

June 11, 2012

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

APPLICANT'S MOTION FOR  
SUMMARY DISPOSITION OF CONTENTION 8

INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.1205 and 2.710, The Detroit Edison Company ("Detroit Edison") files this motion for summary disposition of Contention 8.<sup>1</sup> Contention 8 relates to the discussion in Detroit Edison's Environmental Report ("ER") regarding the Eastern Fox snake ("fox snake"). Summary disposition is warranted on the grounds that the discrepancies and omissions averred in Contention 8 have been cured, and there no longer exists any genuine issue as to any material fact relevant to the contention. Therefore, under the applicable Nuclear Regulatory Commission ("NRC") regulations, Detroit Edison is entitled to a decision as a matter of law. This motion is supported by a Statement of Material Facts as to which Detroit Edison asserts that there is no genuine dispute and the affidavits of Peter W. Smith, Director, Nuclear Development – Licensing and Engineering, for Detroit Edison, and David Mifsud, an expert herpetologist.

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<sup>1</sup> Counsel for Detroit Edison has contacted counsel for the NRC Staff and Joint Intervenor. Counsel for the NRC Staff does not oppose the motion. The Joint Intervenor indicated that they oppose the motion.

## LEGAL STANDARDS FOR SUMMARY DISPOSITION

Detroit Edison set forth the relevant law regarding the standard for summary disposition in a prior motion and does not repeat that detailed discussion herein.<sup>2</sup> The relevant legal standards are also recited in an earlier Licensing Board decision.<sup>3</sup>

In summary, Detroit Edison bears the initial burden of demonstrating that no genuine issue as to any material fact exists and that it is entitled to judgment as a matter of law.<sup>4</sup> Once Detroit Edison meets its burden, the Intervenors must “counter each adequately supported material fact with its own statement of material facts in dispute and supporting documentation” and cannot rely on “mere allegations or denials.”<sup>5</sup> Merely “colorable” or inadequately probative evidence is insufficient to defeat a motion for summary disposition.<sup>6</sup> It is not sufficient for there merely to be the existence of *some* alleged factual dispute between the parties, for “the requirement is that there be no *genuine* issue of *material* fact.”<sup>7</sup> “Only disputes over facts that

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<sup>2</sup> See “Applicant’s Motion For Summary Disposition of Contention 3,” dated April 26, 2010, at 1-4.

<sup>3</sup> See Order (Granting Motion for Summary Disposition of Contention 3), dated July 9, 2010, at 5-6.

<sup>4</sup> 10 C.F.R. § 2.325.

<sup>5</sup> *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 754 (1977).

<sup>6</sup> *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 297 (2010).

<sup>7</sup> *Anderson v. Liberty Lobby*, 477 U.S. 242, 247-48 (1986) (emphasis in original).

might affect the outcome” of a proceeding preclude summary disposition.<sup>8</sup> “Factual disputes that are . . . unnecessary will not be counted.”<sup>9</sup>

### SCOPE OF ADMITTED CONTENTION 8

#### A. Petition to Intervene and Proposed Contention 8

Contention 8, as proposed, alleged that “inadequate mitigation has been considered” relative to threatened and endangered species.<sup>10</sup> The primary focus of the proposed contention was the fox snake, which is listed as a threatened species by the Michigan Department of Natural Resources (“MDNR”).<sup>11</sup> Relying solely on a letter from Lori Sargent, a wildlife biologist for the MDNR,<sup>12</sup> the Intervenor highlighted discrepancies between recorded sightings of the fox snake at the Fermi property by State biologists and statements in the ER that the fox snake had not been observed on the property. The Intervenor also asserted that “alternatives have not been given the requisite ‘hard look’ and as a result several species are threatened and

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<sup>8</sup> *Id.* at 248.

<sup>9</sup> *Id.*

<sup>10</sup> See “Petition of Beyond Nuclear, Citizens for Alternatives to Chemical Contamination, Citizens Environmental Alliance of Southwestern Ontario, Don’t Waste Michigan, Sierra Club, Keith Gunter, Edward McArdle, Henry Newman, 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 for Leave to Intervene in Combined Operating License Proceedings and Request for Adjudication Hearing,” at 89 (Mar. 9, 2009) (“Pet.”).

