ORAL ARGUMENT NOT YET SCHEDULED

No. 21-1162

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OHIO NUCLEAR-FREE NETWORK and BEYOND NUCLEAR,
Petitioners,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and
UNITED STATES OF AMERICA,
Respondents

On Petition for Review of Action by the
Nuclear Regulatory Commission

RESPONDENTS' MOTION TO DISMISS

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GLOSSARY

ACO	American Centrifuge Operating, LLC
AEA	Atomic Energy Act
NEPA	National Environmental Policy Act
NRC	Nuclear Regulatory Commission

INTRODUCTION

The U.S. Nuclear Regulatory Commission ("NRC" or "Commission"[1]) and the United States of America (together, "Respondents") jointly move to dismiss the Petition for Review filed by Ohio Nuclear-Free Network and Beyond Nuclear.

Pursuant to the Atomic Energy Act ("AEA") and the Hobbs Act, only a "party aggrieved" by a final order entered in a proceeding described in AEA § 189 may obtain judicial review in the federal courts of appeals. *See* 42 U.S.C. § 2239(a)(1)(A), (b)(1); 28 U.S.C. §§ 2342(4), 2344. This Court has consistently held that the "party aggrieved" requirement means that petitioners must have been parties to the underlying agency proceeding, or at least sought to have become parties to the agency proceeding, in order to obtain judicial review under the Hobbs Act.

Neither Ohio Nuclear-Free Network nor Beyond Nuclear was ever a "party," or sought to become a "party," to the NRC license amendment proceeding that is the subject of their Petition for Review. Instead of seeking an administrative hearing on the license amendment request—which they are entitled to seek under the AEA and the NRC's implementing procedural regulations—these organizations instead chose only to send a letter to the NRC staff performing the

[1] We use the term NRC to refer to the agency as a whole, and the term "Commission" to refer to the collegial body, currently composed of three members, that oversees the agency.

safety and environmental review of the license amendment, requesting that the agency take certain actions. Under the NRC's comprehensive rules of adjudicatory procedure, this letter did not make either organization a "party" to the licensing proceeding or constitute a request for a hearing. Thus, the Court should dismiss the Petition for Review, either for lack of jurisdiction or for failure to exhaust a mandatory statutory requirement.

BACKGROUND

The agency action that is the subject of this Petition for Review is the NRC's approval of a license amendment, on June 11, 2021, which authorizes American Centrifuge Operating, LLC ("ACO") to operate a cascade of 16 uranium enrichment centrifuges and produce high-assay low-enriched uranium at the American Centrifuge Plant in Piketon, Ohio.[2] Exhibit 1. Prior to issuing this license amendment, the NRC staff prepared a "safety evaluation report," involving

[2] "Gas centrifuge" technology involves placing uranium hexafluoride gas in a cylinder that rotates at a high speed. The centrifugal force of the rotation separates lighter and heavier uranium isotopes, and the resulting gas enriched in the lighter isotope (i.e., uranium-235) is then fed into additional centrifuges until the desired level of enrichment is achieved. These interconnected centrifuge machines are referred to as "cascades."

a comprehensive safety, security, safeguards, and financial review, which concluded that ACO's application satisfied all applicable regulations.[3]

The NRC also prepared an Environmental Assessment prior to issuing the license amendment, consistent with the agency's regulations implementing the National Environmental Policy Act ("NEPA") in 10 C.F.R. Part 51. This document assessed and disclosed the potential environmental impacts associated with the issuance of the license amendment, and concluded that a "finding of no significant impact" was appropriate. The Environmental Assessment was published in the Federal Register in June 2021. *American Centrifuge Operating, LLC; American Centrifuge Plant*, 86 Fed. Reg. 31,539 (June 14, 2021).

In addition to its licensing responsibilities and NEPA obligations, section 189 of the AEA requires the NRC, "upon the request of any person whose interest may be affected by the proceeding," to provide the opportunity for a hearing when, among other things, the agency grants or amends a license. 42 U.S.C. § 2239(a)(1)(A). In order to carry out this statutory mandate, the NRC has promulgated comprehensive procedures in 10 C.F.R. Part 2, detailing when and how members of the public can seek an administrative hearing on an NRC

[3] The public version of the NRC's safety evaluation report is available at https://adamswebsearch2.nrc.gov/webSearch2/main.jsp?AccessionNumber=ML21148A291.

licensing action. *See*, *e.g.,* 10 C.F.R. § 2.309(b) (governing the timing for the submission of hearing requests); *id.* § 2.309(f) (providing requirements for the admissibility of "contentions," i.e., statements of law or fact to be raised or controverted in a hearing). These regulations state that any person "who desires to participate as a party" in an NRC proceeding "must file a written request for hearing and a specification of the contentions which the person seeks to have litigated in the hearing." *Id*. § 2.309(a).

On March 30, 2021, prior to the issuance of the license amendment, Ohio Nuclear-Free Network submitted a letter to the NRC, on behalf of numerous additional organizations including Beyond Nuclear. Exhibit 2. This letter requested that the NRC conduct a "nonproliferation review of the nuclear weapons, international and domestic terrorism implications" of the license amendment request and "prepare a Programmatic Environmental Impact Statement" rather than an environmental assessment. The letter did not request a hearing or make any reference to the requirements in 10 C.F.R. § 2.309 for seeking a hearing.

