

incorrect; the Intervenor could have petitioned the Board for a new or amended contention based on that same information in early 2010, three years before the FEIS Contentions were filed.”

DTE states (p. 7 of its “ Applicant’s Answer to Proposed New Contentions Based on Final Environmental Impact Statements,” hereinafter “DTE Answer”) that “contrary to resubmitted Contention 3, the FEIS describes how DTE will manage Class B and C wastes onsite, including the environmental consequences of extended on-site storage and the environmental consequences of constructing additional storage.”

The Staff incorrectly maintains that Intervenor failed to plead new circumstances. Significant “changes” include that the WCS waste facility in Texas has opened since the DEIS phase of the Fermi 3 case, and that onerous and new decommissioning standards are presently under consideration by the Vermont state legislature respecting the Vermont Yankee nuclear power plant. Vermont, Maine and Texas have primacy over other states to use the WCS for disposal of low-level radioactive waste. Intervenor demonstrated in their February 19, 2013 filing that there presently is a moratorium on acceptance of LLRW at the Texas facility which does not originate from the three Compact states. There is reason to believe that the legislation under consideration in Vermont will consume more of the existing waste disposal space at WCS than had been allocated to Vermont. At best, Michigan as a LLRW-generating state will be required to compete with many other non-Compact states for access to WCS as a waste disposal option. The FEIS contains no discussion of the vagaries of the disposal options for LLRW.

The NRC remains embroiled in controversy over the “waste confidence decision” by the Commission that there would be a high-level radioactive waste disposal facility within 60 years

of the closure of currently-operating nuclear plants. While the subject here is LLRW and not high-level waste, NRC regulations similarly require “confidence” that a low-level radioactive waste disposal facility will be available when needed, and in the case of Fermi 3, at least by 10 years following the start of operations. The options after 10 years which are discussed in the FEIS merely kick the proverbial burial vault down the road and do not effectively answer the question of whether there will be permanent storage.

Generally a “good cause” finding based on “new information” can be resolved by a straightforward inquiry into when the information at issue was available to the petitioner. In some instances, however, “good cause” may involve more than looking at the dates on the various documents submitted by the petitioners and instead, turn on a more complex determination about when, as a cumulative matter, the separate pieces of the new information “puzzle” were sufficiently in place to make the particular concerns espoused reasonably apparent. *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 26 (1996). The fact that petitioners raise an argument to support admission of a contention for the first time late in a proceeding is not necessarily fatal where the argument rests significantly on a licensee document prepared after the petitioner submitted its original contention and where petitioners promptly bring it to the adjudicator’s attention. *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 255 (1996).

The potential obstacles to access to WCS as a LLRW disposal facility arose after publication of the DEIS, and they have been promptly brought to the attention of the ASLB. Reality, based on the history of development of radioactive waste facilities in the U.S., is complex. Assumptions that a new low-level waste site will open any time in the near future is

pure speculation. There is not even any discussion of site searching at this time, and it took 32 years to get the WCS dump open. Expecting a new site to appear is unrealistic. It is more likely that waste will remain at the Fermi site and as such, the EIS and all licensing documents should address that reality, and analyze and plan for indefinite storage at the Fermi plant site.

Contention 3 should be admitted for adjudication.

II. REPLY AS TO RESUBMITTED CONTENTION 13 **(NEED AND DEMAND FOR POWER)**

In their answers, both DTE and the NRC Staff skirt the wholly-legitimate basis underlying Intervenors' resuscitation of Contention 13, *viz.*, that the Staff substantially altered the basis for its decision that the principal projection of demand was adequate. Between the publications of the DEIS and FEIS, the Staff finally decided that the roundly-discredited Michigan Public Service Commission's 2006 "21st Century Electric Energy Plan" was somewhat vulnerable to criticism. The Staff took a battering from the Intervenors at the DEIS stage concerning the fact that this 2006 projection did not address the global 2007 economic collapse. Thus, the Staff, in a move reminiscent of the Catholic Church's reluctant recognition that Galileo's heliocentrist theory might dislodge Earth from the centerpoint of the Universe, finally conceded in the FEIS that the worst economic downturn since the Great Depression caused observable effects in Michigan, the worst-hit of the 50 states: "Because the MPSC 21st Century Electric Energy Plan was completed in 2007, it did not include any potential shifts in the demand for electricity due to the economic downturn that began in late 2008. The impacts of the recession were particularly severe in Michigan, due in large part to downturns in automobile manufacturing and supporting industries." The Staff then compared the 21st Century Plan, for consistency, with another forecast in the FEIS, and pronounced it good. But that reconsideration

