



A U.S. Department of Energy
Site-Specific Advisory Board

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September 28, 2018

Mr. Doug Hintze, Manager
Environmental Management Los Alamos Field Office
3747 West Jemez Road, MS A316
Los Alamos, NM 87544

Dear Mr. Hintze,

I am pleased to enclose Recommendation 2018-03 "Interface With Defense Nuclear Facilities Safety Board" which was unanimously approved by the Northern New Mexico Citizens' Advisory Board during its meeting on September 26, 2018.

Please contact me if you have questions regarding this recommendation. We look forward to the response from the Department of Energy.

Sincerely,

Gerard Martínez y Valencia
Chair, NNMCAB

Enclosure: a/s
Cc w/encl:
U. S. Senator Tom Udall
U. S. Senator Martin Heinrich
U. S. Congressman Ben R. Lujan
Secretary Butch Tongate, NMED
David Borak, DFO (via e-mail)
M. Lee Bishop, DDFO (via e-mail)
David Rhodes, EM-LA (via e-mail)
Gil L. Vigil, Executive Director Eight Northern Indian Pueblos
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NNMCAB File

1 **NORTHERN NEW MEXICO CITIZENS' ADVISORY BOARD**
2 **Recommendation to the Department of Energy**
3 **No. 2018-03**
4 **INTERFACE WITH DEFENSE NUCLEAR FACILITIES SAFETY BOARD**
5 **Drafted by: Stanley Riveles**
6

7 **Background**
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9 On May 14, 2018, the Department of Energy (DOE) issued Order 140.1, entitled “Interface with the
10 Defense Nuclear Facilities Safety Board (DNFSB).” Effective on the date of publication, Order 140.1
11 was released without advance public notice and without opportunity for public comment. The purpose,
12 according to the Order, is to “emphasize line management accountability and establish clear
13 requirements and responsibilities when working with the Defense Nuclear Facilities Safety Board.” In
14 so doing, however, the terms of the Order appear to restrict the mission of the DNFSB and raise
15 concerns about how the effectively DNFSB will carry out its safety mission in the future.
16

17 The DNFSB is an independent organization within the executive branch, chartered by Congress with the
18 responsibility of providing recommendations and advice to the President and the Secretary of Energy
19 regarding public health and safety issues at Department of Energy defense nuclear facilities. The
20 organization does not have any regulatory authority over the conduct or activities of DOE. Instead, it
21 was created in the late 1980s, under the Atomic Energy Act, to provide expert citizen advice and
22 recommendations for consideration and decision by senior DOE officials. Independent reviews of
23 DNFSB recommendations have cited its contributions to improvements in the management and storage
24 of environmental waste; reductions in risk of fire and explosion; improvements in safety standards and
25 procedures; and long-term planning and emergency procedures.
26

27 The relationship between the Northern New Mexico Citizens' Advisory Board (NNMCAB) and the
28 DNFSB is a limited one. Most of the facilities subject to DNFSB jurisdiction fall under National
29 Nuclear Security Administration. However, there are a number of Environmental Management (EM)
30 sites at LANL and New Mexico, such as Waste Isolation Pilot Plant (WIPP) that do fall under DNFSB
31 purview. Whether or not an EM site is subject to DNFSB oversight depends on the level of danger to
32 the public and certain categories of workers. Under the DOE interpretation laid out under the new
33 Order, some undetermined number of facilities at EM sites around the country may no longer be subject
34 to DNFSB safety evaluation. (There is a question about the status of WIPP.) Also, the definitions of
35 “worker” and “public” safety are in dispute and subject to interpretation.
36

37 Order 140.1 has been the subject of substantial media attention and criticism. In addition, several public
38 interest organizations have raised specific concerns about the impact of Order-140.1. They have called
39 for clarification of the following issues:

- 40 • Exclusion of Hazard Category 3 facilities from DNFSB oversight.
- 41 • Exclusion from DNFSB oversight of DOE workers directly involved in affected operations
- 42 • Restriction of contacts between DNFSB officials and contractor personnel.
- 43 • Limitations on access of DNFSB officials to “pre-decisional” and other types of information.
- 44 • Requirement that DOE “speak with one voice” in interaction with DNFSB.
- 45 • Restrictions on staff and whistleblowers from raising safety concerns.

46 The lack of clarity perceived in the provisions of the Order have prompted interested organizations, as
47 well as elected representatives, to call for suspension of the order pending consultations and
48 reconsideration. These include the Energy Communities Alliance and the Alliance of Nuclear Worker
49 Advocacy Groups, among others. In addition, Senators Heinrich and Udall from New Mexico have
50 called for language in 2019 DOE legislation to suspend the order. In a letter approved by all four Board
51 members, the DNFSB detailed the specific reasons why the Order is inconsistent with provisions of the
52 Atomic Energy Act, under which it was created.

