

Miller, Diane M.

From: William Slattery [whslattery@yahoo.com]
Sent: Tuesday, December 04, 2001 3:10 PM
To: niocindocket@cdc.gov
Subject: Comment on Proposed 42 CFR 81



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The attached comment letter is being submitted on behalf of Atlantic Legal Foundation, 205 East 42nd Street, New York, NY 10017;tel.:(212)573-1960. Sincerely, W.H. Slattery, President.

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December 4, 2001

NIOSH Docket Office
Robert A. Taft Laboratories
M/S C34
4676 Columbia Parkway
Cincinnati, OH 45226

Re: Energy Employees Occupational Illness
Compensation Program Act of 2000 ("EEOICPA");
Proposed Regulations – 42 CFR Part 81
Federal Register 50967 *et seq.*, October 5, 2001,
(the "Proposed Guidelines")

Dear Madam/Sir:

We submit this letter of comment on the Proposed Guidelines as solicited by the Notice of Proposed Rulemaking appearing in the *Federal Register* on October 5, 2001.

Atlantic Legal Foundation is a nonpartisan, nonprofit public interest law firm which has a long history of promoting the use of sound science in litigation in Federal and state courts and by Federal and state administrative agencies.

ALF's particular interest in the Proposed Guidelines arises from the concern that the Proposed Guidelines, without the changes here proposed, may be misused in civil litigation not involving the compensation scheme for Government workers (and certain employees of Government contractors) who may have been exposed to radiation in the course of their employment in an attempt to prove that a particular cancer was caused by radiation, or by a particular level of exposure to radiation. Government reports, statements and data compilations benefit from an exception to the

hearsay rule which facilitates their admission into evidence in Federal courts and those state courts which have adopted a rule patterned on Rule 803 (8) of the Federal Rules of Evidence.

The Proposed Guidelines should not be applied in civil litigation because, as noted by Chauncey Starr in his comment of November 26, 2001, the Probability of Causation model used in the Proposed Guidelines does not account for an exposure level below which no occupational illness will occur and because the assumed Linear No Threshold extrapolation to zero does not represent a scientific consensus, and has no experimental foundation. *See* R. Wilson, "Probability of Causation: its Use in Compensation Schemes," *Nuclear News*, June, 2001; *see also* J. Beyea and S. Greenland, "The Importance of Specifying the Underlying Biologic Model in Estimating the Probability of Causation," *Health Physics*, 76:269-274 (1999).

While the Congress can, of course, make a policy choice to compensate whomever it chooses, whether or not their exposure has resulted, or is likely to result, in cancer, this approach should not be the basis of imposing liability on private parties, and may perpetuate an exaggerated public fear of the effects of radiation at any level, no matter how small. The Proposed Guidelines should not imply that the radiation *actually* caused the cancers for which the Guidelines provide compensation.

The final rule and the Proposed Guidelines should explicitly state that they are not to be used in any way in civil litigation as proof of fault, or as establishing any standard for proof of causation, other than in situations expressly contemplated by EEOICPA.

Sincerely,

William H. Slattery
President