UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Gregory B. Jaczko, Chairman
Kristine L. Svinicki
George Apostolakis
William D. Magwood, IV
William C. Ostendorff

In the Matter of	)	
SOUTHERN NUCLEAR OPERATING CO.	)	Docket Nos. 52-025-COL and 52-026-COL
(Vogtle Electric Generating Plant, Units 3 and 4)	)	

CLI-12-11

MEMORANDUM AND ORDER

The Southern Alliance for Clean Energy (SACE), Blue Ridge Environmental Defense League (BREDL), Center for a Sustainable Coast, Citizens Allied for Safe Energy, and Georgia Women's Action for New Directions (Georgia WAND) (collectively, Petitioners) seek to stay the effectiveness of our recent decision in this matter (CLI-12-2),[1] pending judicial review.[2] In CLI-12-2, we authorized the issuance of two combined licenses (COLs) entitling Southern

[1] 75 NRC __ (Feb. 9, 2012) (slip op.).

[2] *Petitioners' Motion to Stay the Effectiveness of the Combined License for Vogtle Electric Generating Plant Units 3 and 4 Pending Judicial Review* (Feb. 16, 2012) (Stay Motion). Petitioners offer a Declaration by Dr. Arjun Makhijani in support of their Stay Motion. *Declaration of Dr. Arjun Makhijani in Support of Motion to Stay Effectiveness of Vogtle COL Approval* (Feb. 16, 2012) (Makhijani Declaration), appended to the stay motion as Attachment A. Savannah Riverkeeper joined the current four Petitioners in challenging the COL application in the contested hearing (*see* CLI-12-2, 75 NRC at __ (slip op. at 4)), but did not join them in filing the Stay Motion that we address today.

Nuclear Operating Company (Southern) to construct and operate two new nuclear power reactors at its Vogtle Electric Generating Plant (Vogtle).[3] Petitioners argue that, prior to approving the Vogtle COLs, the NRC Staff should have prepared a "supplemental [environmental impact statement (EIS)]" addressing the environmental implications of the Fukushima Dai-ichi nuclear accident and considering the recommendations of the NRC's Fukushima Task Force.[4] Southern and the Staff oppose the Stay Motion.[5] As discussed below, we decline to stay the effectiveness of CLI-12-2.

I. BACKGROUND

Pursuant to 10 C.F.R. part 52, subpart C, Southern submitted an application in 2008 seeking our approval to construct and operate two new nuclear reactors at its Vogtle site.[6] Petitioners sought and were granted a "contested hearing" pursuant to the Atomic Energy Act

[3] Petitioners have sought judicial review of CLI-12-2 in the United States Court of Appeals for the District of Columbia Circuit. *See Blue Ridge Envtl. Def. League v. NRC*, No. 12-1151 (D.C. Cir. filed Mar. 20, 2012). Separately, Petitioners, along with five other organizations, have asked the same court to review the NRC's recent approval of the AP1000 design, which is the design for the two new reactors at the Vogtle facility. *See Blue Ridge Envtl. Def. League v. NRC*, No. 12-1106 (D.C. Cir. filed Feb. 16, 2012). Both petitions for review are attached to the Stay Motion as Appendix B.

[4] Stay Motion at 2 (referring to "Recommendations for Enhancing Reactor Safety in the 21st Century: The Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident" (July 12, 2011) (ADAMS accession no. ML112510271) (Near-Term Report) (transmitted to the Commission via "Near-Term Report and Recommendations for Agency Actions Following the Events in Japan", Commission Paper SECY–11–0093 (ML112310021) (package))). *See also* Stay Motion at 11.

[5] *NRC Staff Answer to Petitioners' Motion to Stay the Vogtle Units 3 and 4 Combined Licenses Pending Judicial Review* (Feb. 27, 2012) (Staff Answer); *Southern Nuclear Operating Company's Response to Motion to Stay* (Feb. 27, 2012) (Southern Answer). Southern, in support of its opposition, appends to its answer both an Affidavit from Joseph A. Miller, Southern's Executive Vice President for Nuclear Development, and a letter from Georgia State Senator Jesse Stone. *Affidavit of Joseph A. "Buzz" Miller* (Feb. 27, 2012); Stone, Jesse, Georgia State Senator, letter to Joseph A. Miller, Georgia Power Company (Feb. 27, 2012).

[6] *See* Southern Nuclear Operating Co., "Vogtle Electric Generating Plant, Units 3 and 4; COL Application," Rev. 0, Docket Nos. 52-025-COL & 52-026-COL (Mar. 31, 2008), attached as a CD to Miller, Joseph A., Southern Nuclear Operating Co., to NRC (Mar. 28, 2008) (ML081050133).

