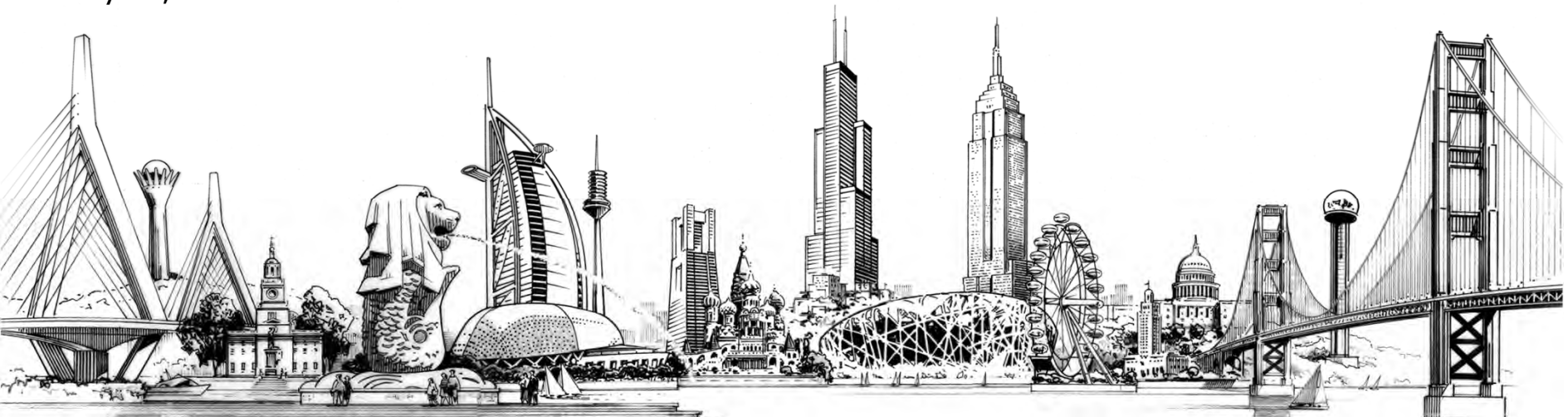
Morgan Lewis

NUCLEAR REGULATORY ROUNDUP

Grant Eskelsen & Ryan Lighty

May 22, 2019



AGENDA

1. • Supreme Court Cases of Interest
2. • NRC Enforcement & Investigations Update
3. • Hot Topics in Subsequent License Renewal
4. • Developments in 10 C.F.R. Part 52 Space

1

SUPREME COURT CASES OF INTEREST

Ryan Lighty

Three Cases of Interest

Virginia Uranium, Inc. v. Warren

- States' ability to regulate radiological safety through "bottleneck" laws.

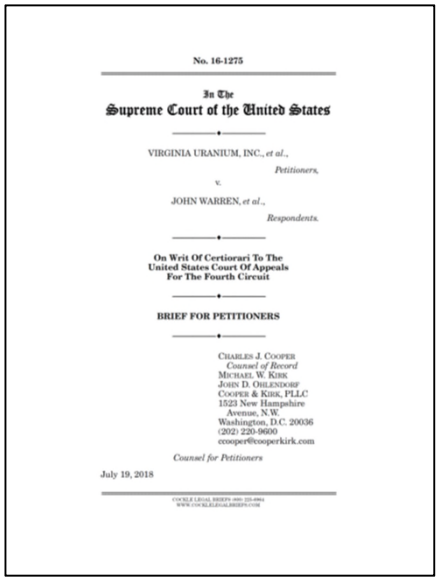
Kisor v. Wilkie

- *Auer / Seminole Rock* deference to agency interpretations of their own regulations.

Food Marketing Institute v. Argus Leader Media

- Freedom of Information Act standard for withholding private commercial information submitted to federal agencies.

Virginia Uranium, Inc. v. Warren



No. 16-1275

In The
Supreme Court of the United States

VIRGINIA URANIUM, INC., *et al.*,
Petitioners,
v.
JOHN WARREN, *et al.*,
Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fourth Circuit

BRIEF FOR PETITIONERS

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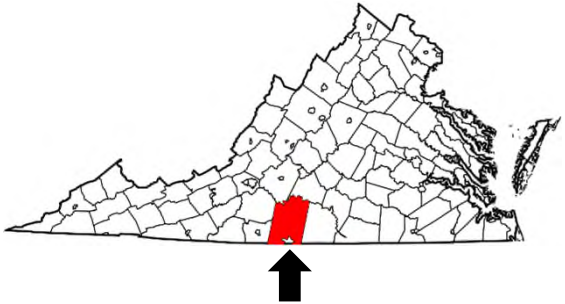
Counsel for Petitioners

July 19, 2018

QUESTION PRESENTED:

Whether the Atomic Energy Act pre-empts a state law that on its face regulates an activity within its jurisdiction (here, uranium mining), but has the purpose and effect of regulating the radiological safety hazards of activities entrusted to the Nuclear Regulatory Commission (here, the milling of uranium and the management of the resulting tailings).

Virginia Uranium – Key Facts



Petitioners own the largest natural uranium deposit in the United States.

They are challenging a 1983 Virginia statute passed by the state's General Assembly which enacted a moratorium on uranium mining:

