



STATE OF TENNESSEE  
DEPARTMENT OF ENVIRONMENT AND CONSERVATION  
NASHVILLE, TENNESSEE 37243-0435

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COMMISSIONER

BILL LEE  
GOVERNOR

February 21, 2019

**Via Electronic Mail to hearing@dnfsb.gov**

Bruce Hamilton, Chairman  
Defense Nuclear Facilities Safety Board  
625 Indiana Ave. NW, Suite 700  
Washington, DC 20004

RE: Public Comments Regarding Department of Energy Order 140.1  
Interface with the Defense Nuclear Safety Board

Dear Chairman Hamilton:

The Tennessee Department of Environment and Conservation (TDEC) appreciates the opportunity to provide comments on proposed changes to U.S. Department of Energy (DOE) Order 140.1, *Interface with the Defense Nuclear Safety Board* which according to DOE seeks to emphasize line management accountability and establish clear requirements and responsibilities when working with the Defense Nuclear Facilities Safety Board (DNFSB, the Board).<sup>1</sup> DOE Order 140.1 was created to define the role of DOE employees and contractors when interfacing with DNFSB. However, rather than limiting the scope of responsibilities and accountability to DOE, TDEC believes the Order as proposed inappropriately and unnecessarily restricts the roles and responsibilities of the Board. The proposed Order also limits the Board's access to facilities and documents, adds additional layers of communication, and inaccurately interprets terms currently clearly defined in statute. It also proposes changes that place protection of public health and the environment at risk. In essence, TDEC believes that DOE Order 140.1 undermines the independent oversight and efficacy of the DNFSB and its responsibilities. Further, since Oak Ridge National Laboratory (ORNL) and associated facilities fall within city limits of Oak Ridge, TN, and have high proximity to a population of over 25,000 Tennesseans, TDEC believes that DNFSB plays an important role in providing oversight and ensuring the safety of the citizens of Oak Ridge.<sup>2</sup> Moreover, DOE's investment in ORNL and Tennessee represented \$5.6 billion in economic impact and supported more than 34,000 jobs in Fiscal Year 2017.<sup>3</sup> As such, TDEC views DNFSB's role as an important safeguard for the economy of the state.

TDEC provides the following comments and concerns regarding DOE 140.1:

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<sup>1</sup> To review DOE Order 140.1, please visit <https://www.directives.doe.gov/directives-documents/100-series/0140.1-BOrder/>

<sup>2</sup> For more information on population of Oak Ridge, TN, please visit <https://www.census.gov/quickfacts/fact/table/oakridgecitytennessee/PST045217>.

<sup>3</sup> See "U.S. Department of Energy FY2017: Economic Impact in Tennessee" for more information, <https://eteconline.org/wp-content/uploads/2018/05/DOE-EIS-FY17-Report.pdf>.

- **The Order limits the role of the DNFSB in a manner inconsistent with the Atomic Energy Act.**

42 USC § 2286 created the DNFSB as an independent Board to provide analysis, advice and recommendations to the Secretary of Energy to address the protection of public health and safety. However, Order 140.1 creates definitions (see Section 7), categories (see Section 4a) and exclusions (see Section 3c) pertaining to statutorily founded roles and responsibilities of the Board. The State is concerned this is an over step of authority impeding on Congressional intent for administration of the Board.

- a. It is the Board’s purview to determine to what they need access.**

Federal code specifically states: “The Secretary 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” (emphasis added).<sup>4</sup> It is clearly stated that the determination of what the Board needs is a decision to be made by the Board itself. Despite this distinct statement, DOE Order 140.1 denies the Board access to pre-decisional and deliberative information<sup>5</sup> which can be essential to effective recommendations by the Board. The Order further asserts control over what the Board can access by allowing for the denial of information that “does not have a reasonable relationship to the functions of the DNFSB,”<sup>6</sup> which would be determined by the Department. Federal Code establishes several requirements of the DNFSB, including investigations, analysis of design and operational data, and review of facility design and construction.<sup>7</sup> This Order limits information and documents the Board can access to those that are not “pre-decisional” or “deliberative,” two undefined terms not present in the statute and further exerts authority to interpret the functions of the Board established by the Atomic Energy Act (AEA).

