Government Accountability Project
National Office
1612 K Street, NW Suite #1100 • Washington, D.C. 20006
202.408.0034 • www.whistleblower.org

TESTIMONY OF RICHARD D. MILLER
SENIOR POLICY ANALYST
GOVERNMENT ACCOUNTABILITY PROJECT

BEFORE THE

COMMITTEE ON JUDICIARY
SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY AND CLAIMS
U.S. HOUSE OF REPRESENTATIVES

"THE ENERGY EMPLOYEES OCCUPATIONAL ILLNESS COMPENSATION PROGRAM ACT – ARE WE FULFILLING THE PROMISE WE MADE TO THESE VETERANS OF THE COLD WAR WHEN WE CREATED THE PROGRAM?"

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SUMMARY OF TESTIMONY OF RICHARD MILLER, GOVERNMENT ACCOUNTABILITY PROJECT

An OMB "Passback" memo to the Department of Labor ("DOL") outlines options for administrative procedures to reduce the number of Special Exposure Cohorts ("SEC") approved by the Secretary of Health and Human Services ("HHS") as a way to contain the growth in benefit costs under the Energy Employees Occupational Illness Program Act ("EEOICPA"). The OMB memo implies that the HHS's decision making process is out of control, that the President's Advisory Board on Radiation and Worker Health ("the Advisory Board") and its audit contractor are not trustworthy, and that, absent Administration intervention, unwarranted benefits will be paid out for radiation related cancers.

In providing for Special Exposure Cohorts as part of EEOICPA, Congress found that the radiation dose records of the Department of Energy ("DOE") and its vendors were of questionable reliability, and were concerned that the absence of exposure monitoring would leave nuclear weapons workers with cancer facing an insurmountable burden of proof. EEOICPA provides claimants with a relief valve where it is not feasible to estimate the radiation dose to workers with sufficient accuracy: HHS may designate additional members of the SEC after receiving a recommendation by the Advisory Board. Members of the SEC receive an automatic presumption that their cancer is work related if they have 1 of 22 "radio sensitive" cancers and were employed in a job with potential radiation exposure for 1 year-- without having to secure a radiation dose reconstruction through the National Institute for Occupational Safety and Health ("NIOSH"). Subtitle B provides a $150,000 lump sum benefit plus medical benefits.

Congress mandated a 4-step SEC evaluation process with checks and balances to ensure that all viewpoints are heard and that each SEC designation is scientifically credible. OMB has proposed 4 actions which, if adopted, constitute a direct attack on the checks and balances set forth in law by (1) by requiring the HHS Secretary to secure permission of the Administration or a White House led task force before making any SEC designations; (2) by loading the Advisory Board with members who will oppose SECs in the name of addressing "imbalance"; (3) by adding another review on top of the Advisory Board for each SEC decision; and (4) by imposing unspecified "constraints" on the Advisory Board's audit contractor. The result: budget cutters and political advisors will dictate SEC decisions, in place of a transparent scientific process.

Atomic workers served their nation's defense by building and testing nuclear weapons, while putting their health in jeopardy. Most would do it over again without hesitation, if called upon to do so. They expect, in turn, that the Government will honor its commitment to provide fair compensation decisions if they were made ill from their work in nuclear weapons facilities. However, this Passback memo suggests that OMB is intent on dishonoring this commitment. The DOL's fingerprints on OMB's plan stains their reputation as an impartial arbiter of claims.

Unless the OMB's plans are disavowed at the highest levels, the credibility of the Energy Employees Compensation program is in jeopardy. Nuclear workers can and will justifiably question whether each and every denial is a product of interference driven by OMB budget cutters—rather than a scientifically credible decision—unless OMB/DOL's posture is reversed.

INTRODUCTION

I am Richard Miller, a Senior Policy Analyst with the Government Accountability Project ("GAP"), a non profit organization based in Washington, D.C. Although GAP's work is primarily focused on supporting whistleblowers, our programs include the oversight of the agencies implementing EEOICPA. GAP serves as an information hub for claimants, Congress, unions and the media. GAP assisted with the EEOICPA reform amendments in 2004 which were included in the FY 05 Defense Authorization Act (P.L.108-375). Prior to GAP, I was a staff representative for DOE atomic weapons employees, and worked on the bi-partisan effort to enact EEOICPA[1] as part of the FY 01 Defense Authorization Act (P.L.106-398).

We appreciate the opportunity to testify today before the Subcommittee, and commend the Judiciary Committee for using its jurisdiction to conduct oversight hearings on EEOICPA.