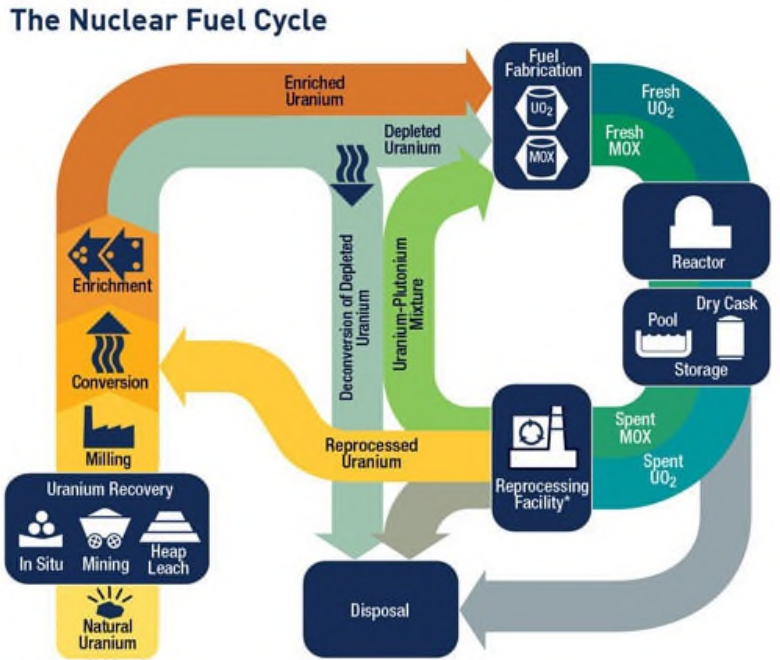
"Notwithstanding any other provision of law, permit applications for uranium mining shall not be accepted by any agency of the Commonwealth prior to July 1, 1984, and until a program for permitting uranium mining is established by statute."

Virginia Uranium – Regulatory Jurisdiction

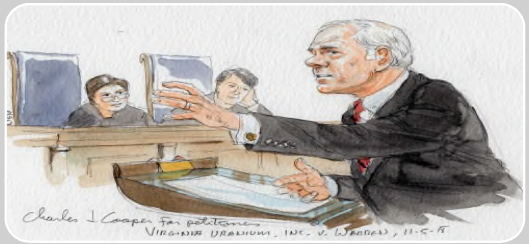
The NRC does not have jurisdiction to regulate traditional uranium mining on private lands; that authority belongs to the states.

The AEA requires mills and tailings-disposal facilities to hold NRC licenses.

The AEA provides that nothing in the relevant sections affects states' authority to **"regulate activities *for purposes other than* protection against radiation hazards."**



Virginia Uranium – Oral Argument (Nov. 5, 2018)



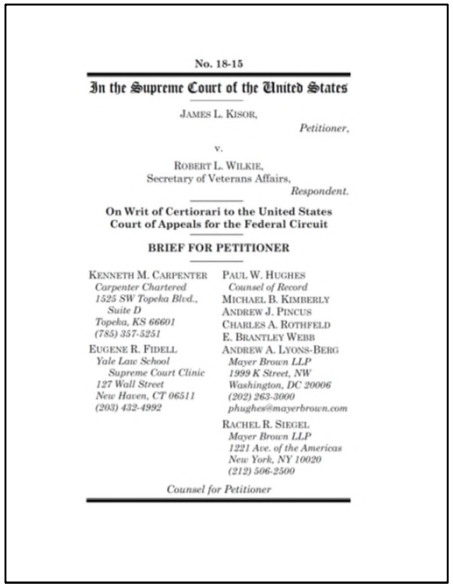
Virginia Uranium's counsel argued that the court should ask whether a prohibited purpose was a "motivating factor."

The U.S. Solicitor General argued that a plausible non-safety rationale could save a statute unless it was entirely foreclosed by the legislative history.

The Commonwealth's counsel reinforced the fact that the statute regulates only uranium mining, not milling or tailings management.

Sketches by Art Lien / SCOTUSblog

Kisor v. Wilkie



No. 18-15

In the Supreme Court of the United States

JAMES L. KISOR,
Petitioner,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR PETITIONER

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Counsel for Petitioner

QUESTION PRESENTED:

Whether the Supreme Court should overrule Auer v. Robbins and Bowles v. Seminole Rock & Sand Co., which direct courts to defer to an agency's reasonable interpretation of its own ambiguous regulation.

Kisor – Key Facts

- James Kisor served in the Marines during the Vietnam War and later filed for benefits for post-traumatic-stress disorder.
- In 2006, the Department of Veterans Affairs acknowledged that Kisor suffers from PTSD, but refused to give him benefits dating back to 1983, as requested.
- The VA relied on its interpretation of the term "relevant" in one of its regulations.
- The U.S. Court of Appeals for the Federal Circuit deferred to the VA's interpretation of its regulation.
- The main issue: whether **courts** or **agencies** should resolve regulatory ambiguities.

Kisor – Refresher on Deference

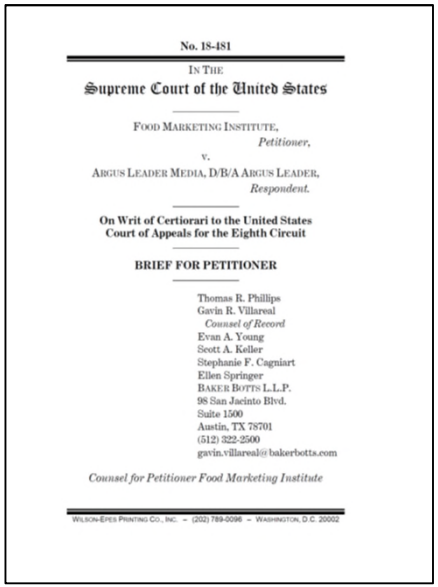
Chevron U.S.A. v. Natural Resources Defense Council (1984)	Auer v. Robbins (1997) / Seminole Rock & Sand Co. (1945)
Interpretation of a statute by the agency authorized to implement it (often found in that agency's regulations). The courts ask "whether Congress has directly spoken to the precise question at issue" such that its "intent … is clear," in which case "the unambiguously expressed intent controls." If the statute is "silent or ambiguous with respect to the specific issue," the courts will defer to the agency's interpretation, provided that the interpretation is reasonable.	Interpretation of a regulation by the agency that promulgated it. The court defers to an agency's interpretation of its own regulation unless it is "plainly erroneous or inconsistent with the regulation." Courts need only determine whether the interpretation is reasonable, rather than whether it is the best interpretation.

