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Sent: Monday, August 26, 2002 11:49 AM
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Subject: BCTD Comments on SEC

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NIOSH Docket Officer
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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***

Submitted by:

***The Building and Construction Trades Department, AFL-CIO
815 – 16th Street, N.W.
Washington, DC 2006
Attention: Pete Stafford, Director, Safety and Health***

Summary: The proposed rule does not appear helpful to potential claimants under this program. This draft is at a stage of development where it should not be presented as a ***rule***. NIOSH should consider recasting it as a guidance document which could “evolve” into a rule in the future.

The rule, as drafted, is convoluted and not easy to understand. It is also circular in its reasoning. Under the proposed rule, the only way to qualify for inclusion in the SEC is to prove that dose reconstruction cannot be done in accordance with the NIOSH rule for dose reconstruction; the only way this can be proven is for NIOSH to be given the opportunity to perform a dose reconstruction. Therefore, in order to succeed petitioners must prove that a dose reconstruction cannot be done and they must be able to challenge a dose reconstruction that has been done by NIOSH. There is no time limit on how long NIOSH can take to conduct a dose reconstruction or to review a subsequent SEC petition. Thus, it is likely that workers for whom NIOSH cannot perform a dose reconstruction will have to wait at least two years for NIOSH to complete its work. This built in delay is not acceptable under any circumstances, and is especially cruel given that these claimants have cancer. The approach of this rule is not what Congress intended; it creates an undue burden on workers to prove their case, and will not result in a timely disposition of petitions.

Core BCTD Concerns

The core of BCTD’s concern rests with NIOSH’s interpretation of the EEOICP statute, and the actions that follow from that interpretation, in which there is a strong likelihood that (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) it has shifted the burden of proof from DOE to show that records are complete on to workers to prove that records are totally incomplete, and (3) it has lost sense of the need for timely disposition of these claims. This places an undue burden on workers which is

BCTD Comments on NIOSH Proposed SEC Rule

patently unfair. At its core, the NIOSH rule proposes the following steps, with BCTD comments and proposed alternative approach:

1. NIOSH expects that petitions shall prove that (1) it is not feasible to estimate with sufficient accuracy the radiation dose that the class received using as the benchmark its own dose reconstruction model; and (2) that there is reasonable likelihood that such radiation dose may have endangered the health of members of the class. NIOSH offers some assistance, but only if petitioners prove that they cannot get access to all exposure information. *The BCTD contends that Congress did not intend that it was the duty of petitioners to provide proof of these conditions, but rather to show that it was possible for these conditions to exist. Had it been the Congressional intent that petitioners prove these conditions, it would surely have included workers in Section 3625(b) which directs DOE to provide such information, but only to DHHS and members and staff of the Advisory Board. NIOSH should reconsider this interpretation, and revise the rule to incorporate as the criterion for consideration of petitions that petitioners shall show that there is a reasonable likelihood that some exposure records may be incomplete.*
2. Upon receipt of the petition, NIOSH will then evaluate (or challenge) the petition to determine whether it is sufficiently documented and justified to be considered by the Advisory Board. To do this, NIOSH expects that the petitioners will have conducted exposure assessments by radiation health professionals that are in terms of scope and quality equivalent to what NIOSH itself might have conducted. The NIOSH rule also limits the burden of proof that it places upon petitioners to one test: SEC membership qualifies only where a dose reconstruction cannot be performed. Therefore, for all practical purposes, NIOSH requires petitioners to prove that dose reconstructions cannot be performed on members of the class before NIOSH will accept the petition. *The BCTD contends that it is unreasonable for NIOSH to expect that workers meet this burden of proof. Workers are not radiation health professionals, and in most cases will not have the resources to obtain such expertise, and even if they did, such expertise is rarely available to workers. Further, since the statute does not give workers access to all the needed information held by DOE, it is unreasonable to expect that workers will be able to obtain such information based on the history of obfuscation that has characterized DOE's response to private requests for radiation exposure data and information. NIOSH should revise the rule to read that upon acceptance of the petition NIOSH will determine whether there is sufficient exposure information available to make individual dose estimates.*

3. NIOSH will apply its rules for radiation dose reconstruction and its guidelines for causation, notwithstanding the potential for arbitrary actions under these rules. The Notice acknowledges, in response to comments on 42CFR Part 82, that the conditions that NIOSH will apply for making a dose determination will vary on a case-by-case basis. The absence of firm guidelines is very troubling. Further, the rule for dose reconstruction is designed to review risk for individual workers and not classes. Consequently, the proposed SEC rule could lead to a determination in which if NIOSH could perform a dose reconstruction on even only one member of a class that has made a petition for inclusion in the SEC, it could deny the petition for the class as a whole. *This approach was not the intent of Congress, because it changes the burden of proof from DOE to show that records are complete and onto workers to show that they are totally incomplete. In the case of both the Gaseous Diffusion Plants and Amchitka, Congress concluded that the classes qualified for SEC status because records on some workers were incomplete, and therefore it was not possible for a worker to show whether his or her records were complete. NIOSH should revise the rule to read that unless DOE can produce records sufficient for NIOSH to conduct individual dose estimates on all members of the class, the class shall be included in the SEC. Moreover, NIOSH should develop and publish for comment more detailed guidance on how these determinations will be reached.*
4. Under the proposed rule since claimants will not be able to perform this work themselves, they will be forced into NIOSH's dose reconstruction framework; that is, unless they allow NIOSH to try and fail to perform a dose reconstruction, NIOSH will not consider the petition for SEC. This means the following steps that will be faced by a petitioner:

Table 1: Time Line for SEC Claims Process

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

In other words, under the proposed rule the government finds it reasonable to expect claimants with cancer to wait roughly two to three years to have their claims acted upon. This unconscionable delay in processing claims is not acceptable. *NIOSH should reconsider the rule in terms of the*

making its procedures timely. The maximum time allotted for the review of a claim should be six months exclusive of Congressional review.

Finally, NIOSH has stated that it has no alternative to this process given the statutory limitations it is operating under. The BCTD does not believe that NIOSH is so limited under the Statute. NIOSH should rethink its attachment to the model (IREP) and consider other options. On the one hand NIOSH says that it can perform dose reconstructions because it has on hand and is fully informed about DOE's existing exposure information. On the other hand it says it does not know enough about DOE exposures to determine in the absence of conducting a dose reconstruction, whether there is a case for SEC inclusion. *As an alternative to this rule, the BCTD recommends that NIOSH establish a standard for when SEC coverage is applicable, and apply that standard in accordance with its knowledge of the strengths and limitations of DOE site exposure records. One simple standard might be, "Any worker is included in the SEC where exposure records are found to be deficient for at least xx (e.g., 30%) of the duration of employment."*

Specific Concerns

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 BCTD position that Congress left for the Board to define what is meant by "such other."*
 - b. One of the criterion 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, or if costs are prohibitive, then it is not feasible. *The BCTD 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

The BCTD 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 the case issues develop.