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In the Matter of	)	
DUKE ENERGY CORP.	)	Docket Nos. 50-369-LR, 50-370-LR, 50-413-LR, & 50-414-LR
(McGuire Nuclear Station, Units 1 & 2, and Catawba Nuclear Station, Units 1 & 2	)	(consolidated)

CLI-02-14

MEMORANDUM AND ORDER

This order addresses portions of the appeals submitted by licensee Duke Energy Corporation (Duke) and the NRC staff from the Atomic Safety and Licensing Board's (Board) January 24, 2002, order in this license renewal proceeding involving four of Duke's nuclear power plants. *See* LBP-02-04, 55 NRC 49 (2002). The Board in LBP-02-04 granted petitions to intervene and requests for hearing of the Blue Ridge Environmental Defense League (BREDL) and the Nuclear Information and Resource Service (NIRS). The Board ruled that BREDL and NIRS had each demonstrated standing and that each had filed at least one admissible contention challenging Duke's application to renew its operating licenses for Units 1 and 2 of the McGuire Nuclear Station and Units 1 and 2 of the Catawba Nuclear Station.

Among other things, the Board admitted a contention concerning the possible use of mixed oxide (MOX) fuel[1] at the McGuire and Catawba facilities.[2]

Both Duke and the NRC staff argue on appeal that the MOX contention is inadmissible. We agree and therefore reverse the MOX ruling in LBP-02-04. Our reversal of the MOX ruling renders moot the staff's motion for stay and interlocutory review of the Board's March 1, 2002 order granting discovery and scheduling a hearing on the MOX issues. Since the reversal also renders discovery and the hearing on this issue unnecessary, we also dismiss the staff's motion to vacate the Board's March 1st order.

I. PROCEDURAL BACKGROUND

This proceeding stems from Duke's June 13, 2001, application to renew licenses for four nuclear power plants for an additional 20 years of operation, effective at their licenses' respective expiration dates. The current operating licenses for Units 1 and 2 of the McGuire Nuclear Station and Units 1 and 2 of the Catawba Nuclear Station expire in 2021, 2023, 2024, and 2026, respectively. On July 16th, this agency published in the *Federal Register* a notice that it had received Duke's application[3] and, on August 15th, we published a notice of opportunity for hearing on the application.[4] In response to the August 15th notice, BREDL and NIRS each

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[1] MOX fuel is a mixture of uranium and plutonium oxides. *See Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-09, 55 NRC ___, slip op. at 2 (April 3, 2002).

[2] The Board also admitted issues concerning the completeness of the Severe Accident Mitigation Alternatives ("SAMA") evaluation which Duke had included in its environmental reports and certified to the Commission the petitioners' issues related to risks from acts of terrorism. Duke and the NRC staff have each filed an appeal challenging the admissibility of the SAMA issues. On February 6, 2002, the Commission issued CLI-02–06 accepting the certification of the terrorism issues. We address neither the SAMA nor the terrorism issues in this Memorandum and Order but will do so in future Commission issuances.

[3] 66 Fed. Reg. 37,072.

[4] 66 Fed. Reg. 42,893.

submitted a timely petition to intervene and request for hearing to oppose Duke's license renewal application. On October 4th, the Commission referred those petitions and requests to the Licensing Board Panel.[5]

On October 23, 2001, BREDL filed a petition asking the Commission to dismiss, as legally invalid, Duke's license renewal application or, alternatively, to hold this adjudication in abeyance pending major anticipated changes in the current licensing basis, *i.e.*, the use of MOX fuel and changes to account for increased security threats. In support of its two requests for relief, BREDL offered arguments relating to the risk of terrorist attacks, the use of MOX fuel, and the impropriety of the NRC staff's exempting Duke from a filing requirement.

