

ORAL ARGUMENT NOT YET SCHEDULED
No. 21-1162

IN THE 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
and
AMERICAN CENTRIFUGE OPERATING, LLC
Intervenor.

On Petition for Review of an Order of the
United States Nuclear Regulatory Commission

**ADDENDUM OF STATUTES AND REGULATIONS TO
BRIEF OF FEDERAL RESPONDENTS**

TODD KIM
Assistant Attorney General
JUSTIN D. HEMINGER
Attorney
Environment and Natural Resources
Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
justin.heminger@usdoj.gov
(202) 514-5442

MARIAN L. ZOBLER
General Counsel
ANDREW P. AVERBACH
Solicitor
ERIC V. MICHEL
Senior Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852
(301) 415-0932
eric.michel2@nrc.gov

April 27, 2022

TABLE OF CONTENTS

Statutes Cited

28 U.S.C. § 2342.....	3a
28 U.S.C. § 2344.....	3a
42 U.S.C. § 2014.....	3a
42 U.S.C. § 2073.....	4a
42 U.S.C. § 2077.....	4a
42 U.S.C. § 2092.....	5a
42 U.S.C. § 2156.....	5a
42 U.S.C. § 2157.....	6a
42 U.S.C. § 2239.....	7a
42 U.S.C. § 2241.....	7a
42 U.S.C. § 2243.....	8a
42 U.S.C. § 4332.....	8a
42 U.S.C. § 5841.....	9a

Regulations Cited

10 C.F.R. § 2.302.....	10a
10 C.F.R. § 2.303.....	10a
10 C.F.R. § 2.308.....	10a
10 C.F.R. § 2.309.....	10a

10 C.F.R. § 2.311.....12a

10 C.F.R. § 51.1.....12a

10 C.F.R. § 51.14.....13a

10 C.F.R. § 51.20.....13a

10 C.F.R. § 51.21.....14a

10 C.F.R. § 51.31.....15a

10 C.F.R. § 51.32.....15a

10 C.F.R. § 110.42.....15a

28 U.S.C. § 2342. Jurisdiction of court of appeals (excerpted)

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of-

[. . .]

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;

[. . .]

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

28 U.S.C. § 2344. Review of orders; time; notice; contents of petition; service (excerpted)

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States.

[. . .]

42 U.S.C. § 2014. Definitions (excerpted)

The intent of Congress in the definitions as given in this section should be construed from the words or phrases used in the definitions. As used in this chapter:

[. . .]

(z) The term "source material" means (1) uranium, thorium, or any other material which is determined by the Commission pursuant to the provisions of section 2091 of this title to be source material; or (2) ores containing one or more of the foregoing materials, in such concentration as the Commission may by regulation determine from time to time.

(aa) The term "special nuclear material" means (1) plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the Commission, pursuant to the provisions of section 2071 of this title, determines to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material.

[. . .]

**42 U.S.C. § 2073. Domestic distribution of special nuclear material
(excerpted)**

(a) Licenses

The Commission is authorized (i) to issue licenses to transfer or receive in interstate commerce, transfer, deliver, acquire, possess, own, receive possession of or title to, import, or export under the terms of an agreement for cooperation arranged pursuant to section 2153 of this title, special nuclear material, (ii) to make special nuclear material available for the period of the license, and, (iii) to distribute special nuclear material within the United States to qualified applicants requesting such material-

- (1) for the conduct of research and development activities of the types specified in section 2051 of this title;
- (2) for use in the conduct of research and development activities or in medical therapy under a license issued pursuant to section 2134 of this title;
- (3) for use under a license issued pursuant to section 2133 of this title;
- (4) for such other uses as the Commission determines to be appropriate to carry out the purposes of this chapter.

(b) Minimum criteria for licenses

The Commission shall establish, by rule, minimum criteria for the issuance of specific or general licenses for the distribution of special nuclear material depending upon the degree of importance to the common defense and security or to the health and safety of the public of-

- (1) the physical characteristics of the special nuclear material to be distributed;
- (2) the quantities of special nuclear material to be distributed; and
- (3) the intended use of the special nuclear material to be distributed.

[. . .]

**42 U.S.C. § 2077. Unauthorized dealings in special nuclear material
(excerpted)**

(a) Handling by persons

Unless authorized by a general or specific license issued by the Commission, which the Commission is authorized to issue pursuant to section 2073 of this title, no person may transfer or receive in interstate commerce, transfer, deliver, acquire, own, possess, receive possession of or title to, or import into or export from the United States any special nuclear material.