- b. The Order creates exemptions and exceptions inconsistent with statute.**

Section 3c of the Order lists eight “exemptions/exceptions” to the Board’s authority and oversight. Most of these are based upon statutorily defined roles, but Exemptions 2 and 3 hinder the Board’s legal role. Exemption 2 excludes “Nuclear Hazard Category 3 or Below Category 3 facilities” from the Board’s oversight.<sup>8</sup> Hazard categories are a DOE construct and assigned by them. There is no statutory definition for “hazard categories.” The AEA states the Board’s role is “at each DOE defense nuclear facility.”<sup>9</sup> Therefore, this Order uses non-statutory language to limit the Board’s access to facilities that the AEA grants the Board access.

The only limitation of the DNFSB’s access to information defined in the AEA is a limitation on the type of people who may have access, not to the information itself.<sup>10</sup> TDEC supports DNFSB having access to all facilities associated with the nuclear defense mission. This paradigm provides oversight aimed at ensuring the public health and safety.

As written, the DOE Order 140.1 would result in a DNFSB facility oversight scope reduction of 88% at NNSA and 56% at the Oak Ridge National Laboratory (ORNL).<sup>11</sup> Independent oversight of potentially

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<sup>4</sup> 42 U.S. Code § 2286c(a)

<sup>5</sup> DOE Order 140.1 Section 4b(2)(c)

<sup>6</sup> DOE Order 140.1 Section 4a(2)(e)

<sup>7</sup> 42 U.S. Code §§ 2286a(b)(2) – (4)

<sup>8</sup> DOE Order 140.0 Section 3c(2)

<sup>9</sup> 42 U.S. Code §2286a(b)(1)

<sup>10</sup> 42 U.S. Code §2286c(b)

<sup>11</sup> DNFSB Public Hearings August 28 and November 28, 2018. See Exhibit 9.

hazardous operations is a key component of protecting the public health and safety. Examples of contributions by the Board at ORR include but are not limited to:

- Leverage to ensure corrective action. In 2018 the Board was involved in suspending use of the intermediate storage tanks that support special processing precipitation operations until corrective actions were taken.<sup>12</sup>
- Influencing efficient and effective operations. In 2008, numerous recommendations by the Board regarding uranium airborne releases, processing the backlog of uranium solutions, and uranium storage were implemented.<sup>13</sup>
- Implementation of enhanced safety precautions. In 2000 and 2002 the Board's staff observed a number of safety-related matters relative to the deactivation program for the Molten Salt Reactor Experiment (MSRE) at ORNL.<sup>14</sup> In 2013, the Board held a hearing in response to concerns regarding safety at Y-12 including aging infrastructure. The Board examined near-term and long-term risk assessment and mitigation efforts.
- In 1994 the DNFSB's recommendation 94-2, which dealt with conformance in safety standards when dealing with low-level nuclear waste and disposal, resulted in actions vital to remediation work still conducted at ORR today.<sup>15</sup>

Loss of DNFSB oversight would result in reduced transparency and awareness of what is happening at the numerous facilities across the ORR. The Board's role has been critical in securing the health and safety of everyone on and around ORR.

Exemption 3 of this Order further restricts the Board's access to facilities "that do not adversely affect or have the potential to adversely affect public health and safety."<sup>16</sup> This determination is highly subjective. The Order grants DOE the authority to determine which facilities would be determined to impact public health and safety. This would negate the role of the DNFSB in determining which facilities have the potential to affect the public – an important check and balance in the system.

Exemption 4 of this Order notes the exception of facilities or activities involved with transportation of nuclear explosives or nuclear material in accordance with 42 U.S. Code §2286g(1)(B). NNSA and ORNL routinely transport potentially hazardous materials in this category that should be overseen by the DNFSB. This enhances the DNFSB's ability to protect public health and safety.

### **c. Public hearing statements contradict the language in the Order**

During DNFSB public hearings, when questioned about potential changes as a result of this order, DOE leaders often stated they did not foresee any changes in the relationship with the Board or changes to access to information or facilities.<sup>17</sup> However, as written, this Order provides several significant changes to how DOE personal and contractors interface with the DNFSB. The personal interpretation offered by DOE leaders at public hearings conflicts with the language in the Order, and may not be the interpretation of their successors. TDEC recommends the final order clarify these discrepancies.