reopened the need and demand issue in this licensing case to scrutiny.

This difference in basis as between the DEIS and FEIS - even though the Staff clings to its original conclusion - created space for Intervenors' renewed Contention 13. DTE and the Staff suggest, incorrectly, that applying the standards of the recently-revised 10 C.F.R. § 2.309(c) precludes admissibility of Contention 13. Subsection c of the revised § 2.309 requires that:

- (i) The information upon which the filing is based was not previously available;
- (ii) The information upon which the filing is based is materially different from information previously available; and
- (iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.

The information "not previously available" is the information that the NRC Staff altered the basis for its conclusion that demand was adequately considered, between the publications of the DEIS and the FEIS. Although admittedly the 2010 NERC/ReliabilityFirst projection was present in the public domain at the time of the DEIS, it was ascribed no relevance, nor even acknowledged by the NRC Staff, in the DEIS analysis of need and demand for Fermi 3. It was not up to Intervenors in 2010 or 2011 to bring to the ASLB's attention information tending to support the Staff's conclusion. Whatever prompted the NRC Staff to change the basis for its conclusion following the DEIS stage, the first time the NERC/ReliabilityFirst projection was mentioned at all in this proceeding was in the 2013 publication of the FEIS. The theme of the new information is that the NRC Staff now agrees that there could be fallibility to uncorroborated, dogmatic reliance on the 21st Century Energy Plan.

Intervenors timely raised Contention 13 by challenging the adequacy of that corroboration in the FEIS, and so their critique of the 2010 projection is timely since it was drawn into the proceedings only by through the FEIS. Intervenors' filing is timely, notes

requisite new information that the NRC Staff determined to make “new” by its reliance on the 2010 projection for the very first time in the FEIS.

Even the 21st Century Energy Plan on which the Staff places such uncritical weight contains the undoing of Fermi 3. It contains undertones of hostility to the nuclear option. For example:

The modeling effort assessed a wide range of potential baseload unit technologies. Due to its price volatility, natural gas was not selected as a long term energy production fuel. *Nuclear power was also eliminated from consideration as a long term energy source during the first half of the planning period, due to the extremely long lead-time (assumed to be 12 years) required to bring a nuclear plant on-line.* No new nuclear plants have been started in almost three decades, and issues regarding the permanent disposal of spent nuclear fuel remain unresolved.

(Emphasis supplied). 21st Century Energy Plan p. 17 (http://www.michigan.gov/documents/mpsc/21stcenturyenergyplan_185274_7.pdf). The Plan also states, “[m]any participants are concerned with cost overruns or paying too much for a utility-constructed plant. *Excessive costs associated with the Fermi II and Midland nuclear projects have not been forgotten.*” (Emphasis supplied). *Id.*, Appendix I, p. 48 (http://www.michigan.gov/documents/mpsc/energyplan_appendix1_185276_7.pdf). Also, “It is evident from the curves, for example, that *the levelized cost of nuclear units exceeds the costs of other technologies over the entire range of plant capacity factors.* On this basis, nuclear units were “screened-out” of the base model run.” *Id.*, Appendix 2, p. 34 (http://www.michigan.gov/documents/mpsc/energyplan_appendix2_185279_7.pdf).

Added to this is the fact that the rate increases necessary to pay for Fermi 3 will, by themselves, comprise a powerful recessionary impact that is not contained in, nor analyzed within the NRC Staff’s referenced projections.

