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NIOSH Docket Office
Robert A. Taft Laboratories
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Subject: **COMMENTS ON PROPOSED AMENDMENTS TO 42 CFR PART 83, SPECIAL EXPOSURE COHORT RULE**

I submit the following comments on the proposed changes to the Special Exposure Cohort Regulations at 42 CFR Part 83, which were included in the Interim Final Rule (IFR) published on December 22, 2005. I am a retired faculty member from the Department of Pathology and Immunology at Washington University School of Medicine in St. Louis, and I am a Board member of the United Nuclear Weapons Workers headed by Denise Brock. I assisted in the successful SEC petition for the Mallinckrodt-Destrehan Street 1942-1957 former workers. I am currently assisting claimants from two Illinois EEOICPA covered sites to prepare SEC petitions.

As stated in the ABRWH comments to 42CFR 83 submitted March 14, 2006:
"The purpose of this rulemaking is to harmonize the HHS rule with the new time limits included in the Conference Report for the FY 05 Defense Authorization Act (P.L. 108-375) which were set forth to ensure that evaluations of Special Exposure Cohort petitions are completed in a timely fashion by NIOSH and the Advisory Board, and that Special Exposure Cohort determinations will be decided by the Secretary of HHS within 30 days of receipt of a recommendation from the Advisory Board.

"The amendments to the Energy Employees Occupational Illness Compensation Act enacted as part of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 05 P.L. 108-375 state:

"DEADLINES—(1) Not later than 180 days after the date on which the President receives a petition for designation as members of the Special Exposure Cohort, the Director of the National Institute for Occupational Safety and Health shall submit to the Advisory Board on Radiation and Worker Health a recommendation on that petition, including all supporting documentation.

"The Conference Report States:
To ensure that applications to be a SEC member are processed promptly, new timelines have

been included. Within 180 days of receipt of a petition for designation as members of a SEC, the Director of NIOSH must submit to the Advisory Board a recommendation on that petition, including all supporting documentation. During the 180 day period when NIOSH is preparing the petition for review by the Advisory Board, NIOSH should identify all deficiencies in the petition within the first 30 days. When the President receives an affirmative recommendation from the Advisory Board to designate a class to the SEC, the President shall have a period of 30 days in which to accept or reject the recommendation and notify Congress. If the President does not send a determination notice within 30 days, and if there is an affirmative Board recommendation, the class recommended to be a SEC will automatically become a SEC, subject to a 30 day notification period in Congress."

I have several comments to convey regarding the proposed new SEC rules and on the position related thereto of the Advisory Board made on 3/14/06:

(1) I agree with the basic assessment by ABRWH of the essence of the new SEC rules as quoted above.

(2) I also strongly agree with three main and general recommendation comments made by Chairman Paul Ziemer and the Board. I agree also with the Board request to NIOSH urging a more comprehensive revision of the entire SEC petition process to ensure more timely and fair processing of SEC submissions that would better fulfill the original Congressional intent of the EEOICPA legislation.

I have the additional comments on the basic proposed changes to the new SEC rules:

(3) Provision A. *180-day Deadline for NIOSH Recommendations*. Amendments to section 83.11(c) proposed reducing the time from 30 to 7 days that a petitioner can request a review of a proposed finding by NIOSH that the petition fails to meet the specified requirements. The 7 day window is too narrow, especially in view of US Postal performance and tracking issues regarding when NIOSH notification reaches the petitioner, often unexpectedly, giving the petitioner no time to research the denial issues and too little time to rebut NIOSH effectively. Rather, I suggest the 30 day limit be retained for a petitioner to request a review, and that, instead, 30 days be trimmed from the NIOSH evaluation period, reducing it from 180 to 150 days. Five months is a generous and reasonable amount of time to allow NIOSH to consider qualified petitions as now defined in section 83.5 of the amended provisions. In fact, 90 or 120 days would be reasonable for this phase of the SEC petition process. If the change from 180 to 150 days requires more frequent Advisory Board or SC&A meetings, then that should be done.