On December 28, 2001, we issued CLI-01-27, denying BREDL's petition. In that order, we rejected the abeyance request on the grounds that the instant adjudication would address many issues entirely unconnected to terrorism, would result in no immediate licensing action, and would cause BREDL no injury other than litigation costs.[6] We rejected BREDL's exemption request on the grounds that it raises fact-sensitive questions of when and whether exemption-related issues may be raised in an adjudicatory hearing, and that we generally preferred for the Licensing Board to address such questions in the first instance, allowing us ultimately to consider them after development of a full record.[7]

On January 24, 2002, the Board issued LBP-02-04 in which it concluded that each petitioner has standing and has offered at least one admissible contention. More specifically, the Board admitted two contentions (reframed by the Board) relating to the anticipated use of

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[5] Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-01-20, 54 NRC 211 (2001).

[6] Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-01-27, 54 NRC 385, 389-91 (2001).

[7] *Id.* at 391-92.

MOX fuel in the four subject facilities and to severe accident mitigation alternatives (SAMA). In addition, the Board declined to rule on the admissibility of issues relating to terrorism risks and instead certified those issues to the Commission. The Board rejected as inadmissible the remainder of NIRS's and BREDL's contentions.

On February 6, 2002, the Commission issued CLI-02-6, accepting certification of the terrorism issues and setting a briefing schedule.[8] On February 25 and March 12, 2002, the parties filed briefs on the terrorism issues. In addition, on February 4, 2002, pursuant to 10 C.F.R. § 2.714a(c), the NRC staff and Duke filed interlocutory appeals of the Board's admission of the MOX and SAMA contentions. The staff and Duke do not contest intervenors' standing. NIRS and BREDL oppose the appeals.

On March 1, 2002, the Board issued an order granting discovery and scheduling a July hearing date on NIRS's MOX issues. On March 11, 2002, the NRC staff filed a motion for stay and interlocutory review of the Board's March 1st order.

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[8] The Commission simultaneously issued similar orders agreeing to address terrorism issues in three other proceedings: *See Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-02-03, 55 NRC __ (Feb. 6, 2002), *accepting referral of* LBP-01-37, 54 NRC 476 (2001) (denying admission of terrorism contention and referring issue to the Commission); *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit No. 3; Facility Operating License NPF-49), CLI-02-05, 55 NRC ___ (Feb. 6, 2002), *accepting referral of* LBP-02-05, 55 NRC 49 (2002) (denying admission of terrorism contention and referring issue to the Commission); and *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-04, 55 NRC __ (Feb. 6, 2002), *granting in part petition for interlocutory review of* unpublished Memorandum and Order (Ruling on Motion to Reconsider) (Jan. 16, 2002) (denying reconsideration of admission of terrorism contention).

II. ADMISSIBILITY OF NIRS's and BREDL's CONTENTIONS

A. The Commission's Standards for Admissibility of Contentions

The Commission's rules governing licensing proceedings require that a petitioner to intervene raise at least one admissible contention.[9] Our contention pleading rules require a detailed, fact-based showing that a genuine and material dispute of law or fact exists.[10] Moreover, a contention is not admissible unless it falls within the scope of the proceeding, as that scope is defined by the Commission in its Referral Order[11] and in the relevant regulatory and statutory provisions.[12]

The scope of license renewal proceedings is narrow.[13] In our order referring this proceeding to the Licensing Board, we specifically limited the case's scope under the Atomic Energy Act ("AEA") to "a review of the plant structures and components that will require an aging management review for the period of extended operation and the plant's systems, structures and components that are subject to an evaluation of time-limited aging analyses."[14]

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[9] 10 C.F.R. § 2.714(b)(1).

[10] *See Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 1 and 3), CLI-01-24, 54 NRC 349, 358-59 (2001).

[11] *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-01-20, 54 NRC 211, 212-13 (2001).

[12] *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000).

[13] Final Rule, "Nuclear Power Plant License Renewal; Revisions," 60 Fed. Reg. 22,461, 22,465, 22,481 (May 8, 1995).

[14] *McGuire*, CLI-01-20, 54 NRC at 212-13, citing Final Rule, "Nuclear Power Plant License Renewal; Revisions," 60 Fed. Reg. 22,461 (May 8, 1995), and 10 C.F.R. §§ 54.4, 54.21(a), (c). *See also McGuire*, CLI-01-27, 54 NRC at 391, citing *Florida Power & Light Co.* (Turkey Point Nuclear Generating Station, Units 3 & 4), CLI-01-17, 54 NRC 3, 6-13 (2001). *See generally Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 7, 8, 9, 10, 13 (2001).