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<sup>12</sup> DNFSB. Matthew Duncan and Dibesh Shrestha. Oak Ridge Activity Report for Week Ending September 21, 2018

<sup>13</sup> DNFSB. R. Todd Davis and David Owen. Oak Ridge Activity Report for the Week Ending February 1, 2008;

<sup>14</sup> DNFSB. John T. Conway. Letters to DOE Environmental Management. July 10, 2000 and September 23, 2002.

<sup>15</sup> DNFSB. John T. Conway. Letter to Secretary of Energy Hazel O'Leary. September 8, 1994.

<sup>16</sup> DOE Order 140.1 Section 3c(3)

<sup>17</sup> DNFSB Public Hearings August 28 and November 28, 2018. See responses by Assistant Secretary Anne White, Jay Mullis, Associate Principal Deputy Administrator William White and Associate Under Secretary Matthew Moury.

- **The Order attempts to unilaterally define what Congress established when creating the DNFSB. If new definitions are desired by DOE, they should undergo the legislative process to be enacted.**
  - a. **The definition of “Public Health and Safety” unnecessarily restricts the role of the DNFSB.**

As established in the AEA, the DNFSB serves to provide adequate protection of the public health and safety at DOE nuclear facilities.<sup>18</sup> The Order defines “public health and safety” as the “health and safety of individuals located beyond the site boundaries of DOE sites,”<sup>19</sup> despite the fact no definition is provided in the AEA. Site boundaries vary significantly by site, and on the Oak Ridge Reservation this limitation results in the exclusion of not only DOE employees and contractors, but the public and business owners. The public can easily access the Oak Ridge Reservation via multiple state roads, hunters openly use parts of the Reservation, visitors and tourists are at Oak Ridge National Laboratory and East Tennessee Technical Park daily.

- b. **The definition of “Atomic Energy Defense Activity” aims to define a statutory term.**

DOE Order 140.1 exempts facilities from DNFSB purview that do not conduct atomic energy defense activities in accordance with the AEA.<sup>20</sup> However, the AEA does not define what is included as such an activity. This Order lists specific activities to be considered AEA activities,<sup>21</sup> thus impeding statutory authority by again unilateral redefining of a statutory term.

- c. **The definition of “nuclear facility” is not the same as defined by the AEA.**

The AEA includes a specific definition of the term “Department of Energy defense nuclear facility.”<sup>22</sup> However, this order independently defines the term for use of the DNFSB’s role. Definitions of terms in DOE orders should be consistent with AEA definitions.

- **This order has the potential to result in less efficiency.**
  - a. **Channeling requests will delay work products and information.**

DOE Order 140.1 includes new requirements for contractors to refer all informational and access requests to the site liaison.<sup>23</sup> Preventing direct access to information and sites may result in lessening the Board’s ability to ensure the public health and safety.

- b. **Increased bureaucracy hinders protection of the public.**

The Order requires recommendations involving imminent danger to be provided to the President within 24 hours.<sup>24</sup> Upon notification and confirmation of a severe threat or imminent danger, all agencies should be notified in tandem to allow for immediate action to be taken to protect the public health. The Secretary should have enough power and flexibility vested in the position to implement DNFSB’s recommendations in a timely manner.

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<sup>18</sup> 42 U.S. Code § 2286a(a)

<sup>19</sup> DOE Order 140.1 Section 7h

<sup>20</sup> 42 U.S. Code § 2286g(1)(C)

<sup>21</sup> DOE Order 140.1 Section 7a

<sup>22</sup> Ibid.

<sup>23</sup> DOE Order 140.1 Section 4b(3)

<sup>24</sup> Ibid. (11)

TDEC appreciates the opportunity to comment on DOE's proposed revisions to Order 140.1 and respectfully requests that appropriate steps be taken to revise or rescind this Order to ensure the DNFSB continues to retain its independent role of protecting public health and safety. Please contact me should you have any questions regarding these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "D. W. Salyers". The signature is fluid and cursive, with the first letter of each name being capitalized and prominent.

David W. Salyers, P.E.  
Commissioner

cc: Kendra Abkowitz, TDEC, OPSP  
Dana Casey, TDEC, DOR – OR  
Kristof Czartoryski, TDEC, DOR – OR  
Chuck Head, TDEC, BOE  
Colby Morgan, TDEC, DOR – OR  
Joseph Sanders, TDEC, OGC  
Chris Thompson, TDEC, DOR