

December 12, 1995

Dr. John F. Ahearne (Co-Chair)  
Mr. Gerald F. Scannell (Co-Chair)  
Advisory Committee on External Regulation  
of Department of Energy Nuclear Safety  
1726 M Street, NW  
Washington, DC 20036

Gentlemen:

I appreciated the opportunity to be a part of this study and to contribute to the lively and thought-provoking exchanges that took place. The subject matter is certainly one that merits attention by our lawmakers, either to confirm that the status quo suffices or to make changes in the national interest.

In highlighting issues, the Committee's report reveals the complexity of the existing regulatory framework relative to the Department of Energy's nuclear programs. Our deliberations on these issues showed considerable diversity of ideas as to fixes, general agreement on some broad concepts, and lack of unanimity on any number of the detailed recommendations.

I recognize the difficulty of achieving consensus on all aspects of a report of such detail, given the diversity of backgrounds and interest of Committee membership. However, I find so much of that detail at variance with my own views that I cannot endorse the report as a whole. I do endorse a number of the principal conclusions and observations.

My views with respect to the report are summarized in the enclosure. I request these views be included as a part of the report submitted to the Secretary of Energy.

Respectfully,  
[signed 12/12/95]  
Joseph J. DiNunno  
Board Member

Enclosure

## **STATEMENT BY JOSEPH J. DiNUNNO**

### **RELATIVE TO THE**

## **REPORT OF THE ADVISORY COMMITTEE ON EXTERNAL REGULATION**

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## A. With respect to the report in general:

1. The report in too many places, in my view, shows lack of factual rigor, impartiality, and objectivity that should obtain for a report of this importance.
  - a. The report too often makes claims and assertions that are judgement calls, representing viewpoints of either individuals or segments of the Committee, but not necessarily the Committee as a whole.
  - b. Where the report summarizes factual information and published critiques of the Department of Energy (DOE) and predecessor agencies by impartial entities, it is quite useful and informative. The report also identifies well major issues that must be examined by the Administration and Congress, if they elect to pursue the matter of increased external regulation as the Committee recommends. However, the multiplicity of detailed solutions offered as recommendations is another matter. They reflect too often the aspirations of special interest groups. The detailed meeting records (transcripts) of the spirited exchanges that took place at the Committee's public, plenary sessions attest to considerable differences in views on so-called detailed recommendations which are offered in the report as Committee consensus.
2. The report targets the statutory authority given to DOE and its predecessor agencies to establish requirements for assuring radiation protection and then implementing them (self-regulation) as the major source of difficulty. The assertion is that such authority allowed mission objectives to be given greater priority than protection of the environment, and that such authority led to environmental degradation, now the subject of costly cleanup and environmental restoration efforts. That, historically, there was substantial environmental contamination of sites and production facilities, is indisputable. However, the report labors hard to make this case as the rationale for advocating external regulation, implying that only such a measure will assure that DOE in the future would be more constrained from perpetrating environmental damage than in the past. In evaluating this premise, I believe it important to bear in mind the following:
  - a. DOE is subject today to many more statutory environmental requirements than in the pre-1980 period in which most of the conditions requiring remedial actions were created. The DOE mission today and the way it is constrained in its operations are far different from the pre-1980's DOE. The report should be read with the understanding that what the Committee really addressed was not so much whether there is to be external regulation, but rather whether there is to be MORE external regulation.
  - b. Much of the fix sought by elimination of all vestiges of self-regulation by DOE has already been accomplished by environmental protection statutes. For a large fraction of the current DOE mission (cleanup and environmental restoration), problems identified do not stem from lack of regulation but perhaps from too many regulators in overlapping roles. A large fraction of DOE's program today falls into this regulatory arena. More external regulation will further complex not simplify this problem.
  - c. The Committee's deliberations on external regulation centered much upon nuclear materials

and their regulation under existing provisions of the Atomic Energy Act (AEA) and the Resource Conservation and Recovery Act (RCRA). Since such special materials are crucial to the sustenance of the weapons program, external regulation of their uses raises substantive issues involving and potentially affecting national security.

B. With respect to principal conclusions and observations:

Notwithstanding the above observations, there are concepts and conclusions presented in the report that I do endorse, some fully and others with qualifications. Those I wish to highlight with commentary are the following:

1. **Agree**: There is no longer any reason, in principle, to allow DOE to continue to self-regulate its nuclear activities, with the exception of certain aspects of defense nuclear facilities still required to support the weapons surveillance and stewardship program.