We likewise specifically limited the proceeding's scope under the National Environmental Protection Act ("NEPA") to issues specified in 10 C.F.R. §§ 51.71(d) and 51.95(c) (identifying which environmental issues are exempt from consideration in the staff's site-specific environmental impact statement).[15] Our regulations divide environmental review for such applications into generic ("Category 1") and plant-specific ("Category 2") components, based on an extensive study of potential environmental consequences of operating a nuclear power plant for an additional 20 years.[16] Under our regulations, applicants must include in their environmental reports analyses of the plant-specific Category 2 issues only (*e.g.*, impact of extended operation on endangered or threatened species); they are generally not required to provide analyses of Category 1 issues (*e.g.*, impacts from principal noise sources). However, the applicant must provide additional analysis of even a Category 1 issue if new and significant information has surfaced that may bear on the applicability of the Category 1 finding at the plant which is the subject of the application.[17]

Under our NEPA rules, the NRC staff will prepare a site-specific Supplemental Environmental Impact Statement ("SEIS") which augments the GEIS. The SEIS will consider public comments, including plant-specific claims and "new and significant" information on

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[15] *McGuire*, CLI-01-20, 54 NRC at 213 (2001), citing NUREG-1437, "Generic Environmental Impact Statement ("GEIS") for License Renewal of Nuclear Power Plants (May 1996)," and Final Rule, "Environmental Review for Renewal of Nuclear Power Plant Operating Licenses," 61 Fed. Reg. 28,467 (June 5, 1996), *amended*, 61 Fed. Reg. 66,537 (Dec. 18, 1996).

[16] 10 C.F.R. Part 51, Subpart A, Appendix B. *See also* GEIS. The federal courts have recognized GEISs as a legitimate means by which this agency can avoid pointlessly "relitigat[ing] issues that may be established fairly and efficiently in a single rulemaking." *See, e.g., Kelley v. Selin*, 42 F.3d 1501, 1511 (6th Cir.), *cert. denied*, 515 U.S. 1159 (1995).

[17] *Turkey Point*, CLI-01-17, 54 NRC at 11.

generic findings, and will weigh all expected environmental impacts -- both generic and plant-specific.[18]

Finally, the Commission's rules provide a vehicle by which a petitioner may seek to raise issues that would otherwise be beyond the scope of a license renewal proceeding. Pursuant to 10 C.F.R. § 2.758, a petitioner may seek a waiver of one or more of the Commission's AEA- or NEPA-related license renewal rules. To obtain such a waiver, however, the petitioner must demonstrate that a strict application of the rule would not serve the purposes for which it was promulgated.[19]

B. Description and Analysis of Petitioners' MOX Contentions

1. Petitioners' MOX Contentions and their Admission by the Board

The Board admitted NIRS's two MOX-related contentions:

> 1.1.1: MOX fuel use will have a significant impact on the safe operation of Catawba and McGuire during the license renewal period and must be considered in the license renewal application. [AEA-related MOX contention]
>
> 1.2.4: Environmental reports do not consider MOX fuel use. [NEPA-related MOX contention][20]

However, the Board combined the two into the following reformulated contention:

> Anticipated MOX fuel use in the Duke plants will have a significant impact on aging [AEA] and environmental [NEPA] license renewal issues during the

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[18] *Id.* at 12, 15.

[19] *See also Turkey Point*, CLI-01-17, 54 NRC at 10 (regarding AEA health-and-safety issues), 12 & 15 (regarding NEPA environmental issues). The intervenor or petitioner may also raise its concerns outside the context of an adjudication by filing either an enforcement petition under 10 C.F.R. § 2.206 or a rulemaking petition under 10 C.F.R. § 2.802. In addition, the intervenor or petitioner may use the notice-and-comment process for the Supplemental Environmental Impact Statement (SEIS) and ask the Commission to forgo use of a questionable generic finding and to suspend license renewal proceedings, pending a rulemaking or an update of the GEIS. Finally, the Commission itself solicits comments from the public and then reviews (and revises as necessary) its license renewal rules every ten years, beginning seven years after the last review. *See Turkey Point*, CLI-01-17, 54 NRC at 12.

