



Fall 1989

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Recommended Citation

Bill Payne, *Lights Dim for Domestic Uranium Producers*, 29 Nat. Resources J. 1079 (1989).
Available at: <https://digitalrepository.unm.edu/nrj/vol29/iss4/9>

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LIGHTS DIM FOR DOMESTIC URANIUM PRODUCERS

Nuclear Energy-Department of Energy's failure to impose restrictions on enrichment of foreign source uranium was not a violation of the statutory language of section 161(v) of the Atomic Energy Act, where imposition of restrictions would have no impact on the return to viability of the domestic uranium mining and milling industry. *Huffman v. Western Nuclear, Inc.*, 108 S.Ct. 2087 (1988).

STATEMENT OF THE CASE

In June 1988, a unanimous United States Supreme Court issued a decision which will have a fundamental and devastating effect on the ability of the domestic uranium mining and milling industry to return to a competitive position in the marketplace.¹

Under section 161(v) of the Atomic Energy Act of 1954² the Department of Energy (DOE) sells all uranium enrichment services to electric utilities that require enriched uranium as reactor fuel.³ The statute requires, however, that DOE shall restrict its enrichment of foreign-source uranium for domestic use "to the extent necessary to assure the maintenance of a viable domestic uranium industry."⁴ DOE determined in 1984, that the domestic industry was not viable and that imposition of restrictions on the enrichment of foreign uranium would not make it viable.⁵

Prior to that finding, three domestic mining and milling companies brought suit against DOE, and some of its officers, in the United States District Court for the District of Colorado. The domestic producers moved for summary judgment on the theory that DOE's preceding failure to restrict enrichment of foreign source uranium, and the conceded non-viability of the domestic producers, was a sufficient nexus to establish judgment requiring restrictions under section 161(v) of the Atomic Energy Act.⁶

The district court granted summary judgment to Western Nuclear on the question of the legality of continued unrestricted foreign uranium

1. *Huffman v. Western Nuclear, Inc.*, 108 S. Ct. 2087 (1988).

2. Atomic Energy Act of 1954 § 161(v), 42 U.S.C. § 2201(v)(A) (1982). This section provides: [That the DOE] enter into contracts with persons licensed under . . . this title for such periods of time as the Commission may deem necessary or desirable to provide, after December 31, 1968, for the producing or enriching of special nuclear material in facilities owned by the Commission.

3. See *infra* note 18.

4. 42 U.S.C. § 2201(v)(B)(ii).

5. *Western Nuclear, Inc. v. Huffman*, 825 F.2d 1430, 1433 (10th Cir. 1987), *rev'd*, 108 S.Ct. 2087 (1988). See also Dep't. of Energy, 1987 Uranium Enrichment Annual Report 28 (1987).

6. 825 F.2d at 1432. See *infra* note 23.

enrichment.⁷ The court determined that immediate injunctive relief was necessary and entered an order requiring that DOE limit enrichment of foreign uranium intended for domestic use to 25 percent of all material enriched during the period June 6 to December 31, 1986, followed by a complete ban on any foreign enrichment on January 1, 1987, "continuing until the viability of the domestic uranium industry is assured."⁸ DOE appealed the ruling to the Tenth Circuit. The appeals court affirmed the lower court's judgment on the issue of the interpretation of section 161(v).⁹

Granting DOE's petition for *certiorari*, a unanimous United States Supreme Court reversed the lower court on the narrow issue of statutory construction of the language of section 161(v).¹⁰ The sole question presented to the Court was whether section 161(v) required DOE to restrict enrichment of foreign uranium whenever domestic uranium production was not viable.¹¹ The Court concluded that non-viability alone did not trigger DOE's obligation to restrict foreign enrichment, leaving the more critical issue—whether DOE had actually violated section 161(v) in failing to impose restrictions when the industry first sought relief—to be addressed on remand.¹²

THE EVOLUTION OF SECTION 161(v) OF THE ATOMIC ENERGY ACT

Commercial development of domestic uranium resources has been closely tied to government regulation since the establishment of the Atomic Energy Commission (AEC) in 1946. The Atomic Energy Act of 1954 expanded the original Act, providing the comprehensive regulatory structure

7. 825 F.2d at 1432.

8. 108 S.Ct. at 2091.