Kisor – The Parties' Positions

Mr. Kisor argues that *Auer* deference is inconsistent with the Administrative Procedure Act

The Government argues that the VA's interpretation is objectively correct, thus, the case would end up the same with or without *Auer*

Food Marketing Institute v. Argus Leader Media



No. 18-481

IN THE

Supreme Court of the United States

FOOD MARKETING INSTITUTE,
Petitioner,
v.
ARGUS LEADER MEDIA, D/B/A ARGUS LEADER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR PETITIONER

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Counsel for Petitioner Food Marketing Institute

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTIONS PRESENTED:

(1) Whether the statutory term "confidential" in the Freedom of Information Act's Exemption 4 bears its ordinary meaning, thus requiring the government to withhold all "commercial or financial information" that is confidentially held and not publicly disseminated—regardless of whether a party establishes substantial competitive harm from disclosure—which would resolve at least five circuit splits; and

(2) Whether, in the alternative, if the Supreme Court retains the substantial-competitive-harm test, that test is satisfied when the requested information could be potentially useful to a competitor, as the U.S. Courts of Appeals for the 1st and 10th Circuits have held, or whether the party opposing disclosure must establish with near certainty a defined competitive harm like lost market share, as the U.S. Courts of Appeals for the 9th and District of Columbia Circuits have held, and as the U.S. Court of Appeals for the 8th Circuit required here.

FMI – FOIA Primer

- The Freedom of Information Act ("FOIA") (codified at 5 U.S.C. § 552) establishes a broad public right to request records from executive branch agencies, subject to certain exceptions.
- FOIA Exemption 4 allows the government to withhold "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." (In other words, certain records that private entities and individuals submit to administrative agencies.)

FMI – Key Facts

- A South Dakota newspaper, the Argus Leader, requested data about the federal food stamp program.
- The U.S. Department of Agriculture, which runs the program, refused to turn over data about food stamp sales at specific stores.
- The district court ordered USDA to release the data, concluding that any competitive harm to the stores was "speculative at best."
- The Food Marketing Institute entered the case to appeal that ruling after USDA declined to do so.
- The U.S. Court of Appeals for the 8th Circuit affirmed.

FMI – Is Competitive Harm Required?

- The 8th Circuit's decision relies a test similar to that from a 1974 D.C. Circuit decision, *National Parks & Conservation Association v. Morton*, which reads Exemption 4 narrowly.
- *National Parks* stands for the proposition that an agency may not defer to a company's own claim about the confidentiality of its information. Instead, the term "confidential" extends only to information for which disclosure is likely "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained."
- Most circuit courts follow this (or a similar) standard.

FMI – Key Arguments & Possible Outcomes

- FMI argues that the *National Parks* test ignores the plain meaning of the term "confidential," and that the Court should overturn it, as it did in *Milner v. Dep't of Navy*, which overturned a three-decade old 9th Circuit interpretation of Exemption 2.
- The newspaper attempted to distinguish *Milner*, arguing that nearly every circuit has adopted *National Parks*, and Congress has yet to intervene.
- The Court could adopt an approach similar to *Critical Mass Energy Project v. NRC*.
- The Court also could resolve the case on procedural grounds, and never reach the merits.

Sketches by Art Lien / SCOTUSblog

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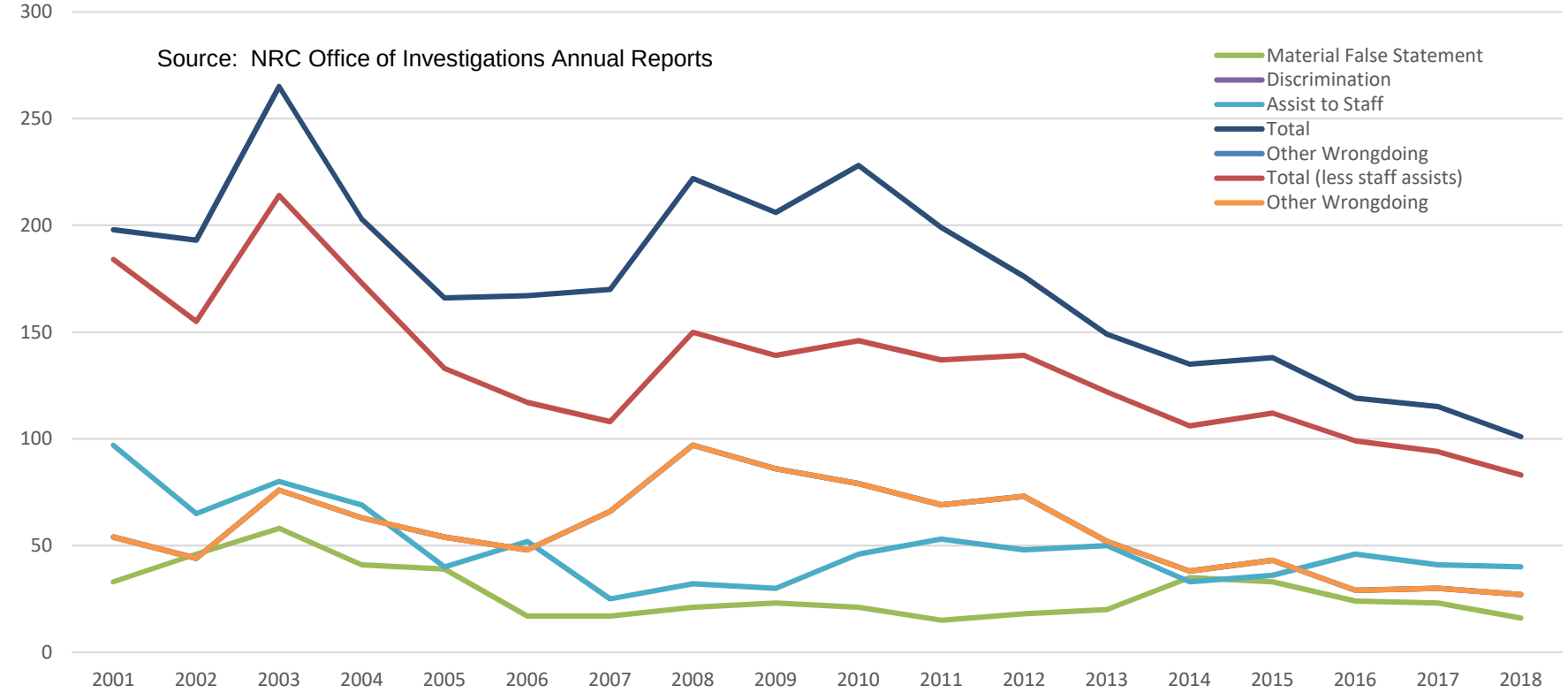
NRC ENFORCEMENT & INVESTIGATIONS UPDATE

