

**UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT**

BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE, INC., et al.)	
)	
Petitioners,)	
v.)	
)	
UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA,)	No.12-1151 (consolidated with No. 12-1106)
)	
Respondents,)	
)	
SOUTHERN NUCLEAR CO.,)	
)	
Intervenors.)	
)	

**PETITIONERS’ MOTION TO STAY THE EFFECTIVENESS OF
LICENSING DECISIONS FOR VOGTLE ELECTRIC GENERATING
PLANT UNITS 3 AND 4 PENDING DETERMINATION OF THIS CASE**

I. INTRODUCTION

Pursuant to 5 U.S.C. § 705(d), 28 U.S.C. § 2349, Fed. R. App. P. 18, and D.C. Cir. R. 18, the Petitioners in Case No. 12-1151¹ move this Court to stay the effectiveness of the U.S. Nuclear Regulatory Commission’s (“NRC’s”) decision to issue combined licenses (“COLs”) and extended limited work authorizations (“LWAs”) for Units 3 and 4 of the Vogtle Electric Generating Plant (“Vogtle

¹ Petitioners in Case No. 12-1151 are the organizations that participated in licensing hearings for the proposed Vogtle reactors: Blue Ridge Environmental Defense League (“BREDL”), Center for a Sustainable Coast (“CSC”), Georgia Women’s Action for New Directions (“Georgia WAND”), and Southern Alliance for Clean Energy (“SACE”).

3&4”), pending the Court’s resolution of this case. This Motion is supported by the Declaration of Dr. Arjun Makhijani (April 18, 2012) (“Makhijani Declaration”) (Att. 1). As demonstrated below, Petitioners satisfy the four-part test for issuance of a stay.² Petitioners have consulted the NRC and Southern Nuclear Co. (“Southern”), who stated that they intend to oppose this motion.

II. STATEMENT OF FACTS

A. Fukushima Accident, Emergency Petition, and Task Force Report

In March 2011, a catastrophic accident began at the Fukushima Dai-ichi Nuclear Power Station, Units 1-6, in Okuma, Japan. Following a magnitude 9.0 earthquake and a subsequent tsunami, onsite and offsite power was lost for a sustained period, and offsite radiological releases contaminated a large geographical area of land and ocean.

The NRC Commissioners immediately appointed a Task Force, composed of its most qualified and experienced technical staff, to study the regulatory implications of the accident for the United States. The Commission instructed the Task Force to make a “systematic and methodical review of [NRC] processes and regulations” and recommend changes to its regulations and policies in light of the accident.³ Shortly after the Task Force was appointed, Petitioners submitted an

² See *Va. Petroleum Jobbers Ass’n v. Fed. Power Comm’n*, 259 F.2d 921, 925 (D.C. Cir. 1958).

³ Charter for the Nuclear Regulatory Commission Task Force to Conduct a Near-Term Evaluation of the Need for Agency Actions Following the Events in Japan (March 30, 2011).

Emergency Petition, asking the NRC to suspend all pending licensing decisions while it investigated the implications of the Fukushima accident.⁴

On July 12, 2011, the Task Force issued its report, making twelve overarching recommendations for regulatory action in three major areas: risk analysis for earthquakes and floods, equipment upgrades to protect reactor core and spent fuel cooling systems during extended power outages and multi-unit accidents, and emergency planning upgrades for extended power outages and multi-unit accidents.⁵ The Task Force also recommended that the NRC review its entire regulatory scheme and implement a risk-informed, defense-in-depth regulatory framework. The recommendations included orders and rulemakings that were applicable to all new reactors.⁶

In October 2011, the Commission adopted all of the Task Force recommendations and ordered the NRC Staff to implement them within the following five years.⁷ The manner of implementation was left undecided.⁸ For pending reactor license applications, the Commission did not require implementation of the recommendations before licensing or state that the

⁴ Emergency Petition to Suspend All Pending Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident (April 14-18, 2011) (“Emergency Petition”) (Att. 2).

