

DEFENSE NUCLEAR FACILITIES SAFETY BOARD

TO: Office Directors, Defense Nuclear Facilities Safety Board

FROM: Defense Nuclear Facilities Safety Board

DATE: March 19, 2020

SUBJECT: The National Defense Authorization Act for Fiscal Year 2020 and the Board's interface with the Department of Energy

The National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020, as passed by Congress and signed into law by President Trump,¹ made several significant amendments to the Defense Nuclear Facilities Safety Board's (Board) enabling legislation in the Atomic Energy Act of 1954, as amended (AEA).² Some of these changes are relevant to the Department of Energy's (DOE) Order 140.1, *Interface with the Defense Nuclear Facilities Safety Board*. As articulated in the Board's September 17, 2018, letter to Secretary Perry, our concerns with DOE Order 140.1 fall into four categories: (1) exemptions that limit the scope of DOE compliance based on a facility's hazard categorization, (2) a definition of public health and safety limited to individuals beyond the site boundary, (3) vesting in DOE the right to determine the scope of the Board's access right, and (4) access to deliberative information.

The NDAA included provisions that touch on all four of the topics described in our September 17th letter. In general, the changes in the NDAA serve to clarify and validate our historic interpretation of the AEA. While we do not believe any significant changes in the conduct of the Board's oversight practices are necessary following the NDAA, DOE Order 140.1 is being revised in light of the newly restated congressional intent regarding Board access, DOE cooperation, and public health and safety. Further, the Board is seeking to establish a Memorandum of Understanding or other vehicle to further define our interface with DOE. This memorandum is intended to provide guidance to DNFSB leadership and staff in light of the revised AEA and interact with DOE in the course of carrying out our oversight responsibilities.

¹ National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 113 Stat. 1198 (2019).

² Codified at 42 U.S.C. § 2286 *et. seq.*

I. Exemptions to DOE Cooperation

DOE Order 140.1 implements DOE's roles and responsibilities, including requirements to cooperate with the Board's right of access to facilities, personnel, and information. Exemptions in DOE Order 140.1 identify areas where, in DOE's interpretation, general requirement to cooperate do not apply. These areas include DOE facilities with a Hazard Category of 3 or below and facilities that do not affect the health and safety of individuals beyond the site boundary. Regarding facility hazard categorization, the NDAA included the following new language:

The access provided to defense nuclear facilities, personnel, and information under this subsection shall be provided without regard to the hazard or risk category assigned to a facility by the Secretary.³

While the AEA previously defined Board jurisdiction as reaching facilities that met the AEA definition of "Department of Energy defense nuclear facility,"⁴ the 2020 revision clarifies that Board's jurisdiction is without regard to such hazard categorization. Therefore, Board staff should continue to exercise oversight responsibilities at all defense nuclear facilities regardless of hazard categorization and pursuant to established Board policy.

With respect to whether the "public health and safety" standard reaches on-site workers, such as co-located workers and facility workers, the NDAA had an additional clarification to the Board's mission statement, discussed in more detail below.

II. Public Health and Safety

Section 3202 of the NDAA revised the Board's mission statement found at 42 U.S.C. § 2286a. The Board's revised mission statement is as follows (new language is in **bold**):

*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, **including with respect to the health and safety of employees and contractors at such facilities.**⁵*

The mission statement was initially added to the AEA in the National Defense Authorization Act for Fiscal Year 2013.⁶ The mission statement served to clarify the Board's role as a

³ 42 U.S.C. § 2286c.

⁴ 42 U.S.C. § 2286g. Note that the definition of "Department of Energy defense nuclear facility" has never included any limitation based on a facility's hazard categorization.

⁵ 42 U.S.C. § 2286a(a).