It would be easier to accept the possibility of heliocentricism in the 17th century than that the proffered economic rationales for Fermi 3 should allow its construction in the 21st. Contention 13 should finally be admitted to this licensing case for adjudication.

III. REPLY AS TO NEW/RESUBMITTED CONTENTION 23 (SEGMENTATION OF TRANSMISSION LINE CORRIDOR)

DTE and the NRC Staff seem to believe that despite rank evidence of incomplete data to allow regulatory clearance for construction of high-voltage lines in the transmission corridor, enough rote expostulation is present in the FEIS to express in general terms what will happen, and so NEPA should be deemed to be satisfied. This line of argument contradicts the ASLB's point following the DEIS of the Staff's obligation to not allow segmentation of the transmission corridor from the remainder of the Fermi 3 project, and also concedes the very tentative exploration of environmental impacts in the corridor that has been undertaken.

A. Lack of Information to Support NEPA's 'Hard Look'

Jurisdictional wetlands have not yet been delineated, so they are not identified on maps. The physical footprint of the Milan substation may be enlarged by four or more times, but the decision as to that is neither firm nor is their any definition as to what changes would occur as a consequence. There is no demonstrated compliance with the Endangered Species Act. There will be temporary disruption of perhaps 143 acres during construction, with no details about what disruptions or the potential permanence of those acts might be. There is general mention of periodic clearcutting beneath the unmapped transmission lines and use of herbicides to retard regrowth, but no disclosures beyond the mere mention. Historic and cultural resources surveys are incomplete.

The nondisclosure of these details in the FEIS means that the NRC as lead agency has not

provided a true and accurate statement of the “environmental impact of the proposed action.” Consequently, there is not full identification or consideration of alternatives to the proposed destructive effects in the corridor, and there is not a clear grasp of the “irreversible and irretrievable commitments of resources” that would occur with implementation of the Fermi 3 project and its associated transmission lines.. See 42 U.S.C. § 4332(2)(C). The FEIS does not contain the “full and fair discussion” of significant environmental impacts that is “supported by evidence that the agency has made the necessary environmental analyses.” 40 C.F.R. § 1502.1. The FEIS does not include a genuine analysis of the direct, indirect, and cumulative impacts of the proposed action. See 40 C.F.R. §§ 1508.7, 1508.8, 1508.25. Federal agencies must analyze and discuss “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(c). That discussion does not appear in the FEIS respecting the corridor.

To satisfy NEPA, the federal agency must demonstrate it has taken a “hard look” at the environmental consequences of the proposed action. “To comply with NEPA’s ‘hard look’ requirement, an agency must adequately identify and evaluate environmental concerns.” *Friends of the Bow v. Thompson*, 124 F.3d 1210, 1213 (10th Cir. 1997). The Staff’s resolute refusal to include the transmission corridor as part of the overall Fermi 3 project curtails the hard look. The FEIS must show how many transmission lines, and where they will be located, within the corridor in order for there to be an adequate depiction of possible environmental effects. Because of the insufficient characterization of the larger project the ASLB has little choice but to resolve the issue against the NRC Staff, admit the contention and allow evidence to be discovered of significant adverse impacts to force detailed FEIS coverage of the corridor. See,

e.g., La. Wildlife Fed'n v. York, 761 F.2d 1044, 1052 (5th Cir. 1985) (“In order to raise a substantial environmental issue, a party need not show that the proposed project will have significant adverse impacts that the Corps has not considered. It must show only that the project may have such impacts”).

The twin objectives of NEPA are to ensure that the federal agency “consider[s] every significant aspect of the environmental impact of a proposed action” and to “inform the public that it has indeed considered environmental concerns in its decision-making process.” *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1153–54 (9th Cir. 2006); *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97 (1983). Thus, “NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. . . . Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.” 40 C.F.R. § 1500.1(b).

NEPA’s emphasis on “the importance of coherent and comprehensive up-front environmental analysis. . . ensure[s] informed decision-making to the end that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.” *Blue Mtns. Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1216 (9th Cir. 1998). The purpose of NEPA is to ensure that agencies do not make uninformed - as opposed to unwise - decisions. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989).

