

1 CHAIRMAN CONWAY: Thank you. A.J.

2 VICE CHAIRMAN EGGENBERGER: I have no  
3 questions.

4 DR. MANSFIELD: This was very valuable.  
5 Thank you.

6 CHAIRMAN CONWAY: It was very helpful to  
7 us. I appreciate the time you've given us this  
8 morning. Thank you very much.

9 MS. CARPENTER: Thank you.

10 CHAIRMAN CONWAY: Now, as we indicated in  
11 our previous announcements, we always invite members  
12 of the public and representatives of the public to  
13 testify. I've been informed that Mr. Richard Miller,  
14 Government Accountability Project [GAP], would like to  
15 speak this morning. Is he present? Mr. Miller,  
16 welcome.

17 MR. MILLER: Good morning, Mr. Chairman  
18 and members of the Board. My name is Richard Miller  
19 and I thank you for carving me into your schedule  
20 today. I hope I can emulate the crispness of the  
21 briefing that you've received from your previous  
22 speakers. It's often the case that you come to speak  
23 to advise people on your views and you learn more from  
24 coming to the meetings than you ever think you could  
25 possibly convey.

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1           Let me just say today that I'm here to  
2 address really one question and make a plea to you.  
3 GAP, as you may know, represents whistleblowers  
4 throughout the federal government and now in the  
5 private sector and also has a project which oversees  
6 the health, safety, and environmental policies and  
7 practices within the nuclear weapons complex.

8           I spent many years working for the Oil,  
9 Chemical, and Atomic Workers Union. We've had many  
10 interactions over the years in the past. In my new  
11 capacity, I'm continuing some of these activities, one  
12 of which included work with the Congress on the  
13 passage of a provision, Section 3173 of the Defense  
14 Authorization Act, FY03 [Fiscal Year 2003], which  
15 amended the Atomic Energy Act to provide for the  
16 Department of Energy to convert its orders governing  
17 industrial and construction safety into enforceable  
18 regulation. Now as you know, these have not been  
19 enforceable regulations since the passage of the  
20 Atomic Energy Act.

21           Today, of course, the Office of  
22 Environment, Safety and Health, Office of Enforcement,  
23 is responsible for the Price-Anderson regulations at  
24 10 CFR 835. This provision would add responsibility  
25 to that particular organization by adding industrial

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1 and construction safety to their enforcement regime.

2 I would like to just briefly outline  
3 several key salient points within the legislation and  
4 offer several comments and, as I say, a plea to the  
5 Defense Board, which I will get out up front so you  
6 know what the task is before I tell you what the  
7 subject is. People always want to know: what does he  
8 really want to talk to the Chairman about?

9 What we want to talk to the Chairman  
10 about, and members of the Board and staff, is this:  
11 that this is a process, in this rulemaking, which has  
12 to be concluded (at least by statute) by the second of  
13 December this year, which we would be very grateful  
14 for your scrutiny, oversight, and careful  
15 consideration. The basis for this - I must say and at  
16 the risk of seeming over-gracious towards you - is  
17 that you all stepped in at a point in the process of  
18 this legislation that highlighted the problem.

19 DOE Order 440.1A [Worker Protection  
20 Management for DOE Federal and Contractor Employees],  
21 which really is the core of DOE safety orders for  
22 industrial and construction safety was, shall we say,  
23 potentially under attack for elimination by certain  
24 individuals as part of the DOE order review process  
25 that was underway in an effort to eliminate redundant

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1 or needless regulation. And on March 29, 2002, Mr.  
2 Chairman, you directed a letter on the order review  
3 process which highlighted the fact that this should  
4 not happen, and we're grateful for you doing so  
5 because we think that reinforced certain staff  
6 perspectives within DOE. However, we thought it was  
7 important to legislate that point. It was just too  
8 important, at least from the experience of ourselves  
9 and other worker representatives in the nuclear  
10 weapons complex.

11 These regulations after being promulgated  
12 will become enforceable one year thereafter, which  
13 gives DOE a year to basically come into compliance  
14 with rules that they say they already are in  
15 compliance with. But we learned with the USEC [United  
16 States Enrichment Corporation] experience that it  
17 does take time to come into compliance with rules that  
18 you say you are in compliance with.

