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Sent: Monday, August 26, 2002 12:50 PM
To: niocindocket@cdc.gov
Cc: Jordan Barab; Peg Seminario; Delisbur@infi.net; rrabinow@starpower.net
Subject: AFL-CIO Comments on Proposed SEC Rules

August 26, 2002
NIOSH Docket Office
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Sent Electronically to NIOCINDOCKET@CDC.GOV

Dear Sir or Madam:

The American Federation of Labor and Congress of Industrial Organizations represents more than 14 million working people throughout the country. Many of our members worked during the Cold War in America's nuclear weapons program and were represented by our affiliated unions, including the unions of the Building and Construction Trades Department and the Paper, Allied-Industrial, Chemical and Energy Workers International Union (PACE).

After decades of denial by the Department of Energy and the Atomic Energy Commission, Congress determined in 2000 that these men and women should receive "timely, uniform, and adequate compensation" for their diseases from exposure to radiation, beryllium, or silica while working in DOE nuclear weapons-related programs and, where applicable, their survivors.

Sadly, the proposed rules of the National Institute for Occupational Safety and Health for designating classes of employees as members of the Special Exposure Cohort for compensation under the Energy Employees Occupational Illness Compensation Act would completely frustrate the will of Congress and prolong the suffering of these patriots. The proposed rules fail for the following reasons:

- (1) NIOSH has created an adversarial proceeding in which a class of workers without resources is once again pitted against the Government with its unlimited resources;**
- (2) NIOSH has shifted the burden of proof from the Department of Energy to show that records are complete on to workers to prove that records are totally incomplete.**

Proposed dose reconstruction standards are improper
Specifically, Section 83.2 (a), of the proposed rules sets forth a subjective standard for deciding whether or not NIOSH will determine that a radiation dose can be reconstructed. A "determination by NIOSH that it cannot complete a dose reconstruction for the claimant" is inconsistent with the Act. Section 3626(b) sets a higher standard: "it is not feasible to estimate with sufficient accuracy the radiation dose the class received."

NIOSH cannot deny Special Exposure Cohort petitions if NIOSH can assert, without defining its terms, that it can "complete a dose reconstruction." The proposed rule would permit NIOSH to "complete" dose reconstructions which are inaccurate, unreliable and miss significant amounts of unmonitored dose.

The proposed rule relies upon a definition of "endangered the health" (Proposed Rule Section 83.5) that rests on "statistical estimates of the probability that a specific cancer was caused by specific amount and types of ionizing radiation." Since the radiation dose of these workers is assumed to be an unknown (and not knowable), how can NIOSH determine whether their health was endangered using potential radiation dose estimates? If NIOSH does not have a good enough dose for estimating the likelihood of causation, how is it possible that there is a good enough dose for deciding whether a worker was endangered?

There will be situations where NIOSH will not be able to determine the potential level of radiation to which the class was exposed and the rule does not state what NIOSH will do in these situations. The rule's silence implies that NIOSH has only one choice. When it cannot estimate a potential dose, it will conclude that the class was not endangered. This would be an unreasonable and illogical conclusion. Additionally, it would be an unlawful execution of the SEC provision, which is to provide compensation to those claimants who "may have been endangered" and for whom "sufficient" dose data does not exist. NIOSH should, if it sticks with the proposed "endangerment" algorithm, create alternative methods when it cannot estimate "potential" dose.

The proposed rule relies upon unacceptable biostatistics and bad policy

Congress never intended for these workers to be subjected to pseudo-science and circular reasoning.

Instead, NIOSH should use the approach Congress applied to Special Exposure Cohorts at the gaseous diffusion plants: (250 days and the individuals in class were monitored for radiation or should have been monitored) or, in cases where the potential dose cannot be estimated, NIOSH should assign a dose that exceeds the threshold for the most radio-sensitive cancer to meet the endangerment test. Additional criteria will have to be developed for acute exposures of a shorter duration (e.g., fought fire with pyrophoric radioactive materials) that can serve as a proxy for endangerment.

Since NIOSH has superior access to exposure records than do the workers Congress has determined to protect, NIOSH should investigate each petition for inclusion in the Special Exposure Cohort by requesting exposure records from DOE or its contractor. A NIOSH request should be subject to a time limit. If DOE or its contractor fails to provide records within a reasonable amount of time, NIOSH should assume that no adequate records exist to reconstruct the dose. Petitions should not wait indefinitely for exposure records that may never be produced

Dose reconstruction process is excessive

Moreover, under the proposed rule, since claimants will not be able to perform dose reconstructions themselves, they will be subjected to a flawed NIOSH dose reconstruction framework. Unless claimants allow NIOSH to try and fail to perform a dose reconstruction, NIOSH will not consider the petition for the Special Exposure Cohort. This means a petitioner will face the following steps:

Estimated Time Line for SEC Claims Process under Proposed Rule

Step No.	Procedure	Duration
1	Filing of claim	1-3 month
2	DOL request for DOE employment records	3-6 months

3	Referral to NIOSH dose reconstruction	6-9 months
4	Review by dose reconstruction by DOL	1-3 months
5	Submission of SEC Petition	1-3 months
6	NIOSH review of petition	3 months
7	Board on Worker and Radiation Health review	3-6 months
8	Congressional review	6 months
	Total duration	24-40 months

Congress never intended to prolong the suffering of these dedicated workers. On the contrary, it sought to make every effort to assist them to file their claims and to resolve them as quickly as possible.