The NRC staff responded to the letter on May 28, 2021. Exhibit 3. The response stated that, in accordance with the NRC's normal licensing process, the NRC staff was planning to complete its environmental assessment and safety evaluation report in June 2021 before making a final decision on the license amendment request. The response also directed the organizations to public NRC

webpages that provided further information relating to the topics raised in their letter.

Ohio Nuclear-Free Network and Beyond Nuclear did not submit anything further to the NRC concerning the license amendment request after this March 2021 letter. Instead, on August 2, 2021, they filed a Petition for Review in this Court challenging the NRC staff's June 2021 issuance of the license amendment.

ARGUMENT

I. Dismissal is Required Because Ohio Nuclear-Free Network and Beyond Nuclear Were Never "Parties" Before the NRC

Ohio Nuclear-Free Network and Beyond Nuclear's failure to seek a hearing before the NRC necessitates dismissal of the Petition for Review, either as a matter of jurisdiction or because "aggrieved party" status is a mandatory, statutory prerequisite to obtaining judicial review.

The Hobbs Act vests exclusive jurisdiction in the federal courts of appeals to review and determine the validity of certain agency actions. 28 U.S.C. § 2342. With respect to the NRC,[4] this includes all "final orders" that are made reviewable by section 189 of the AEA, including (among other things) final orders for the

[4] The Hobbs Act still refers to final orders of the "Atomic Energy Commission," the NRC's predecessor. The Energy Reorganization Act of 1974 abolished the Atomic Energy Commission and transferred all licensing and related regulatory functions to the newly created NRC. 42 U.S.C. § 5841(a), (f).

"granting, suspending, revoking or amending of any license." *Id.* § 2342(4); 42 U.S.C. § 2239(a)(1)(A), (b)(1). Any "party aggrieved" by such an order—and only such a party—may file a petition for review in the federal courts of appeals within 60 days of entry of the final order. *See* 28 U.S.C. § 2344.

This Court has "consistently held" that the "party aggrieved" language in the Hobbs Act "requires that petitioners have been parties to the underlying agency proceedings." *ACA Int'l v. FCC*, 885 F.3d 687, 711 (D.C. Cir. 2018) (citing *Simmons v. ICC*, 716 F.2d 40 (D.C. Cir. 1983)). Indeed, this Court has expressly held, in the context of the AEA, that "participating in the appropriate and available administrative procedure" is the "statutorily prescribed prerequisite" to invocation of the Court's jurisdiction, and that petitioners who were never "parties" (or who never sought to become "parties") to the underlying AEA proceeding cannot obtain judicial review under the Hobbs Act. *Gage v. AEC*, 479 F.2d 1214, 1217-18 (D.C. Cir. 1973); *see also Bullcreek v. NRC*, 359 F.3d 536, 540 (D.C. Cir. 2004) ("The Hobbs Act requires that a party participate in the underlying agency proceeding . . . ."); *Prof'l Reactor Operator Soc. v. NRC*, 939 F.2d 1047, 1049 n.1 (D.C. Cir. 1991) (petitioners who did not participate in NRC rulemaking proceeding by submitting comments were not "parties aggrieved").

Ohio Nuclear-Free Network and Beyond Nuclear were never "parties" to the licensing proceeding, and never sought to become "parties" under the NRC's rules

of adjudicatory procedure, and thus they are jurisdictionally barred from challenging the NRC's action. And even if this Court were to determine that dismissal of the Petition for Review is not required as a matter of its jurisdiction,[5] the same result is nonetheless required as a matter of "non-jurisdictional, mandatory exhaustion." This Court's recent decision in *Fleming v. U.S. Dep't of Agriculture*, 987 F.3d 1093, 1098-99 (D.C. Cir. 2021), explained the difference between "jurisdictional exhaustion," which a court must enforce regardless of whether it is raised by a party, and "non-jurisdictional, mandatory exhaustion," which constitutes an affirmative defense that, once raised by the government, must be enforced. Since this Court has consistently held that participation as a "party" in the underlying agency proceedings is a statutory prerequisite to judicial review under the Hobbs Act, *ACA Int'l*, 885 F.3d at 711, *Gage*, 479 F.2d at 1217, the

[5] In *Vermont Dep't of Public Serv. v. U.S.*, 684 F.3d 149, 156 (D.C. Cir. 2012), this Court stated that the language of the Hobbs Act does not impose a jurisdictional exhaustion requirement, albeit in a different context—issue exhaustion. In that case, which concerned the renewal of a nuclear power plant license, the petitioners had in fact sought an administrative hearing before the NRC and pursued judicial review after its conclusion. However, the petitioners raised a claim before the Court that had never been raised before the agency. This Court held that, although the Hobbs Act did not state in "clear, unequivocal terms" that consideration of the new claim was statutorily barred, the discretionary doctrine of "non-jurisdictional exhaustion" nonetheless warranted denial of the petition for review. *Id.* at 157-60. *Vermont Department of Public Service* addresses whether there are jurisdictional boundaries on what claims a "party aggrieved" can raise in federal court, not whether "party aggrieved" status constitutes a jurisdictional requirement, as suggested by *ACA International*, 885 F.3d at 711.

Court must dismiss this Petition for Review, given that Federal Respondents have raised this mandatory requirement at the earliest possible stage. *Fleming*, 987 F.3d at 1099.