<sup>11</sup> The Eastern Fox snake is not listed as a threatened or endangered species under the Federal Endangered Species Act. See U.S. Fish & Wildlife Service, *Species Reports* (available at [http://ecos.fws.gov/tess\\_public/pub/listedAnimals.jsp](http://ecos.fws.gov/tess_public/pub/listedAnimals.jsp)) (last accessed on April 20, 2012).

<sup>12</sup> In January 2010 the Michigan Department of Natural Resources and the Michigan Department of Environmental Quality merged to become the Michigan Department of Natural Resources and Environment (“MDNRE”). The merger lasted until March 2011, when the departments were split back into separate agencies.

endangered.”<sup>13</sup> The Intervenor argued that, if Fermi 3 goes forward, “mitigative measures must be taken.”<sup>14</sup>

As explained by the Board, Contention 8 is a contention under the National Environmental Policy Act (“NEPA”) alleging that the ER fails to adequately assess Fermi 3’s impacts on the fox snake.<sup>15</sup> The threshold factual question presented by Contention 8 is the discrepancies between information presented in the ER and observations made by MDNR personnel regarding the presence of fox snakes at the Fermi 3 site.<sup>16</sup> Assuming that a viable snake population is present at the site, the Board also considered the portion of proposed Contention 8 that related to mitigation of impacts to that snake population. As the Board noted, MDNR contended that construction could harm fox snakes present at the site.<sup>17</sup> The Michigan State biologist recommended that Detroit Edison develop a “plan for protection of this rare species with regard to this new reactor project.”<sup>18</sup>

Ultimately, the Board admitted the portion of Contention 8 alleging that the ER fails to propose mitigation measures related to the fox snake. The Board found Contention 8 inadmissible to the extent that it could be construed as challenging the discussion of impacts to any other species.<sup>19</sup>

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<sup>13</sup> Pet. at 89.

<sup>14</sup> *Id.*

<sup>15</sup> LBP-09-16 at 62.

<sup>16</sup> *Id.* at 66.

<sup>17</sup> *Id.* at 65.

<sup>18</sup> *See* Pet. at 90 (citing a letter from Lori Sargent, MDNR, to G. Hatchett, NRC, dated February 9, 2009 (ADAMS Accession No. ML090401014)).

<sup>19</sup> LBP-09-16 at 62.

B. First Summary Disposition Motion

Contention 8 was the subject of a summary disposition motion filed by Detroit Edison on November 16, 2010.<sup>20</sup> In the motion, Detroit Edison explained that it had resolved the discrepancy in the ER regarding the presence of fox snakes at the Fermi site and had developed mitigation measures. Specifically, in Attachment 7 to NRC3-10-0005, Detroit Edison provided a response to NRC Request for Additional Information (“RAI”) TE 2.4.1-12.<sup>21</sup> Detroit Edison acknowledged the presence of fox snakes at the site and presented a map showing the locations where Detroit Edison employees made observations of fox snakes during the period from 1990 to 2007.<sup>22</sup>

Detroit Edison also identified mitigation measures to reduce impacts to the fox snake.<sup>23</sup> Detroit Edison re-evaluated the proposed site layout and, based on that review, made changes to the project.<sup>24</sup> The revised site layout significantly reduces potential wetland impacts

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<sup>20</sup> “Applicant’s Motion for Summary Disposition of Contention 8.”

<sup>21</sup> Letter to NRC Document Control Desk from Peter W. Smith, Director, Nuclear Development – Licensing and Engineering, Detroit Edison Company, NRC3-10-0005, “Detroit Edison Company Response to NRC Requests for Additional Information Letter No. 2 Related to the Environmental Review,” at Attachment 7 (ADAMS Accession No. ML100541329).

<sup>22</sup> *Id.*, Attachment 7, at 3.

<sup>23</sup> In NRC3-10-0005, Detroit Edison explained that “eastern fox snakes have been observed in numerous locations including those that are developed and currently in use for Fermi 2 operations” and stated that, due to the observed wide distribution at the Fermi site, all undeveloped areas are considered to provide habitat for the species. *Id.* As a result, Detroit Edison concluded that construction of Fermi Unit 3 will impact a portion of the fox snake habitat at the site and that mitigation measures would be necessary.

