On June 21, 1989, VA published regulations at 38 CFR 3.309 to implement the provisions of Pub. L. 100–321. The introductory language of the statute had indicated that it was to apply to veterans ''who participated in atmospheric or underwater nuclear tests as part of the United States nuclear weapons testing program.'' In formulating the regulations, therefore, VA defined radiation risk activity as including onsite participation in a test involving the atmospheric detonation of a nuclear device by the United States. The effect of that rulemaking was to exclude those veterans exposed to ionizing radiation during atmospheric nuclear testing by governments other than the United States from the presumption of service connection.

The Secretary determined that this rule should be revised to allow consideration of service connection on the same presumptive basis for these veterans as for veterans exposed to ionizing radiation due to atmospheric nuclear detonations conducted as a part of the U.S. testing program. Accordingly, on September 8, 1994, VA published a proposal in the **Federal Register** (59 FR 46379–46380) to amend its adjudication regulations at 38 CFR 3.309(d)(3) to extend the presumption that specified diseases are the result of in-service exposure to ionizing radiation to veterans who were present at atmospheric nuclear tests conducted by any government allied with the United States during World War II. Interested persons were invited to submit written comments, suggestions or objections on or before November 7, 1994.

On November 2, 1994, the President signed Pub. L. 103–446, the Veterans' Benefits Improvements Act. Section 501(a) of that law clarified Congressional intent on this issue by amending 38 U.S.C. 1112(c)(3)(B) to define the term ''radiation-risk activity'' to include onsite participation in a test involving the atmospheric detonation of a nuclear device ''without regard to whether the nation conducting the test was the United States or another nation.''

We received two comments in response to the proposed rule published September 8, 1994. Both comments suggested that the amendment should apply to any nuclear tests to which military personnel were assigned and that the phrases ''any government allied with the United States during World War II'' and ''atmospheric nuclear tests conducted by allied governments'' are therefore too restrictive.

We not only agree, but the suggestion is consistent with section 501 of Public Law 103–446, the Veterans' Benefits Improvements Act of 1994. We have revised the regulation accordingly.

One comment expressed concern that literal interpretation of the phrase ''onsite participation'' could disqualify those veterans involved in aerial sampling, ground support and decontamination activities and suggested we expand the term ''atmospheric nuclear test'' to include ''test activities'' without requiring that the veteran had literally been present at the test site itself.

The term ''onsite participation'' is a statutory term (See 38 U.S.C. 1112 (c)(3)(B)(i)) that VA has interpreted to mean presence at a test site, performance of official military duties in direct support of the nuclear test during the operational period of the test itself, and duties performed during the six-month period following a test in connection with test-related projects, including decontamination activities. (See 38 CFR 3.309(d)(3)(iii)) This definition clearly precludes the possibility that veterans engaged in aerial sampling, ground support or decontamination activities would be ineligible for consideration under this regulation. In our judgment, that definition of the term ''onsite participation'' is sufficiently broad to assure inclusion of all veterans engaged in test activities including support, clean up, decontamination and follow-up duties, and no change in the current language of the regulation is warranted.

One comment stated that dosimeter records are not available for all tests and suggested that we revise the regulation to include an alternate method for reconstructing radiation exposure.

The statute and this implementing regulation establish the presumption that specific radiogenic diseases arising in veterans who participated in specific radiation risk activities are service-connected regardless of the amount of radiation to which the veteran was exposed. For this reason, inclusion of dose reconstruction methods in this regulation would be both unnecessary and inappropriate.

One comment recommended that we add language to the regulation setting out evidentiary requirements for establishing a veteran's participation in a test, to include review of military orders, unit history and the veteran's affidavit supported by adequate lay testimony.

Neither 38 U.S.C. 1112(c) nor 38 CFR 3.309(d) set forth specific evidentiary requirements for establishing a veteran's presence at Hiroshima, Nagasaki or an atmospheric nuclear test. Eligibility for VA benefits is determined based on the preponderance of evidence. Any evidence that the veteran offers, whether it is documentary, testimonial or in some other form, is included in the record and considered (See 38 CFR 3.103(d)) and a veteran's statement is clearly evidence which VA must consider along with service records and all other evidence of record. In addition, by regulation VA must resolve reasonable doubt as to service origin or any other point in favor of the claimant. (See 38 CFR 3.102.) In our judgment, these provisions adequately address the concerns expressed in the comment and there is therefore no need to add language to this regulation setting forth specific evidentiary requirements.

VA appreciates both comments received in response to the proposed regulatory amendment, which is now adopted with changes as noted above. The effective date of the amendment is November 2, 1994, the date Public Law 103–446 was enacted.

The Secretary certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This amendment will directly affect VA beneficiaries but will not directly affect small business. Therefore, pursuant to 5 U.S.C. 606(b), this final rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

This regulatory action has been reviewed by the Office of Management and Budget under Executive Order 12866.

The Catalog of Federal Domestic Assistance program numbers are 64.101, 64.109 and 64.110.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Health care, Individuals with disabilities, Pensions, Veterans.

Jesse Brown,

Secretary of Veterans Affairs.

For the reasons set forth in the preamble, 38 CFR part 3 is amended to read as follows:

PART 3—ADJUDICATION

Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation

1. The authority citation for part 3, subpart A, continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.