The effort to secure compensation for workers made ill from employment in nuclear weapons facilities has been underway for over 40 years. Since the late 1940s, senior Atomic Energy Commission officials recognized that "cancer is a specific industrial hazard of the atomic energy business."[2] Beginning in the late 1950s, Congress held a series of hearings on establishing a federal compensation scheme for nuclear weapons workers. This effort has been driven by the inability of state workers' compensation programs to adequately deal with occupational illnesses (as opposed to injuries), and the difficulty in overcoming the unlimited resources spent by the Energy Department to defeat such claims--without regard to merit.

UNMONITORED RADIATION EXPOSURES ARE THE REASON FOR SPECIAL EXPOSURE COHORTS

Numerous government and scientific reports document that the DOE failed to properly monitor workers at its nuclear weapons facilities, and that many of its records are unreliable--

[1] *See*: Testimony of Richard Miller before the Senate HELP Committee, Subcommittee on Employment, Safety & Training, May 15, 2000; the House Judiciary Committee, Subcommittee on Immigration & Claims (http://www.house.gov/judiciary/mill0921.htm) on September 21, 2000; and the Senate Energy Committee, November 21, 2003 (S. Hrg. Report 108-334, http://www.access.gpo.gov/congress/senate/senate08ch108.html)

[2] Letter from E.W. Goodpasture, Vice Chair, Advisory Committee on Biology and Medicine, to Gordon Dean, Chairman AEC, December 1, 1951. Also see: *Early Health Problems of the US Nuclear Weapons Industry and Their Implications for Today*, Senate Committee on Government Affairs, S.Prt.101-63, December, 1989.

especially between the 1940s and the 1970s. Major deficiencies in monitoring programs persisted into the early 1990s at a number of DOE sites. Three examples follow:

- **Nevada Test Site**--Workers at the Nevada test site in the 1950s and 1960s were laid off or removed from the higher paying jobs in "forward areas" if they exceeded their quarterly dose limit of 3 rem. Supervisors were responsible for keeping track of the dose limits. Monitors placed radiation dose badges between 2 inch thick lead bricks when workers approached their quarterly limits. Workers at the Hardtack II blast were told "don't get overexposed; we don't have anyone to replace you."[3]

NIOSH's site profile for the Nevada Test Site excludes exposures during the period of atmospheric weapons testing prior to 1963, and excludes exposures to workers at 10 underground tests which blew out or vented radiation during the period between 1958-1986. There are no beta monitoring records prior to 1975.

- **Iowa Army Ammunition Plant**--Prior to 1968, fewer than 3 percent of the workers were monitored for external radiation exposure at the Iowa Army Ammunition Plant (IAAP) where they assembled and disassembled over 20 types of nuclear weapons. There are no internal radiation monitoring records throughout the 26 year history of this plant.

HHS approved a Special Exposure Cohort for the IAAP nuclear weapons workers, after receiving a unanimous Advisory Board recommendation (11-0). The audit contractor and board members reviewed classified weapons design records to ascertain the feasibility of reconstructing radiation dose at the IAAP and concluded it could not be done.

- **Paducah Gaseous Diffusion Plant**—Uranium enrichment plant workers inhaled extremely radiotoxic dusts containing plutonium-239 and neptunium-237 from recycled uranium at the Paducah, Kentucky site, but were not adequately protected or monitored for nearly 40 years. A 1960 Atomic Energy Commission (AEC) memo explains why:[4]

> *There are possibly 300 people at Paducah who should be checked out, but they [Union Carbide] hesitate to proceed to intensive studies because of the union's use of this as an excuse for hazard pay.*
>
> *I also pointed out to Dr. Ward the need to get post mortem samples on any of these potentially contaminated men for correlation of tissue content*

[3] William J. Brady, Principal Health Physicist, Nevada Test Site (1952-1991), Review of the NIOSH Site Profile for the Nevada Test Site, December 13, 2005, SCA-TR-TASK1-0006

[4] March 11, 1960, C.L. Dunham, Director of the Division of Biology and Medicine, Atomic Energy Commission

with urine output, but I am afraid the policy at this plant is to be wary of the unions and any adverse public relations.

Paducah's management did not monitor workers (dead or alive) for neptunium and plutonium intakes until 1992—three years after the plant stopped processing recycled uranium. A DOE-sponsored exposure assessment in 2000 found that maximally exposed workers could have received a committed dose between 599-2,238 rem to the bone.[5] Whole body annual dose limits are 5 rem per year. EEOICPA designated Paducah plant workers who were employed between 1952-1992 for at least one year as members of the SEC--due to the lack of monitoring.