<sup>24</sup> Smith Affidavit at ¶4; *see also* Statement of Material Facts at ¶4.

and therefore results in reduced impacts to primary fox snake habitat.<sup>25</sup> The revised site layout reduced wetland and open water impacts by approximately 127 acres to approximately 40 acres,<sup>26</sup> resulting in approximately 20 acres of permanent impacts to wetlands and open water impacts.<sup>27</sup> Moreover, for those undeveloped areas that would be impacted by construction (including wetland and non-wetland areas), approximately 147 acres of impacts will be temporary in nature — these areas will be restored to a condition of equivalent or better ecological value once construction is complete.<sup>28</sup>

Detroit Edison also developed a *Fermi 3 Construction Habitat and Species Conservation Plan: Eastern Fox Snake (Elaphe gloydi)* (“Mitigation Plan”).<sup>29</sup> The Mitigation

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<sup>25</sup> See NRC3-09-0017, Attachment 2, at Figure 2.1-4 (responding to RAI GE3.1-1) (ADAMS Accession No. ML093650120); NRC3-11-0001, Attachment 1, at Figure 2.1-4 (ADAMS Accession No. ML110110551); NRC3-11-0026, Attachment 1, at Figure 2.1-4 (ADAMS Accession Nos. ML11200A049 and ML11200A050). The NRC relied upon Revision 3 to complete its draft EIS. See Meeting Notes from the Onsite Meetings on August 8-9, 2011, to Discuss the Fermi 3 Site Layout and Conceptual Aquatic Resource (Wetland) Mitigation Plan, dated Dec. 5, 2011 (ADAMS Accession No. ML11332A158).

<sup>26</sup> Because their jurisdictions vary, MDNR and NRC wetland acreage calculations differ slightly, which results in slight differences between the wetland acreage numbers reported in the ER and DEIS, the wetland permit application, and the Mitigation Plan.

<sup>27</sup> See NRC3-11-0026, Attachment 1, at ER mark-up Section 4.3.1.2.2 (page 4-48 to 4-49) (reducing wetland and open water impacts from 167 acres to approximately 40 acres); see also Smith Affidavit at ¶4. Of this acreage, approximately 20 acres (50 percent) are temporary impacts that would be restored following construction. Detroit Edison, “Habitat and Species Conservation Plan: Eastern Fox Snake (*Elaphe gloydi*),” March 2012, Appendix C at 1; see also Smith Affidavit at ¶4. The changes to the site layout reduced impacts to undeveloped areas overall — including both wetland areas and non-wetland areas. See NRC3-11-0026, Attachment 1, at ER mark-up Section 4.3.1.2.2 at 4-49. All undeveloped areas are assumed to be suitable fox snake habitat.

<sup>28</sup> NRC3-11-0026, Attachment 1, at 4-5.; see also Statement of Material Facts at ¶5; Smith Affidavit at ¶4.

<sup>29</sup> NRC3-10-0005, Attachment 7, at Enclosure 2. Revision 1 of the Mitigation Plan, dated March 2012, is included as Attachment 1.

Plan describes measures to enhance employee awareness of fox snakes and to reduce impacts to fox snakes and their habitat from Fermi 3 construction activities. Specific measures to minimize impacts to fox snakes identified by the plan include: (1) an employee education program (*i.e.*, training); (2) pre-job briefings at the beginning of each construction shift where fox snakes may be encountered; (3) preconstruction surveys (developed areas); (4) preconstruction surveys (undeveloped areas); (5) construction mitigation measures; and (6) monitoring and reporting.<sup>30</sup> The Mitigation Plan was developed with input from a herpetologist with significant experience designing projects to monitor, conserve, manage, rescue, and translocate reptiles in Michigan, including fox snakes.<sup>31</sup>

In LBP-11-14, the Board denied the motion for summary disposition. The Board agreed with Detroit Edison that the revised ER cured the discrepancy between the original ER and the MDNR records by changing ER Section 4.3.1.2.1 to acknowledge the sightings of the fox snake at the Fermi 3 site.<sup>32</sup> The Board also acknowledged that Detroit Edison revised the site layout and developed a construction mitigation plan for the fox snake.<sup>33</sup> The Board explained that, in substance, the revised site layout and mitigation plan constitute alternatives to the Fermi 3 project as originally proposed.<sup>34</sup> According to the Board, Detroit Edison “has therefore addressed two of the issues that led the Board to admit Contention 8: it has acknowledged the

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<sup>30</sup> Attachment 1 at 7-9; *see also id.* at Appendices B, C, D, and E.