53
54 In an August 28, 2018, public hearing called by the DNFSB to review the Order, DOE officials
55 defended its authority to delimit oversight jurisdiction of the DNFSB vis-à-vis DOE operations.
56 William (Ike) White, Chief of Staff and Associate Principal Deputy Administrator for the National
57 Nuclear Security Administration, is quoted as saying that “it is certainly not intended to harm” the DOE-
58 DNFSB relationship.” The changes are designed to ensure DOE leaders “have ownership and
59 accountability for the decisions they make.” Other DOE officials who spoke at the hearing said they
60 believed the negative impacts of the Order have been exaggerated by the critics. They believed that the
61 actual changes would be minimal, and that any ambiguities, such as access to information and timing of
62 discussions, would be smoothed out during interactions between the two organizations. Matthew
63 Moury, Associate Under Secretary of Energy for Environment, Health, Safety and Security, defended
64 the safety record of the department and restated the DOE commitment to ensuring safety while carrying
65 out its mission. The Hearing evidently did not close the gap. At the end, Acting DNFSB Director Bruce
66 Hamilton questioned whether provisions of the Order are consistent with the Atomic Energy Act, under
67 which the DNFSB was created.

68
69 Under its Charter, the NNMCAB “provides advice and recommendations concerning the following EM
70 site-specific issues: clean-up standards and environmental restoration; waste management and
71 disposition; stabilization and disposition of non-stockpile nuclear materials; excess facilities; future land
72 use and long-term stewardship; risk assessment and management; and clean-up science and technology
73 activities.” Ultimately, the goals are protection of the natural environment and human safety. The
74 NNMCAB does not question or undervalue the commitment of DOE EM to safety standards and
75 performance. It also believes that, in the final analysis, DOE EM must take responsibility for carrying
76 out operational tasks. The Chairs also understand that the DOE and DNFSB have sometimes had policy
77 disagreements, and that reforms of DNFSB activities and procedures have been urged by independent
78 observers, such as the Government Accountability Office. At the same time, it is acknowledged that the
79 DNFSB has made and continues to make constructive contributions to improving DOE safety standards
80 and performance.

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82 **Comments and Observations**

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84 The NNMCAB believes that the health and safety of the public, as well as responsible execution of the
85 EM mission requires the consistent and transparent implementation of applicable laws and policies.
86 Disagreement on the implementation of the law among Executive Branch agencies, as is currently the
87 case, jeopardizes such implementation. By fostering the perception of organizational conflict, it
88 undermines public credibility. The absence of the opportunity for comment by the public or, indeed, by
89 the DNFSB itself, diverges from common practice and raises questions about the process that resulted in
90 the Order.

91

92 The NNM CAB takes note of the positions of Senators Udall and Heinrich who have called for
93 suspension of the Order pending review by Congress and the public. The NNM CAM also takes note of
94 the DNFSB recommendation to suspend the Order and its offer to collaborate with DOE to clarify
95 implementation.

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97 **Recommendation**

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99 The NNM CAB recommends that DOE suspend implementation of Order 140.1 pending clarification of
100 how the order will be implemented at LANL EM sites and how such implementation may differ from
101 previous practice. The NNM CAB requests DOE to provide such clarification through the EM site
102 manager, through DNFSB representatives at LANL, and at public forums. The NNM CAB recommends
103 that the DNFSB hold its next hearing in New Mexico, as Senators Udall and Heinrich have proposed.
104

105 Pertinent questions are listed below.

- 106 1. What direct and/or indirect effects would restrictions on the operations and effectiveness of
107 DNFSB have on the information and oversight mission and responsibilities of the
108 NNM CAB?
- 109 2. Can the NNM CAB receive a full accounting of the changes under this new Order affecting
110 EM sites and how it is designed to benefit the public, nuclear site workers and public
111 health?
- 112 3. How will this Order affect flow of information necessary for the NNM CAB to fulfill their
113 advisory role with DOE EM?
- 114 4. What is the actual impact of this Order on DOE/EM at LANL and its contractor?
- 115 5. Does the Order conflict legally with the Statute that created the DNFSB?
- 116 6. Why was this Order put into effect without notice in the Federal Register or public
117 hearings?
- 118 7. Why has the DNFSB been excluded from information regarding DOE Nuclear Hazard
119 Category 3 or below? At LANL, re-categorization of the Rad Lab to Nuclear Hazard
120 Category 3 takes it outside of the DNFSB's purview.
- 121 8. Is WIPP still under the purview of DNFSB?
- 122 9. What does "speaking in one voice" mean? Does this in any way restrict employees and
123 staff from raising safety concerns?
- 124 10. In reviewing past safety incidents at LANL specifically and at other nuclear facilities, how
125 will this Order change the likelihood that such safety incidents will be uncovered in time
126 for corrective action?
- 127 11. What are the expected life-cycle costs and duration of the LANL clean-up?

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129 **Intent**

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131 It is the intent of the NNM CAB to maintain its interest in this issue and update its members, as
132 appropriate, at future meetings.
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135 **References**

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