The Staff asserts that the ASLB merely made a “recommendation” when it pointedly agreed with Intervenors that segmentation of the project had occurred and that the transmission corridor NEPA analysis was deficient.² Staff Answer at 22. The Staff maintains that NEPA

²Notably, the Staff did not respond to the Intervenors’ observations that the ASLB possesses inherent authority to *sua sponte* require consideration of an issue. See Intervenors’ “Motion for

compliance is an “independent responsibility,” fulfillment of which cannot be dictated by the ASLB. Staff Answer at 22, citing *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 74 (2004). But the Commission’s decision in *Duke Energy*, CLI-04-6 shows that the Commission, upon review of an interlocutory appeal addressing whether safeguards information need be shared with intervenors, found that the ASLB had improperly ordered the NRC Staff to conduct meetings, something which is outside the Board’s adjudicatory span of authority. At the same time, the Commission reaffirmed that certain adjudicatory issues fall within the span of Licensing Board authority:

We long have held that licensing boards do not sit to correct NRC staff misdeeds or to supervise or direct NRC staff regulatory reviews.

The *licensing boards’ sole, but very important, job is to consider safety, environmental, or legal issues raised by license applications.* Licensing boards simply have no jurisdiction over non-adjudicatory activities of the Staff that the Commission has clearly assigned to other offices unless the Commission itself grants that jurisdiction to Board.

(Emphasis supplied). It is beyond cavil that the ASLB has the job of considering whether or not the requirements of NEPA have been followed and that the scope of that job extends to the review of claims of NEPA compliance by the NRC Staff in NEPA documents. *Duke Energy* affords no protection to the NRC Staff’s naked assertion that it need not comply with NEPA

Resubmission of Contentions 3 and 13, for Resubmission of Contention 23 or Its Admission as a New Contention, and for Admission of New Contentions 26 and 27” at 24-25. A licensing board has the power to raise *sua sponte* any significant environmental or safety issue in operating license hearings. 10 C.F.R. § 2.340(a) (formerly § 2.760a); *Consol. Edison Co. of N.Y.* (Indian Point Nuclear Generating Units 1, 2 & 3), ALAB-319, 3 NRC 188, 190 (1976); *Houston Lighting & Power Co.* (South Texas Project, Units 1 & 2), LBP-85-8, 21 NRC 516, 519 (1985). The Board’s independent responsibilities under NEPA may require it to raise environmental issues not raised by a party. *Tenn. Valley Auth.* (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-380, 5 NRC 572 (1977). The ASLB has this prerogative especially where an issue is excluded from the proceeding because it has not been properly raised, rather than because it has been rejected on its merits. *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 & 2), LBP-82- 79, 16 NRC 1116, 1119 (1982). The Board need only give its reasons for raising the problem. *Southern Cal. Edison Co.* (San Onofre Nuclear Generating Station, Units 2 & 3), LBP-81-36, 14 NRC 691, 697 (1981).

even after a licensing board has explicitly exposed its violation. Whether the Board “ordered” the Staff to clean up its act, or cautioned that NEPA compliance was wanting, it remains that no less than the U.S. Supreme Court imposes squarely upon the NRC a continuing duty to adhere to NEPA:

... NEPA ... require[s] that agencies take a "hard look" at the environmental effects of their planned action, *even after a proposal has received initial approval* Application of the ‘rule of reason’ thus turns on the value of the new information to the still-pending decision-making process. In this respect the decision whether to prepare a supplemental EIS is similar to the decision whether to prepare an EIS in the first instance: if there remains ‘major Federal actio[n]’ to occur, and if the new information is sufficient to show that the remaining action will ‘affec[t] the quality of the human environment’ in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared.

(Emphasis supplied). *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373-374

(1989). Whether it is called a correction of the Final EIS, or a supplemental EIS (SEIS), the ASLB identified NEPA deficiencies within the DEIS, and Intervenors had a right to expect a change of approach by the Staff toward investigation and documentation of transmission corridor effects at the FEIS stage. The public has a right to expect adherence by lead federal agencies to NEPA, which has not happened here. Intervenors timely moved for relief by resubmitting Contention 23 upon learning that their expectations were disappointed.