<sup>31</sup> *See generally* Mifsud Affidavit at ¶¶1-12.

<sup>32</sup> LBP-11-14 at 19.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

presence of the species at the site and developed alternatives that appear intended to reduce impacts to the species.”<sup>35</sup>

But, the Board found that Contention 8, as admitted, also concerned the adequacy of the ER’s assessment of Fermi 3’s impacts on the fox snake and the sufficiency of its consideration of alternatives that would reduce or eliminate impacts to the species. The Board explained that this concern “was prompted by the conflict between the ER’s claim that the project would have only a small impact on the snake and that no mitigation measures were necessary, and the opinion of MDNR that ‘going forward with the construction would not only kill snakes but destroy the habitat in which they live and possibly exterminate the species from the area,’ and that mitigation should be considered.”<sup>36</sup> The Board noted also that “[t]he revised ER, like the original ER, makes no mention of MDNR’s comments on the original ER, much less demonstrates that those concerns have been entirely resolved by DTE’s draft mitigation plan, revised site layout, or other new information.”<sup>37</sup> The Board therefore concluded that there remained a “an unresolved conflict between the opinion of MDNR and that of DTE concerning the impact of Fermi Unit 3 construction activities on the eastern fox snake and the need for mitigation of those impacts.”<sup>38</sup>

The Board held that Contention 8, as admitted, was limited to potential impacts on fox snakes that arise during construction activities.<sup>39</sup> As a result, the Board did not consider

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 17-18 (citations omitted).

<sup>37</sup> *Id.* at 20.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 24.



the Intervenor's claims regarding the effect of salt deposition on local vegetation or their theory that fox snakes might be injured by radiation while sunning themselves on the Fermi 2 Independent Spent Fuel Storage Installation.<sup>40</sup> The Board explained that any arguments regarding impacts to fox snakes "that do not result from the construction of Fermi Unit 3" must be made in the context of a new or amended contention that meets Commission requirements for admissibility and timeliness.<sup>41</sup>

THE APPLICANT IS ENTITLED TO  
SUMMARY DISPOSITION ON CONTENTION 8

Detroit Edison moves for summary disposition of Contention 8 on the ground that there no longer exists a genuine dispute concerning any facts material to the foregoing matters. Detroit Edison's ER has been superseded by the NRC Staff's Draft Environmental Impact Statement ("DEIS") for Fermi 3. The DEIS acknowledges the potential adverse impacts to fox snakes from Fermi 3 construction activities and describes the role of MDNR with respect to mitigation of potential impacts to fox snakes. And, Detroit Edison has submitted its Mitigation Plan to MDNR, which concluded that the plan is acceptable and provides adequate protection for the fox snakes at the Fermi site. The acceptability and sufficiency of the Mitigation Plan is also supported by Detroit Edison's expert herpetologist, who concluded that the Mitigation Plan is comprehensive and will effectively minimize impacts to fox snakes during construction. Given that the remaining aspect of Contention 8 was premised on MDNR's view as to the need for

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.* To date, the Intervenor's have not filed a new or amended contention relating to impacts to fox snakes from non-construction activities. Issues related to fox snake impacts during Fermi 3 operations are therefore outside the scope of Contention 8, as admitted.

mitigation, the “conflict” between MDNR and Detroit Edison has been resolved and so has the premise for the contention.

