsideration should be an extraordinary action and should not be used as an opportunity to reargue facts and rationales which were (or should have been) discussed earlier.[24]

DTE claims that its Motion satisfies the requirements of Section 2.323(e) because it "could not have reasonably anticipated that the Board would deny summary disposition based on the lack of Federally-enforceable mitigation."[25] This argument fails because the Board did not deny summary disposition based on the lack of "Federally-enforceable mitigation." As explained above, the Board denied summary disposition because, while the DEIS assumed that both mitigation and monitoring would be required by MDNR, a state agency, the Staff failed to provide any basis of this conclusion.[26] The Board ruled that NEPA's "hard look" requirement is not satisfied merely by assuming that a state agency is "on duty" and will take all measures necessary to prevent significant environmental impacts.[27]

---

[24] Final Rule: Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2207 (Jan. 14, 2004).

[25] Reconsideration Motion at 14.

[26] LBP-12-23 at 26.

[27] Id. at 26-27 (quoting New York v. NRC, 681 F.3d 471, 481 (D.C. Cir. 2012)).

We see nothing sufficiently novel or unexpected in this holding that would justify filing a motion for reconsideration. As Intervenors argue, the Board's ruling follows from the general Administrative Procedure Act requirement that the Staff "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[28] Similarly, in applying NEPA's "rule of reason" to an EIS, courts expect an agency to go "beyond mere assertions and indicate[d] its basis for them,"[29] and to "explicate fully its course of inquiry, its analysis and its reasoning."[30] Thus, in a site-specific EIS, conclusory statements do not pass muster; the EIS must provide reasons supporting its analysis, not just conclusions.[31] The Board's application of this basic rule of federal administrative law hardly constitutes the "compelling circumstances" necessary to justify a motion for reconsideration.

b. DTE's new argument concerning State law requirements is too late and, in any event, fails to show any clear and material error in the Board's ruling.

DTE attempts to cure the failure of the DEIS to explain the basis of its predictions of future MDNR actions by citing provisions of the Michigan Natural Resources and Environmental Protection Act, under which DTE will require a permit from MDNR for any action that may result in the "taking" of a threatened species.[32] DTE states that "[b]ecause fox snakes are present at

---

[28] Int. Recon. Opp. at 11 (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

[29] Dubois v. U.S. Dept. of Agriculture, 102 F.3d 1273, 1287 (1st Cir. 1996) (quoting Silva v. Lynn, 482 F.2d 1282, 1287 (1st Cir. 1973)).

[30] Id. (quoting Mass. v. Andrus, 594 F.2d 872, 883 (1st Cir. 1979)).

[31] See Sierra Club v. Kimbell, 595 F. Supp. 2d 1021, 1030 (D. Minn. 2009). Accord Sierra Nevada Forest Protection Campaign v. Rey, 573 F. Supp. 2d 1316, 1325 (E.D. Cal. 2008) (NEPA does not allow an agency to rely on the conclusions and opinions of its staff without providing both supporting analysis and data), rev'd on other grounds, Sierra Forest Legacy v. Rey, 577 F.3d 1015 (9th Cir. 2009).

[32] See Reconsideration Motion at 10.

the site and because construction activities have the potential to result in 'take' of fox snakes, Detroit Edison must apply for and obtain a permit from MDNR prior to performing any site construction activities."[33] DTE invites the Board to assume that the permit, when issued, will require implementation of DTE's Conservation Plan.[34]

This new argument comes too late. As Intervenors correctly argue, a motion for reconsideration should not include new arguments or evidence unless a party demonstrates that the new material relates to a Board concern that could not reasonably have been anticipated.[35] DTE's argument concerning future permit requirements was not included in its Second Motion for Summary Disposition of Contention 8. Thus, it is not properly before the Board unless it relates to a Board concern that DTE could not reasonably have anticipated.

