

From: [joseph carson](#)
To: [Hearing; Shelby Qualls](#)
Subject: [EXTERNAL] Joseph Carson, PE, Comments on Board's Public Hearing on November 28, 2018
Date: Friday, December 28, 2018 9:40:41 PM
Attachments: [OSC-request-extension-MA-19-1256.pdf](#)
[OSC Preliminary Determination 12-19-18.pdf](#)

December 28, 2018

To: DNFSB

From: Joseph Carson, PE, deeply concerned DOE nuclear safety professional
[REDACTED]

Subject: Public Comments on Public Meeting of November 28, 2018

This email and its attachments as well as related information at my website www.merit-principles.org are my additional comments to the public meeting. Previously, I submitted my related whistleblower disclosure to the US Office of Special Counsel (OSC) as a public comment. Now I include OSC's closure letter, which takes no issue with my (as your) claim that DOE is violating the law in DOE Order 140.1. I also have attached my request to OSC for an extension of time to respond to its preliminary determination to close my whistleblower reprisal complaint, without making a "reasonable belief" determination about the underlying whistleblower disclosures. DOE's corruption – just as DNFSB's – does not arise in a vacuum, it is the expectable result of the decades-long, compounded, continuing, law-breaking in the "immune system" of the federal civil service – the US Office of Special Counsel (OSC) and US Merit Systems Protection Board (MSPB).

Just as DNFSB is NOT self-regulating for its management and safety culture – by law, OSC and MSPB have essential, non-transferable, responsibilities for it – neither in DOE..

It should have been you – the DNFSB – not me, filing such a whistleblower disclosure with OSC. You, as I, took an oath of office. You, as I, are subject to federal agency ethics requirements at 5 CFR part 2635.101 - Basic obligation of public service," see <https://www.law.cornell.edu/cfr/text/5/2635.101>.

Most specifically, by 5 CFR 2635.101(b)(11):

Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.

While it is not inappropriate to have a public hearing related to the DNFSB's claims that aspects of the DOE Order violate aspects of the DNFSB enabling legislation, it is inappropriate – and, in my professional opinion, inconsistent with engineering ethics/rules of professional conduct for professional engineers (PE), that the Board has not filed a whistleblower disclosure with the US Office of Special Counsel, per 5 U.S.C. section 1213.

I contend there is a reason the DNFSB is not following this statutorily established mechanism – the DNFSB casts a blind eye at the realities of whistleblower reprisal in DOE and its contractors, and, with few exceptions, has since its creation. As one specific, if the DNFSB were trustworthy to its statutory responsibilities, it would have – many years ago – issued a recommendation to the Secretary of Energy that he direct the Attorney General to issue opinions on the interpretation of the approximately dozen civil service laws I publicly claim, regardless of risk to my employment in DOE, my PE license, my security clearance, etc., that are being violated by the US Office of Special Counsel and US Merit Systems Protection Board, thereby precluding DOE (and the DNFSB for that matter) from having an adequate safety and security culture.

If DOE had an adequate safety culture, could DOE Order 140.1 been issued as written? No, it could not have been - if DOE had an adequate safety culture, any number of DOE and DOE contractor employees would have submitted differing professional opinions (DPOs) about the draft order – and copied the DNFSB with them.

If the DNFSB were to file a whistleblower disclosure with OSC, and OSC referred it for investigation, then the Secretary of Energy would have to investigate how the Order was drafted and why such concerns were NOT raised and resolved during its preparation, review and approval. The obvious reason would then become apparent – fear of reprisal and/or fear of being ignored for doing anything other than bystander to one's concerns in DOE. That would implicate – as it ought – DNFSB's oversight of DOE (as it would OSC and MSPB vis-à-vis their responsibilities for DOE's management and safety culture). Well, DNFSB, you (just as OSC, MSPB and DOE) have been bystander to my concerns for decades now, so "what goes around, comes around," I suppose.

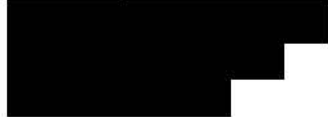


U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505
202-804-7000

December 19, 2018

BY ELECTRONIC MAIL

Mr. Joseph Carson



Subject: Final Determination on DI-19-1112
Preliminary Determination on MA-19-1256

Dear Mr. Carson:

The U.S. Office of Special Counsel (OSC) has completed its review of the information you provided regarding your disclosure (DI-19-1112) and prohibited personnel practice complaint (MA-19-1256). OSC has made a final decision to close your disclosure file. We have made a preliminary determination to close your prohibited personnel practice file, but we are delaying our final decision for 13 calendar days so that you may submit a written response.

You are an engineer at the Department of Energy (DOE) in Oak Ridge, Tennessee. In your disclosure to OSC, you allege that DOE Order 140.1 "Interface with the Defense Nuclear Facilities Safety Board" violates the Atomic Energy Act, 5 U.S.C. § 2286a, by attempting to diminish the Defense Nuclear Facilities Safety Board's (DNFSB) ability to perform its obligations under the statute. On September 17, 2018, the chairman of the DNFSB sent a letter to the Secretary of Energy detailing the DNFSB's concerns regarding DOE Order 1401.1. You are not sure whether or not DOE has responded to DNFSB's letter and you suggested to OSC that if we needed additional information it would be best to reach out to DNFSB's general counsel.

In your prohibited personnel practice complaint, you allege that on September 11, 2018, you made a whistleblower disclosure in a memorandum that you sent to your branch director, division director, office manager, the Assistant Secretary for Environmental Management, and the Secretary of Energy. You informed OSC that in the memorandum you stated that OSC and the Merit Systems Protected Board (MSPB) are violating several laws. You allege that OSC's and MSPB's violations have precluded the Secretary of Energy from complying with his duty to prevent prohibited personnel practices. You allege that in your September 11, 2018 memorandum you also stated that DOE attorneys colluded to engage in reprisal against you from 1999 to 2003. You allege that DOE has significantly changed your working conditions by failing to taken any action regarding your whistleblower disclosure.

U.S. Office of Special Counsel

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Disclosure (DI-19-1112)

OSC is authorized by law to determine whether a disclosure should be referred to the involved agency for investigation or review, and a report. OSC may refer allegations of violations of law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. Disclosures referred for investigation and a report by the agency must include information sufficient for OSC to determine whether there is a substantial likelihood of wrongdoing. If a substantial likelihood determination cannot be made, OSC will determine whether there is sufficient information to exercise its discretion to refer the allegations. OSC does not have the authority to investigate disclosures and therefore, does not conduct its own investigations into disclosures.

You allege that DOE Order 140.1 violates the Atomic Energy Act. You have not provided sufficient information to demonstrate a substantial likelihood that DOE has violated a law, rule, or regulation with regard to DOE Order 140.1. You suggested to OSC that we could contact DNFSB's general counsel for more information. However, because OSC does not have the authority to investigate disclosures we cannot do so unless a DNFSB employee files a disclosure with our office. You may inform DNFSB employees that they may file a disclosure with OSC.

If you wish to pursue this matter further, you may also contact the U.S. Department of Energy, Office of the Inspector General (OIG) as follows: *mailing address* DOE Office of Inspector General, 1000 Independence Avenue, S.W., Washington, D.C. 20585; *hotline number* – (800) 541-1625; *main phone number* – (202) 586-4393; *hotline e-mail* – ighotline@hq.doe.gov.

Prohibited Personnel Practice (MA-19-1256)

In your prohibited personnel practice complaint, you allege that DOE retaliated against you for making your September 11, 2018 disclosure by failing to take any action or respond to your disclosure. OSC analyzed these allegations for potential violations of 5 U.S.C. § 2302(b)(8). It is a violation of sections 2302(b)(8) to take or fail to take, or to threaten to take or fail to take, a personnel action with respect to any employee for making a protected disclosure of information.

To establish a violation of sections 2302(b)(8), OSC must demonstrate before the Merit System Protection Board (Board) that: (1) the employee made a protected disclosure; (2) the proposing or deciding officials had knowledge of the protected disclosure or protected activity; (3) a personnel action was taken or threatened; and (4) the protected disclosure was a contributing factor in the personnel action at issue. If OSC establishes the elements of retaliation under section 2302(b)(8), the agency may defend with clear and convincing evidence that it would have taken the same action in the absence of the protected disclosure by showing, for example, the strength of the evidence in support of the personnel action and the lack of a motive to retaliate against the employee.

U.S. Office of Special Counsel

Mr. Joseph Carson

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OSC does not believe that it could demonstrate a violation of 2302(b)(8) in your case. While you have asserted that DOE standing by and not responding to your whistleblower disclosure constitutes a significant change in duties, OSC does not believe that DOE's failure to respond could be considered a personnel action because it has not resulted in any change to your job duties. Accordingly, OSC does not believe that it could demonstrate a violation of section 2302(b)(8).

For the reasons discussed above, we plan to take no further action on your prohibited personnel complaint. We will delay our final decision for 13 calendar days in order to provide you the opportunity to submit written comments about our findings. Otherwise, we plan to close our prohibited personnel practice file and notify you of any additional rights you have to file before the Board.

Please contact me at [REDACTED] if you have any questions.

Sincerely,

Sheri S. Shilling
Attorney
Retaliation and Disclosure Unit

December 27, 2018

Ms. Sheri Shilling
US Office of Special Counsel (OSC)



Subject: MA-19-1256 - Request for one month extension of time to submit written comments on pre-determination letter of December 19, 2018

Dear Ms. Shilling,

I request a one month extension of time to submit written comments. My reasons include:

1. I have just returned from being out of town for the holidays, the current due date is January 2, 2019.
2. I now intend to retain an attorney to represent me at OSC in this complaint and it will be early January before I will be able to do so.
3. I now intend to spur Congressional interest and media interest in OSC's preliminary determination that despite Congress mandating performance plans of agency supervisors contain a critical element that they not bystand to the whistleblower disclosures of their subordinates, OSC contends they can still do so without creating "any significant change in the working conditions" of their whistleblowing subordinate, no matter how many lives may be at stake. If nothing else, such interest will, I hope, require OSC to provide more justification for its position that regardless how many lives may be at stake, OSC "does not believe" the personnel action of "any other significant change in working conditions" can occur when an agency ignores a whistleblower.
4. As I shared in our discussion after I received your letter on December 19, it seems to be OSC's position that I have to create such workplace disruption in making my whistleblower disclosures - such as interrupting work meetings to state them, sending mass emails to my colleagues detailing them and criticizing my supervisors for ignoring them, etc. - to spur a disciplinary action against me so that - after over 10 years of ceaseless effort on my part, OSC will be forced to make a "reasonable belief" determination regarding them. I wish to create media and Congressional interest in this matter to force OSC to admit that a federal whistleblower must create a disruption in their workplace in making their whistleblower disclosures sufficient to receive a disciplinary action if the agency is not to ignore the whistleblower with impunity - regardless of how many lives may be at stake.
5. By law - the "Congressional Statement of Findings and Purpose," of Pub L. 101-12, the Federal Whistleblower Protection Act of 1989, codified in the endnotes of 5 U.S.C. §1201 - OSC "shall act in the interests of employees who seek its assistance."

For the above reasons, I request OSC “act in my interests” in granting the extension of time.

Ms. Shilling, I understand that by legal ethics your client is OSC. However, legal ethics do not allow lawyers to conspire to break the law - or actually break the law themselves - to advance or defend the interests of their client.