A. DEIS Discussion of Fox Snakes

In the DEIS, the NRC Staff recognized that the fox snake could be harmed by construction activities.<sup>42</sup> The NRC Staff concluded that the Fermi 3 project could result in mortality of some individual fox snakes “unless appropriate avoidance and mitigation measures are taken.”<sup>43</sup> Along those lines, the NRC Staff recognized that the Fermi 3 site layout has been reconfigured to minimize impacts to wetlands and other potential fox snake habitat.<sup>44</sup> The NRC Staff also acknowledged that Detroit Edison prepared a Mitigation Plan for construction and explained that the Mitigation Plan would be submitted to and reviewed by MDNR.<sup>45</sup> The NRC Staff stated that MDNR likely will require monitoring of the fox snake in order to assess the effectiveness of Detroit Edison’s mitigation measures. To the extent that Contention 8 relates to the absence of any mention of MDNR’s comments on the original ER, the DEIS resolved the issue by acknowledging MDNR’s original comments, MDNR’s role in reviewing the Mitigation

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<sup>42</sup> NUREG-2105, “Draft Environmental Impact Statement for Combined License (COL) for Enrico Fermi Unit 3,” dated October 2011, at 4-24. Overall impacts to fox snakes, as a species, can be small even if individual snakes are harmed or killed. *See, e.g.*, DEIS at 1-3 to 1-4 (discussing impact significance levels).

<sup>43</sup> DEIS at 4-36.

<sup>44</sup> *Id.* at 4-25.

<sup>45</sup> *Id.* The DEIS explains that the Mitigation Plan includes: (1) surveying the area prior to disturbance and relocating any snakes found during the survey; (2) limiting disturbance of habitat to seasons when the snake is active so that it can more easily be located during surveys or moved to undisturbed areas; (3) training for construction workers; (4) instructions to notify appropriate persons when a snake is sighted; (5) giving appropriate stop-work authority in order to protect snakes or occupied habitat when found; and (6) posting signs warning drivers of the potential presence of fox snakes. *Id.* at 4-35. As discussed below, Detroit Edison has submitted its Mitigation Plan to MDNR, which found it acceptable.

Plan, and the possibility that MDNR might impose additional requirements on Detroit Edison beyond the Mitigation Plan.<sup>46</sup>

The DEIS also discussed the role of the Mitigation Plan with respect to construction-related impacts on the fox snake. Table 4-21 of the DEIS summarizes the measures and controls to limit adverse impacts during Fermi 3 construction. Under the discussion of specific measures and controls to reduce “Ecological Impacts, Terrestrial and wetland resources,” the DEIS lists: “Implement Habitat and Species Conservation Plan for the eastern fox snake.”<sup>47</sup> This notation addresses the Board’s prior concern that the need for a mitigation plan was not specifically addressed in Detroit Edison’s ER.<sup>48</sup>

B. MDNR Review of Fox Snake Mitigation Plans

The key remaining dispute identified by the Board in LBP-11-14 related to MDNR’s opinion on the impacts of construction on the fox snake and the adequacy of Detroit Edison’s proposed mitigation measures. In denying summary disposition previously the Board concluded that there remained “an unresolved conflict between the opinion of MDNR and that of DTE concerning the impact of Fermi Unit 3 construction activities on the eastern fox snake and the need for mitigation of those impacts.”<sup>49</sup> The Board referred to an earlier letter to the NRC from Lori Sargent, who is an Endangered Species Specialist, Wildlife Division, for MDNR. Ms.

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<sup>46</sup> See LBP-11-14 at 19-20 (finding a dispute, in part, because the ER “makes no mention of the MDNR comments on the original ER, much less demonstrates that those concerns have been entirely resolved by DTE’s draft mitigation plan, revised site layout, or other new information”).

<sup>47</sup> DEIS at 4-121.

<sup>48</sup> See LBP-11-14 at 20 (noting that Detroit Edison prepared a mitigation plan even through its ER maintains that “no mitigation is necessary”). Detroit Edison’s ER has now been superseded by the NRC Staff’s DEIS, which acknowledges the need for mitigation.

<sup>49</sup> *Id.*

Sargent had previously written that “going forward with construction would not only kill snakes but destroy the habitat in which they live and possibly exterminate the species from the area.”<sup>50</sup> Ms. Sargent also stated in her earlier letter that MDNR would “like to see a plan for protection” of the fox snake.<sup>51</sup> At the time the DEIS was issued, MDNR had not yet reviewed Detroit Edison’s proposed Mitigation Plan or commented on the adequacy of the measures to protect fox snakes.<sup>52</sup> So, to address MDNR’s concerns and those raised by the Intervenor in Contention 8, Detroit Edison submitted its Mitigation Plan to MDNR for review.