9. 825 F.2d at 1440. The Circuit Judge (McKay) held that:

Plaintiffs' claim that section 2201(v) unambiguously requires that DOE implement restrictions on enrichment of foreign uranium when the domestic industry is not viable is correct. The DOE has not implemented such restrictions and, thus, the district court's decision granting plaintiff injunctive relief was correct and should be affirmed.

10. 108 S.Ct. 2087, 2092 (1988).

DOE is required to impose restrictions to the extent necessary to serve a particular goal, and if no extent will serve that goal, the DOE does not violate the statute by declining to impose restrictions. Indeed, DOE suggests, to impose restrictions it knew were incapable of serving the statutory goal would, in fact, be outside its authority. DOE's reading strikes us as the more natural one.

Id. at 2092. See also Dep't. of Energy, 1987 Uranium Enrichment Annual Report 28 (1987).

11. 108 S.Ct. at 2088. See also Dep't of Energy, 1987 Uranium Enrichment Annual Report 28 (1987).

12. 108 S.Ct. at 2093 n.11;

All we have resolved here is that the industry's nonviability does not necessarily trigger an obligation to impose enrichment restrictions. Whether DOE, in fact, has violated § 161(v) by failing to impose restrictions is a question to be addressed, in the first instance, on remand after an opportunity for presentation of further evidence and further briefing.

Id.

for managing the developing U.S. nuclear industry.¹³ The relationship between the producers and the government, established originally for national security reasons, has persisted largely because the AEC and its successors, the Energy Research and Development Administration (ERDA), and the DOE, have remained the sole domestic source for uranium enrichment services.¹⁴

As initially enacted, the Atomic Energy Act of 1946 allowed private domestic uranium mining, but limited the sale of uranium exclusively to the U.S. Government.¹⁵ Amendments to the Act in 1954 permitted, for the first time, private ownership of nuclear reactors as well as private lease of government owned and supplied nuclear fuels.¹⁶ Further amendments in 1964 added section 161(v),¹⁷ which addressed how the government would provide and charge for enrichment services¹⁸ to private customers.

13. Atomic Energy Act of 1954, 42 U.S.C. § 2201-2296 (1982). See also C. Allardice and E. Trapnell, *The Atomic Energy Commission* (1974).

Effective federal control of atomic energy activities is provided in the organic atomic energy law by vesting the government with

power (1) to restrict the possession, use, or transfer of those materials vitally important to or involved in the field either by reason of national security or public health and safety; (2) to control the building, possession, use, and transfer of facilities for production or utilization of atomic energy or particularly sensitive materials that, in the law, are designated special nuclear materials; and (3) to determine what knowledge must be kept secret and under what circumstances that knowledge can be disseminated or used. . . . The law authorizes the commission to establish health and safety regulations, to enter into agreements with the states for the enforcement and implementation of these regulations, and to use itself or compel the licensing of patents obtained by others in the field of Atomic energy.

Id. at 46.

14. Montagne, *The Federal Uranium Enrichment Program and the Criteria and Full Cost Recovery Requirements of Section 161(v) of the Atomic Energy Act*, 2 J. Min. L. & Pol'y, 2-3 (1986).

The Atomic Energy Commission was established by the Atomic Energy Act of 1946, 60 Stat. 755 (1946), and was re-constituted under the Atomic Energy Act of 1954, 24 U.S.C. § 2011 (1973). The Atomic Energy Commission was abolished by the Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1233 (1974), and the AEC's uranium enrichment activities were transferred to the newly formed Energy Research and Development Administration (ERDA). 42 U.S.C. §§ 5812 & 5814(c) (1983). ERDA was abolished and its functions transferred to the DOE by the DOE Organization Act of 1977, 42 U.S.C. § 7151(a) (1977).

Id. at 3, nn.4-5.

15. *Western Nuclear, Inc. v. Huffman*, 825 F.2d 1430, 1432 (10th Cir. 1987), *rev'd*, 108 S.Ct. 2087 (1988). See also Proposed Uranium Enrichment Services Criteria 51 Fed. Reg. 3624, 3625 (1986) (to be codified at 10 C.F.R. Pt. 762).