If this Court were to do otherwise, it would vitiate the statutory scheme Congress has established via the AEA and the Hobbs Act for the judicial review of NRC licensing decisions. It would also render optional the NRC's comprehensive adjudicatory procedures for seeking and obtaining a hearing. Petitioners should not be permitted to evade the administrative prerequisite to judicial review that Congress has created.

II. The March 2021 Letter Did Not Make Ohio Nuclear-Free Network or Beyond Nuclear "Parties" to the Agency Proceeding

Nor can it reasonably be asserted that Ohio Nuclear-Free Network's March 2021 letter to the NRC conferred "party" status or constituted a request for "party" status. NRC regulations are clear—anyone "whose interest may be affected by a proceeding *and who desires to participate as a party* must file a written request for hearing" that satisfies the NRC's admissibility requirements. 10 C.F.R. § 2.309(a) (emphasis added). Both organizations failed to file such a request.

Upon receipt, the NRC did not treat the letter as a request for an AEA section 189 hearing, and for good reason. The letter—submitted by an attorney with extensive experience practicing in NRC adjudicatory proceedings—made no

mention of such a request, made no reference to the admissibility requirements in 10 C.F.R. § 2.309, and was emailed directly to an NRC staff member rather than submitted through the NRC's E-Filing system for adjudicatory hearings (*see* 10 C.F.R. § 2.302). The agency established no hearing docket, nor did it refer the letter to the Atomic Safety and Licensing Board, both of which are standard actions upon the receipt of a hearing request.[6] 10 C.F.R. §§ 2.303, 2.308. The NRC treated the letter for what it was: correspondence from interested stakeholders, not a hearing request filed under the NRC's rules of procedure. And Petitioners never suggested otherwise before the agency.

To be sure, this Court has held in other contexts that merely "submitting comments" or otherwise making a "full presentation of views to the agency" confers "party aggrieved" status on litigants whose positions are then later rejected. *See ACA Int'l*, 885 F.3d at 711 (commenting in support of a petition filed by another party is sufficient to obtain "party aggrieved" status).[7] But this less

[6] The Atomic Safety and Licensing Board is a panel of administrative judges, appointed by the Commission, that is authorized by Section 191 of the AEA to conduct hearings. 42 U.S.C. § 2241.

[7] Submission of comments is also sufficient to confer "party aggrieved" status in an NRC *rulemaking* proceeding that is reviewable under the Hobbs Act. *Reytblatt v. NRC*, 105 F.3d 715, 720 (D.C. Cir. 1997). However, submission of comments, rather than formal intervention, is the means by which members of the public participate in informal rulemaking. This is distinguishable from a license amendment proceeding in which an adjudicatory hearing is available.

stringent treatment is reserved for "agency proceedings that do *not* require intervention as a prerequisite to participation," *id*. (emphasis added). As this Court has held, in AEA section 189 proceedings, "participating in the appropriate and available administrative procedure" is a "statutorily prescribed prerequisite." *Gage,* 479 F.2d at 1217; *see also Water Transp. Ass'n v. ICC*, 819 F.2d 1189, 1192 (D.C. Cir. 1987) (judicial review of the outcome of agency proceeding will be denied to those who did not seek to intervene when intervention "is prerequisite to participation").

NRC provided notice to the public of the license amendment request on its website in January 2020,[8] and counsel for Petitioners had actual notice of the request by no later than March 30, 2021 (the date of its letter to the agency). Even measuring from that later date, either Ohio Nuclear-Free Network or Beyond Nuclear thus could have filed contentions challenging the sufficiency of ACO's application in accordance with the NRC's regulations in 10 C.F.R. Part 2, as late as May 29, 2021. *See* 10 C.F.R. §2.309(b)(4) (hearing request in a licensing

[8] The NRC posts notice of all licensing actions concerning the use of NRC-regulated materials on a rolling, monthly basis at https://www.nrc.gov/materials/miau/material-licensing-application.html. Notice of the American Centrifuge Plant license amendment appears on page 49 of the notice posted on January 2, 2020 (covering licensing action requests received in calendar year 2019), which is available at https://www.nrc.gov/docs/ML2000/ML20007H726.pdf.

proceeding is timely if submitted within sixty days of public notice on the NRC's web site, or sixty days after the requestor receives actual notice, whichever is later). If either organization was concerned with the scope of the NRC's environmental review under NEPA, one or both likewise could have sought a hearing on that basis. *See* 10 C.F.R. § 2.309(f)(2) (permitting contentions on issues arising under NEPA). And had either sought a hearing, the "final order" concluding that proceeding would have been reviewable in this Court.[9]

Petitioners did not follow the path that Congress forged. Instead, what they have brought to this Court is a challenge to the NRC's issuance of a license amendment—the result of a highly technical, non-adversarial, staff-level review—lacking any adjudicatory record produced by the Atomic Safety and Licensing Board or the Commission. This is not what Congress envisioned when it channeled judicial review of NRC licensing decisions through the adjudicatory opportunity it also provided via section 189 of the AEA. This Court should not countenance an attempt to "sidestep the administrative process," *Malladi Drugs & Pharmaceuticals, Ltd. v. Tandy*, 552 F.3d 885, 891 (D.C. Cir. 2009), or encourage

[9] Even if the organizations were denied a hearing request (e.g., failure to propose an admissible contention), such a denial would have been appealable to the Commission (10 C.F.R. § 2.311(c)), and that outcome reviewable in this Court under the Hobbs Act. *See, e.g.*, *NRDC v. NRC*, 823 F.3d 641 (D.C. Cir. 2016) (reviewing the NRC's denial of a hearing request).

the "flouting" or "disregard" of agency procedures by litigants who voluntarily bypass or choose not to exhaust mandatory administrative remedies. *See Boivin v. U.S. Airways, Inc.*, 446 F.3d 148, 155 (D.C. Cir. 2006) (citation omitted); *Vermont Dep't of Pub. Serv.*, 684 F.3d at 157-58. The failure to seek a hearing under the NRC's rules of procedure in 10 C.F.R. Part 2, which implement its statutory hearing mandate, necessitates dismissal of the Petition for Review.