DTE perpetrates in its answer a word game, insisting that compliance with NEPA as to the transmission corridor has been accomplished by production of a “bounding analysis” (DTE Answer at 24-25):

... [T]he fact that the precise location of the transmission corridor is not yet final does not mean that the FEIS is necessarily deficient. To the contrary, the FEIS includes a bounding discussion of transmission line impacts.

This represents a serious misunderstanding of the concept of “bounding analysis.” It’s an

analysis designed to identify the range of potential impacts or risks, both upper and lower, to simplify assumptions or to address uncertainty because expected values are unknown. A bounding analysis is appropriate for use when many uncertainties prevent a more realistic approach (*i.e.*, one based on expected values), but not when effects may be measured and quantified. “Bounding means that the EIS by implication considers lesser risks when it looks at greater risks.” *South Carolina ex rel. Beasley v. O’Leary*, 953 F.Supp. 699, 708 (D.S.C. 1996).

Even if the concept of “bounding analysis” is pertinent to the transmission corridor, the route of the three 345kV lines offsite from Fermi 3 is not established:

ITCTransmission has not yet formally announced a route for the offsite portion of the proposed new transmission line serving Fermi 3. ***Detroit Edison expects that the proposed new transmission line would be built within the existing Fermi 2 transmission corridor for approximately 18.6 mi extending outward from the Fermi site boundary. Detroit Edison expects that the remaining 10.8 mi, extending to the Milan Substation, would be built within an undeveloped right-of-way (ROW) possessed but not yet used by ITCTransmission (Detroit Edison 2011a).*** The route for the undeveloped ROW crosses mostly agricultural and forest land with scattered wetlands. No part of the route crosses designated or protected natural or recreational areas or areas with planned minerals development, although the route likely crosses some prime farmland. Land use restrictions within the corridor segments are governed by agreements between *ITCTransmission* and individual property owners along the corridor (Detroit Edison 2011a).

(Emphasis supplied). FEIS p. 2-10. DTE admits as much in its admission (DTE Answer at 30), “As noted above, *ITCTransmission* has not yet announced a route for the offsite portion of the proposed new transmission line serving Fermi 3.” It would seem rather difficult to realistically claim to have iterated the upper and lower bounds of risk to natural resources, animals and plants under the route of the largest commercial transmission lines used in the business, when that pathway remains unidentified right down to the present moment.

NEPA compels environmental analysis where, as here, "there remains major Federal

action to occur." *Norton v. S. Utah Wilderness Alliance (SUWA)*, 542 U.S. 55, 73 (2004) (internal quotation marks omitted); *see also* 40 C.F.R. § 1502.9(c)(1)(i)-(ii) (providing that agencies must prepare supplements to an environmental impact statement if “[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns” or “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts”). In the instance of the transmission corridor, the FEIS contains many admissions, tacit as well as explicit, that there remains federal action to occur, beyond construction of Fermi 3 and associated infrastructure on the DTE site. The transmission line portion of the Fermi 3 project, which is the *sine qua non* not only for transporting electricity generated by Fermi 3 into the grid, but also, for transmitting electricity from the grid to the Fermi 3 reactor in the event of a loss of onsite power, will continue to be the subject of Federal agency scrutiny into the future. NEPA’s disclosure requirement continues to attach to, not just the activities of building the Fermi 3 and outbuildings on DTE property, but also to the associated transmission facilities which will serve to connect the plant to the national grid.

