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Sent: Tuesday, October 30, 2001 12:05 AM
To: niocindocket@cdc.gov
Subject: Comments - Dose Reconstruction Interim Rule



Comments.doc

**To Whom It May Concern: Comments to the dose reconstruction interim rule
are attached.**

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October 30, 2001

Re: Comments – Probability of Causation/Dose Reconstruction, 42 CFR Part 82
Federal Register Vol. 66, No. 194, October 5, 2001

To Whom It May Concern:

The purpose of this letter is to comment on the interim final rule implementing provisions of the Energy Employees Occupational Illness Compensation Program Act. The proposed rule establishes methods for estimating the dose levels of ionizing radiation incurred by workers in nuclear weapons production programs. The following comments are intended to address the generic question raised in the October 5, 2001, Federal Register notice, to wit:

(3) Does the interim rule implement an appropriate process for involving the claimant in the dose reconstruction?

I. The following general comments address the process to “estimate” the probability of causation.

A. Dose reconstruction should not be used to impute doses¹ when actual exposure records were required and previously existing records are now missing or incomplete. No process exists for survivor/claimants to develop full occupational histories, medical records or exposure records.

B. If DOE, DOE’s predecessors (AEC) or a contractor failed to maintain radiation exposure records or cannot now produce the records, the burden of proof on the actual level of exposure should shift from the claimant to DOE. This is reasonable because exposure records were required at the time and only DOE has privity of contract to compel the contractors to produce records. This is

¹ Section 3623(d)

particularly important because the exposures are likely to be higher in the 1950s and 1960s, the period for which the records are missing or incomplete.²

C. If, in the absence of actual records, dose reconstruction is relied on to make a claim determination, the survivor/claimant should be given an opportunity and the necessary resources to make an independent technical review and evaluation of the dose reconstruction. The process of dose reconstruction requires a level of technical knowledge and skills exceeding the ability of most, if not all, survivor/claimants.

II. The dose reconstruction process described in Section 82.10(c) of the interim rule for conducting claimant interviews raises the following issues:

A. The process unfairly places the burden of proof on a survivor/claimant because:

1. The employee was prohibited from discussing job assignments and working conditions during the period of employment due to a security clearance.

2. During the 1950s and 1960s, the employees were not given copies of exposure and medical records. Most survivor/claimants are not aware of the technical issues related to the employee's exposure.

3. The employee is now dead and cannot provide specific information to the survivor/claimant regarding job functions or working conditions, or circumstances regarding accidents or incidents which may not be documented, or where documentation is incomplete or missing.

4. The employee's co-workers may be difficult to identify, reluctant to volunteer information, have insufficient recollection or incomplete information, may have moved or may be dead. The survivor/claimant should be given assistance in identifying and following up with co-workers or the burden of proof should be shifted to DOE.

B. The process unfairly places the burden for compiling information on the survivor/claimant because:

1. The employee was prohibited from discussing or documenting job assignments and working conditions due to security. Survivor/claimants must, therefore, assemble personnel records, exposure records and medical records through Freedom of Information Act (FOIA) requests to DOE. The survivor/claimant cannot obtain information directly from a contractor without initiating legal action to facilitate discovery because FOIA does not apply to a corporate entity.

² The comments to the interim rule acknowledge that in the early years, records were primarily maintained for research on the health effects of exposure to radiation. Federal Register, Vol. 66, No. 194, page 50979.

2. The survivor/claimant has attempted to obtain employment, medical and exposure information from the Department of Energy through FOIA and the response(s):

- (a) Include copies documents which are of poor quality and cannot be read or interpreted.
- (b) Include copies of documents where information has been redacted, obliterated or is otherwise rendered incomplete.
- (c) Include incomplete documentation or gaps in chronology without explanation.
 - i. Refer to exposure records maintained and retained by DOE contractors which cannot now be located by DOE.
 - ii. Explain that other records responsive to the request may exist at "other" federal records centers and that efforts will be made to locate information – with indefinite times for response and ultimately no follow-up.
 - iii. Provide no way to interpret the technical information which is produced.

3. The employee's personal medical records during the period of employment are no longer available due to the passage of time, lapse of records retention periods, or the death of a treating physician during the period of employment.

4. The process in the interim rule does not provide the survivor/claimant with any resources, assistance or support to:

- (a) identify any relevant information on employment history;
- (b) identify any relevant information on medical history;
- (c) confirm or supplement radiation information and medical monitoring;
- (d) differentiate between external and internal exposures and exposure sources;
- (e) develop detailed information on work tasks, processes, radiologic protection, monitoring instruments, monitoring practices and incidents which may have resulted in undocumented radiation exposures;³
- (f) identify co-workers and other witnesses with information relevant to the radiation exposures of the covered worker to supplement or confirm information on work experiences.⁴

³ The testimony elicited at site based public meetings includes numerous accounts of incidents when employees were directed to remove film badges, dosimeters and other monitoring badges when performing certain tasks. INEEL meeting on July 31, 2001. The document archives establish that DOE was aware of the deficiencies in the record keeping of exposures. Also, releases from accidents such as the SL-1 incident establish catastrophic exposures of indefinite duration which could not be monitored with available instruments and were not documented. Furthermore, interviews contained in the Human Radiation Experiments Documents archive establish numerous incidents of undocumented exposures, incomplete record keeping by contractors and the military.

⁴ Assistance is necessary to identify co-workers and to facilitate their cooperation.

The survivor/claimant must be given meaningful technical assistance and resources in this process or the "reconstruction" effort will be incomplete, insufficient and unfair.

Please contact me during regular business hours at 801-468-2655 if you have any questions or require additional information.

Sincerely

Craig W. Anderson