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Sent: Tuesday, May 06, 2003 2:06 PM
To: 'NIOCINDOCKET@CDC.GOV'
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Subject: Building and Construction Trades Department, AFL-CIO comments on NIOSH SEC Rule

May 6, 2003
NIOSH Docket Office
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Electronic Submission to: NIOCINDOCKET@CDC.GOV

**Re: Procedures for Designating Classes of Employees as Members of the
Special Exposure Cohort Under the Energy Employees Occupational Illness Compensation Act of 2000; Notice of
Proposed Rulemaking
68 FR 11294 (March 7, 2003)**

Submitted by:
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The Building and Construction Trades Department, AFL-CIO (BCTD) represents over 500,000 workers who have been employed at DOE sites over the past 55 years. The BCTD presented views on the first version of this rule as it relates to the unique needs of construction workers in comments dated August 26, 2002.

In those comments the BCTD stated that the proposed rule did not meet the Statutory Requirements, had the propensity for significant procedural delays and did not contain any standards for the determinations that NIOSH would undertake. NIOSH is to be commended for reducing some of the burden it originally placed on claimants in terms of preparing a petition. However, the proposed Rule still does not address the need to provide specifications for how determinations are made. Three crucial issues in the core of this proposed Rule raise serious concerns about its legality and responsiveness to the mandate of Congress:

* This proposed Rule continues to be so vague and lacking in specificity that it does not meet the intent of the Congress. This proposal has made a complex procedure even more complex. The proposed Rule creates a process that substantially extends the time for claimants to receive a decision. The lack of standards for its decision-making leaves the process fraught with uncertainty. NIOSH has created a system that will more likely than not lead to extended delays, denial of claims without a standard for decision and therefore undermines the intent of Congress to take care of those exposed at the Nuclear Weapons Facilities. It is inappropriate to require claimants to go through these extreme exercises. By experimenting with unproven formulas in order to 'guess' at exposures and causation NIOSH effectively put the claimants into an experimental and demonstration program. Claimants have a basic right to a timely disposition of their claims, and with certainty in their understanding of what standard is used for decision. This proposal turns this process on its head.

* In one area, the executive branch has chosen to use an administrative procedure to, in effect, amend the underlying legislation [42 USC 7384] by proposing to limit the number of cancers that are covered by the SEC.

* This Rule combines with another Rule issued by NIOSH on Dose Reconstruction [67 FR 22314] to create a "house of cards," by which this proposed Rule effectively serves to

amend the already promulgated Rule on Dose Reconstruction without a rule-making procedure.

As a result of this construct decisions this Rule will on the one hand be open to virtually unlimited challenges, yet, on the other hand it will be difficult to make such challenges since the Rule lacks specifications against which to judge decisions. This is a set-up that will have the effect of denying claimants due process.

The Rule is particularly deficient with regard to construction workers employed intermittently by subcontractors. It sets up a system that is so lacking in practicality that it could take years for NIOSH to complete the review of a petition for SEC status. In this regard, the rule is callous towards a class of claimants who in most cases are either cancer victims, or the survivors of cancer victims. These claimants are mostly older people who are ill or frail. NIOSH has an obligation to craft a Rule that gives consideration to this reality.

NIOSH's lack of progress in processing cases to date should be ample proof that its construct is not working. While the U.S. Department of Labor has processed over 40,000 claims, and made final decisions on almost 20,000 of these claims, NIOSH has managed to complete dose reconstructions on less than 20 claims. NIOSH's backlog of incomplete dose reconstructions exceeds 12,500, and increases by approximately 1,000 per month. At this rate of decision, by the end of the second effective year of this program, July 31, 2003, NIOSH will have a backlog of at least 15,000 cases. The inability of the existing process to complete dose reconstructions in a timely fashion is not acceptable. This proposed Rule does nothing to demonstrate that it will streamline NIOSH's process, and if anything, appears to complicate it still further.

Overriding Issues

1. NIOSH has given undue emphasis to comments submitted by the Health Physics Society while not responding to the major concerns of the victims who are covered by this program.

a. NIOSH has crafted a rule for the exceptional case where a worker knows the source terms of his or her exposures, rather than the typical case, where the worker lacks such knowledge.

b. NIOSH continues to over-emphasize analytical models at the expense of timely disposition of cases. Procedures proposed in this Rule further complicate NIOSH's work. This approach misplaces the priorities of the Congressional mandate to resolve these issues for the claimants. Under its existing rules, NIOSH in the 20 months since EEOICPA became effective has completed less than 20 dose reconstructions.

2. The proposed Rule is not responsive to comments submitted by the Building and Construction Trades Department dated August 26, 2002 on the previous Rule in several key areas:

a. NIOSH has failed to consider the very complex exposure patterns and lack of dose information on the majority of construction workers, who move extensively within and between DOE sites. Construction workers also had varying job responsibilities and tasks that must be taken into consideration.

b. NIOSH will apply the SEC rule only where a dose reconstruction cannot be done, while refusing to define how a dose reconstruction is done. This circular process is unacceptable because it has no closure. Further, in separate comments, the AFL-CIO has shown that by making SEC review subordinate to dose reconstruction, NIOSH has violated the underlying EEOICPA's intent that these should be two separate processes.

c. NIOSH has refused to make its procedure timely, and has refused to limit the period of time it has to complete any or all of its work on a claim or a petition. This is not reassuring given its performance to date. There is nothing in this rule to suggest that NIOSH will be able to dispose of cases in less than 24 months, which is not acceptable.

d. NIOSH has refused to define closeout procedures or specifications about decision-making criteria, which makes it impossible to determine how a case will be disposed in such a way that the decision is not arbitrary.