SPECIAL EXPOSURE COHORT: WHAT HAPPENS IF THERE IS NOT ENOUGH DATA TO RECONSTRUCT DOSE?

EEOICPA directs NIOSH to establish procedures to "reconstruct" the radiation dose where records are missing or workers were unmonitored. However, in cases where "reasonable" doses cannot be estimated, claimants face an insurmountable burden of proof in establishing a claim for radiation-related cancers. In these cases, Secretary of Health and Human Services may, subject to a recommendation by the Advisory Board, administratively designate classes of workers at a covered facility as members of the Special Exposure Cohort, without need for further legislation, if:

(1) it is not feasible to estimate dose with sufficient accuracy the radiation dose that the class received; and

(2) there is a reasonable likelihood that such radiation dose may have endangered the health of the members of the class.

Members of the SEC receive $150,000 lump sum plus prospective medical costs for 22 listed cancers[6]. NIOSH estimates the 22 cancers cover 60% of the cases filed in this program.

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[5] U.S. Department of Energy, Office of Environment, Safety and Health, *Exposure Assessment Project at the Paducah Gaseous Diffusion Plant*, December 2000, p. 77

[6] The 22 listed cancers are: lung, bone, kidney, leukemia (other than chronic lymphocytic leukemia), multiple myeloma, lymphomas (except Hodgkin's disease), thyroid, male or female breast, esophagus, stomach, pharynx, small intestine, pancreas, bile ducts, gall bladder, salivary gland, urinary bladder, brain, colon, ovary or liver.

In 2000, EEOICPA legislatively designated 4 classes of workers as members of the Special Exposure Cohort: Enrichment plant workers at Portsmouth, Ohio; Paducah, Kentucky; Oak Ridge K-25 plant in Oak Ridge, TN; and workers employed at the Amchitka Island Test Site in Alaska during underground weapons tests. EEOICPA's Special Exposure Cohort provisions are modeled, in part, on those provided to uranium miners[7], uranium millers/ore transporters[8], and civilian atomic weapons test site personnel[9] under the Radiation Exposure Compensation Act (42 USC 2201 note), as well as military personnel under the Atomic Veterans program (38 C.F.R. § 3.309(d))[10]. Although the compensation levels vary between programs, the common theme amongst these programs for radiation exposed workers is that claimants who meet the employment tests can be compensated without providing further proof that the cancer was caused by radiation exposure.

Executive Order 13179 issued on December 8, 2000 directed the Secretary of HHS to promulgate regulations for establishing membership in the SEC, and to consider and issue determinations on petitions by classes of employees to be treated as members of the SEC.

FOUR STEP ADMINISTRATIVE REVIEW PROCESS FOR EVALUATING SECS

There is a four step administrative review process for evaluating SEC Petitions:

[7] A presumption is provided to uranium miners employed in uranium mines located in Colorado, New Mexico, Arizona, Wyoming, South Dakota, Washington, Utah, Idaho, North Dakota, Oregon, and Texas at any time during the period beginning on January 1, 1942, and ending on December 31, 1971, and who were exposed to 40 or more working level months (WLMs) of radiation while employed in a uranium mine, or worked for at least one year in a uranium mine during the relevant time period, and contracted primary lung cancer or certain nonmalignant respiratory diseases.

[8] A presumption is provided to uranium millers or ore transporters located in Colorado, New Mexico, Arizona, Wyoming, South Dakota, Washington, Utah, Idaho, North Dakota, Oregon, and Texas at any time during the period beginning on January 1, 1942, and ending on December 31, 1971, who worked in a uranium mill or transported uranium (or uranium-vanadium ores) for at least one year during the relevant time period and contracted primary lung cancer, certain nonmalignant respiratory diseases, renal cancer, and other chronic renal disease including nephritis and kidney tubal tissue injury.

[9] A presumption is provided to individuals who participated onsite in a test involving the atmospheric detonation of a nuclear device within the official boundaries of the Nevada, Pacific, Trinity, or South Atlantic Test Sites and, after the onsite participation, the claimant contracted one of 21 specified cancers.