[20] NIRS Contentions at 2, 20.

> extended period of operations in the Duke plants, through mechanisms including changes in the fission neutron spectrum and the abundances of fission products, and must therefore be considered in the license renewal application and addressed in the Supplemental EIS.[21]

The Board concluded that NIRS's Contention 1.1.1 fell within the scope of the AEA portion of this proceeding because Duke was *planning* to amend its operating licenses so as to permit the use of MOX fuel at the four plants. The Board relied specifically on the language of 10 C.F.R. § 54.29(a) which provides that, for a plant's operating license to be renewed, there must be "reasonable assurance that the activities authorized by the renewed license will continue to be conducted in accordance with the [current licensing basis], and that *any changes made* to the plant's [current licensing basis] in order to comply with this paragraph are in accord with the [AEA] and the Commission's regulations."[22] The Board construed the regulation's reference to "any changes made" as including future changes in the current licensing basis -- such as future authorization to use MOX fuel -- and therefore concluded that Contention 1.1.1 was admissible as an AEA-related issue in this license renewal proceeding.[23]

The Board also concluded that NIRS's Contention 1.2.4 was admissible as a NEPA-related issue in this proceeding:

> [The contention] presents a specific statement of the issue NIRS wishes to raise; provides a brief explanation of the bases of the contention; provides a fact-based argument sufficient to show a genuine dispute on the material issue of combined fact and law, of whether future anticipated use of MOX fuel in the Duke plants is sufficiently definite to constitute a "proposal" under the law, with a connection, "cumulative impact," "interdependence," or similar relationship to matters at issue in this license renewal proceeding, to warrant being addressed in the SEIS for this proceeding. NIRS has also identified the failure of the [license renewal application] to contain information on the use of MOX fuel in the plants, and provided supporting reasons why it believes the information should be included in the application.

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[21] LBP-02-04, 55 NRC at 107.

[22] *Id.* at 95 (emphasis added).

[23] *Id.* at 96.

> Looking at the contention from the standpoint of whether it falls within the scope of license renewal, we find that NIRS has presented sufficient indication that the use of MOX fuel in the Duke plants could affect . . . the environment with regard to thermal discharges, that we find it to be within the scope of a license renewal proceeding.[24]

2. Admissibility of NIRS's AEA-Related MOX Contention

We disagree with the Board's expansive reading of our AEA-based license renewal regulations.[25] The Board's view that license renewal contemplates inquiry into future, inchoate plans of the licensee would, as a general matter, invite petitioners in license renewal cases to raise safety issues involving a myriad of possible future license amendments. Here, while Duke apparently has a contractual arrangement to purchase MOX fuel, the proposed MOX fuel production facility remains unbuilt and is in the early stages of a contested NRC licensing proceeding.[26] To actually use MOX fuel at Catawba and McGuire, Duke will have to obtain an NRC license amendment, for which Duke has not yet even applied. Nothing in our case law or regulations suggests that license renewal is an occasion for far-reaching speculation about unimplemented and uncertain plans like Duke's MOX plan.[27]

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[24] *Id.* at 107 (emphasis omitted).

[25] We also disagree with the Board's interpretation of the following language in CLI-01-27: "We believe it is generally preferable for the Licensing Board to address such questions [as the MOX issue] in the first instance, allowing us ultimately to consider them after *development of a full record*." *See* CLI-01-27, 54 NRC at 392 (emphasis added). The Board construed the italicized phrase as essentially a requirement that the Board accept the MOX contentions and hold an evidentiary hearing. *See* LBP-02-04, 55 NRC at 105-07. This was not our intent. Our phrase "full record" referred merely to those documents necessary to a ruling on admissibility, *i.e.*, proposed contentions, responses to those contentions, and the transcript of a prehearing conference at which admissibility would be discussed.