(AEA) and our procedural rules,[7] which provide members of the public an opportunity to petition to intervene before a three-judge panel of our Atomic Safety and Licensing Board. Although the initial contested proceeding ended in June 2010,[8] a second Licensing Board was established in August 2010 after three of today's Petitioners sought to reopen the record and litigate a new contention (related to the safety of the proposed new reactors' containment). The second Board denied the request, and we affirmed the Board's decision.[9]

Petitioners subsequently filed motions to reopen the record, this time proposing a contention that the final supplemental environmental impact statement (FSEIS) prepared in conjunction with the *Vogtle* COL application had failed to satisfy the National Environmental Protection Act (NEPA)[10] because it did not account for the environmental implications stemming from the findings and recommendations included in the NRC's Near-Term Report on the Fukushima-Dai'ichi accident.[11] The Board denied Petitioners' motions,[12] and we recently

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[7] AEA § 189a.(1)(A), 42 U.S.C. § 2239(a)(1)(A); 10 C.F.R. §§ 2.309, 52.85.

[8] LBP-10-8, 71 NRC 433 (2010).

[9] LBP-10-21, 72 NRC __ (Nov. 30, 2010) (slip op.), *aff'd*, CLI-11-8, 74 NRC __ (Sept. 27, 2011) (slip op.).

[10] 42 U.S.C. §§ 4321 *et seq.*

[11] *See Motion to Reopen the Record and Admit Contention Regarding the Safety and Environmental Implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-ichi Accident* (filed on Aug. 11, 2011 by Center for a Sustainable Coast, Georgia WAND, and SACE) (Petitioner Motion to Reopen); *Motion to Reopen the Record and Admit Contention Regarding the Safety and Environmental Implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-ichi Accident,* and a separately paginated *Contention Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report* (filed on Aug. 11, 2011 by BREDL) (BREDL Motion to Reopen).

[12] *PPL Bell Bend, L.L.C.* (Bell Bend Nuclear Power Plant), LBP-11-27, 74 NRC __ (Oct. 18, 2011) (slip op.) (rejecting motions regarding five plants, including Vogtle); Memorandum (Corrections regarding LBP-11-27) (Oct. 20, 2011) (unpublished). Shortly thereafter, Petitioners filed motions to reinstate and supplement the basis for the rejected contention, prior to appealing LBP-11-27. *See Motion to Reinstate and Supplement the Basis for Fukushima Task Force Report Contention* (substantively identical motions filed by BREDL, and separately, by (continued . . .)

affirmed the Board's decision.[13]

In addition to contested hearings where interested members of the public have the right to participate and air their concerns, uncontested safety and environmental issues are considered in a so-called "mandatory" hearing.[14] We conducted the mandatory hearing for the proposed new Vogtle reactors on September 27-28, 2011.[15] Both the Staff and Southern participated in the mandatory hearing[16] but Petitioners did not.[17] A portion of the mandatory hearing focused upon the COL FSEIS that the Staff had issued on March 18, 2011.[18]

Following the mandatory hearing, we issued CLI-12-2, where we concluded that the "Staff's review of the safety and environmental issues related to Southern's combined license and limited work authorization applications was sufficient to support the findings . . . for each of the combined licenses to be issued, and [likewise sufficient to support] the findings . . . with

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Center for a Sustainable Coast, Georgia WAND, and SACE on Oct. 28, 2011). The Board rejected these requests. *See Luminant Generation Co. LLC* (Comanche Peak Nuclear Power Plant, Units 3 and 4), LBP-11-36, 74 NRC __ (Nov. 30, 2011) (slip op.).

[13] *See Luminant Generation Co. LLC* (Comanche Peak Nuclear Power Plant, Units 3 and 4), CLI-12-7, 75 NRC __ (Mar. 16, 2012) (slip op.). This decision ruled on petitions for review filed in four matters, including this one.

[14] *See* AEA, §§ 185b, 189a, 42 U.S.C. §§ 2235(b), 2239(a). *See also* Notice of Hearing, Southern Nuclear Operating Co., et al.; Combined Licenses for Vogtle Electric Generating Plant, Units 3 and 4, and Limited Work Authorizations, 76 Fed. Reg. 50,767, 50,768 (Aug. 16, 2011).

[15] We set forth the procedural history of the mandatory hearing in CLI-12-2, 75 NRC at __ (slip op. at 8-11), and therefore do not repeat it here.

[16] *See id.*, 75 NRC at __ (slip op. at 9).

[17] The mandatory hearing, which is required by section 189a of the AEA, does not involve public participation—regardless of whether a contested hearing with public participation has occurred. *See Exelon Generation Co, LLC* (Early Site Permit for Clinton ESP Site), CLI-05-17, 62 NRC 5, 49 (2005) ("The scope of the Intervenors' 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.").