CONCLUSION

Neither Ohio Nuclear-Free Network nor Beyond Nuclear are "parties aggrieved" within the meaning of 28 U.S.C. § 2344. Neither organization sought an administrative hearing before the NRC prior to filing the Petition for Review in this Court. As such, Respondents respectfully request that this Court dismiss the Petition for Review, either for lack of jurisdiction or failure to exhaust a mandatory statutory requirement.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 27(D)

I certify that this filing complies with the requirements of Fed. R. App. P. 27(d)(1)(E) and Circuit Rule 27(a)(2) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this filing complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) and Circuit Rule 27(a)(2) because it contains 2,779 words, according to the count of Microsoft Word, excluding the parts of the filing exempted under Fed. R. App. P. 32(f).

/s/ Eric V. Michel
ERIC V. MICHEL

Counsel for Respondent United States Nuclear Regulatory Commission

ADDENDUM

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici

The petitioners are Ohio Nuclear-Free Network and Beyond Nuclear. The respondents are the U.S. Nuclear Regulatory Commission and the United States of America. There are no amici.

(B) Ruling Under Review

The petitioners have identified as the ruling under review the NRC's approval, dated June 11, 2021, of an application submitted by American Centrifuge Operating, LLC, to amend NRC licenses SNM-7003 and SNM-2011. This document is attached to this motion as Exhibit 1.

(C) Related Cases

There are no related cases.

EXHIBIT 1

Approval Letter from Jacob I. Zimmerman, U.S. Nuclear Regulatory Commission, to Kelly L. Fitch, American Centrifuge Operating, LLC (June 11, 2021)

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

June 11, 2021

Ms. Kelly L. Fitch, Regulatory Manager
American Centrifuge Operating, LLC
P.O. Box 628
Mail Stop 7560
3930 U.S. 23 South
Piketon, Ohio 45661

SUBJECT: CENTRUS ENERGY CORP. AMERICAN CENTRIFUGE OPERATING – LICENSE AMENDMENT 13 – APPROVAL TO OPERATE SIXTEEN CENTRIFUGES TO DEMONSTRATE PRODUCTION OF HIGH-ASSAY LOW-ENRICHED URANIUM IN PIKETON, OHIO UNTIL MAY 31, 2022 (EPID L-2020-LLA-0085)

Dear Ms. Fitch:

By letters dated December 5, 2019 (Agencywide Documents Access and Management System [ADAMS] Accession No. ML19352G024), April 22, 2020 (ADAMS Accession No. ML20125A103), May 7, 2020 (ADAMS Accession No. ML20139A100), and June 23, 2020 (ADAMS Accession No. ML20314A098), American Centrifuge Operating, LLC (ACO), a wholly owned indirect subsidiary of Centrus Energy Corp., requested that the U.S. Nuclear Regulatory Commission (NRC) amend its Materials License SNM-2011 for the American Centrifuge Plant (ACP). By letters dated May 25, 2021 (ADAMS Accession Nos. ML21148A261, ML21148A148, ML21148A147) and June 10, 2021 (ADAMS Accession No. ML21162A049), ACO provided final updates to the documents contained in the submittals identified above. The submittals are seeking approval from the NRC to possess licensed material for the purpose of demonstrating production of up to 600 kilograms of High-Assay Low-Enriched Uranium (HALEU) in the form of uranium hexafluoride for the Department of Energy (DOE) under a 3-year contract which expires on May 31, 2022.

The NRC staff has completed its review of the submittals identified above, and has found them to be acceptable. The details associated with the reviews are documented in a publicly available Safety Evaluation Report (Enclosure 1 to this letter) and its five non-public appendices (Enclosures 2 to 6). Enclosure 7 contains Amendment 13 to License SNM-2011 (non-public) for the ACP, and Enclosure 8 contains its redacted version (public). Amendment 13 to License SNM-2011 is effective immediately. The Environmental Assessment (ADAMS Accession No. ML21085A705) associated with this license amendment was issued on June 4, 2021.

As part of this licensing action, the following amendments to License SNM-7003 and SNM-2011 are being made:

Enclosures 2 to 7 transmitted herewith contain sensitive non-public Information. When separated from the sensitive conditions in Enclosures 2 to 7, this document and Enclosures 1 and 8 are decontrolled.

(1) License Condition (LC) 6 consisting of the possession limits for the commercial ACP is being changed to LC 6 and a new LC 6.a is being added consisting of the possession limits for the HALEU Demonstration Program that expires on May 31, 2022.

(2) LC 10.c has been modified to incorporate the Environmental Report dated May 25, 2021.

(3) LC 10.d has been modified to incorporate the Fundamental Nuclear Material Control Plan dated May 25, 2021.