(4) Provision B. *30-day Deadline for Determinations by HHS*. I am adamantly opposed to changing section 88.16 to eliminate petitioner administrative appeals to the Director of NIOSH who rejects a Board recommended SEC petition: (a) due process requires this appeal option, (b) The Director's office should not be excused from speeding up the appeal and review process if the process is to remain as "claimant friendly" as possible. I dispute that compliance "would not be possible," however, it is true that 30 days means the review/appeals/re-review process mandated by Congress would have to be carried out very efficiently should the NIOSH Director/HHS Secretary not agree with a Board recommendation to approve a particular SEC

petition. This proposed amendment removes a key right from petitioners that must not be abrogated. The NIOSH Director must remain accountable for overturning a Board recommended SEC petition, for example, when this crucial decision might be based on unwarranted political-cost containment considerations rather than on valid scientific reasons, for example. Although new section 83.18 gives the petitioner a chance to have an administrative review by the Secretary of HHS, this would not adequately compensate for loss of an administrative review by the NIOSH Director. I believe it would be far more likely that arbitrary economics-based decisions would be concealed by this new process.

(5) Provision C. *Computation of Time Periods*. I have no further comment except the new paragraph (c) should contain the time periods I recommend rather than the ones NIOSH proposes for section 83.5, and the administrative review by the Director of NIOSH should be retained.

(6) My final comment relates to the potential application of the new rules to future, in progress SEC petitions on behalf of former worker and survivor EEOICPA claimants at the Granite City Steel and Dow Chemical (Madison-Spectrulite) covered sites in Illinois.

Our research to date indicates that little or no radiation monitoring data exists for former workers at either site. To date for Title B there have been 624 claims and 416 cases from GCS, of which final decisions for 187 cases have been denied and only 1 case has received approval for final payment and 137 cases have been referred to NIOSH for dose reconstruction and are pending final decisions. At the Dow Chemical (Madison-Spectrulite) site to date for Title B there have been 187 claims and 170 cases, of which final decisions for 74 cases have been denied and only 2 cases have received approval for final payment and 73 cases have been referred to NIOSH for dose reconstruction and are pending final decisions. These data are summarized in the ADDENDUM table on the last page of these comments. We believe that the few claims paid from either site are due to workers who qualified with POCs greater than 50% based on work at other DOE covered sites rather than their employment at the two Illinois sites.

John and Chris Ramspott, she being the survivor-claimant of two former GCS workers, received a letter from Larry Elliott of NIOSH dated September 23, 2005, in which he stated explicitly, "*We have not located records indicating that employees were monitored for radiation exposure during the period this facility performed quality control work for the Atomic Energy Commission (1953-1966).*" Conflicting directly with this statement is the next paragraph, in which Mr. Elliott goes on to state further that: "*NIOSH has completed dose reconstructions for 4 of more than 60 case (sic) involving employment at Granite City Steel that have been referred to by NIOSH by DOL. These dose reconstructions were based on overestimates…*" How could radiation dose reconstructions be performed if no monitoring data exists for the site workers?

Extensive research that the Ramspotts have carried out also indicates that little or no radiation monitoring data exists for the GCS workers. Some of the 24 and 25 Mev Betatron particle accelerator operators who x-rayed Mallinckrodt uranium-238 ingots for structural flaws did wear film badges (from Lindauer, probably), however, it is doubtful at this point that the data from those film badges has survived to the present time. Mr. Erickson of the ESL/US Dept. of Homeland Security laboratory, successor to the former AEC HASL facility, has been contacted, thus far to no avail, to attempt further to obtain any GCS or Dow (Madison/Spectrulite) film

badge monitoring data. Many EEIOCPA claims from both sites have been held at NIOSH for dose reconstruction purposes for months to years. NIOSH has not created a site profile or an industrial radiography TIB for either Illinois site. NIOSH and DOL, who hold joint responsibility for conducting site expert Worker Outreach meetings, have thus far not held such formal meetings with transcripts for either site.