16. Private Ownership of Special Nuclear Materials Act of 1964, Pub. L. No. 88-489 (codified as amended in scattered sections of 42 U.S.C. § 2013 (1982). See also 825 F.2d at 1432.

17. Atomic Energy Act of 1954, 42 U.S.C. § 2201(v) (1982).

18. See generally G. Davis, *Radiation and Life* (1970). Uranium-235 is the fuel used in reactors. Naturally occurring uranium is comprised of approximately 0.72% U-235, the rest being mainly U-238. Enrichment involves separating most (approx. 90%) of the U-235 from the U-238. Chemical separation is impossible as both U-235 and U-238 have identical chemical properties (i.e. identical electron orbits), the difference being that U-238 has 3 more neutrons in its nucleus giving it a greater mass. Separation requires taking advantage of the difference in mass through a process of diffusion of a uranium gas through a porous material. The process involves combining natural fluoride with

Section 161(v) resulted from a series of congressional hearings which identified a number of important policy questions related to the Atomic Energy Act, one of which was whether or not some restrictions should be imposed on the importation of foreign uranium for enrichment and sale on the U.S. domestic market.¹⁹ Because of the cost of its domestic uranium procurement program, the AEC was anxious to allow private utilities to deal directly with the mining concerns for ore procurement to be enriched in AEC facilities. The question of allowing foreign source uranium procurement was first raised as a result of this desire.²⁰ Ultimately, however, the change in policy resulted from the growing economic competitiveness of nuclear power with fossil fuels. A continued government monopoly was viewed as a limitation on the economic development of nuclear power,²¹ but a totally unregulated market was not desirable either. Domestic producers expressed concern in congressional testimony that they might fall victim to dumping of cheap foreign uranium, or that periods of low demand from nuclear utilities would be insufficient to sustain both the U.S. producers and foreign suppliers if restrictions were not imposed.²² Responding to their concerns, Congress added to section 161(v) the requirement:

that the commission, to the extent necessary to assure the maintenance of a viable domestic uranium industry, shall not offer such [enrichment] services for source or special nuclear materials of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States. The Commission shall establish criteria in writing setting forth the terms and conditions under which services provided under this subsection shall be made available for source or special nuclear material of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States.²³

In order to protect and guarantee the strength of the fledgling domestic uranium industry, the AEC at that time (1966) decided to enrich no foreign source uranium for domestic use.²⁴

the raw uranium to form uranium hexafluoride. This compound is solid at room temperature, but easily vaporizes when heated. When vaporized, each gas molecule will contain a single U-235 or U-238 atom. In effect, 0.72% of the molecules have a U-235 atom, the rest U-238. In this gaseous state, the molecules containing the lighter U-235 atoms will diffuse more rapidly through a porous filter than the heavier U-238 molecules. The gain in enriched U-235 in each diffusion is very small (.0014% of the total U-235), so achieving a 90% enrichment of U-235 requires approximately 3,450 diffusions. *Id.* at 179-81.

19. See generally Montagne, *supra* note 14, at 12.

20. *Id.* at 13.

21. See generally U.S. Atomic Energy Comm'n, Annual Report to Congress 23 (1974).

22. *Id.*

23. Atomic Energy Act of 1954, 42 U.S.C. § 2201 (1982). See also 51 Fed. Reg. 3,626 (1986).

24. Atomic Energy Commission, Uranium Enrichment Services, Criteria, 31 Fed. Reg. 16,479 (1966).

Anticipating a continued rapid growth in the domestic uranium industry, the AEC in 1974 revised its previous enrichment limitation to allow the gradual phase out of all restrictions on the amount of foreign uranium permitted to be enriched by the government for domestic consumption.²⁵ Enriched foreign uranium which was to be used in the United States would be limited to a set percentage for each end user, increasing from 10 percent to 100 percent over the 1977–1984 time frame. Restrictions were completely lifted on all enrichment services provided to foreign origin uranium producers where the enriched uranium would not be used in the United States.²⁶

At the time, this provision was of little consequence to either the AEC or the domestic mining and milling industry, as demand was greater than supply and domestic producers perceived no threat from foreign sources.²⁷ Unfortunately, the boom did not continue into the 1980s. A number of factors, including reduced demand for electricity, higher costs for capital expenditures, delays in construction of new nuclear facilities, Nuclear Regulatory Commission licensing deferrals, and heightened concerns about nuclear power in general, contributed to a rapid decline in domestic demand for enriched uranium.²⁸