The AFL-CIO also joins in the flowing concerns, which have been raised by the Building and Construction Trades Department:

1. Presentation of Statutory Requirements. NIOSH errs in two interpretations of the statute:

a. In Background Section (D)—Statutory Requirements for Designating Classes of Employees as Members of the Cohort, NIOSH misstates the statute. The notice should be corrected to read: "The Board's advice is to be based on 'exposure assessments by radiation health professionals, information provided by DOE and such other information as the Board considers appropriate.'" This is a very significant distinction, because "such other" would mean "other than exposure assessment by radiation health professionals" which "other such" would mean "same as exposure assessment by radiation health professionals." This is more than a semantic difference, because all the rest of the rule derives from this interpretation. It is the AFL-CIO's position that Congress left for the Board to define what is meant by "such other."

b. One of the criteria for inclusion in the SEC as defined in the statute is "It is not feasible (our emphasis) to estimate with sufficient accuracy the dose that the class received." In Background Section (E) NIOSH has chosen to interpret this to mean that "...if NIOSH can successfully reconstruct the radiation doses of the members of the class..." then the class does not qualify for SEC membership. In other words, NIOSH has chosen to interpret "feasible" in the most narrow, technical or scientific manner. Yet, "feasible" has many other meanings. It may be technically possible to reconstruct a dose, but if it cannot be done in a timely manner, then it is not feasible. The AFL-CIO position is that Congress had in mind a much broader interpretation of "feasible" than NIOSH has included in its rule.

2. The Role of the Advisory Board

This rule limits the role of the Advisory Board to a post-hoc review of actions taken by NIOSH on individual petitions. Yet, Congress clearly implied a more proactive role for the Advisory Board, including determining the kind of information that petitioners can rely on to make their case [See EEOICPA Section 3626 (a)(2)]. Therefore, before this rule is promulgated, NIOSH should go back to the Advisory Board and ask it to define what type of information—both quantitative and qualitative – can be used by petitioners to make their case. For instance, we can envision a board saying that qualitative information on deficient exposure monitoring could be acceptable. Under EEOICP, an affidavit from co-workers is sufficient proof of employment where DOE cannot verify employment from its records. Why could not affidavits from workers be used to determine that exposure records are sufficiently

deficient to warrant inclusion of a class in the SEC?

3. NIOSH's Singular View of the Process is Ill Advised.

NIOSH has concluded that the process for establishing additional members of the SEC should follow a single procedure, in which petitioners in effect must prove NIOSH dose reconstruction process wrong before NIOSH will accept their petition. This singular approach is both impractical and ill advised. We note with regret that in the year that has passed since EEOICP went into effect NIOSH has managed to complete only seven (7) dose reconstructions; that is, NIOSH has reviewed the exposure information on seven workers only. This is hardly encouraging to those who believe that workers should be entitled to an expedited hearing on their claims, given that these claims are for cancers, many of which have poor outcomes. We also think that NIOSH has reasoned poorly when it decided that only one approach is permissible. There are many different ways in which determination of a petition can be made, and it seems that NIOSH has selected the most cumbersome one as its sole approach.

4. NIOSH's Assumption that Risk Can be Extrapolated is not Validated

NIOSH believes that if it can establish a dose reconstruction for one worker, then it can extrapolate that finding to other workers similarly situated. Thus, a petition for class may not be approved if as few as one dose reconstruction can be made for members of that class. The amount of uncertainty that surrounds this belief has not been determined. For instance, in CPWR-NIOSH T-BEAM projects attempting to standardize exposure estimates for construction trades workers doing similar tasks, the variability in exposures has been so great as to make a prediction of exposure levels infeasible in many cases. It is likely that this will be the case with radiation as well. Therefore, we don't think the fact that a dose reconstruction can be made for one worker should be used to evaluate a petition for SEC coverage for a class of workers.

5. The Proposed Process Does Not Appear Timely

NIOSH proposes a process with many steps, but does not sufficiently place time limits on each of them (paragraph 83.10(a)). As noted in table 1, we estimate that the NIOSH part of the process (steps 3-7) will take 15-18 months, and it is possible that a petition for a class could be dragged out indefinitely. As noted above, the timeliness of dose reconstructions to date is not encouraging, and while NIOSH has an explanation for why so few have been completed to date, claimants are not getting satisfaction. Clearly, the procedures for reviewing a SEC petition are much more complex than reviewing a claim from a single worker. We think NIOSH has a duty to impose deadlines upon itself in the review of SEC petitions, which if not met, gives the petitioner a favorable decision. It seems that 30 days is a reasonable time to perform the initial review.

Concern about the Basic Construct of the Rule

The AFL-CIO also questions whether this proposal is appropriately characterized as a rule under the Administrative Procedures Act. The reason for this concern is the potential for highly arbitrary actions under this proposal. NIOSH has stated that this proposal will be interpreted on a case by case basis suggesting more that this is a

general statement of NIOSH policy and does not have the specificity for a rule. Further, the proposal as presented has the potential of becoming "a house of cards," with this rule being dependent on another rule (for dose reconstruction) first failing. It would be appropriate for NIOSH to revise the proposal by incorporating comments received, and then reissuing the draft as a guidance document, rather than a rule. This will enable NIOSH to be more flexible in their interpretation and action as case issues develop.

**Sincerely,
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Coordinator for Workers' Compensation**

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