[. . .]

(c) Distribution by Commission

The Commission shall not-

- (1) distribute any special nuclear material to any person for a use which is not under the jurisdiction of the United States except pursuant to the provisions of section 2074 of this title; or
- (2) 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.

42 U.S.C. § 2092. License requirements for transfers

Unless authorized by a general or specific license issued by the Commission which the Commission is authorized to issue, no person may transfer or receive in interstate commerce, transfer, deliver, receive possession of or title to, or import into or export from the United States any source material after removal from its place of deposit in nature, except that licenses shall not be required for quantities of source material which, in the opinion of the Commission, are unimportant.

42 U.S.C. § 2156. Criteria governing United States nuclear exports

The United States adopts the following criteria which, in addition to other requirements of law, will govern exports for peaceful nuclear uses from the United States of source material, special nuclear material, production or utilization facilities, and any sensitive nuclear technology:

- (1) IAEA safeguards as required by Article III(2) of the Treaty will be applied with respect to any such material or facilities proposed to be exported, to any such material or facilities previously exported and subject to the applicable agreement for cooperation, and to any special nuclear material used in or produced through the use thereof.
- (2) No such material, facilities, or sensitive nuclear technology proposed to be exported or previously exported and subject to the applicable agreement for cooperation, and no special nuclear material produced through the use of such materials, facilities, or sensitive nuclear technology, will be used for any nuclear explosive device or for research on or development of any nuclear explosive device.
- (3) Adequate physical security measures will be maintained with respect to such material or facilities proposed to be exported and to any special nuclear

material used in or produced through the use thereof. Following the effective date of any regulations promulgated by the Commission pursuant to section 2156a of this title, physical security measures shall be deemed adequate if such measures provide a level of protection equivalent to that required by the applicable regulations.

- (4) No such materials, facilities, or sensitive nuclear technology proposed to be exported, and no special nuclear material produced through the use of such material, will be retransferred to the jurisdiction of any other nation or group of nations unless the prior approval of the United States is obtained for such retransfer. In addition to other requirements of law, the United States may approve such retransfer only if the nation or group of nations designated to receive such retransfer agrees that it shall be subject to the conditions required by this section.
- (5) No such material proposed to be exported and no special nuclear material produced through the use of such material will be reprocessed, and no irradiated fuel elements containing such material removed from a reactor shall be altered in form or content, unless the prior approval of the United States is obtained for such reprocessing or alteration.
- (6) No such sensitive nuclear technology shall be exported unless the foregoing conditions shall be applied to any nuclear material or equipment which is produced or constructed under the jurisdiction of the recipient nation or group of nations by or through the use of any such exported sensitive nuclear technology.

42 U.S.C. § 2157. Additional export criterion and procedures (excerpted)

(a)(1) As a condition of continued United States export of source material, special nuclear material, production or utilization facilities, and any sensitive nuclear technology to non-nuclear-weapon states, no such export shall be made unless IAEA safeguards are maintained with respect to all peaceful nuclear activities in, under the jurisdiction of, or carried out under the control of such state at the time of the export.

[. . .]

42 U.S.C. § 2239. Hearings and judicial review (excerpted)

(a)(1)(A) In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties under sections 2183, 2187, 2236(c) or 2238 of this title, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

[. . .]

(b) The following Commission actions shall be subject to judicial review in the manner prescribed in chapter 158 of title 28 and chapter 7 of title 5:

- (1) Any final order entered in any proceeding of the kind specified in subsection (a).

[. . .]

42 U.S.C. § 2241. Atomic safety and licensing boards; establishment; membership; functions; compensation (excerpted)

(a) Notwithstanding the provisions of sections 556(b) and 557(b) of title 5, the Commission is authorized to establish one or more atomic safety and licensing boards, each comprised of three members, one of whom shall be qualified in the conduct of administrative proceedings and two of whom shall have such technical or other qualifications as the Commission deems appropriate to the issues to be decided, to conduct such hearings as the Commission may direct and make such intermediate or final decisions as the Commission may authorize with respect to the granting, suspending, revoking or amending of any license or authorization under the provisions of this chapter, any other provision of law, or any regulation of the Commission issued thereunder. The Commission may delegate to a board such other regulatory functions as the Commission deems appropriate. The Commission may appoint a panel of qualified persons from which board members may be selected.