⁵ Near-Term Report and Recommendations for Agency Actions Following the Events in Japan at 69-70 (July 12, 2011) (“Task Force Report”) (Att. 3).

⁶ *Id.* at 71-72.

⁷ SRM-SECY-11-0124, Recommended Actions to be Taken Without Delay from the Near-Term Task Force Report (Oct. 18, 2011) (Att. 4).

⁸ *Id.*

recommendations would be addressed in the environmental impact statements (“EISs”) for the reactor licensing decisions.

B. Petitioners’ Requests for Consideration of Fukushima Issues

In the summer of 2011, after the NRC had failed to respond to the Emergency Petition and the Task Force had issued its report, Petitioners submitted motions to re-open the record of the Vogtle COL proceeding (which had closed in June 2010) and admit a contention challenging the failure of the EIS for Vogtle 3&4 to address the environmental implications of the Task Force Report.⁹ Separately, Petitioners requested the NRC to consider the environmental implications of the Task Force Report in the rulemaking proceeding for the AP1000 standardized design on which the Vogtle COL applications were based.¹⁰

C. NRC Decisions

On September 9, 2011, in CLI-11-05, the Commission denied the Petitioners’ April 2011 Emergency Petition, concluding that the Fukushima accident had not yet raised any generic environmental issues that should be addressed in a generic NEPA review.¹¹

⁹ Motion to Reopen the Record and Admit Contention to Address the Safety and Environmental Implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-ichi Accident (August 11, 2011) (Two virtually identical motions to reopen were filed: one by CSC, Georgia WAND, and SACE; and the other by BREDL. The CSC et al. motion is attached as Att. 5).

¹⁰ Supplemental Comments by the AP1000 Group, et al., Regarding NEPA Requirement to Address Safety and Environmental Concerns (Aug. 11, 2011).

¹¹ *Union Electric Co. d/b/a Ameren Missouri*, et al., CLI-11-05, __ NRC __, slip op. at 30-31

On October 18, 2011, in LBP-11-27, the NRC’s Atomic Safety and Licensing Board (“ASLB”) rejected as premature Petitioners’ August 2011 contention, finding that it was still unable to reach “any informed conclusion” regarding the safety or environmental implications of the Fukushima accident with respect to reactor licensing.¹² Petitioners submitted a petition for review of LBP-11-27 to the Commission.¹³

On December 30, 2011, the NRC issued a rule certifying the AP1000 standardized design on which the proposed new Vogtle reactors are based.¹⁴ The NRC asserted that no changes to the AP1000 design were required to meet the Task Force recommendations because the Task Force itself had already concluded that the AP1000 design “has many of the features and attributes necessary to address the Task Force recommendations.”¹⁵ In any event, the Commission noted that:

Even if the Commission concludes at a later time that some additional action is needed for the AP1000, the NRC has ample opportunity and legal authority to modify the AP1000 DCR to implement NRC-required design changes, as well as to take any necessary action to ensure that holders of COLs referencing the AP1000 also make the necessary design changes.¹⁶

On February 9, 2012, the NRC Commissioners issued CLI-12-02,

(2011) (“CLI-11-05”) (Att. 6).

¹² *PPL Bell Bend, L.L.C., et al., LBP-11-27*, 74 NRC ___, slip op. at 12 (2011) (Att. 7).

¹³ Petition for Review of LBP-11-27 (Nov. 2, 2011) (Att. 8).

¹⁴ 76 Fed. Reg. 82,079.

¹⁵ 76 Fed. Reg. at 82,081.

