

August 13, 2011

The Honorable Peter Winokur, Chairman
Defense Nuclear Facilities Safety Board
625 Indiana Avenue NW, Suite 700
Washington DC 20004-2901

Attention: Andrew Thibadeaux

Subject: Comments on the Department of Energy's Final Decision on Recommendation 2011-1 and "information" submitted per 42 U.S.C. section 2286b(j)

Dear Chairman Winokur,

Per 42 U.S.C. section 2286d(b)(3), I submit "comments, data, views, or arguments" concerning the Department of Energy (DOE's) response (and final decision) to Recommendation 2011-1.¹

Per 42 U.S.C. section 2286b(j), I also submit "information" about events and practices in DOE's Defense Nuclear Facilities and suggestions for specific measures regarding "standards" at DOE's Defense Nuclear Facilities.

As several senior members of the DNFSB staff know,² I have been a deeply concerned licensed professional engineer (PE), employed by DOE as a nuclear safety engineer for almost 20 years. DOE's safety culture - at WTP, other Defense Nuclear Facilities, and elsewhere - is, at best, built on a foundation of sand and for reasons not directly within the power of the Secretary of Energy to change.³ The unstated (and unfounded) premise of Recommendation 2011-1 is that DOE can, by itself, create an adequate safety culture at WTP. DOE plays along with the unfounded

¹ Since DOE's response of June 30, 2011 accepted, purportedly in whole, DNFSB Recommendation 2011-1, it is DOE's "final decision" to the Recommendation, per section 2286d(d). However, review of the Federal Register notice of July 19, 2011 (Volume 76, Number 138, pages 42686-42688) indicates that DOE failed to describe its response as its "final decision" - which means it also likely failed to "transmit to the Committee on Armed Services and an Appropriations of the Senate and to the Speaker of the House of Representatives a written report containing that decision and reasoning" as required for DOE's final decisions on Board Recommendations. The online correspondence log of DOE's Representative to the DNFSB does not show such a transmittal.

² Along with Congress, media, the President, and many members of my profession of engineering, and many leaders in Christian denominations and churches

³ I could make the same argument, for the same reasons, about the safety culture in DNFSB

DNFSB premise in its final decision.

To the extent the Recommendation 2011-1 reflects the DNFSB's belief that DOE can, all by itself, with no reliance on other parties, create a healthy safety culture, it is delusional - devoid of reference to contrary (and relevant) law, standards and facts. To extent DOE's final decision appears to agree with DNFSB's delusions, it is a "lie from hell."

The DNSFB can readily verify or disprove my claim that DOE simply does not have jurisdiction to investigate claims of reprisal or other types of prohibited personnel practices (PPPs) made by DOE employees.^{4 5} Additionally, the Civil Service Reform Act of 1978 (CSRA) assigned the U.S. Merit Systems Protection Board (MSPB) the duty and authority to conduct "special studies" necessary to determine and report "as to whether the public interest in a civil service (in DOE) free of prohibited personnel practices is adequately protected." This it has failed to do, in any meaningful sense, in 33 years, as the DNFSB can readily verify.⁶

So, given the facts, which include DOE's lack of jurisdiction to investigate complaints of reprisal and lack of jurisdiction to conduct "special studies" to evaluate whether OSC is properly interpreting and applying its nondiscretionary statutory duties to protect DOE employees from reprisal and other types of PPPs, how can the DNSFB not caveat, significantly, its recommendations about DOE's safety culture?

Additionally, the issues at WTP also involve engineering ethics/rules of professional conduct for licensed professional engineers (PEs). Neither DOE nor DNFSB can have healthy safety cultures if engineering ethics have significant deficiencies in scope and implementation. Engineering ethics/rules of professional conduct as promulgated and implemented by the engineering profession/State Boards of Engineering are "standards" that the DNFSB has a positive nondiscretionary duty to review and evaluate, by 2286a(a)(1). Review of DNFSB Recommendations and Annual Reports to Congress indicates the DNFSB has failed, since its

⁴ Neither does the DNFSB for any such allegations by DNSFB employees, by the Civil Service Reform Act of 1978 and Federal Whistleblower Protection Act of 1989. By law, only the U.S. Office of Special Counsel has jurisdiction to investigate such claims. Other agencies do not have jurisdiction to investigate them, absent a formal delegation of authority from the Office of Special Counsel.

⁵ The DOE Inspector General has repeatedly told me it does not have jurisdiction to investigate my claims of reprisal, one type of PPP.