[. . .]

42 U.S.C. § 2243. Licensing of uranium enrichment facilities (excerpted)**(a) Environmental impact statement****(1) Major Federal action**

The issuance of a license under sections 2073 and 2093 of this title for the construction and operation of any uranium enrichment facility shall be considered a major Federal action significantly affecting the quality of the human environment for purposes of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(2) Timing

An environmental impact statement prepared under paragraph (1) shall be prepared before the hearing on the issuance of a license for the construction and operation of a uranium enrichment facility is completed.

(b) Adjudicatory hearing**(1) In general**

The Commission shall conduct a single adjudicatory hearing on the record with regard to the licensing of the construction and operation of a uranium enrichment facility under sections 2073 and 2093 of this title.

(2) Timing

Such hearing shall be completed and a decision issued before the issuance of a license for such construction and operation.

(3) Single proceeding

No further Commission licensing action shall be required to authorize operation.

42 U.S.C. § 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts (excerpted)

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall-

[. . .]

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on-

(i) the environmental impact of the proposed action,

- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

[. . .]

42 U.S.C. § 5841. Establishment and transfers (excerpted)

(a) Composition; Chairman; Acting Chairman; quorum; official spokesman; seal; functions of Chairman and Commission

- (1) There is established an independent regulatory commission to be known as the Nuclear Regulatory Commission which shall be composed of five members, each of whom shall be a citizen of the United States. [. . .]

[. . .]

(f) Transfer of licensing and regulatory functions of Atomic Energy Commission. There are hereby transferred to the Commission all the licensing and related regulatory functions of the Atomic Energy Commission, the Chairman and members of the Commission, the General Counsel, and other officers and components of the Commission-which functions officers, components, and personnel are excepted from the transfer to the Administrator by section 5814(c) of this title.

10 C.F.R. § 2.302. Filing of documents (excerpted)

(a) Documents filed in Commission adjudicatory proceedings subject to this part shall be electronically transmitted through the E-Filing system, unless the Commission or presiding officer grants an exemption permitting an alternative filing method or unless the filing falls within the scope of paragraph (g)(1) of this section.

[. . .]

10 C.F.R. § 2.303. Docket

The Secretary shall maintain a docket for each proceeding conducted under this part, commencing with either the initial notice of hearing, notice of proposed action, order, request for hearing or petition for leave to intervene, as appropriate. The Secretary shall maintain all files and records of proceedings, including transcripts and video recordings of testimony, exhibits, and all papers, correspondence, decisions and orders filed or issued. All documents, records, and exhibits filed in any proceeding must be filed with the Secretary as described in §§ 2.302 and 2.304.

10 C.F.R. § 2.308. Treatment of requests for hearing or petitions for leave to intervene by the Secretary

Upon receipt of a request for hearing or a petition to intervene, the Secretary will forward the request or petition and/or proffered contentions and any answers and replies either to the Commission for a ruling on the request/petition and/or proffered contentions or to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel for the designation of a presiding officer under § 2.313(a) to rule on the matter.

10 C.F.R. § 2.309. Hearing requests, petitions to intervene, requirements for standing, and contentions (excerpted)

(a) General requirements. Any person whose interest may be affected by a proceeding and who desires to participate as a party must file a written request for hearing and a specification of the contentions which the person seeks to have litigated in the hearing. [. . .] [T]he Commission, presiding officer, or the Atomic Safety and Licensing Board designated to rule on the request for hearing and/or petition for leave to intervene, will grant the request/petition if it determines that the requestor/petitioner has standing under the provisions of paragraph (d) of this section and has proposed at least one admissible contention that meets the

requirements of paragraph (f) of this section. [. . .] If a request for hearing or petition to intervene is filed in response to any notice of hearing or opportunity for hearing, the applicant/licensee shall be deemed to be a party.

(b) Timing. Unless specified elsewhere in this chapter or otherwise provided by the Commission, the request or petition and the list of contentions must be filed as follows:

[. . .]

(4) In proceedings for which a Federal Register notice of agency action is not published, not later than the latest of:

(i) Sixty (60) days after publication of notice on the NRC Web site at <http://www.nrc.gov/public-involve/major-actions.html>, or

(ii) Sixty (60) days after the requestor receives actual notice of a pending application, but not more than sixty (60) days after agency action on the application.