Here, DTE not only could have anticipated, but actually did anticipate, that the Board would consider the question whether mechanisms will be in place to ensure implementation of a mitigation plan for the eastern fox snake. In Intervenors' Opposition to DTE's Second Summary Disposition Motion, they argued that "[a]bsent a viable enforcement mechanism, there is no guarantee whatsoever that mitigation will take place."[36] DTE filed a Reply, arguing that the "supposed absence of a 'viable enforcement mechanism' to ensure that the mitigation will take place" was outside the scope of the admitted contention.[37] But DTE did not include in its Reply the argument concerning future permit requirements, even though that would also have been

---

[33] Id. at 11.

[34] Id. at 11-12.

[35] Int. Recon. Opp. at 10 (citing Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 & 2), LBP-84-10, 19 NRC 509, 517-18 (1984)).

[36] Intervenors' Response in Opposition to Applicant's Motion for Summary Disposition of Contention 8 (Eastern Fox Snake) (July 2, 2012) at 8 [hereinafter "Int. Opp. to Summary Disposition of C-8"].

[37] Reply to Response in Opposition to Summary Disposition of Contention 8 (July 9, 2012) at 2.

responsive to Intervenors' argument concerning the lack of a viable enforcement mechanism.[38] DTE thus had the opportunity to include in its Reply the new argument that implementation of the mitigation plan will be required in a future MDNR permit, but it failed to do so.[39] The argument is therefore too late now.

DTE's new argument also fails to identify a "clear and material error" in the Board's decision, as required by Section 2.323(e). The statutory provisions cited by DTE appear to establish an enforceable obligation for DTE to seek a permit from the MDNR if construction activities will result in a taking of the snake. However, they do not establish any enforceable requirement to implement DTE's Conservation Plan. DTE also cites the MDNR checklist, but, although the checklist states that the impact on the snake will be small if DTE's Conservation Plan is implemented, it provides no indication that MDNR will require implementation of the Plan.[40] The limited information before the Board also fails to resolve the question whether the MDNR will require the monitoring that the Staff concluded would be necessary, in addition to the measures identified in DTE's Conservation Plan, "to support development and implementation of effective mitigation measures."[41] Intervenors, moreover, have questioned whether the MDNR has sufficient resources to enforce mitigation and monitoring requirements necessary to protect the snake.[42] Thus, even with DTE's new argument, assessing the regulatory actions MDNR is likely to take is a litigable evidentiary issue and is not appropriate for summary disposition.[43]

---

[38] The Board considered the arguments in DTE's Reply, even though the Reply was not authorized by NRC regulations. LBP-12-23 at 19-20.

[39] See Int. Recon. Opp. at 10-12.

[40] LBP-12-23 at 28.

[41] DEIS at 4-36.

[42] See Int. Opp. to Summary Disposition of C-8 at 7.

[43] See Gulf States Utilities Co. (River Bend Station, Unit 1), LBP-95-10, 41 NRC 460, 471

c. DTE's remaining arguments revisit issues that the Board has already addressed and fail to show any clear and material error.

DTE emphasizes that NEPA does not require mitigation measures identified in an EIS to be finalized, adopted, or legally enforceable.[44] The Board agreed with this general proposition in both LBP-12-23 and in an earlier ruling in this case.[45] In the DEIS, however, the Staff "expressly premised its conclusion that the impact of construction and pre-construction activities on the snake will be small on its assumption that MDNR will require mitigation that will be sufficient to protect the snake from the impacts of such activities."[46] This conclusion is not a mere identification or description of potential mitigation; it directly relates to the agency's determination whether the license should be issued. NEPA requires a weighing of the environmental costs of a project against its benefits to society at large.[47] "'The purpose of the cost-benefit analysis called for by NEPA is to identify each significant environmental cost and to determine whether, all other factors considered, on balance the incurring of that cost is warranted.'"[48] Thus, as part of the NRC's decision-making process under NEPA, it balances the

---

(1995) (Question whether bankruptcy courts would adequately fund nuclear facilities to ensure safety was a disputed factual issue precluding summary disposition).

[44] Reconsideration Motion at 4.

[45] LBP-12-23 at 13-14 (quoting LBP-11-14, 73 NRC 591, 607 (quoting Laguna Greenbelt, Inc. v. U.S. Dep't of Transp., 42 F.3d 517, 528 (9th Cir. 1994))).