In processing my whistleblower reprisal complaint, you are neither a counsel or advocate for OSC - you, yourself, are the implementer of specific laws that detail OSC’s non-discretionary statutory duties to protect me from reprisal. I have paid an enormous professional and personal cost to comply with my positive legal and professional duty, as a PE, to be a “mandated reporter” when necessary to “hold paramount” the public health and safety in my professional duty, regardless of possible workplace retribution. I simply do not accept you or others at OSC can say “if we break the laws requiring us to protect you, then our primary duty becomes to do whatever we can to prevent any exposure of that fact, in order to protect the interests of our client, OSC.” But that is what you and other OSC attorneys say, as best I can tell. If this is not the case, then why did you not make a reasonable belief determination about my whistleblower disclosures? Nothing - apparently other than your self-interest and a misguided reading of legal ethics to put OSC’s interests above the lives of American - above its very mission - is preventing you from doing so.

From your outgoing voice mail, I understand you are out of the Office until January 2, 2019, the same day my written comments to your preliminary determination are due.

Therefore I am copying your chain of command at OSC with my request, so that it can be acted upon before then.

Respectfully,

_____/s/_____

Joseph Carson, PE



Enclosed:

My whistleblower reprisal complaint, MA-19-1256
Your preliminary determination of December 19, 2018

copy: Special Counsel Kerner; Principal Deputy Special Counsel Epstein; Associate Special Counsel Wagner; Karen Gorman, Chief of Retaliation and Disclosure Unit; Elizabeth McCurray, Chief of Retaliation and Disclosure Unit

November 29, 2018

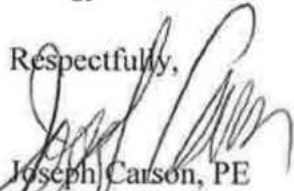
DNFSB
625 Indiana Ave, NW
Suite 700
Washington, DC 20004-2901

Subject: Comments on Board's Public Meeting of November 28, 2018

Dear DNFSB,

Per the Federal Register Notice of November 7, 2018, I include as my public comments my Whistleblower Disclosure to the U.S. Office of Special Counsel that alleges Department of Energy Order 140.1 violates the enabling legislation of the DNFSB.

Respectfully,



Joseph Carson, PE



INFORMATION ABOUT FILING A WHISTLEBLOWER DISCLOSURE
WITH THE
OFFICE OF SPECIAL COUNSEL

IMPORTANT

Before filling out this Office of Special Counsel (OSC) Disclosure of Information form, please read the following sections about limitations on OSC's jurisdiction over whistleblower disclosures. Only the most frequently occurring impediments to OSC jurisdiction are described. OSC may not have jurisdiction over you or your disclosure for other reasons not discussed below.

COMPLETED DISCLOSURE FORMS CAN BE SENT TO OSC BY MAIL, AT: DISCLOSURE UNIT, OFFICE OF SPECIAL COUNSEL, 1730 M STREET, N.W. (SUITE 218), WASHINGTON, DC 20036-4505. OR BY FAX: 202-254-3711

PLEASE KEEP A COPY OF DISCLOSURE MATERIALS PROVIDED TO OSC. REPRODUCTION CHARGES UNDER THE FREEDOM OF INFORMATION ACT MAY APPLY TO REQUESTS PROCESSED BY OSC FOR COPYING OF COPIES OF MATERIALS IN OSC FILES.

OSC WHISTLEBLOWER DISCLOSURE CHANNEL

The OSC Disclosure Unit serves as a secure channel that can be used to disclose -

- a violation of law, rule or regulation;
- gross mismanagement;
- gross waste of funds;
- abuse of authority, or
- substantial and specific danger to public health or safety.

OSC does **not** have authority to investigate the disclosures that it receives. The law provides that OSC will (a) refer protected disclosures that establish a substantial likelihood of wrongdoing to the appropriate agency head, and (b) require the agency head to conduct an investigation, and submit a written report on the findings of the investigation to the Special Counsel.

If OSC finds no substantial likelihood that the information discloses one or more of the categories of wrongdoing, the Special Counsel must: (a) inform the whistleblower of the reasons why the disclosure may not be acted on further; and (b) direct the whistleblower to other offices available for receiving disclosures.

OSC JURISDICTION

The Disclosure Unit has jurisdiction over federal employees, former federal employees, and applicants for federal employment. It is important to note that a disclosure must be related to an event that occurred in connection with the performance of an employee's duties and responsibilities. The Disclosure Unit has **no jurisdiction** over disclosures filed by:

VISIT [HTTP://WWW.OSC.GOV](http://www.osc.gov) FOR MORE INFORMATION ABOUT
OSC JURISDICTION AND DISCLOSURE PROCEDURES

**INFORMATION ABOUT FILING A WHISTLEBLOWER DISCLOSURE
WITH THE OSC (cont'd)**

- employees of the U.S. Postal Service and the Postal Rate Commission;
- members of the armed forces of the United States (*i.e.*, non-civilian military employees);
- state employees operating under federal grants; and
- employees of federal contractors.

FIRST-HAND INFORMATION REQUIRED

In order to make a "substantial likelihood" finding (*see previous page*), OSC must be in possession of reliable, first-hand information. OSC cannot request an agency head to conduct an investigation based on an employee's (or applicant's) second-hand knowledge of agency wrongdoing. This includes information received from another person, such as when a fellow employee informs you that he/she witnessed some type of wrongdoing. (Anyone with first-hand knowledge of the allegations you want to report may file a disclosure in writing directly with OSC.) Similarly, speculation about the existence of misconduct does not provide OSC with a sufficient legal basis upon which to send a matter to the head of an agency. If you think that wrongdoing took place, but can provide nothing more than unsubstantiated assertions, OSC will not be able to go forward with the matter.

DE MINIMIS ALLEGATIONS

While an allegation might technically constitute a disclosure, OSC will not review or refer *de minimis* or trivial matters.

ANONYMOUS SOURCES

While OSC will protect the identity of persons who make disclosures, it will not consider anonymous disclosures. If a disclosure is filed by an anonymous source, the disclosure will be referred to the Office of Inspector General in the appropriate agency. OSC will take no further action.

MATTERS INVESTIGATED BY AN OFFICE OF INSPECTOR GENERAL

It is the general policy of OSC not to transmit allegations of wrongdoing to the head of the agency involved if the agency's Office of Inspector General has fully investigated, or is currently investigating, the same allegations.

DISCLOSURE OF INFORMATION

(Please print legibly or type and complete all pertinent items. Enter "N/A" (Not Applicable) or "Unknown" where appropriate.)

PART 1: BACKGROUND INFORMATION

1. Name of person seeking OSC action ("Complainant"): Mr. (X) Ms. () Mrs. () Miss ()

Joseph Larson, PE

2. Status:

Current Federal Employee (X) Applicant for Federal Employment ()

Former Federal Employee () Other (please specify):

3. Contact Information:

Home or mailing address:

[Redacted]

Telephone number(s):

[Redacted]

(Home)

[Redacted]

(Office) Ext.

()

(Cell)

Fax number:

()

E-mail address:

[Redacted]

4. Current position, title, series, and grade:

GS-14-801 Facility Representative

5. Agency Name:

Dept. of Energy

6. Agency Address:

1000 Independence Ave, SW Washington, DC 20585

7. How did you first become aware that you could file a disclosure with OSC?

OSC Brochure () OSC Poster () OSC Speaker () OSC Web Site ()

Agency Personnel Office () Union (X) Co-worker () News Story ()

Other (please describe):

Date (approximate): 1992

8. If you are filing this complaint as a legal or other representative of the person making a disclosure, please supply the following information:

Name / title of filer: Mr. () Ms. () Mrs. () Miss ()

N/A

9. Contact Information:

Home or mailing address: _____

Telephone number(s): () _____ (Home)

() _____ (Office) Ext. _____

Fax number: () _____

E-mail address: _____

PART 2: DETAILS OF YOUR DISCLOSURE

1. I know about the information I am disclosing here based on (check all that apply):

I have personal and/or direct knowledge of events or records involved (X)

Other employees have told me about events or records involved ()

Other source(s) (X)

(please explain):

See attached

2. Please identify the U.S. government department or agency involved in your disclosure:

U.S. Department of Energy

3. Please identify the organizational unit of the department or agency involved:

Office of the Secretary

4. Address of the organizational unit:

1000 Independence Ave, SW Washington DC 20585

5. Please identify the type of agency wrongdoing that you are alleging (check all that apply). If you check "violation of law, rule, or regulation," please provide, if you can, the particular law, rule or regulation violated (by name, subject, and/or citation).

Violation of law, rule, or regulation (X) (please specify): _____

42 U.S.C. Section 2286a

Gross mismanagement () Gross waste of funds () Abuse of authority ()

Substantial and specific danger to public health ()

Substantial and specific danger to public safety ()

6. Please describe the agency wrongdoing that you are disclosing, indicating how the agency's actions fit within the type(s) of wrongdoing that you checked in item 5. *(Be as specific as possible about dates, locations and the identities and positions of all persons named. Also, please attach any documents that might support your disclosure. Continue on a separate sheet of paper if you need more space.)*

See Attached

PART 3: OTHER ACTIONS YOU ARE TAKING ON YOUR DISCLOSURE

1. I have previously disclosed (or am disclosing) the violations alleged here to *(complete all that apply)*:

Inspector General of department / agency involved Date: ___ / ___ / ___

Other office of department / agency involved Date: ___ / ___ / ___
(please specify):

_____ Date: ___ / ___ / ___
Department of Justice

Other Executive Branch / department / agency Date: ___ / ___ / ___
(please specify):

_____ Date: ___ / ___ / ___
General Accounting Office (GAO)

Congress or congressional committee Date: ___ / ___ / ___
(please specify member or committee):

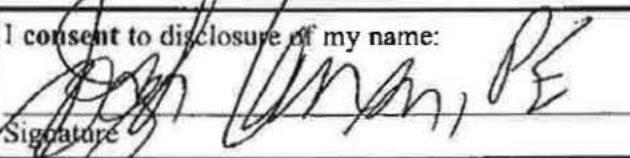
_____ Date: ___ / ___ / ___
Press / media (newspaper, television, other)
(please specify):

2. If you disclosed the information reported here through any other channel described in question 1, above, what is the current status of the matter?

N/A

PART 4: CONSENT, CERTIFICATION, AND SIGNATURE

Do you consent to the disclosure of your name to others outside the Office of Special Counsel if it becomes necessary in taking further action on this matter?

I consent to disclosure of my name:
 PE
Signature _____ Date: 11/29/2018

I do not consent to disclosure of my name:
Signature _____ Date _____

I certify that all of the statements made in this complaint (including any continuation pages) are true, complete, and correct to the best of my knowledge and belief. I understand that a false statement or concealment of a material fact is a criminal offense punishable by a fine of up to \$10,000, imprisonment for up to five years, or both. 18 U.S.C. § 1001.

Signature

Date

PART 5: PRIVACY ACT / PAPERWORK REDUCTION ACT STATEMENTS

Routine Uses. Limited disclosure of information from OSC files is needed to fulfill OSC's investigative, prosecutorial and related responsibilities. OSC has described 18 routine uses for information in its files in the *Federal Register* (F.R.), at 66 F.R. 36611 (July 12, 2001), and 66 F.R. 51095 (October 5, 2001). A copy of the routine uses is available from OSC on request. A summary of the routine uses appears below.

