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**Sent:** Tuesday, May 06, 2003 8:03 PM
**To:** NIOCINDOCKET@CDC.GOV
**Subject:** Comments regarding the HHS Notice of Proposed Rulemaking

HHS comments.doc
(31 KB)

**Attached are the Tri-Valley CAREs comments on the HHS Notice of Proposed Rulemaking Procedure for Designating Classes of Employees as Members of the Special Exposure Cohort under EEOICPA, 68 FR 11294-11310, published on March 7, 2003.**

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**TRI-VALLEY CARES (COMMUNITIES AGAINST A RADIOACTIVE ENVIRONMENT)**

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Comments of Inga Olson, Program Analyst
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Regarding the HHS Notice of Proposed Rulemaking

For Designating Classes of Employees as Members of the Special Exposure Cohort Under the Energy Employees Occupational Illness Compensation Program Act of 2000 (EEOCIPA)

Federal Register Vol. 68, No. 45, pp.11294-11310 (March 7, 2003)

Outlined below are Tri-Valley CAREs comments on the HHS Notice of Proposed Rulemaking Procedure for Designating Classes of Employees as Members of the Special Exposure Cohort under the EEOICPA, 68 FR 11294-11310, published on March 7, 2003.

Tri-Valley CAREs is a non-profit organization started in 1983 by a group of neighbors and laboratory workers from the Lawrence Livermore National Laboratory (LLNL). We have a Technical Assistance Grant from the Environmental Protection Agency and represent the community's point of view on cleanup issues at the LLNL Superfund site. In addition, we have been providing assistance to current and former Department of Energy (DOE) employees, contractors, and subcontractors in California who are applying for compensation under the EEOICPA. We coordinate and facilitate a support group for sick workers and their family members.

Our comments on the following four aspects of the proposed rule are based on our experience and knowledge assisting sick workers and family members in all aspects of the EEOICP process as well as our role as a watchdog organization monitoring lab activities over the last 20 years.

1. **Section 83.5 – Definitions, Class of Employees**

The definition in Section 83.5(c) should not be limited to a group of employees who work or worked at the *same* DOE or Atomic Weapons Employer (AWE) facility. The San Francisco Bay Area is home to many EEOICPA covered facilities. It is not uncommon for DOE subcontractors to work at a variety of facilities in the area such as Lawrence Livermore National Laboratory (LLNL) and its sister plant across the street, Sandia National Laboratory. This could form a common exposure cohort. The record-keeping at the labs is not good. Employees routinely work at the Nevada Test Site, Rocky Flats

and other nuclear facilities and often those records of traveling workers are unavailable or missing, providing a common basis for an SEC.

The NIOSH rule, section 83.5(c) should be amended so that employees who work or worked at one or more DOE and/or AWE facility can be included as a "class of employees." This amendment should be used as well in accumulating days of potential radiation exposure to meet the 250 day employment threshold under 83.13.

The Special Exposure Cohort (SEC) has been set up to address the situation where a dose reconstruction cannot be conducted due to inadequate information. If a lack of information exists at more than one facility where the employee worked, all facilities need to be considered for whom the availability of information and recorded data is comparable with respect to the informational needs of dose reconstructions conducted under 42 CFR Part 82. In addition, common exposure histories can crossover from process-to-process, building-to-building and site-to-site. To reiterate, classes should be defined by whether there was insufficient data to estimate doses for employees who meet the employment duration threshold.

2. **Section 83.7 – Who can submit a petition on behalf of a class of employees?**

We commend you on broadening the population who can file a petition in the proposed rule 83.7. This rule proposes that both unions and groups who are adequately authorized are able to file a petition. We know this is important because of our work here at Tri-Valley CAREs (TVC). Although we have played an advocacy role in support of a compensation program for sick nuclear workers for many years, we had no intention of getting so involved in the nuts and bolts of assisting workers with their applications, providing a repository for information related to the EEOICPA and coordinating and facilitating a support group. However, we started receiving so many calls from sick workers whose needs were not being met, that we began providing assistance until a time when a permanent resource center is located in Livermore to assist sick workers and family members.

A natural extension of our activities would be in filing petitions for membership in a Special Exposure Cohort for appropriate individuals and classes. For that reason, we support the provision in Section 83.7 to allow organizations such as TVC to file petitions on behalf of a class, subject to authorization from at least one individual in the class. We do not support a proposal from those who would seek to limit the right to petition to only unions which represent workers at a given site. This is unworkable.

3. **Section 83.12(b)(1)(iv) and 83.13(b)(2)(iii) and 83.13(c)(4) – Limiting the List of 22 Specified Cancers**

Authority to limit the list of specified cancers should be deleted from 83.13 of the rule. It is plainly unlawful and contradicts clear Congressional intent. Limiting the list of specified cancers where dose cannot be "capped" is scientifically unworkable. Limiting

the list of cancers relies on risk determinations without any basis for estimating a plausible dose, and, as a matter of science, completely contradicts the logic of NIOSH's previous determination to jettison the IREP model as the basis for determining endangerment in the June 2003 SEC Proposed Rule. We are also disappointed that NIOSH would consider adopting this claimant hostile approach to interpreting the statue as a matter of policy.

The SEC was authorized in order to compensate people, many of whom were unknowingly exposed to radiation and/or whose exposure records are in many cases missing, incomplete, inaccurate or unreliable. The injustice of this type of situation was taken into account when the legislation was written. Any action to limit the 22 cancers is not consistent with the spirit, intent and wording of the original bill. In fact, in a floor statement from the lead co-sponsor, Senator Jeff Bingaman, he referred to SEC claimants being eligible for benefits if they contracted any of the 22 cancers. He referred to this as a "fixed" list of cancers – not a variable list as the rule suggests. We refer you to the October 12, 2000 Congressional Record for elaboration.

Furthermore, the SEC portion of the Rule is based on: 1) the fact that it is not feasible to accurately estimate dose, and 2) there is a reasonable likelihood a person or persons may have been endangered. Estimating which organs may be effected or not when there is not adequate information to estimate a worst case dose is "splitting a hair too finely." In the face of NIOSH's admitted inability to estimate the risk to individual organs when doses cannot be "capped" the benefit of the doubt should be given to the sick workers and the authority to limit cancers should not be allowed.

4. **How will NIOSH account for radiation doses accumulated at SEC Sites for non-specified cancers?**

Regular LLNL employees have routinely traveled for extended periods to the Nevada Test Site, Amchitka Island Test site and other testing facilities. Where individual claims are filed for non-SEC cancers, how will NIOSH assign or otherwise calculate doses accumulated at SEC sites such as Alaska Test Site? Will NIOSH try to estimate Amchitka doses? Will these "assigned doses" be added to doses accumulated at LLNL? What if a class of workers at the Nevada Test Site is ultimately put in an SEC, how would those doses be assigned (given they cannot be estimated?) Will NIOSH account for this in the SEC rule, or will it address this in the dose reconstruction rule?