19 The second question is level of  
20 protection. As the statute and the accompanying  
21 report language, which is attached to my testimony,  
22 provides that Order 440.1A is that particular standard  
23 which incorporates, of course, the OSHA [Occupational  
24 Safety and Health Administration] regulations, except  
25 where there are clearly recognizable hazards in the

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1 DOE complex, such as with explosive safety, beryllium,  
2 biohazards, and so forth.

3 The law provides the Secretary with  
4 flexibility in three areas, and I want to focus on  
5 this just briefly. One is to tailor the  
6 implementation of regulations to reflect activity and  
7 hazards within a particular work environment. The  
8 second is to deal with facilities that are in the D&D  
9 [deactivation and decommissioning] phase. Third is to  
10 achieve national security missions of the Energy  
11 Department in an efficient and timely manner. I don't  
12 know if that means "waiver" or not.

13 What we do know is that these were  
14 narrowly crafted areas for flexibility, basically to  
15 provide assurance that common sense would be  
16 effectuated in its implementation, so, for example, no  
17 sense in applying weapons explosives regulations when  
18 you are dealing with demolition and conventional  
19 explosives. For example, there is no reason to  
20 upgrade a facility for railing and guard rails and  
21 tagout lockout in a de-energized building that's going  
22 to be demolished. Lastly, of course, there's no need  
23 at any point to compromise national security missions.  
24 Again, the question becomes, "Should there be a waiver  
25 process?"

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1                   Finally, deeming assessed fines or  
2 penalties up to \$70,000 per day, and continuing  
3 violations constitute a separate violation. In  
4 addition, DOE is authorized and directed to put into  
5 all of its contracts a provision which would call for  
6 a graded reduction in work fees for violations  
7 proportionate to severity.

8                   At the Department of Energy's urging, the  
9 conferees included what's called a "choice of  
10 penalties" section, a provision which provides that  
11 for any violation of these new regulations, the  
12 Secretary shall pursue either civil penalties or  
13 contract penalties, but not both. This was well  
14 articulated by the contracting community, including  
15 the current Under Secretary before he assumed that  
16 responsibility. It was no surprise to see that  
17 entered in the debate. In having vigorously opposed  
18 that provision with no success, I must confess here  
19 today, the "choice of penalty" provision I think is  
20 certainly open to whether or not this hamstring's DOE's  
21 ability both to control its contractors and assure  
22 adequate levels of safety. Let me just offer briefly  
23 some quick comments.

24                   DR. MANSFIELD: May I ask just a question?  
25 Do you expect that the contracts that incorporate

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1 penalties would remain unrenegotiated in the face of  
2 regulation? That is, why should a contractor sign up  
3 for an extra penalty under the contract when he's  
4 already forced into regulation to accept the penalty?

5 MR. MILLER: Currently under 10 CFR Part  
6 835, for example, both of those apply. You can have  
7 both a contract penalty for a nuclear safety violation  
8 and the same with security violations under 234(b).  
9 My view is: why treat the industrial safety rules  
10 differently than you treat nuclear and security?

11 DR. MANSFIELD: My question was: will the  
12 contractor treat it differently and essentially  
13 negotiate not to have that?

14 MR. MILLER: Well, here's the question.  
15 Under all DOE M&O [Management and Operating]  
16 contracts, as I understand it, and in the M&I  
17 [management and integration] contracts, the primes,  
18 and I'm willing to stand corrected here, they  
19 specifically provide a boilerplate provision that says  
20 its regulations are promulgated, and the contractors  
21 must comply with future regulations. So it's up to  
22 DOE, I guess, at that point to determine whether they  
23 want their contractors to be customer-friendly or not.

24 This is an area where you all have done an  
25 excellent job of focusing on how DOE has dealt with

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1 the necessary and sufficient standards. The Defense  
2 Board has noted that DOE's field offices tend to lack  
3 expertise and sufficient staff to tailor necessary and  
4 sufficient safety requirements for each job.

5 Frankly, we are concerned about even worse  
6 than that, which is eliminating minimum safety  
7 requirements in favor of these vague performance-based  
8 approaches, which most people that I've talked to  
9 agree in reality is a reduced emphasis on safety. We  
10 have lots of competition between milestones and  
11 safety, not different than we've had at any other  
12 period in this self-regulatory system. Particularly,  
13 we just want to draw attention and compliment you on  
14 your focus as a Board on the Fernald situation and  
15 what was really an extraordinary level of accidents  
16 with Mactech and others out there due to inexperienced  
17 workers.