As a result, private producers were left with huge unmarketable stockpiles of nuclear fuel.²⁹ The inventories had increased because production, based on long term contracts, was much greater than demand in the declining market.³⁰ In addition, the increasing percentage of foreign uranium allowed to be enriched for domestic consumption had peaked, and by 1984, the United States had essentially become a member of an international free market for uranium.³¹ This combination of uranium oversupply, decreasing demand, and low cost foreign uranium resulted in the drop in prices for domestic ore from \$43.70 per pound in 1979 to a low of \$14.45 per pound in 1986.³² The sharp decline in prices had a

25. Foreign Uranium for Domestic Use, Modification of Restriction on Enrichment, 39 Fed. Reg. 38,016 (1974).

26. *Id.*

(a) 10 percent at any time during 1977; (b) 15 percent at any time during 1978; (c) 20 percent at any time during 1979; (d) 30 percent at any time during 1980; (e) 40 percent at any time during 1981; (f) 60 percent at any time during 1982; (g) 80 percent at any time during 1983. Thereafter, there shall be no restriction on the furnishing of feed material of foreign origin for the provision of enrichment services.

Id. at 38,017.

27. *Western Nuclear, Inc. v. Huffman*, 825 F.2d 1430, 1432 (10th Cir. 1987), *rev'd*, 108 S.Ct. 2087 (1988).

28. Proposed Uranium Enrichment Services Criteria, 51 Fed. Reg. 3,625 (1986) (to be codified at 10 C.F.R. Pt. 762).

29. 825 F.2d at 1433.

30. See Energy Information Administration, Domestic Uranium Mining and Milling Industry, Viability Assessment 5–6 (1986).

31. *Id.*

32. *Id.*

concurrent negative effect on employment in the domestic industry. From a high of 21,951 employees engaged in exploration, mining, and milling in 1979, the total in 1986 had declined to 2,120, a figure 90 percent lower than 1979.³³

Just as significantly, the average daily feed of raw uranium ore to mills in 1986 was 3,740 tons a day, which represented only 9 percent of the total domestic milling capacity.³⁴ This contrasts with the 77 percent use of mill capacity in 1981, when the domestic suppliers first requested DOE to restrict foreign source enrichment. Also during this period, the number of operating uranium mills in the United States declined from 20 to 6.³⁵ These trends were graphically reflected in expenditures for uranium exploration and development. In 1978, for example, \$314 million were spent domestically for surface drilling, land acquisition, and other costs related to geologic and geophysical investigations and research.³⁶ By 1986, these same expenditures industry-wide totalled just over \$22 million.³⁷

Compounding the problem, DOE had also by this time lost its enrichment monopoly on foreign commercial fuels to two European government consortiums and the Soviet Union.³⁸ In fact, by the early 1980s, DOE had become the highest priced primary supplier of enrichment services in the world.³⁹ As a consequence, DOE was not only losing fees from domestic producers seeking cheaper enrichment services elsewhere, but also losing foreign source customers to less expensive foreign enrichment facilities.⁴⁰

Faced with rapidly declining revenues from enrichment services, DOE in 1983 adopted several major initiatives in an effort to return the United States to a competitive position in the world enrichment market. Among the initiatives, DOE implemented a variable tails option for enrichment

33. Energy Information Administration, *Uranium Industry Annual* 46 (1986). The employment figures for 1979-86 contrast sharply with those from 1967 (following imposition of restrictions on foreign uranium) to 1978 (where the effect of lifted restrictions was beginning to be felt) when the total industry employment grew from 6,751 workers to 20,840. *Id.*

34. *Id.* at 47.

35. *Id.*

36. *Id.* at 14.

37. *Id.*

38. *Huffman v. Western Nuclear, Inc.* 108 S.Ct. at 2087, 2089 (1988). 51 Fed. Reg. 3,625 (1986). See also Montagne, *The Federal Uranium Enrichment Program and the Criteria and Full Cost Recovery Requirements of Section 161(v) of the Atomic Energy Act*, 2 J. of Min. L. & Pol'y 5 (1986).