[26] *See Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-09, 55 NRC ___ (April 3, 2002).

[27] *See* further discussion at 14-16, *infra*; *cf. Turkey Point*, CLI-01-17, 54 NRC at 24 & n.18 (only "tangible plan" requires consideration, not a "speculative" assumption).

The Board's reliance on 10 C.F.R. § 54.29(a) to admit the MOX contention is misplaced. This rule, by its very terms, focuses on the "current" licensing basis, not some future licensing basis. This temporal limitation is also expressly spelled out in the regulatory definition of "current licensing basis," *i.e.*, "NRC requirements . . . *that are docketed and in effect*."[28] Because Duke's future plan to use MOX fuel is not a part of the *current* licensing basis for the four plants, it is perforce not part of the licensing basis that is "docketed and in effect."

The Board takes out of context the phrase "changes made to the plant's [current licensing basis]," in an effort to include changes made after submission of the license renewal application. The words immediately following this phrase, however, make clear that the "changes" referenced are only those that are necessary "in order to comply with [section 54.29(a)]," *i.e.*, necessary to satisfy the "standards for issuance of a renewed license." In other words, if "managing the effects of aging,"[29] or some other specific license renewal requirement, requires any changes in the current licensing basis, then the NRC will consider the overall lawfulness and reasonableness of those changes under the AEA and under NRC regulations. But a future plan to change from low-enriched uranium fuel to MOX fuel is not the kind of "change" to which section 54.29(a) refers.

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[28] 10 C.F.R. § 54.3 (emphasis added). *Accord Turkey Point*, CLI-01-17, 54 NRC at 9 (the current licensing basis includes only those requirements "applicable to a specific plant *that are in effect at the time of the license renewal application*" (emphasis added)). *See also* Final Rule, "Nuclear Power Plant License Renewal," 56 Fed. Reg. 64,943, 64,949 (Dec. 13, 1991) ("1991 Final Rule") ("the current licensing basis . . . is the set of NRC requirements applicable to a specific plant and a licensee's written commitments for ensuring compliance with and operation within applicable NRC requirements and the plant-specific design basis . . . *that are docketed and are in effect*" (emphasis added)), 64,950 ("the Commission has revised the [current licensing basis] definition to restrict commitments to those that are written and *on the plant-specific docket*" (emphasis added)), *superseded in other respects by* Final Rule, "Nuclear Power Plant License Renewal; Revisions," 60 Fed. Reg. 22,461 (May 8, 1995) ("Final Rule"); the 1991 Final Rule's discussion of "current licensing basis" remains valid (*see* 60 Fed. Reg. at 22,473).

[29] 10 C.F.R. § 54.29(a)(1).

In short, we do not consider the AEA-related MOX issue suitable for adjudication in this proceeding and we therefore reverse the Board's admission of this issue. Duke may (or may not) ultimately use MOX fuel at its Catawba and McGuire plants. The MOX issue may well become ripe for NRC consideration down the road, *i.e.*, when and if Duke seeks a license amendment to use MOX fuel, but it is not ripe now. While our ruling to exclude the MOX issue from a license renewal case is consistent with the limited nature of license renewal proceedings,[30] we also note that, as a general matter, contentions that are based on projected changes to a license, not currently before the NRC in any proceeding or application, are not sufficient to support admission of a contention. An NRC proceeding considers the application presented to the agency for consideration and not potential future amendments that are a matter of speculation at the time of the ongoing proceeding.[31]

3. Admissibility of NIRS's NEPA-Related MOX Contention

For similar reasons, we also disagree with the Board's ruling that NIRS's MOX contentions fall within the scope of the NEPA portion of this proceeding. In CLI-01-27, we described the issue as follows:

> BREDL's [MOX] "fuel" argument raises a much-litigated environmental law issue: the so-called "cumulative impact" issue. In this proceeding, the issue is styled: whether the NRC staff is obliged to consider in an Environmental Impact Statement the cumulative effect of the instant license extension action together with an as-yet-unfiled application for an amendment permitting use of plutonium/MOX fuel.[32]

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[30] *See, e.g., McGuire*, CLI-01-27, 54 NRC at 391 ("License renewal, by its very nature, contemplates a limited inquiry. . . ."); *Turkey Point*, CLI-01-17, 54 NRC at 7-10.