[46] LBP-12-23 at 23 (citing DEIS at 4-44).

[47] Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-06-3, 63 NRC 19, 30 (2006).

[48] Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-366, 5 NRC 39, 62 (1977) (quoting Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Section), ALAB-161, 6 AEC 1003, 1007 (1973), remanded on other grounds, CLI-74-2, 7 AEC 2 (1974), further statement of Appeal Board views, ALAB-175, 7 AEC 62 (1974), aff'd, sub nom. Citizens for Safe Power v. NRC, 524 F.2d 1291 (D.C. Cir. 1975)).

benefits of the proposed action against its "environmental and other costs."[49] A finding that the impact of construction on the snake will be small reduces the environmental cost of the proposed action and thereby increases the likelihood that the cost/benefit balance will favor issuance of the license. The Staff must therefore explain the basis for its finding, rather than merely offering an unsupported, unexplained conclusion.[50]

The Board's ruling on this point is consistent with the CEQ Guidance, which is "designed to facilitate agency compliance with NEPA, by clarifying the commitments agency decisionmakers may decide to make when complying with NEPA, and ensuring that information about those commitments is accurate and made available to the public."[51] The Guidance states that "[a]gencies should not commit to mitigation measures considered and analyzed in an EIS or EA if there are insufficient legal authorities, or it is not reasonable to foresee the availability of sufficient resources, to perform or ensure the performance of the mitigation."[52]

In its Reconsideration Motion, DTE argues that the CEQ Guidance is irrelevant to the issues in this case.[53] There are multiple flaws in this argument, the first of which is that it could have been filed in DTE's Reply and is therefore too late now. DTE obviously anticipated that the Board might consider the views of CEQ, since its Reply argued that Intervenors' reliance on the CEQ Guidance was outside the scope of Contention 8 as admitted by the Board. It is therefore too late for DTE to add a new argument challenging the applicability of the CEQ Guidance to this case.

---

[49] 10 C.F.R. § 51.107(a)(3).

[50] LBP-12-23 at 26-27.

[51] CEQ Guidance, 76 Fed. Reg. at 3843.

[52] Id. at 3848.

[53] Reconsideration Motion at 7.

DTE's arguments concerning the CEQ Guidance also fail to identify any clear and material error in the Board's ruling.[54] DTE stresses that the CEQ Guidance is not binding.[55] The Board agreed,[56] but federal courts nevertheless defer to CEQ Guidance when it reasonably interprets the CEQ's NEPA regulations.[57] DTE fails to offer any reason to conclude that the CEQ Guidance on mitigation misinterprets its NEPA regulations, and therefore the Guidance was appropriately considered by the Board, together with other authorities, in deciding whether summary disposition should be granted.

DTE also argues that the CEQ Guidance does not apply here because the NRC is without authority to require mitigation for a species, such as the eastern fox snake, that is not listed under federal law.[58] DTE fails to cite any legal authority, however, that supports its narrow interpretation of the NRC's authority, and the agency's regulations in fact broadly authorize environmental conditions in combined licenses, without limiting the agency's authority to species that are listed under federal law.[59]

DTE errs, however, in claiming the Board ruled that the NRC has the responsibility to "impose mitigation measures or monitoring related to the fox snake."[60] The Board ruled only that, because the Staff relied on future mitigation and monitoring to support its finding in the

---

[54] Id. at 7-9.

[55] Id. at 7.

[56] LBP-12-23 at 24.

[57] See, e.g., League of Wilderness Defenders v. U.S. Forest Serv., 549 F.3d 1211, 1218 (9th Cir. 2008); Habitat Education Center, Inc. v. U.S. Forest Serv., 593 F.Supp.2d 1019, 1032 (E.D. Wis. 2009).

[58] Reconsideration Motion at 7-9.

[59] 10 C.F.R. §§ 50.36b, 51.107(a)(3).

[60] Reconsideration Motion at 9.

DEIS that the impact of construction on the snake will be small, it must provide a sufficient basis to conclude that those commitments are enforceable, either by the NRC itself, a state agency, or some other competent authority.[61] If it is unable to identify any such basis, then the Staff may modify its finding, as it did in the FEIS.