[18] *See* Southern Nuclear Operating Company, Inc.; Notice of Availability of the Final Supplemental Environmental Impact Statement for Vogtle Electric Generating Plant Units 3 and 4; Combined License Application Review, 76 Fed. Reg. 16,645 (Mar. 24, 2011).

respect to the limited work authorizations."[19] In that decision, we authorized the Director of the Office of New Reactors "to issue the limited work authorizations" (permitting Southern to engage in certain construction activities in connection with proposed Units 3 and 4) and also to issue "appropriate licenses authorizing construction and operation of . . . Units 3 and 4."[20] On February 10, 2012, the Staff issued the COLs and LWAs for those two units.[21]

Petitioners now seek to stay the effectiveness of CLI-12-2 and the issuance of both the COLs and LWAs. Given that the NRC has already issued the COLs and LWAs, we construe the Stay Motion as a request that we stay the *effectiveness* of the COLs and LWAs. As noted above, Petitioners assert that, prior to approving the Vogtle COLs, the NRC should have prepared a supplement to the COL FSEIS addressing the environmental implications of the Fukushima events and considering the recommendations of the Fukushima Near-Term Task Force.[22]

II. DISCUSSION

A. Stay Standards

The Commission considers requests for stays of Licensing Board decisions under 10 C.F.R. § 2.342. This regulation, however, does not apply to requests for stays of Commission

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[19] CLI-12-2, 74 NRC at __ (slip op. at 85). The purpose of a mandatory hearing is to determine whether the Staff's review of the application has been adequate to support the required regulatory findings. *See id.*, 75 NRC at __ (slip op. at 12, 14).

[20] *Id.*, 74 NRC at __ (slip op. at 85).

[21] *See* Matthews, David B., Office of New Reactors, NRC, letter to Joseph A. "Buzz" Miller, Southern Nuclear Operating Co., "Issuance of Combined Licenses and Limited Work Authorizations for Vogtle Electric Generating Plant (VEGP) Units 3 and 4)" (Feb. 10, 2012) (ML113360395).

[22] Stay Motion at 1-2, 11. Previously, we had declined to suspend ongoing licensing proceedings, including the *Vogtle* proceeding, pending our agency's ongoing Fukushima review. *See Union Electric d/b/a/ Ameren Missouri* (Callaway Plant, Unit 2), CLI-11-5, 74 NRC ___ (Sept. 9, 2011) (slip op.).

decisions pending judicial review.[23] While we have no specific rule governing stays of agency action pending judicial review, federal law requires parties seeking such stays in court to come to the agency first,[24] and we traditionally have entertained such motions.[25] We exercise our discretion here to consider Petitioners' motion.[26]

In deciding motions seeking a stay of agency action pending judicial review, we look to the same four-part test that governs stays of licensing board decisions pending Commission review, set forth in 10 C.F.R. § 2.342(e). Thus, in deciding whether to grant a stay, we weigh and balance the following equitable factors:

> (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
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> (2) Whether th[at] party will be irreparably injured unless a stay is granted;
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> (3) Whether the granting of a stay would harm the other parties; and

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[23] *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-11, 37 NRC 251, 263 (1993). *See also Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-8, 33 NRC 461, 468 (1991) (requests to stay effectiveness of future licensing action pending judicial appeal more appropriately styled "motion to reconsider" and "motion to hold in abeyance").

[24] *See* Fed. R. App. P. 18(a)(1).

[25] *See Shieldalloy Metallurgical Corp.* (Decommissioning of the Newfield, New Jersey Site), CLI-10-8, 71 NRC 142, 147 & n.25 (2010); *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-11, 37 NRC 251, 263-65 (1993); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-92-4, 35 NRC 69, 80-82 (1992). *See generally David Geisen*, CLI-09-23, 70 NRC 935, 936 (2009).

[26] Because 10 C.F.R. § 2.342 does not apply to Petitioners' motion, we do not address Southern's request that we strike the motion because it exceeds that rule's ten-page limit. *See Southern Nuclear Operating Company's Motion to Strike or, in the Alternative, Request for Page Limit Extension* (Feb. 22, 2012). *See also Shoreham*, CLI-91-8, 33 NRC at 468 n.2. Southern also makes another procedural argument—that Petitioners' Stay Motion is too late because their motion, and an accompanying lawsuit, should have been filed months ago in the wake of either the Board's decision denying reopening (LBP-11-27) or our decision declining to suspend NRC licensing proceedings pending completion of the agency's review of the Fukushima accident (CLI-11-5). We find that argument unpersuasive because only *final* NRC action is subject to judicial review. *See* 28 U.S.C. § 2342. Neither the Board's decision denying reopening nor the Commission's decision refusing to suspend proceedings amounted to final agency action.