⁶ National Defense Authorization Act for Fiscal Year 2013, Pub. Law. No. 112-239, § 3202(b) (2013).

source of independent analysis, advice, and recommendations for the Secretary, who in turn serves as owner and operator of defense nuclear facilities. In so doing, the mission statement incorporated the “public health and safety” standard included in the AEA since its original passage in 1954 and incorporated into the Board’s mission in 1988.

In keeping with the tradition of the mission statement clarifying the Board’s role in relation to the Secretary of Energy and DOE, the new language clarifies the ambit of “public health and safety” with respect to employees and contractors at DOE facilities. The Joint Explanatory Statement accompanying the Conference Report to the NDAA indicates that the purpose of this language is to “clarify that the mission of the Board includes provision of recommendations covering adequate protection of employee health and safety at defense nuclear facilities.”⁷ Recommendations are the Board’s strongest statutory tool. The explanatory statement, therefore, confirms that it is Congress’s intent that the Board employ its full suite of powers in service of worker safety. Thus, the new language confirms the broad, unambiguous meaning of “public health and safety” that includes public employees and contractors at defense nuclear facilities.⁸

III. Access to Facilities, Personnel, and Information

Section 3203 of the NDAA included revisions to 42 U.S.C. § 2286c, clarifying the Secretary of Energy’s obligation to cooperate and provide the Board with access to information, facilities, and personnel. The revised section 2286c includes language making explicit that that the *only* reason the Secretary may deny access to a Board employee is on the basis of individual need-to-know or access authorization. In addition, section 3203 of the NDAA replaced the requirement for “ready access” with “prompt and unfettered access.” The revised language at 42 U.S.C. § 2286c is included below, with the NDAA changes in bold.

(a) Cooperation

*Except as specifically provided by this section, the Secretary of Energy shall fully cooperate with the Board and provide the Board with **prompt and unfettered** ~~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 **prompt and unfettered** ~~ready~~ access to such facilities, personnel, and information of the contractor as the Board considers necessary to carry out its responsibilities under this*

⁷ H. Rep. 116-333 at 1529.

⁸ See Oversight of Worker Safety by the Defense Nuclear Facilities Safety Board, Casey Q. Blaine, Acting General Counsel, February 6, 2019.

subchapter. The access provided to defense nuclear facilities, personnel, and information under this subsection shall be provided without regard to the hazard or risk category assigned to a facility by the Secretary.

(b) Access to ~~information~~ Authority of the Secretary to Deny Information

(1) The Secretary of Energy may deny access to information under subsection (a) only ~~provided to the Board~~ to any person who—

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

(B~~2~~) does not need such access in connection with the duties of such person.⁹

The NDAA's changes to the AEA regarding cooperation of the Secretary primarily serve to clarify and strengthen the Board's right to access to facilities, personnel, and information the Board considers necessary to carry out its responsibilities under the AEA. Historically, the Board was to be afforded "ready access" without regard to any common law evidentiary privilege or facility hazard categorization. Despite this, DOE Order 140.1 purports to restrict the Board's access to facilities that, within DOE's judgment, could not affect the health and safety of individuals outside the site boundary.¹⁰ Moreover, DOE Order 140.1 requires additional approvals within DOE before information can be provided to the Board; i.e., the information is not automatically produced upon the Board's request.¹¹

By replacing "ready access" with "prompt and unfettered access," Congress clarified and strengthened two essential elements of the Board's access right: (1) that the access to information be without unreasonable temporal delays; and (2) that the access be without restriction and unencumbered by unreasonable bureaucratic processes within DOE. The word "prompt" explicitly incorporates a temporal immediacy to DOE's allowance of access.¹² The word "unfettered" indicates that there are no exceptions to the Board's right of access, and that DOE may not place unnecessary bureaucratic hurdles between the Board and the requested access.¹³ Further, pursuant to the revised section 2286c(b), the Secretary is **only** permitted to deny access to **individuals**, and not to the agency as a whole,

⁹ 42 U.S.C. § 2286c.

