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United States Senate

COMMITTEE ON HEALTH, EDUCATION,
LABOR, AND PENSIONS
WASHINGTON, DC 20510-2300

Senator Edward M. Kennedy's Labor Policy Office

Date: May 6, 2003

To: Diana Miller

Fax Number: 513-533-8230

From: Portia Wu

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Message:

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Congress of the United States
Washington, DC 20510

May 6, 2003

Dr. John Howard, Director
National Institute of Occupational Safety and Health
Department of Health and Human Services
Hubert H. Humphrey Building
200 Independence Avenue, S.W.
Room 715H
Washington, D.C. 20201

RE: NIOSH proposed rules on Special Exposure Cohorts

Dear Dr. Howard:

We are writing to express our strong concern regarding the Department's proposed rule relating to Special Exposure Cohorts (68 *Federal Register* 11294 et seq.), which has been developed by the National Institute for Occupational Safety and Health (NIOSH) pursuant to the Energy Employees Occupational Illness Compensation Program Act of 2000 (EEOICPA). Two key issues in the rule deviate substantially from Congressional intent in crafting this law. A number of us were involved in the deliberations that led to the EEOICPA, and all of us are concerned that it be implemented in accordance with the understanding at the time of enactment of how key features of the Act would operate.

Our first objection to the proposed rulemaking deals with a provision that permits NIOSH to limit the list of "specified cancers" in a given Special Exposure Cohort to fewer than the 22 cancers listed or incorporated by reference in the definition of "specified cancers" in section 3621(17) of EEOICPA. There is nothing in the statute or in the record of Congressional deliberation that supports this change in how EEOICPA would operate. Indeed, the legislative history clearly delineates Congressional intent that a "fixed list" of specified cancers was intended to serve as the basis for compensation for members of a Special Exposure Cohort, and not a variable list drawn up at the discretion of the agency. As specifically stated in the *Congressional Record* for October 12, 2000 (page S10377), "Once a group of workers was placed in the category [i.e., the Special Exposure Cohort], it would be eligible for compensation for a fixed list of radiation-related cancers."

Those of us who participated in deliberations during the conference on the provisions of EEOICPA fully expected that all specified cancers would apply to any group of workers added to a Special Exposure Cohort. We would strongly urge that this aspect of the proposed rule be conformed to the letter and spirit of the law.

Our second objection relates to the meaning proposed for the terms "feasible" and "sufficient accuracy" with respect to dose reconstruction by NIOSH. The proposed rule would take the position that it is feasible to estimate radiation dose with sufficient accuracy "if HHS has access to sufficient information to estimate the maximum radiation dose that could have been incurred in plausible circumstances by any member of the class." We believe that this standard is inconsistent with clearly expressed Congressional intent. The pertinent discussion in the legislative history (also from page S10377) is as follows:

There are several reasons why reconstructing a dose might be infeasib[le]. First, relevant records of dose may be lacking, or might not exist altogether. Second, there might be a way to reconstruct the dose, but it would be prohibitively expensive to do so. Finally, it might take so long to reconstruct a dose for a group of workers that they will be all dead before we have an answer that can be used to determine their eligibility.

This passage evidences a much broader test of feasibility, motivated by a concern that the dose reconstruction process could become so complicated that the essential aim of the statute (i.e., compensation) would be frustrated. We are concerned that the standard proposed for adoption by NIOSH will result in dose reconstructions being attempted in many of the circumstances that we sought to exclude when crafting the statute. In particular, the final rule should clarify the use of a time limit, after which time it would be presumed that NIOSH had determined that the "not feasible to estimate with sufficient accuracy" standard had been met. Thus, we would urge, at a minimum, that the rule incorporate these three factors into its definition of feasibility, and that the rule specify parameters related to time and cost to serve as a means of considering, in a uniform manner, the issues of excessive length of time and prohibitive cost.

In addition to these concerns that are motivated by what we see as a misreading of the statute, we have two other concerns about the rule, as proposed.

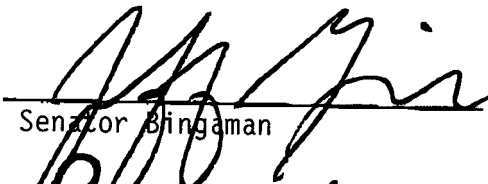
First, the rule proposes that when NIOSH is able to construct "worst case estimates" of dose, workers will be excluded from membership in the Special Exposure Cohort. Worst case estimates are used in a different and apparently incompatible way, though, in the existing dose reconstruction rule (42 C.F.R. § 82). Claimants should not fall into a regulatory void between this proposed rule and the dose reconstruction rule. Either claimants should receive a final determination of their eligibility for compensation under 42 C.F.R. § 82 or they should be included in the Special Exposure Cohort. The proposed rule should clarify, as well, that § 3626 does not require a demonstration that no "worst case estimate" can be reached for inclusion in the Special Exposure Cohort.

Second, while the proposed rule references the fact that there will be numerous administrative processes (such as appeals), these processes are not described in any way that can provide for informed public comment. Yet, the administrative processes will be very important to claimants who will seek their rights under EEOICPA. We believe that

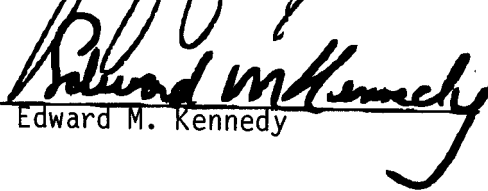
additional information needs to be made available along these lines, so that this topic can be addressed in the final rule.

Thank you for your attention and consideration of our concerns. We are looking forward to hearing from you or your designee soon about the steps you will take to address them. Staff members who were involved in the negotiations that led to EEOICPA are available if your staff has any questions: Robert Simon of the staff for the Senate Committee on Energy and Natural Resources (224-9201), John Drake or Ed Wallace of the staff of the Senate Committee on Finance (224-4515), and Holly Fechner of the staff for the Senate Committee on Health, Education, Labor and Pensions (224-5441).

Sincerely,



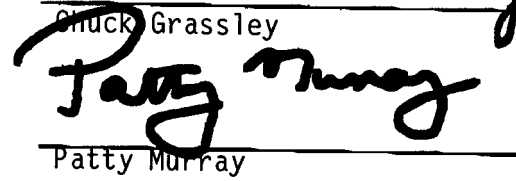
Senator Bingaman



Edward M. Kennedy



Chuck Grassley



Patty Murray