

rule as much guidance as possible concerning these decisions.

The rule provides clear requirements explaining who is eligible to petition and identifying the information required of the petitioners. In terms of helping individuals decide whether to petition, as discussed in the HHS rule on dose reconstruction (42 CFR part 82.12), NIOSH will directly encourage any claimant for whom it cannot complete a dose reconstruction to petition. As discussed above, HHS and DOL also encourage any employee who has incurred a cancer to submit a claim to DOL immediately, whether or not they submit a petition to HHS, since medical benefits only cover medical costs incurred for the cancer beginning on the date a claim is submitted. Otherwise, HHS generally encourages petitions whenever there is justification, as specified in the rule; in other words, whenever it is known that a class of employees was exposed to radiation that was not monitored, either by personal dosimetry such as radiation badges and biological tests, or by monitoring of the area in which the class of employees worked. Knowledge that the records of such monitoring were destroyed, lost, or falsified would also justify submitting a petition. The rule also specifies expert sources that may justify a petition.

Petitioners should understand, however, that having justification to petition does not mean that the petition will be successful. For example, in some cases NIOSH may be able to conduct dose reconstructions even when no radiation monitoring information is available, using knowledge of health physics and with sufficient information on the radiation source, quantity, and the relevant work processes that might involve radiation exposures.

It also may be useful for potential petitioners to understand how HHS plans to prioritize petitions for evaluation. The highest priority petitions will be those based on NIOSH finding that it is unable to complete a dose reconstruction for a claimant. These petitions will be evaluated first because in these cases, HHS already knows there is a class of employees for whom dose reconstructions are infeasible and among whom one or more individuals have incurred cancer, for which a claimant is awaiting a decision on a claim. The second highest priority will be petitions for a class of employees that does not include current claimants awaiting dose reconstructions. The lowest priority will be petitions including current claimants awaiting dose reconstructions, since the dose reconstruction process will determine whether or not it is feasible

to estimate doses with sufficient accuracy for these claimants. If NIOSH finds the dose reconstructions cannot be completed for these claimants, then their petition process will be expedited, as described above.

#### *R. Use of Unspecified Procedures by HHS*

One labor organization recommended that HHS strike provisions in the initially proposed rule (section 83.14(e)) that would have allowed the Secretary to make Cohort determinations based on factors and procedures other than those specified in the rule.

HHS has omitted this provision from the current proposed rule. The provision was intended to permit the Secretary flexibility in responding to novel, unforeseen issues that might arise in the course of considering the addition of a particular class of employees. Upon further consideration, HHS believes the specified procedures of this rule will fully and expeditiously serve its purpose.

#### *S. Decisionmaking Authority*

HHS received several comments concerning its authority to determine whether or not to add a class of employees to the Cohort. One labor organization recommended HHS be required to comply with the recommendation of the Board. Another labor organization and an advocacy group recommended the Secretary delegate authority for such determinations to the Director of NIOSH to expedite the determinations.

Section 3626 of EEOICPA (42 U.S.C. 7384q) specifically authorizes the President (delegated to the Secretary of HHS) to determine whether or not to add a class of employees to the Cohort and specifically limits the role of the Board to providing advice related to such determinations. Hence, this rule cannot make the recommendations of the Board binding on the Secretary. Moreover, the Federal Advisory Committee Act, under which the Board is established, specifies the following: "Unless otherwise specifically provided by statute or Presidential directive, advisory committees shall be utilized solely for advisory functions. Determinations of action to be taken and policy to be expressed with respect to matters upon which an advisory committee reports or makes recommendations shall be made solely by the President or an officer of the Federal Government." (5 U.S.C.A. App. 2 § 9(b)).

The Secretary can delegate authority to the Director of NIOSH to determine the designation of classes of employees.

The Secretary may consider such a delegation of authority for the designation of certain classes of employees if, upon experience, the Secretary finds this is likely to improve the effectiveness and efficiency of the program.

#### *T. Regulatory Approach*

HHS received several comments concerning the regulatory approach to establishing these procedures. One labor organization and the two advocacy groups recommended this rule be issued as an interim final rule to allow HHS and petitioners to obtain experience with certain elements of the rule before rulemaking is completed. Three other labor organizations recommended that these procedures be issued as a general statement of policy rather than a rule, asserting that more flexibility is required in such procedures than could be encompassed in a rule. The commenters did not specify, however, the provisions that require greater flexibility.

As discussed below, HHS has determined that the rule, as initially proposed, required changes that were not discussed in the initial notice of proposed rulemaking and that could not reasonably have been anticipated based on a reading of the initial notice. For this reason, HHS is issuing this second notice of proposed rulemaking and obtaining public comment on this revised proposal.

For the same reason, HHS does not find sufficient justification to publish these procedures as an interim final rule with a request for comments. If HHS were to issue the current proposal as an interim final rule, the rule and determinations the Secretary would make under the rule could be legally contested on the basis of HHS not having provided sufficient notice and opportunity for public comment in advance of issuing the rule. Such a contest could delay implementation of these procedures more substantially than issuance of this second notice.

HHS considered the issuance of a statement of policy, versus a rule, before issuing the initial proposed rule in June 2002. HHS found then, and continues to find, that these procedures are regulatory in nature, comprising requirements that are binding on petitioners and on HHS.

#### *U. Congressional Review Period*

One individual commented that the 180 day congressional review period should be eliminated or shortened to 60 days or less.

HHS must allow for the full 180 day review period as required by law under