(4) LC 10.e has been modified to incorporate the License Application dated May 25, 2021.

(5) LC 10.f has been modified to incorporate the Quality Assurance Program Description dated May 25, 2021.

(6) LC 10.g has been deleted since the Security Program documents are addressed via other LCs.

(7) LC 10.l has been modified to replace SP-HQ-0001 and SP-HQ-0002 with SP-HQ-0008 approved on September 4, 2018 as clarified on September 11, 2018 per the DOE's three-year accreditation dated August 15, 2018 (accredited through August 14, 2021).

(8) New LC 10.y has been added incorporating the Security Plan for the Physical Protection of Special Nuclear Material at the ACP SP-3605-0042 dated May 25, 2021.

(9) LC 11 was modified to clarify that it also applies to the HALEU Demonstration Program.

(10) LC 12 was modified to incorporate the special authorizations and exemptions identified in Section 1.2.5 of the ACP License Application Revision dated May 25, 2021.

(11) LC 14, requiring ACO to obtain liability insurance prior to obtaining licensed material was modified to state that it does not apply to the HALEU Demonstration Program.

(12) LC 15, which requires, in part, that ACO obtain funding before operation, was modified to state that it does not apply to the HALEU Demonstration cascade.

(13) LC 16, requiring ACO to provide final copies of the proposed financial assurance instruments to the NRC for review at least 6 months prior to the planned date for obtaining licensed material, was modified to state that it does not apply to the HALEU Demonstration Program.

(14) LC 19 was modified to update the application with more recent Nuclear Quality Assurance (NQA-1) requirements for computer software for nuclear facility applications.

(15) A new LC 25 was added requiring prior NRC approval of any liquid uranium hexafluoride (UF_6) operations at the ACP.

(16) A new LC 26 was added prohibiting ACO from producing UF_6 product in excess of 20 percent U-235 by weight.

(17) A new LC 27 was added prohibiting ACO from implementing changes to reduce the margin of subcriticality for safety without NRC approval of the change, require ACO to provide a summary of non-administrative changes to the computer code validation report within 30 days, and provide the revised validation report to the NRC upon request.

(18) A new LC 28 was added to require a maintenance, testing and calibration program for security systems.

In accordance with Title 10 of the *Code of Federal Regulations*, Section 2.390 of the NRC's "Agency Rules of Practice and Procedure," a copy of this letter and Enclosures 1 and 8 will be available electronically for public inspection in the NRC Public Document Room, or from the Publicly Available Records component of the NRC's ADAMS. ADAMS is accessible from the NRC Web site at http://www.nrc.gov/reading-rm/adams.html (the Public Electronic Reading Room). Enclosures 2 to 7 to this letter contain sensitive, unclassified information, and are deemed Official Use Only – Security-Related Information (OUO-SRI), Proprietary Information, or Safeguards Information (SGI). Therefore, these will not be placed in the Public Document Room, nor will they be publicly available in ADAMS, with the exception of Enclosure 5 marked SGI which will not be placed in ADAMS.

If you have any questions regarding this action, please contact Mr. Yawar Faraz by telephone at 301-415-7220, or via e-mail at Yawar.Faraz@nrc.gov.

Sincerely,

Jacob I. Zimmerman, Chief
Fuel Facility Licensing Branch
Division of Fuel Management
Office of Nuclear Material Safety
and Safeguards

Docket No. 07007004
License No. SNM-2011

Enclosures:
1. Safety Evaluation Report (public)
2. Safety Evaluation Report Appendix A Integrated Safety Analysis (OUO-SRI)
3. Safety Evaluation Report Appendix B Minimum Margin of Subcriticality (OUO-SRI, Proprietary)
4. Safety Evaluation Report Appendix C Material Control and Accounting (OUO-SRI, Proprietary)
5. Safety Evaluation Report Appendix D Physical Security of Special Nuclear Material (SGI)
6. Safety Evaluation Report Appendix E Emergency Management (OUO-SRI, Proprietary)
7. Amendment 13 of the ACP License (OUO-SRI)
8. Amendment 13 of the ACP License (public)

cc: centrus_acp@listmgr.nrc.gov
L. Cutlip, Senior Vice President, Centrus
A. Griffith, DOE NE-HQ
S. Harlow, DOE NE-HQ

K. Fitch 4

SUBJECT: AMERICAN CENTRIFUGE OPERATING – LICENSE AMENDMENT 13 – APPROVAL TO OPERATE SIXTEEN CENTRIFUGES TO DEMONSTRATE PRODUCTION OF HIGH-ASSAY LOW-ENRICHED URANIUM IN PIKETON, OHIO UNTIL MAY 31, 2022 (EPID L-2020-LLA-0085)

DATED: June 11, 2021

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ADAMS Accession Nos.: ML21138A826 (Pkg), ML21138A827 (Ltr)
ML21148A291 (Encl 1), ML21148A293 (Encl 2)
ML21148A294 (Encl 3), ML21152A021 (Encl 4)
ML21152A029 (Encl 6), ML21138A829 (Encl 7),
ML21138A828 (Encl 8) ***via e-mail**

OFFICE	NMSS/DFM/FFLB*	NMSS/DFM/FFLB*	OGC/GCRPS/HLWFCNS *	NMSS/DFM/FFLB*
NAME	YFaraz	ELee	LClark	JZimmerman
DATE	05/25/2021	06/02/2021	05/28/2021	06/11/2021

