

DOE contractors or subcontractors, or AWEs who worked an aggregate of at least 250 days before February 1, 1992 at a gaseous diffusion plant in (1) Paducah, Kentucky, (2) Portsmouth, Ohio, or (3) Oak Ridge, Tennessee and who were monitored using dosimetry badges or worked in a job that had exposures comparable to a job that is or was monitored using dosimetry badges; or (4) employees of DOE or DOE contractors or subcontractors employed before January 1, 1974 on Amchitka Island, Alaska and exposed to ionizing radiation in the performance of duty related to the Long Shot, Milrow, or Cannikin underground nuclear tests. Employees included in the Cohort who incur a specified cancer¹ qualify for compensation (see DOL regulations 20 CFR part 30 for details). Cancer claims submitted by these employees or their survivors do not require DOL to evaluate the probability that the cancer was caused by radiation doses incurred during the performance of duty for nuclear weapons programs of DOE, as is required for other cancer claims covered by EEOICPA.

C. Purpose of the Proposed Procedures

EEOICPA authorized the President to designate classes of employees to be added to the Cohort, while providing Congress with the opportunity to review these decisions and expedite or reverse them. As noted previously, the President has delegated his authority in this matter to the Secretary of HHS. The purpose of this notice of proposed rulemaking is to establish procedures by which the Secretary of HHS will determine whether to add to the Cohort new classes of employees from DOE and AWE facilities. The procedures are intended to ensure that petitions for additions to the Cohort are given uniform, fair, scientific consideration, that petitioners and interested parties are provided the opportunity for appropriate involvement in the process, and to comply with specific statutory requirements of EEOICPA. The procedures also address, within their relevant scope, the stated congressional purpose of the compensation program to provide timely compensation to covered employees or their survivors for covered illnesses incurred by such employees in the performance of duty.

D. Statutory Requirements for Designating Classes of Employees as Members of the Cohort

EEOICPA includes several requirements for these procedures. The Advisory Board on Radiation and Worker Health ("the Board") is authorized to provide advice to the President (delegated to the Secretary of HHS) concerning the designation of additional classes as members of the Cohort. The Board's advice is to be based on "exposure assessments by radiation health professionals, information provided by the Department of Energy, and such other information as the Advisory Board considers appropriate." 42 U.S.C. 7384q. Section 7384q specifies that HHS obtain the advice of the Board "after consideration of petitions by classes of employees * * * for such advice." This section also mandates two broad criteria to govern HHS decisions, which are to be made after receiving the advice of the Board. Members of a class of employees at a DOE or AWE facility may be treated as members of the Cohort for purposes of the compensation program if HHS "determines that: (1) It is not feasible to estimate 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 members of the class."

Finally, 42 U.S.C. 7384l(14)(C) requires the Secretary to submit a report to Congress for each class of employees the Secretary designates to be added to the Cohort. The report must define the class of employees covered by the designation and specify the criteria used to make the designation. This section requires that the designation take effect 180 days after the date on which HHS submits the report to Congress "unless Congress otherwise provides."

E. Relationship of Proposed Procedures to Existing Rule Promulgated by HHS To Implement EEOICPA

These procedures complement the HHS final rule: "Methods for Radiation Dose Reconstruction Under the Energy Employees Occupational Illness Compensation Program Act of 2000" promulgated by HHS on May 2, 2002 at 42 CFR Part 82 (67 FR 22314).

The rule 42 CFR part 82 provides the methods by which NIOSH is conducting dose reconstructions to estimate the radiation doses incurred by individual covered employees who have incurred cancer. These estimates are required by EEOICPA to adjudicate a cancer claim for an employee who is not a member of the Cohort or whose claim is not

covered by provisions of EEOICPA for compensating members of the Cohort. The methods to arrive at these estimates, however, will be directly considered by HHS in reviewing petitions to add classes of employees to the Cohort. In particular, HHS will consider these methods in determining for a petitioning class of employees, as required by EEOICPA, whether "it is not feasible to estimate with sufficient accuracy the radiation dose that the [individual members of] the class received."

III. Summary of Public Comments

On June 25, 2002, HHS promulgated a notice of proposed rulemaking specifying procedures for adding classes of employees to the Cohort (42 CFR part 83; see 67 FR 42962). Public comments were solicited from June 25, 2002 to August 26, 2002. During this period, comments were also submitted by the Advisory Board on Radiation and Worker Health.

HHS received comments from nine organizations and 36 individuals. Organizations commenting included several labor organizations representing DOE workers, the Defense Threat Reduction Agency (which conducts radiation dose reconstructions for a compensation program serving U.S. Atomic Veterans), the Health Physics Society, and two advocacy groups. A summary of these comments and HHS responses is provided below. These are organized by general topical area. The HHS responses in this section also serve to explain changes made to the original proposal and the intent of the new rule provisions.

A. Feasibility of Dose Reconstructions

As noted above, EEOICPA requires HHS to find that it is "not feasible to estimate with sufficient accuracy the radiation dose that the class received" as a condition for adding the class to the Cohort. HHS received comments from several labor organizations and an advocacy group recommending that the rule establish one or more clear tests defining when dose reconstructions would not be feasible, some commenters distinguishing this requirement as separate and apart from the requirement for "sufficient accuracy." One specific recommendation is that HHS establish a time limit for completing dose reconstructions, the expiration of which would determine the dose reconstruction to be not feasible. HHS has consistently heard concern about the duration of processes for adjudicating cancer claims and its impact on claimants in failing health and their families. These concerns were

¹ Specified cancers are a limited group of cancers that are compensable under provisions governing compensation for members of the Cohort. The list of specified cancers can be found in this rule under section 83.5.