OSC may disclose information from its files in the following circumstances:

1. to disclose that an allegation of prohibited personnel practices or other prohibited activity has been filed;
2. to disclose information needed by the Office of Personnel Management (OPM) for inquiries involving civil service laws, rules or regulations, or to obtain an advisory opinion;
3. to disclose information about allegations or complaints of discrimination to entities concerned with enforcement of anti-discrimination laws;
4. to the MSPB or the President, when seeking disciplinary action;
5. to the involved agency, MSPB, OPM, or the President when OSC has reason to believe that a prohibited personnel practice has occurred, exists or is to be taken;
6. to disclose information to Congress in OSC's annual report;
7. to disclose information to third parties (without identifying the complainant unless OSC has the complainant's consent) as needed to conduct an investigation; obtain an agency investigation and report on information disclosed to the OSC whistleblower disclosure channel; or to give notice of the status or outcome of the investigation;
8. to disclose information as needed to obtain information about hiring or retention of an employee; issuance of a security clearance; conduct of a security or suitability investigation; award of a contract; or issuance of a license, grant, or other benefit;
9. to the Office of Management and Budget (OMB) for certain legislative coordination and clearance purposes;

10. to provide information from an individual's record to a congressional office acting pursuant to the individual's request;
11. to furnish information to the National Archives and Records Administration for records management purposes;
12. to produce summary statistics and work force or other studies;
13. to provide information needed by the Department of Justice for certain litigation purposes;
14. to provide information needed by courts or adjudicative bodies for certain litigation purposes;
15. to disclose information to the MSPB as needed in special studies authorized by law;
16. for coordination with an agency's Office of Inspector General or comparable entity, to facilitate the coordination and conduct of investigations and review of allegations;
17. to news media or the public in certain circumstances (except when the Special Counsel determines that disclosure in a particular case would be an unwarranted invasion of personal privacy); and
18. to the Department of Labor and others as needed to implement the Uniformed Services Employment and Recmployment Rights Act of 1994, and the Veterans' Employment Opportunities Act of 1998.

Purposes, Burdens, and Other Information. An agency may not conduct or sponsor a collection of information, and persons may not be required to respond to a collection of information, unless it (a) has been approved by OMB, and (b) displays a currently valid OMB control number. The information in this form is collected pursuant to OSC's legal responsibility (at 5 U.S.C. § 1213) to receive disclosures from current or former federal employees, or applicants for federal employment, alleging possible wrongdoing by federal agencies. The information will be used by OSC to determine whether the facts establish that: (a) OSC has jurisdiction over the subject of the disclosure; (b) there is a substantial likelihood that the facts indicate a violation of law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety; and (c) referral for investigation by the agency involved, or other appropriate action is warranted. The reporting burden for this collection of information is estimated to be an average of one hour per response, including the time for reviewing instructions, searching existing data sources, gathering the data needed, and completing and reviewing the form.

Please send any comments about this burden estimate, and suggestions for reducing the burden, to the U.S. Office of Special Counsel, Legal Counsel and Policy Division, 1730 M Street, N.W. (Suite 201), Washington, DC 20036-4505. Use of this form to report disclosures of information is not mandatory. As indicated in part 4 of the form, filers may request that OSC maintain their name in confidence.

Attachment to Whistleblower Disclosure of Joseph Carson, PE about Department of Energy Order 140.1, "Interface with Defense Nuclear Facilities Safety Board."

Part 2: Block 6: Please describe the agency wrongdoing that you are disclosing, indicating how the agency's actions fit within the types of wrongdoing you checked in item 5.

As the Defense Nuclear Facilities Safety Board (DNFSB) has communicated to the Secretary of Energy, it contends (and I agree) that Department of Energy Order 140.1, "Interface with the Defense Nuclear Facilities Safety Board" violates 5 U.S.C. §2286a.^{1 2}

See September 17, 2018 letter from the Chairman of the DNFSB to the Secretary of Energy.³ The Secretary of Energy has not responded to this letter to date.

Additionally, by the rules of professional conduct for professional engineers (PEs) licensed in Tennessee:⁴

0120-02-.02 PROPER CONDUCT OF PRACTICE.

(1) The registrant shall at all times recognize *the primary obligation to protect the safety, health and welfare of the public* (emphasis added) in the performance of the registrant's professional duties.

(2) If the registrant becomes aware of a decision taken by an employer, client, or contractor, against the registrant's advice, which violates applicable Federal, State or Local Laws, Regulations, or Codes which may affect adversely the safety, health and welfare of the public, the registrant shall:

- (a) Report the decision to the authority having jurisdiction charged with the enforcement of the applicable Federal, State or Local Laws, Regulations, and Codes;
- (b) Refuse to consent to the decision; and
- (c) In circumstances where the registrant reasonably believes that other such decisions

¹ DOE Order 140.1 is available at:
<https://www.directives.doe.gov/directives-documents/100-series/0140.1-BOrder>.

² The enabling legislation for the DNFSB is available at:
https://www.dnfsb.gov/sites/default/files/page/Enabling%20Legislation%20-%202016_0.pdf.

³ This letter is available at:
<https://www.dnfsb.gov/sites/default/files/document/16011/Regarding%20DOE%20Order%20140.1%20%5B2018-100-064%5D.pdf>.

⁴ Engineer Carson is licensed in Tennessee, see
<https://publications.tnsosfiles.com/rules/0120/0120-02.20181023.pdf>.

will be taken notwithstanding the registrant's objections, terminate services with reference to the project.

Engineer Carson has been informed by his licensing authority that "public" includes workers when the engineer has responsibilities for workplace health and safety.

Exhibits to this whistleblower disclosure:

DOE Order 140.1, "Interface with Defense Nuclear Facilities Safety Board
5 U.S.C § 2286, Enabling legislation for the DNFSB
DNFSB Letter to Secretary of Energy, Sept. 17, 2018

SUBJECT: INTERFACE WITH THE DEFENSE NUCLEAR FACILITIES SAFETY BOARD

1. **PURPOSE.** The purpose of this Order is to emphasize line management accountability and establish clear requirements and responsibilities when working with the Defense Nuclear Facilities Safety Board (DNFSB).
2. **CANCELLATION.** DOE M 140.1-1B, *Interface with the Defense Nuclear Facilities Safety Board*, dated 03-30-01. Cancellation of a directive does not, by itself, modify or otherwise affect any contractual or regulatory obligation to comply with the directive. Contractor Requirements Documents (CRDs) that have been incorporated into a contract remain in effect throughout the term of the contract unless and until the contract or regulatory commitment is modified to either eliminate requirements that are no longer applicable or substitute a new set of requirements.
3. **APPLICABILITY.**

- a. **Departmental Applicability.** The requirements in this Order apply to DOE personnel, including employees of the National Nuclear Security Administration (NNSA), who administer, oversee, and/or are responsible for a "Department of Energy (or DOE) Defense Nuclear Facility," as defined in this Order. This is consistent with 42 U.S. Code (U.S.C.) § 2286a, *Mission and Functions of Board*, which states, "The mission of the Board shall be to provide independent analysis, advice, and recommendations to the Secretary of Energy to inform the Secretary, in the role of the Secretary as operator and regulator of the defense nuclear facilities of the Department of Energy, in providing adequate protection of public health and safety at such defense nuclear facilities."

The Administrator of the NNSA must assure that NNSA employees comply with their responsibilities under this Order. Nothing in this directive will be construed to interfere with the NNSA Administrator's authority under section 3212(d) of Public Law (P.L.) 106-65 to establish administration-specific policies, unless disapproved by the Secretary.

- b. **DOE Contractors.** Except for the equivalencies/exemptions contained in paragraph 3.c., the CRD (see Attachment 1 of this Order) sets forth requirements of this Order that will apply to contracts that include the CRD. The CRD, or its requirements, must be inserted into all contracts that require design, construction, management, operation, decontamination, decommissioning, or demolition of one or more DOE defense nuclear facilities, as defined in this Order.
- c. **Exemptions/Exceptions.** Equivalencies and exemptions to this Order are processed in accordance with DOE O 251.1, *Departmental Directives Program*, current version.

- (1) Exemption. In accordance with the responsibilities and authorities assigned by Executive Order 12344, codified at 50 U.S.C. sections 2406 and 2511, this Order does not apply to the DOE NNSA Naval Reactors Propulsion Program. [42 U.S.C. § 2286g(1)(A)]
- (2) Exemption. 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.) (42 U.S.C. § 2286a)
- (3) Exemption. 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. (42 U.S.C. § 2286a)
- (4) Exemption. This Order does not apply to any facility or activity involved with transportation of nuclear explosives or nuclear material. [42 U.S.C. § 2286g(1)(B)]
- (5) Exemption. This Order does not apply to any facility that does not conduct atomic energy defense activities. [42 U.S.C. § 2286g(1)(C)]
- (6) Exemption. This Order does not apply to a nuclear waste storage facility developed pursuant to the Nuclear Waste Policy Act of 1982 and licensed by the Nuclear Regulatory Commission. [42 U.S.C. § 2286g(2)]
- (7) Exemption. This Order does not apply to functions relating to the safety of atomic weapons. [42 U.S.C. § 2286a(c)]
- (8) Exemption. This Order does not apply to nuclear facilities or activities subject to regulation by the Nuclear Regulatory Commission (NRC).

4. REQUIREMENTS.

- a. The Department of Energy (DOE) is responsible for the safe operations of its facilities and sites, and has the responsibility and duty to:
 - (1) Carry out the DOE mission in a safe, secure, and environmentally responsible way.
 - (2) Provide reasonable assurance of adequate protection to public health and safety.
 - (3) Perform its role as facility operator and regulator, as well as steward for the taxpayer, in accomplishing DOE's legally mandated missions.

- (4) Consider information, ideas, and technical advice from the DNFSB and its staff.
- (5) 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.

To fulfill these obligations, DOE must make sound technical decisions, drawing on all reasonably available information, including advice and observations from the DNFSB, and accept responsibility for the outcomes of its decisions, including appropriately managing the risks associated with its operations.

b. When executing these requirements, Departmental Elements must:

- (1) Cooperate with the DNFSB and provide the DNFSB with ready access to such facilities, personnel, and information as necessary to carry out its statutory responsibilities, to include providing access to:
 - (a) Completed documents representing DOE's decisions related to the safe design and operations of defense nuclear facilities and supporting the statutory requirements of the DNFSB. This would include, for example, safety basis documents, safety design strategies, documented safety analyses, safety evaluation reports, and similar documentation, as well as completed Standards related to the design, construction, operation, and decommissioning of facilities.
 - (b) Defense nuclear facilities to observe operations and maintenance activities, including DOE's formal review processes, to demonstrate readiness of the contractor and DOE to support safe operations. This would include, for example, contractor and federal readiness assessments and reviews, as well as routine operations and maintenance related to providing adequate protection of public health and safety.
 - (c) Completed documents representing any event or practice at a defense nuclear facility which the DNFSB considers may adversely affect public health and safety. This would include, for example, approved results of fact-finding reviews and investigations associated with defense nuclear facilities.
- (2) In accordance with direction from the Secretary, or the Secretary's designee, may deny access for the following reasons:
 - (a) The person requesting the information has not been granted an appropriate security clearance or access authorization by the Secretary.