In a letter to Detroit Edison, dated April 6, 2012, Ms. Sargent provided the results of MDNR’s review of the Mitigation Plan.<sup>53</sup> MDNR concluded that the information provided by Detroit Edison “adequately address[ed] the concerns for potential threatened and endangered species at the site in question.”<sup>54</sup> MDNR further concluded that the proposed project would have “minimal” impacts on fox snakes if it proceeded according to the Mitigation Plan developed by Detroit Edison.<sup>55</sup> MDNR’s conclusions are buttressed by Detroit Edison’s expert herpetologist,

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<sup>50</sup> Letter from L. Sargent, Endangered Species Specialist, MDNR, to G Hatchett, NRC, dated February 9, 2009 (ADAMS Accession No. ML090401014).

<sup>51</sup> *Id.*

<sup>52</sup> *See* DEIS at 4-36.

<sup>53</sup> The State of Michigan previously accepted the revised site layout during its review of the Detroit Edison’s wetland permit application. Detroit Edison received its final MDEQ wetland permit on January 24, 2012. *See* MDEQ Wetland Permit No. 10-58-011-P, dated January 24, 2012 (ADAMS Accession No ML12037A243).

<sup>54</sup> Letter from L. Sargent, Endangered Species Specialist, MDNR, to R Westmoreland, Detroit Edison, dated April 6, 2012 (Attachment 2) (“MDNR Letter”).

<sup>55</sup> *Id.* Detroit Edison will implement the Mitigation Plan during construction. Peter Smith Affidavit at ¶9.

who agrees that the Mitigation Plan is comprehensive, will effectively minimize impacts to the fox snake, and will, in the long term, actually expand fox snake habitat.<sup>56</sup>

MDNR considered the steps that Detroit Edison will take to protect fox snakes during construction. The Mitigation Plan utilizes proven techniques and technology to collect as many fox snakes as possible from impacted areas and ensure their survival once they are relocated to unimpacted areas.<sup>57</sup> The targeted collections and relocations of fox snakes will include visual encounter surveys, cover object surveys, barrier fence surveys, mark-recapture, and radio telemetry.<sup>58</sup> All captured fox snakes will be marked with a Passive Integrated Transponder (“PIT”) tag (some fox snakes will also be fitted with radio transmitters) for future identification, detection, and monitoring.<sup>59</sup> During the peak of site preparation activities, fox snake collection will be conducted daily during the fox snake’s active season.<sup>60</sup> Under the Mitigation Plan, Detroit Edison will remove fox snakes during pre-construction and construction activities up to a 90% targeted collection goal, with continuing opportunistic collection.<sup>61</sup>

Collected fox snakes that are injured will be taken to a qualified reptile veterinarian for treatment and maintained offsite until healed and deemed suitable for release.<sup>62</sup>

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<sup>56</sup> Mifsud Affidavit ¶¶3, 6, 8, and 12.

<sup>57</sup> *Id.* at ¶3; Statement of Material Facts at ¶¶14-16.

<sup>58</sup> Mitigation Plan, Appendix D, at 1; *see also* Statement of Material Facts at ¶13; Mifsud Affidavit at ¶3.

<sup>59</sup> Mitigation Plan, Appendix D, at 1, 3; *see also* Statement of Material Facts at ¶16; Mifsud Affidavit at ¶3.

<sup>60</sup> Mitigation Plan, Appendix D, at 2; *see also id.*, Appendix D, at 6 (Table 1); *see also* Statement of Material Facts at ¶14.

<sup>61</sup> Mitigation Plan, Appendix D, at 2; *see also* Mifsud Affidavit at ¶6..

