CHAIRMAN CONWAY: Thank you. A.J.

VICE CHAIRMAN EGGENBERGER: I have no questions.

DR. MANSFIELD: This was very valuable.

Thank you.

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

MS. CARPENTER: Thank you.

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

MR. MILLER: Good morning, Mr. Chairman and members of the Board. My name is Richard Miller and I thank you for carving me into your schedule today. I hope I can emulate the crispness of the briefing that you've received from your previous speakers. It's often the case that you come to speak to advise people on your views and you learn more from coming to the meetings than you ever think you could possibly convey.
Let me just say today that I'm here to address really one question and make a plea to you. GAP, as you may know, represents whistleblowers throughout the federal government and now in the private sector and also has a project which oversees the health, safety, and environmental policies and practices within the nuclear weapons complex.

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

Today, of course, the Office of Environment, Safety and Health, Office of Enforcement, is responsible for the Price-Anderson regulations at 10 CFR 835. This provision would add responsibility to that particular organization by adding industrial
and construction safety to their enforcement regime.

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

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

DOE Order 440.1A [Worker Protection Management for DOE Federal and Contractor Employees], which really is the core of DOE safety orders for industrial and construction safety was, shall we say, potentially under attack for elimination by certain individuals as part of the DOE order review process that was underway in an effort to eliminate redundant
or needless regulation. And on March 29, 2002, Mr. Chairman, you directed a letter on the order review process which highlighted the fact that this should not happen, and we're grateful for you doing so because we think that reinforced certain staff perspectives within DOE. However, we thought it was important to legislate that point. It was just too important, at least from the experience of ourselves and other worker representatives in the nuclear weapons complex.

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

The second question is level of protection. As the statute and the accompanying report language, which is attached to my testimony, provides that Order 440.1A is that particular standard which incorporates, of course, the OSHA [Occupational Safety and Health Administration] regulations, except where there are clearly recognizable hazards in the
DOE complex, such as with explosive safety, beryllium, biohazards, and so forth.

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

What we do know is that these were narrowly crafted areas for flexibility, basically to provide assurance that common sense would be effectuated in its implementation, so, for example, no sense in applying weapons explosives regulations when you are dealing with demolition and conventional explosives. For example, there is no reason to upgrade a facility for railing and guard rails and tagout lockout in a de-energized building that's going to be demolished. Lastly, of course, there's no need at any point to compromise national security missions. Again, the question becomes, "Should there be a waiver process?"
Finally, deeming assessed fines or penalties up to $70,000 per day, and continuing violations constitute a separate violation. In addition, DOE is authorized and directed to put into all of its contracts a provision which would call for a graded reduction in work fees for violations proportionate to severity.

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

DR. MANSFIELD: May I ask just a question? Do you expect that the contracts that incorporate
penalties would remain unrenegotiated in the face of regulation? That is, why should a contractor sign up for an extra penalty under the contract when he's already forced into regulation to accept the penalty?

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

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

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

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

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

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

Secondly, I just want to flag for you just as a matter of process, DOE has not opened the door and said, "Come on in," like you've done here today and said, "Hey, how can we think about this statute constructively?" So our hope is that DNFSB may have better access than us mere members of the public, troublesome and burdensome ones to be tolerated, I suspect.
Next, we're concerned that the regulations may allow DOE to delegate authority to its field offices under this rulemaking process where they will establish the health and safety requirements. It means that basically the contractors will be writing their own health and safety requirements and telling DOE, "Here's what we're willing to be enforced against." We think that's probably the wrong approach, particularly where Order 440.1A has both very solid procedural provisions, overall management requirements in the contractor directive provisions, as well as incorporating the OSHA regulations with those exceptions that we talked about, beryllium explosives and so forth. In addition, DOE's beryllium rule, we point out, is not enforceable through fines and penalties, even though it's an excellent rule.

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

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

CHAIRMAN CONWAY: That's fine.

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

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

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

CHAIRMAN CONWAY: Okay. Also as I mentioned earlier, we will keep the record open until October 10th, if you want to add anything else in the meeting, if you think about it and want to put anything more in. Also, is there anyone present that would like to speak? I have at least one other
individual who has asked some time to submit a
statement for the record, which as I said, we will
keep the record open until the 10th of October. Kent.

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

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

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

[Signature]