[. . .]

(f) Contentions.

(1) A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:

(i) Provide a specific statement of the issue of law or fact to be raised or controverted [. . .]

(ii) Provide a brief explanation of the basis for the contention;

(iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;

(iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;

(v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;

(vi) In a proceeding other than one under 10 CFR 52.103, provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant

matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief [. . .]

(2) Contentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner. On issues arising under the National Environmental Policy Act, participants shall file contentions based on the applicant's environmental report. Participants may file new or amended environmental contentions after the deadline in paragraph (b) of this section (e.g., based on a draft or final NRC environmental impact statement, environmental assessment, or any supplements to these documents) if the contention complies with the requirements in paragraph (c) of this section.

10 C.F.R. § 2.311. Interlocutory review of rulings on requests for hearings/petitions to intervene, selection of hearing procedures, and requests by potential parties for access to sensitive unclassified non-safeguards information and safeguards information (excerpted)

[. . .]

(c) An order denying a petition to intervene, and/or request for hearing, or a request for access to the information described in paragraph (a) of this section, is appealable by the requestor/petitioner on the question as to whether the request and/or petition should have been granted.

10 C.F.R. § 51.1. Scope

This part contains environmental protection regulations applicable to NRC's domestic licensing and related regulatory functions. These regulations do not apply to export licensing matters within the scope of part 110 of this chapter or to any environmental effects which NRC's domestic licensing and related regulatory functions may have upon the environment of foreign nations. Subject to these limitations, the regulations in this part implement:

(a) Section 102(2) of the National Environmental Policy Act of 1969, as amended.

10 C.F.R. § 51.14. Definitions (excerpted)

[. . .]

Environmental report means a document submitted to the Commission by an applicant for a permit, license, or other form of permission, or an amendment to or renewal of a permit, license or other form of permission, or by a petitioner for rulemaking, in order to aid the Commission in complying with section 102(2) of NEPA.

10 C.F.R. § 51.20. Criteria for and identification of licensing and regulatory actions requiring environmental impact statements

(a) Licensing and regulatory actions requiring an environmental impact statement shall meet at least one of the following criteria:

(1) The proposed action is a major Federal action significantly affecting the quality of the human environment.

(2) The proposed action involves a matter which the Commission, in the exercise of its discretion, has determined should be covered by an environmental impact statement.

(b) The following types of actions require an environmental impact statement or a supplement to an environmental impact statement:

(1) Issuance of a limited work authorization or a permit to construct a nuclear power reactor, testing facility, or fuel reprocessing plant under part 50 of this chapter, or issuance of an early site permit under part 52 of this chapter.

(2) Issuance or renewal of a full power or design capacity license to operate a nuclear power reactor, testing facility, or fuel reprocessing plant under part 50 of this chapter, or a combined license under part 52 of this chapter.

(3) Issuance of a permit to construct or a design capacity license to operate or renewal of a design capacity license to operate an isotopic enrichment plant pursuant to part 50 of this chapter.

(4) Conversion of a provisional operating license for a nuclear power reactor, testing facility or fuel reprocessing plant to a full term or design capacity license pursuant to part 50 of this chapter if a final environmental impact statement covering full term or design capacity operation has not been previously prepared.

(5)-(6) [Reserved]

(7) Issuance of a license to possess and use special nuclear material for processing and fuel fabrication, scrap recovery, or conversion of uranium hexafluoride pursuant to part 70 of this chapter.

- (8) Issuance of a license to possess and use source material for uranium milling or production of uranium hexafluoride pursuant to part 40 of this chapter.
- (9) Issuance of a license pursuant to part 72 of this chapter for the storage of spent fuel in an independent spent fuel storage installation (ISFSI) at a site not occupied by a nuclear power reactor, or for the storage of spent fuel or high-level radioactive waste in a monitored retrievable storage installation (MRS).
- (10) Issuance of a license for a uranium enrichment facility.
- (11) Issuance of renewal of a license authorizing receipt and disposal of radioactive waste from other persons pursuant to part 61 of this chapter.
- (12) Issuance of a license amendment pursuant to part 61 of this chapter authorizing
 - (i) closure of a land disposal site,
 - (ii) transfer of the license to the disposal site owner for the purpose of institutional control, or
 - (iii) termination of the license at the end of the institutional control period.
- (13) Issuance of a construction authorization and license pursuant to part 60 or part 63 of this chapter.
- (14) Any other action which the Commission determines is a major Commission action significantly affecting the quality of the human environment. As provided in § 51.22(b), the Commission may, in special circumstances, prepare an environmental impact statement on an action covered by a categorical exclusion.

