



September 27, 2018

Defense Nuclear Facilities Safety Board
625 Indiana Ave, NW
Washington, DC 20004

Via email to hearing@dnfsb.gov

Dear Members of the Safety Board:

Nuclear Watch New Mexico is submitting these formal comments to express in the strongest problem terms our opposition to DOE Order 140.1 *Interface with the Defense Nuclear Facilities Safety Board*. We find that the Department of Energy's (DOE's) attempt to restrict and suppress DNFSB access is very misguided, arrogant, and likely illegal in that it acts contrary to the Board's enabling legislation.

DOE Order 140.1 is seriously misguided: I first note how the DOE's nuclear weapons programs, which the semiautonomous National Nuclear Security Administration took over in 2001, have been on the Government Accountability Office's High Risk List for project mismanagement for 26 consecutive years. Obviously, the GAO's High Risk List speaks volumes about DOE's and NNSA's inability to adequately govern themselves while burning taxpayer dollars.

I extend the example of the GAO's High Risk List to the attempt to restrict Safety Board access. Just as the GAO's High Risk List reflects DOE and NNSA constantly blown project budgets and schedules and lack of contractor accountability, so too does the DNFSB's decades of site reporting reflect the chronic safety problems endemic to the nuclear weapons complex. To get to the point, DOE Order 140.1 seeks to kill the messenger and muzzle the message that nuclear weapons research and production is inherently dangerous, requiring independent safety oversight to help keep workers and the public protected.

DNFSB observations and formal recommendations have slowed down the nuclear weaponeers agenda for exorbitant new production facilities and an increased tempo in nuclear weapons research and production. So, what is DOE's and NNSA's completely misguided answer? It is to cripple DNFSB oversight, thereby increasing the chances for serious nuclear safety mishaps.

Concerning arrogance, Nuclear Watch fails to understand how DOE and NNSA can believe that they can unilaterally restrict DNFSB access by executive fiat (i.e., DOE Order 140.1). As you well know, the Safety Board was created by Congress, and we believe that only Congress can substantively change the DNFSB's purview. We are pleased to see this reflected in very recent legislation appropriating the DOE's FY 2019 budget. It states:

The conferees are concerned with the recently issued Order 140.1, Interface with the Defense Nuclear Facilities Safety Board (DNFSB), and the potential impacts on the

903 W. Alameda #325, Santa Fe, NM 87501 • Voice and fax: 505.989.7342
info@nukewatch.org • www.nukewatch.org • <http://www.nukewatch.org/watchblog/>
<http://www.facebook.com/NukeWatch.NM>

ability of the DNFSB to carry out its Congressionally-mandated responsibilities. Not later than 30 days after the enactment of this Act, the Department shall provide to the Committees on Appropriations of both Houses of Congress a briefing on how the Order differs from the previous Manual, how the Department plans to incorporate concerns from the DNFSB and the public, and the Department's plans to implement the Order across the organization.¹

Nuclear Watch believes that DOE is going to have quite a bit of difficulty justifying DOE Order 140.1 to Congress. Related, we are quite pleased with the positions that our two New Mexican senators have taken against the Order 140.1 and note that Tom Udall sits on the Senate Energy and Water Appropriations Subcommittee. Given that Congress has required DOE to brief it soon on DOE Order 140.1, we strongly urge DNFSB to brief key Congressional offices (such as Udall) and committees beforehand.

Concerning the possible illegality of DOE Order 140.1, below is DNFSB's Enclosure attached to its September 17, 2018 letter to DOE Secretary Rick Perry, followed by my own comments. (DNFSB language in italics, bolding is in original)

Enclosure – Board Concerns with DOE Order 140.1

The Board takes exception to the following items contained in DOE Order 140.1:

*1. **Exemptions** – DOE Order 140.1 implements DOE's roles and responsibilities identified in the Board's enabling legislation. Notably, these responsibilities include requirements to cooperate with the Board and provide the Board with ready access to facilities, personnel, and information. Exemptions included in the Order identify areas where federal and contractor personnel are not required to cooperate with the Board. The two exemptions contained in the Order which are listed below improperly state that DOE shall determine which facilities adversely affect public health and safety. As it pertains to the Board's oversight role, the Atomic Energy Act gives the Board the authority to make that determination, not DOE.*

“This Order does not apply to DOE Nuclear Hazard Category 3 or Below Hazard Category 3 facilities, as defined in DOE-STD-1027. (If requested, the DNFSB shall be provided access to the information that led to the DOE determination that a facility is less than Hazard Category 2 to allow the DNFSB oversight into that determination.)”

“This Order does not apply to nuclear facilities or activities at DOE defense nuclear facilities, as defined in this Order, that do not adversely affect or have the potential to adversely affect public health and safety.”