¹⁶ *Id.*

concluding the uncontested part of the hearing and approving the issuance of COLs for Vogtle 3&4.¹⁷ A majority of the Commissioners conceded that “[t]he Fukushima events were significant, warranting enhancements in safety measures.”¹⁸ Yet, the majority made no commitment to implement the Task Force recommendations other than as a matter of NRC post-licensing enforcement discretion.¹⁹ With respect to NEPA, the majority asserted that no supplemental EIS was required because Fukushima-like accidents in the United States have an “extremely low probability,” despite their “potentially high consequences.”²⁰

NRC Chairman Jaczko dissented from CLI-12-02, protesting that the majority was issuing the Vogtle COL “as if Fukushima never happened.”²¹ Observing that the Fukushima accident “has fundamentally altered our understanding and appreciation of the *impacts* of a catastrophic natural disaster,” the Chairman expressed grave concern that the NRC had yet to implement some of the most urgent recommendations applicable to Vogtle, even to the point that it had not “determined whether implementation will be based on adequate protection [of public health and safety].”²² He also noted that the expectation that newly licensed reactors (such as Vogtle) would incorporate Fukushima-related safety measures

¹⁷ *Southern Nuclear Operating Co.*, CLI-12-02, 75 NRC __ (Att. 9).

¹⁸ *Id.*, slip op. at 82.

¹⁹ *Id.*, slip op. at 83 n.363 (emphasis added).

²⁰ *Id.*, slip op. at 74.

²¹ Statement of Chairman Gregory B. Jaczko, Commission Affirmation Session (February 9, 2012) (Att. 10).

²² CLI-11-02, dissent, slip op. at 3-4.

was an “implicit underpinning” of the Commission’s decision in CLI-11-05 not to stop new reactor licensing while it reviewed the implications of the Fukushima accident, as it had done after the 1979 Three Mile Island reactor accident.²³

On March 16, 2012, the Commission issued CLI-12-07, upholding the ASLB’s decision in LBP-11-27 to reject Petitioners’ contention. The Commission refused to disturb the ASLB’s conclusion that Petitioners “have not identified environmental effects from the Fukushima Dai-ichi events that can be concretely evaluated at this time, or identified specific new information challenging the site-specific environmental assessments [for Vogtle 3&4].”²⁴ According to the Commission, the information generated by the Fukushima accident remains “inchoate” and has not “mature[d] into something that . . . might affect our [environmental] review.”²⁵

D. Petitions for Review and Stay Motion to NRC

On February 16, 2012, Petitioners asked this Court to review the AP1000 rule and moved the Commission for a stay of the Vogtle licensing decisions. On March 20, 2012, Petitioners sought Court review of CLI-12-07 and all related Vogtle licensing decisions.²⁶ On April 3, 2012, the Court consolidated the petitions for review of the Vogtle licensing decisions and the AP1000 rule and established a

²³ *Id.* at 5.

²⁴ *Luminant Generation Co., et al.*, CLI-12-07, 75 NRC ___, slip op. at 9 (Att. 11).

²⁵ *Id.*, slip op. at 14.

²⁶ *See* Att. 12.

briefing schedule. Petitioners' initial brief is due May 11, 2012.

E. Commission Decision on Stay Motion

On April 16, 2012, the Commission issued CLI-12-11, denying Petitioners' motion to stay the effectiveness of the Vogtle 3&4 COLs and LWAs.²⁷ Despite acknowledging that the Fukushima events were "significant," the Commission found that Petitioners failed to demonstrate that they had a strong likelihood of prevailing on the merits of their appeal or that failure to issue a stay would cause irreparable harm to Petitioners and the environment.²⁸

III. ARGUMENT

A. Standard for Issuance of a Stay

Under section 10(d) of the Administrative Procedure Act (5 U.S.C. § 705), "the reviewing court . . . may issue all necessary and appropriate process to postpone the effective date of an agency action . . . pending conclusion of the review proceedings."²⁹ The four criteria for issuance of a stay are:

(1) Has the movant made a strong showing that it is likely to prevail on the merits of its appeal? (2) Has the movant shown that, without such relief, it will be irreparably injured? (3) Would the issuance of a stay substantially harm other parties interested in the proceeding? (4) Where lies the public interest?³⁰

²⁷ *Southern Nuclear Operating Co.*, CLI-12-11, __ NRC __ (Att. 13).