- (b) The person requesting the information does not need such access in connection with his/her duties.
 - (c) The request is for predecisional or otherwise privileged records, for example, attorney-client, attorney work product, procurement-sensitive, or deliberative process draft documents that have not been approved for release; or to participate in deliberative meetings or discussions supporting the development of predecisional or other process draft documents that have not been approved for release. NOTE: Such documents should be considered on a case-by-case basis.
 - (d) Release of the requested information would violate the Privacy Act (5 U.S.C. § 552a).
 - (e) The requested information does not have a reasonable relationship to the functions of the DNFSB as enumerated in the Atomic Energy Act, such as information that does not pertain to a Department of Energy defense nuclear facility, as defined in Section 318 of the Atomic Energy Act, as amended (42 U.S.C. § 2286g).
- (3) Ensure that requests made to DOE contractors for information or access related to defense nuclear facilities or activities by the DNFSB, including DNFSB staff, are referred to the appropriate Departmental Site Liaison for response.
 - (4) Ensure that DOE contractors will only respond to DNFSB requests when formally tasked to do so by an authorized Departmental Site Liaison.
 - (5) Refer legal questions regarding the appropriateness of releasing information requested by the DNFSB or its staff to the DOE Office of General Counsel or the NNSA Office of General Counsel, as appropriate.
 - (6) Establish a response team for each recommendation provided by the DNFSB. Assign a Responsible Manager to lead the team, selected by and operating under the authority of a Cognizant Head of a Departmental Element.
 - (7) If warranted, provide comments on DNFSB draft recommendations within 30 days of receipt by DOE or, if additional time is granted by the DNFSB, within the time permitted by the DNFSB.
 - (8) Respond to DNFSB recommendations within 45 days after a recommendation is published in the Federal Register, or up to an additional 45 days if additional time is granted by the DNFSB, with a statement regarding whether the Secretary accepts or rejects, in whole or in part, the recommendation; a description of actions to be taken; and the

Secretary's views on the recommendation. Responses to DNFSB recommendations must be published in the Federal Register for a public comment period of 30 days.

- (9) Provide a final decision, including the Secretary's reasoning, within 30 days of receiving a notice of a DNFSB decision to reaffirm or revise a recommendation that had previously been rejected in whole or in part. The Secretary's final decision and reason therefore must be published in the Federal Register, and a report on that decision and its reasoning must be provided to the DNFSB and to the Committees on Armed Services, Appropriations, and Energy and Commerce of the House of Representatives; and the Committees on Armed Services, Appropriations, and Energy and Natural Resources of the Senate.
- (10) Transmit an Implementation Plan to the DNFSB within 90 days of the date of publication of the Secretary's final decision on a recommendation in the Federal Register, if any part of that recommendation is accepted. This Implementation Plan must convey the Secretary's best judgment on how to address those issues identified in the DNFSB's recommendation within the context of DOE's overall nuclear safety program.
 - (a) An additional 45 days for which to transmit the Implementation Plan may be obtained upon submitting a notification explaining the reasons for the delay and describing the actions the Secretary is taking to prepare an Implementation Plan.
 - (b) This notification must be sent to the DNFSB and to the Committees on Armed Services, Appropriations, and Energy and Commerce of the House of Representatives; and the Committees on Armed Services, Appropriations, and Energy and Natural Resources of the Senate.
 - (c) All significant revisions to the Implementation Plan must also be formally provided to the DNFSB.
 - (d) A notification by letter must be sent to the DNFSB, in lieu of a formal revision, for any minor revisions to an Implementation Plan.
- (11) For DNFSB recommendations involving imminent danger or severe threat to public health and safety, convene a response team within 24 hours of receipt of the recommendation and provide the Secretary's recommendation to the President.
- (12) Make available sufficient resources to satisfy the commitments, milestones, and corrective actions contained in Implementation Plans and other DOE correspondence to the DNFSB, subject to the availability of appropriated funds.

- (13) Fully implement Implementation Plans within one year of transmitting them to the DNFSB or, if an Implementation Plan cannot be implemented within that time, provide a report to the Committees on Armed Services, Appropriations, and Energy and Commerce of the House of Representatives; and the Committees on Armed Services, Appropriations, and Energy and Natural Resources of the Senate, describing the reasons for delay and when implementation will be complete. (This requirement is typically satisfied in DOE's Annual Report to Congress on DNFSB-related activities.)
- (14) Provide notification to the President and the Committees on Armed Services, Appropriations, and Energy and Commerce of the House of Representatives; and the Committees on Armed Services, Appropriations, and Energy and Natural Resources of the Senate if implementation of any portion of an accepted recommendation is impractical because of budgetary considerations, or would affect the Department's ability to meet annual nuclear weapon stockpile requirements.
- (15) Respond to DNFSB reporting requirements, and, in cases where a completion date requested by the DNFSB cannot be met, transmit a letter to the DNFSB that includes an expected date for transmitting the report. Note: Responses to reporting requirements provide information to the Board and should not be the origin of actions for the Department.
- (16) At the same time the President submits the budget to Congress, provide an annual report to the Committees on Armed Services, Appropriations, and Energy and Commerce of the House of Representatives; and the Committees on Armed Services, Appropriations, and Energy and Natural Resources of the Senate, that describes Department DNFSB-related activities from the previous fiscal year.

5. RESPONSIBILITIES.

a. Secretary of Energy.

- (1) Ensures cooperation with the DNFSB in support of the DNFSB's enabling statute.
- (2) Responds to DNFSB recommendations in accordance with the DNFSB's enabling statute.
- (3) Designates a Responsible Manager to develop, manage, and execute the Implementation Plan in response to each accepted recommendation.
- (4) Provides the DNFSB a copy of the Department's Implementation Plan for each accepted recommendation and approves any subsequent plan changes.

- (5) Provides annual reports to Congress concerning DNFSB-related activities of the Department.

b. Deputy Secretary of Energy.

- (1) Ensures DNFSB issues are properly addressed within the Department.
- (2) Resolves disagreements that cannot otherwise be resolved within the Department.
- (3) Assigns lead responsibility for DNFSB-related issues to the cognizant Under Secretary.

c. Under Secretaries.

- (1) Consistent with guidance from the Deputy Secretary, implement the Department's process with respect to the DNFSB via assignment to the cognizant Head of the Departmental Element.
- (2) Delegate specific issues to Heads of Departmental Elements for information gathering and action for response.

d. Heads of Departmental Elements.

- (1) Responsible for coordinating responses to DNFSB recommendations, correspondence, or other DNFSB issues; and designating and empowering individuals to manage the associated planning, response, and implementation activities, consistent with guidance provided.
- (2) Coordinate with other affected Heads of Departmental Elements responsible for defense nuclear facilities in order to form an integrated Departmental position.
- (3) Designate a point of contact (Program Interface) within their respective organizations, to represent their organizations and coordinate with the Departmental Representative and his/her staff on DNFSB-related matters.
- (4) Identify contracts to which the CRD from this Order should apply and notify the cognizant Contracting Officers to incorporate the CRD from this Order into those contracts.

e. Program Interface.

- (1) Performs responsibilities given to the Head of the Departmental Element under this Order, as delegated.
- (2) Coordinates with other affected Program Interfaces and the Departmental Representative to support an integrated Departmental position.

- (3) Serves as the primary Program Interface for Responsible Managers.
- (4) Integrates with Heads of Field Elements and Departmental Site Liaisons as appropriate to ensure Head of Departmental Element cognizance.
- (5) Coordinates the resolution of matters within the Departmental Element that cannot otherwise be resolved by the Heads of Field Elements.

f. Heads of Field Elements (with Responsibility for Defense Nuclear Facilities).

- (1) Designate a point of contact to serve as liaison with the Departmental Representative and his/her staff on DNFSB-related matters.
- (2) Provide DNFSB staff with appropriate access (refer to paragraphs 4.a. and 4.b. of this Order) to defense nuclear facilities, personnel, and existing information at the site.
- (3) Work with Heads of Departmental Elements to identify contracts to which the CRD from this Order should apply and notify the cognizant Contracting Officers to incorporate the CRD from this Order into those contracts.

g. Departmental Representative to the DNFSB.

- (1) Represents the Secretary in regular and continuing interactions with the DNFSB.
- (2) Advises Departmental officials on DNFSB priorities, concerns, actions, and plans.
- (3) Manages Departmental interface activities and provides advice to line management on DNFSB-related matters.
- (4) Coordinates with cognizant Departmental Elements to respond to DNFSB recommendations, DNFSB correspondence, or other DNFSB issues.
- (5) Facilitates communication and cooperation with the DNFSB and its staff.
- (6) Reviews DNFSB staff requests and Departmental written communications to the DNFSB for consistency and responsiveness.
- (7) Transmits non-Secretarial correspondence to the DNFSB and DNFSB Staff.
- (8) Manages DNFSB-related issues and DOE commitments and actions.
- (9) Maintains awareness of Departmental commitments to provide information to the DNFSB.

- (10) Prepares reports on DNFSB-related activities for Departmental management, Congress, and the President.
- (11) Maintains and distributes a listing of key Departmental personnel for DNFSB-related activities.
- (12) Maintains the Department's central repository of official DNFSB communications and makes this information available to Departmental and contractor personnel.
- (13) Supports the Departmental Elements in conducting training, briefings, and presentations.
- (14) Supports the Departmental Directives Program in accordance with DOE O 251.1, current version, as the Office of Primary Interest (OPI) for this Order:
 - (a) Coordinates relevant directives reviews with the DNFSB.
 - (b) Provides the responsible parties with DNFSB comments through the process used by the Department.
 - (c) Facilitates communication between responsible parties and the DNFSB regarding DNFSB comments, if received prior to a directive's approval.
 - (d) Informs responsible parties of relevant DOE Implementation Plan provisions and Secretarial commitments to the DNFSB that impact directives of interest to the DNFSB.

h. Responsible Managers.

- (1) For each assigned DNFSB recommendation, reporting requirement, or letter requesting information, and for each Departmental commitment, manage the response, planning, implementation, tracking, and completion of the DOE Implementation Plan and/or response.
- (2) Provide status updates to the Departmental Representative to the DNFSB.
- (3) Keep Departmental leadership informed of any issues that need senior management attention.
- (4) For cross-organizational issues, coordinate with those impacted or affected.

i. Departmental Site Liaisons.

- (1) Participate in day-to-day DNFSB-related interactions with the Departmental Representative and his/her staff, other Departmental elements, and DNFSB staff.
- (2) Be cognizant of and coordinate day-to-day DNFSB-related activities, to include communicating and reporting to their management on the status of DNFSB activities at their site.
- (3) Provide requested support in responding to and executing DOE Implementation Plans and requests for information.
- (4) Prepare, coordinate, and conduct Departmental activities to support site visits by the DNFSB.
- (5) Be sufficiently knowledgeable of DNFSB practices to advise their organizations and assist their management in interfaces with the DNFSB and its staff.

j. Contracting Officer (CO).

- (1) For M&O contracts, after being notified by the cognizant Head of the Departmental Element, Head of the Field Element, or his or her designee, the CO must incorporate the CRD into the contract by the due date established by the official. The CO must incorporate the CRD without alteration unless the CRD permits alteration and the appropriate exemption/exception process is followed, or unless requirements are tailored per DEAR 970.5204-2.
- (2) For non-M&O contracts, after being notified by the Head of the Departmental Element, Head of Field Element, or his or her designee, the CO must, to the extent possible, incorporate the CRD, either bilaterally or unilaterally, if within the limitation established in the Federal Acquisition Regulation, into the contract by the due date established by the official. If it appears that incorporation will not occur by the due date, then the CO must consult with Head of the Departmental Element or Head of Field Element, as appropriate. The CO must incorporate the CRD without alteration unless the appropriate process for exemption/equivalency is followed.

k. All Departmental Personnel.

- (1) Cooperate with the DNFSB and DNFSB staff, subject to paragraphs 4.a. and 4.b. of this Order.