DOE currently has three competitors, all government owned. . . . The first is Eurodif, over 50% owned by France, and the remainder by Spain, Italy, Belgium, and Iran. . . .

The second is Urenco, owned by West Germany, the United Kingdom, and the Netherlands. . . . The third is Technasbexport, owned by the Soviet Union.

Id. at 5-6 n.12.

39. Proposed Uranium Enrichment Services Criteria, 51 Fed. Reg. 3,625 (1986) (to be codified at 10 C.F.R. Pt. 762).

40. *Western Nuclear Inc. v. Huffman*, 825 F.2d at 1432 (10th Cir. 1987), *rev'd*, 108 S.Ct. 2087 (1988).

services to attract customers away from foreign competition.⁴¹ In effect, DOE allowed tails⁴² from already enriched uranium, but still containing low quantities of usable material, to be mixed with natural uranium prior to enrichment. This process allowed a greater amount of enriched uranium to be produced from less natural uranium.⁴³ The net effect was that DOE enrichment costs declined as users now had an option of buying either more natural uranium, requiring less enrichment, or less uranium, mixed with tails, requiring more enrichment, based on the most attractive market conditions at the time.⁴⁴ The variable tails option, however, accelerated the decline in demand for higher priced domestic uranium.⁴⁵

Responding to the increasing plight of domestic uranium producers, Congress in 1983 again amended the Atomic Energy Act of 1954 by adding section 170B (42 U.S.C. §2201), which required the Secretary of Energy to make an annual determination of the viability of the domestic mining and milling industry for the years 1983 to 1992.⁴⁶ The amendment required that the Secretary, within nine months of enactment, establish by rulemaking the criteria for making the annual determination.⁴⁷ These criteria, still in effect today, defined viability as "the extent to which the domestic mining and milling uranium industry will be capable, at any particular time, of supplying the needs of the domestic nuclear power industry under a variety of hypothetical conditions."⁴⁸ This measure involved four major attributes of viability: resource capability; supply response capability; financial capability; and import commitment dependency.⁴⁹

41. *Id.* at 1433.

42. Tails (depleted uranium) consist of uranium having a smaller percentage of U-235 than the 0.7% found in natural uranium. Tails are obtained either from spent fuel elements, or as a by-product of the uranium enrichment process. Nuclear Terms, a Brief Glossary, U.S. Atomic Energy Comm'n, 14 (2d ed.).

43. See III U.S. Dep't of Energy, Nuclear Proliferation and Civilian Nuclear Power; Report of the Nonproliferation Alternative Systems Assessment Program: Resources and Fuel Cycle Facilities (1980). An estimated 19,000 short tons of U-238 was contained in mill tailings in 1977. This quantity was expected to increase with future milling operations. Because of the uranium grades and metallurgical characteristics of these tailings, it was estimated that, at most, 40 percent of the uranium content could be recovered. The estimated cost for recovery in 1979 was \$60 per pound. Annual production was estimated by DOE to be reached in the late 1990s and to continue to 2010, when the last of the mill tailings will have been processed. *Id.* at 35.

44. 825 F.2d at 1433.

45. *Id.*

46. Criteria to Assess Viability of Domestic Uranium Mining and Milling Industry, 48 Fed. Reg. 45,746 (1983) (codified at 10 C.F.R. Pt. 761).

47. *Id.*

48. 48 Fed. Reg. 45,747 (1983).

49. *Id.*

The fundamental criteria which define the four attributes are the following: 1) Resource Capability: Whether domestic economic uranium reserves can supply all domestic needs for a future ten-year period; 2) Supply Response Capability: The level of domestic uranium production capacity sufficient to meet projected domestic nuclear power needs for a ten-year period; 3) Financial Capability: The ability of the domestic uranium industry to obtain funds adequate to finance the level of production capability defined under supply response capability; 4) Import Commitment Dependency: Whether ex-

The viability criteria were based on the assumption that a viable domestic uranium industry was one which could meet domestic demands under a variety of eventualities, including a disruption of foreign uranium supplies.⁵⁰ Following promulgation of these criteria, DOE reported that the industry was viable in 1983 but was not in 1984.⁵¹

In 1983, after implementation of the variable tails option, a number of domestic mining and milling companies requested that DOE implement restrictions on enrichment of foreign uranium required by section 161(v).⁵² DOE initially refused because it found the domestic industry viable and thus that section 161(v) was not applicable.⁵³ After finding that the industry was not viable in 1984 or in 1985, DOE still refused to impose

ecuted contracts or options for source material or special nuclear material will result in greater than 37 1/2 percent of actual or projected domestic uranium requirements for any two-consecutive-year period being supplied by source material or special nuclear material from foreign sources.