It is my contention that NIOSH, given the situation recounted in the preceding paragraphs, should be required by the SEC rules to now proactively facilitate submitting SEC petitions for both Illinois sites, for which NIOSH knows the radiation monitoring data is grossly inadequate to perform accurate, timely individual dose reconstructions. A search of the CER DOE database could indicate which other sites are potentially eligible for SEC petitions. I am certain the same situation (little or inadequate radiation monitoring data) exists for sites that have not yet applied for SEC petitions, and did exist for many sites that have been awarded SEC petitions. ABRWH meeting transcripts amply bear out this latter contention.

(7) Rather than facilitating the SEC petition process, recently the following situations that could have the opposite effect have unfortunately emerged: (a) a "passback" memorandum has emerged from the Office of Management and Budget (OMB) that seeks to restrain EEOICPA funding based on DOL's assertion that overall program costs are rising due to the recent spate of awarded SECs for many sites, and (b) OMB proposes inserting 4 additional constraints to impede the awarding of SEC petitions and thereby contain costs. The result has been a back room movement to sharply curtail EEOICPA funding. If enacted, the new OMB-proposed Presidential review would prolong rather than shorten the SEC approval process. The House Judiciary subcommittee headed by Representative John Hostettler held hearings on this matter on March 1, 2006.

The recent EEOICPA developments were reviewed by Richard Miller of the Government Accountability Project (GAP). Richard Miller's remarks that are relevant to this proposed amendment to 42 CFR Part 83 SEC rules may be found at URL:

http://www.whistleblower.org

The specific Web page is: **http://www.whistleblower.org/program/domestic.cfm**

(8) The inclusion of the provision added by the Conference committee that the President of the United States will be allowed a 30-day period to review Board and HHS recommended SEC petitions before they are passed along to Congress is a truly ill-advised and regrettable politicization of the EEOICPA process. Not only would this provision delay the SEC approval process further by 30 more days, but it would unfairly jeopardize final passage of hard-won SEC petitions based on scientific considerations. It is likely the President's main reason to not approve a recommended SEC petition would be cost containment. Cost containment provisions are already integral to EEOICPA by having formidable requirements to reconstruct radiation doses and for claimants to provide medical and employment records that were lost, destroyed or hidden from public disclosure. These factors undoubtedly result in many meritorious claims being denied. A task that would have been difficult 30 or 40 years ago, is for many elderly claimants nearly impossible 40 to 60 years after the fact of a nuclear weapons program that was cloaked in secrecy and obfuscation.

In summary, the proposed NIOSH amendments to 42 CFR Part 83 are well intentioned but

flawed with respect to imposing impossible to meet time constraints on SEC petitioners. Removing the opportunity for administrative review of denied SEC petitions by the NIOSH Director so as not to unduly inconvenience NIOSH abridges a fundamental due process right of SEC petitioners. The rules are inadequate in not providing sufficient details to ensure that SEC petitions will be evaluated, qualified and awarded in a timely, fair and equitable manner to all parties. Such would be the case given the common situation that insufficient, or poor quality, radiation monitoring data exists to allow carrying out full, accurate and timely individual dose reconstructions as originally envisioned by Congress when it created EEOICPA in 2000.

Respectfully submitted,

Daniel W. McKeel Jr, MD

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ADDENDUM: CLAIMS AND CASES AT GCS AND DOW-MADISON/SPECTRULITE FROM THE DOL WEBSITE 3/23/06

DOL EEOICPA Statistic	Granite City Steel	Dow (Madison-Spectrulite)
Claims to date	624	187
Cases to date	416	170
Cases denied with final decisions	187	74
Cases approved with final decisions	1	2
Forwarded to NIOSH for dose reconstruction and pending	137	73