[10] The following atomic veterans are covered: internment as a prisoner of war (POW) in Japan; post-war occupation of Hiroshima or Nagasaki; participation in atmospheric nuclear weapons testing (such as the Nevada Test Site or the Pacific Proving Grounds); participation in underground nuclear weapons testing at Amchitka Island, Alaska; or assignment to a gaseous diffusion plant at Paducah, Kentucky; Portsmouth, Ohio; or K-25 at Oak Ridge, Tennessee.

(1) NIOSH first "qualifies" SEC petitions to make sure they are complete, and then evaluates such petitions within 180 days, after which it issues a recommendation to the petitioners and the Advisory Board;

(2) the Advisory Board conducts an independent review and votes on a recommendation to the HHS Secretary. Subject to Advisory Board direction, the audit contractor assesses technical issues;

(3) the Secretary issues a final agency decision within 30 days of receipt of the Advisory Board's recommendation and transmits it to Congress; and

(4) Congress has 30 days to veto a SEC designation or allow it to go into effect.

As of February 26, 2006, this process was followed with 8 petitions. It has resulted in the approval of 6 SECs at 4 sites. HHS has denied 2 petitions and disqualified nearly 20 at the earliest stages of review. The SEC approvals to date are:

- Mallinckrodt Chemical Works, St. Louis, Missouri (1942-1948 and 1949-1957)
- Iowa Army Ammunition Plant, Burlington, Iowa (1948-1949 and 1949-1974)
- Linde Ceramics, Tonowanda, New York (1942-1947)
- Y-12 Calutron Workers, Oak Ridge, Tennessee (1943-1947)

These four facilities listed above performed work during the earliest years of the nuclear weapons production operations. In these 6 cases, the HHS determined that there was no formal health physics program, and where the radiation monitoring did exist, it was too limited to complete a credible radiation dose estimate. About 1,125 cases are covered which involve the compensation of the 22 listed cancers, according to recent NIOSH statistics.

There are 5 SEC petitions which have been "qualified" and are undergoing evaluation. Two have exceeded the 180 day deadline for submission to the Advisory Board (Rocky Flats and Y-12). Four of these SEC Petitions are on the Agenda for the April 2006 Advisory Board:.

- Rocky Flats Plant, Denver, Colorado
- Y-12 Plant steamfitters and pipefitters from 1949-1957, Oak Ridge, Tennessee
- Ames Laboratories, Ames, Iowa
- Pacific Proving Grounds, Marshall Islands
- Chapman Valve, Springfield, Massachusetts

The following nine petitions are in the early stages of review and have not yet been "qualified" for evaluation:

- NUMEC, Apollo, Pennsylvania (1957-86)
- Fernald Site, Harrison, Ohio (1951-89)
- Monsanto Research, Dayton, Ohio (1943-46
- Nuclear Metals, Concord, Massachusetts (1981-1991)
- Blockson Chemical, Joliet, Illinois (1952-62)
- Oak Ridge Institute for Nuclear Studies, Oak Ridge, Tennessee (1950-1956)
- Hanford, Washington, DuPont employees 1943 to September 1, 1946
- Los Alamos Lab, Los Alamos, New Mexico (1943 to 1975)
- Y-12 Nurses, Oak Ridge Tennessee (1956 to 1957 and 1962 to 1964)

OMB'S "PASSBACK" DETAILS WHITE-HOUSE LED INTERAGENCY GROUP TO REVIEW ADMINISTRATIVE OPTIONS TO REDUCE SICK WORKER BENEFIT COSTS

The Office of Management and Budget (OMB) "Passback" to the DOL states:

! ***Energy Employees Occupational Illness Compensation Program Act (EEOICPA) Part B.*** *ESA[11] is to be commended for identifying the potential for a large expansion of EEOICPA Part B benefits through the designation of Special Exposure Cohorts (SEC). The Administration will convene a White House-led interagency work group including HHS and Energy to develop options for administrative procedures to contain growth in the cost of benefits provided by the program. Discussions are not limited to, but will involve, the following five options.*

1. *Require Administration clearance of SEC determination[s];*
2. *Address any imbalance in membership of President's Advisory Board on Radiation and Worker Health;*
3. *Require an expedited review by outside experts of SEC recommendations by NIOSH;*
4. *Require NIOSH to apply "conflict of interest" rules and constraints to the Advisory Board's contractor; and*
5. *Require that NIOSH demonstrate that its site profiles and other dose reconstruction guidance are balance[d].*

ANALYSIS OF THE OMB OPTIONS AND RECOMMENDATIONS

1. "Require Administration clearance of SEC determination[s]."