OFFICIAL RECORD COPY

EXHIBIT 2

Letter from Terry J. Lodge, on behalf of Ohio Nuclear-Free Network and various other organizations, to U.S. Nuclear Regulatory Commission (March 30, 2021)

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March 30, 2021

Ms. Jean Trefethen
NRC Environmental Project Manager for Centrus
Via email only to Jean.Trefethen@nrc.gov

RE: American Centrifuge Plant; Docket Number 70-7004; License Number SNM-2011
License Amendment Request for American Centrifuge Operating, LLC's License Application for the American Centrifuge Plant (ACP) in Piketon, Ohio

Dear Ms. Trefethen:

I am writing as counsel for the Ohio Nuclear Free Network (ONFN), a statewide association of people concerned about civil and defense uses of nuclear fission byproducts.

Tom Clements of Savannah River Watch has passed along to me his exchange of correspondence with you concerning the pending American Centrifuge Operating, LLC's (ACP) license amendment request, by which ACP would create, via a centrifuge array, high-assay low enrichment uranium (HALEU) as a "demonstration."

On behalf of the ONFN and the additional undersigned organizations, we request that the NRC conduct a nonproliferation review of the nuclear weapons, international and domestic terrorism implications of the ACP proposal, and that the NRC prepare a Programmatic Environmental Impact Statement (PEIS). A PEIS would bring in a wide set of issues, such as nuclear non-proliferation and the end use of the HALEU in various illusory reactor projects. A PEIS would also explicate the prospective effects on uranium extraction, which bear considerable portents for Environmental Justice, given the extent to which indigenous lands are affected by mining. Per unit of HALEU produced, there will be much larger volumes of uranium mining and mill tailings waste generated, and much more depleted uranium waste created. There are environmental justice impacts regardless of whether uranium is mined domestically or imported, but since proposed federal policy includes incentives to source uranium domestically (and to limit sourcing from Russia), there are significant EJ impacts that the NRC cannot ignore.

The proposal envisions the commencement of an entirely new generation of nuclear power reactors, fueled by HALEU, which would be uranium enriched up to 20%, with the Centrus High-Assay Low-Enriched Uranium Demonstration Project being allowed by the NRC

"to enrich small amounts of uranium up to 25% to factor in process fluctuations."[1] Uranium enriched to more than 20% is classified as "highly enriched uranium" (HEU), which poses greater nuclear weapons proliferation concerns. When Iran announced recently that it was enriching uranium to 20%, many western countries expressed alarm because of nuclear weapons proliferation concerns.[2] Under the final Iran nuclear deal, negotiated and signed in 2015, Iran was not allowed to enrich uranium beyond 3.67%.[3] A civil enrichment plant designed to produce nuclear reactors fuel could easily be reconfigured to produce material for nuclear weapons. That's why such facilities pose nuclear proliferation risks and need to be rigorously safeguarded.[4]

There is also Pentagon interest in using HALEU in military nuclear power reactors. And American entrepreneurs are promoting small modular reactor (SMR) designs to foreign governments, including designs that would use HALEU fuel. The export of HALEU would require congressional action to allow it, under § 123 of the Atomic Energy Act (AEA).

These probable end uses of HALEU suggest that the demonstration program being proposed for Piketon signals commencement of a "major federal action," as defined by the National Environmental Policy Act (NEPA). Just last April, Centrus stated that it "expects to have a fully licensed, operable HALEU production capability at a small scale that could be expanded modularly to meet commercial and/or government requirements for HALEU."[5]

Federal agencies are required to prepare an Environmental Impact Statement (EIS) for every major federal action significantly affecting the quality of the human environment. NEPA § 102(2)(C); 42 U.S.C § 4332(2)(C). According to 40 CFR §1508.1(q)(2) and (3) of NEPA regulations, major federal actions may include: projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by Federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; legislative proposals; implementation of treaties and international conventions or agreements, including those implemented pursuant to statute or regulation; and formal documents establishing an agency's policies which will result in or substantially alter agency programs; and adoption of formal plans, such as official documents prepared or approved by Federal agencies, which prescribe alternative uses of Federal resources, upon which future agency actions will be based. The HALEU plan falls athwart nearly every one of those categories.

According to a recent report issued by the Union of Concerned Scientists, "[w]hile HALEU is considered impractical for direct use in a nuclear weapon, *it is more attractive for*

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[1]Email, J. Trefethen to T. Clements (3/19/2021), https://srswatch.org/wp-content/uploads/2021/03/Emails-between-Tom-Clements-and-NRC-on-Centrus-March-2021.pdf

[2]https://blog.ucsusa.org/elliott-negin/ask-a-scientist-iran-and-the-bomb

[3]*Id.*

[4]*Id.*

[5]https://www.centrusenergy.com/news/advanced-reactor-concepts-arc-and-centrus-energy-sign-letter-of-intent-for-haleu-supply/

nuclear weapons development than the LEU [low-enriched uranium] used in LWRs [light water reactors]." [6] (Emphasis added). U.S. reactor development has implications for proliferation, "both because US vendors seek to export new reactors to other countries and because other countries are likely to emulate the US program. The United States has the responsibility to set a good international example by ensuring its own nuclear enterprise meets the highest nonproliferation standards."[7]

Under the AEA, the Commission has a legal and non-discretionary duty to consider whether when granting a license, such an action could be inimical to the common defense and security of the United States or the health and safety of the public. *See, e.g.*, 42 U.S.C. § 2077(c)(2)[8] or § 2099.[9] Moreover, the Commission's NEPA analysis must consider the full range of risks to the common defense and security potentially arising from its licensing decision, and must consider all reasonable alternatives that could eliminate or mitigate those risks. *See, San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006).

