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**DEFENSE NUCLEAR FACILITIES
SAFETY BOARD**

Washington, DC 20004-2901



September 17, 2018

The Honorable James Richard Perry
Secretary of Energy
U.S. Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585-1000

Dear Secretary Perry:

Testimony by Deputy Secretary Dan Brouillette and DOE senior staff at the Board's August 28, 2018 public hearing confirmed our apprehension that DOE Order 140.1 wrongly attempts to diminish the Board's ability to perform its statutory mandate under the Atomic Energy Act of 1954, as amended. Our primary concerns with the Order are contained in the enclosure. The testimony indicated that the Department would not fulfill its obligations under the Atomic Energy Act based on its unilateral interpretation of the statute.

The Board plans to hold two additional hearings to solicit feedback and receive input from the public and stakeholders.

In the event you are willing to suspend the Order pending revisions, we will collaborate with you on what revisions would be appropriate.

Yours truly,


Bruce Hamilton
Acting Chairman

Enclosure

c: The Honorable James Inhofe
The Honorable Jack Reed
The Honorable Mac Thornberry
The Honorable Adam Smith
The Honorable Richard Shelby

The Honorable Patrick Leahy
The Honorable Rodney Frelinghuysen
The Honorable Nita Lowey
Mr. Joe Olencz

ENCLOSURE

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.”

- 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.
- 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” (emphasis added). 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.
- 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.