Given all the open items and question marks respecting the transmission corridor which has been unlawfully segmented from the Fermi 3 onsite portion of the plant project - including lack of firm determination how many transmission lines will traverse the corridor and their precise locations, lack of wetlands delineation,³ and omission of myriad other aspects of impacts

³At FEIS p. F-54 it says, “Wetland delineation surveys have not yet been conducted to determine the precise locations and extent of wetlands.” And at FEIS p. 4-44 appears the admission, “A conceptual transmission line corridor has been identified, but wetland delineation surveys have not yet been conducted to determine the precise locations and extent of wetlands.” Finally, Appendix J, p. J-2 of the FEIS contains this unsupported and unequivocal admission that within the FEIS there is no attempt to identify jurisdictional wetlands in the transmission corridor: “Any subsequent changes to the proposed site plan

upon the environment from building and managing a transmission corridor - much by way of “significant new circumstances or information” remains to be disclosed in a lawful FEIS.

Instead of taking seriously the ASLB’s pointed language following the DEIS stage, the Staff has circled the wagons and made the inapropos assertion that the Licensing Board has no power to oversee whether NEPA is followed as to the transmission corridor part of the plan.

Applying the standards of revised 10 C.F.R. § 2.309(c), Contention 23 should be admitted. The information upon which the filing is based - that the NRC Staff pointedly ignored the guidance of the Licensing Board and instead merely republished in the FEIS the same data and conclusions that were published in the DEIS - became known only with the publication of the FEIS. § 2.309(c)(i). The Staff insistence that there is no NEPA violation to be remedied in the FEIS is materially different from previous knowledge. Presumably the ASLB expected that its authoritative legal analysis, whether it were an order or an advisory, would prompt adherence to NEPA and important departures in the FEIS treatment of the transmission corridor, as compared to the exposition in the DEIS. § 2.309(c)(ii). Finally, the filing is timely, having been proffered by Intervenors within the time limit set by the ASLB. § 2.309(c)(iii).

B. The Endangered Species Concurrence By FWS Has Been Withheld

DTE contends there has been compliance with the federal Endangered Species Act within the transmission corridor, citing at least 24 pages in the FEIS Appendix F which (DTE Answer at 30) “addresses impacts to Federally-listed and candidate species that could occur in the offsite

and/or activities as a consequence of the USACE-identified LEDPA would result in fewer adverse impacts on waters of the United States than identified in the Final EIS.

Thus NEPA’s requirements that disclosure of direct and cumulative environmental impacts be disclosed within the FEIS, and that straightforward details about the transmission line locations be provided within the EIS, have been knowingly violated.

transmission corridor. . . [and cuts off] any basis for a dispute with the discussion in the FEIS/BA regarding transmission-related impacts on protected species. . . , [making] this aspect of resubmitted Contention 23 . . . inadmissible.”

But a hard look at the cited pages reveals impermissibly shallow identification and discussion of plant and animal species and the foreseeable effects upon them. Even a somewhat cursory review of the cited pages uncovers repeated admissions of incomplete or nonexistent documentation which adds up to noncompliance with federal law. For example, at FEIS p. F-45, it says:

ITC Transmission has not conducted systematic terrestrial and aquatic surveys for the Fermi 3 lines. Instead, the BA relies on information about the possible occurrence of endangered or threatened species in counties crossed by the transmission lines from FWS records (FWS 2011a) and the Michigan Natural Features Inventory (MNFI) (MNFI 2007a).

(Emphasis supplied). And at FEIS p. F-47, it states:

ITC Transmission has not conducted systematic aquatic surveys for the Fermi 3 lines. Instead, the BA relies on information about the possible occurrence of endangered or threatened species in counties crossed by the transmission lines from FWS records (FWS 2011a) and the MNFI (MNFI 2007a).

(Emphasis supplied). Then, at pp. F-53-54:

Thus, the routes and corridor boundaries shown in Figure 2-5 are considered provisional and subject to change (Detroit Edison 2011a). Field surveys for Federally listed threatened and endangered species or species that are candidates for Federal listing have not yet been conducted in the proposed corridors. No Federally listed terrestrial species or species that are candidates for Federal listing are known to occur in the affected or directly adjoining habitats, but several Federally listed terrestrial species could potentially use the corridor and adjoining habitats (MNFI 2007a; FWS 2011a). Wetland delineation surveys have not yet been conducted to determine the precise locations and extent of wetlands.

