

Miller, Diane M.

From: Randy Rabinowitz [rrabinow@starpower.net]

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To: NIOCINDOCKET@CDC.GOV

Subject: EEOICPA Comments

Attached are PACE'S Comments to NIOSH's proposed rule

May 1, 2003

Sent Electronically to NIOCINDOCKET@CDC.GOV

NIOSH Docket Office
Robert A. Taft Laboratories
M S C34
4676 Columbia Parkway
Cincinnati, OH 45226

To the Docket Officer:

These comments are submitted on behalf of the Paper, Allied-Industrial, Chemical and Energy Workers International Union (PACE) in response to the Proposed Procedure for Designating Classes of Employees as Members of the Special Exposure Cohort Under the Energy Employees Occupational Illness Compensation Program Act of 2000 published in the *Federal Register* on March 7, 2003.

PACE represents 320,000 workers nationwide in oil, chemical, pulp, paper, auto parts and nuclear industries. We represent workers at eleven Department of Energy (DOE) sites in the DOE nuclear complex and workers at a number of current and former beryllium and other atomic weapons employers. Additionally, PACE represents tens of thousands of former workers potentially affected by this proposed rule. These procedures for designating additional members of the special exposure cohort (SEC) will govern whether our members and their families, and thousands of other workers, receive compensation for radiation induced cancers.

PACE applauds NIOSH for revising the proposed procedures in response to comments NIOSH received from PACE and other unions. This revised proposal reflects important changes to the proposed procedures. Nevertheless, despite some improvements, NIOSH's revised proposed procedures remain fundamentally flawed. They are premised on a narrow, mistaken interpretation of EEOICPA, one that assumes that Congress expressed a preference for adjudicating cancer claims individually, on the basis of dose-reconstruction. Nothing in the statutory language or legislative history of EEOICPA support NIOSH's interpretation. Rather, Congress intended the procedures established under §3626 to represent a viable, alternative basis for large groups of similarly situated workers to obtain compensation on a basis comparable to

that which applies to gaseous diffusion plant workers. Any interpretation of EEOICPA which creates unwarranted obstacles for workers seeking inclusion in the SEC is inequitable and inconsistent with Congress' intent.

What are the Statutory Criteria for Inclusion in the SEC?

Congress established two alternative procedures by which employees who are not legislatively included within the SEC may receive compensation under EEOICPA. Under §3623, an employee with a specified cancer may receive compensation only if that cancer was “at least as likely as not related to employment . . .” Compensation may be awarded only after NIOSH completes a “reasonable estimate of dose” and that dose shows that the employee is within “the upper 99 percent confidence interval of the probability of causation in the radioepidemiological tables . . .” NIOSH has adopted regulations defining each of these technical terms.

But, §3626 provides an opportunity for employees to be added to the SEC, thus enabling those with specified cancers to obtain compensation on an alternate basis. The fundamental flaw in NIOSH's proposed procedures is that it reads the terms in §3626 as synonymous with those in §3623. To the contrary, Congress chose different terms to define the different criteria it directed NIOSH to rely upon when deciding whether to add workers to the SEC. Rudimentary principles of statutory construction dictate that when Congress uses different terms in related provisions, it intended a different meaning. If Congress had wanted the terms in §3626 to have the same meaning as the terms in §3623 it would have used the same language.

For example, §3623 requires NIOSH to provide a “reasonable estimate of dose.” For those purposes it may be rational for NIOSH to assume that an estimate of maximum radiation dose is reasonable. But, §3626 does not provide for inclusion in the SEC only when no “reasonable estimate of dose” may be reconstructed. Rather, it provides for inclusion in the SEC when dose cannot “feasibly” be reconstructed with “sufficient accuracy.” Obviously, unless NIOSH reads the words “feasibly” and “sufficient accuracy” out of the statute, the maximum radiation dose concept used under §3623 cannot serve as the statutory criteria for inclusion in the SEC.