10 C.F.R. § 51.21. Criteria for and identification of licensing and regulatory actions requiring environmental assessments

All licensing and regulatory actions subject to this subpart require an environmental assessment except those identified in § 51.20(b) as requiring an environmental impact statement, those identified in § 51.22(c) as categorical exclusions, and those identified in § 51.22(d) as other actions not requiring environmental review. As provided in § 51.22(b), the Commission may, in special circumstances, prepare an environmental assessment on an action covered by a categorical exclusion.

10 C.F.R. § 51.31. Determinations based on environmental assessment (excerpted)

(a) General. Upon completion of an environmental assessment for proposed actions other than those involving a standard design certification or a manufacturing license under part 52 of this chapter, the appropriate NRC staff director will determine whether to prepare an environmental impact statement or a finding of no significant impact on the proposed action. As provided in § 51.33, a determination to prepare a draft finding of no significant impact may be made. [. . .]

10 C.F.R. § 51.32. Finding of no significant impact (excerpted)

(a) A finding of no significant impact will:

- (1) Identify the proposed action;
- (2) State that the Commission has determined not to prepare an environmental impact statement for the proposed action;
- (3) Briefly present the reasons why the proposed action will not have a significant effect on the quality of the human environment;
- (4) Include the environmental assessment or a summary of the environmental assessment. If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference;
- (5) Note any other related environmental documents; and
- (6) State that the finding and any related environmental documents are available for public inspection and where the documents may be inspected.

10 C.F.R. § 110.42. Export licensing criteria (excerpted)

(a) The review of license applications for export for peaceful nuclear uses of production or utilization facilities or for export for peaceful nuclear uses of special nuclear or source material requiring a specific license under this part is governed by the following criteria:

- (1) IAEA safeguards as required by Article III (2) of the NPT will be applied with respect to any such facilities or material proposed to be exported, to any such material or facilities previously exported and subject to the applicable agreement for cooperation, and to any special nuclear material used in or produced through the use thereof.
- (2) No such material or facilities proposed to be exported or previously exported and subject to the applicable agreement for cooperation, and no special nuclear material produced through the use of such material or facilities,

will be used for any nuclear explosive device or for research on or development of any nuclear explosive device.

(3) Adequate physical security measures will be maintained with respect to such material or facilities proposed to be exported and to any special nuclear material used in or produced through the use thereof. Physical security measures will be deemed adequate if such measures provide a level of protection equivalent to that set forth in § 110.44.

(4) No such material or facilities proposed to be exported, and no special nuclear material produced through the use of such material, will be retransferred to the jurisdiction of any other country or group of countries unless the prior approval of the United States is obtained for such retransfer.

(5) No such material proposed to be exported and no special nuclear material produced through the use of such material will be reprocessed, and no irradiated fuel elements containing such material removed from a reactor will be altered in form or content, unless the prior approval of the United States is obtained for such reprocessing or alteration.

(6) With respect to exports of such material or facilities to nonnuclear weapon states, IAEA safeguards will be maintained with respect to all peaceful activities in, under the jurisdiction of, or carried out under the control of such state at the time of export. This criterion will not be applied if the Commission has been notified by the President in writing that failure to approve an export because this criterion has not been met would be seriously prejudicial to the achievement of United States nonproliferation objectives or otherwise jeopardize the common defense and security, in which case the provisions of section 128 of the Atomic Energy Act regarding Congressional review will apply.

(7) The proposed export of a facility or of more than 0.003 effective kilograms of special nuclear material, other than plutonium containing 80 percent or more by weight of plutonium-238, would be under the terms of an agreement for cooperation.

(8) The proposed export is not inimical to the common defense and security and, in the case of facility exports, does not constitute an unreasonable risk to the public health and safety in the United States.

[. . .]

/s/ Eric V. Michel

ERIC V. MICHEL
Counsel for Respondent U.S. Nuclear
Regulatory Commission