- (2) Coordinate DNFSB and DNFSB staff requests with the Departmental Representative, Departmental Site Liaisons, and Headquarters Program Offices.
- (3) Promptly bring to the attention of Departmental management (and the Departmental Representative, if appropriate) any conflict that arises with DNFSB staff.
- (4) Ensure requests from the DNFSB or its staff are appropriately documented and vetted through the Departmental Representative, Departmental Site Liaisons, and Headquarters Program Offices.

6. REFERENCES.

- a. Executive Order (E.O.) No. 12344, Naval Nuclear Propulsion Program, dated 2-1-82 (42 U.S.C. §7158 note).
- b. E.O. 13392, *Improving Agency Disclosure of Information*, dated 12-14-05 (published at 70 Fed. Reg. 75373).
- c. Atomic Energy Act of 1954, Sections 311-321, *codified at* Title 42, Chapter 23, *Development and Control of Atomic Energy*; Subchapter XVII.A, *Defense Nuclear Facilities Safety Board* (42 U.S.C. §§ 2286 - 2286i).
- d. Nuclear Waste Policy Act of 1982, 42 U.S.C. §§ 10101 et seq.
- e. Privacy Act of 1974, 5 U.S.C. § 552a.
- f. Title XXXII of the National Defense Authorization Act for Fiscal Year 2000, Pub. L. 106-65, as amended (“NNSA Act”).
- g. 10 Code of Federal Regulation (C.F.R.) Part 830, *Nuclear Safety Management*.
- h. Title 48, Federal Acquisition Regulations System, Part 43, *Contract Modifications*.
- i. DEAR 970.5204-2, *Laws, Regulations, and DOE Directives*.
- j. Deputy Secretary of Energy Memorandum, “Relationship with the Defense Nuclear Facilities Safety Board,” dated 10-13-2017.
- k. DOE O 251.1, *Departmental Directives Program*, current version.
- l. DOE O 252.1, *Technical Standards Program*, current version.
- m. DOE O 410.1, *Central Technical Authority Responsibilities Regarding Nuclear Safety Requirements*, current version.
- n. DOE O 474.2, *Nuclear Material Control and Accountability*, current version.

- o. DOE-STD-1027-92 Chg Notice 1, *Hazard Categorization and Accident Analysis Techniques for Compliance with DOE Order 5480.23, Nuclear Safety Analysis Reports*, dated 12-12-97, or subsequent version.
- p. DOE-STD-3009-2014, *Preparation of Nonreactor Nuclear Facility Documented Safety Analysis*, dated 11-2-14.
- q. Office of the Departmental Representative to the Defense Nuclear Facilities Safety Board (DNFSB) website, <https://www.energy.gov/ehss/departmental-representative-defense-nuclear-facilities-safety-board-dnfsb>.

7. DEFINITIONS.

- a. Atomic Energy Defense Activity. Any activity of the Secretary performed in whole or in part in carrying out any of the following functions:

- (1) Naval reactors development;
- (2) Weapons activities, including defense inertial confinement fusion;
- (3) Verification and control technology;
- (4) Defense nuclear materials production;
- (5) Defense nuclear waste and materials by-products management;
- (6) Defense nuclear materials security and safeguards and security investigations; and
- (7) Defense research and development.

(This term is broader than “DOE defense nuclear facilities” since the latter excludes specific “atomic energy defense activities,” for example, those related to naval reactors.)

- b. Deliberative process draft. Internal communications on Departmental policy issues that have not been adopted as DOE policy.

- c. Department of Energy Defense Nuclear Facility.

- (1) A production facility or utilization facility (as defined in 42 U.S.C. §2014 [§ 11 of the Atomic Energy Act]) that is under the control or jurisdiction of the Secretary of Energy and that is operated for national security purposes, but does not include:
 - (a) Any facility or activity covered by Executive Order No. 12344, dated February 1, 1982 [50 U.S.C. § 2511 note], pertaining to the Naval nuclear propulsion program;

- (b) Any facility or activity involved with the transportation of nuclear explosives or nuclear material;
 - (c) Any facility that does not conduct atomic energy defense activities; or
 - (d) Any facility owned by the United States Enrichment Corporation (now Centrus).
- (2) A nuclear waste storage facility under the control or jurisdiction of the Secretary of Energy, but not a facility developed pursuant to the Nuclear Waste Policy Act of 1982 and licensed by the Nuclear Regulatory Commission. (42 U.S.C. § 2286g)
- d. Department of Energy Nuclear Facility. A Department of Energy reactor or nonreactor nuclear facility where an activity is conducted for, or on behalf of, DOE, including any related area, structure, facility, or activity to the extent necessary to ensure proper implementation of the requirements established in 10 C.F.R. Part 830.
- e. Equipment or device capable of producing and/or utilizing special nuclear material in such a manner as to “affect the health and safety of the public.” Equipment or device (not including an atomic weapon) in or at a Hazard Category 1 or 2 “DOE nuclear facility,” as defined by 10 C.F.R. § 830.3, whose DOE-approved Documented Safety Analysis (DSA):
 - (1) Describes or otherwise identifies hazards from “special nuclear material,” (SNM), as defined in this Order; and
 - (2) Includes “safety class” structures, systems, or components, as defined by 10 C.F.R. § 830.3, for the protection of the public due to the hazards posed by the SNM utilized or produced in that facility.¹
- f. Nonreactor nuclear facility. Those facilities, activities, or operations that involve or will involve radioactive and/or fissionable materials in such form and quantity that a nuclear or a nuclear explosive hazard potentially exists to workers, the public, or the environment, but does not include accelerators and their operations and does not include activities involving only incidental use and generation of radioactive materials or radiation such as check and calibration sources; use of radioactive sources in research and experimental and analytical laboratory activities; electron microscopes; and X-ray machines.

¹ A determination that a DOE facility is a production facility and/or utilization facility is *not* by itself a determination that the facility is a “Department of Energy defense nuclear facility.” The statutory definition of “Department of Energy defense nuclear facility” (42 U.S.C. § 2286g) includes additional criteria that may impact the ultimate determination of whether a particular production facility and/or utilization facility is a DOE “defense nuclear facility.”

- g. Production facility.
- (1) Any equipment or device determined by DOE to be capable of the production of special nuclear material in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public; or
 - (2) Any important component part especially designed for such equipment or device as determined by DOE.
- h. Public Health and Safety. Health and safety of individuals located beyond the site boundaries of DOE sites with DOE Defense Nuclear Facilities.
- i. Quantities of Special Nuclear Material Determined to be “of Significance to the Common Defense and Security.” Those quantities of SNM that meet the minimum threshold quantities for categorization of the facility as a Hazard Category 2 nuclear facility, consistent with the latest version of DOE Technical Standard 1027.
- j. Safety Class Structures, Systems, or Components. The structures, systems, or components, including portions of process systems, whose preventive or mitigative function is necessary to limit radioactive hazardous material exposure to the public, as determined from safety analyses², as defined in 10 C.F.R. Part 830.
- k. Site boundary. For the purpose of implementing this Order, the DOE site boundary is a geographic boundary within which public access is controlled and activities are governed by DOE and its contractors, and not by local authorities. A public road or waterway traversing a DOE site is considered to be within the DOE site boundary if DOE or the site contractor has the capability to control, when necessary, the road or waterway during accident or emergency conditions.
- l. Special Nuclear Material. Plutonium; uranium-233; uranium enriched in the isotope 235, excluding source material; separated Am-241; separated Am-243; and separated Np-237.
- m. Utilization facility.
- (1) Any equipment or device, except an atomic weapon, determined by DOE to be capable of making use of special nuclear material in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public, or peculiarly adapted for making use of atomic energy in such quantity as to be of

² See Technical Standard 3009-94, *Preparation Guide for U.S. Department of Energy Nonreactor Nuclear Facility Safety Analysis, or successor document.*

significance to the common defense and security, or in such manner as to affect the health and safety of the public; or

- (2) Any important component part especially designed for such equipment or device as determined by DOE.

8. CONTACT. Questions concerning this Order should be addressed to the Office of the Departmental Representative to the DNFSB at 301-903-4586.

BY ORDER OF THE SECRETARY OF ENERGY:



DAN BROUILLETTE
Deputy Secretary

CONTRACTOR REQUIREMENTS DOCUMENT (CRD)
DOE O 140.1, *INTERFACE WITH THE DEFENSE NUCLEAR FACILITIES*
SAFETY BOARD

This CRD establishes the requirements for DOE contractors whose contracts involve defense nuclear facilities as defined in the Definitions section of DOE O 140.1. Regardless of the performer of the work, the contractor is responsible for complying with the requirements of this CRD. In accordance with DOE Acquisition Regulation 970.5204-2, *Laws, Regulations, and DOE Directives*, the contractor is responsible for flowing down the requirements of this CRD to subcontractors at any tier to the extent necessary to ensure the contractor's compliance with the requirements. Contractors whose contracts contain this CRD must:

1. Refer all requests for information or access related to defense nuclear facilities or activities made of DOE contractors by the DNFSB or its staff to the appropriate DOE Departmental Site Liaison for determinations regarding response.
2. Only respond to DNFSB requests for information or access when formally tasked by an authorized DOE Manager or Departmental Site Liaison.
3. Assign contractor DNFSB liaisons or designees to ensure adequate interface with their Departmental Site Liaison on DNFSB-related matters. Such interface includes, but is not limited to, the following:
 - a. Representing their company on day-to-day DNFSB-related issues and interactions with the Departmental Site Liaison on DNFSB-related matters.
 - b. Being cognizant of and coordinating day-to-day DNFSB-related activities as requested by their local Departmental Site Liaison.
 - c. Notifying their DOE counterparts and the Departmental Site Liaison within 2 working days of any requested or proposed briefings to, or other direct contact with, the DNFSB or its staff.
4. Not make commitments to or discuss potential actions related to DNFSB and/or DNFSB staff interactions, site reviews, etc., with the DNFSB or its staff.
5. Have a mechanism in place to expeditiously review and release contractor documents to support the DOE target date of providing existing information to the DNFSB. Work with the Departmental Site Liaison when the material may be delayed.
6. Ensure contractor personnel contacted by the DNFSB or its staff are aware of their responsibility to not provide any DOE and/or contractor documentation to the DNFSB or its staff without prior DOE direction. NOTE: DNFSB members and staff are required to submit written requests for information to the local Departmental Site Liaison and the Office of the Departmental Representative to the DNFSB.

7. Upon request by DOE, provide a representative at any entrance or exit briefings for site visits arranged by DNFSB representatives.
8. Upon request by DOE, comply with the personnel interview processes and procedures implemented by DNFSB representatives during a site visit. This must be done in a manner that does not compromise safety. Contractors must direct their personnel who perform safety-related functions, such as control room operators, to request that interviews be scheduled at mutually convenient times when safety-related duties cannot be compromised.¹

¹ Federal representatives have a right to attend contractor interviews.