Similarly, under §3623, compensation may be awarded only when it is “more likely than not” based on the “upper 99 percent confidence level” of radioepidemiology tables that radiation *caused* a worker's cancer. Again, §3626 provides different criteria for determining when a group of workers may be added to the SEC. Congress provided workers must be added to the SEC when “there is a reasonable likelihood that such radiation may have endangered the health of members of the class.” While §3623 requires that NIOSH look at each cancer separately to determine whether a worker's radiation dose was high enough to cause a particular cancer, §3626 requires a more generalized determination that radiation may have *caused or contributed* to adverse health effects. Second, while §3623 requires that there be a 51% likelihood that radiation caused a cancer, §3626 looks only to whether there is a reasonable likelihood of a link between adverse health effects and radiation – clearly a lesser standard more akin to whether

radiation caused or contributed to a worker's illness. Finally, under §3623 radiation must be the sole cause of the cancer; NIOSH has opted not to consider synergistic effects between radiation and other occupational toxins. Under §3626 there is no basis for considering the effects of radiation in isolation.

The §3626 criteria do not supplement or complement the criteria in §3623. They are separate, independent provisions. NIOSH should look to the characteristics of the existing SEC (and the quality of data available for dose reconstruction at gaseous diffusion plants) to define §3626. Indeed, the fundamental flaw in NIOSH's proposed procedures is that they look to §3623 to define the concepts in §3626. Congress clearly did not intend such a result. Rather, it provided in §3602(8) that nuclear workers "should have efficient, **uniform**, and adequate compensation for . . . radiation-related health conditions." (emphasis supplied). NIOSH's interpretation of §3626 creates inequity because it permits those at sites other than gaseous diffusion plants to gain inclusion in the SEC only on substantially narrower grounds than that which Congress used for other workers. There is no reason to believe that Congress intended such a result. Rather, EEOICPA suggests the procedures in §3626 were included so that workers who were not employed at gaseous diffusion plants would have the opportunity for inclusion in the SEC on a comparable basis as those who worked at gaseous diffusion plants. NIOSH has undermined Congress' goal of creating uniform compensation by reading the criteria in §3623 as a limit on when §3626 applies. Instead, NIOSH should read §3626 in conjunction with the statutory provisions governing compensation for current members of the SEC, rather than as a default procedure for those who do not meet the criteria of §3623.

When Is It Infeasible to Accurately Assess Radiation Dose?

Under proposed §83.13, NIOSH retains its flawed interpretation that it will view favorably petitions under §3626 *only* when dose reconstruction under §3623 has failed. Under NIOSH's view §3626 is no more than an infrequently relied upon supplement to §3623 rather than an alternative procedure for obtaining compensation on a basis comparable to members of the existing SEC. Indeed, NIOSH explicitly states that the procedures for adding members to the SEC are a complement to those for individual dose reconstruction. 68 *Fed. Reg.* 11295. Nothing in the statute indicates Congress intended the procedures in §3626 to serve as a default when the procedures under §3623 have failed. Indeed, had Congress intended such a result, the provisions of §3626 would have been merely another subsection of §3623, rather than an independent, alternative method of obtaining compensation. By inexplicably linking the two procedures, §3626 becomes subordinate to §3623. PACE strongly disagrees with this narrow, cramped interpretation of EEOICPA. It will have the effect of creating potentially insurmountable obstacles to those seeking inclusion in the SEC.