[31] *See Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 257, 267 (1996).

[32] 54 NRC at 392 (footnote omitted), citing, *inter alia*, *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

In *Kleppe v. Sierra Club*, the Supreme Court ruled against environmental groups seeking to force the United States Department of the Interior (and other agencies regulating the coal industry) to prepare a comprehensive EIS covering all projects related to coal-mining in the Northern Great Plains Region. The Court found such an EIS inappropriate because the agency did not have pending before it a "proposal" for region-wide action.[33] The Court concluded that only "when several *proposals* for . . . actions that will have *cumulative or synergistic environmental impact* upon a region are *pending concurrently* before an agency, [must] their environmental consequences . . . be considered together."[34] The Court held that agencies are not required to consider "possible environmental impacts of *less imminent actions* when preparing the impact statement on proposed actions"[35] and specifically reversed the court of appeals' ruling that the government must include within its NEPA review any significant federal actions merely under "consideration" -- as compared with those that are actually proposed.[36]

Taken literally, *Kleppe* invalidates NIRS's NEPA contention because Duke has submitted no "proposal" (*i.e.*, a license amendment application) to use MOX fuel in the Catawba and McGuire reactors. *Kleppe*, however, was decided a quarter-century ago, and as the Licensing Board's extensive digest of subsequent federal decisions indicates,[37] the case has been subject to a wide range of judicial interpretations, many seemingly inconsistent with each other and even with *Kleppe* itself. Thus, the matter warrants a closer look.

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[33] *Kleppe*, 427 U.S. at 414-15.

[34] *Id.* at 410 (emphasis added).

[35] *Id*. at 410 n.20 (emphasis added).

[36] *Id.* at 404.

[37] *See* LBP-02-04, 55 NRC at 97-103.

Our collective reading of the post-*Kleppe* rulings suggests, as the Board indicated, that to bring NEPA into play, a possible future action must at least constitute a "proposal" pending before the agency (*i.e.*, ripeness), and must be in some way interrelated with the action which the agency is actively considering (*i.e.*, nexus).[38] The United States Court of Appeals for the District of Columbia Circuit said as much in *National Wildlife Federation v. FERC*:

> *Kleppe* . . . clearly establishes that an EIS need not delve into the possible effects of a hypothetical project, but need only focus on the impact of the particular proposal at issue and *other pending or recently approved proposals that might be connected to or act cumulatively with the proposal at issue*.[39]

We believe that the possibility of a future MOX application satisfies neither the ripeness nor the nexus test.

The issue of ripeness ultimately boils down to what constitutes a "proposal." Many courts have required concrete or reasonably certain projects, not projects that are "merely contemplated."[40] This approach is reasonable,[41] especially as applied in the context of this Commission's responsibilities under NEPA. At this point, we have before us no details about Duke's future MOX fuel plans. We would, to say the least, have a very difficult time analyzing the environmental effects of a "merely contemplated" license application that we have never

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[38] *See id.* at 104.

[39] 912 F.2d 1471, 1478 (D.C. Cir. 1990) (emphasis added).

[40] *See*, *e.g.*, *Society Hill Towers Owners Association v. Rendell*, 210 F.3d 168, 182 (3d Cir. 2000)); *Crounse Corp. v. Interstate Commerce Comm'n*, 781 F.2d 1176, 1194-95 (6th Cir. 1986); *South Louisiana Env'l Council, Inc. v. Sand*, 629 F.2d 1005, 1015-16 (5th Cir. 1980)).