Id.

50. Energy Information Administration, Domestic Uranium Mining and Milling Industry, Viability Assessment 2 (1986).

51. Proposed Uranium Enrichment Services Criteria, 51 Fed. Reg. 3,627 (1986) (to be codified at 10 C.F.R. Pt. 762). In his review, the Secretary was required to make:

(1) an assessment of whether executed contracts or options for source material or special nuclear material will result in greater than 37 1/2 percent of actual or projected domestic uranium requirements for any two-consecutive-year period being supplied by source material or special nuclear material from foreign sources; (2) projections of uranium requirements and inventories of domestic utilities for a 10-year period; (3) present and probable future uses of the domestic market by foreign imports; (4) whether domestic economic reserves can supply all future needs for a future 10-year period; (5) present and projected domestic uranium exploration expenditures and plans; (6) present and projected employment and capital investment in the uranium industry; (7) the level of domestic uranium production capacity sufficient to meet projected domestic nuclear power needs for a 10 year period; and (8) a projection of domestic uranium production and uranium price levels which will be in effect under various assumptions with respect to imports.

48 Fed. Reg. 45,749 (1983).

52. 51 Fed. Reg. at 3,626.

53. *Id.* See also Montagne, *supra* note 14, at 17 n. 71.

Based on optimistic forecasts of expanding demand for nuclear power and, consequently, uranium . . . the AEC in 1974 adopted new criteria phasing out the limitations during the period 1978-83. As noted, the optimistic projections did not come to pass. The domestic uranium industry began to appeal for relief in 1981. . . . Despite several requests from domestic producers to reimpose enrichment limitations under section 161v, the Department of Energy (now in charge of implementation of section 161v has declined. At first, the principle grounds for refusal was simply the domestic uranium industry was 'viable.' However, as of September 26, 1985, DOE declared that the domestic uranium industry was in fact not viable in calendar year 1984. DOE nevertheless has declined to reimplement section 161v. . . . One of the rationales offered by DOE for its refusal to act is that reimposition of enrichment limitations would be circumvented in that utilities would go abroad for enrichment services. The federal government now takes the position that it lacks authority under the Atomic Energy Act to prevent this kind of circumvention through the licencing process.

Id.

restrictions under section 161(v) stating that restrictions would not make the domestic industry viable.⁵⁴ Following the first report of non-viability, the Secretary of Energy in 1985, stated that:

DOE does not believe this determination, standing alone, either authorizes or requires imposing restrictions on the enrichment of feed material of foreign origin under § 161(v) of the Atomic Energy Act. Instead, it indicates that DOE should continue its analysis by considering, in the words of the statute, '*the extent*' to which restricting enrichment of foreign source material for domestic end use will, in fact, '*assure the maintenance of a viable domestic uranium industry.*' DOE's preliminary view is that restrictions would not assist the domestic mining and milling industry in any meaningful way.⁵⁵

Shortly thereafter, DOE again initiated rulemaking to consider revising the criteria used in DOE's offering of enrichment services. Recognizing the depressed condition of the U.S. domestic industry, the Secretary of Energy nevertheless decided not to restrict foreign source enrichment because "[i]mport restrictions on foreign uranium would not assure the viability of the domestic mining and milling industry."⁵⁶ His rationale was based on the observation that the difficulties facing the domestic mining and milling industry resulted from more than the difference in cost between foreign and domestic ore. He found that non-viability also resulted from declining demand for nuclear power, excess uranium inventories, excess production capacity, and cancellation of powerplants.⁵⁷ After receiving extensive comments to the contrary, the revised criteria again failed to include restrictions on foreign source enrichment.⁵⁸ In fact, the new criteria specifically stated that "DOE may not restrict the enrichment of uranium of foreign origin for domestic use except to the extent it determines such a restriction is necessary to assure the maintenance of a viable domestic uranium industry."⁵⁹ Explaining the lack of restrictions in view of comments received from the domestic uranium industry, the Secretary responded that "[t]he plain language of the statute makes clear that restrictions are not to be imposed automatically if the domestic mining industry is non-viable, but only if they are needed to, and in fact, will assure the maintenance of a viable domestic uranium industry."⁶⁰

54. *Western Nuclear, Inc. v. Huffman*, 825 F.2d 1430, 1433 (10th Cir. 1987), *rev'd*, 108 S.Ct. 2087 (1988).

