



STATE OF SOUTH CAROLINA

Governor's Nuclear Advisory Council

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Subject: South Carolina Nuclear Advisory Council Response to Request for Comment on New DOE Order 140.1

This letter is in response to a request for comment regarding the provisions of a recently issued Department of Energy (DOE) Order 140.1 *Interface with the Defense Nuclear Facilities Safety Board* (DNFSB). This Order was issued replacing the previous DOE Order 140.1-1B and implements new requirements for the DOE and its contractors regarding requests for access and information by the DNFSB.

The S.C. Governor's Nuclear Advisory Council opposes the provisions of this new Order.

First, it restricts direct communications by the DNFSB with the DOE and allows communication with DOE's contractors only with the approval of DOE, the agency over which the DNFSB is providing oversight, review and advice. The DNFSB is an independent Federal agency responsible for safety oversight of the Department of Energy's defense nuclear facilities. It was established to improve the operational safety of DOE's activities in recognition of the fact that the DOE uniquely holds operational as well as safety and protection missions.

Second, we find no stated intent or benefits for this revision. We have concerns about reduced DOE transparency regarding the safety of conducted operations at DOE facilities where significant hazards to public health and the environment reside. We are concerned about the possibility of hampered and untimely access to information necessary for the DNFSB to conduct its mission which is "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." (42 U.S.C. § 2286 et seq.)

Third, after a close review of the DOE Order, we have concluded that the order it is not in compliance with the enabling legislation and statute for the DNFSB. The new requirements of the DOE Order are not consistent and aligned with the intent of the enabling legislation which created the DNFSB. The DNFSB was established as an independent agency to provide additional insight and advice to DOE for the express purpose of ensuring public health and safety and protection of the environment. The requirements stated in the DOE Order governing DOE personnel and contractors are, in fact, a de facto restriction placed upon the DNFSB, an agency independent of such DOE restrictions. If there are issues related to the efficacy and efficiencies of interactions between the DOE and the DNFSB, we feel that a

more direct effort on improving collaboration should be undertaken which would not create this strong appearance of a lack of transparency by the DOE.

Our specific comments follow:

1. The Order, as written, provides for new and unreasonable restrictions on the DNFSB's access to information by limiting access and interaction directly with DOE's contractors, directing contractors not to be responsive to DNFSB requests and requiring instead that all communications be formalized and channeled through the DOE. Additionally, there is no language in the Order requiring the DOE and its contractors to respond in a timely manner to requests for access or information.

Specifically, the Order provides in item 4 b. (2):

“Ensure that DOE contractors will only respond to DNFSB requests when formally tasked to do so by an authorized Departmental liaison.”

2. The requirement of section 4 b. (2). of DOE Order 140.1, is inconsistent with the requirement of item 5 of the same Order. Section 4 b.(2) limits the ability of the DOE to cooperate in a transparent manner with the DNFSB while Section 5, as noted below, requires the Secretary to cooperate with the DNFSB.

DOE Order 140.1:

5. RESPONSIBILITIES. Secretary of Energy.

(1) Ensures cooperation with the DNFSB in support of the DNFSB's enabling statute.

3. More importantly, the new DOE Order 140.1 is in direct conflict with the language of the enabling legislation as established in law via statute passed by Congress as shown below. The statute is absolutely clear that the DOE must provide unencumbered access to whatever information the DNSFB may require to conduct their mandated mission. The statute also specifically provides that DOE contractors shall provide access and information without any restrictions other than in item (b).

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]

§ 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.

The law governing the DNFSB is very clear as to when the Secretary of Energy may deny access to information as shown below.

(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.

To summarize, we do not believe DOE Order 140.1 is in the best interest of the nation for the following reasons. Order 140.1:

1. Creates a process that is likely in conflict with the enabling legislation passed by Congress.
2. Forces DOE contractors to violate the provisions of the Atomic Energy Act, Sec. 314 governing contractor obligations to provide information to the DNFSB if they are forced by the DOE to not respond to such requests through the application of Order 140.1.
3. Allows the DOE to determine what information is appropriate for the DNSFB and how soon the DOE may respond to requests.
4. Reduces transparency of DOE operations.
5. The Secretary is creating 3 new reasons to deny information to the DNSFB which are not included in the law. The Atomic Energy Act does not empower the Secretary of Energy to do so.

Given these significant points of concern the need for these new restrictions is not understood, especially given that they were incorporated in virtual secrecy by the DOE without full vetting in the open or with public discussion and input. We are confident that the actions and recommendations taken by the DNFSB since its inception have contributed greatly to the safe operation of DOE facilities, improved the safety of the employees on the site, ensured the public interest is included in the DOE planning process and provided an avenue for an impartial third party to review DOE activities.

We urge you to reject Order 140.1 and require the DOE to comply with the Atomic Energy Act which specifies the responsibilities of the DOE to respond to all requests the DNFSB considers necessary to carry out its responsibilities.

Regards,



Rick Lee
Chairman
SC Governor's Nuclear Advisory Council

Cc: Members