**ENABLING STATUTE OF THE
DEFENSE NUCLEAR FACILITIES SAFETY BOARD
42 U.S.C. § 2286 et seq.**

**NATIONAL DEFENSE AUTHORIZATION
ACT, FISCAL YEAR 1989
(Pub. L. No. 100-456, September 29, 1988),**

**AS AMENDED BY NATIONAL DEFENSE
AUTHORIZATION ACT, FISCAL YEAR 1991
(Pub. L. No. 101-510, November 5, 1990),
NATIONAL DEFENSE AUTHORIZATION ACT
FISCAL YEARS 1992 AND 1993
(Pub. L. No. 102-190, December 5, 1991),
ENERGY POLICY ACT OF 1992
(Pub. L. No. 102-486, October 24, 1992),
NATIONAL DEFENSE AUTHORIZATION ACT
FISCAL YEAR 1994
(Pub. L. No. 103-160, November 30, 1993),
FEDERAL REPORTS ELIMINATION ACT OF 1998
(Pub. L. No. 105-362, November 10, 1998),
NATIONAL DEFENSE AUTHORIZATION ACT
FISCAL YEAR 2001
(Pub. L. No. 106-398, October 30, 2000), AND
NATIONAL DEFENSE AUTHORIZATION ACT
FISCAL YEAR 2003
(Pub. L. No. 107-314, December 2, 2002)
NATIONAL DEFENSE AUTHORIZATION ACT
FISCAL YEAR 2004
(Pub. L. No. 108-136, November 7, 2003)
NATIONAL DEFENSE AUTHORIZATION ACT
FISCAL YEAR 2009
(Pub. L. No. 110-417, October 14, 2008)
NATIONAL DEFENSE AUTHORIZATION ACT
FISCAL YEAR 2013
(Pub. L. No. 112-239, January 2, 2013)
NATIONAL DEFENSE AUTHORIZATION ACT
FISCAL YEAR 2015
(Pub. L. No. 113-291, December 19, 2014)
NATIONAL DEFENSE AUTHORIZATION ACT
FISCAL YEAR 2016
(Pub. L. No. 114-92, November 25, 2015)**

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 23. DEVELOPMENT AND CONTROL OF ATOMIC ENERGY
SUBCHAPTER XVII.A.
DEFENSE NUCLEAR FACILITIES SAFETY BOARD
42 U.S.C. § 2286

§ 2286. Establishment of Defense Nuclear Facilities Safety Board [Atomic Energy Act, Sec. 311]

(a) Establishment.

There is hereby established an independent establishment in the executive branch, to be known as the Defense Nuclear Facilities Safety Board" (hereafter in this subchapter referred to as the "Board").

(b) Membership.

(1) The Board shall be composed of five members appointed from civilian life by the President, by and with the advice and consent of the Senate, from among United States citizens who are respected experts in the field of nuclear safety with a demonstrated competence and knowledge relevant to the independent investigative and oversight functions of the Board. Not more than three members of the Board shall be of the same political party.

(2) Any vacancy in the membership of the Board shall be filled in the same manner in which the original appointment was made.

(3) No member of the Board may be an employee of, or have any significant financial relationship with, the Department of Energy or any contractor of the Department of Energy.

(c) Chairman, Vice Chairman, and Members.¹

(1) The President shall designate a Chairman and Vice Chairman of the Board from among members of the Board.

(2) In accordance with paragraphs (5), (6), and (7),² the Chairman shall be the chief executive officer of the Board and, subject to such policies as the Board may establish, shall exercise the functions of the Board with respect to—

- (A) the appointment and supervision of employees of the Board;
- (B) the organization of any administrative units established by the Board; and
- (C) the use and expenditure of funds.

¹ Amended by Section 3202(a) of the National Defense Authorization Act for FY 2013. Pub. L. No. 112-239. Amendment revises the responsibility and authority of the Chairman, Vice Chairman and Board Members.

² Amended by Section 3202(a)(1) of the National Defense Authorization Act for FY 2016. Pub. L. No. 114-92.

(3) The Chairman may delegate any of the functions under this paragraph to any other member or to any appropriate officer of the Board.

(4) The Vice Chairman shall act as Chairman in the event of the absence or incapacity of the Chairman or in case of a vacancy in the office of Chairman.

(5) Each member of the Board, including the Chairman and Vice Chairman, shall—

- (A) have equal responsibility and authority in establishing decisions and determining actions of the Board;
- (B) have full access to all information relating to the performance of the Board's functions, powers, and mission; and
- (C) have one vote.

(6) In carrying out paragraph (5)(B), the Chairman may not withhold from any member of the Board any information that is made available to the Chairman regarding the Board's functions, powers, and mission (including with respect to the management and evaluation of employees of the Board).³

(7)(A) The Chairman, subject to the approval of the Board, shall appoint the senior employees described in subparagraph (C).

(B) The Chairman, subject to the approval of the Board, may remove a senior employee described in subparagraph (C).

(C) The senior employees described in this subparagraph are the following senior employees of the Board:

- (i) The senior employee responsible for budgetary and general administration matters.
- (ii) The general counsel.
- (iii) The senior employee responsible for technical matters.⁴

(d) Terms.

(1) Except as provided under paragraph (2), the members of the Board shall serve for terms of five years. Members of the Board may be reappointed.

(2) Of the members first appointed—

³ Added by Section 3202(a)(2) of the National Defense Authorization Act for FY 2016. Pub. L. No. 114-92.

⁴ Added by Section 3202(b)(1) of the National Defense Authorization Act for FY 2016. Pub. L. No. 114-92.

- (A) one shall be appointed for a term of one year;
- (B) one shall be appointed for a term of two years;
- (C) one shall be appointed for a term of three years;
- (D) one shall be appointed for a term of four years; and
- (E) one shall be appointed for a term of five years, as designated by the President at the time of appointment.

(3) Any member appointed to fill a vacancy occurring before the expiration of the term of office for which such member's predecessor was appointed shall be appointed only for the remainder of such term. A member may serve after the expiration of that member's term until a successor has taken office.

(e) Quorum.

Three members of the Board shall constitute a quorum, but a lesser number may hold hearings.

§ 2286a. Mission and Functions of the Board. [Atomic Energy Act, Sec. 312] ⁵

(a) Mission.—The mission of the Board shall be to provide independent analysis, advice, and recommendations to the Secretary of Energy to inform the Secretary, in the role of the Secretary as operator and regulator of the defense nuclear facilities of the Department of Energy, in providing adequate protection of public health and safety at such defense nuclear facilities.

(b) Functions.

The Board shall perform the following functions:

(1) Review and evaluation of standards.

The Board shall review and evaluate the content and implementation of the standards relating to the design, construction, operation, and decommissioning of defense nuclear facilities of the Department of Energy (including all applicable Department of Energy orders, regulations, and requirements) at each Department of Energy defense nuclear facility. The Board shall recommend to the Secretary of Energy those specific measures that should be adopted to ensure that public health and safety are adequately protected. The Board shall include in its recommendations necessary changes in the content and implementation of such standards, as well as matters on which additional data or additional research is needed.

⁵ Amended by Section 3202(b) of the National Defense Authorization Act for FY 2013. Pub. L. No. 112-239. Amendment revises the Board's mission.

(2) Investigations.

(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.

(B) The purpose of any Board investigation under subparagraph (A) shall be—

(i) to determine whether the Secretary of Energy is adequately implementing the standards described in paragraph (1) of the Department of Energy (including all applicable Department of Energy orders, regulations, and requirements) at the facility;

(ii) to ascertain information concerning the circumstances of such event or practice and its implications for such standards;

(iii) to determine whether such event or practice is related to other events or practices at other Department of Energy defense nuclear facilities; and

(iv) to provide to the Secretary of Energy such recommendations for changes in such standards or the implementation of such standards (including Department of Energy orders, regulations, and requirements) and such recommendations relating to data or research needs as may be prudent or necessary.

(3) Analysis of design and operational data.

The Board shall have access to and may systematically analyze design and operational data, including safety analysis reports, from any Department of Energy defense nuclear facility.

(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. An action of the Board, or a failure to act, under this paragraph may not delay or prevent the Secretary of Energy from carrying out the construction of such a facility.

(5) Recommendations.⁶

⁶ Amended by Section 3202(b) of the National Defense Authorization Act for FY 2013. Pub. L. No. 112-239. Amendment requires that Board recommendations specifically assess risk whenever sufficient data exists.

The Board shall make such recommendations to the Secretary of Energy with respect to Department of Energy defense nuclear facilities, including operations of such facilities, standards, and research needs, as the Board determines are necessary to ensure adequate protection of public health and safety. In making its recommendations the Board shall consider, and specifically assess risk (whenever sufficient data exists), the technical and economic feasibility of implementing the recommended measures.

(c) Excluded functions.⁷

The functions of the Board under this subchapter do not include functions relating to the safety of atomic weapons. However, the Board shall have access to any information on atomic weapons that is within the Department of Energy and is necessary to carry out the functions of the Board.

§ 2286b. Powers of Board. [Atomic Energy Act, Sec. 313]

(a) Hearings.

(1) The Board or a member authorized by the Board may, for the purpose of carrying out this subchapter, hold such hearings and sit and act at such times and places, and require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such evidence as the Board or an authorized member may find advisable.

(2)(A) Subpoenas may be issued only under the signature of the Chairman or any member of the Board designated by him and shall be served by any person designated by the Chairman, any member, or any person as otherwise provided by law. The attendance of witnesses and the production of evidence may be required from any place in the United States at any designated place of hearing in the United States.

(B) Any member of the Board may administer oaths or affirmations to witnesses appearing before the Board.

(C) If a person issued a subpoena under paragraph (1) refuses to obey such subpoena or is guilty of contumacy, any court of the United States within the judicial district within which the hearing is conducted or within the judicial district within which such person is found or resides or transacts business may (upon application by the Board) order such person to appear before the Board to produce evidence or to give testimony relating to the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt of the court.

(D) The subpoenas of the Board shall be served in the manner provided for subpoenas issued by a United States district court under the Federal Rules of Civil Procedure for the United States district courts.

⁷ Added by Section 3202 (b)(2)(B) of the National Defense Authorization Act for FY 1992 and FY 1993. Pub. L. No. 102-190.

(E) All process of any court to which application may be made under this section may be served in the judicial district in which the person required to be served resides or may be found.

(b) Staff.

(1) The Board may, for the purpose of performing its responsibilities under this subchapter—

(A) in accordance with section 2286(c)(7), hire⁸ such staff as it considers necessary to perform the functions of the Board, including such scientific and technical personnel as the Board may determine necessary, but not more than the equivalent of 130⁹ full-time employees; and

(B) procure the temporary and intermittent services of experts and consultants to the extent authorized by section 3109(b) of title 5 [United States Code] at rates the Board determines to be reasonable.

(2) The authority and requirements provided in section 2201(d) of this title [§ 161 d. of the Atomic Energy Act] with respect to officers and employees of the Commission shall apply with respect to scientific and technical personnel hired under paragraph (1)(A).¹⁰

(c) Regulations.

The Board may prescribe regulations to carry out the responsibilities of the Board under this subchapter.

(d) Reporting requirements.

The Board may establish reporting requirements for the Secretary of Energy which shall be binding upon the Secretary. The information which the Board may require the Secretary of Energy to report under this subsection may include any information designated as classified information, or any information designated as safeguards information and protected from disclosure under section 2167 or 2168 of this title [§ 147 or 148 of the Atomic Energy Act].

⁸ Amended by Section 3202(b)(2) of the National Defense Authorization Act for FY 2016. Pub. L. No. 114-92.

⁹ Amended by Section 3203(a) of the National Defense Authorization Act for FY 2015. Pub. L. No. 113-291. This amendment took effect on October 1, 2015. *Id.* at 3203(b).

¹⁰ Added by the National Defense Authorization Act for FY 1991. Pub. L. No. 101-510.

(e) Use of Government facilities, etc.

The Board may, for the purpose of carrying out its responsibilities under this subchapter, use any facility, contractor, or employee of any other department or agency of the Federal Government with the consent of and under appropriate support arrangements with the head of such department or agency and, in the case of a contractor, with the consent of the contractor.