(4) Where the public interest lies.[27]

Of these factors, irreparable injury is the most important.[28] Specifically, "[a] party seeking a stay must show it faces imminent, irreparable harm that is both 'certain and great.'"[29] Without a showing of irreparable injury, Petitioners must make "an overwhelming showing" of likely success on the merits.[30] (This has also been referred to as a demonstration of "virtual certainty."[31]) And if a movant makes neither of these first two showings, then we need not consider the remaining factors.[32]

B. Analysis of the Four Stay Factors

1. Immediate and Irreparable Injury

Petitioners claim that "they will be irreparably harmed if construction of the Vogtle 3&4 reactors is allowed to proceed."[33] They consider the "commitment of resources involved in building Vogtle 3&4" to be "significant," and "the impacts of construction activities to air, soil, and

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[27] 10 C.F.R. § 2.342(e). *See also Shieldalloy*, CLI-10-8, 71 NRC at 150-51.

[28] *Shieldalloy,* CLI-10-8, 71 NRC at 151; *Geisen*, CLI-09-23, 70 NRC at 936 & n.4.

[29] *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 237 (2006).

[30] *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-13, 67 NRC 396, 400 (2008); *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 7 (1994); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-8, 29 NRC 399, 412 (1989).

[31] *Shieldalloy*, CLI-10-8, 71 NRC at 154; *Geisen*, CLI-09-23, 70 NRC at 937; *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-13, 67 NRC 396, 400 (2008); *Kerr-McGee Chemical Corp.* (West Chicago Rare Earths Facility), ALAB-928, 31 NRC 263, 269 (1990) ("movant must demonstrate that the reversal of the licensing board is a 'virtual certainty'").

[32] *Shieldalloy*, CLI-10-8, 71 NRC at 163 ("Shieldalloy's failure to satisfy the first two stay factors renders it unnecessary to make determinations on the two remaining factors: harm to other parties and where the public interest lies") (footnote omitted); *Oyster Creek*, CLI-08-13, 67 NRC at 400, 401.

[33] Stay Motion at 2. *See also* Makhijani Declaration at 4-5.

water, including the project's carbon footprint" to be both "significant and irreversible."[34] According to Petitioners, "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."[35]

We find Petitioners' arguments unpersuasive for two reasons. First, we see no "imminent, irreparable harm that is both 'certain and great.'"[36] The NRC's FEIS for the Early Site Permit (ESP) phase of the Vogtle licensing process expressly addressed the air and water pollution that would result from construction and related activities, and found the effects "small."[37] Later, the NRC's FSEIS for the COL application made a similar finding.[38] Petitioners offer no explanation of what change in circumstances calls for us now to view the effects of construction at the Vogtle site as "great" rather than "small." Indeed, Petitioners do not argue

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[34] Stay Motion at 2.

[35] *Id.* at 16. *See also* Makhijani Declaration at 4-5. For examples, see Stay Motion at 16-17; Makhijani Declaration at 5.

[36] *Vermont Yankee*, CLI-06-8, 63 NRC at 237.

[37] *See*, *e.g.*, "Final Environmental Impact Statement for an Early Site Permit (ESP) at the Vogtle Electric Generating Plant Site–Final Report, Main Report," NUREG-1872, Vol. 1 (Aug. 2008) (Cover through Chapter 4: ML090760332; Chapters 5 through 11: ML090760333). For specific examples, *see id.* § 3.2.4.3, at 3-16 (hydrocarbons emitted from diesel generators), § 4.1.1, at 4-2 to 4-3 (impacts on land use), § 4.2.1, at 4-5 to 4-6 (impacts on air quality), § 4.2.2, at 4-6 to 4-7 (impacts on air quality due to increased traffic), §§ 4.3 to 4.3.2, at 4-7 to 4-13 (water-related impacts, generally), § 4.3.3, at 4-13 (water quality impacts), § 4.4.2.2, at 4-28 to 4-29 (impacts to ponds and streams onsite from site-preparation and construction activities), § 4.5.4.1, at 4-46 to 4-49 (impacts due to increased traffic), § 4.7.1.1, at 4-58 to 4-59 (impacts on soil), § 4.7.1.2, at 4-59 (impacts on water), § 4.7.1.3, at 4-59 (impacts on air), § 4.8.1.1, at 4-62 (impacts on air quality), § 5.2.2, at 5-4 (hydrocarbons emitted from diesel generators).