The Commission, then, has a legal and non-discretionary duty to consider whether a decision to grant a first-of-a kind commercial license for HALEU enrichment could abet the proliferation of this fuel to domestic terrorists or foreign governments. Saudi Arabia, for example, is acquiring SMRs for the unabashed purpose of developing nuclear weapons. In some contexts, SMR commerce could be indirectly if not directly inimical to the common defense and security of the United States or the health and safety of its public. The Commission's NEPA analysis of HALEU must consider the full range of defense and security risks implicated by this licensing decision, and must consider all reasonable alternatives that could eliminate or mitigate those risks. These alternatives should be compiled in a Programmatic Environmental Impact Statement, evoking considerable public participation before the decision is made, instead of the planned Environmental Assessment/Finding of No Significant Impact (EA/FONSI), which completely cuts the public out.[10]

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[6]Lyman, Edwin, "'Advanced' Isn't Always Better: Assessing the Safety, Security, and Environmental Impacts of Non-Light-Water Nuclear Reactors." (Union of Concerned Scientists, Washington, D.C., 3/18/2021).
https://www.ucsusa.org/resources/advanced-isnt-always-better#read-online-content

[7]*Id.*

[8]"[The Commission shall not] distribute any special nuclear material or issue a license pursuant to section 2073 of this title to any person within the United States if the Commission finds that the distribution of such special nuclear material or the issuance of such license would be inimical to the common defense and security or would constitute an unreasonable risk to the health and safety of the public."

[9] The NRC may not grant a license application "if, in the opinion of the Commission, the issuance of a license to such person for such purpose would be inimical to the common defense and security or the health and safety of the public." *Cf.*, 42 U.S.C. § 2099.

[10]The NRC staff's conclusion "that issuance of a draft FONSI for public comment would not further the purposes of NEPA" is incomprehensible in light of the significance of this project. Email, J. Trefethen to T. Clements, *supra*.

Proliferation and security issues have been a part of NEPA decision making since the inception of NEPA. *See Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission,* 481 F.2d 1079 (D.C. Cir. 1973), where the Court of Appeals required the AEC to prepare a programmatic environmental impact statement (PEIS) on the AEC's Liquid Metal Fast Breeder Reactor (LMFBR) Program. Nonproliferation and terrorism were addressed in the subsequent LMFBREIS.

At the preliminary injunction hearing in the 1974 case, *West Michigan Environmental Action Council v. AEC*, Dkt . No . G-58-73 (W.D. Mich. 1974) the Atomic Energy Commission (AEC) settled the litigation by offering to prepare a generic Programmatic EIS on plutonium recycle, which later came to be known as the "Generic Environmental Statement on Mixed Oxide Fuel" (GESMO), No. RM-50-1, a document subsequently initiated by NRC as the successor to AEC for these matters). In 1976, the NRC began extensive administrative proceedings to compile a record on whether or not it was wise to reprocess spent nuclear fuel and recycle the recovered plutonium. In preparing a Draft EIS, the NRC attempted to narrow the scope of the proceeding, a position which was challenged, and in 1976 the NRC was required to supplement its GESMO Statement to cover issues related to protecting plutonium from theft, diversion, or sabotage.

But the critics of recycling plutonium, alarmed in part by comments by the President's Council on Environmental Quality (CEQ) to the NRC that GESMO failed to adequately address the special dangers of sabotage and theft posed by large-scale transportation of plutonium materials, successfully sued to halt interim licensing because it require as-yet unidentified changes to how the U.S. would comply with its obligations under the Nuclear Nonproliferation Treaty (NPT). As a nuclear weapons state, the U.S. is a party to a voluntary safeguards agreement under which the International Atomic Energy Agency applies safeguards to nuclear material held or used in facilities. The Second Circuit, recognizing a possibly dramatic shift in direction of the U.S. nuclear industry, with implications beyond domestic nuclear power expansion, ordered a pause in NRC licensing to allow for the completion of the PEIS:

> The requirements of the NEPA apply to the development of a new technology as forcefully as they apply to the construction of a single nuclear power plant. It cannot be doubted that the Congress, in enacting NEPA, intended that agencies apply its standards to the decision to introduce a new technology as well as to the decision to license related activity; *see* 42 U.S.C. § 4331(a) (1970); S.Rep. No. 91-296, 91st Cong., 1st Sess., 20 (1969). The fact that the environmental effects of such a decision about a new technology will not emerge for years does not mean that the program does not affect the environment or that an impact statement is unnecessary; *see Scientists' Institute, supra*, 481 F.2d 1079, 1089-90 (discussing the technology of the uranium breeder reactor). ***In numerous cases involving the commercial introduction of a new technology, as well as in cases where the agency has undertaken isolated activity which the courts found to be in actuality part of a larger program, the courts have not hesitated to identify major federal action on the broader scale and to require the preparation of a regional or generic impact statement before allowing major federal action to proceed.*** *See Sierra Club v. Morton*,

