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December 28, 1987

NIOSH Docket Office
E-23
1600 Clifton Road, N.E.
Atlanta, GA 30333

Re: Regulations Proposed for 42 C.F.R. Part 84

Dear Sir:

Nucor Steel-Nebraska filed original comments by letter of December 22, 1987. Attached are two (2) additional copies of those comments inadvertently omitted at time of previous mailing.

I apologize for any inconvenience.

Donald M. Mosiman
Donald M. Mosiman

DMM/bl
Enclosures

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Re: Regulations Proposed for 42 C.F.R. Part 84

Dear Sir:

The following comments on the proposed regulations for respiratory protective devices, 42 C.F.R. Part 82, noticed at 52 Fed. Reg. 32402-43 (Aug. 27, 1987) (hereafter "Proposed Rules") are submitted on behalf of Nucor Steel-Nebraska (Nucor). Nucor also wishes to adopt by reference and thereby join in the more detailed remarks and comments submitted on behalf of the Respiratory Protection Group of the Industrial Safety Equipment Association, Inc. (ISEA).

Nucor Steel-Nebraska (Nucor), a division of Nucor Corporation, is a primary manufacturer of specialty steel products employing solely a scrap metal recycling process. Nucor is located in Norfolk, Nebraska. The facility produces both carbon and alloy steels and is among the most modern and efficient mills in the United States. Steel scrap is melted down in electric arc furnaces and then transformed into products such as angles, rounds, channels, flats and coils. The plant has been operating since 1973 and currently employs approximately 495 people.

Nucor is currently required under Occupational Safety and Health Act (OSHA) regulations to supply particulate air-purifying respirators to certain of its employees. 29 C.F.R. § 1910.1025 (1986). The regulations specify that Nucor must select such respirators from among those approved by the Mine Safety and Health Administration (MSHA) and the National Institute for Occupational Safety and

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Health (NIOSH) under 30 C.F.R. Part 11. The Proposed Rules are designed, in large part, to replace the certification scheme embodied in those regulations and, therefore, will directly touch Nucor by affecting the universe of such approved respirators.

Nucor has been informed by its respirator supplier that the respirators Nucor uses could not pass the certification test requirements under the Proposed Rules. Nucor's supplier has also indicated that, given state-of-the-art technologies, the respirator modifications needed to meet the standards proposed would likely make the respirator onerous to wear. Nucor is also informed that respirators offered by other safety equipment manufacturers would be similarly affected.

Nucor's primary concern with the Proposed Rules is that its employees who use respirators are ambulatory and any change in a respirator that serves to make it additionally uncomfortable (e.g., increase in weight, bulk, in- or exhalation resistance, heat or perspiration) will, in all likelihood, be unwelcomed, perhaps to the point that workers would refuse to wear them. (See, for example, the attached artist's rendition of the changes that the Proposed Rules would have on gas and vapor respirators given state-of-the-art technology.) If analogous changes would be required of the type of respirators that Nucor uses, such changes undoubtedly would be met with great reluctance by employees or outright refusal. This could pose a two-part problem to any employer, including Nucor. First, there would be reduction in worker safety and health, which runs directly contrary to the rationale underpinning the Proposed Rules and the concern of employers. Second, the employer could face fines under OSHA and its implementing rules because the workers would not be wearing the mandatory respirators. Thus, there may actually be a reduction in the safety of those workers for whom the Proposed Rules are designed to protect. There may as well be a possible increase in employer exposure to OSHA penalties due to the refusal of workers to wear uncomfortable safety equipment and not because respirators are not provided.

The Proposed Rules would also, if promulgated, require an applicant to conduct workplace or simulated workplace testing. See, e.g., 42 C.F.R. Subpart D (proposed). NIOSH will either issue or deny respirator certification after reviewing a report prepared by the applicant on its workplace or simulated workplace test results. Id. While the tests will be required and reviewed

under the Proposed Rules, NIOSH has only "begun to develop model protocols for performing such tests in a proven and reliable manner." 52 Fed. Reg. 32402. This, unfortunately handicaps the certification process and makes meaningful review and comment on the Proposed Rules impossible. Such protocols are critical to the analysis of any report and, consequently, the certification process. That, in turn, means that such protocol cannot be separated from the operative regulations. NIOSH itself would not have a "benchmark" that has been publicly reviewed upon which its critique of an applicant's report can be grounded. An applicant would literally be acting at its peril in its formation of workplace or simulated workplace testing protocol, as the applicant also would be without any such standard protocol upon which it could draw from, or refer to, in design of its work place or simulated work place testing.

With the certification decision resting in large part upon NIOSH review of the workplace testing (which necessarily will include a NIOSH review of the applicant's protocol for such testing), the standard model protocols against which NIOSH will judge the applicant's protocols must be subject to review and comment during the rulemaking and not after the fact, as NIOSH appears to propose. Such model protocols will be an integral part of the certification rules and thus legally cannot be made publicly available for the first time at the point of final rulemaking.


It is ironic to note that, on one hand, NIOSH specifically solicited comment on "the need for a requirement in the final rule for prior approval by NIOSH of [an applicant's] workplace or simulated workplace test protocols based upon minimum protocol criteria established by NIOSH" (52 Fed. Reg. 32403), but, on the other, fails to have its model protocol subjected to public comment as required by the Administrative Procedure Act, 5 U.S.C.A. § 553(c)(1977). NIOSH apparently feels that there may be a need for prior review of applicants' testing protocols but fails to see the legal, as well as practical, need for its model protocols to undergo public review. For similar reasons, the correlation that NIOSH assumes will ultimately be established between simulated and actual workplace testing (52 Fed. Reg. 32403) must also be subjected to public comment before the regulations become final, in part so that meaningful review of the proposed simulated workplace testing plan can be conducted.

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Nucor is gravely concerned that NIOSH has proposed, in effect, to abandon its practice of certifying respirators for use in general industry and construction. NIOSH apparently will only do so for respirators employed in mining. NIOSH, by certifying solely respirators designed for use in mining, will leave non-mining industry without certified respirators that reflect the individual circumstances and particular needs of such industry. This would seem contradictory to the generally laudable objective that is otherwise sought under the Proposed Rules which require field or workplace testing to reflect respirator performance in the field. The effect of the NIOSH position may be to compromise the occupational safety and health needs of significantly more workers than are protected by the NIOSH shift to certifying only respirators for mining.

Nucor lastly takes issue with characterization of the Proposed Rules as not resulting in a major increase in cost or prices to consumers or individual industries. 52 Fed. Reg. 32404. Nucor currently uses in excess of 20,000 replaceable respirator filters on an annual basis (representing approximately 1.3 filters per worker per 8 hour shift). Nucor has been informed that the increase in cost to bring the respirators it presently uses into conformity with the Proposed Rules will be a multiple of the present cost of \$1.60 per unit. The total annual increase to Nucor could approximate \$150,000, which, respectfully, is substantial. The annual increase would ultimately have to be passed on to the consumers of Nucor's products.

Respectfully submitted,
Nucor Steel-Nebraska,
a Division of Nucor Corporation


by Donald M. Mosiman its Attorney