[38] *See*, *e.g.*, "Final Supplemental Environmental Impact Statement for Combined Licenses (COLs) for Vogtle Electric Generating Plant Units 3 and 4–Final Report," NUREG-1947 (Mar. 2011), at Chapter 4 (NUREG-1947) (ML11270A216). For specific examples, *see id.* § 4.2, at 4-4 (impacts on air pollution due to increased traffic), § 4.3, at 4-4 to 4-5 (impacts on water), § 4.4.1, at 4-6 to 4-13 (impact on land resources), § 4.4.3, at 4-14 to 4-16 (impacts on aquatic ecosystem), § 4.8.2, at 4-24 to 4-26 (impacts of transporting construction material and personnel to construction site).

that the findings in the ESP FEIS and COL FSEIS have changed. Nor do Petitioners acknowledge or address the NRC's exhaustive consideration of construction impacts on the environment. Consequently, Petitioners have failed to show that "certain and great" harm would result from a denial of their request that the NRC prepare a supplement to the COL FSEIS addressing the Task Force Report Recommendations.

Second, the "irreparable harm" on which Petitioners rely—alleged environmental impacts of construction—is unrelated to the Fukushima-driven challenge raised in their petition for judicial review. That challenge relates to alleged risks and environmental effects of *operating* the new Vogtle reactors, not constructing them. To qualify as "irreparable harm" justifying a stay, the asserted harm "must be related" to the underlying claim.[39] Here, Petitioners claim that significant construction impacts at Vogtle Units 3 and 4, if site activities are not stayed, will constitute irreparable harm. Yet in the contested proceeding for Vogtle Units 3 and 4, Petitioners raised only one contention challenging the adequacy of the COL FSEIS as regards construction impacts, and the asserted harm to which that contention alludes (related to the Savannah River) is not mentioned in the Stay Motion.[40]

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[39] *United States v. Green Acres Enter., Inc.,* 86 F.3d 130, 133 (8th Cir. 1996). *See also National Football League v. McBee & Bruno's, Inc.,* 792 F.2d 726, 733 (8th Cir. 1986) (injury that had "never been the focus of" the lawsuit was insufficient to find irreparable harm). Put differently, where the claimant "has not shown a sufficient causal connection" between the alleged irreparable harm and the underlying claim, relief will be denied. *Perfect 10, Inc. v. Google, Inc.,* 653 F.3d 976, 982 (9th Cir. 2011).

[40] *Joint Intervenors' Motion to Admit New Contention* (July 23, 2009), at 2:

> Channel maintenance . . . of the Savannah River Federal Navigation Channel . . ., to support movement of heavy equipment and components for the construction of Units 3 and 4 at the Vogtle Electric Generating Plant has potentially significant environmental impacts that have not been fully evaluated. . . . NEPA requires the staff to conduct an impacts analysis on this channel maintenance.

Petitioners' only other proffered environmental contention in this proceeding did not relate to construction. Petitioner Motion to Reopen at 1 ("the [COL FSEIS] fails to address the extraordinary environmental and safety implications of the findings and recommendations raised (continued . . .)

As noted above, the Staff addressed the issue of construction impacts in both the COL FSEIS and the ESP FEIS, so Petitioners had ample opportunity to proffer their construction-impacts arguments at both the ESP hearing and the COL contested hearing. Petitioners failed to take advantage of these opportunities.[41] Petitioners, in short, did not exhaust available agency remedies on the issue of construction impacts. We therefore see no basis for a claim of irreparable harm arising from construction impacts that were fully identified and discussed in the FEIS for the ESP and the FSEIS for the COLs, but are unrelated to any contention proposed by Petitioners.

2. Likelihood of Success on the Merits

Petitioners argue that there is a "a strong likelihood of [their] prevailing on their claim that the NRC violated the National Environmental Policy Act ('NEPA') by refusing to address the environmental implications of the catastrophic nuclear reactor accident at Fukushima Dai-ichi in a supplemental environmental impact statement . . . for the licensing of Vogtle 3&4."[42]

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by the Nuclear Regulatory Commission's Fukushima Task Force . . . in its report"); BREDL Motion to Reopen at 1 (same).

Similarly, the declarations Petitioners filed during the contested portion of this proceeding in support of their representational standing mention Vogtle-specific injuries related to only the operation (but not construction) of the two new units: (i) the inability of the Savannah River to provide sufficient cooling water for the new reactors, (ii) the effects of releasing heated water into the river, (iii) the effects of the facility drawing too much water from the river, and (iv) routine releases of radioactive substances into the air and water. *See generally* declarations in support of Petitioners' representational standing (appended to *Petition for Intervention*) (Nov.17, 2008) (ML083230453).

[41] *See* COL contentions set forth in Petitioners' Motion to Reopen at 1; BREDL Motion to Reopen at 1; *Proposed New Contention by Joint Intervenors Regarding the Inadequacy of Applicant's Containment/Coating Inspection Program* (Aug. 12, 2010), at 1; *Joint Intervenors' Motion to Amend Contention Safety-1* (Oct. 23, 2009), at 2-3; *Joint Intervenors' Motion to Admit New Contention* (July 23, 2009), at 2; *Petition for Intervention* at 8, 1, 14. *See also* contentions set forth in the ESP proceeding: Docket No. 52-011-ESP, *Jnt* [sic] *Supplement to Petition for Intervention* (Dec. 27, 2006), at 2 (ML070080349); *Petition for Intervention* (Dec. 11, 2006), at 5-38 (ML063470165).