<sup>62</sup> Mitigation Plan, Appendix D, at 3; *see also* Statement of Material Facts at ¶15

Other collected fox snakes will be relocated to an on-site “safe zone” or, once construction is complete, to the off-site mitigation site.<sup>63</sup> Temporary snake barrier fences around the “safe zone” and mitigation site will prevent collected fox snakes from moving into active construction areas and will help them acclimate to the mitigation site.<sup>64</sup> These efforts will significantly reduce potential impacts to the fox snake.<sup>65</sup>

MDNR also reviewed the habitat restoration and enhancement program described in the Mitigation Plan. The goal of this program is to maximize the functionality of habitat for fox snakes and to offset loss of habitat from construction activities.<sup>66</sup> Restoration activities will address foraging grounds, basking sites, shelter, snags, hibernacula, and nesting sites.<sup>67</sup> Enhancements may include creation of wildlife culverts or permanent barrier fences in areas of high fox snake activity at the Fermi site.<sup>68</sup>

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<sup>63</sup> Mitigation Plan, Appendix D, at 7; *see also* Statement of Material Facts at ¶15; Mifsud Affidavit at ¶6.

<sup>64</sup> Mitigation Plan, Appendix D, at 1; *id.* at 8; *see also* Statement of Material Facts at ¶15; Mifsud Affidavit at ¶6.

<sup>65</sup> Mifsud Affidavit at ¶¶3, 6; *see also* Statement of Material Facts at ¶15.

<sup>66</sup> Mitigation Plan, Appendix C, at 1; *see also* Mifsud Affidavit at ¶¶2-6, 8; Statement of Material Facts at ¶¶5-8; Mifsud Affidavit at ¶8 (concluding that “[o]verall habitat availability and quality will be greater after restoration and enhancement efforts than at present . . . the fox snake will not be extirpated from the area, but rather will have an opportunity to expand its range.”).

<sup>67</sup> Mitigation Plan, Appendix C, at 1; *see also* Statement of Material Facts at ¶7; Mifsud Affidavit at ¶8; Smith Affidavit at ¶6.

<sup>68</sup> Mitigation Plan, Appendix C, at 1; *see also* Statement of Material Facts at ¶6.

MDNR also assessed the adequacy of the Mitigation Plan for protecting fox snakes from vehicular traffic, an issue previously indentified by the Intervenor.<sup>69</sup> The Mitigation Plan notes the potential for fox snakes to be killed by construction vehicles and identifies measures to reduce the risk to snakes.<sup>70</sup> For example, roadways used by construction vehicles will be *walked down daily* when fox snakes are likely to present along roadways and any fox snakes found will be *relocated* to areas that will not be disturbed during construction.<sup>71</sup> Vehicle drivers will also be *trained* to identify fox snakes and stop vehicles to avoid fox snakes.<sup>72</sup> And, construction-related vehicles will be held to a *speed limit* of 15 mph within the construction area.<sup>73</sup> *Signs* to enhance awareness of fox snakes will also be posted along roads.<sup>74</sup>

MDNR also considered the *sampling and monitoring programs* embedded in the Mitigation Plan. Detroit Edison will monitor all areas restored, enhanced, or created during Fermi 3 construction.<sup>75</sup> Sampling will be conducted after site preparation work is complete and

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<sup>69</sup> See e.g., LBP-11-14 at 21 (citing Intervenor's arguments regarding potential transportation impacts).

<sup>70</sup> Mitigation Plan at 7; see also Mifsud Affidavit at ¶¶7, 9; Statement of Material Facts at ¶¶10-12, 15.

<sup>71</sup> Mitigation Plan at 7-8; see also Statement of Material Facts at ¶10; Mifsud Affidavit at ¶¶4, 7.

<sup>72</sup> Mitigation Plan at 8; see also Statement of Material Facts at ¶12; Mifsud Affidavit at ¶7.

<sup>73</sup> Mitigation Plan at 8; see also Statement of Material Facts at ¶12; Mifsud Affidavit at ¶7.

<sup>74</sup> Mitigation Plan, Appendix B, Figure 1, at 4; see also Statement of Material Facts at ¶12; Mifsud Affidavit at ¶7.