This interpretation is particularly troubling because NIOSH apparently believes, despite considerable evidence to the contrary, that there is no radiation dose it cannot estimate, however inaccurately. An uncertain, maximum radiation dose is not the same as an accurate radiation dose. NIOSH has improperly defined the two as synonymous. By doing so, NIOSH ignores the

uncertainty surrounding its maximum radiation dose estimates. NIOSH seems to believe that so long as it errs on the side of over-estimating dose, no workers should complain. While NIOSH's worker friendly approach is laudable, NIOSH is obliged to rely on the statutory criteria for evaluating petitions— accuracy of estimates – not on another set of criteria which it views as just as good. Nowhere in NIOSH's proposal does it suggest a formula for determining the degree of accuracy of its maximum likely dose estimates. That is because precise numbers can mask uncertainty. And, as the number of seemingly precise guesstimates of radiation dose increases, so too does the uncertainty surrounding their accuracy. The proposed procedures beg the question of how accurate a dose estimate must be before §3626 applies. In doing so, NIOSH has created obstacles to inclusion in the SEC. Nothing in EEOICPA permits such an approach. Congress required NIOSH to focus on accuracy. NIOSH must revise its interpretation to ensure that accuracy is the touchstone for inclusion in the SEC.

Section 3626 also requires that dose reconstruction be feasible. Feasible usually means "capable of being done," *see American Textile Mfrs v. Donovan*, 452 U.S. 490 (1981), and implies consideration of the time, effort and expense involved in dose reconstruction. In PACE's view, many dose reconstructions involve too much time and expense and the quality of the actual dose estimate is uncertain. Under such circumstances, we believe dose reconstruction is not feasible.

In its comments on the initial proposed procedures for adding workers to the SEC, PACE suggested NIOSH set a time limit for completing individual dose reconstruction. If dose could not be reconstructed within a certain time frame, the affected employee or group of employees should be added to the SEC on the ground that dose reconstruction is not feasible. In its revised proposal, NIOSH agrees in principle with this position, 68 *Fed. Reg.* 11296. Nevertheless, its revised procedures do not set any time limit because, NIOSH claims, the dose reconstruction process is just starting and it is too soon to impose time limits.

It is now almost three years since Congress adopted EEOICPA. NIOSH has already let a substantial contract for dose reconstruction. Under that contract, NIOSH told the PACE Atomic Energy Council, 8000 dose reconstructions must be completed each year. NIOSH further promised PACE officials that the entire backlog of dose reconstructions would be eliminated by the end of 2004. Setting a time limit on dose reconstructions would provide workers with confidence that these deadlines are not illusory.

In 2000, Congress told employees seeking compensation for radiation induced cancer that their claims would be processed expeditiously and that long delayed compensation finally would be forthcoming. Three years have passed since Congress made that promise to DOE contract workers. Yet, in that time virtually no workers with cancer, other than those employed at gaseous diffusion plants, have received compensation. These delays are the direct result of the slow pace of NIOSH dose reconstructions. The proposed procedures effectively enshrine this slow pace into the program. By refusing to establish a time limit on individual dose reconstruction, NIOSH ensures that sick employees and their families will continue to bear the

burden of delay. Enough time has passed for NIOSH to get its program up and running. The procedures should presume that inclusion in the SEC is appropriate because NIOSH cannot feasibly estimate radiation dose for any dose reconstruction not completed within six months from receipt of a claim (or in the case of pending applications, six months from the date of the final rules).

Has Radiation Exposure Endangered Worker Health?

The second criteria in §3626 for inclusion in the SEC is whether radiation exposure *may* have endangered a workers' health, not whether it is more likely than not that radiation was the cause of a specific cancer. Once again, NIOSH confuses the criteria in §3626 with those in §3623 and improperly proposes to add the criteria in the latter as additional criteria for inclusion in the SEC. Nothing in EEOICPA permits NIOSH to do so.

Under §83.13(b)(4) NIOSH interprets EEOICPA as granting it authority to include workers in the SEC as to some cancers but not others. *See also* 68 **Fed. Reg.** 11296. Congress very clearly stated that an individual who is included in the SEC is entitled to compensation for any specified cancer. Congress intended an *exposure* cohort, not a *disease* cohort. NIOSH lacks the authority to decide that employees added to the SEC may receive compensation for some, but not other, types of cancer.