²⁸ *Id.*, slip op. at 11.

²⁹ See also *Coll. Broad., Inc. v. Librarian of Cong.*, No. 02-1322, 2003 WL 151923, at *1 (D.C. Cir. Jan. 14, 2003) (citing *In re GTE Serv. Corp.*, 762 F.2d 1024, 1026 (D.C. Cir. 1985)).

³⁰ *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958); see also *Natural Res. Def. Council v. EPA*, 489 F.3d 1250, 1264 (D.C. Cir. 2007).

As discussed below, Petitioners ably meet all four criteria.³¹

B. Petitioners Have a Strong Likelihood of Prevailing on the Merits of their Appeal

On judicial review, Petitioners have a strong likelihood of prevailing upon the merits of their claim that the NRC violated NEPA by failing to address the environmental implications of the Fukushima accident in a supplement to the EIS for Vogtle 3&4. The NRC's refusal to supplement the Vogtle 3&4 EIS to address the lessons of the Fukushima accident constitutes clear legal error that is entitled to no deference by a reviewing court.³²

1. NEPA requires a supplemental EIS for new and significant information

NEPA forbids the Commission from issuing a reactor license unless and until it has taken a "hard look" at the environmental impacts of that licensing

³¹ This Court traditionally has evaluated these four factors on a "sliding scale." *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291-92 (D.C. Cir. 2009) ("If the movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor."). However, in *Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008), the Supreme Court seemed to treat each of the four factors as an independent prong and thus called the sliding scale test into question. *See also Davis v. Pension Ben. Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009); *Sherley v. Sebelius*, 644 F. 3d 388, 393 (D.C. Cir. 2011). In any event, as discussed herein, Petitioners make a strong showing on all four factors, rendering this distinction moot.

³² *Citizens Against Rails-to-Trails v. Surface Trans. Bd.*, 267 F.3d 1144, 1151 (D.C. Cir. 2001) (agency's conclusion that NEPA does not apply as a matter of law is subject to *de novo* review). *See also Calvert Cliff's Coordinating Comm'n v. AEC*, 449 F.2d 1109, 1114 (D.C. Cir. 1971) (compliance with NEPA is nondiscretionary); *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1300 (D.C. Cir. 1984), *vacated in part and reh'g en banc on other grounds*, 760 F.2d 1320 (D.C. Cir. 1985) (duty to supplement an EIS is nondiscretionary).

action.³³ Even where the NRC has concluded that a proposed reactor operation meets its basic safety requirements, NEPA still requires the NRC to consider cost-effective alternatives for avoiding or mitigating environmental impacts that are reasonably foreseeable and yet not covered by safety regulations.³⁴ That duty continues until the action is taken; even where the impacts of a proposed licensing action have been studied and reported in an EIS, NEPA requires the agency to supplement the EIS by considering the implications of any new information that could significantly affect the action or its environmental impacts.³⁵

2. As a matter of law, the NRC violated NEPA by refusing to supplement the EIS for Vogtle 3&4

The NRC denies that the Fukushima Task Force Report presents new and significant information relevant to the Vogtle 3&4 licensing decision.³⁶ As a matter of law, however, the Commission itself established the novelty and significance of the Task Force recommendations by endorsing and adopting them *in toto* and committing to apply them to Vogtle at some point in the future.³⁷ The Commission has even explicitly stated that “[t]he Fukushima events were

³³ *Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87, 97 (1983). See also 10 C.F.R. § 51.20(b)(2) (requiring EIS for issuance of a COL).

³⁴ *Citizens for Safe Power, Inc. v. NRC*, 524 F.2d 1291, 1299 (D.C. Cir. 1975); *Limerick Ecology Action v. NRC*, 869 F.2d 730-31 (3rd Cir. 1989).

³⁵ 10 C.F.R. § 51.92. See also *Marsh v. Or. Natural Res. Council*, 490 U.S. 360 (1989).