In order to "contain growth in the cost of benefits," OMB's "Passback" memo proposes to have Administration officials clear all decisions by the HHS Secretary regarding SEC petitions. If adopted, the requirement for "Administration clearance" would apparently override

[11] ESA is the Employment Standards Administration within the DOL. The Office of Workers' Compensation Programs (OWCP) which administers EEOICPA is part of ESA.

the scientific findings of the HHS Secretary, NIOSH, the Advisory Board and its contracted health physicists, and pre-empt the 4-step review process outlined in EEOICPA. By having OMB (or an interagency group which they convene) override the scientific review process and the legal requirements set forth in EEOCIPA and HHS regulations (42 CFR Part 83), it would appears to render the Advisory Board's work largely ceremonial and will undermine the credibility of the program

To date, each SEC petition has gone through a rigorous, public scientific assessment of a facility's radiation monitoring practices and production hazards to determine if "it is not feasible to estimate dose with sufficient accuracy." In addition to reviewing the NIOSH Special Cohort Evaluation Reports, the Advisory Board has tasked their audit contractor, S. Cohen and Associates (SC&A), to assist in the technical analysis. SC&A's health physicists interview site experts, review historical records, and analyze the technical approaches used by NIOSH, and then present their independent assessments to NIOSH, the Board and the public. Congress also relies upon these assessments for guidance in judging the scientific issues.

OMB's desire to contain the growth in the cost of benefits curiously overlooks the questionable growth of administrative costs. NIOSH's dose reconstruction contractor has seen its costs grow from $74 million to at least $200 million over five years.

DOL's FY 07 Budget Request projects a drop in Subtitle B benefits from $460 million in FY 2006 to $277 million. DOL has not explained whether this accounts for implementation of the options outlined in the OMB "Passback" memo, or whether this merely reflects a falloff in claims activity as NIOSH works down its backlog of dose reconstruction cases, or whether it reflects both.[12]

Conclusion: New SEC petitions could be denied or reduced in scope if the White

[12] The savings from eliminating new SEC might save upwards of $100 million, but this amounts to less than 6/1000ths of a percent of annual entitlement spending 3/100ths of a percent of the deficit.

House/OMB dictates decisions on SECs to the HHS Secretary. The price for political meddling is that SEC denials will lack credibility and will be presumed to be decided by the White House based on budget grounds rather than scientific grounds. Budget-driven SEC decisions should not override or circumvent the scientific review process. The costs that have run out of control are those for the dose reconstruction contractor, not SECs.

2. "Address any imbalance in membership of President's Advisory Board on Radiation and Worker Health."

The term "imbalance" must be defined. Given the OMB's goal of reducing the approval of Special Cohorts, this option appears to be designed to load the Advisory Board with new members who would have a philosophical tilt in favor of DOE's radiation dosimetry programs and against SECs. This mindset defeats the very purpose of an independent Advisory Board which is to instill credibility in the scientific evaluation process—and not serve as a rubber stamp for anyone.

The General Accounting Office recommended that the Defense Department establish an Advisory Board for the Atomic Veterans program because there was strong criticisms by veterans groups about the validity of the dose estimates and the conflicts of interest by the agency and contractors performing the dose reconstructions. GAO found[13]:

> *Veterans and veterans' service organizations have expressed concern over the completeness of data used by DOD and the methodology it uses to estimate doses, particularly doses from inhaled or ingested radioactive particles. Some are also skeptical about DOD's ability to be unbiased in the dose reconstruction process, since DOD was responsible for the atmospheric testing that exposed the veterans to radiation.*

To prevent conflicts of interest, EEOICPA precluded DOE or its staff from performing dose reconstructions. However, after NIOSH was assigned this task, it contracted with a major DOE prime contractor, Oak Ridge Associated Universities (ORAU), to perform the dose reconstructions. ORAU staffed up with DOE contractor staff, thereby circumventing the

[13] *Veterans Benefits: Independent Review Could Improve the Credibility of Radiation Exposure Estimates*, Report to the Committee on Veterans Affairs, January 2000, GAO/HEHS-00-32, pp. 8

statutory prohibition intended to prevent this conflict of interest. These conflicts have raised significant doubts about the credibility of the science being used for dose reconstruction. To date, NIOSH's conflict of interest policy has been largely ineffectual, and NIOSH staff has allowed ORAU to evade key restrictions. The presence of such glaring conflicts of interest increases the necessity of having an independent Advisory Board to serve as a check and balance.