“Covered employee[s] with cancer” are entitled to compensation under EEOICPA. Section 3621(9) defines a covered employee as “an individual with a specified cancer who is a member of the Special Exposure Cohort . . .” Section 3621(14) defines a member of the SEC as “an individual designated as a member of the Special Exposure Cohort by the President for purposes of the compensation program under section 3626.” Neither section provides for conditional inclusion in the SEC as to some cancers but not others. Once a group of individuals is designated for inclusion in the SEC, they are entitled to compensation on the same basis as other members of the SEC – in other words they must be compensated for any specified cancer. Congress intended the SEC to be an *exposure* cohort, not a *disease* cohort. Were NIOSH to create disease cohorts, it would create yet another area of nonuniform compensation as between existing members of the SEC and those who might be added to the SEC. Congress intended uniformity of compensation criteria, §3602(8), not its opposite.

Further there is no scientific basis for the suggestion that NIOSH can distinguish between which cancers might warrant compensation and those where compensation is unwarranted. Throughout its revised proposal, NIOSH recognizes that it cannot rely on NIOSH IREP to determine who is added to the SEC because, by definition, in such cases NIOSH will lack adequate information to characterize exposures. 68 **Fed. Reg.** 11297.

Yet, NIOSH proposes to allow NIOSH IREP to govern its decisions under §3626 indirectly, if not directly, by looking at radiation source. Implicit in NIOSH's suggestion that some cancers are more likely to occur following certain exposures and other cancers are more

closely linked to different types of radiation exposure is the notion that it should evaluate the epidemiology evidence, make judgements about which cancers are more strongly associated with certain types of radiation, and weigh the probability that certain exposures are likely to cause certain cancers. These are risk based notions suggesting that NIOSH is improperly incorporating the probability of causation determination required under §3623 into §3626. Nothing in §3626 gives NIOSH this authority. Further, by relying on probability of causation concepts, NIOSH is ignoring the statutory criteria that workers should be included in the SEC when radiation *may* have made them sick, not when there is a 51% chance that it did so. Congress decided that *all* SEC members – those designated by Congress and those added under §3626 – receive compensation for *any* specified cancers. NIOSH is not at liberty to second guess Congress' decision.

Unions Must Be Recognized as the Exclusive Representative.

The proposed procedures, §83.7, in a departure from earlier drafts, propose that any person may file a petition on behalf of a group of workers and act as their representative so long as “one or more individuals” authorize the representation. This provision directly conflicts with federal labor law and is incompatible with the union’s legal responsibility to act as the exclusive representative of the collective interests of the employees in certified bargaining units. NIOSH must narrow §83.7 so it is consistent with federal labor law.

Under established principles of federal labor law, when a union is certified as the representative of employees in a bargaining unit, it is recognized as the *exclusive* representative of those employees. Other entities are prohibited from representing the collective interests of employees in the affected bargaining unit. Any NIOSH procedures inconsistent with this bedrock principle are incompatible with the National Labor Relations Act.

Other agencies have developed procedures recognizing that a union certified to represent employees in a bargaining unit is the only entity that can act on their collective behalf. For example, section 8(e) of the Occupational Safety & Health Act provides that a “representative of employees” may accompany the OSHA compliance officer during the physical inspection of a workplace. OSHA has interpreted this provision as requiring that the union exercise those walk-around rights. Others may act as a representative of employees only if no union is certified to represent the workers. *See OSHA Firm*, Ch.II, A.2.h.2. Similarly, when employees seek to participate in employer contests to OSHA citations, the Occupational Health and Safety Review Commission requires that those contest rights be exercised by an “authorized employee representative.” 29 C.F.R. §2200.20(b). An “authorized employee representative” is a “labor organization that has a collective bargaining relationship with the cited employer and that represents affected employees.” 29 C.F.R. §2200.1(g).