³⁶ CLI-12-02, slip op. at 79-84; CLI-12-07, slip op. at 9-14; CLI-12-11, slip op. at 11-15.

³⁷ See discussion above at page 3 and note 7.

significant, warranting enhancements in safety measures.”³⁸ Having conceded through its statements and actions that the Fukushima Task Force Report presents new and significant information, the NRC is bound as a matter of law to supplement the EIS for Vogtle.

The NRC’s arguments that the information presented by the Task Force Report is not new or significant simply are not plausible in light of these actions and statements. Having adopted every recommendation of the Task Force, for instance, the Commission cannot credibly state that the lessons of the Fukushima accident have not yet “mature[d]” enough for a determination regarding their environmental significance to its licensing decisions.³⁹ The Commission’s assertions that Fukushima-like accidents are “not imminent” or too improbable to warrant NEPA consideration are similarly contradicted by its claim to have mounted a “significant effort” to respond to the accident in its regulatory program.⁴⁰ The NRC would not have adopted the Task Force recommendations if

³⁸ CLI-12-02, slip op. at 82. *See also* CLI-12-07, slip op. at 11; CLI-12-11, slip op. at 15 and n.64.

³⁹ *See* CLI-12-02, slip op. at 14 (citing *Town of Winthrop v. FAA*, 535 F.3d 1, 4 (1st Cir. 2008); *Village of Bensenville v. FAA*, 457 F.3d 52, 71(D.C. Cir. 2006). Neither of these cases is comparable to the instant case. In *Town of Winthrop*, the FAA prepared an EIS, new information came to light, the agency considered such new information, and it concluded supplementation was not required. In *Village of Bensenville*, the Court found that the FAA did not violate NEPA when it relied on an outdated forecast in its environmental review, because the agency considered more recent forecasts when they became available and determined that these forecasts would not alter its original conclusions. Here, in contrast to both cases, the NRC has refused to conduct any NEPA analysis whatsoever of information it has found to be both new and significant to its regulatory program.

⁴⁰ CLI-12-02, slip op. at 14-15 and n. 64.

it did not believe them to be necessary to protect against future accidents.

Finally, the NRC violates NEPA's "rule of reason" by asserting that the word "significant" means something different "colloquially" than it does under NEPA.⁴¹ The NRC may not have it both ways -- claiming to recognize the significance of the Fukushima accident for purposes of reassuring the public, and at the same time denying the significance of the accident for purposes of excluding the public from its decisions.⁴²

The NRC has neither denied the significance of the Task Force recommendations nor delayed their adoption. Yet, it has postponed the implementation of the Task Force recommendations until sometime in the future, after the reactors are licensed. By proceeding to license Vogtle 3&4, without either imposing the Task Force recommendations as part of the licensing decision or addressing their significance for the safety and environmental impacts of the reactors, the NRC violates NEPA's "fundamental" goal of ensuring that agencies "do not make decisions based on incomplete information."⁴³

⁴¹ *Id.*, slip op. at 15 n. 64.

⁴² *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016, 1030-1 (9th Cir. 2006) ("We find it difficult to reconcile the Commission's conclusion that, as a matter of law, the possibility of a terrorist attack on a nuclear facility is "remote and speculative," with its stated efforts to undertake a "top to bottom" security review against this same threat. Under the NRC's own formulation of the rule of reasonableness, it is required to make determinations that are consistent with its policy statements and procedures. Here, it appears as though the NRC is attempting, as a matter of policy, to insist on its preparedness and the seriousness with which it is responding to the post-September 11th terrorist threat, while concluding, as a matter of law, that all terrorist threats are "remote and highly speculative" for NEPA purposes.").

⁴³ *Town of Winthrop v. FAA*, 535 F.3d at 4 (citing *Marsh v. Or. Natural Res. Counsel*, 490 U.S.