> 169 U.S.App.D.C. 20, 514 F.2d 856 (1975), *cert. granted*, 423 U.S. 1047, 96 S.Ct. 772, 46 L.Ed.2d 635, 44 U.S.L.W. 3397 (1976) (requiring a regional impact statement for coal mining in the Northern Great Plains area)*; Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation, (Conservation Society I)*, 508 F.2d 927 (2d Cir. 1974), *vacated and remanded*, 423 U.S. 809, 96 S.Ct. 19, 46 L.Ed.2d 29, 44 U.S.L.W. 3199 (1975); *Scientists' Institute, supra* (declaratory judgment that the AEC must prepare a generic impact statement for the new technology of the breeder reactor); *see also Indian Lookout Alliance v. Volpe*, 484 F.2d 11 (8th Cir. 1973). Such broad-scale impact statements may be required for a series of major federal actions, even though individual impact statements are to be prepared for each isolated project; *see Sierra Club, supra,* at 871; *Scientists' Institute, supra*. Otherwise, agencies could take an approach "akin to equating an appraisal of each tree to one of the forest." *Jones v. Lynn*, 477 F.2d 885, 891 (1st Cir. 1973).

Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Com'n, 539 F.2d 824, 841-842 (2nd Cir. 1976) (emphasis added).

In 2009, the U.S. Department of Energy ("DOE") was required to address nonprolifer - ation issues in its preparation of the "Draft Global Nuclear Energy Partnership Programmatic Environmental Impact Statement" (GNEP PEIS, DOE/EIS-0396). It attempted to do so by relying on a separate "Nonproliferation Impact Assessment: Companion to the Global Nuclear Energy Partnership Programmatic Environmental Impact Statement," prepared by the Office of Nonproliferation and International Security of the National Nuclear Security Administration (NNSA). Along with several other NEPA matters, this artificial separation was challenged by commenting environmentalists. Subsequent to those critical comments, DOE ceased all work on the GNEP PEIS.

A proliferation review, conducted within the NEPA process, is essential and legally-required. Given the precedential nature of this HALEU demonstration and its potential terrorism and nuclear weapons proliferation implications, a PEIS and extended opportunity for public participation and comment before finalization of an agency decision is not only clearly warranted, it is legally required. Please suspend plans for issuance of an EA/FONSI immediately, and formally announce and commence a Programmatic Environmental Impact Statement on the proposed development of HALEU enrichment capability at Piketon.

Please put my request into ADAMS and make it publicly available. Please add my email address to the NRC's Centrus listserv so that I can receive Centrus LCF, ACP and HALEU demonstration-related updates in the future, and also, please email me a link to an electronic version of the EA upon its issuance, should the NRC persist in that direction. Thank you.

Sincerely,

/s/ Terry J. Lodge
Counsel for Ohio Nuclear Free Network

cc: John Lubinski, Director, NRC Office of Nuclear Materials Safety and Safeguards, John.Lubinski@nrc,gov

Secretary Jennifer Granholm, U.S. Department of Energy, The.Secretary@hq.doe.gov
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EXHIBIT 3

E-mail from Yawar Faraz, U.S. Nuclear Regulatory Commission, to
Terry J. Lodge, Counsel for Ohio Nuclear-Free Network
(May 28, 2021)

From: Faraz, Yawar
To: tjlodge50@yahoo.com
Cc: Trefethen, Jean; Centrus_ACP@listmgr.NRC.gov
Subject: License Amendment Application for High-Assay Low-Enriched Uranium Demonstration Program
Date: Friday, May 28, 2021 2:27:00 PM

Dear Mr. Lodge,

Thank you for your letter dated March 30, 2021, sent on the behalf of the Ohio Nuclear Free Network regarding the American Centrifuge Operating (ACO) high-assay low-enriched uranium (HALEU) Demonstration Program license amendment request. Your letter has been placed in the Agencywide Documents Access and Management System (ADAMS) under Accession No. ML21090A056.

The NRC is completing an Environmental Assessment (EA) and a Safety Evaluation Report (SER) documenting the NRC's review of the ACO's license amendment request in accordance with the NRC's normal licensing process. We plan to complete the EA and SER and make a final decision on the amendment request in June 2021.

ACO is a subsidiary of Centrus Energy Corp. (Centrus). We maintain a public webpage that provides information on the Centrus enrichment facility license on the NRC's website at: https://www.nrc.gov/materials/fuel-cycle-fac/usecfacility.html. The webpage contains information on the proposed HALEU Demonstration Program, including the license amendment application currently under review.

The NMSS staff has posted a set of frequently asked questions (FAQs) on the NRC public website at https://www.nrc.gov/docs/ML2114/ML21147A067. The purpose of the FAQs is to address topics raised in comments and concerns that you and other interested stakeholders have raised on the NRC staff's licensing review of the amendment application. The NRC plans to post additional FAQs in the future. Additionally, we have added your email address to the Centrus listserv so that you will receive publicly available Centrus-related documents issued by the NRC.

In accordance with Title 10 of the Code of Federal Regulations Section 2.390, "Public inspections, exemptions, requests for withholding" of the NRC's "Agency Rules of Practice and Procedure," a copy of this message will be available electronically for public inspection in ADAMS. ADAMS is accessible from the NRC Web site at: http://www.nrc.gov/readingrm/adams.html (the Public Electronic Reading Room).

Yawar Faraz
Senior Project Manager
U.S. Nuclear Regulatory Commission
301-415-7220