¹⁰ Interface with the Defense Nuclear Facilities Safety Board, DOE O 140.1 at 1, 14, May 14, 2018.

¹¹ *Id* at 3-4; Desk Reference Supporting DOE Order 140.1, Interface with the Defense Nuclear Facilities Safety Board, § 3.1, available at <https://ehss.energy.gov/deprep/deskreference/drSupporting3.asp>.

¹² Merriam-Webster defines "prompt" as "being ready and quick to act as occasion demands" or "performed readily or immediately", <https://www.merriam-webster.com/dictionary/prompt>.

¹³ Merriam-Webster defines "unfettered" as "free and unrestrained", <https://www.merriam-webster.com/dictionary/unfettered>.

based on the particular individual's security clearance and need-to-know. This provision should not be used by DOE as an outright reason to deny an information or access request made by the Board.

IV. Deliberative Process Information

The NDAA also added the following new prohibition at 42 U.S.C. 2286c on public dissemination of information received from DOE:

(c) Application of nondisclosure protections by Board.

The Board may not publicly disclose information provided under this section if such information is otherwise protected from disclosure by law, including deliberative process information.¹⁴

“Protected from disclosure by law” includes several categories of information, including classified information, unclassified controlled nuclear information, and safeguards information. In addition, the inclusion of deliberative process information as an illustrative example indicates that the Board should also safeguard information protected from disclosure in civil discovery processes, such as attorney client communications, attorney work product, executive privilege, and other applicable privileges.

By including a subsection requiring the Board to not disclose information “otherwise protected from disclosure by law, including deliberative process information,” the AEA now implicitly recognizes that the Board will receive such information in the normal course of business. The Board has traditionally protected such information from disclosure when provided by DOE.¹⁵ This statutory change requires that the Board continues to do so in the future.

Notably, the provision requiring the Board to not disclose information applies to information “provided under this section.” Information provided under another section of the AEA is not included in this prohibition, notably the Secretary's response to a draft Recommendation pursuant to Section 2286d. In the event of a final Recommendation, publication of the “recommendation and any related correspondence from the Secretary” remains mandatory pursuant to Section 2286d.

¹⁴ 42 U.S.C. § 2286c.

¹⁵ See e.g. Operating Procedure 11.2-1, *Posting of Public Calendar and Outside Entity Briefing Materials on the Internet*, § 5(b) (requiring staff members to respect DOE markings regarding legally protected information when posting information to the internet).

V. Next Steps

Moving forward, it is incumbent on Board management to ensure that the staff understands the changes wrought by the NDAA while continuing to elevate access issues to Board attention. The Board staff must remain cognizant of their need to promptly engage management in the event of any unusual delays so issues can be elevated, as appropriate. Finally, it is of course incumbent on all staff and management to conduct themselves in a manner consistent with this memorandum, the Board's strategic plan, and all policy documents following the NDAA.

AFFIRMATION OF BOARD VOTING RECORD

SUBJECT: Board Interpretative Statement re the NDAA for FY20 and Interface with DOE

Doc Control#: 2020-300-0013

The Board acted on the above document on 03/19/2020. The document was Approved.

The votes were recorded as:

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIPATING	COMMENT	DATE
Bruce Hamilton	✓	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	03/19/2020
Jessie H. Roberson	✓	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	03/19/2020
Joyce L. Connery	✓	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	03/19/2020

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Board Members.

Nicholas Moore

Executive Secretary to the Board

Attachments:

1. Voting Summary
2. Board Member Vote Sheets

DEFENSE NUCLEAR FACILITIES SAFETY BOARD

NOTATIONAL VOTE RESPONSE SHEET

FROM: Bruce Hamilton

SUBJECT: Board Interpretative Statement re the NDAA for FY20 and Interface with DOE

Doc Control#: 2020-300-0013

DATE: 03/19/2020

VOTE: Approved

Member voted by email.