(Emphasis supplied). Moreover, at p. F-56, “According to FWS’s National Wetland Inventory mapping, the identified transmission route crosses about 30 wetlands or other waters that *may* be

regulated by the USACE and MDEQ (FWS 2010).” (Emphasis supplied). Further, at p. F-67, there is this passage:

Because ITCTransmission **has not yet performed on-the-ground field surveys for Federally listed species along the proposed routes**, the review team consulted online sources, including the MNFI and the FWS Environmental Conservation Online System, to determine what information is currently available. **Once final routes have been determined, ITCTransmission is expected to conduct on-the-ground field surveys** for each line prior to completing applications for the required USACE and MDNR permits.

(Emphasis supplied).

At FEIS p. F-68, “The Indiana bat has been observed in Washtenaw and Wayne counties (MNFI 2007a), and this species **might** occur in suitable habitat along the transmission line corridor.” At p. F-70 “It is not known whether suitable stream habitat or populations of the snuffbox mussel occur along the proposed offsite transmission line corridor.” At p. F-75:

Consequently, if Detroit Edison and ITCTransmission (1) **conduct surveys to identify whether the eastern massasauga rattlesnake or its habitat occur along or adjacent to the proposed transmission line corridors**, (2) are flexible in routing to avoid such sites, (3) implement BMPs to minimize impacts, and (4) adhere to Federal and State laws, the review team concludes that operation of the Fermi 3 transmission lines would have no effect on the eastern massasauga rattlesnake.

(Emphasis supplied).

Also, it says at p. F-76:

However, if Detroit Edison and ITCTransmission (1) **conduct surveys to identify whether the Eastern prairie fringed orchid occurs along or adjacent to the proposed transmission line corridors**, (2) are flexible in routing to avoid such sites, (3) implement BMPs to minimize impacts associated with vegetation control activities, and (4) adhere to Federal and State laws, the review team concludes operation of the Fermi 3 transmission lines may affect, but would not likely adversely affect, the Eastern prairie fringed orchid.

(Emphasis supplied) . Too, at FEIS p. F-77, “It is **not known whether suitable stream habitats for, or populations of, the snuffbox mussel occur** along the proposed transmission line corri-

dor.” (Emphasis supplied). And at p. F-85, this passage appears:

Habitat along the offsite transmission line corridor *has not been surveyed for potential Indiana bat habitat* and it is possible suitable habitat currently exists. Because Detroit Edison can avoid adverse impacts, building the proposed transmission lines may affect, but is not likely to adversely affect, the Indiana bat. *The eastern massasauga rattlesnake could occur within the transmission line corridor*. Because Detroit Edison has the ability to reduce impacts on the snake by simple management efforts, building the transmission line may affect, but is unlikely to adversely affect, the eastern massasauga rattlesnake.

(Emphasis supplied).

This biological assessment is full of craters of missing information. DTE and the NRC Staff have attempted to parlay a complete lack of field surveys and a desultory review of literature on the internet into a biological assessment. They make a mockery of NEPA and the Endangered Species Act with such superficial contrivance. The ignorance of the true facts of the species present in the transmission corridor not only makes this an incomplete biological assessment, but puts threatened and endangered species at risk of further harm and even extirpation.

IV. REPLY AS TO NEW CONTENTION 26 (ESA NONCOMPLIANCE)

Intervenors’ Contention 26 alleges a contention of omission for the failure by the NRC Staff to conclude Endangered Species Act requirements for the transmission corridor. DTE maintains (DTE Answer at 33) that the same information that appeared in the biological assessment of the DEIS appears in the FEIS and that in June 2012, that the U.S. Fish and Wildlife Service commented on the biological assessment but that, by implication, all regulatory requirements under the ESA have been completed.