[42] Stay Motion at 1. *See also id.* at 11.

According to Petitioners, our adoption of the Near-Term Task Force's recommendations for improving the NRC's regulatory system "established, as a matter of law, that the Fukushima accident and the Task Force's report regarding its implications for U.S. reactors constitute 'new and significant information' that should have been addressed in a supplemental EIS"[43] (referring to a supplement to the COL FSEIS). Petitioners refer generally to NEPA and specifically to section 51.92(a) of our rules,[44] arguing that the duty to supplement the FSEIS is mandatory, is not avoidable through findings of compliance with the agency's safety regulations, and is waivable only where the consequences are "remote and highly improbable."[45]

As noted above, proponents of a stay who fail to demonstrate irreparable injury will not prevail unless they demonstrate that their success on the merits is a "virtual certainty."[46] Petitioners fail to meet this high standard.[47] In the *Vogtle* proceeding's "contested" phase, where Petitioners *were* parties, we declined to overturn a Licensing Board decision refusing to reopen the record to consider Petitioners' Fukushima-related arguments—arguments nearly identical to those they raise in the current stay motion.[48] We addressed Petitioners' requests that we reopen the contested proceeding to consider whether the Staff's environmental review took into account the "new and significant environmental implications stemming from . . . the

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[43] *Id.* at 2. *See also id.* at 12; Makhijani Declaration at 2-3.

[44] Stay Motion at 12 (quoting 10 C.F.R. § 51.92(a)).

[45] *Id.* (citation omitted).

[46] *See* note 31 and associated text, *supra*.

[47] We initially observe that the petition for judicial review, as it is currently framed, purports to challenge our mandatory hearing decision (CLI-12-2). But because Petitioners did not participate in the mandatory hearing, and were not parties to it, they may not challenge the mandatory hearing decision, as such, in court. *See* 28 U.S.C. § 2342 (only a "*party* aggrieved" can seek judicial review). Petitioners may, however, seek judicial review of our final licensing action—the COLs and LWAs themselves—which would include prior agency adjudicatory decisions on contested issues.

[48] *See Comanche Peak*, CLI-12-7, 75 NRC at __, __ (slip op. at 1, 15).

Near-Term Report."[49] We declined to do so, concluding generally that "Petitioners ha[d] not identified environmental effects from the Fukushima . . . events that can be concretely evaluated at this time, or identified specific new information challenging the site-specific environmental assessments in the captioned matters."[50] We also concluded, specific to *Vogtle*, that "an application-specific NEPA review represents a 'snapshot' in time," and that while "NEPA requires that we conduct our environmental review with the best information available today[, i]t does not require that we wait until inchoate information matures into something that later might affect our review."[51] Finally, we found Petitioners' proposed Fukushima contention "too vague" for hearing under the Commission's contention-admissibility rules and, as pled, lacking the kind of "'significance' and potential for a 'different result' that under our reopening rule would justify restarting already-closed hearings."[52]

We conclude that Petitioners are unlikely to obtain judicial relief, for the same reasons we rejected Petitioners' Fukushima-based contention. Petitioners assume that our review of NRC regulations in light of the Fukushima events constitutes "new and significant" information requiring a supplement to the COL FSEIS.[53] But Petitioners have not demonstrated that the Fukushima events or any regulatory response to those events would raise environmental impacts that differ significantly from the impacts that the NRC has already reviewed and

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[49] *Id.* at __ (slip op. at 3) (footnote omitted).

[50] *Id.* at __ (slip op. at 9).

[51] *Id.* at __ (slip op. at 14) (footnotes omitted).

[52] *Id.* at __ (slip op. at 14 & n.47). *See* 10 C.F.R. § 2.326(a) (reopening standards).

[53] For new information to be sufficiently "significant" to merit the preparation of a supplemental FEIS, the information "must paint a *seriously* different picture of the environmental landscape." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-06-3, 63 NRC 19, 28 (2006) (emphasis in original; citation and internal quotation marks omitted). Also, NEPA case law requires EIS supplementation only where new information identifies a "previously unknown" environmental concern, but not where the new information "amounts to mere additional evidence supporting one side or the other of a disputed environmental effect." *Id.*

addressed in the ESP FEIS or the COL FSEIS for Vogtle. Specifically, the NRC's FEIS for Vogtle's ESP examined the environmental impacts of constructing the two new reactors—including the potential impacts from design basis accidents and severe accidents—and concluded that those impacts would be small.[54] The COL FSEIS subsequently confirmed that this conclusion still remains valid.[55] Petitioners' stay motion never even refers to the analyses in the ESP FEIS and the COL FSEIS.[56] Petitioners simply have not shown, from a NEPA perspective, that the Fukushima events or our potential regulatory responses to those events reveal environmental impacts that differ significantly from those the NRC has already studied.