COMMENTS:

None

Bruce Hamilton

Nicholas Moore

From: Bruce Hamilton
Sent: Wednesday, March 18, 2020 4:55 PM
To: Nicholas Moore; ExSec
Subject: RE: Notational Vote: Doc#2020-300-013, Board Interpretative Statement re the NDAA for FY20 and Interface with DOE - BLUE FOLDER

I approve.

I have no comments.

From: Nicholas Moore
Sent: Wednesday, 18 March, 2020 4:51 PM
To: Bruce Hamilton <JBHamilton@dnfsb.gov>; Jessie Roberson <JessieR@dnfsb.gov>; Joyce Connery <JConnery@dnfsb.gov>
Cc: Glenn Sklar [REDACTED]; Chris Roscetti [REDACTED]; Joseph Gilman [REDACTED]; Katherine Herrera [REDACTED];
Richard Tontodonato [REDACTED]; Douglas Minnema [REDACTED]; Timothy Dwyer [REDACTED]; Donita Vines
[REDACTED]; Dana Hienz [REDACTED]; Todd Davis [REDACTED]; ExSec [REDACTED]
Subject: Notational Vote: Doc#2020-300-013, Board Interpretative Statement re the NDAA for FY20 and Interface with DOE - BLUE FOLDER

This email is an electronic record of Notational Vote. Voting ballot will follow shortly. Also, accepting electronic votes.

DEFENSE NUCLEAR FACILITIES SAFETY BOARD NOTATIONAL VOTE RESPONSE SHEET

FROM: Members of the Board
SUBJECT: Board Interpretative Statement re the NDAA for FY20 and Interface with DOE

DOC#2020-300-013

This item is ready for Notational Vote. The approved amendment Doc#2020-300-013A has been incorporated in the final version. A redline-strikeout version is attached to document the approved changes.

Approved _____
Disapproved _____
Abstain _____
Recusal – Not Participating _____

DEFENSE NUCLEAR FACILITIES SAFETY BOARD
NOTATIONAL VOTE RESPONSE SHEET

FROM: Jessie H. Roberson

SUBJECT: Board Interpretative Statement re the NDAA for FY20 and Interface with DOE

Doc Control#: 2020-300-0013

DATE: 03/19/2020

VOTE: Approved

Member voted by email.

COMMENTS:

None

Jessie H. Roberson

Nicholas Moore

From: Jessie Roberson
Sent: Wednesday, March 18, 2020 5:52 PM
To: Nicholas Moore
Cc: ExSec
Subject: Re: Notational Vote: Doc#2020-300-013, Board Interpretative Statement re the NDAA for FY20 and Interface with DOE - BLUE FOLDER

Approved without comment. Jessie Roberson

Sent from my iPhone

On Mar 18, 2020, at 4:51 PM, Nicholas Moore [REDACTED] wrote:

This email is an electronic record of Notational Vote. Voting ballot will follow shortly. Also, accepting electronic votes.

**DEFENSE NUCLEAR FACILITIES SAFETY BOARD
NOTATIONAL VOTE RESPONSE SHEET**

FROM: Members of the Board
SUBJECT: Board Interpretative Statement re the NDAA for FY20 and Interface with DOE

DOC#2020-300-013

This item is ready for Notational Vote. The approved amendment Doc#2020-300-013A has been incorporated in the final version. A redline-strikeout version is attached to document the approved changes.

Approved_____
Disapproved_____
Abstain_____
Recusal – Not Participating_____

COMMENTS:

Below_____
Attached_____

DEFENSE NUCLEAR FACILITIES SAFETY BOARD

NOTATIONAL VOTE RESPONSE SHEET

FROM: Joyce L. Connery

SUBJECT: Board Interpretative Statement re the NDAA for FY20 and Interface with DOE

Doc Control#: 2020-300-0013

DATE: 03/19/2020

VOTE: Approved

COMMENTS:

None

Joyce L. Connery