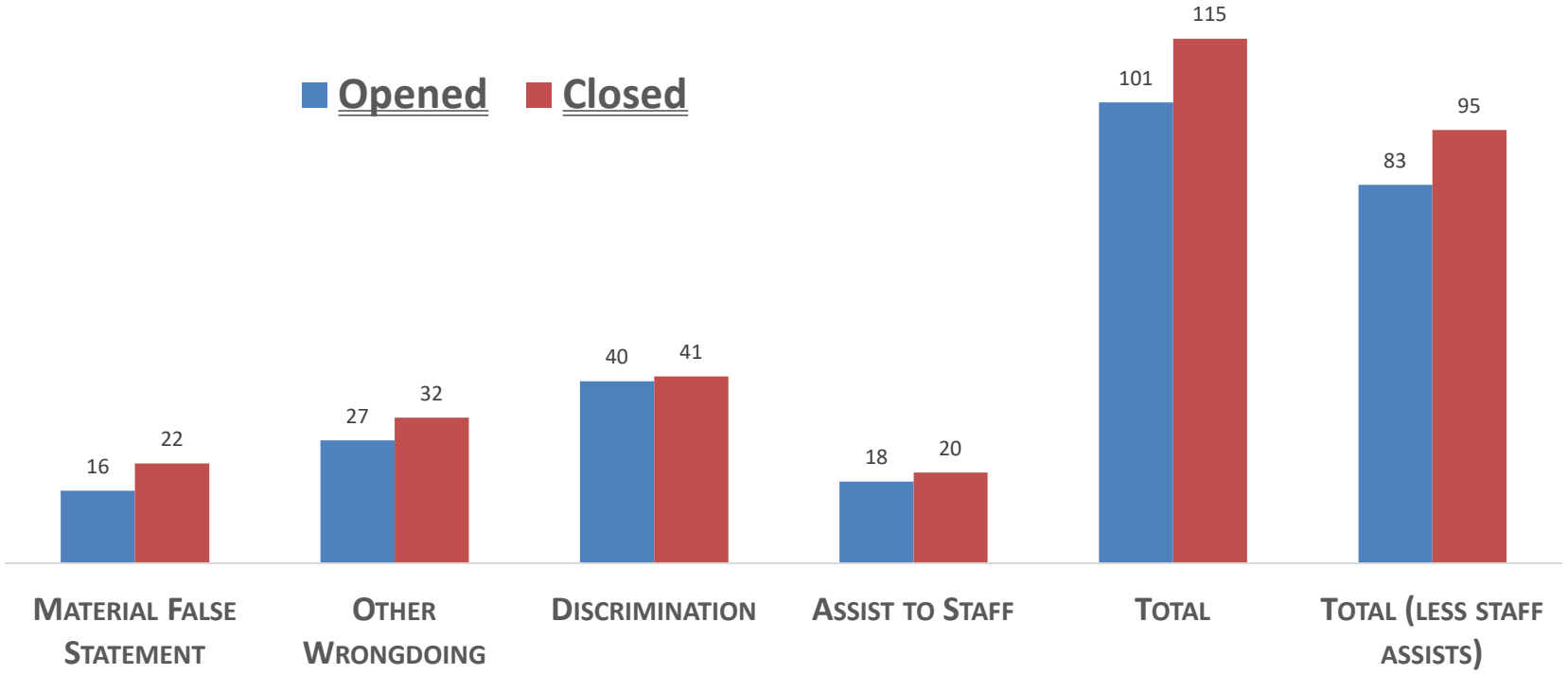
Grant Eskelsen

Number of Investigations Opened Continues Downward Trend

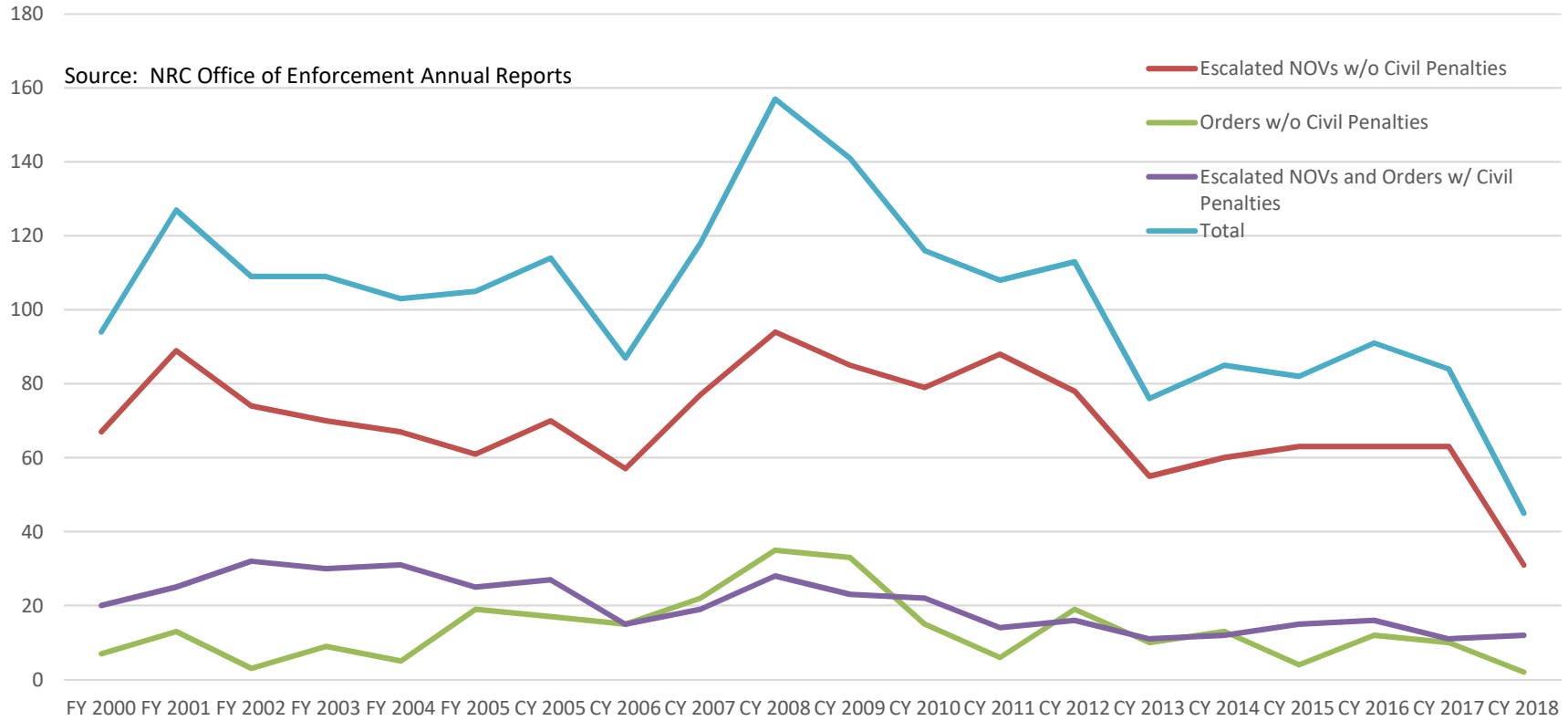


Number of Investigations Closed Higher than Investigations Opened in 2018

Source: NRC Office of Investigations Annual Reports

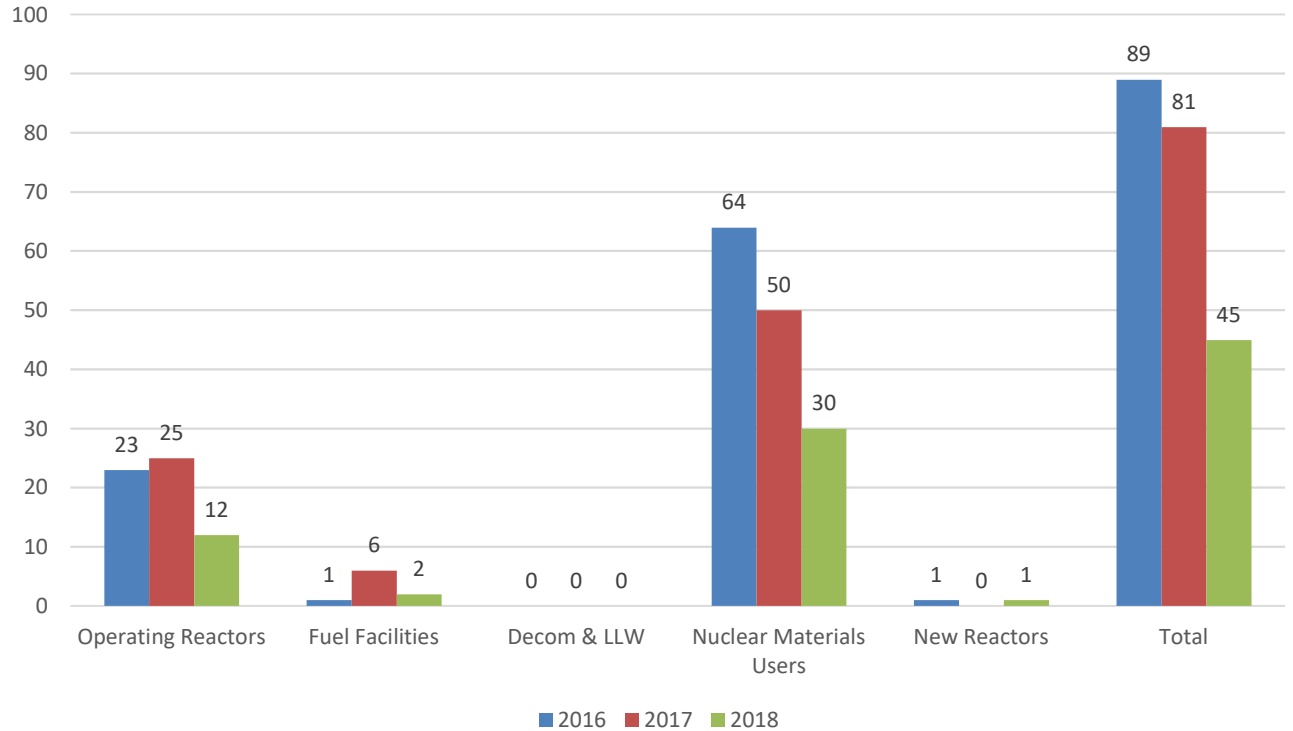


Number of Enforcement Actions Dropped Drastically



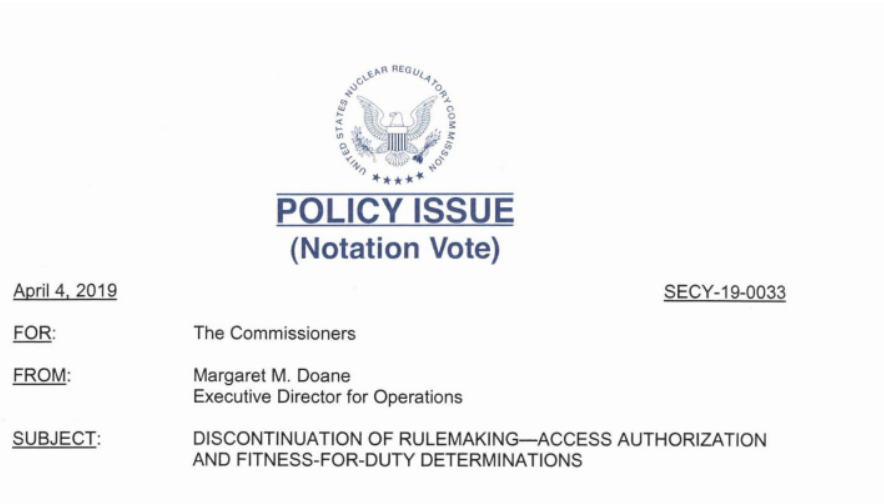
Materials Users Remain Subjects of the Majority of Enforcement Actions

Source: NRC Office of Enforcement Annual Reports



Third-Party Reviews of Access Authorization and Fitness-for-Duty Determinations

- End of rulemaking that began in November 2015 in response to 7th Circuit decision on role of third-parties in reviewing access authorization and fitness-for-duty determinations
- Could a third-party arbitrator overrule licensee's determination?
- Reason for NRC Staff change in position
  - NRC Budget and Resources
  - Fairly rare
  - Credit to licensee's defense in depth
- Enforcement risk?