3. NIOSH, in its revised Rule, has introduced two new scientific elements, which have the effect of amending its already established Rule for Dose Reconstruction, as well as the underlying EEOICPA.

a. The new emphasis in the rule on source terms appears to be without much merit to workers in general, and certainly has little practical relevance to

construction workers; yet, NIOSH fails to address these limitations in the Rule, even where it has knowledge of these limitations:

i. In general, maximum potential dose for a particular type of radionuclide is not sufficient to estimate lifetime exposure, and is not valid to estimate total exposure for construction workers, who are exposed to a mixture of radionuclides.

ii. NIOSH has already acknowledged that it cannot get reliable source term information from construction workers in the telephone interviews it has conducted to date, because the workers have not been adequately informed about the hazards they may have been exposed to.

iii. It is unreasonable to expect that dose can be apportioned for workers who constantly move between facilities within DOE sites and from DOE site to DOE site, and who have potential for exposures to any and all sources, and little to no knowledge about such exposures.

b. The new Rule also proposes to limit the number of cancers that are covered by an SEC finding based on the underlying type of probable radiation exposures. The scientific applicability of this proposal is virtually without merit, but more to the point, it would appear to be contrary to the Congressional intent with regard to SEC coverage, which provided for a set list of cancers for all claimants covered by an SEC.

Specific Issues

1. Section 83.5. NIOSH needs to correct the following errors in the definitions:

a. In section 83.5(c) NIOSH has defined facility as a singular term rather than plural (i.e., facilities) term. There are several reasons why this should be defined as a plural term.

i. A DOE site may contain many facilities and most construction workers are not limited to a single facility.

ii. Many DOE workers move from DOE site to DOE site. These may be the most heavily exposed workers, engaged in repair and maintenance, clean-up and/or decommissioning activities.

iii. In the Act, Congress accepted that SECs may span several DOE sites, as in the case of the Gaseous Diffusion Plants at Oak Ridge, Paducah and Portsmouth.

iv. Reasonable statutory construction does not require defining facility in singular terms. Cumulative exposure at various sites within the DOE Complex is a reasonable interpretation of the statute for the benefit of claimants, including those who were engaged in construction activities.

b. In Section 83.5(k)(5) the definition of covered cancers does not specify rectal cancers.

2. Section 83.13. NIOSH continues to fail to define how it will determine that it cannot do a dose reconstruction

a. Under section 83.13(a) NIOSH is unduly vague about the types of information to be used to make dose reconstructions, including 83(a)(8), which simply states "Other Sources." NIOSH does not explain how these sources will be used to decide that a dose reconstruction cannot be performed.

b. Under section 83.13(b)(1)(i) NIOSH states that "Radiation doses can be estimated with sufficient accuracy if NIOSH has established that it has access to sufficient information to estimate the maximum radiation dose..." Apart from the rather Kafkaesque quality of this formulation, it is totally circular and therefore unscientific. NIOSH not only refuses to define what is meant by "sufficient information to estimate maximum radiation dose [our emphasis]," but it goes on to state that these terms will be decided on a case-by-case basis. Clearly this is totally unacceptable basis for the core reasoning in a federal regulation. As long as these terms remain undefined everything else in this section is "in the eye of the beholder", that is, it is arbitrary.

c. Under section 83.13(b)(1)(ii-iv) NIOSH introduces a new analytical method which is based on source terms knowledge. This application raises several concerns:

i. This is not covered in its Rule for Dose Construction [67 FR 22314], nor in its guidelines on "Probability of Causation" [67 FR 22296]

ii. NIOSH fails to define how it will determine maximum dose from knowledge of source type or equipment. This will prove to be an unattainable task for NIOSH to accomplish for construction workers because of the mobility of the workforce.

iii. NIOSH fails to define how it will deal with uncertainty.

iv. NIOSH fails to define how risk will be apportioned when NIOSH has partial dose information only or there are different source terms for exposure.

d. Under section 83.13(b)(1)(iv), NIOSH acknowledges that there are instances where it may not be able to estimate radiation dose; yet then goes on to state that it will consider the available source term information to determine whether the types of SEC cancers covered should be by a subset of those authorized in the statute. This raises several concerns:

i. It has failed to define how this will be done.

ii. It has failed to define how it applies to workers with apportioned risk between source terms or exposure facilities. The reason for this is that NIOSH appears to assume that workers were employed or exposed in a single facility, rather than across facilities within a given DOE site, or from work at many different sites. BCTD has established that many of its members traveled from DOE site to DOE site to work. This type of exposure scenario is not taken into account in the basic construct for this rule. It has failed to show that Congress authorized the selection of subsets from the list of cancers covered by an SEC in 42 USC 7384.