3. The NRC may not shift its responsibility for NEPA compliance to Petitioners

The burden of NEPA compliance falls squarely on federal agencies and not on the members of the public who seek to enforce it.⁴⁴ NEPA requires agencies to analyze new and significant information relating to the environmental impacts of an agency action and allow the public to respond.⁴⁵ In violation of this basic principle, the NRC attempts to shift its NEPA burden onto Petitioners by refusing to address the environmental implications of the Task Force recommendations -- or even to grant Petitioners a hearing on whether it should do so -- unless Petitioners explained the significance of the Task Force recommendations “for the unique characteristics” of Vogtle 3&4 or to “identify information that was not considered in the environmental review for the application.”⁴⁶

The NRC’s demand for a technical analysis of the precise effects of the Fukushima recommendations on the Vogtle 3&4 COL application goes far beyond

360, 371 (1989)).

⁴⁴ *Dubois v. U.S. Dept. Of Agric.*, 102 F.3d 1273, 1291 (1st Cir. 1996); *Friends of the Clearwater v. Dombek*, 222 F.3d 552, 559 (9th Cir. 2000). See further *Friends of the River v. FERC*, 720 F.2d 93, 123 (D.C. Cir. 1983) (stating that “NEPA expressly places the burden of compiling information on the agency so that the public and interested government departments can conveniently monitor and criticize the agency’s action.”) (internal citations omitted).

⁴⁵ *Town of Winthrop v. FAA*, 535 F.3d at 4 (citing *Marsh v. Or. Natural Res. Council*, 490 U.S. 360 (“The goal of NEPA is to focus attention on the possible environmental effects of proposed actions, which in turn furthers two important purposes: to ensure that agencies do not make decisions based on incomplete information, and to provide information about environmental effects to the public and other governmental agencies in a timely fashion so that they have an opportunity to respond.”)).

⁴⁶ CLI-12-07, slip op. at 13.

the “notice” required by NEPA.⁴⁷ Petitioners satisfied their NEPA burden by asserting that the Task Force recommendations raised significant safety and environmental issues that should be addressed in the Vogtle 3&4 licensing proceeding, and indeed in every reactor licensing proceeding now pending before the NRC. Having conceded the general safety significance of the Task Force recommendations, the NRC was required by NEPA to explain the technical environmental significance of the recommendations for the new Vogtle reactors.

4. The Commission violated NEPA by excluding Petitioners from its decision-making process

The opportunity for broad public participation in environmental decisions is a key NEPA requirement.⁴⁸ The Commission violated this requirement by basing its denial of Petitioners’ NEPA claim on merits determinations made in a closed evidentiary hearing with Southern Co., from which it barred Petitioners.⁴⁹ As discussed in CLI-12-11, the Commission held a “mandatory” evidentiary hearing, limited to participation by Southern Co. and the NRC technical Staff, in which it “considered at length the possibility of severe accidents, including those like the accident at Fukushima” and examined the Task Force Report and its environmental

⁴⁷ *Dubois*, 102 F.3d at 1291.

⁴⁸ *See Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989).

⁴⁹ *Id.*, slip op. at 4 and n.17 (citing *Exelon Generation Co., LLC*, CLI-05-17, 62 NRC 5, 49 (2005) (“The scope of the Intervenor’s participation in adjudications is limited to their admitted contentions, i.e., they are barred from participating in the uncontested portion of the hearing. Any other result would contravene the objectives of our ‘contention’ requirements.”)).

implications.⁵⁰ Thus, in violation of NEPA, the NRC took comment from Southern Co. and the NRC Staff on the question of whether to supplement the Vogtle EIS to address Fukushima issues, but gave Petitioners no comparable opportunity. The resulting one-sided decision violates NEPA's requirement to consider all relevant viewpoints on environmental issues.⁵¹