POLICY ISSUE
(Notation Vote)

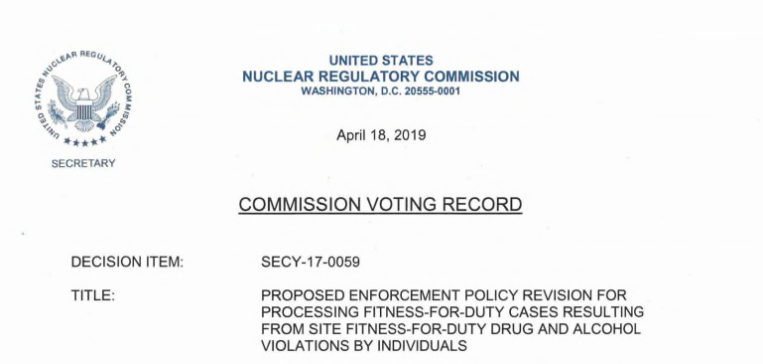
April 4, 2019 SECY-19-0033

FOR: The Commissioners

FROM: Margaret M. Doane
Executive Director for Operations

SUBJECT: DISCONTINUATION OF RULEMAKING—ACCESS AUTHORIZATION AND FITNESS-FOR-DUTY DETERMINATIONS

Change in Enforcement Policy on Fitness-for-Duty Violations



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

SECRETARY

April 18, 2019

COMMISSION VOTING RECORD

DECISION ITEM: SECY-17-0059

TITLE: PROPOSED ENFORCEMENT POLICY REVISION FOR PROCESSING FITNESS-FOR-DUTY CASES RESULTING FROM SITE FITNESS-FOR-DUTY DRUG AND ALCOHOL VIOLATIONS BY INDIVIDUALS

NRC Enforcement Policy

U. S. Nuclear Regulatory Commission
Office of Enforcement
Washington, DC 20555-00

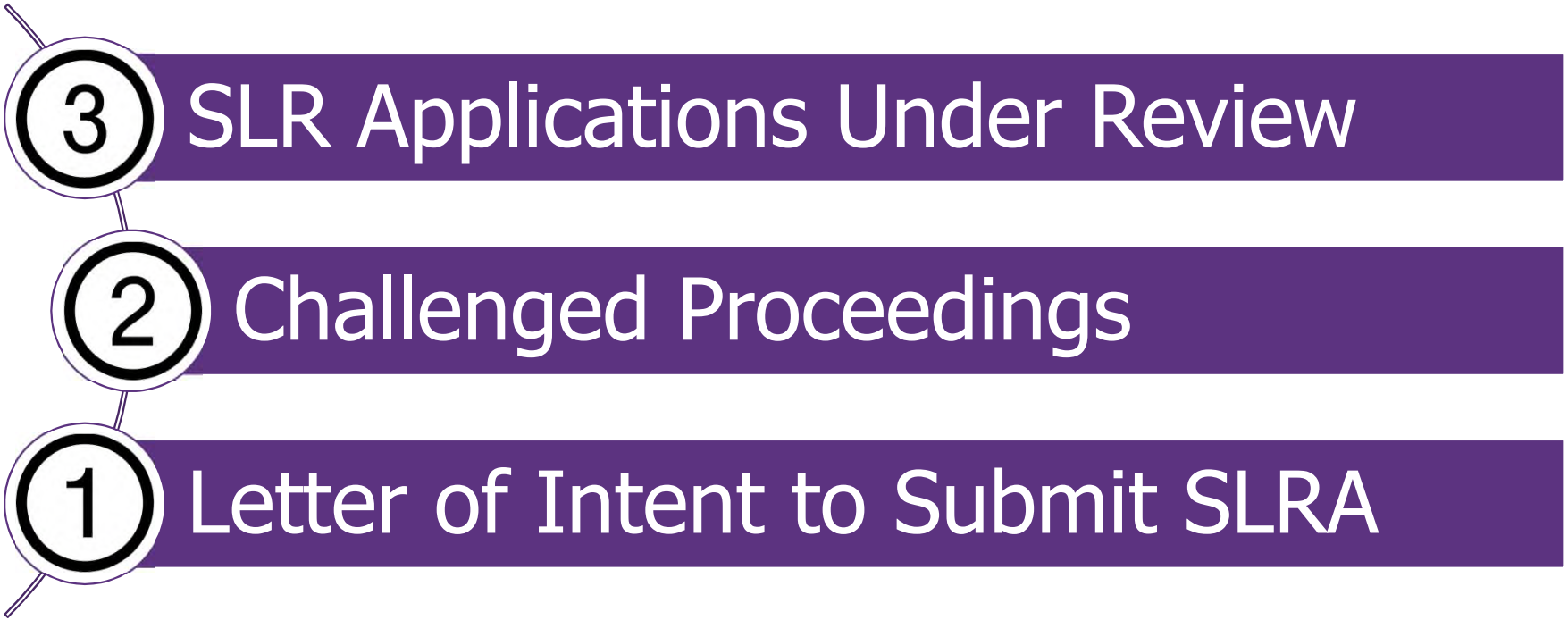
- Violations of 10 CFR Part 26 may subject individuals to NRC enforcement action
- NRC Enforcement Policy also authorized NRC to consider enforcement actions against *licensees*
- By unanimous vote, Commission approved change to the NRC Enforcement Policy
  - "NRC will not typically consider FFD drug and alcohol-related violations for enforcement actions *unless there is an apparent deficiency* in the licensee's FFD program . . . ."