Thus, NIOSH policy should recognize the exclusive right of a labor union to represent the collective interests of employees in represented bargaining units who might petition for inclusion in the SEC. Furthermore, recognition of the union’s exclusive right to represent employees in

certified bargaining units will conserve NIOSH resources, because it will avoid the potential problem of several competing representatives filing overlapping or inconsistent petitions on behalf of common employees.

There are three possible exceptions to the principle that the union *must* be recognized as the exclusive representative of workers in bargaining units for which it is certified. Of course, if no union is certified as the bargaining representative of a group of employees, then there is no exclusive representative for those workers. And, retired workers are not viewed as members of a certified bargain unit under federal labor law, so NIOSH is not required to recognize the union as the exclusive representative for a petition that covers only retired workers, but not workers in an existing bargaining unit. Finally, employees may file a petition on their own behalf for inclusion in the SEC. Nothing in federal labor law prohibits an employee from designating his or her own representative, provided that representative does not act on behalf of the collective interest of employees in the bargaining unit. Finally, a certified union may designate another person or entity to act on its members behalf.

PACE does not mean to denigrate the very real and important contribution of worker advocacy groups. In many areas they work on behalf of workers who are not otherwise represented or in conjunction with local union leadership and there is no reason NIOSH should not continue to recognize the important contribution such worker advocacy groups make. What is improper, however, is to allow any group to displace the union as the *exclusive* representative of workers in units where it has been certified as the collective bargaining representative.

Proof Requirements Are Unnecessarily High

Section 83.9(c)(3)(ii) requires a petition to include *two* affidavits, independent of the petitioner, to corroborate an exposure incident. This standard of proof is too high. There is no reason why NIOSH needs three sworn statements to corroborate an exposure incident (the petitioner plus two others). Corroboration by an independent source, if one is available, should be adequate. But where the exposed workers are deceased, corroboration requirements should be waived or NIOSH should accept second hand accounts of the exposure incident as adequate corroboration. Workers already face enormous hurdles in proving a negative – that their exposure records are incomplete and cannot accurately be reconstructed. NIOSH should not needlessly add to these hurdles.

Miscellaneous Other Comments

1. Proposed § 83.9 requires a petition to identify the facility to which it applies. NIOSH should clarify that “facility” in the singular may include facilities in the plural. The term facility should be broad enough to include occupational groups across facilities, and among different facilities on the same site. Organizational labels should not be a basis for distinguishing between like exposure patterns.

2. Under §83.11, NIOSH is authorized to reject petitions without presenting them to the Advisory Board. Before NIOSH rejects a petition as inadequate, it should establish an internal review procedure to verify that the petition is so lacking further evaluation is unwarranted.

3. Under §83.9(b), NIOSH requires that when it cannot complete dose reconstruction, the claimant must petition NIOSH for inclusion in the SEC. This imposes a needless burden on claimants. When NIOSH cannot complete a dose reconstruction, it should automatically consider the claimant for inclusion in the SEC. No further action on the part of the claimant should be required under such circumstances.

4. NIOSH should narrowly limit the circumstances under which the Secretary may reject an Advisory Board recommendation to include workers in the SEC. A decision by the Secretary to ignore the advice of the Advisory Board in most circumstances would be arbitrary. Further, the Secretary should be required to provide a detailed explanation of his decision when he reaches a conclusion contrary to the recommendation of the Advisory Board.

5. Under §83.13, NIOSH should make clear that any changes to an SEC class will apply prospectively only, so workers or their survivors who have received benefits under an earlier decision do not have to worry that those benefits will be taken away.

In conclusion, PACE believes that NIOSH's interpretation of §3626 is unduly narrow, improperly departs from the concept of uniform compensation for nuclear workers and creates unwarranted barriers to inclusion in the SEC. We believe that NIOSH should read §3626 in light of the criteria Congress used in creating the existing SEC and not, as its proposal would do, by reading §3626 as the default procedure after dose reconstruction under §3623 has failed.

Very truly yours,

Randy S. Rabinowitz