⁶ I have submitted Freedom of Information Act requests to about 20 agencies, including DOE, DNFSB, OSC and MSPB, for any records by which their heads can tell their employees that they are adequately protected from PPPs. While policies to protect their employees from PPPs may exist, there have been no assessments to determine whether they are effective in implementation.

creation, to consider the content and implementation of engineering standards related to the professional conduct and ethics of the engineers responsible for safety related to the design, construction, operation, and decommissioning of DOE's defense nuclear facilities (i.e. codes of engineering ethics/rules of professional conduct). How can DNFSB perform its duties regarding DOE's safety culture if the DNFSB does not consider such the content and implementation of such vital standards?

It appears that leadership in the Department of Energy will not exercise the moral courage necessary to substantiate or dispel my concerns about the "broken covenant" of the CSRA.⁷ But no one - not in DNSFB, nor DOE, nor OSC, nor MSPB, nor the federal whistleblower community - disagrees with my contention that DOE simply does not have, by itself, the statutory authority to create a strong safety culture in its defense nuclear facilities.

By law, DOE must rely, in essential part, on OSC to properly interpret and apply its nondiscretionary statutory duties to protect DOE employees with responsibilities for safety in those facilities from reprisal and other types of PPPs.⁸ By law, it has relied on MSPB to conduct "special studies" to determine whether these employees are adequately protected from reprisal and other types of PPPs. DOE has been greatly harmed by the failures of OSC and MSPB to properly interpret and apply with their respective nondiscretionary statutory duties, and the failed safety culture the DNFSB has identified at WTP cannot be properly understood or fixed without identifying all the essential factors to it, even if they reside outside the control of DOE.

The 3 most relevant civil service laws to the "broken covenant" are, arguably, "standards" within the jurisdiction of the DNSFB to review and evaluate - and since the DNFSB has an indisputable right to task the Office of Legal Counsel of the Department of Justice to issue an opinion on their

⁷ See www.broken-covenant.org for eye-glazing detail. I am now retaining an experienced whistleblower attorney, at cost of several thousand dollars, to give his best, impartial, objective opinion as to whether my concerns are reasonable and, if so, whether they warrant resolution at the Office of Legal Counsel. I hope his review is completed in next few weeks and I will share it with the DNFSB as more "information" as defined in its authorizing statute.

⁸ A similar argument could be made about the Department of Labor Whistleblower Protection Program for DOE contractor employees, at least in part. Since DOE contractor employees can file whistleblower reprisal complaints with it, as an alternative to DOE's internal program, if it is not complying with its duties, then DOE cannot create an adequate safety culture.

The Department of Labor has publicly admitted its whistleblower protection program has been a failure and, on August 1, 2011 announced plans to make it viable, see www.osha.gov/newsrelease.html

interpretation,⁹ I hope it will exercise that authority pursuant to its discharging its statutory mandate regarding safety in DOE.

While MSPB has the responsibility and authority to conduct “special studies” about safety culture anywhere in the Executive Branch, the DNFSB has the authority to conduct such special studies in DOE.¹⁰ Finally, the DNFSB has the authority to get assistance from other organizations in discharging its responsibilities.¹¹ I urge it to seek the assistance of organizations that have specialized knowledge in the scope and implementation of engineering ethics/rules of professional conduct.¹²

If DNFSB does these things: 1) recognizes DOE “has fallen and cannot get up” with respect to its safety culture, 2) that DOE “cannot get up” unless and until OSC and MSPB are properly interpreting and applying their duties to ensure DOE employees are adequately protected from reprisal and other types of PPPs and “engineering ethics/rules of professional conduct” are more than so much “eyewash,” and 3) uses its lawful authority to obtain interpretations about key OSC/MSPB nondiscretionary duties relative to protecting federal employees from PPPs from the Office of Legal Counsel, conducts its own special studies about whether DOE employees are adequately protected from PPPs, and/or obtains assistance from organizations expert in engineering ethics; then it would be in a position to issue coherent Recommendations about DOE’s safety culture and properly evaluate DOE’s responses/final decisions/implementation plans for such recommendations.

Until then, no.

Respectfully,

⁹ Because they affect DNFSB employees too

¹⁰ See 5 U.S.C. sections 1204(a)(3) and (e)(3) for MSPB’s duty and authority. OPM is prohibited from conducting oversight in areas assigned to MSPB, see 5 U.S.C. section 1103(a)(5). By 42 U.S.C. section 2286b(i), the DNFSB appears able to do what MSPB has failed or refused to do for 33 years - conduct a “special study” of DOE (and, as necessary, OSC) to determine “whether the public interest in a civil service free of PPPs is adequately protected.” Since the fact or perception of PPPs could well be a contributing factor in the failed safety culture at WTP, I think the DNFSB has a positive duty to conduct such a special study.

¹¹ See 5 U.S.C. section 2286b(g)

¹² National Institute of Engineering Ethics (NIEE), Board of Ethical Review of National Society of Professional Engineers (NSPE), National Council of Examiners for Engineering and Surveying (NCEES) are some such organizations

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