(f) Assistance from certain agencies of the Federal Government.

With the consent of and under appropriate support arrangements with the Nuclear Regulatory Commission, the Board may obtain the advice and recommendations of the staff of the Commission on matters relating to the Board's responsibilities and may obtain the advice and recommendations of the Advisory Committee on Reactor Safeguards on such matters.

(g) Assistance from organizations outside the Federal Government.

Notwithstanding any other provision of law relating to the use of competitive procedures, the Board may enter into an agreement with the National Research Council of the National Academy of Sciences or any other appropriate group or organization of experts outside the Federal Government chosen by the Board to assist the Board in carrying out its responsibilities under this subchapter.

(h) Resident inspectors.

The Board may assign staff to be stationed at any Department of Energy defense nuclear facility to carry out the functions of the Board.

(i) Special studies.

The Board may conduct special studies pertaining to adequate protection of public health and safety at any Department of Energy defense nuclear facility.

(j) Evaluation of information.

The Board may evaluate information received from the scientific and industrial communities, and from the interested public, with respect to—

(1) events or practices at any Department of Energy defense nuclear facility; or

(2) suggestions for specific measures to improve the content of standards described in section 312(b)(1), the implementation of such standards, or research relating to such standards at Department of Energy defense nuclear facilities.

§ 2286c. Responsibilities of the Secretary of Energy. [Atomic Energy Act, Sec. 314]

(a) Cooperation.

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 under this subchapter. Each contractor operating a Department of Energy defense nuclear facility under a contract awarded by the Secretary shall, to the extent provided in such contract or otherwise with the contractor's consent, fully cooperate with the Board and provide the Board with ready access to such facilities, personnel, and information of the contractor as the Board considers necessary to carry out its responsibilities under this subchapter.

(b) Access to information.

The Secretary of Energy may deny access to information provided to the Board to any person who—

(1) has not been granted an appropriate security clearance or access authorization by the Secretary of Energy; or

(2) does not need such access in connection with the duties of such person.

§ 2286d. Board Recommendations. [Atomic Energy Act, Sec. 315]¹¹

(a) Submission of Recommendations.—(1) Subject to subsections (h) and (i), not later than 30 days before the date on which the Board transmits a recommendation to the Secretary of Energy under section 312, the Board shall transmit to the Secretary in writing a draft of such recommendation and any related findings, supporting data, and analysis to ensure the Secretary is adequately informed of a formal recommendation and to provide the Secretary an opportunity to provide input to the Board before such recommendation is finalized.

(2) The Secretary may provide to the Board comments on a draft recommendation transmitted by the Board under paragraph (1) by not later than 30 days after the date on which the Secretary receives the draft recommendation. The Board may grant, upon request by the Secretary, additional time for the Secretary to transmit comments to the Board.

(3) After the period of time in which the Secretary may provide comments under paragraph (2) elapses, the Board may transmit a final recommendation to the Secretary.

¹¹ Amended by Section 3202(c) of the National Defense Authorization Act for FY 2013. Pub. L. No. 112-239. Amendment revises the requirements of the Board's recommendations.

(b) Public availability and comment.

Subject to subsections (h) and (i), after the Secretary of Energy receives a recommendation from the Board under subsection (a)(3), the Board shall promptly make available to the public such recommendation and any related correspondence from the Secretary by—

- (1) providing such recommendation and correspondence to the public in the regional public reading rooms of the Department of Energy; and
- (2) publishing in the Federal Register—
 - (A) such recommendation and correspondence; and
 - (B) a request for the submission to the Board of public comments on such recommendation that provides interested persons with 30 days after the date of the publication in which to submit comments, data, views, or arguments to the Board concerning the recommendation.

(c) Response by Secretary.

(1) The Secretary of Energy shall transmit to the Board, in writing, a statement on whether the Secretary accepts or rejects, in whole or in part, the recommendations submitted to him by the Board under section 2286a of this title [§ 312 of the Atomic Energy Act], a description of the actions to be taken in response to the recommendations, and his views on such recommendations. The Secretary of Energy shall transmit his response to the Board within 45 days after the date of the publication, under subsection (b), of the notice with respect to such recommendations or within such additional period, not to exceed 45 days, as the Board may grant.

(2) At the same time as the Secretary of Energy transmits his response to the Board under paragraph (1), the Secretary, subject to subsection (i), shall publish such response, together with a request for public comment on his response, in the Federal Register.

(3) Interested persons shall have 30 days after the date of the publication of the Secretary of Energy's response in which to submit comments, data, views, or arguments to the Board concerning the Secretary's response.

(4) The Board may hold hearings for the purpose of obtaining public comments on its recommendations and the Secretary of Energy's response.

(d) Provision of information to Secretary.

The Board shall furnish the Secretary of Energy with copies of all comments, data, views, and arguments submitted to it under subsection (b) or (c) of this section.

(e) Final decision.

If the Secretary of Energy, in a response under subsection (c)(1), rejects (in whole or part) any recommendation made by the Board under section 2286a of this title [§ 312 of the Atomic Energy Act], the Board shall either reaffirm its original recommendation or make a revised recommendation and shall notify the Secretary of its action. Within 30 days after receiving the notice of the Board's action under this subsection, the Secretary shall consider the Board's action and make a final decision on whether to implement all or part of the Board's recommendations. Subject to subsection (i), the Secretary shall publish the final decision and the reasoning for such decision in the Federal Register and shall transmit to the Committees on Armed Services, Appropriations, and Energy and Commerce of the House of Representatives and the Committees on Armed Services, Appropriations, and Energy and Natural Resources of the Senate a written report containing that decision and reasoning.

(f) Implementation plan.

The Secretary of Energy shall prepare a plan for the implementation of each Board recommendation, or part of a recommendation, that is accepted by the Secretary in his final decision. The Secretary shall transmit the implementation plan to the Board within 90 days after the date of the publication of the Secretary's final decision on such recommendation in the Federal Register. The Secretary may have an additional 45 days to transmit the plan if the Secretary submits to the Board and to the Committees on Armed Services, Appropriations, and Energy and Commerce of the House of Representatives and the Committees on Armed Services, Appropriations, and Energy and Natural Resources of the Senate a notification setting forth the reasons for the delay and describing the actions the Secretary is taking to prepare an implementation plan under this subsection. The Secretary may implement any such recommendation (or part of any such recommendation) before, on, or after the date on which the Secretary transmits the implementation plan to the Board under this subsection.

(g) Implementation.

(1) Subject to paragraph (2), not later than one year after the date on which the Secretary of Energy transmits an implementation plan with respect to a recommendation (or part thereof) under subsection (f), the Secretary shall carry out and complete the implementation plan. If complete implementation of the plan takes more than 1 year, the Secretary of Energy shall submit a report to the Committees on Armed Services, Appropriations, and Energy and Commerce of the House of Representatives and the Committees on Armed Services, Appropriations, and Energy and Natural Resources of the Senate setting forth the reasons for the delay and when implementation will be completed.

(2) If the Secretary of Energy determines that the implementation of a Board recommendation (or part thereof) is impracticable because of budgetary considerations, or that the implementation would affect the Secretary's ability to meet the annual nuclear weapons stockpile requirements established pursuant to section 2121 of this title [§ 91 of the Atomic Energy Act], the Secretary shall submit to the President, and to such committees a report containing the recommendation and the Secretary's determination.

(h) Imminent or severe threat.

(1) In any case in which the Board determines that a recommendation submitted to the Secretary of Energy under section 2286a of this title [§ 312 of the Atomic Energy Act] relates to an imminent or severe threat to public health and safety, the Board and the Secretary of Energy shall proceed under this subsection in lieu of subsections (a) through (e) of this section.

(2) At the same time that the Board transmits a recommendation relating to an imminent or severe threat to the Secretary of Energy, the Board shall also transmit the recommendation to the President and for information purposes to the Secretary of Defense. The Secretary of Energy shall submit his recommendation to the President. The President shall review the Secretary of Energy's recommendation and shall make the decision concerning acceptance or rejection of the Board's recommendation.

(3) After receipt by the President of the recommendation from the Board under this subsection, the Board promptly shall make such recommendation available to the public and shall transmit such recommendation to the Committees on Armed Services, Appropriations, and Energy and Commerce of the House of Representatives and the Committees on Armed Services, Appropriations, and Energy and Natural Resources of the Senate. The President shall promptly notify such committees of his decision and the reasons for that decision.

(i) Limitation.

Notwithstanding any other provision of this section, the requirements to make information available to the public under this section—

(1) shall not apply in the case of information that is classified; and

(2) shall be subject to the orders and regulations issued by the Secretary of Energy under sections 2167 and 2168 of this title [§§ 147 and 148 of the Atomic Energy Act] to prohibit dissemination of certain information.

§ 2286e. Reports. [Atomic Energy Act, Sec. 316]¹²

(a) Board report.

(1) The Board shall submit to the Committees on Armed Services, Appropriations, and Energy and Commerce of the House of Representatives and the Committees on Armed Services, Appropriations, and Energy and Natural Resources of the Senate each year, at the same time that the President submits the budget to Congress pursuant to section 1105(a) of Title 31 [United States Code], a written report concerning its activities under this subchapter, including all recommendations made by the Board, during the year preceding the year in which the report is

¹² Amended by Section 3202(d) of the National Defense Authorization Act for FY 2013 (Pub. L. No. 112-239). Amendment requires submission of the Board and DOE's respective annual reports to the Committees on Armed Services, Appropriations, and Energy and Commerce of the House of Representatives and the Committees on Armed Services, Appropriations, and Energy and Natural Resources of the Senate.

submitted. The Board may also issue periodic unclassified reports on matters within the Board's responsibilities.

(2) The annual report under paragraph (1) shall include an assessment of—

(A) the improvements in the safety of Department of Energy defense nuclear facilities during the period covered by the report;

(B) the improvements in the safety of Department of Energy defense nuclear facilities resulting from actions taken by the Board or taken on the basis of the activities of the Board; and

(C) the outstanding safety problems, if any, of Department of Energy defense nuclear facilities.

(b) DOE report.

The Secretary of Energy shall submit to the Committees on Armed Services, Appropriations, and Energy and Commerce of the House of Representatives and the Committees on Armed Services, Appropriations, and Energy and Natural Resources of the Senate each year, at the same time that the President submits the budget to Congress pursuant to section 1105(a) of Title 31 [United States Code], a written report concerning the activities of the Department of Energy under this subchapter during the year preceding the year in which the report is submitted.

(c) Requirements for first annual report.

(1) Before submission of the first annual report by the Defense Nuclear Facilities Safety Board under section 316(a) of the Atomic Energy Act of 1954 (as added by subsection (a)), the Board shall conduct a study on whether nuclear facilities of the Department of Energy that are excluded from the definition of "Department of Energy defense nuclear facility" in section 318(1)(C) of such Act (hereafter in this subsection referred to as "non-defense nuclear facilities") should be subject to independent external oversight. The Board shall include in such first annual report the results of such study and the recommendation of the Board on whether non-defense nuclear facilities should be subject to independent external oversight.

(2) If the Board recommends in the report that non-defense nuclear facilities should be subject to such oversight, the report shall include a discussion of alternative mechanisms for implementing such oversight, including mechanisms such as a separate executive agency and oversight as a part of the Board's responsibilities. The discussion of alternative mechanisms of oversight also shall include considerations of budgetary costs, protection of the security of sensitive nuclear weapons information, and the similarities and differences in the design, construction, operation, and decommissioning of defense and non-defense nuclear facilities of the Department of Energy.