Separately, Petitioners point to our mandatory hearing decision, CLI-12-2, and argue that we have disregarded the Near-Term Task Force's recommendations and that we consider a Fukushima-like accident "too unlikely to warrant consideration."[57] Even assuming that non-parties to the mandatory hearing may challenge its result, Petitioners' characterization of our approach is incorrect. The record shows that we recognized the Staff's examination of potential severe accidents in both its ESP FEIS and its COL FSEIS, and we considered at length the possibility of severe accidents,[58] including those "like the accident at Fukushima."[59] At the evidentiary hearing, we "asked a series of questions about whether the severe accident analysis conducted as part of the ESP [F]EIS considered accidents involving multiple units at the site in

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[54] ESP FEIS § 5.10.1, at 5-80 (design basis accidents), § 5.10.2, at p. 5-89 (severe accidents), § 5.10.4, at 5-91 (summary). *See* CLI-12-2, 75 NRC at __ (slip op. at 73).

[55] COL FSEIS § 5.10.1, at p. 5-17 (design basis accidents), § 5.10.2, at 5-19 (severe accidents), § 5.10.4, at 5-20 (summary).

[56] Petitioners argue merely that "[e]ven where the impacts of a proposed licensing action have been studied and reported in an EIS, NEPA requires the agency to supplement that EIS by considering the implications of any new information that could significantly affect the action or its impacts." Stay Motion at 12.

[57] *Id.* at 15.

[58] CLI-12-2, 75 NRC at __-__ (slip op. at 72-75).

[59] *Id*. at __ (slip op. at 74).

disaster scenarios analogous to the multi-layer disaster that occurred at Fukushima."[60] We considered Southern's answers indicating that Southern's environmental analysis assumed multiple concurrent accidents (though from independent causes).[61] And at the evidentiary hearing, we also took into account one Staff witness's statement that:

> [A]fter the Fukushima accident, the staff examined the task force report and noted that [it] emphasized that a Fukushima[-]like event is unlikely in the U.S. and the staff determined that this did not represent new and significant information for the Vogtle Review. Additionally, for the purpose of the environmental analysis accident consequences[,] the staff draws its key inputs from the design basis accidents in the [probabilistic risk assessment] reference and design certification and the COL safety side analysis. Because those have not changed following the Fukushima event, this further supports the determination there is no currently new and significant information that would change the staff's conclusion in the [F]SEIS.[62]

We ultimately accepted the Staff's position that our regulatory approach and our regulated plants' capabilities "allow the Task Force to conclude that a sequence of events like the Fukushima accident is unlikely to occur in the United States and [that] continued operation and continued licensing activities do not pose an imminent threat to public health and safety."[63]

Given the specific consideration we gave to the Fukushima events, we disagree with Petitioners' conclusion that we consider severe accidents such as Fukushima "too unlikely" to be considered in an EIS. What we instead concluded was that the Staff's analysis of the proposed action in *Vogtle* already properly accounts for severe accidents generally, and

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[60] *Id.* at __ (slip op. at 72).

[61] *Id.* at __ (slip op. at 72-73). We also considered the fact that Staff's environmental analysis did not consider concurrent accidents at multiple Vogtle units. *Id.* at __ (slip op. at 73).

[62] Corrected Transcript of Evidentiary Hearing (Sept. 27, 2011) (Tr.), 63-64 (Hatchett), attached as Appendix B to Order (Adopting Proposed Transcript Corrections, Admitting Post-Hearing Responses, and Closing the Record of the Proceeding) (Nov. 1, 2011) (unpublished). *See also id.* at 80 (Hatchett).

[63] CLI-12-2, 75 NRC at __ (slip op. at 22).

appropriately concludes, more specifically, that the Fukushima events did not alter the Staff's conclusion that severe accident risks at Vogtle remain small.[64]

Likewise, we wish to emphasize that our denial of a stay today in no way diminishes the seriousness with which we and our Staff continue to take the Fukushima events and their potential ramifications for our own regulations of nuclear power plants. As we explained in CLI-12-2, "our review of recommended actions associated with lessons learned from the Fukushima . . . events is ongoing,"[65] we will "continue[] to develop the technical basis for Fukushima-related requirements,"[66] and we will impose those new requirements "when the