C. Failure to Issue a Stay Will Cause Irreparable Harm to Petitioners and the Environment

As demonstrated in Section 4.1 of the attached Declaration of Dr. Arjun Makhijani, the failure to issue a stay would cause irreparable harm to Petitioners and the environment by irretrievably committing a large amount of natural resources and generating significant emissions of carbon to the environment. As Dr. Makhijani attests, the scale of construction to build new reactors is immense, utilizing a vast amount of construction materials. In addition, construction will impact air quality. Fabrication of the amount of concrete needed for two AP1000 units -- roughly 300,000 metric tons -- will result in emissions of large amounts of mercury and other hazardous air pollutants such as hydrochloric acid, hydrocarbons, and fine particulates responsible for increasing the occurrence of respiratory diseases. Similarly, steel production from ore involves considerable pollution. Further, the use of diesel engines on the construction site will cause

⁵⁰ *Id.*, slip op. at 13-14.

⁵¹ *See e.g.* Council on Environmental Quality regulation 40 C.F.R. § 1506.6.

particulate, hydrocarbon, and nitrous oxide emissions. The transportation of the vast amounts of materials to the site will also cause similar air pollution and indirect water and soil pollution impacts associated with production and refining of petroleum.

Furthermore, the generation of carbon during construction of Vogtle 3&4 is irreversible and significant: on the order of one-and-a-half million metric tons of carbon dioxide, equivalent to that emitted by about 300,000 typical cars in one year. Many of these consequences of the construction process will be repeated if the NRC requires Fukushima-related backfits in the future.⁵² Thus, NRC's assertions in CLI-12-11 that the environmental impacts of this massive construction project are "small" or insignificant defies logic.⁵³

NRC's argument that Petitioners may not assert irreparable harm caused by construction because the harm is not "related" to Petitioners' underlying claim is likewise illogical.⁵⁴ To the contrary, Petitioners' claims regarding irreparable harm and their underlying claims relate directly to the environmental harm caused by licensing the Vogtle reactors. And irreparable harm to the environment has repeatedly been found sufficient to support a stay in NEPA actions.⁵⁵

⁵² *Id.*

⁵³ CLI-12-11, slip op. at 8-9

⁵⁴ CLI-12-11, slip op. at 9.

⁵⁵ See e.g., *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 24 (D.D.C. 2009), judgment entered, CIV.A. 08-2243 CKK, 2009 WL 8161704 (D.D.C. July 30, 2009), and case dismissed, 09-5093, 2009 WL 2915013 (D.C. Cir. Sept. 8, 2009). In contrast, in the cases

D. The Issuance of a Stay Will Not Substantially Harm Other Parties Interested in this Proceeding

As discussed in Section 4.2.1 of Dr. Makhijani’s declaration, the harm to Southern Co. from a stay of construction is essentially economic; indeed, if changes are ordered after substantial construction is done, Southern Co. will benefit from a stay rather than be harmed.

The financial exposure of Southern Co. is likely to be small compared to that of other parties because Georgia electric ratepayers carry the primary financial risk for the Vogtle project. Under Georgia’s Construction Work in Progress (“CWIP”) law, absent fraud, Southern Co. may recover from the ratepayers all of the costs of construction for which it is responsible, including costs of delays or default.⁵⁶ Further, the Vogtle 3&4 project has received a conditional commitment for a loan guarantee from the federal government amounting to \$8.3 billion. In the event that Southern Co. abandons the project and defaults on the loan, the United States taxpayer carries the risk.⁵⁷ The cost of delaying construction must also be compared to the cost of postponing consideration of the Fukushima Task Force

cited by NRC in CLI-12-11, claims regarding irreparable harm and the underlying claims were found to arise under distinct statutes or distinct subject areas. *See US v. Green Acres Enter., Inc.*, 86 F3d 130, 133 (8th Cir. 1996) (irreparable harm arose from a Clean Water Act violation while underlying claim was for breach of contract); *National Football League v. McBee & Bruno’s, Inc.*, 792 F.2d 726, 792 F2d 729, 733 (8th Cir. 1986) (injury caused by private individuals viewing a football game broadcast that was “blacked out” held unrelated to underlying copyright infringement claim); *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 982 (9th Cir. 2011)(asserted irreparable harm found to have no causal relationship to bankruptcy).