3

HOT TOPICS IN SUBSEQUENT LICENSE RENEWAL ADJUDICATIONS

Ryan Lighty

SLRAs By the Numbers



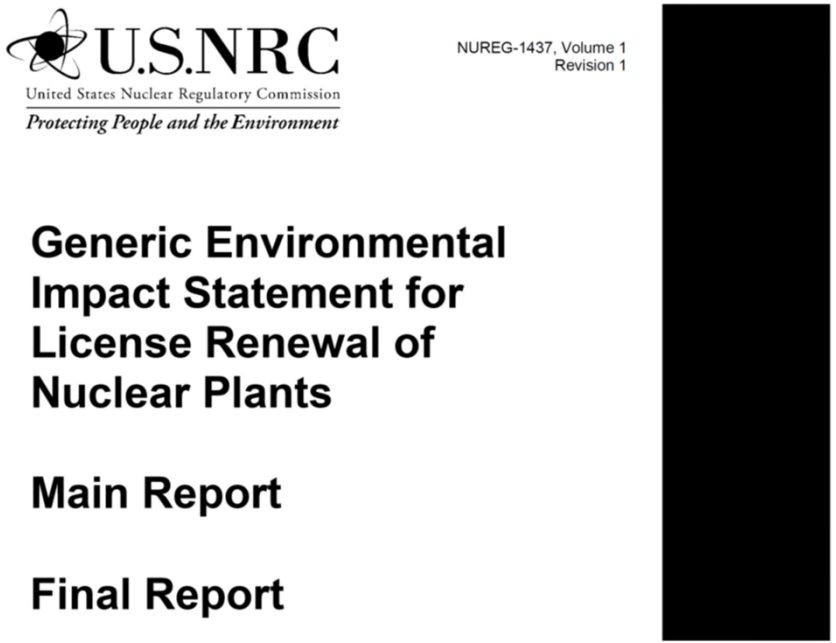
Litigation Items of Interest

The NRC has defined subsequent license renewal ("SLR") to be the period of extended operation from 60 years to 80 years.

10 C.F.R. Part 51 Environmental Framework	Consideration of "Operating Experience"
• Whether environmental impact conclusions in the Generic Environmental Impact Statement for License Renewal ("GEIS") are applicable to SLR applications, or only "initial" license renewal applications.	• Whether a certain quantum of "operating experience" is needed for effective aging management in the 60-80 year interval.

License Renewal Environmental Refresher

- Licensees must submit an Environmental Report (“ER”); and Staff must prepare Environmental Impact Statement (“EIS”).
- The GEIS distinguishes impacts generic to all plants (Category 1) versus those requiring plant-specific analysis (Category 2).
- These categories, plus determinations on all Category 1 issues are codified in Part 51.



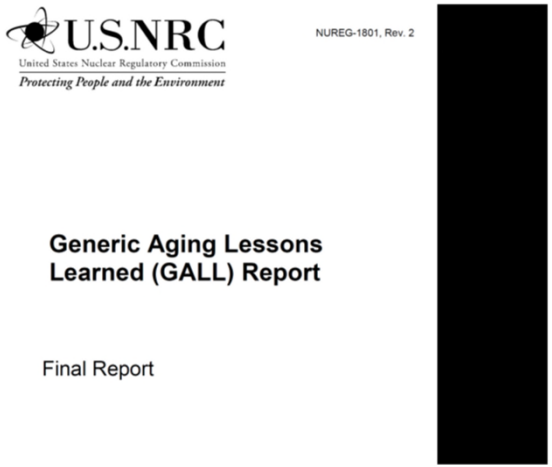
Hot Topic: Environmental | 10 C.F.R. Part 51

(3) For those applicants seeking an initial renewed license and holding an operating license, construction permit, or combined license as of June 30, 1995, the environmental report shall include the information required in paragraph (c)(2) of this section subject to the following conditions and considerations:

(i) The environmental report for the operating license renewal stage is not required to contain analyses of the environmental impacts of the license renewal issues identified as Category 1 issues in appendix B to subpart A of this part.

- The only notable reference to this limitation is the 1991 proposed rule
- The relevant discussion was eliminated from the 1996 final rule
- It is not discussed in the 2013 GEIS/Part 51 update rulemaking; in fact, the rulemaking justification explicitly contemplates applicability to SLR
- SLR guidance explicitly contemplates applicability to SLR
- The analog regulation for the EIS does not contain this limitation

License Renewal Aging Management Refresher



XI.M5 BWR FEEDWATER NOZZLE

Program Description

This program includes enhanced inservice inspection (ISI) in accordance with (a) the requirements of the American Society of Mechanical Engineers (ASME) Code, Section XI, Subsection IWB, Table IWB 2500-1 (2004 edition[4]); (b) the recommendation of General Electric (GE) NE-523-A71-0594, Rev. 1, *Alternate BWR Feedwater Nozzle Inspection Requirements*; and (c) NUREG-0619 recommendations for system modifications to mitigate cracking. The program specifies periodic ultrasonic inspection of critical regions of the boiling water reactor (BWR) feedwater nozzle.

10. ***Operating Experience:*** Cracking has occurred in several BWR plants (NUREG-0619, U.S. Nuclear Regulatory Commission [NRC] Generic Letter 81-11). This AMP has been implemented for nearly 30 years and has been found to be effective in managing the effects of cracking on the intended function of feedwater nozzles.

Hot Topic: Aging Management | 10 C.F.R. Part 54

Response: OE is not required by regulations; and, in any event, there are other sources of OE (e.g., internal, international, and research-based)

Concern: Plant shutdowns will decrease available external OE

4

DEVELOPMENTS IN 10 C.F.R. PART 52 SPACE

Grant Eskelsen

APR1400 Design Certification

- Combined Operating License Applicants under 10 CFR Part 52 can reference an approved Design Certification
- Design Certifications = rulemakings
  - Approved designs are incorporated as Appendices to Part 52
- Korea Electric Power Corporation and Hydro & Nuclear Power submitted application in December 2014 for the Advanced Power Reactor 1400 ("APR1400")
- Issued the Final Safety Evaluation Report ("SER") in September 2018 and Standard Design Approval
- On April 30, 2019, NRC announced it would publish a Final Direct Rule certifying the APR1400