Nuclear Watch New Mexico wholeheartedly agrees with the Safety Board's comments. To be more specific, and to view this from more of a legal perspective, DOE's usurpation of what facilities the Board can inspect clearly violates the language of the DNFSB's enabling legislation, as follows:

¹ JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, p. 52.
Nuclear Watch New Mexico • Comments to DNFSB on DOE Order 140.1 • September 27, 2018

(A) The Board shall investigate *any* event or practice at a Department of Energy defense nuclear facility which the Board determines has adversely affected, or may adversely affect, public health and safety.² (emphasis added)

To put this in context, DOE's denial of access to Hazard Category-3 or less facilities would deny the Board's access to more than 75% of all NNSA facilities. To illustrate the importance of these facilities, NNSA recently issued a Finding of No Significant Impact for an environmental assessment raising the plutonium inventory 10-fold in the Los Alamos Lab's Rad Lab, thus raising it to a Hazard Category-3 facility.

That environmental assessment was utterly inadequate in that it failed to consider potential beryllium operations (known to widely and seriously affect occupational safety) and Intentional Destructive Acts, despite declared DOE policy under the National Environmental Policy Act of the necessity do so. Moreover, the EA explained away safety, occupational and seismic risks in "preliminary analyses" instead of final, peer reviewed studies. Finally, NNSA failed to place raising the plutonium limit in the Rad Lab within the larger context of expanded plutonium pit production as a "Reasonably Foreseeable Action." This is contrary to the fact that expanded pit production is already legislatively required, and DNFSB's own weekly reports have acknowledged how central the Rad Lab is to that expanded production. Now NNSA seeks to eliminate the Rad Lab and other Hazard Category-3 and under facilities from the Safety Board's purview, again seriously increasing the chances of nuclear safety mishaps.

2. *Public Health and Safety* – *DOE Order 140.1 defines "public health and safety" as the "health and safety of individuals located beyond the site boundaries of DOE sites with DOE Defense Nuclear Facilities." The Atomic Energy Act does not refer to the site boundary as the demarcation for defining public health and safety. By this definition, the Order claims to exempt onsite individuals and workers from the Board's oversight. This is inconsistent with the Atomic Energy Act and with long-standing historical precedence.*

Nuclear Watch New Mexico notes the thousands of workers harmed in the past by nuclear weapons research, production and testing. The billions paid to date in compensation, which the Department of Energy originally resisted, is testament to that. It remains vital that the Safety Board keep occupational safety under its purview so that workers can be better protected (DOE's cavalier attitude to the occupational dangers of tank farm vapors at the Hanford Nuclear Reservation is a current example). Moreover, we argue that there is not always a bright line between occupational and public safety. We assert that if worker safety is better protected, it then follows that public safety is better protected.

3. *Determination of Access* – *The Atomic Energy Act states, "The Secretary of Energy shall fully cooperate with the Board and provide the Board with ready access to such facilities, personnel, and information as the Board considers necessary to carry out its responsibilities." The Order excludes the language "as the Board considers necessary" in requirements for Board access, thus indicating that DOE has the power to determine what access the DNFSB needs to carry out its responsibilities. The Board has the statutory authority to make determinations on the information it needs to carry out its responsibilities, not DOE.*

² §2286a. Mission and Functions of the Board, Atomic Energy Act, Sec. 312, https://www.dnfsb.gov/sites/default/files/page/statute_1.pdf

This too violates the DNFSB's enabling legislation:

(A) The Board shall investigate *any* event or practice at a Department of Energy defense nuclear facility which the Board determines has adversely affected, or may adversely affect, public health and safety.³ (emphasis added)

4. Deliberative Information – DOE Order 140.1 allows DOE to deny requests related to deliberative documents, pre -decisional documents or deliberative meetings. There are no limitations on the Board's access to this type information contained in the Atomic Energy Act, except those provided for in 42 U.S.C. § 2286c(b). This restriction has potential impacts to the Board's safety mission, because the Board's expert advice is often dependent upon information, meetings, and discussions with individuals that may be construed as deliberative or pre - decisional. Congress has asked the Board to express its view early in the process of design and construction, for instance, so that the Board's opinion can be considered prior to DOE decision being made.

DNFSB enabling legislation explicitly states:

(4) Review of facility design and construction.

The Board shall review the design of a new Department of Energy defense nuclear Facility before construction of such facility begins and shall recommend to the Secretary, within a reasonable time, such modifications of the design as the Board considers necessary to ensure adequate protection of public health and safety. During the construction of any such facility, the Board shall periodically review and monitor the construction and shall submit to the Secretary, within a reasonable time, such recommendations relating to the construction of that facility as the Board considers necessary to ensure adequate protection of public health and safety...⁴

So once again, DOE Order 140.1 appears to be in direct conflict with the DNFSB's enabling legislation, and therefore is of dubious legality.