[64] CLI-12-2, 75 NRC at __, __ (slip op. at 22, 74). *See also* Staff Answer at 10. None of this is to say that we consider the Fukushima events anything less than "significant" as that word is colloquially used. We considered Fukushima-related arguments at the mandatory hearing (*see* Tr. at 63-64, 79-82, 296-97, 303, 326-30, 355-56), in CLI-12-2, and throughout CLI-11-5. Further, we have undertaken a significant effort, through the Fukushima Task Force's Near-Term Report and other Staff activities associated with lessons learned from the events, to develop an appropriate regulatory response. *See generally* "Recommendations for Enhancing Reactor Safety in the 21st Century, The Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident" (July 12, 2011) (transmitted to the Commission via SECY–11–0093, "Near- Term Report and Recommendations for Agency Actions Following the Events in Japan" (July 12, 2011) (ML11186A950 (package)); Staff Requirements—SECY–11–0093—Near-Term Report and Recommendations for Agency Actions Following the Events in Japan (Aug. 19, 2011) (ML112310021); "Recommended Actions To Be Taken Without Delay from the Near-Term Task Force Report", Commission Paper SECY–11–0124 (Sept. 9, 2011) (ML11245A127); Staff Requirements—SECY–11–0124—Recommended Actions to be Taken without Delay from the Near-Term Task Force Report (Oct. 18, 2011) (ML112911571); "Prioritization of Recommended Actions to be Taken in Response to Fukushima Lessons Learned," Commission Paper SECY–11–0137 (Oct. 3, 2011) (ML11269A204); Staff Requirements—SECY–11–0137—Prioritization of Recommended Actions to be Taken in Response to Fukushima Lessons Learned (Dec. 15, 2011) (ML113490055); Staff Requirements—SECY–12–0010—Engagement of Stakeholders Regarding the Events in Japan (Mar. 21, 2012) (ML120820056).

[65] CLI-12-2, 75 NRC at __ (slip op. at 81).

[66] *Id.* at __ (slip op. at 84).

justification is fully developed and we evaluate the Staff's bases" for those requirements.[67] Indeed, we recently issued orders applicable to the *Vogtle* COLs and to other NRC licenses.[68]

3. Injury to Other Parties, and the Public Interest

Because we have concluded that Petitioners failed to demonstrate either irreparable injury or a likelihood of success on the merits of their appeal to the D.C. Circuit, we need not consider the remaining two "stay" factors—injury to other parties and the public interest.[69] We nonetheless have briefly examined them. Petitioners maintain that if the NRC ultimately imposes new and costly Fukushima-driven requirements, ratepayers or taxpayers may ultimately pay the consequences. Southern argues that delaying construction at the Vogtle site to await judicial review on Petitioners' NEPA claims could degrade safety, would lead to job losses in the short term, and might cause higher construction costs in the long term. The competing arguments do not tip the balance in Petitioners' favor.

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[67] *Id.* at __ (slip op. at 82).

[68] *See All Power Reactor Licensees and Holders of Construction Permits in Active or Deferred Status* (Order Modifying Licenses with Regard to Requirements for Mitigation Strategies for Beyond-Design-Basis External Events (Effective Immediately)), No. EA-12-049 (Mar. 12, 2012) (ML12054A735) and, particularly, Att. 3 ("Requirements for Mitigation Strategies for Beyond-Design-Basis External Events at COL Holder Reactor Sites (Vogtle Units 3 and 4)"); *All Power Reactor Licensees and Holders of Construction Permits in Active or Deferred Status* (Order Modifying Licenses with Regard to Reliable Spent Fuel Pool Instrumentation (Effective Immediately), No. EA-12-051 (Mar. 12, 2012) (ML12054A679), and, particularly, Att. 3 ("Requirements for Reliable Spent Fuel Pool Level Instrumentation at Combined License Holder Reactor Sites" (specific to Vogtle)).

[69] *See* text associated with note 32, *supra*.

III. CONCLUSION

For the foregoing reasons, we *deny* Petitioners' Stay Motion.

IT IS SO ORDERED. [70]

For the Commission

[NRC Seal]

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 16th day of April 2012.

[70] Petitioners also have sought a housekeeping stay to enable them to prepare a request that the D.C. Circuit stay the effectiveness of CLI-12-2. That motion is denied. There is no emergency warranting any kind of stay in this proceeding.

Chairman Jaczko's opinion, concurring:

I did not support the Commission decision authorizing the Vogtle licenses because they did not include a binding obligation to implement all Fukushima-related safety enhancements. Nonetheless, given that these licenses have been issued, I concur with the general analysis of my colleagues that Petitioners have not satisfied the standard for obtaining a stay of a Commission decision.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
	)	
SOUTHERN NUCLEAR OPERATING COMPANY	)	Docket Nos. 52-025 and 52-026-COL
	)	ASLBP No. 10-903-01-COL-BD02
(Vogtle)	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER (CLI-12-11)** have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Nancy Greathead]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 16th day of April 2012