June 9, 2005

The Honorable Alberto Gonzales
Attorney General of the United States
United States Department of Justice
Room 4400
Washington, DC 20530

Dear Mr. Attorney General:

We are writing to recommend that the Office of Legal Counsel (OLC) withhold issuance of any written legal opinions regarding the feasibility of estimating radiation dose under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA) where it involves classified information, until the full ramifications of such an opinion are explored. We understand that OLC has instructed the Secretary of Health and Human Services (HHS) to refrain from determining that, in the context of a Special Exposure Cohort (SEC) petition, it is not feasible to estimate dose with sufficient accuracy because information is classified.

Due process and transparency are matters of significant sensitivity. It is well documented that defense nuclear workers were often put in harm's way without their knowledge or consent. The government used the guise of state secrets on nuclear weapons production activities to withhold information needed by workers to secure workers' compensation claims, to thwart demands for hazard duty pay and to avoid adverse publicity and embarrassment.

For example, a 1947 memo from the AEC Director of Oak Ridge operations to the AEC General Manager stated:

> *Papers referring to levels of soil and water contamination surrounding Atomic Energy Commission installations, idle speculation on future genetic effects of radiation and papers dealing with potential process hazards to employees are definitely prejudicial to the best interests of the government. Every such release is reflected in an increase in insurance claims, increased difficulty in labor relations and adverse public sentiment.*

In October 1947 Oak Ridge recommended to AEC Headquarters that the AEC Insurance Branch routinely review declassification decisions for liability concerns:

> *Following consultation with the Atomic Energy Commission Insurance Branch, the following declassification criteria appears desirable. If specific locations or activities of the Atomic Energy Commission and/or its contractors are closely associated with statements and information which would invite or tend to encourage claims against the Atomic Energy Commission or its contractors such portions of articles to be published should be reworded or deleted. The effective establishment of this policy necessitates review by the Insurance Branch as well as the Medical Division prior to declassification.*

In 1948, the AEC Declassification Branch recommended declassification of a study of the effect of gamma radiation on Los Alamos workers' blood because it fell within the field of "open research." The AEC Insurance Branch called for "very careful study" before making the report public:

> *We can see the possibility of a shattering effect on the morale of the employees if they become aware that there was substantial reasons to question the standards of safety under which they are working. In the hands of labor unions the results of this study would add substance to demands for extra hazardous pay knowledge of the results of this study might increase the number of claims of occupational injury due to radiation and place a powerful weapon in the hands of a plaintiff's attorney.*

A March 11, 1960, memo by AEC biomedical officials stated "possibly 300 people at Paducah should be checked out" for neptunium-237 contamination, but noted that there was hesitation to "proceed to intensive studies because of the union's use of this as an excuse for hazard pay." This policy persisted through the Cold War. At the time EEOICPA was enacted, the Secretary of Energy admitted that claims for occupational illness were routinely challenged by Energy and its contractors–without regard to merit.

Because official secrecy was used to withhold the truth about the dangers to workers' well being at government atomic facilities, transparency and due process for claimants is a necessary component of any adjudication under this program. Congress created an Advisory Board which operates in the sunshine to oversee the work of government scientists who are conducting radiation dose reconstruction for compensation decisions, as a way to facilitate transparency. Congress created a non adversarial adjudication process to ensure that information would be shared more freely than in a traditional adversarial proceeding.

At the April 26, 2005, meeting of the Advisory Board on Radiation and Worker Health (Advisory Board) in Cedar Rapids, Iowa, NIOSH presented the OLC's position in "power point" slides. One slide explained that classified information could not be used to justify that "it is not feasible to estimate radiation dose with sufficient accuracy" as part of a Special Exposure Cohort evaluation. The presentation maintained that claimant's due process rights could be preserved in a limited form, where classified information is involved. It suggested that in an appeals hearing, classified information could be reviewed with government officials in an *ex parte* communication with the judge *in camera*. The negative effect is that claimants would be in the dark about the scientific basis for a radiation dose estimate, and unable to challenge the technical basis. Their approach could place claimants in a situation where they must depend on the government's word without a public vetting. It also requires them to have faith that the government scientists, who are the defendants, will present information to a judge in a way which fully represents the interests of the claimant.

This is not to say that the withholding of classified information necessitates the frustration of due process, or that the only remedy is a SEC. In many cases, claims involving classified production or process information can still be reconstructed, since individual dosimetry records are generally not classified. Moreover, classified information will not always be central to reaching a credible compensation decision.

However, in older facilities where inadequate radiation dosimetry records are the rule, classified records may be the only data source. For example, NIOSH scientists recently asserted in their "SEC Evaluation Report" that it was feasible to estimate dose with sufficient accuracy at the Iowa Army Ammunition Plant (IAAP) using classified information. As such they recommended that the petition be denied. However, an independent probe of the classified information by Q cleared Board members and consultants found the government scientists were in error and that they could <u>not</u> estimate dose with sufficient accuracy. The Board received a non-classified presentation from this investigation, and voted unanimously to reverse the NIOSH scientists recommendation.

Claimants in Iowa were fortunate to have a rigorous review undertaken on their behalf, because they lack Q clearances, and classification had barred their ability to credibly challenge contentions by government scientists. We think it is most unlikely that this petitioning group would have seen the same result if these same government scientists were in control of the presentation of their case to a judge *ex parte* and *in camera* without any claimant rebuttal. Even this procedure does not guarantee due process for claimants who wish to appeal an adverse decision involving classified information.

OLC should take note that the concept of "feasibility" extends beyond the technical ability to reconstruct a radiation dose. In an October 12, 2000, floor statement involving the enactment of EEOICPA, Senator Jeff Bingaman stated that "infeasibility" could entail lack of relevant

radiation dose records, that records are missing altogether, that it would be prohibitively expensive to reconstruct dose, or it might take so long that the workers would have died by the time the job was completed. Congress did not limit "feasibility" to only technical issues, and OLC should not officially sanction a definition of feasibility contrary to that which Congress prescribed and which conflicts with legislated objectives.

Tenet v. Doe is not applicable in relation to EEOICPA, nor does it serve as a reasoned basis for limiting due process under EEOICPA. In Tenet v. Doe, both the plaintiff and defendant parties had knowledge of the state secrets at issue in a contractual dispute over compensation for espionage services. The Court found, citing *Totten*, that there is no due process right attached to contracts with the President of the United States involving clandestine employment relationships. By contrast, EEOICPA claimants are left unable to contest what they are not allowed to know. EEOICPA did not diminish due process rights when classified information is involved. The law provides a relief mechanism when the feasibility of a transparent dose reconstruction is simply not possible: a Special Exposure Cohort. Moreover, individuals with claims under EEOICPA did not enter into a special employment relationship with the Government in any way similar to the type addressed by the *Totten* court.

In the face of OLC's recent verbal opinion to HHS, NIOSH recently declared at the Cedar Rapids meeting that transparency is no longer a "necessary" part of their program. It is merely a program"value". We strongly urge that any written opinion rendered by OLC comply with the legislative and policy objectives of EEOICPA. Otherwise, there is a risk that the OLC's opinion will further conflict with the purposes and intents of the program.

Please feel free to contact me or Phil Kiko on my staff at 225-5727 if you have any questions.

Sincerely,

F. JAMES SENSENBRENNER, JR.
Chairman

CHRISTOPHER S. BOND
United States Senator