The GAO assessment of the Atomic Veterans Program identified a need for peer review:

> *The Institute of Medicine has been critical of the program's lack of quality control, including the lack of a peer review process. The National Research Council has also suggested that dose reconstruction be reviewed, or subjected to peer review, by outside independent scientists. It has reported that such review could result in greater public confidence in dose reconstruction.*

The drafters of EEOICPA heeded the GAO's advice, and established an Advisory Board to conduct a peer review through "an independent review process." It is tasked to: (1) make recommendations on Special Exposure Cohorts, (2) audit the quality of dose reconstructions, and (3) assess NIOSH procedures.

EEOICPA requires the Advisory Board to have a balance of medical, scientific and worker perspectives, and authorizes staff support for the Board activities. The Advisory Board is appointed by the President and operates under the Federal Advisory Committee Act. It has 12 members at present. It meets at least quarterly and has 8-12 subcommittee or working group meetings per year. To date there have been 35 full Board meetings

After the White House added several workers to meet the statutory requirements in late 2001, the Board enjoyed a genuine "balance" in terms of perspectives–with a 6-6 split. However, this balance required Board members to reach a consensus and no perspective dominated.

In January 2006, the White House removed two members without cause (Dr. Anderson of Wisconsin and Mr. Espinosa of New Mexico), and appointed three new members (Mr. Poston of

Texas, Dr. Lockey of Ohio and Mr. Clawson of Idaho). Since these new members have not participated in Board deliberations up to this point, it is premature to judge the impacts of these changes. However, two of these new members may have conflicts of interest. One individual has had two of his children working for a subcontractor to NIOSH; and another Board member serves as a DOE-appointed expert serving as a defense expert in evaluating workers' compensation claims.

There has been an ongoing effort to impair the independence and effectiveness of the Advisory Board even prior to the OMB/DOL recommendation:

- In 2004-5 NIOSH program staff worked to weaken the independence of the Advisory Board and its audit activity. NIOSH staff blocked the Board from using its audit contractor for SEC Reviews. Staff said that the auditor was engaging in "scope creep."

- NIOSH Program staff urged the White House Presidential Personnel Office to replace Dr. Anderson and Mr. Espinosa, even though, from my perspective, they were contributing effectively to the work of the Board[14].

- In December 2004, DOL declared that there was a $3 million ceiling for the 5-year audit process, even though Congress had not set a cap. As the dose reconstruction program grew and NIOSH's projected costs tripled, it became evident that the audit effort would be larger than originally anticipated.

Although EEOICPA does not specify term limits for Advisory Board members, HHS-established 3 year terms. The term for 4 of the 12 Advisory Board members expired in August 2005; however, they continue to serve at the pleasure of the President. Based on the Passback memo, it appears that OMB and DOL would like to replace some of these Board members as a way to reduce approvals of Special Exposure Cohorts.

Conclusion: The OMB plans to address "any imbalance" in the Advisory Board appears to be code language to load the Advisory Board with new members who will oppose new SEC's and reduce benefit costs. A genuinely balanced and independent Board—coupled with an audit contractor which is not threatened with constraints-- is essential to counter this program's built-

[14] This is based on attending 32 of the 34 Advisory Board meetings that were open to the public.

in conflicts of interest. Should the OMB move forward with the option to further stack this Board, the program's scientific credibility will be crippled. As a result of the three recent Board appointments, it is likely that Board has taken on more decidedly pro-DOE bias. This will make it all the more difficult for the Advisory Board to hold accountable those former DOE contractor staffers who are conflicted.

3. <u>"Require an expedited review by outside experts of SEC recommendations by NIOSH."</u>

There is already an outside "peer review" of SEC Petitions. But OMB seems to want another one which circumvents the Advisory Board. Under the current process, NIOSH must justify to the Advisory Board why it cannot reconstruct dose, if it recommends approval of an SEC. Likewise, it must prove to the Advisory Board that it can reconstruct dose for a representative sample of cases, if it recommends the denial of a SEC Petition. The Advisory Board's review of SEC Petitions involves the following elements:

- **$** NIOSH "site profiles" are critically evaluated to look at data adequacy. The Board asks "is there enough data to reconstruct a reasonable radiation dose estimate?"
- **$** The Advisory Board has developed formal criteria. They evaluate whether "co-worker" data is a reliable surrogate when individual dose records are missing. Site experts are frequently consulted on working conditions to test NIOSH's assumptions against the real world. The audit contractor has assisted with these technical assessments.
- **$** *Example*: Mallinckrodt never measured worker exposure to three extremely radiotoxic substances. The audit contractor demonstrated that these unmonitored isotopes dominated the radiation risk for certain organs. NIOSH contended that it could estimate dose for these unmonitored exposures in theory, but the Board wanted more than conjecture. To evaluate this, the Board secured 4 audit reports, held 3 dedicated Board meetings, exchanged data in working groups, and demanded NIOSH provided "proof of process."
- **$** SEC petitioners are invited to address the Advisory Board and participate in working group meetings and conference calls.
- **$** The Advisory Board and NIOSH carry out their reviews in open meetings which are transcribed. Phone calls between the audit contractor and NIOSH are memorialized in detailed written summaries. Congress is able to monitor this process. This transparency increases credibility.

<u>Conclusion:</u> DOL has never voiced a technical concern about an SEC Petition at an Advisory Board meeting, yet OMB proposes a duplicative review process to second guess HHS and the Advisory Board. Absent an open and deliberative evaluation process, the DOL's review

will lack scientific credibility. EEOICPA provides the HHS Secretary with 30 days from receipt of the Advisory Board's recommendation to render a decision. As a practical matter, it is unlikely that an "expedited review" could evaluate complex issues in 30 days.

Unless the goal is to circumvent the Advisory Board's peer review process, or counter their recommendations, why have a second review?

4. "Require NIOSH to apply "conflict of interest" rules and constraints to the Advisory Board's contractor."

OMB/DOL needs to declare what it perceives to be audit contractor's conflicts of interest and what it means by the term "constraints" on the contractor.

When the audit contract was being developed, the Advisory Board imposed conflict of interest requirements far more stringent that those required under federal law because the integrity of the technical advice provided to the Advisory Board had to be beyond reproach. Indeed, these restrictions are far greater than those imposed on NIOSH, Oak Ridge Associated Universities ("ORAU"), or members of the Advisory Board. The Advisory Board is fortunate to have been able to find a "white hat" firm which brings the needed technical competence while having complete independence from the DOE and its contractors.

SC&A submitted a conflict of interest plan to the Advisory Board on August 24, 2004 which restricts any SC&A Team members who was previously involved in health physics programs at a DOE site from having any involvement in auditing at that site. This plan also prohibits SCA Team members from having any involvement, if they served as an expert witness for DOE in cases involving radiation related claims. Further, SC&A cannot bid on work with NIOSH, DOE, or their contractors while they are serving as the audit contractor.

Some SC&A staff have well-publicized positions on the weaknesses in DOE's radiation dosimetry programs, and their skepticism is well founded. SC&A reports have exposed weaknesses in NIOSH site profiles and dose reconstructions. Their approach in auditing is well-

balanced: they have found cases where radiation dose is underestimated and other cases where radiation dose is overestimated. To resolve technical differences, the Advisory Board oversees a 6-step "comment resolution" process between NIOSH staff and SC&A staff. In some cases, NIOSH has revised its technical approaches in response to the audit findings, and in other cases SC&A has withdrawn findings after receiving more information. A standardized set of procedures drives this peer review process.

The conflicts of interest which have significantly tainted this compensation program are rooted in ORAU—not SC&A. As noted above, ORAU has a 5-year contract with NIOSH for dose reconstruction and SEC evaluations. ORAU hired current and former DOE contractor and federal staff who managed health physics programs at the DOE sites where they are now tasked to write key documents used on compensation decisions. Listed below are five examples of conflicts of interest involving DOE contractor staff performing site profiles for ORAU:

- **Hanford, Washington**--Jack Fix and Don Bihl, who work for Battelle and managed Hanford's health physics programs for many years, were hired to write the Hanford Site Profiles (and revisions) for NIOSH . Battelle is still under contract to DOE to run the radiation dosimetry programs at Hanford.

- **Idaho Labs, Idaho**-- Norm Rohrig and Bryce Rich both managed the INEEL radiation protection programs, and prepared the NIOSH site profile at INEEL. Bryce Rich's disclosure indicates that served as a defense expert on radiation related worker claims.

- **Pantex, Texas**--Jerome Martin is leading the team writing the NIOSH/ORAU Pantex site profile. He previously managed the Pantex site health physics program.

- **Paducah, Kentucky**--Carol Berger wrote an internal radiation dose report for Martin Marrietta at Paducah in 1992. Then she was hired to write the "bulk of" NIOSH's internal radiation dose site profile at Paducah (internal dose), where she simply cut-and-pasted her previous assessment, which had been found several years ago to incorrectly minimize exposure to transuranics such as neptunium-237 and plutonium-239.