DOCKET NO. 52-046

ADVANCED POWER REACTOR 1400 STANDARD DESIGN

STANDARD DESIGN APPROVAL

PURSUANT TO SUBPART E OF 10 CFR PART 52

Changes to Design Certifications

- 10 CFR Part 52 limits changes that can be made to a certified design
- Three tiers of categories
  - Tier 1
  - Tier 2*
  - Tier 2
- Changes to Tiers 1 and 2* categories require NRC preapproval pursuant to 10 CFR 52.63(b)(1)
- Changes to Tier 2 categories can be changed by a licensee under standards similar to those in 10 CFR 50.59 pursuant to 10 CFR 52.63(b)(2)

SECY-19-0034

- Based on recent operating experience, "NRC approval has sometimes been required for departures . . . that were of minimal safety significance."
- Refining general principles for Tier 1 and Tier 2* content
  - "[S]tandardization restrictions will typically apply at a *qualitative and functional*, rather than at a numeric, level of detail."
- Two new general principles for Tier 1 content
  - (1) Tier 1 should be described at a qualitative and functional level of detail
  - (2) Tier 1 should not include detail that could necessitate approval for design departures that have minimal safety significance
- Focus is on information that is safety-significant

April 8, 2019

POLICY ISSUE
(Information)

SECY-19-0034

FOR: The Commissioners

FROM: Margaret M. Doane
Executive Director for Operations

SUBJECT: IMPROVING DESIGN CERTIFICATION CONTENT

Biography

Grant Eskelsen
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Grant W. Eskelsen handles a broad range of matters for the nuclear industry. He routinely counsels clients on compliance with nuclear-export related matters, including 10 CFR Part 810 and 10 CFR Part 110. Grant holds a top-secret security clearance and supports investigations and litigation involving classified information. He also provides due diligence support for energy transactions and supports clients in claims against the government for its ongoing failure to accept spent fuel from utilities. Grant also assists clients in internal investigations and litigation related to government contracting.

Biography

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Ryan K. Lighty represents and advises utilities, merchant plants, reactor designers, technology startups, and other domestic and international energy industry participants and investors in litigation, transactional, and regulatory matters before the US Nuclear Regulatory Commission (NRC), the US Department of Energy (DOE), and in federal court.

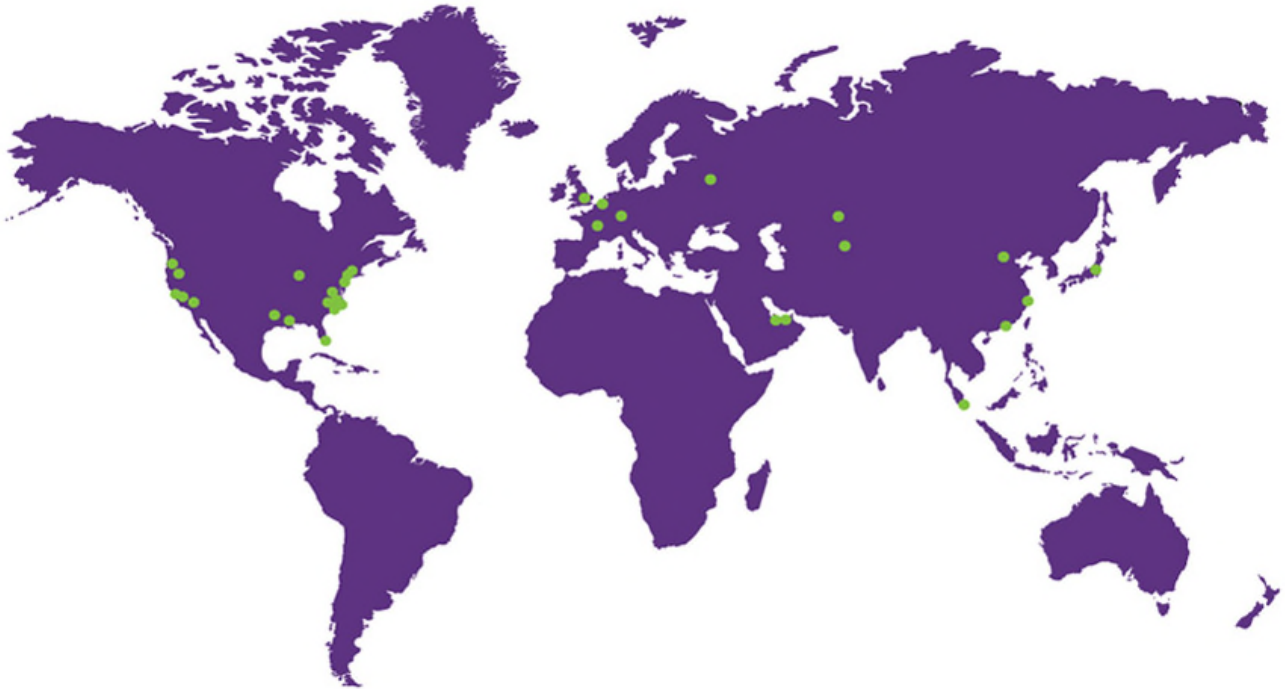
He advises clients on NRC licensing issues (including license applications, amendments, renewals, transfers, and terminations) related to new and operating power reactors, research and test reactors, independent spent fuel storage installations (ISFSIs), fuel cycle facilities, and industrial and medical use of radioactive source, by-product, and special nuclear materials, as well as reactor operator licensing and NRC and DOE (Part 810) export and import controls. Ryan also counsels clients on NRC design certifications for advanced reactors and small modular reactors, as well as DOE grants, intellectual property waivers, and energy efficiency standards. He also guides clients on complex NRC regulatory matters, including fitness-for-duty, access authorization, and nuclear security programs.

Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

Our Locations

Abu Dhabi
Almaty
Beijing*
Boston
Brussels
Century City
Chicago
Dallas
Dubai
Frankfurt
Hartford
Hong Kong*
Houston
London
Los Angeles
Miami
Moscow
New York
Nur-Sultan
Orange County
Paris
Philadelphia
Pittsburgh
Princeton
San Francisco
Shanghai*
Silicon Valley
Singapore*
Tokyo
Washington, DC
Wilmington



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