[41] NEPA is governed by a "rule of reason." *See generally San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1300 (D.C. Cir. 1984), *reh'g en banc granted on other grounds*, 760 F.2d 1320 (D.C. Cir. 1985), *aff'd on reh'g en banc*, 789 F.2d 26 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 923 (1986) (applying a "rule of reason" in deciding whether the EIS for the licensing of the Diablo Canyon nuclear power plant had to be supplemented to include discussion of possible environmental consequences of a core melt accident).

seen, and we would have an even more difficult time appraising how those effects would combine with those of another action to create "cumulative impacts."[42]

The Commission of course recognizes that Duke *could* file a license amendment application to use MOX fuel. Indeed, Duke has even signed a contract with DOE which would, at some point in the future, oblige Duke to use such fuel at its McGuire and Catawba facilities. DOE, however, has recently modified its plutonium disposition program in a way that will postpone until the fall of 2008 the delivery of the first MOX fuel assemblies to McGuire. During the next 6½ years, any number of events could occur that would render a license amendment application to use MOX fuel unnecessary. The mere possibility that Duke might, at some undetermined future time, file a MOX-related amendment application is speculative by its very nature. We see no reason to doubt Duke's statement that its submittal of a MOX license amendment application is uncertain:

> Duke is currently participating in an international program to reduce stockpiles of surplus weapons plutonium in the United States and Russia. This program may eventually involve the use of MOX fuel at McGuire and/or Catawba. However, the future use of MOX fuel at McGuire and Catawba reactors is not a certainty. Substantial uncertainties and contingencies continue to surround the program. . . . Duke . . . has filed no license amendment request with the Commission for the approval of such use. [T]he ultimate use of any MOX fuel is dependent on a number of factors entirely outside Duke's control. These include, but are not limited to, actions by the U.S. Department of Energy, including the consummation of certain international agreements, the outcome of the current licensing proceeding for the proposed MOX fuel fabrication facility in South Carolina, and plutonium disposition activities in Russia.[43]

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[42] *See Crounse,* 781 F.2d at 1193-96 (ruling that the ICC had justified the limited scope of its analysis on the grounds that "the lack of final design and engineering plans made it impossible to conduct an in-depth analysis"). *See generally Kleppe*, 427 U.S. at 402 ("Absent an overall plan for regional development, it is impossible to predict the level of coal-related activity that will occur in the region").

[43] *See* Duke's Memorandum of Law in Support of Appeal from LBP-02-04, dated Feb. 4, 2002, at 4-5 (citation and footnote omitted).

Given these major uncertainties surrounding Duke's potential filing of a MOX application, we consider such an application simply too inchoate to rise to the level of a "proposal" within the meaning of *Kleppe* and its progeny.[44] Consequently, we conclude that the possible MOX application fails the "ripeness" test and should not be considered in this proceeding.

Moving now to the need for the license renewal and the MOX amendment to be interrelated (*i.e.*, the nexus test), we apply the test the court of appeals set forth in *Webb v. Gorsuch*.[45] There, the court stated that, when developing an EIS, an agency must consider the impact of other proposed projects "only if the projects are so interdependent that it would be unwise or irrational to complete one without the other."[46] We see no "interdependence" *at all*

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[44] *See Sierra Club v. Marsh*, 976 F.2d. 763, 768 (1st Cir. 1992):

> Whether a particular set of impacts is definite enough to take into account, or too speculative to warrant consideration, reflects several different factors. With what confidence can one say that the impacts are likely to occur? Can one describe them "now" with sufficient specificity to make their consideration useful? If the decisionmaker does not take them into account "now," will the decisionmaker be able to take account of them before the agency is so firmly committed to the project that further environmental knowledge, as a practical matter, will prove irrelevant to the government's decision? (citations omitted)

See also Kleppe, 427 U.S. at 412 ("The determination of the region, if any, with respect to which a comprehensive statement is necessary requires the weighing of a number of relevant factors, including *the extent of the interrelationship among proposed actions* and *practical considerations of feasibility*" (emphasis added)); *Concerned Citizens on I-190 v. Secretary of Transp.*, 641 F.2d 1, 6 (1st Cir. 1981) (relying in part on "the existence of continuing opportunities to limit its adverse effects," the Court upheld the EIS against a challenge that it failed to take sufficient account of the impact of such future development on Boston's drinking water supply). Regarding the third question, *see United States Department of Energy Project Management Corp.; Tennessee Valley Auth'y* (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 424 (1982) (in rejecting a request for a cumulative impact statement, the Commission cited *Kleppe* and ruled that "site preparation as proposed will not result in any irreversible or irretrievable commitments to the remaining segments of the . . . project"), *rev'd and remanded per curiam on other grounds sub nom. Natural Resources Defense Council v. NRC*, 695 F.2d 623 (D.C. Cir. 1982).