<sup>75</sup> Mitigation Plan, Appendix D, at 1; see also Mifsud Affidavit at ¶¶9-11; Statement of Material Facts at ¶¶16-18.

for a minimum of five years after the site preparation phase of construction.<sup>76</sup> Sampling will be conducted year round.<sup>77</sup> Monitoring efforts include visual encounter surveys, cover objects, mark-recapture (including PIT tags and radio telemetry), and barrier fence surveys.<sup>78</sup> These activities were summarized in Appendix D, Table 1, *Eastern Fox Snake Construction Monitoring Plan Methods and Representative Timeline*.<sup>79</sup> Detroit Edison will also produce an annual monitoring report.<sup>80</sup>

In light of MDNR's review and acceptance of the Mitigation Plan, Detroit Edison has resolved the remaining dispute identified by the Board — that is, there is no longer “an unresolved conflict between the opinion of MDNR and that of DTE concerning the impact of Fermi Unit 3 construction activities on the eastern fox snake and the need for mitigation of those impacts.”<sup>81</sup> MDNR has reviewed the Fermi 3 project, considered the entirety of the Mitigation Plan, and concluded that the Mitigation Plan is adequate to protect the fox snake.<sup>82</sup> The

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<sup>76</sup> Mitigation Plan, Appendix D, at 1; *see also* Statement of Material Facts at ¶17; Mifsud Affidavit at ¶10; Smith Affidavit at ¶9.

<sup>77</sup> Statement of Material Facts at ¶17.

<sup>78</sup> Mitigation Plan, Appendix D, at 1. Additional details on the sampling and monitoring programs are provided in Appendix D.

<sup>79</sup> *Id.* at 6.

<sup>80</sup> *Id.* at 2. Metrics of success will be gauged through the accomplishment of *Measures of Habitat Restoration, Enhancement, and Mitigation Success*, which are found in the Mitigation Plan, Appendix C; *see also* Mifsud Affidavit at ¶11.

<sup>81</sup> LBP-11-14 at 20. In response to comments by MDNR, Detroit Edison also prepared a mitigation plan that addresses Detroit Edison activities during Fermi 3 operations. However, as noted above, impacts to the fox snake during operations are outside the scope of Contention 8.

<sup>82</sup> Attachment 2 - MDNR Letter; *see also* Mifsud Affidavit at ¶¶2-8 (describing the Mitigation Plan and concluding that it will greatly minimize impacts to the fox snake and, in the long-term, will actually expand the fox snake habitat in the area).



adequacy and effectiveness of the mitigation measures were confirmed by Detroit Edison's expert herpetologist.<sup>83</sup>

Overall, the dispute that formed the basis for Contention 8 has been conclusively resolved. Detroit Edison addressed the Intervenor's and MDNR's questions regarding the presence of fox snakes at the Fermi site and prepared a comprehensive mitigation plan. The DEIS acknowledged MDNR's original comments, the Mitigation Plan prepared by Detroit Edison, and MDNR's role in reviewing the mitigation plan. MDNR reviewed Detroit Edison's proposed construction Mitigation Plan and found that it addresses the State's earlier concerns. Detroit Edison's expert herpetologist reached the same conclusion. In contrast, the Intervenor has offered no expert, apart from MDNR, to challenge the adequacy of the Mitigation Plan. As a result, there remains no genuine issue as to any material fact relevant to the Contention 8. Detroit Edison is entitled to a decision as a matter of law.

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<sup>83</sup> Mifsud Affidavit at ¶¶2, 3, and 12.

CONCLUSION

For the above reasons, the Board should grant summary disposition of Contention

8.

Respectfully submitted,

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Dated at Washington, District of Columbia  
this 11th day of June 2012

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:

THE DETROIT EDISON COMPANY

(Fermi Nuclear Power Plant, Unit 3)

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)  
)  
)

Docket No. 52-033-COL

CERTIFICATE OF SERVICE

I hereby certify that copies of “APPLICANT’S MOTION FOR SUMMARY DISPOSITION OF CONTENTION 8,” “STATEMENT OF MATERIAL FACTS IN SUPPORT OF SUMMARY DISPOSITION,” “AFFIDAVIT OF PETER W. SMITH,” and “AFFIDAVIT OF DAVID MIFSUD” in the captioned proceeding have been served via the Electronic Information Exchange (“EIE”) this 11th day of June 2012, which to the best of my knowledge resulted in transmittal of the foregoing to the following persons.

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