- **Rocky Flats, Colorado**--Roger Falk was a radiation monitoring manager at the DOE Rocky Flats plants from 1996 to 1998, and is now employed by ORAU as a "Principal Author" of the NIOSH site profile at Rocky Flats. He is assisting NIOSH/ORAU efforts in evaluating a Special Cohort Petition from the Rocky Flats workforce.

While these individuals have important site knowledge which NIOSH and ORAU should

tap, the job of writing key decision documents means individuals with conflicts of interest are presumably assessing the validity of their previous work for application in a NIOSH site profile. Defects in scientific assessments have been directly traced to these conflicts of interest. Some individuals were expert witnesses on workers' radiation claims; they should not be writing key documents for a site where they had previously served as an expert. We note that the Director of NIOSH is now aware of these conflicts and is reworking the conflict of interest policy. However, we are puzzled how OMB/DOL could have overlooked these well-advertised conflicts of interest is puzzling, if rooting out conflicts of interest was a genuine concern.

It appears that OMB/DOL's goal is to hobble the effectiveness of the Advisory Board's audit contractor. The DOL's FY 07 budget request specifically removes the line item for the Advisory Board's audit contractor. NIOSH and the Advisory Board receive their funds for this program though DOL, instead of direct allocations from the Treasury. This pass-through budgeting process allows DOL to impact the work of NIOSH and the audit contractor. In response to DOL's threat to cut off funding for the audit contractor, the FY 06 Labor/HHS Appropriations Act allocated $4.5 million for the Advisory Board and its audit contractor.[15]

In late 2004, certain NIOSH Program Staff took actions which threatened the audit contractor's independence. We are pleased that NIOSH Director Howard eliminated "triple-hatting" where the senior manager overseeing the dose reconstruction program, Larry Elliott, was also serving as both the Designated Federal Official to the Advisory Board (which is overseeing his program) and overseeing the audit contractor's budget. Given the purported concern about conflict of interest, it is troubling that OMB overlooked this conflict of interest.

[15] The FY 06 Labor, HHS Appropriations Act states: "[n]ot later than 30 days after enactment, in addition to other sums transferred by the Secretary of Labor to the National Institute for Occupational Safety and Health (''NIOSH'') for the administration of the Energy Employees Occupational Illness Compensation Program (''EEOICPA''), the Secretary of Labor shall transfer $4,500,000 to NIOSH from the funds appropriated to the Energy Employees Occupational Illness Compensation Fund (42 U.S.C. 7384e), for use by or in support of the Advisory Board on Radiation and Worker Health (''the Board'') to carry out its statutory responsibilities under EEOICPA (42 U.S.C. 7384n–q), including obtaining audits, technical assistance and other support from the Board's audit contractor with regard to radiation dose estimation and reconstruction efforts, site profiles, procedures, and review of Special Exposure Cohort petitions and evaluation reports.

Conclusion: Given the stringent "conflict of interest" requirements already imposed on SC&A under their contract, the OMB's proposal appears to be without basis. OMB needs to declare why it is recommending the imposition of "constraints," in addition to SC&A's existing conflict of interest requirements, and how this will improve the quality of the audit.

SUMMARY

Atomic workers served their nation's defense by building and testing nuclear weapons, while putting their health in jeopardy from exposure to radiation, beryllium and other toxic substances. Claims for radiation related cancers depend on credible and complete radiation records. Where workers went unmonitored, and it is not feasible to estimate radiation dose with sufficient accuracy, Congress provided that workers may petition to be members of the Special Exposure Cohort and receive an automatic presumption their cancer was work related.

The OMB has recently outlined a set of options for administrative actions intended to cut SEC approvals as a way "contain growth in the cost of benefits." If implemented, these will eviscerate the statutory checks-and- balances designed to ensure fair decisions, and undermine the credibility of benefit determinations.

A heartfelt bipartisan effort led to the enactment of EEOICPA as a way to help these patriotic Cold War Veterans. If the Government now decides to "stack the deck" by dictating to HHS that they must deny SECs as a way to reduce benefit costs--even though there are inadequate records to make a fair compensation decisions—then the workers and their families have every reason to be cynical.

Unless the OMB's options outlined in the "Passback" memo are disavowed at the highest levels of the Administration, nuclear workers can justifiably question whether each and every denial is a product of political interference—rather than a scientifically credible decision. It is imperative that we restore the program's credibility.