The Fish and Wildlife Service obviously disagrees. In the letter at pp. F-21 to F-23, the East Lansing FWS Field Supervisor states:

You have also made a determination of effects for the 29.4 miles of proposed transmission lines associated with the project. ***We are not able to concur with your effects determinations for the proposed transmission lines at this time. Your evaluation indicates that terrestrial and/or aquatic surveys for listed species will be conducted once the location of the transmission line corridors have been finalized. We will defer concurrence with your determinations until corridor locations are finalized and we have reviewed the results of future surveys.*** We also recommend that future surveys include those for the Indiana bat and for listed mussel species at stream crossings when the stream bottom is to be disturbed. Future consultation should be completed prior to submission of Michigan Department of Environmental Quality and/or the Army Corps of Engineers permit applications for stream crossings or wetland fill associated with the transmission line towers.

(Emphasis supplied). Without making any explicit reference to the June 2012 decision by the Fish and Wildlife Service which deferred further determinations about the Fermi project, the Staff attempts to argue that “[t]he Intervenor likewise have not identified any inconsistency between the FEIS and the substance of the BA or FWS’s response, let alone one based on any information in the FEIS that was not previously available.” NRC Answer at 28.

The problem for the Staff and Applicant is that the ESA process has been ruled incomplete by the federal agency charged with its enforcement, and that incompleteness stems directly from the obstinate refusals of Staff and DTE to candidly perform the necessary decisionmaking and documentation to complete the FEIS for the corridor. The FWS letter corroborates the core allegation made by Intervenor, that there has not been a biological assessment conducted of the 1,069-acre proposed transmission corridor area to identify federally- and state-threatened and -endangered plant and animal species, nor has the requisite interagency consultation occurred. Because the assessment and consultation process might resolve in the development of mitigation plan arrangements, and those mitigation arrangements must be disclosed in the FEIS for the Fermi 3 project, there is serious noncompliance with NEPA and the ESA.

The “new information” here is that the Staff and DTE have evidently determined not to take action to complete the ESA requirements for the transmission corridor until some unclear future time. Applying the standards of 10 C.F.R. § 2.309(c), Contention 26 should be admitted. The information upon which the filing is based - that the FWS concurrence has not been issued and will not be forthcoming absent proper investigation of the various aspects of the transmission corridor - could have changed at any point down to publication of the FEIS. The public learned for the first time of the NRC Staff’s determination to leave the ESA aspects of the licensing case incomplete at that point of publication. 10 C.F.R. § 2.309(c)(i), (ii). Intervenors’ filing is timely, having been proffered by Intervenors within the time limit set by the ASLB. § 2.309(c)(iii).

V. REPLY AS TO CONTENTION 27 (NHPA NONCOMPLIANCE)

The essentially-admitted lack of completion of historic and cultural resource survey and identification work within the transmission corridor remains incomplete down to date of this filing. DTE asks the ASLB to rely on the narrative appearing at pp. 4-100 through 4-102 of the FEIS, which contains repeated admissions of the incomplete nature of the NHPA aspects of the COLA, even as the Staff and DTE insist that it is evidence of fulfillment of the requirements.

Applying the standards of revised 10 C.F.R. § 2.309(c), Contention 27 should be admitted. The information upon which the filing is based - that the NRC Staff would pointedly ignore the guidance of the Licensing Board and adhere within the FEIS to the same data and conclusions that were published in the DEIS - became known only with the publication of the FEIS. 10 C.F.R. § 2.309(c)(i). The Staff insistence that there is no NEPA/NHPA failing which needed to be remedied by substantial additional work to change the outcome as narrated in the

FEIS is materially different from previous knowledge, in that the ASLB clearly expected that its authoritative legal advice, whether an order or an advisory, would prompt adherence to federal law. § 2.309(c)(ii). Finally, the filing was timely tendered within the time limit set by the ASLB. § 2.309(c)(iii).

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**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)	March 25, 2013
(Fermi Nuclear Power Plant, Unit 3))	
)	

* * * * *

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing “COMBINED REPLY IN SUPPORT OF ‘MOTION FOR RESUBMISSION OF CONTENTIONS 3 AND 13, FOR RESUBMISSION OF CONTENTION 23 OR ITS ADMISSION AS A NEW CONTENTION, AND FOR ADMISSION OF NEW CONTENTIONS 26 AND 27’” have been served upon the following persons via Electronic Information Exchange this 25th day of March, 2013:

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