[45] 699 F.2d 157 (4th Cir. 1983).

[46] *Id.* at 161. *Accord Park County Resource Council, Inc. v. USDA*, 817 F.2d 609, 623

(continued...)

between Duke's license renewal application and any potential fuel-related amendment application. License renewal obviously can go forward without reference to the MOX issue. The Catawba and McGuire plants could operate throughout their current licensing term plus an additional twenty-year renewal term (if license renewal is approved) without using MOX fuel, just as they have to date. Likewise, assuming Commission authorization, the plants could use MOX fuel during the remainder of their current operating licenses regardless of whether Duke had sought any license renewals.[47] License renewal and MOX use are, in short, separate questions.

For these reasons, we conclude that the possible MOX application fails the "nexus" test and need not be considered in this license renewal proceeding. NIRS and BREDL are of course free to raise MOX-related safety and environmental issues (including the question

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[46](...continued)
(10th Cir. 1987); *Society Hill Towers Owners' Assoc. v. Rendell*, 210 F.3d 168, 181 (3rd Cir. 2000); *Webb v. Gorsuch*, 699 F.2d 157, 161 (4th Cir. 1983); *Airport Neighbors Alliance, Inc. v. U.S.*, 90 F.3d 426 (10th Cir. 1996) (ruling that additional components of the airport expansion Master Plan were "not so interdependent that it would be unwise or irrational to complete the runway . . . upgrade without them," and that there was no "inextricable nexus" between the runway upgrade and the other parts of the plan, such that the rest of the plan could not be abandoned "without destroying the [runway upgrade's] functionality"). *See generally Thomas v. Peterson*, 753 F.2d 754, 759 (9th Cir. 1985) (concluding that the environmental effects of an action need not be considered in an EIS regarding a second action so long as the first action has "independent utility," *i.e.*, so long as the agency might reasonably take the first action without taking the second); *Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105, 1118 (9th Cir. 2000) *cert. denied*, 122 S.Ct. 41 (2001) (same). *But see Fritiofson v. Alexander,* 772 F.2d 1225, 1241 n.10 (5th Cir. 1985) ("there may be circumstances in which proposals that are not functionally or economically interdependent may, because of cumulative impacts, trigger the requirement to prepare a comprehensive EIS").

[47] As the Board itself acknowledges, Duke has twice stated its intent to move forward with the license renewal process *regardless* of whether it uses MOX fuel in any of its four plants. *See* LBP-02-04, 55 NRC at 95, citing Duke's Response to Amended Petitions to Intervene filed by [NIRS] and [BREDL]," dated Dec. 13, 2001, at 15, and Duke's Response to [BREDL]'s Petition to Dismiss Licensing Proceeding or, in the Alternative, Hold It In Abeyance," dated Nov. 5, 2001, at 10-11.

whether the use of MOX fuel will aggravate any aging effects) when and if Duke submits a license amendment application seeking permission to possess and use MOX fuel.

IV. CONCLUSION

We grant the interlocutory appeals in part, defer consideration of the SAMA and terrorism issues, and reverse the MOX ruling in LBP-02-04. We also dismiss as moot the NRC staff's motion for stay and interlocutory review and vacate the Board's March 1, 2002 order granting discovery and scheduling a hearing on the MOX issues.

IT IS SO ORDERED.

For the Commission[48]

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 12th day of April, 2002

[48] Commissioners Dicus and Merrifield were not present for the affirmation of this Order. If they had been present, they would have approved it.