⁵⁶ Ga. Code Ann. § 46-3A-7(d) (2010).

⁵⁷ Makhijani Declaration, § 4.5.

recommendations all the way to the eve of operation, as proposed by the NRC in CLI-12-02. As Dr. Makhijani states, it is very costly to retrofit a plant after construction is well advanced or nearly completed.⁵⁸

Southern Co. itself has expressed a preference for pre-construction resolution of all reactor design issues related to safety. On its website, Southern Co. notes that “it was common for licensing requirements to change” under the NRC’s previous procedure of granting an operating license only after construction had completed.⁵⁹ Since construction on the projects had already begun, implementation of the new requirements under the old regime resulted in “costly redesigns.”⁶⁰ Southern Co. states its preference for the NRC’s current process of issuing COLs because it “provide[s] for the resolution of all safety and environmental issues before construction begins.”⁶¹

If the NRC postpones consideration of the Task Force recommendations and subsequently requires Fukushima-related backfits to Vogtle 3&4, Southern Co. could well be forced to make the “costly redesigns” it seeks to avoid. Therefore, by

⁵⁸ *Id.*, §§ 4.4 to 4.8. To go ahead with construction now also increases the risk that needed retrofits will never be imposed. *See* CLI-11-02, dissent, slip op. at 6 (“Unless we impose [a requirement for Fukushima-related safety measures] now, when the licenses are issued, we cannot be certain that they will be implemented before operation or, indeed, at all.” Factors that contribute to the risk of non-action include regulations that allow licensed reactors “to avoid compliance with new safety enhancements based on considerations like implementation costs” as well as the general “difficulty of requiring timely compliance with new safety requirements that are not tied down in the license.”).

⁵⁹ The Plan – Avoiding Time and Cost Overruns, www.southerncompany.com/nuclearenergy/plan.aspx (last visited April 18, 2012).

⁶⁰ *Id.*

⁶¹ *Id.*

Southern Co.'s own logic, the issuance of a stay would be in Southern Co.'s interest.⁶²

E. The Issuance of a Stay is in the Public Interest

Finally, as discussed in Section 4.3 of Dr. Makhijani's declaration, issuance of a stay is in the public interest for three reasons. First, the costs of Fukushima-based retrofits may be significant because the NRC expects to issue orders, and may subsequently issue regulations, imposing new requirements relating to flooding, seismic events, and station blackout.⁶³ The costs of these requirements are likely to be significant, given that protection against flooding, seismic events, and station blackout all involve changes to reactor design rather than mere administrative measures. Such costs, if considered in a supplemental EIS before construction of Vogtle 3&4 begins, may change and tip the balance toward other more affordable energy sources.⁶⁴

Second, the cost of backfits will be higher after construction starts. Thus, if issuance of a stay is denied and Fukushima-related backfits are postponed until after the reactors are built, as proposed by the Commission, ratepayers -- and potentially taxpayers -- will bear increased costs of redesign and backfits.⁶⁵

⁶² Makhijani Declaration, § 4.2.4.

⁶³ *Id.*, § 4.3.1.

⁶⁴ *Id.*

⁶⁵ *Id.* As discussed above, ratepayers currently finance construction for the Vogtle project via their monthly power bills. Taxpayers are also at risk because the federal government has conditionally committed an \$8.33 billion loan guarantee to the project.

Finally, issuance of a stay is in the public interest because it would be consistent with past NRC policy regarding the consideration of the implications of the Three Mile Island accident, and because considering safety improvements before construction and operation is, as a matter of policy, the most effective way to ensure that they will be implemented in a timely way.⁶⁶

IV. CONCLUSION

For the foregoing reasons, the Court should grant Petitioners' Motion.

Respectfully submitted,

(Electronically signed by)

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⁶⁶ *Id.*, § 4.6.3.