**However**: The added costs may provide a compelling reason for not so proceeding. The cost penalty to achieve change will be a function of the specifics of any external regulatory regime put in place. The value-added from additional regulation relative to the costs still remains to be established. I recognize that the Committee did not have the time or resources to analyze the costs relative to benefits of the regulatory schemes suggested in the report. However, the report has taken the position that costs for the legal changes recommended will be justified by increased safety and operating efficiencies. Such assertions without substantive supportable facts are particularly vulnerable to scepticism and discredit. It is critical in this era of Federal budget austerity to be able to demonstrate that additional regulatory schemes will generate the projected benefits in terms of increased safety of the worker and the public and do so at costs justifiable by those benefits.

Regulatory processes, including public participation opportunities such as those provided for cleanup under environmental statutes, may have to be limited for security reasons in regulation of the residual defense nuclear complex and for cleanup programs requiring expedited action. In my view some of the changes offered as recommendations in the report are likely to lead to more, not less, administrative proceedings and litigation of issues in the courts. Such implications deserve much more scrutiny than was possible within the time and resource constraints of this study.

In establishing the Defense Nuclear Facilities Safety Board (DNFSB), Congress determined that DOE defense nuclear facilities should be subject to independent, external oversight. Some form of external oversight should be retained for aspects of defense nuclear facilities not subjected to such external regulatory processes as might be decided for non-defense nuclear activities.

2. **Agree**: External regulation offers the potential for enhanced public credibility and greater stability in the framework and execution of DOE's safety management program.

**However**: although increased public confidence and assurance may result, claims for significant increase in safety over a well-executed internal ES&H program with DNFSB oversight are not supported.

3. **Agree**: Both the DNFSB and the NRC are existing agencies whose current activities make them lead candidates for assuming such additional external regulatory functions the Congress may decide to authorize. Neither agency, as currently authorized and organized, is viewed to be totally suitable to administer to the perceived future needs for external regulation of the DOE.

**However**: The record of the Committee's deliberations has shown a strong bias by the drafters towards regulation by the Nuclear Regulatory Commission (NRC). The final report still shows some evidence to that effect although better balance has been achieved.

The single new agency concept discussed in the report represents an ideal against which possibilities for restructuring existing agencies might well be measured. The weighing of pros and cons of restructuring using either the Board or the NRC, should in my view, focus on the relative complexities of bringing one or the other closer to that ideal. On this choice, Committee members could not come to closure. My own views are that it is preferable to add to the functions and resources of the Board, a small agency, more readily adaptable and already dedicated to independent external oversight of the most hazardous of DOE nuclear programs than to divert the focus of the NRC now dedicated to regulation of the commercial industry. On this, reasonable persons might well disagree.

4. **Agree**: In moving to external regulation as a better way for assuring that basic ES&H objectives are achieved, the fulfillment of the nation's national security mission is not to be thwarted or unduly impeded. This is presented as the general sense of the Committee.

**However**: The fulfillment of this objective could be significantly affected by report recommendations for specific language changes to existing provisions of both the AEA and the RCRA. I do not endorse such recommendations. The implications of such changes deserve much more scrutiny than the Committee was able to provide, not only for their effects upon DOE's nuclear activities but also upon the commercial industry as well. These statutory changes include:

- altering the basic safety mandate of the Atomic Energy Act (page 28\*);
- Permitting state regulation of nuclear facility safety, using standards inconsistent with Federal Standards (Page 30\*); and
- Provision for citizen suits directly against DOE and its contractors in addition to new layers of Federal regulation of DOE (Page 37\*).

5. **Agree**: DOE's efforts to strengthen its internal system must continue, and any transition to increase external regulation must be carefully thought out and managed. The report underscores the need for an effective internal health and safety system and urges the Department to continue efforts already underway to clarify and strengthen that system.
6. **Agree**: Flexibility is a key attribute needed in any regulatory regime devised by an external regulator to deal with the diversity of activities and facilities that make up the DOE complex.

**However**: although this attribute is recognized in the report as essential, so much of the detail presented as recommendations would deny such flexibility. (See commentary under 4. above)

Respectfull Submitted:

Joseph J. DiNunno  
12/12/95

\* Page numbers refer to report draft dated December 7, 1995. These may be different for the final report.