55. 51 Fed. Reg. at 3,627 (emphasis added).

56. *Id.*

57. *Id.*

58. Uranium Enrichment Services Criteria, 10 C.F.R. § 762.3 (1986).

59. *Id.*

60. 51 Fed. Reg. 27,134 (1986).

ANALYSIS

Huffman, and the issues it raises, will have important consequences for domestic utilities using nuclear power and for consumers of such power.⁶¹

The domestic uranium mining and milling industry was a very real creation of the U.S. Government. Until the 1964 amendment to the Atomic Energy Act allowing for private ownership of nuclear fuels, the government monopoly was complete.⁶² As a consequence of government control, the development of the industry was inextricably linked to the regulatory structure dictated by the Atomic Energy Act. Congress recognized this unusual dependency in its finding that "[t]he processing and utilization of source, byproduct, and special nuclear materials must be regulated in the national interest and in order to provide for the common defense and security and to protect the health and safety of the public."⁶³ More significantly, the legislative history of the enactment of the Atomic Energy Act of 1954 expressly recognized the need for close government and private cooperation in the development of nuclear energy where the committee report stated:

We do not believe that the efforts of free enterprise, using its own resources and moneys, are by themselves adequate to achieve the speediest possible attack on the goal of peacetime power. Neither do we believe that maximum progress toward this objective will be afforded by an effort relying exclusively on governmental research and development, using the public's moneys. We believe, rather, that teamwork between Government and industry—teamwork of the type encouraged by these amendments—is the key to optimum progress, efficiency, and economy in this area of atomic endeavor.⁶⁴

In *Huffman*, the Court failed to adequately consider the context of the legislative history preceding Congress's adoption of section 161(v), examining only the issue of whether "DOE *must* impose restriction on the enrichment of foreign-source uranium whenever the domestic industry is determined not to be viable."⁶⁵

While the Court agreed that the legislative history supported congressional intent to maintain a viable domestic mining and milling industry, it refused to accept Western Nuclear's position that the statutory language

61. *Western Nuclear, Inc. v. Huffman*, 825 F.2d 1430, 1432 (10th Cir. 1987), *rev'd*, 108 S.Ct. 2087 (1988).

62. Private Ownership of Special Nuclear Materials Act, Pub. L. No. 88-489, 42 U.S.C. § 2201-2296 (1954) (codified as amended at § 2013) (1964). See also S. Rep. No. 1699, 83rd Cong., 2d Sess., reprinted in 1954 U.S. Code Cong. & Admin. News 3456, 3463.

63. Atomic Energy Act, 42 U.S.C. § 2012(d) (1954).

64. S. Rep. No. 1699, 83rd Cong., 2d Sess., reprinted in 1954 U.S. Code Cong. & Admin. News 3456, 3464.

65. *Huffman v. Western Nuclear, Inc.*, 108 S.Ct. 2087, 2091.

indicated that Congress made a policy determination that timely imposition of restrictions on the enrichment of foreign source uranium would *always* assure the viability of the domestic industry. This would mandate DOE impose source restrictions whenever the industry's viability was threatened or destroyed.⁶⁶

Instead, the Court reversed the lower court, adopting DOE's argument that, "DOE is required to impose restrictions to the extent necessary to serve a particular goal, and if no extent will serve that goal, then DOE does not violate the statute by declining to impose restrictions."⁶⁷ In reaching that conclusion, the Court reasoned that if complete restriction would not assure a viable domestic industry, then Congress could not have intended restrictions be imposed where the purpose of the statute was unattainable.⁶⁸