In addition to the CEQ Guidance, the Board noted the extensive federal case law holding that mitigation used to support a FONSI must be required by statute or regulation when, as here, the mitigation was not part of the original proposal. DTE does not dispute that federal decisions so hold, but it maintains that those decisions have no bearing on this case because here the NRC prepared an EIS.[62] The Board acknowledged that the Staff had not issued a FONSI, but it also noted that the Staff "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."[63] The Board concluded that "[s]uch 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."[64]

Although DTE disputes the Board's conclusion, it acknowledges that in an EA "[a]gencies cannot 'take credit' for mitigation to reduce impacts below the 'significant impact' threshold unless there is a means to ensure that the mitigation takes place."[65] We see no sound reason why an agency should be able to take credit for unenforceable mitigation in an EIS to support a finding that an impact will be insignificant (i.e., small) when it may not do so in

---

[61] See LBP-12-23 at 27.

[62] Reconsideration Motion at 6.

[63] LBP-12-23 at 25.

[64] Id.

[65] Reconsideration Motion at 6.

an EA. "[T]he level of analysis required by NEPA in an EIS is more rigorous than is required when the [agency] has determined on the basis of its EA that the project as proposed will not result in significant environmental impact."[66] And the Staff effectively did take credit for mitigation in the DEIS when it concluded that the MDNR would require mitigation and monitoring sufficient to ensure that the impact of construction on the snake would be small. As described above, this finding impacts the agency's cost/benefit balancing, which in turn impacts the determination whether a license should be issued. The licensing decision is certainly as important as a decision to issue a FONSI, if not considerably more so. There is thus no justification for applying a less stringent standard to an EIS than to an EA.

Finally, DTE states that its affidavit stating its intention to implement the Conservation Plan "provides an alternate basis for assuming mitigation."[67] But, as the Board responded, DTE's affidavit does not make the Plan enforceable.[68] Such voluntary commitments are not legally binding unless they are incorporated in a license.[69] On this issue as well, DTE's argument has already been considered by the Board and, in any event, fails to show that the Board made a clear and material error.

---

[66] Sierra Club v. U.S. Army Corps of Engineers, 464 F. Supp. 2d 1171, 1227 (M.D. Fla. 2006)(emphasis added).

[67] Reconsideration Motion at 12.

[68] LBP-12-23 at 28-29.

[69] See Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 305 (1994) ("By virtue of their incorporation by reference into the license, the procedures and limitations on activities prescribed in the specified manuals and documents became binding license requirements which AMS was not free to ignore."); GE Hitachi Global Laser Enrichment LLC (GLE Commercial Facility), LBP-12-21, 74 NRC __, __ (slip op. at184) (Sept. 19, 2012) (stating that voluntary commitments are not enforceable unless they are "tied down").

C. Conclusion.

For the foregoing reasons, the Board denies DTE's Motion for Reconsideration.

IT IS SO ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD
/RA/

Ronald M. Spritzer, Chairman
ADMINISTRATIVE JUDGE
/RA/

Dr. Anthony J. Baratta
ADMINISTRATIVE JUDGE
/RA/

Dr. Randall Charbeneau
ADMINISTRATIVE JUDGE

Rockville, Maryland
January 30, 2013

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Denying Motion for Reconsideration of the Board's Order Denying Second Motion for Summary Disposition of Contention 8)** have been served upon the following persons by Electronic Information Exchange.

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

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

Anthony J. Baratta
Administrative Judge
E-mail: Anthony.Baratta@nrc.gov

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

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

James Maltese, Law Clerk
E-mail: james.maltese@nrc.gov

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

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

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

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

Docket No. 52-033-COL
MEMORANDUM AND ORDER (Denying Motion for Reconsideration of the Board's Order Denying Second Motion for Summary Disposition of Contention 8)

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

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

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

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

OGC Mail Center : OGCMailCenter@nrc.gov

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

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

[Original signed by Brian Newell]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
This 30th day of December 2012