18 Secondly, I just want to flag for you just  
19 as a matter of process, DOE has not opened the door  
20 and said, "Come on in," like you've done here today  
21 and said, "Hey, how can we think about this statute  
22 constructively?" So our hope is that DNFSB may have  
23 better access than us mere members of the public,  
24 troublesome and burdensome ones to be tolerated, I  
25 suspect.

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1           Next, we're concerned that the regulations  
2           may allow DOE to delegate authority to its field  
3           offices under this rulemaking process where they will  
4           establish the health and safety requirements. It  
5           means that basically the contractors will be writing  
6           their own health and safety requirements and telling  
7           DOE, "Here's what we're willing to be enforced  
8           against." We think that's probably the wrong  
9           approach, particularly where Order 440.1A has both  
10          very solid procedural provisions, overall management  
11          requirements in the contractor directive provisions,  
12          as well as incorporating the OSHA regulations with  
13          those exceptions that we talked about, beryllium  
14          explosives and so forth. In addition, DOE's beryllium  
15          rule, we point out, is not enforceable through fines  
16          and penalties, even though it's an excellent rule.

17                 Two other points here is that we would  
18                 like the Defense Board to review the staffing plan for  
19                 the Office of Enforcement, so that it's going to be  
20                 able to adequately oversee this expanded capacity. We  
21                 don't know who else is competent to come in and do a  
22                 management review to see if this is going to work and  
23                 whether the self-reporting system, which is really the  
24                 backbone of the existing Price-Anderson regime is  
25                 adequate and appropriate for industrial and

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1 construction safety violations.

2 I guess those are our thoughts. I'm  
3 sorry. I went on a little bit longer.

4 CHAIRMAN CONWAY: That's fine.

5 MR. MILLER: I welcome any questions you  
6 may have.

7 CHAIRMAN CONWAY: Very good. As always,  
8 we are very pleased to have you come before us and  
9 keep in communication with us. Since you made  
10 reference to a letter of March 29<sup>th</sup>, I will have that  
11 put into the record at this point so people will  
12 understand what you referred to.

13 MR. MILLER: That will be terrific. Mr.  
14 Chairman, if you or your staff would like to get back  
15 to us to discuss what role or responsibilities you  
16 might assume, it appears to us at least that your  
17 statutory authorities would allow you to delve into  
18 this area. We would welcome the answer "Yes" to our  
19 request.

20 CHAIRMAN CONWAY: Okay. Also as I  
21 mentioned earlier, we will keep the record open until  
22 October 10<sup>th</sup>, if you want to add anything else in the  
23 meeting, if you think about it and want to put  
24 anything more in. Also, is there anyone present that  
25 would like to speak? I have at least one other

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1 individual who has asked some time to submit a  
2 statement for the record, which as I said, we will  
3 keep the record open until the 10<sup>th</sup> of October. Kent.

4 MR. FORTENBERRY: Yes. I wanted to take  
5 the opportunity before we close here. Certainly the  
6 NR folks subjecting themselves to our questions and  
7 whatnot, I appreciate. That was done from a success  
8 story. I want to particularly express my admiration  
9 of the folks here from the NRC allowing us to probe  
10 and question what was a major issue for you. So I  
11 really appreciate that. It shows frankness and your  
12 interest in understanding what has happened and how to  
13 deal with it. I appreciate that.

14 CHAIRMAN CONWAY: We thank you all for  
15 coming, and we will recess at this point. I'll make  
16 note that it's 12:00 noon. We'll recess at this point  
17 subject to the call of the Chair. As we mentioned, we  
18 will have additional hearings in the future,  
19 continuing to explore the subject matters that we  
20 discussed here today. Thank you again. Off the  
21 record.

22 (Whereupon, the above-entitled matter was  
23 concluded at 12:03 p.m.)

24  
25

CERTIFICATE

This is to certify that the foregoing transcript in the  
matter of: Meeting

Before: Defense Nuclear Facilities Safety Board

Date: September 10, 2003

Place: Washington, DC

represents the full and complete proceedings of the  
aforementioned matter, as reported and reduced to  
typewriting.



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