The narrow position adopted by the Supreme Court was consistent with recent trends deferring to agency interpretation of statutes under agency administration,⁶⁹ but failed to adequately address the underlying issue of how far the government should retreat from protecting vulnerable domestic uranium producers from market forces beyond their control. In reversing the lower court, the Supreme Court at once upheld the deference to agency interpretation of statutes it enforces, while ignoring its own recent pronouncement in *Chevron U.S.A. v. Natural Res. Def. Council*.⁷⁰ In *Chevron*, the Court found that on questions of statutory interpretation, it: "*must reject administrative constructions which are contrary to clear Congressional intent. If a court . . . ascertains that Congress had an intention on the precise questions at issue, that intention is the law and must be given effect.*"⁷¹

The Court's analysis is strained in focusing only on the semantics of the statutory construction of section 161(v) to the exclusion of the underlying purpose of the statute. The case's larger dimension rests squarely

66. *Id.* at 2092.

67. *Id.*

68. *Id.* at 2092-93.

69. See *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984), where the Court explained:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

70. *Id.*

71. *Id.* at 843, n. 9 (emphasis added).

on determining to what extent Congress thought regulation necessary "to assure the maintenance of" the domestic industry.⁷²

In its report to Congress, prior to enactment of section 161(v), the Joint Committee on Atomic Energy recognized the importance and necessity of a viable domestic uranium industry. The Committee report stated, "[t]he maintenance of a viable domestic uranium mining and milling industry is an essential part of a sound nuclear industry and is also vital to the long-range defense and security interests of the United States."⁷³ The Committee specifically considered how "maintenance" should be ensured and concluded that foreign enrichment should only be allowed when the domestic industry is viable:

importation could have a serious impact on the uranium mining and milling industry, particularly during a period of limited demand for its product. Accordingly, the flexible restriction contained in the committee bill will allow the [DOE] to review periodically the condition of the domestic and world uranium markets and to offer enrichment services on a basis which will assure, in its opinion, the maintenance of a viable domestic uranium mining and milling industry.⁷⁴

The legislative history of section 161(v) overwhelmingly supports the conclusion that Congress enacted the statute to insure that DOE maintain a viable domestic uranium industry.⁷⁵

CONCLUSION

The *Huffman* Court's holding that a non-viable industry requires no statutory protection under the Atomic Energy Act raises the fundamental question of whether or not the industry can ever recover without protection against foreign competitors. In skirting the broad legislative intent of Congress in enacting section 161(v), the Supreme Court effectively sealed the fate of the domestic uranium producers for the foreseeable future. The Court's narrow focus, ruling only on the challenge to the entry of summary judgment by the court below, restricted the lower court's inquiry on remand solely to the issue of whether DOE in fact violated section 161(v) by failing to impose restrictions on foreign uranium enrichment.⁷⁶ This will do nothing to revive the industry. While conceded that restric-

72. Atomic Energy Act, 42 U.S.C. § 2201(v) (1982) (emphasis added).

73. S. Rep. No. 1325, 88th Cong., 2d Sess. 3105, 3115, *reprinted in* 1964 U.S. Code Cong. & Admin. News 3105, 3115.

74. 1964 U.S. Code Cong. & Admin. News 3120.

75. This was also the conclusion of the Tenth Circuit. *Western Nuclear, Inc. v. Huffman*, 825 F.2d 1430, 1440 (10th Cir. 1987), *rev'd*, 108 S.Ct. 2087 (1988).

76. See *Huffman*, *supra* note 15.

tions alone will not revive the industry, restriction is the first necessary step before revival will occur.

In deciding this case, the Court fundamentally changed the historic relationship of the domestic uranium industry as a co-partner with the government in the development of uranium resources. In effect, free market forces, rather than Congress, will now determine if or when the domestic producers re-enter the domestic market as viable competitors. While both the legislative history and the stated purpose of the Atomic Energy Act⁷⁷ seem to reinforce a national commitment to a strong domestic uranium mining and milling capability, the present decision effectively removes the government's guarantee of responsibility for the survivability of the industry.

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77. Atomic Energy Act, 42 U.S.C. § 2011 (1982), provides:

(a) the development, use, and control of atomic energy shall be directed so as to make the maximum contribution to the general welfare, subject at all times to the paramount objective of making the maximum contribution to the common defense and security; and (b) the development, use, and control of atomic energy shall be directed so as to promote world peace, improve the general welfare, increase the standard of living, and strengthen free competition in private enterprise.