To add to this, Nuclear Watch New Mexico speculates that this may be the primary motivation in DOE Order 140.1, that is to cut off DNFSB review of new facility designs. Nuclear Watch has extensive experience with both the problem-plagued Chemistry and Metallurgy Research Replacement (CMRR) Project at the Los Alamos Lab and the Uranium Processing Facility at the Y-12 Plant near Oak Ridge, TN. In both cases, DNFSB's expressed seismic concerns played a large role in driving estimated constructions costs up to the point where the original designs of both projects had to be abandoned.

While we await the next reincarnation of the CMRR Project, NNSA is already pressing ahead with a heavily modified UPF that will continue operations at two old dangerous, contaminated facilities previously slated for closure, and which the DNFSB has observed can never be brought up to modern seismic standards. Moreover, it was DNFSB who first made public through its site weekly reports that a major mistake had been made where all needed equipment would not fit into the originally designed "big box" UPF. That design mistake cost the American taxpayer a half-billion dollars that no one was held accountable for. DOE's attempt to cut out the DNFSB

³ Ibid.

⁴ Ibid.

from reviewing “deliberative information”, especially construction design of new nuclear weapons production facilities that will cost taxpayers tens of billions of dollars, must be vigorously opposed.

In addition to the points the DNFSB raised in its Enclosure to DOE Secretary Perry, Nuclear Watch is particularly appalled by the DOE Order’s stated intention to:

Formulate consolidated DOE positions on policy (to include directives and standards) prior to DNFSB and DNFSB staff engagement so that *DOE speaks with one voice*.
(emphasis added)

This smacks of political control by DOE Washington DC headquarters that again seeks to kill the messenger rather than really buckling down and addressing nuclear safety issues. We are reminded of former NNSA Administrator Frank Klotz’s ridiculous argument that DNFSB weekly site reports should no longer be available to the public because the resulting embarrassment to NNSA personnel might discourage them from self-reporting nuclear safety problems. First, this was clearly contrary to the democratic ideals and public right-to-know that this country professes to follow. Second, the general history of history of DOE’s and NNSA’s nuclear weapons complex well demonstrates that critical safety problems often get fixed only when they become disclosed and publicly known.

We believe that the “one voice” mentioned above is a regressive throwback to the dark Cold War days, when the federal government prioritized nuclear weapons production far above worker and public safety. While not seeking to minimize the threat that the Soviet Union’s nuclear stockpile historically posed to the United States of America, we note that our own government’s nuclear weapons research, production and testing killed and sickened an unknown number of our own citizens, while fortunately Soviet nuclear weapons killed no Americans. My underlying point is that the access and statutorily-mandated scope of purview of the Safety Board must be preserved in order to protect the American public. This is especially true given the planned increased tempo of U.S. nuclear weapons programs under the \$1.2 trillion so-called modernization.

These comments are meant to help protect the Safety Board from DOE and NNSA. But I note that DOE Order 140.1 is really only the latest manifestation in the nuclear weaponeers’ attempts to cripple the DNFSB, previously tried through legislation passed by the House Armed Services Strategic Forces Subcommittee. Those pieces of legislation sought to either cut the Board’s budget or hogtie it with onerous reporting requirements but were rejected by Congress as a whole. This could possibly explain the genesis of DOE Order 140.1 as an attempt to do an end run around Congress.

That said, the Defense Nuclear Facilities Safety Board can often be its own worst enemy. Discord among Board Members and low employee morale are well known, as is former Board Chairman Sean Sullivan’s attempt to abolish the Board entirely. To this we add the Board’s recent proposal to cut its own funding and personnel, which we were pleased to see prohibited by newly enacted legislation.

My penultimate comment is this: Physician, heal thyself! In Nuclear Watch’s view, the Safety Board plays an absolutely vital function in protecting the public from a self-regulating nuclear weapons industry that poses many dangers. We fully support the Board but ask that it rise above its own internal divisions so that it can fully dedicate itself to its declared “responsibility of

providing recommendations and advice to the President and the Secretary of Energy regarding public health and safety issues at Department of Energy defense nuclear facilities.”

My final comment is this: As the full Safety Board, please strongly challenge DOE Order 140.1, most particularly its possible illegality in that it appears to act contrary to the DNFSB’s enabling legislation. As part of that, please keep key congressional offices and committees apprised of DOE and NNSA attempts to restrict Safety Board access and purview. Finally, I think it would be prudent to hold another public hearing a year from now, in the event that DOE Order 140.1 is not rescinded or legislatively blocked by then.

These comments respectfully submitted,

Jay Coghlan
Executive Director