(d) Requirements for fifth annual report.

The fifth annual report submitted by the Defense Nuclear Facilities Safety Board under section 316(a) of the Atomic Energy Act of 1954 (as added by subsection (a)) shall include—

- (1) an assessment of the degree to which the overall administration of the Board's activities are believed to meet the objectives of Congress in establishing the Board;
- (2) recommendations for continuation, termination, or modification of the Board's functions and programs, including recommendations for transition to some other independent oversight arrangement if it is advisable; and
- (3) recommendations for appropriate transition requirements in the event that modifications are recommended.

§ 2286f. Judicial Review. [Atomic Energy Act, Sec. 317]

Chapter 7 of Title 5 [5 U.S.C. §§ 701 et seq.] shall apply to the activities of the Board under this subchapter.

§ 2286g. “Department of Energy Defense Nuclear Facility” Defined. [Atomic Energy Act, Sec. 318]

As used in this subchapter, the term "Department of Energy defense nuclear facility" means any of the following:

(1) A production facility or utilization facility (as defined in section 2014 of this title [§ 11 of the Atomic Energy Act]) that is under the control or jurisdiction of the Secretary of Energy and that is operated for national security purposes, but the term does not include—

(A) any facility or activity covered by Executive Order No. 12344, dated February 1, 1982 [42 U.S.C. § 7158 note], pertaining to the Naval nuclear propulsion program;

(B) any facility or activity involved¹³ with the transportation of nuclear explosives or nuclear material;

(C) any facility that does not conduct atomic energy defense activities; or

(D) any facility owned by the United States Enrichment Corporation.¹⁴

¹³ Pantex and NTS were added to the Board's jurisdiction by the National Defense Authorization Act for FY 1992 and FY 1993 (Pub. L. No. 102-190) which struck the following language: "with the assembly or testing of nuclear explosives or."

¹⁴ Added by amendment through the Energy Policy Act of 1992. Pub. L. No. 102-486, § 902(a)(7).

(2) A nuclear waste storage facility under the control or jurisdiction of the Secretary of Energy, but the term does not include a facility developed pursuant to the Nuclear Waste Policy Act of 1982 (42 U.S.C. 10101 et seq.) and licensed by the Nuclear Regulatory Commission.

§ 2286h. Contract Authority Subject to Appropriations. [Atomic Energy Act, Sec. 319]

The authority of the Board to enter into contracts under this subchapter is effective only to the extent that appropriations (including transfers of appropriations) are provided in advance for such purpose.

§ 2286h-1. Transmittal of Certain Information to Congress. [Atomic Energy Act, Sec. 320]¹⁵

Whenever the Board submits or transmits to the President or the Director of the Office of Management and Budget any legislative recommendation, or any statement or information in preparation of a report to be submitted to the Committees on Armed Services, Appropriations, and Energy and Commerce of the House of Representatives and the Committees on Armed Services, Appropriations, and Energy and Natural Resources of the Senate pursuant to section 2286e(a) of this title [§ 316(a) of the Atomic Energy Act], the Board shall submit at the same time a copy thereof to such committees.

§ 2286i. Annual Authorization of Appropriations. [Atomic Energy Act, Sec. 321]

Authorizations of appropriations for the Board for fiscal years beginning after fiscal year 1989 shall be provided annually in authorization Acts.

§ 2286j. Inspector general services for Defense Nuclear Facilities Safety Board¹⁶

Within 90 days of enactment of this Act [enacted Dec. 23, 2011], the Defense Nuclear Facilities Safety Board shall enter into an agreement for inspector general services with the Office of Inspector General for the Nuclear Regulatory Commission for fiscal years 2012 and 2013: *Provided further*, That at the expiration of such agreement, the Defense Nuclear Facilities Safety Board shall procure inspector general services annually thereafter.

§ 2286k. Inspector General. [Atomic Energy Act, Sec. 322]¹⁷

(a) **In General.**— The Inspector General of the Nuclear Regulatory Commission shall serve as the Inspector General of the Board, in accordance with the Inspector General Act of 1978 (5 U.S.C. App.).¹⁸

(b) **Budget.**—In the budget materials submitted to the President by the Board in connection with the submission to Congress, pursuant to section 1105 of title 31, United States Code, of the budget for each fiscal year, the Board shall ensure that a

¹⁵ Amended by Section 3202(e) of the National Defense Authorization Act for FY 2013. Pub. L. No. 112-239.

¹⁶ Added by the Consolidated Appropriations Act of 2012. Pub. L. 112-74, Div. B, Title IV, 125 Stat. 880.

¹⁷ Added by Section 3202(f) of the National Defense Authorization Act for FY 2013. Pub. L. No. 112-239.

¹⁸ Amended by Section 3202 of the National Defense Authorization Act for FY 2015. Pub. L. No. 113-291.

separate, dedicated procurement line item is designated for the services of an Inspector General under subsection (a).

RELATED LEGISLATIVE PROVISIONS

§ 3135 of the National Defense Authorization Act of 1992 and 1993 (Public Law 102-190), as amended by § 401 of the Federal Reports Elimination Act of 1998 (Public Law 105-362):

§ 3135. RESUMPTION OF PLUTONIUM OPERATIONS IN BUILDINGS AT ROCKY FLATS.

(a) RESUMPTION OF PLUTONIUM OPERATIONS.

The Secretary of Energy may not resume plutonium operations in a plutonium operations building at the Rocky Flats Plant, Golden, Colorado, until the Defense Nuclear Facilities Safety Board determines, to the satisfaction of the Board, that the Secretary's response to the Board's recommendations numbered 90-2, 90-5, and 91-1 adequately protects public health and safety with respect to the operation of such building.

(b) RESUMPTION OF PRODUCTION OF PLUTONIUM WARHEAD COMPONENTS.

The production of plutonium warhead components for any particular type of warhead may not be resumed at the Rocky Flats Plant until the later of—

(1) April 1, 1992; or

(2) 30 days after the date on which the Secretary of Defense and the Secretary of Energy certify to Congress that the production of that type of warhead is necessary in the interest of the national security of the United States.

(c) DEFINITION.

For purposes of this section, the term "plutonium operations building" means the building numbered 371, 559, 707, 771, 776, 777, or 779 at the Rocky Flats Nuclear Weapons Plant, Golden, Colorado, or any other building at such Plant in which plutonium operations are conducted.

§ 3137 of the National Defense Authorization Act for Fiscal Year 2001 (Public Law 106-398), as amended by § 3115 of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108-136):

§ 3137. CONTINUATION OF PROCESSING, TREATMENT, AND DISPOSITION OF LEGACY NUCLEAR MATERIALS.

(a) CONTINUATION.

The Secretary of Energy shall continue operations and maintain a high state of readiness at the H-canyon facility at the Savannah River Site, Aiken, South Carolina, and shall provide technical staff necessary to operate and so maintain such facility.

(b) LIMITATION ON USE OF FUNDS FOR DECOMMISSIONING OF F-CANYON FACILITY.

No amounts authorized to be appropriated or otherwise made available for the Department of Energy by this or any other Act may be obligated or expended for purposes of commencing the decommissioning of the F-canyon facility at the Savannah River Site until the Secretary submit to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives, and the Defense Nuclear Facilities Safety Board jointly a report setting forth—

(1) an assessment whether or not all materials present in the F-canyon facility as of the date of the report that required stabilization have been safely stabilized as of that date;

(2) an assessment whether or not the requirements applicable to the F-canyon facility to meet the future needs of the United States for fissile materials disposition can be met through full use of the H-canyon facility at the Savannah River Site; and

(3) if it appears that one or more of the requirements described in paragraph (2) cannot be met through full use of the H-canyon facility—

(A) an identification by the Secretary of each such requirement that cannot be met through full use of the H-canyon facility; and

(B) for each requirement so identified, the reasons why such requirement cannot be met through full use of the H-canyon facility and a description of the alternative capability for fissile materials disposition that is needed to meet such requirement.”

(C) REPEAL OF SUPERSEDED PLAN REQUIREMENT.

Subsection (C) of such section is repealed.

§ 3183 of the National Defense Authorization Act for Fiscal Year 2003 (Public Law 107-314):

§ 3183. STUDY OF FACILITIES FOR STORAGE OF PLUTONIUM AND PLUTONIUM MATERIALS AT SAVANNAH RIVER SITE.

(a) STUDY.

The Defense Nuclear Facilities Safety Board shall conduct a study of the adequacy of the K-Area Materials Storage facility (KAMS), and related support facilities such as Building 235-F, at the Savannah River Site, Aiken, South Carolina, for the storage of defense plutonium and defense plutonium materials in connection with the disposition program provided in section

3182¹⁹ and in connection with the amended Record of Decision of the Department of Energy for fissile materials disposition.

(b) REPORT.

Not later than one year after the date of the enactment of this Act [enacted December 2, 2002], the Defense Nuclear Facilities Safety Board shall submit to Congress and the Secretary of Energy a report on the study conducted under subsection (a).

(c) REPORT ELEMENTS.

The report under subsection (b) shall—

(1) address—

(A) the suitability of KAMS and related support facilities for monitoring and observing any defense plutonium or defense plutonium materials stored in KAMS;

(B) the adequacy of the provisions made by the Department for remote monitoring of such defense plutonium and defense plutonium materials by way of sensors and for handling of retrieval of such defense plutonium and defense plutonium materials; and

(C) the adequacy of KAMS should such defense plutonium and defense plutonium materials continue to be stored at KAMS after 2019; and

(2) include such proposals as the Defense Nuclear Facilities Safety Board considers appropriate to enhance the safety, reliability, and functionality of KAMS.

(d) REPORTS ON ACTIONS ON PROPOSALS.

Not later than 6 months after the date on which the report under subsection (b) is submitted to Congress, and every year thereafter, the Secretary and the Board shall each submit to Congress a report on the actions taken by the Secretary in response to the proposals, if any, included in the report.

§ 3112 of the National Defense Authorization Act for Fiscal Year 2009 (Public Law 110-417):

§ 3112. LIMITATION ON FUNDING FOR PROJECT 04-D-125 CHEMISTRY AND METALLURGY RESEARCH REPLACEMENT FACILITY PROJECT, LOS ALAMOS NATIONAL LABORATORY, LOS ALAMOS, NEW MEXICO.

¹⁹ Subtitle E (including § 3182) of the National Defense Authorization Act for FY 2003 provides for the disposition of 34 metric tons of weapons-usable plutonium pursuant to the 2000 United States and Russian Federation agreement. Section 3182 of the Act requires the Department of Energy to submit to Congress a plan for the construction of the MOX facility at the Savannah River Site to process the 34 metric tons of weapons-usable plutonium.

Of the amounts appropriated pursuant to an authorization of appropriations in this Act or otherwise made available for fiscal year 2009 for Project 04-D-125 Chemistry and Metallurgy Research Replacement (in this section referred to as “CMRR”) facility project, Los Alamos National Laboratory, Los Alamos, New Mexico, not more than \$50,200,000 may be made available until—

(1) the Administrator for Nuclear Security and the Defense Nuclear Facilities Safety Board have each submitted a certification to the congressional defense committees stating that the concerns raised by the Defense Nuclear Facilities Safety Board regarding the design of CMRR safety class systems (including ventilation systems) and seismic issues have been resolved; and

(2) a period of 15 days has elapsed after both certifications under paragraph (1) have been submitted.

Bruce Hamilton, Acting Chairman
Jessie H. Roberson
Daniel J. Santos
Joyce L. Connery

**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.